Supreme Court No. 91558-0
(Court of Appeals No. 44453-4-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BRIAN HOLLOWAY,

Petitioner.

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

# PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Brian G. Holloway asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.4(b)(1), (2), (3), and (4).

B. COURT OF APPEALS DECISION

Mr. Holloway seeks review of the Court of Appeals decision filed February 3, 2015.[1] Copy attached as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. The Sixth Amendment requires that a defendant charged with sexual assault be allowed to expose his accuser's false claims of prior victimization by another. This right is so clearly established, that state prison inmates obtain federal habeas corpus relief when denied such means of defending themselves. In his trial, Mr. Holloway was barred from showing that his accuser made a false claim of earlier sexual abuse by another.

Should review be granted, and a new trial ordered, not just to remedy the error in this case, but also to demonstrate that Washington courts fully honor the Bill of Rights?

[1] This Petition is timely filed under RAP 13.4(a). Counsel for the petitioner was not served with a copy of the opinion until March 13, 2015. On March 24, 2015, the Court of Appeals acknowledged the clerical error and granted a motion to recall the prematurely issued mandate.

2. Constitutional due process guarantees a defendant may not be convicted unless the State proves every element of the crime beyond a reasonable doubt. Sexual intercourse requires proof of "penetration of the vagina or anus," or oral contact "involving the sex organs," as opposed to sexual contact, which occurs at "any touching of the sexual or other intimate parts." RCW 9A.44.010(1), (2). In *State v. A.M.*, 163 Wn. App. 414, 416, 260 P.3d 229 (2011), Division I of the Court of Appeals reversed a conviction for child rape, because the State presented evidence the victim's buttocks – not anus – had been penetrated. Here, regarding counts four and eight, complainant G.S.R. testified she was subjected to "rubbing," that was "on [her] skin," "almost" inside her, but different from completed digital-vaginal penetration she said occurred at other times.

Should this Court grant review, reverse and dismiss counts four and eight for lack of sufficient proof, and clarify that touching of the external female genitalia does not constitute vaginal intercourse?

D. STATEMENT OF THE CASE

Petitioner Brian Holloway was convicted of a number of sexual offenses allegedly committed against his younger daughter, complainant G.S.R. She was born in December 1996, lived with her biological mother outside Washington State until ten years of age, when Mr. Holloway

assumed custody. RP 333-36, 370, 428, 547. G.S.R. had a close relationship with him, and his wife. RP 340-41, 354-55, 382-83, 428, 482.

While in Montana with her mother, G.S.R. reported that "Uncle Mike" touched her private area, over her clothing, while she slept. CP __ (sealed record at Sub # 127D, pp.139 (bearing stamped page number 122)).[2] When police and child protective services investigated, G.S.R. admitted the allegation was false and the case was closed. CP __ (sealed Sub # 127C, pp.11-12 (labeled page numbers 10-11 of report).

In July 2011, G.S.R. told Ms. Holloway that Mr. Holloway had touched her on the Fourth of July. RP 431, 542-43. The State initially charged Mr. Holloway with one count of child molestation in the second degree, one count of third degree rape of a child, and two counts of incest. CP 3-4. Over time, G.S.R.'s made more allegations of sexual abuse. *See* RP 367, 417. The State twice amended the information to include five counts of child molestation, four counts of rape of a child, and two counts of incest. CP 9-13, 53-57 (second amended information).

Mr. Holloway sought documentation of G.S.R.'s prior recantation and moved to admit the evidence at trial. *E.g.*, CP 16-19; RP 169-82. Some of the records delivered for *in camera* review showed that G.S.R.

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[2] A supplemental designation of clerk's papers was filed for the documents at subfolder 127 (sealing order), 127C (under seal) and 127D (under seal).

had reported being touched over her clothing while asleep by "Uncle Mike," and that she subsequently recanted the allegation. CP 29-31; CP __ (sealed record at Sub # 127D, pp.139 (bearing stamped page number 122)); CP __ (sealed Sub # 127C, pp.11-12 (labeled page numbers 10-11 of report)).; RP 124-39, 186, 188-92; *see* CP 32-35 (moving for additional discovery). The trial court only reviewed the records *in camera* and kept them sealed from both parties. *E.g.*, RP 148-54, 195, 203.

In support of his request to view the documents, to cross-examine G.S.R. or other witnesses about the recanted allegations, Mr. Holloway argued that the similarity of the allegations, as well as G.S.R.'s prior recantation, made the topic relevant to her veracity on the current charges. CP 41, 58-63; RP 91-119, 148-52. The trial court excluded the evidence, finding it subject to the rape shield statute, irrelevant (although it recognized the case was a credibility contest) and, if relevant, more prejudicial than probative. CP 20-25, 36-40; RP 153-54, 169, 216-17, 220-22, 225-31, 237, 512-16. The records were kept under seal except for use on appeal. CP __ (Sub #127 (order sealing)); RP 216-18 (ruling on in-camera review); RP 225-30; 265-66.

At trial, G.S.R. testified to touching of her breasts (over clothing), buttocks, and genitalia that she said began in 2008. RP 337, 339, 341-64, 386-87. She said she often cuddled with her father, and after falling

asleep, would awaken to him touching her. *E.g.*, RP 339-46, 356-57. A clinical social worker who was treating G.S.R., testified the child had discussed instances of both digital penetration, and instances of rubbing outside her vagina. RP 419. Mr. Holloway testified in his defense and denied he had any sexual contact with G.S.R.. RP 554-55, 567.

His counsel could not bring up the prior false claim of abuse. Mr. Holloway was convicted as charged. CP 166-87; CP 198-214.

## E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

### 1. Brian Holloway's Sixth Amendment rights were violated by the exclusion of evidence highly probative of the complainant's credibility.

#### a. An accused has a due process and Sixth Amendment right to confront the complaining witness on her credibility.

This Court has long held that "'[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations.'" *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). An accused's right to an opportunity to be heard in his defense, including the rights to examine witnesses against him and to offer testimony, is basic in our system of jurisprudence. *Jones*, 168 Wn.2d at 720. "'The right to confront and cross-examine adverse witnesses is [also] guaranteed by both the federal and

state constitutions.'" *Id.* (quoting *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing *Washington v. Texas*, 388 U.S. 14, 23, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967)); U.S. Const. amends. VI, XIV; Const. art. 1, §§ 3, 22.

Washington appellate courts have long recognized that the denial of a defendant's right to adequately cross-examine an essential prosecution witness as to relevant matters tending to establish motive or bias, violates the federal constitutional Sixth Amendment right to confront. *State v. Brooks*, 25 Wn.App. 550, 551-52, 611 P.2d 1274 (1980). "Where a case stands or falls on the jury's belief or disbelief of essentially one witness, that witness' credibility or motive must be subject to close scrutiny." *State v. Roberts*, 25 Wn.App. 830, 834, 611 P.2d 1297 (1980).

b. The trial court violated Mr. Holloway's Sixth Amendment rights by excluding evidence that G.S.R. had previously reported, and then recanted, sexual abuse by another.

The trial court erroneously kept Mr. Holloway from cross-examining G.S.R. on her recantation of a prior allegation of sexual abuse by a third party. RP 35-37, 153-54, 169, 216-17, 220-22, 230-31, 512-16. Mr. Holloway secured documents that verified that G.S.R. previously reported sexual abuse similar to these allegations, that a law enforcement investigation ensued, that G.S.R. recanted, and the case was closed. RP 14-27, 91-119, 124-39, 148-52, 169-82, 186, 188-92, 195, 203; CP 29-35,

41-45, 58-63; CP __ (sealed record at Sub # 127D, pp.139 (bearing stamped page number 122)); CP __ (sealed Sub # 127C, pp.11-12 (labeled page numbers 10-11 of report)).[3] The trial court ruled the evidence was barred by the rape shield statute, was irrelevant, and was more prejudicial than probative. *E.g.*, CP 20-23, 36-39; RP 14-34, 114-15, 129, 215, 220-22, 225-31.

The rape shield statute is inapplicable to prior sexual abuse. *See* RCW 9A.44.020. "Courts should not use Washington's Rape Shield law to exclude evidence that an alleged child victim had previously been abused." *State v. Kilgore*, 107 Wn.App. 160, 177, 26 P.3d 308 (2001) (citing *State v. Carver*, 37 Wn.App. 122, 124, 678 P.2d 842, *review denied*, 101 Wn.2d 1019 (1984)). On this point, the Court of Appeals correctly found that the "trial court erred in applying the rape shield statute to exclude evidence of G.S.R.'s prior recanted allegation of sexual abuse." Slip. Op. at 8.

Unfortunately, without any meaningful analysis, the Court of Appeals failed to correct the trial court error of describing the false claim evidence as "irrelevant." Slip. Op. at 9-10; RP 35-37, 153-54; *see* RP 216-17. When evaluating the admissibility of prior sexual abuse, ER 403 does

[3] Mr. Holloway learned of the recantation while investigating the case and after initial pretrial motions. RP 91-119.

apply. *Kilgore*, 107 Wn. App. at 177. The evidence was relevant and highly probative. The prior false allegation against "Uncle Mike," mirrored what G.S.R. said about the petitioner: that she awoke him touching her private areas. *E.g.*, CP 59. G.S.R.'s credibility was central to the State's case. *E.g.*, RP 643, 650, 697. ("The more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters." *Darden*, 145 Wn.2d at 619.) The records reviewed *in camera* established that G.S.R., in the midst of a coordinated investigation between Child Protective Services and law enforcement, recanted what she said about "Uncle Mike." CP __ (sealed record at Sub # 127D, pp.139 (bearing stamped page number 122)); CP __ (sealed Sub # 127C, pp.11-12 (labeled page numbers 10-11 of report)); CP 58-63.

c. <u>This important constitutional error must be corrected.</u>

Review must be granted. The Court of Appeals' failure to recognize the Sixth Amendment error below stands in stark contrast with how multiple federal courts have dealt with the same issue, regularly granting writs of habeas corpus to state court prisoners like Mr. Holloway.

In *Redmond v. Kingston*, 240 F.3d 590 (7th Cir. 2001), the Seventh Circuit of the Federal Court of Appeals ruled that *Redmond*'s constitutional right of confrontation was violated when he was prohibited

from cross-examining the alleged victim about a prior false claim that she had been forcibly raped. The Hon. Cir. J. Richard Posner wrote that the Wisconsin State "court of appeals' analysis and conclusion cannot be considered a reasonable application of the Supreme Court's confrontation doctrine." *Redmond*, at 591. He added:

> When that unexceptionable rule [of relevance] is applied as it was here to exclude highly probative, noncumulative, nonconfusing, nonprejudicial evidence tendered by a criminal defendant that is vital to the central issue in the case ([complainant's] credibility), the defendant's constitutional right of confrontation has been infringed.

*Id.* at 593.

In *White v. Coplan*, 399 F.3d 18 (1st Cir. 2005), under similar circumstances and applying the same constitutional principles, the First Circuit Court of Appeals also granted a habeas corpus writ because the state court's decision was an unreasonable application of clearly established federal constitutional law:

> The past accusations were about sexual assaults, not lies on other subjects; and while sexual assaults may have some generic similarity, here the past accusations by the girls bore a close resemblance to the girls' present testimony...
>
> If the prior accusations were false, it suggests a pattern and a pattern suggests an underlying motive (although without pinpointing its precise character). The strength of impeachment evidence falls along a continuum. That a defendant told lies to his teacher in grade school is at one end; that the witness was bribed for his court testimony is at another. Many jurors would regard a

> set of similar past charges by the girls, if shown to be false, as very potent proof in White's favor.

*Id.* at 24.

Notably, cross-examination about the past false claim would have been of significant value to Mr. Holloway, even if he would not have been permitted to admit extrinsic evidence in support.

> [C]ross-examination and extrinsic proof are two different issues. The ability to ask a witness about discrediting prior events… is worth a great deal. Imagine if White had been allowed to question the girls about their prior accusations, establish their similarity, and inquire into supposed recantations. The jury, hearing the questions and listening to the replies, might have gained a great deal even if neither side sought or was permitted to go further.

*Id.* at 25.

Federal district courts have followed *Redmond* and *White*, and grant habeas corpus relief to state prisoners who, like Mr. Holloway, were improperly prohibited from questioning their accusers regarding prior false allegations of sexual abuse. *E.g. Averilla v. Lopez*, 862 F. Supp. 2d 987, 995-999 (N.D. Cal. 2012) (Holding complainant's "prior false allegations were highly relevant to the credibility of [her] accusations against Petitioner" and "would have undermined the credibility of her allegations against [him].") *Baker v. McNeil*, 711 F. Supp. 2d 1313, 1316 (N.D. Fla.) *aff'd sub nom. Sec'y, Florida Dep't of Corr. v. Baker*, 406 F. App'x 416 (11th Cir. 2010) ("The trial court denied Mr. Baker's federal

constitutional right to effectively cross-examine the girl by showing that she had falsely accused others of having sex with her, as she admitted during a contemporaneous proffer. The state appellate court ruled the error harmless. It was not.") The *Baker* decision set out the link between relevancy of the evidence, and the Sixth Amendment:

> A rational fact finder, genuinely searching for the truth in this case, would most assuredly want to know that the complaining witness had falsely accused others of sexual abuse that did not occur. What a rational fact finder would want to know is not the test that governs the Confrontation Clause, but is surely a factor in the analysis. Denying the right to cross-examine this witness on this basis violated the Confrontation Clause.

*Id.* at 1316.

Here, the Court of Appeals Opinion mentioned the passage of time as reason to devalue the relevancy of G.S.R.'s "recanted allegation made when she was 7 years old." Slip. Op. at 9. ER 608 does not include any time limitation, but by analogy, ER 609(b) provides for the admission of past convictions deemed relevant to credibility, for 10 years, or even longer. In *Redmond* and *Avarilla*, the passage of time between the false claim of abuse and trial was about a year. In *White*, however, the gap was three to four years, quite close to G.S.R.'s situation. The evidence of the false claim about "Uncle Mike" was not so remote as to render it irrelevant. *See also State v. Kornbrekke*, 156 N.H. 821, 943 A.2d 797 (2008) (Reversing two convictions for sexual assault where the accused

was not allowed to present evidence that the complainant had made a false claim of sexual assault 9 years earlier.) (Relying on *White v. Coplan*, *supra*, granting relief on state evidentiary grounds).

The error below was serious. Mr. Holloway's fundamental Sixth Amendment rights were violated.[4]

d. The State cannot show exclusion of the evidence was harmless beyond a reasonable doubt.

"Because suppressing this evidence denied [Mr. Holloway] his constitutional right to confront a witness, this error must be harmless beyond a reasonable doubt to avoid reversal." *Kilgore*, 107 Wn. App. at 178; *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985) (denial of opportunity to fully and effectively cross-examine deprives defendant of constitutional right to confront witnesses).

The State's case fully depended on "the jury's belief or disbelief of essentially one witness," G.S.R. *Roberts*, 25 Wn. App. at 834. *E.g.* RP 237 (court recognizes case comes down to 'he said, she said'). The exclusion of evidence that demonstrated G.S.R.'s prior dishonesty on the very subject of the charges was not harmless beyond a reasonable doubt.

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[4] The trial court's ruling that the evidence of G.S.R.'s prior false accusation was more prejudicial than probative, not discussed by the Court of Appeals, was also error. Evidence of prior sexual abuse is not prejudicial to the alleged victim. *Carver*, 37 Wn. App. at 124. The State could not meet its burden of showing the evidence should be excluded. *See Jones*, 168 Wn.2d at 720.

2. **Review should be granted, and because the State failed to prove the essential element of sexual intercourse, counts four and eight should be reversed and dismissed with prejudice.**

a. Due process requires the State prove each element of the crime beyond a reasonable doubt.

A criminal defendant may only be convicted if the State proves every element of the crime beyond a reasonable doubt. U.S. Const. amend. XIV; Const. art. I, §§ 3, 22; *Blakely v. Washington*, 542 U.S. 296, 300-01, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On a challenge to the sufficiency of the evidence, this Court must reverse a conviction when, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Drum*, 168 Wn.2d 23, 225 P.3d 237 (2010).

b. Sexual intercourse is an essential element of rape of a child.

To satisfy its burden on rape of a child in the second or third degree, the State must prove that the accused had "sexual intercourse with another." RCW 9A.44.076(1); RCW 9A.44.079(1). The term means:

> (1) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and
>
> (b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes .

RCW 9A.44.010(1)(a).[5] Mr. Holloway's jury was instructed it must find the sexual intercourse element for counts four (rape of a child two) and eight (rape of a child three) and was provided the above definition. CP 114-15; CP 119; CP 125, 129. The jury was instructed, "Sexual intercourse means any penetration of the vagina or anus however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same of opposite sex." CP 119.

Sexual touching without penetration of the vagina or anus, is child molestation, not rape. RCW 9A.44.086(1); RCW 9A.44.089(1); RCW 9A.44.010(2) ("'Sexual contact' means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."); *State v. Weaville*, 162 Wn.App. 801, 256 P.3d 426 (2011) (reversing rape conviction where jury instructed that contact between sex organs constituted penetration).

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[5] An alternative definition of sexual intercourse includes "sexual contact between persons *involving the sex organs* of one person and the mouth or anus of another whether such persons are of the same or opposite sex." RCW 9A.44.010(1)(c) (Emphasis added.) There was no evidence of such contact in this case.

The law specifies that penetration of the "vagina" must occur for there to be sexual intercourse. The words "vagina" and "anus" were added to the statute, which earlier stated that any penetration of the "sexual organ of the female" was sufficient. *See State v. Snyder*, 199 Wash. 298, 299, 91 P.2d 570 (1939); 1975 1st ex. s. ch. 14 § 1 (adding new section to ch. 9.79 RCW). The Court of Appeals' reliance on *Snyder* is misplaced.

An undefined word in a statute should be given its plain, ordinary meaning, absent any contrary legislative intent. *Ravenscroft v. Washington Water Power Co.*, 136 Wn.2d 911, 969 P.2d 75 (1998). The vagina is "a canal that leads from the uterus of a female mammal to the external orifice of the genital canal." *Webster's Third New Int'l Dictionary* 2528 (1993). It is an internal organ of the female reproductive system. "Human female reproductive system," Wikipedia, http://en.wikipedia.org/wiki/Human_female_reproductive_system#Vagina (last visited April 6, 2015).[6]

On the other hand, the labia majora and labia minora are a part of the vulva, which is external to the vaginal canal itself. Web MD, "Your Guide to the Female Reproductive System"; Web MD, "Picture of the Vagina," http://women.webmd.com/picture-of-the-vagina (last visited April 6, 2015). Oral contact with the labia may constitute intercourse

[6] Copies of the webpages cited herein were attached as Appendix B to petitioner's opening brief filed with the Court of Appeals.

under RCW 9A.44.010(1)(c) - where the statute replaces the word "vagina" and "anus" with a broader descriptor of "involving the sex organs" – but a hand touching of the labia, without penetration of the vagina itself. is not "sexual intercourse."

c. The State failed to prove vaginal penetration – sexual intercourse – on counts four and eight.

G.S.R. testified that Mr. Holloway's hand was on, but not in, her. RP 347-49, 360, 362.[7] G.S.R. spoke of touching and "rubbing." RP 347.

Q. Was his hand on the skin of your vagina?

A. Yeah, it was in between it. Yes. on my skin.

Q. And when you say in between it, what do you mean?

A. I don't want to say it.

**Q. Did his finger go inside you?**

**A. Not that I recall, but it was almost.**

Q. And so when you say in between it, do you mean in between—

A. **In the—**

**Q. –the folds of your vagina?**

**A. Yes.**

...

Q. Was his hand moving **on** your vagina?

**A. Yes.**

RP 347-48 (emphasis added). (See Slip. Op. at 4.)

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[7] The State contended this testimony from G.S.R. supported counts four and eight. RP 519, 524, 634-35, 637.

G.S.R. gave a similar description of what allegedly comprised count eight. RP 360, 362. ("[H]e was touching the inside – the – touching the in-crease of my vagina and rubbing it.")

The State and the witness did not distinguish between the creases of the labia majora, and the creases of the labia minora. Regardless, the evidence was insufficient because the creases of both the labia majora and labia minora are external features of female genitalia and not a part of the vagina, an internal organ. Web MD, "Picture of the Vagina," http://women.webmd. com/picture-of-the-vagina (last visited April 6, 2015). Again, the labia may be part of the broader term "sex organs" referenced in .010(1)(c), or "the sexual or other intimate parts" in .010(2), but they are not "the vagina" in .010(1)(b).

Critically, G.S.R.'s testimony on the other two counts of rape (counts five and nine) was significantly different, clearer, and legally sufficient. With respect to those counts, G.S.R. testified that the petitioner "fingered" her and that his hands went inside her like a tampon. RP 350-53, 357, 635, 647; *see* RP 419 (clinical social worker distinguished between G.S.R.'s disclosures of "digital penetration" and "rubbing").

d. <u>Review should be granted to reconcile this case with *A.M.*</u>

This Court should grant review to bring this case in accord with the Division One decision in *State v. A.M.*, 163 Wn. App. 414, 260 P.3d 229

(2012). In *A.M.*, the Court of Appeals reviewed the sufficiency of the evidence under the child rape statute, considering evidence of alleged anal penetration. *Id.* The evidence showed penetration of the buttocks, but did not support penetration of the anus. *Id.* at 417-19. On appeal, *A.M.* argued "penetration of the buttocks, but not the anus" was insufficient to prove rape because it was not "sexual intercourse" under .010(1)(b). *Id.* at 418-19. Division One turned to a dictionary to determine the ordinary meaning of undefined statutory terms and held that the "buttocks" and the "anus" are anatomically "two [distinct] parts, albeit related." *A.M.*, 163 Wn. App. at 421. Since "the legislature has not indicated that penetration of the buttocks alone is sufficient to be sexual intercourse," the Court of Appeals reversed. *Id.*

The statutory construction principle that a single word in a statute should not be read in isolation compels that the meaning ascribed to "vagina" must comport with the meaning ascribed to the second term in the same statutory provision, "anus." *State v. Flores*, 164 Wn.2d 1, 12-13, 186 P.3d 1038 (2008); ("the meaning of a word may be indicated or controlled by reference to associated words"); *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005) (applying the principle of *noscitur a sociis*). The *A.M.* opinion logically distinguished use of the word "anus" from the anatomically separate "buttocks." The same result is compelled

for the companion term, "vagina." The statute requires penetration of the vagina; penetration of the vulva is insufficient.[8]

Other jurisdictions – with broader definitions of sexual intercourse than the current Washington State law – have rejected the argument that proof of vaginal penetration is necessary to sustain a rape conviction. *See People v. Quintana*. 89 Cal. App. 4th 1362, 1367-68, 108 Cal. Rptr. 2d 235 (2001) ("Thus, "genital" opening does not necessarily mean "vaginal" opening… the Legislature knows how to say "vagina," when it presumably means vagina.") *People v. Bristol*, 115 Mich. App. 236, 238, 320 N.W.2d 229 (1981) ("[A] definition of the female genital opening that excluded the labia would be inconsistent with the ordinary meaning of female genital openings. The fact that the Legislature used "genital opening" rather than "vagina" indicates an intent to include the labia.") *State v. Albert*, 252 Conn. 795, 802, 750 A.2d 1037 (2000) ("[A]s the term "genitals" refers especially to the external genital organs, which include the labia majora, it would be unreasonable to conclude that when the legislature used the term genital opening, it meant to exclude the external

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[8] A different result would be compelled if the allegation was of oral-genital contact under RCW 9A.44.010(1)(c). The legislature intentionally calls digital-vaginal or penile-vaginal contact "molestation," unless the vagina is specifically penetrated. On the other hand, rape committed through oral contact is rape even when the oral contact involves "the sex organs," a plainly broader term.

genital organs and refer only to the internal genital organs such as the vagina.")

The statute with which Mr. Holloway was charged specifics that penetration must be of the vagina, or anus. RCW 9A.44.010(1)(a). *Snyder*, based on a differently worded law, needs to be set aside, as do cases that rely on *Snyder* to interpret penetration of the vagina without recognizing the current law uses different, and more specific, language.

e. Counts four and eight should be reversed and dismissed.

Because of insufficient on counts four and eight, the remedy is to reverse and dismiss with prejudice. *See, e.g., Jackson*, 443 U.S. at 319.

F. CONCLUSION

Because of the Sixth Amendment violation, this Court should grant Mr. Holloway's petition for review, and reverse for a new trial on all counts. The petition should also be granted, and two of the rape counts reversed and dismissed, because the State failed to meet its statutory burden regarding the sexual intercourse element of rape.

DATED this 9th day of April 2015

Respectfully submitted,

Mick Woynarowski – WSBA 32801
Washington Appellate Project
Attorney for Petitioner

APPENDIX A –

STATE OF WASHINGTON V. BRIAN G. HOLLOWAY

DECISION OF THE COURT OF APPEALS No. 44453-4-II

(Served on Petitioner's counsel on March 13, 2015)

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# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

| STATE OF WASHINGTON, Respondent, v. BRIAN G. HOLLOWAY, Appellant. | No. 44453-4-II<br><br>UNPUBLISHED OPINION |
|---|---|

SUTTON, J. — Brian G. Holloway appeals his 11 convictions for multiple charges and degrees of child rape, child molestation, and incest. He argues that (1) the trial court violated his Sixth Amendment right to a fair trial, to present a defense, and to cross-examine witnesses; (2) the State failed to prove second and third degree child rape (counts IV and VIII); (3) the trial court and the State's closing argument misstated the burden of proof; and (4) the sentences for three of his convictions exceed the statutory maximum. We hold that (1) the trial court did not violate Holloway's Sixth Amendment right by excluding evidence of G.S.R.'s[1] prior recantation as irrelevant for impeachment under ER 608(b), (2) the State presented sufficient evidence to support the jury's guilty verdicts on counts IV and VIII, (3) the trial court's jury instruction and the State's closing did not misstate the burden of proof as neither were improper, and (4) the trial court imposed a sentence that exceeds the statutory maximum for counts II, III and X. We affirm Holloway's convictions, but remand to amend the community custody terms on counts II, III, and

[1] We use initials in the opinion to protect the confidentiality of the juvenile involved.

X so that the total concurrent sentences for each of these counts does not exceed the statutory maximum.

## FACTS

### I. G.S.R.'s Prior Allegation and Holloway's Abuse

When G.S.R. was seven years old and living with her biological mother in Montana, G.S.R. disclosed that her biological mother's boyfriend's brother had touched her vagina over her clothes while she was sleeping. The police department in Montana investigated before deciding not to pursue the case because G.S.R. "recanted," lacked clarity, and made conflicting statements about the incident. Sealed Clerk's Papers (SCP) at 233.

In 2007 when she was 10 years old, G.S.R. began living with her father, Brian Holloway, and her stepmother, Stephanie Phelps.[2] Shortly after G.S.R. came to live with him, Holloway began touching G.S.R. "in a way that was not good." 3 Verbatim Report of Proceedings (VRP) at 337. Holloway used his hand to touch G.S.R.'s bare butt, breasts, and vagina "fifty or more . . . times." 3 VRP at 361. The touching happened "[a] lot" and "at least once a month." 3 VRP at 337.

After an incident on or about July 4, 2011, G.S.R. became afraid that Holloway had impregnated her. G.S.R. disclosed the incident to Stephanie and, with the aid of counseling, she

[2] We will refer to Stephanie Phelps (previously known as Stephanie Holloway) by her first name for clarity. We mean no disrespect.

disclosed the full extent of Holloway's abuse to the police.[3] The State charged Holloway with 11 offenses: (1) first degree child molestation (count I), (2) second degree child molestation (counts II and III), (3) second degree child rape (counts IV and V), (4) third degree child molestation (counts VI and VII), (5) third degree child rape (counts VIII and IX), (6) first degree incest (count X), and (7) second degree incest (count XI).[4]

## II. Trial

### A. Motions in Limine to Admit Evidence of G.S.R.'s Recanted Allegation of Abuse

On the eve of trial, G.S.R.'s biological mother told Holloway's counsel about G.S.R.'s prior allegation and recantation. The trial court granted Holloway's motion to continue the trial so that Holloway could investigate the issue. Subsequently, the trial court reviewed in camera sealed records relating to G.S.R.'s prior allegation and the police report stating that G.S.R. recanted her allegation.

At trial, Holloway moved to admit evidence of G.S.R.'s prior recanted allegation. Holloway argued that in order to present a defense the trial court must allow him to cross-examine G.S.R. about the recanted allegation and to ask Stephanie whether she had coached G.S.R. to lie. The trial court ruled that (1) the rape shield statute, RCW 9A.44.020, barred evidence of G.S.R's

[3] The State first charged Holloway with only 1 count each of 4 crimes based on G.S.R.'s initial limited disclosure: (1) Second degree child molestation, (2) third degree child rape, (3) first degree incest, and (4) second degree incest. After G.S.R.'s full disclosure, the State amended its information, bringing the total crimes charged to 11, as detailed above.

[4] The State also charged Holloway with two aggravating factors on each charge, totaling 22 aggravating factors: (1) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years and (2) Holloway used his position of trust or confidence to facilitate the commission of the offenses.

prior recantation and (2) this evidence was irrelevant for impeachment under ER 608(b). The trial court ruled that Holloway could not cross-examine either G.S.R. or Stephanie about the prior recanted allegation.

B. G.S.R.'s Trial Testimony

GSR testified about multiple instances of abuse by Holloway. Holloway testified that he never touched G.S.R. inappropriately.

1. Count IV – Second degree child rape

G.S.R. testified that Holloway touched her when she had a red, brown, and yellow plaid blanket on the bed when she was in the fifth grade. She said that his hand was on the skin of her vagina and "in between it." 3 VRP at 348. When asked to clarify what she meant, she said:

> [G.S.R.]: I don't want to say it.
> [STATE]: Did his [Holloway's] finger go inside you?
> [G.S.R.]: Not that I recall, but it was almost.
> [STATE]: And so when you say in between it, do you mean in between—
> [G.S.R.]: In the—
> [STATE]: —the folds of your vagina?
> [G.S.R.]: Yes.

3 VRP at 348-49. The State used this portion of G.S.R.'s testimony during its closing to argue it proved count IV, second degree child rape, beyond a reasonable doubt.

2. Count VIII – Third degree child rape

G.S.R. also testified that Holloway touched her when she had a new lava lamp and daybed in her room. She testified that Holloway "was touching the inside—the—touching the in-crease of my vagina and rubbing it." 3 VRP at 360. The State used this portion of G.S.R's testimony during its closing to argue it proved count VIII, third degree child rape, beyond a reasonable doubt.

C. Reasonable Doubt Instruction and Closing Argument

Both parties proposed a reasonable doubt instruction based on 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 4.01, at 85 (3d ed. 2008) (WPIC 4.01). The versions were identical except the State's proposed instruction included the optional "abiding belief" language in WPIC 4.01, which read: "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." CP at 106. The trial court's instructions to the jury included the abiding belief language over Holloway's objection. The trial court commented that she always includes this optional sentence in the reasonable doubt instruction because this language mirrors her initial oral instructions to the jury at the start of the trial. 4A VRP at 572.

In its closing, the State discussed how and why the jury should evaluate and find G.S.R.'s testimony credible. The State first discussed each count against Holloway, detailing the points of testimony supporting each count. The State then explained the reasonable doubt instruction and said that "it comes down to if you have an abiding belief in the truth of the charge. The law allows you to convict based on the word of a child." 4B VRP at 641. The State urged the jury to convict Holloway based on the truth of G.S.R.'s testimony over Holloway's testimony, saying, "[I]f you sit there in that room, . . . and you say, 'I believe [G.S.R.]. I believe in the truth of what she is saying. I have that abiding belief, a belief that lasts, that I know that this happened to that poor little girl,' then you must convict [Holloway]." 4B VRP at 650. The State argued that even though this was a case of "[h]e said, [she] said," the jury could look to corroborating evidence in the testimony of the other witnesses and also use their "gut" and "personal opinions" when deciding who to believe. 4B VRP at 643. "If you believe [G.S.R.], then [the State] met that burden of

[proof] beyond a reasonable doubt." 4B VRP at 643-44. In rebuttal, the State asked the jury to review the evidence and find Holloway guilty based on the evidence at trial, telling the jury to "know what you know in your mind, in your hearts, in every part of you, that that man [Holloway] is very guilty of what he did to that little girl[ G.S.R.]." 4B VRP at 702-03. The jury returned guilty verdicts on all 11 counts and all 22 aggravating factors.

### III. Sentencing

The trial court sentenced Holloway to 116 months on each count of second degree child molestation (counts II and III) and to 102 months for first degree incest (count X); these sentences were to be served concurrently with the sentences on the other eight counts.[5] The trial court also imposed 36 months of community custody for counts II, III and X. The statutory maximum allowed for counts II, III, and X is 120 months. Holloway appeals.

## ANALYSIS

### I. Admissibility of Recantation Evidence

Every criminal defendant has the right to a fair trial, to confront the State's witnesses, and to present a defense under the Washington and federal constitutions. WASH. CONST. art. I, § 22; U.S. CONST. amend. VI; *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010). The right to confront includes the right to meaningfully cross-examine the States' witnesses to cast doubt on their credibility. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). Where a jury's

[5] Holloway does not challenge the sentences on his other counts (count I, IV, V, VI, VII, VIII, IX or XI). The trial court also sentenced Holloway to (1) 198 months for first degree child molestation (count I), (2) 280 months for each count of second degree child rape (counts IV and V), (3) 60 months for each count of third degree child molestation (counts VI and VII), (4) 60 months for each count of third degree child rape (counts VIII and IX), and (5) 60 months for second degree incest (count XI). All of these sentences were to be served concurrently.

decision to believe or not believe a single witness is particularly important to the outcome of the case, the witness's credibility "must be subject to close scrutiny." *State v. Roberts*, 25 Wn. App. 830, 834, 611 P.2d 1297 (1980). This right is limited by rules governing the admissibility of evidence. *State v. Finch*, 137 Wn.2d 792, 825, 975 P.2d 967 (1999); *see also State v. Donald*, 178 Wn. App. 250, 263-64, 316 P.3d 1081 (2013), *review denied*, 180 Wn.2d 1010 (2014). The right to confront the State's witnesses does not include the right to admit otherwise inadmissible evidence. *State v. Aguirre*, 168 Wn.2d 350, 362-63, 229 P.3d 669 (2010).

We normally review evidentiary rulings for an abuse of discretion. *State v. Williams*, 137 Wn. App. 736, 743, 154 P.3d 322 (2007). But we review de novo a defendant's claim he has been denied his constitutional right to present a defense. *Jones*, 168 Wn.2d at 719. In *Donald*, Division One of our court recognized the conflict between these two standards when the defendant asserts a constitutional right to present a defense. *Donald*, 178 Wn. App. at 255. Our court did not resolve this conflict because we held that the trial court did not err under either standard. *Donald*, 178 Wn. App. at 255. We adopt that same approach here.

Holloway argues that the trial court violated his right to confront the State's witnesses when it erroneously excluded evidence of G.S.R.'s prior recanted allegation under the rape shield statute

and found this evidence was irrelevant for impeachment under ER 608(b).[6] The trial court improperly excluded this evidence under the rape shield statute.[7] But the trial court did not abuse its discretion in excluding this evidence as irrelevant for impeachment under ER 608(b); nor did the trial court violate Holloway's Sixth Amendment right.

A. Rape Shield Statute Not Applicable

Holloway sought to cross-examine G.S.R. about her prior recanted allegation, made when G.S.R. was seven years old involving another male adult; to imply she has a propensity to "cry rape." *State v. Harris*, 97 Wn. App. 865, 872, 989 P.2d 553 (1999). The trial court ruled that this evidence was not admissible under RCW 9A.44.020, the rape shield statute. The rape shield statute does not prohibit admission of evidence of past sexual *abuse* because the rape shield statute is concerned with using a victim's past *consenting* behavior to discredit a current allegation of sexual misconduct. *State v. Kilgore*, 107 Wn. App. 160, 177, 26 P.3d 308 (2001), *aff'd*, 147 Wn.2d 288, 53 P.3d 874 (2002). But consent is not an issue in child sexual abuse. *State v. Carver*, 37 Wn. App. 122, 124, 678 P.2d 842 (1984). The trial court erred in applying the rape shield statute to exclude evidence of G.S.R.'s prior recanted allegation of sexual abuse.

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[6] ER 608(b) provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."

[7] Subject to certain exceptions, the rape shield statute, RCW 9A.44.020 provides that "[e]vidence of the victim's past sexual behavior . . . is inadmissible on the issue of credibility."

B. Credibility Evidence Must Be Relevant

We next review whether the trial court erred when it excluded G.S.R's recantation as irrelevant for impeachment under ER 608(b). Holloway argues that G.S.R.'s prior recanted allegation of sexual abuse at age seven was relevant to her sexual abuse allegation against him. Holloway wanted to impeach G.S.R. by cross-examination at trial with her prior recanted allegation, which Holloway believed to be false. Holloway argues this excluded potential testimony would have cast doubt on G.S.R.'s credibility which was essential to the State's case.

ER 608 allows a party to cross-examine a witness about specific instances of past conduct in order to cast doubt on the witness's credibility. ER 608(b). Credibility impeachment questions must be relevant to the truthfulness of the witness's present testimony. *State v. Benn*, 120 Wn.2d 631, 651-52, 845 P.2d 289 (1993). Such evidence is relevant if it casts doubt on the witness's credibility, or the witness's credibility is "a fact of consequence" to the trial. *State v. Allen S.*, 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999). A defendant's proffered evidence "'must be of at least minimal relevance'" and he or she cannot avoid this requirement simply because that evidence is about a past abuse accusation with some relation to the victim's credibility. *Jones*, 168 Wn.2d at 720 (quoting *Darden*, 145 Wn.2d at 622). A trial court may exclude evidence of specific instances of conduct for impeachment if it is remote in time. *State v. Wilson*, 60 Wn. App. 887, 893, 808 P.2d 754 (1991).

The trial court excluded this evidence as irrelevant. The trial court found that G.S.R.'s recanted allegation made when she was 7 years old was not probative of whether G.S.R. was credible at 15 years old, when she alleged Holloway had sexually abused her for 4 years. We agree that G.S.R.'s prior recanted allegation was not probative of her truthfulness or untruthfulness as to

the current charges against Holloway. This evidence was irrelevant and inadmissible for impeachment under ER 608(b). The trial court did not abuse its discretion in excluding this evidence. Because evidence of G.S.R.'s prior recanted allegation was irrelevant, and the right to confront does not include the right to admit inadmissible evidence, the trial court did not violate Holloway's constitutional right to confront witnesses.

## II. SUFFICIENT EVIDENCE OF PENETRATION

To properly convict a criminal defendant, the jury must decide that the State proved every element beyond a reasonable doubt. WASH. CONST. art. I, §§ 3, 22; *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). We decide whether the State presented sufficient evidence on the charges of second and third degree child rape by asking "'whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt'" based upon the evidence the State presented on the record. *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010) (quoting *State v. Wentz*, 149 Wn.2d 342, 347, 68 P.3d 282 (2003)). We review the evidence in the light most favorable to the State, drawing all reasonable inferences most favorably to the State and interpreted most strongly against the defendant. *Drum*, 168 Wn.2d at 34-35.

A person commits second degree child rape when he or she has sexual intercourse with a child who is at least 12 years old but less than 14 years old; a person commits third degree child rape when he or she has sexual intercourse with a child who is at least 14 years old but less than 16 years old. RCW 9A.44.076; RCW 9A.44.079. The difference between these two degrees of child rape is the age of the victim and the difference in age of the perpetrator. RCW 9A.44.076; RCW 9A.44.079. "'Sexual intercourse'" has its ordinary meaning and includes "any penetration

of the vagina . . . however slight, by an object," when committed on one person by another. RCW 9A.44.010(1)(a)-(b).

Holloway argues that the State did not prove he committed second or third degree child rape as charged in counts IV and VIII because the State did not present sufficient evidence of vaginal penetration.[8] He argues that G.S.R. described Holloway touching, at most, G.S.R.'s labia minora, which, according to Holloway, is not part of the definition of "vagina." Br. of Appellant at 20. The State argues that even if Holloway's characterization of G.S.R.'s testimony is true, it presented sufficient evidence of sexual intercourse because the labia is part of the legal definition of "vagina." Br. of Resp't at 20-21. We agree with the State.

Washington courts have long held that the labia minora are part of the female sex organ, the vagina, and have rejected Holloway's specific argument at least three times. *State v. Snyder*, 199 Wash. 298, 300, 91 P.2d 570 (1939); *State v. Weaville*, 162 Wn. App. 801, 813, 256 P.3d 426 (2011); *State v. Delgado*, 109 Wn. App. 61, 65-66, 33 P.3d 753 (2001), *rev'd in part on other grounds*, 148 Wn.2d 723, 63 P.3d 792 (2003); *State v. Montgomery*, 95 Wn. App. 192, 200-01, 974 P.2d 904 (1999); *State v. Bishop*, 63 Wn. App. 15, 19, 816 P.2d 738 (1991). We decline Holloway's invitation to reexamine the law on this point.

The State provided sufficient evidence of vaginal penetration. Viewed in the light most favorable to the State[9], a rational jury could decide that the State presented proof beyond a

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[8] The jury convicted Holloway of two counts of second degree child rape (counts IV and V) and two counts of third degree child rape (counts VIII and IX). Holloway appeals only two of these four rape convictions: One second degree child rape conviction (count IV) and one third degree child rape conviction (count VIII).

[9] *Drum*, 168 Wn.2d at 34-35.

reasonable doubt through G.S.R.'s testimony that Holloway committed every element of second and third degree child rape as charged. We affirm Holloway's convictions on counts IV and VIII.

### III. Reasonable Doubt Jury Instruction and State's Closing Argument

Holloway argues that the trial court's instruction on reasonable doubt, combined with the State's closing, diluted the State's burden of proof. He also argues that this instruction and the State' closing deprived him of due process and warrant reversal of all of his convictions. We disagree.

#### A. Burden of Proof Jury Instruction

Due process requires that jury instructions clearly inform the jury that the State bears the burden to prove every essential element of a crime beyond a reasonable doubt. *State v. Bennett*, 161 Wn.2d 303, 307, 317, 165 P.3d 1241 (2007). It is reversible error when an instruction fails to do so by relieving the State of its burden. *Bennett*, 161 Wn.2d at 307. We review challenged jury instructions de novo. *Bennett*, 161 Wn.2d at 307.

WPIC 4.01 includes optional "abiding belief" language that instructs the jury as follows: "If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt." WPIC 4.01 (emphasis omitted). The optional "abiding belief" language in WPIC 4.01 is bracketed and is not mandatory on trial courts. Washington courts have upheld the traditional "abiding belief" instruction multiple times, as has the United States Supreme Court. *See, e.g., Victor v. Nebraska*, 511 U.S. 1, 114 S. Ct. 1239, 127 L. Ed. 2d 583 (1994) and *State v. Pirtle*, 127 Wn.2d 628, 658, 904 P.2d 245 (1995) (upholding the "abiding belief" phrase in the pattern instruction because it does not "diminish" the definition of reasonable doubt), *cert. denied*, 539 U.S. 916 (2003).

Holloway cites *State v. Emery*, 174 Wn.2d 741, 278 P.3d 653 (2012) to support his argument. But that case is distinguishable: *Emery* held that the State made an improper argument by telling the jury that its verdict needed to "'speak the truth,'" analyzing the issue under prosecutorial misconduct rules rather than an instructional error. *Emery*, 174 Wn.2d at 751, 756.

Contrary to Holloway's argument, the Washington State Supreme Court in *Bennett* instructed trial courts to use WPIC 4.01 in every criminal case because the concept of reasonable doubt is so fundamental that it requires Washington trial courts to adhere to a "clear, simple, accepted, and uniform instruction." *Bennett*, 161 Wn.2d at 317-18. Failure to use WPIC 4.01 is error unless the proposed instruction "proved to be better than the WPIC." *State v. Castillo*, 150 Wn. App. 466, 472-73, 208 P.3d 1201 (2009).

The reasonable doubt instruction in Holloway's trial told the jury that it must "fully, fairly, and carefully" consider all the evidence or lack of evidence. CP at 106 (Instruction 3). After this consideration, the jury was instructed that if they had an "abiding belief" in the truth of the charge, then they "[were] satisfied beyond a reasonable doubt." CP at 106 (Instruction 3). The reasonable doubt instruction did not infer or tell the jury, as Holloway argues, to disregard the evidence and decide the case based on what they thought was true. The trial court's reasonable doubt instruction, which included the "abiding belief" language, did not relieve the State of its burden of proof and this instruction did not violate Holloway's constitutional rights.

B. State's Closing Argument

Holloway also argues that the State "further diluted" the burden of proof during closing by asking the jury to rely on their gut, intuition, experiences, hearts, and own feelings when deciding whether to believe G.S.R.'s testimony. Br. of Appellant at 31. Holloway argues that the State

appealed to the jury to "find the truth, rather than to determine whether the State had proved each element of each charged offense beyond a reasonable doubt." Br. of Appellant at 33. Holloway never objected to the State's closing or the "abiding belief" language, nor ask for a curative instruction. We hold that the State's closing was not improper.

To prove prosecutorial misconduct, the defendant on appeal must establish that the State's statements were improper and prejudicial in the context of the entire record. *Emery*, 174 Wn.2d at 760, 761. If a defendant does not object during closing, the defendant waives any error unless the misconduct was so flagrant and ill-intentioned that a curative instruction could not have cured the resulting prejudice and there is a substantial likelihood that the misconduct affected the jury's verdict. *Emery*, 174 Wn.2d at 760-61.

Credibility is within the sole determination of the finder of fact. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). During closing, the State urged the jury to find G.S.R. credible and to believe her testimony over Holloway's testimony. By explaining various sources the jury could use to find G.S.R. credible, the State's closing was intended to guide the jury in its credibility determination. The State never told the jury to find the truth, speak the truth, or infer to the jurors that was their role. The State reviewed each count, discussed every element of each crime, detailing the testimony and evidence to support each count. The State asked the jury to convict Holloway based on the evidence and the events that G.S.R. testified to and the State referred to the "abiding belief" language in the reasonable doubt instruction. The State implored the jury to convict based on the evidence it presented, not, as Holloway argues, in order to find the truth.

Our court has already held that closing argument statements similar to the State's closing here did not constitute prosecutorial misconduct. *State v. Curtiss*, 161 Wn. App. 673, 701-02, 250 P.3d 496 (2011) (holding that the prosecutor did not engage in misconduct by telling the jurors to examine their "'gut'" and their "'hearts'" to find the defendant guilty). The State's closing did not relieve the State of its burden of proof.

IV. THREE SENTENCES EXCEED THE STATUTORY MAXIMUM

Holloway argues that the sentencing court erred in imposing sentences that exceed the statutory maximum for his convictions on counts II, III, and X.[10] The State concedes this issue.

A term of confinement, combined with a term of community custody, cannot exceed the statutory maximum for the crime as provided in RCW 9A.20.021; the trial court must reduce the term of community custody if the combined total is beyond the maximum sentence. RCW 9.94A.701(9); *State v. Boyd*, 174 Wn.2d 470, 472-73, 275 P.3d 321 (2012). Holloway's sentences on counts II, III, and X were for class B felonies, which carry a statutory maximum confinement sentence of 120 months. RCW 9A.20.021(1)(b). The trial court sentenced Holloway to 116 months on count II, 116 months on count III, and 102 months on count X, and 36 months of community custody on each of these counts, exceeding the statutory maximum. We remand to amend the community custody terms in the judgment and sentence so that the total concurrent sentences for these three convictions do not exceed the 120 month statutory maximum.

[10] Counts II and III are for second degree child molestation; count X is for first degree incest.

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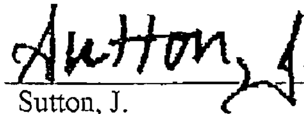
## CONCLUSION

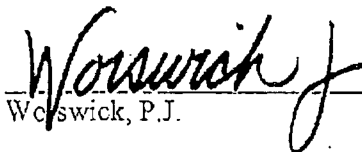
We hold that (1) the trial court properly excluded evidence of G.S.R.'s prior recantation as irrelevant, (2) the State presented sufficient evidence of vaginal penetration to support the jury's guilty verdicts on counts IV and VIII, (3) the trial court's inclusion of "abiding belief" in the reasonable doubt instruction and the State's closing did not misstate the burden of proof because neither were improper, and (4) the trial court imposed a sentence that exceeds the statutory maximum for three of Holloway's convictions. Accordingly, we affirm Holloway's convictions, but remand to amend the community custody terms on counts II, III, and X so that the total concurrent sentences for each of these counts does not exceed the statutory maximum.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

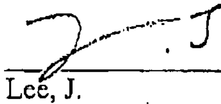


Sutton, J.

We concur:



Worswick, P.J.



Lee, J.

## DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 44453-4-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

☒ respondent Rachael Probstfeld, DPA
[prosecutor@clark.wa.gov]
Clark County Prosecutor's Office

☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: April 10, 2015

# WASHINGTON APPELLATE PROJECT

## April 10, 2015 - 4:16 PM

**Transmittal Letter**

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Case Name: STATE V. BRIAN HOLLOWAY

Court of Appeals Case Number: 44453-4

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