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COA No. 70799-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHARLES LEE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF SNOHOMISH COUNTY

The Honorable David A. Kurtz

APPELLANT'S OPENING BRIEF

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8. The evidence was insufficient to prove the 'non-marriage' element of the offense of conviction.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion in ruling that RCW

9.94A.120 and the State v. Ryan[1] reliability factors allowed admission of child hearsay, where the factors weighed in favor of exclusion, including the fact that M.N. had an established track record of dishonest character generally, that she had a history of falsely claiming sexual abuse specifically, and that she made her allegations against Mr. Lee in response to being accused of wrongdoing?

2. Did the trial court abuse its discretion in excluding relevant evidence that M.N.'s elementary school had ordered that no staff be allowed to ever be alone with M.N. because of concerns she would allege sexual abuse?

3. Did the trial court err, and violate Mr. Lee's right to a fair trial in violation of the state and federal constitutions, in giving the jury the "abiding belief in the truth of the charges" language in the definition of reasonable doubt, over Mr. Lee's objection?

4. Did the prosecutor commit misconduct in closing argument by stating an improper opinion on, and vouching for, M.N.'s credibility, and in commenting on the defendant's silence or failure of the defense to present evidence, and/or shifting the burden of proof?

5. Does cumulative error require reversal?

6. Must the condition of community custody precluding internet

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[1] State v. Ryan, 103 Wn.2d 165, 173, 691 P.2d 197 (1984).

usage be stricken as violative of the SRA?

7. Must this Court strike the condition of community custody requiring Mr. Lee to submit to plethysmograph testing to "ensure" his compliance with "conditions of community custody," as imposed in excess of the court's statutory authority under RCW 9.94A.703, and as violative of the state and federal constitutions?

8. Was the evidence insufficient to prove the 'non-marriage' element of rape of a child?

C. STATEMENT OF THE CASE

1. Procedural history. Over the course of 6 to 7 years, M.N., aged 12 at the time of Charles Lee's trial, made multiple false claims of having been sexually abused by various male adults, including by her biological father. In one instance, M.N. proceeded through a law enforcement-required sexual assault medical examination, and a forensic interview, maintaining her false allegations against family friend D. Knowlton, because she wanted him to stay in jail. 7/10/13RP at 148-50, 187. M.N. admitted that her false allegations in the past were motivated by the desire to remove certain adults from her family life, and her knowledge that accusations like hers would obtain that result. 7/10/13RP at 150, 187-91. M.N.'s anger at Mr. Lee and her jealousy of the time Mr. Lee spent with his daughter Autumn, 7/5/13RP at 30-31, had resulted in

M.N. burning Autumn and pushing Autumn under the water in the bathtub. 7/7/13RP at 31-32; see 7/11/13RP at 186-89.

In this case, a cascading series of evolving accusations against Charles Lee, who had been M.N.'s mother's boyfriend, resulted in multiple amended charging documents, in which the State charged Mr. Lee with four counts of alleged intercourse and molestation under RCW 9A.44.073 and .083.[2] CP 228-29, 222-23, 218-19, 121-14, 154-55, 90-91, 88-89. M.N. described to a forensic child interview specialist at Dawson Place Child Advocacy Center a catalogue of past sexual abuse by the defendant, including being subjected to repeated and durational oral, anal, and vaginal penetration. CP 226-27. Yet, when Charles Lee was in the home, both Autumn Lee and Ms. Niehaus were also present, except for times when Ms. Niehaus briefly walked outside to get the mail. 7/10/13RP at 196-97.

Following evidence at a jury trial, the jury found Mr. Lee not guilty on all but one of the counts, the single charge of rape of a child allegedly occurring on July 2, 2011, in count 1. CP 56, 57, 58, 59. This was an asserted incident which the child's mother, Rachel Niehaus, claimed to have witnessed, although no contact was seen. 7/11/13RP at

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[2] Rape of a child first degree and child molestation first degree are committed if there is sexual intercourse or sexual contact by a person 24 months older than the victim and the victim is less than twelve years old and not married to the defendant. RCW

155.

At sentencing, Mr. Lee expressly disavowed any desire for a SSOSA in order to maintain his absolute innocence. 7/17/13RP at 34. Based on his offender score of zero, Mr. Lee was sentenced on the single conviction to indeterminate imprisonment of 114 months-Life. 7/17/13RP at 45-47; CP 18-32.

2. Trial.

(i). Claims. Mr. Lee, from 2008 to 2011, was the boyfriend, and then ex-boyfriend, of Rachel Niehaus, who lived with her daughter M.N. in Mill Creek, Washington. Mr. Lee and Ms. Niehaus also had their own biological daughter, Autumn Lee, who had been born in November of 2008, and who stayed at the Niehaus home often, and was M.N.'s step-sister. CP 209-11, 215-17, 220-21, 225-27. Rachel Niehaus admitted that M.N. disliked Mr. Lee from the moment he entered the family's life, and more so after Autumn was born. 7/11/13RP at 134-41, 152.

Ms. Niehaus also confirmed that Mr. Lee, early in their relationship, learned that M.N. had made false allegations of sexual abuse in the past, and confirmed that he was wary of being near her. 7/11/13RP at 140. Ms. Niehaus, who was primarily at home from November of 2010 through early July 2011, testified on direct examination that she never left

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9A.44.073; RCW 9.94A.083.

M.N. and Mr. Lee alone in the home. 7/11/13RP at 150-51. When the prosecutor pressed her, asking "Are you sure?," Ms. Niehaus stated there would be times that she went outside to walk to the mailbox. 7/11/13RP at 150-51.

Ms. Niehaus contacted the police in July of 2011, and stated she had walked in on Mr. Lee sexually molesting her daughter M.N., in the living room. She asserted that the defendant, when confronted, stated he was showing M.N. "how we do it." CP 226-27; 7/11/13RP at 155, 158.

M.N. had previously claimed to her mother that she had been abused by Mr. Lee in 2010 and 2011, not all of which claims the mother believed, but which formed the three bases of the acquittal counts.[3] 7/11/13RP at 142.

M.N. had made her initial allegation in 2010, in response to the fact that her mother was questioning her about taking property that had gone missing around the house. 7/11/13RP at 191.

Then, M.N.'s mother, Ms. Niehaus, claimed that on July 2, she walked out of her bedroom into the living room. M.N. was on her hands and knees bent over the green couch. Mr. Lee was "behind her, his hands down his pants playing with himself." 7/11/13RP at 154-55. M.N.'s

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[3] The State received a referral from Mill Creek Police Department concerning the 2010 allegations, but expressly declined to file charges.

clothes were partially "down." 7/11/13RP at 153, 157. Ms. Niehaus went back to her room, where Mr. Lee insisted, "it's not what it looks like." 7/11/13RP at 157.

This incident of July 2 followed Ms. Niehaus taking Autumn to the hospital that morning because M.N. had burned Autumn's arm. M.N. did this to Autumn on purpose, out of anger or jealousy, and she lied to hospital personnel about what had happened. 7/11/13RP at 162, 216; 7/10/13RP at 163-64, 177-82. M.N. knew that Mr. Lee would find out that she had burned Autumn's arm - and she was worried about what would happen when he did, because he was protective of her. 7/10/13RP at 180-82.

Ms. Niehaus took M.N. shopping after the claimed July 2 incident, then later contacted police and made the allegation; Mr. Lee left the house a few hours after the alleged incident. 7/11/13RP at 157. Ms. Niehaus didn't significantly change the frequency that Mr. Lee was permitted to come to the family home after the allegations. 7/11/13RP at 149-50.

M.N testified that on July 2, 2011 (Count 1), at her home at the Heatherwood Apartments, Mr. Lee told her to change into a dress, then told her to face forward onto the couch, and then he raped her. 7/10/13RP at 100, 123-129. M.N. stated that her mother walked into the living room and told Mr. Lee to get out. 7/10/13RP at 130-31. M.N. at one point said

that the defendant had put his penis in her vagina, but later changed this to saying he put his penis in her anus. 7/10/13RP at 129, 138.

Mr. Lee indicated to the police in November of 2010 that he was aware of M.N.'s prior false allegations of sexual abuse by adults, and as a result, he specifically avoided being alone with her. 7/12/13RP at 48-54 (testimony of police officer Ian Durkee).

(ii). Mother and complainant's motivation to lie.

Mr. Lee was very upset about his daughter's burn. 7/11/13RP at 187. On the morning of the claim that sent Mr. Lee to prison in this case, Ms. Niehaus was forced to admit, Mr. Lee had threatened Ms. Niehaus that he "was going to get custody of her [Autumn] or take her back to Louisiana." 7/11/13RP at 196.

M.N.'s mother also confirmed M.N.'s overall dishonesty, her stealing, and her constant attention-seeking behavior, some of which was attributable to jealousy of her step-sister Autumn, but which also long predated that time. 7/11/13RP at 178-79.[4]

M.N. had a history of false crime allegations and harmful untrue

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[4] At trial M.N. denied having even accused her biological father of sexually molesting her, and continued to deny accusing him of doing so, 7/10/13RP at 158, 186, 7/11/13RP at 14; she also stated she had not been abused by Mr. Lee in a 2010 interview, after previously falsely accusing him of other sex abuse, 7/11/13RP at 15. She denied the fact that she had falsely accused one M. Condit of sexually molesting her, and continued to deny ever accusing him of doing so, and then in further cross-examination admitted she had done, and done so falsely. 7/10/13RP at 158-59, 187-88; 7/11/13RP at 11-13.

assertions of serious offenses, fabricated against people as to whom she harbored ill-will. M.N. lied and told authority figures that she had been raped by D. Knowlton, a lie uncovered by the efforts of Mr. Lee's counsel; M.N. claimed she did this because this man had sexually contacted a friend of hers and she wanted him to stay in jail; it was later revealed that she made the false accusation because she wanted that adult out of her family life and knew this would work. 7/10/13RP at 149-50, 158, 188-89; 7/11/13RP at 11, 97.

M.N. had undergone a previous physical examination for an earlier claim of sexual assault, and the claim was false, but M.N. underwent the entire exam process to establish proof of it, although it had never happened. 7/10/13RP at 200-01, 7/11/13RP at 96.[5]

M.N. was very unhappy during the time Mr. Lee was part of her family, in part because when he began dating her mother, she no longer had her room in the apartment where they lived. 7/10/13RP at 168-69. M.N.'s mother had to admit that M.N. disliked Mr. Lee so much she would do whatever she could to undermine him. 7/11/13RP at 152. Her

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[5] As indicated by her mother, M.N. learned a great deal about how sexual assault interviews proceed and how they result in removal of the perpetrator from the family's life, from being present for the investigation of her mother's sexual assault. 7/11/13RP at 140. M.N. had also learned of family friend Sandy Grant's sexual assault as a victim, and the events that occurred after all these sorts of allegations. 7/11/13RP at 108-09, 192; 7/12/13RP at 157-74.

anger at Mr. Lee and her jealousy of Autumn had already been an apparent cause of other harmful lies. Just recently, in 2012, M.N. had claimed that she observed Mr. Lee sexually abusing Autumn, which was false. 7/10/13RP at 196.

In 2010, after M.N. wrongly used her mother's credit cards and responded to being confronted about that by accusing Mr. Lee of abuse, social workers became involved with the family. M.N. was told that she could go to juvenile jail if she continued to make false allegations of sexual molestation. 7/10/13RP at 198-99.

(iii). Medical testimony. M.N. asserted she had severe vaginal and anal bleeding during the July incident, stating it was upwards of a half-hour to an hour of forced intercourse. But no saliva, seminal fluid, or DNA was located in M.N.'s underwear or on or in her person, according to defense witness Mariah Low, the forensic scientist from the Washington State Patrol Crime Laboratory, who the State did not call as a witness, but the defense did. 7/10/13RP at 100-138; 7/16/13RP at 74, 83-88.

According to the affidavit of probable cause, a sexual assault examination nurse or "SANE" examined M.N. on July 7 and "corroborated M.N.'s allegations." CP 226.

But at trial, Paula Newman-Skomski, the Providence Hospital (Everett) nurse stated the child's vaginal indices were both consistent with sexual trauma, and consistent with normal anatomy so as to be non-indicative of injury. 7/15/13RP at 126, 190.

M.N. had asserted that Mr. Lee had sexually abused her a number of times that were "[t]oo many to count." 7/10/13RP at 137-38. Newman-Skomski admitted that if it were true, as M.N. asserted, that she was abused as and how she claimed -- upwards of 300 times by Mr. Lee including every day of the week except Sundays -- her physical examination findings would be dramatically different. 7/15/13RP at 195; 7/10/13RP at 136.

Newman-Skomski, who became a nurse-practitioner in mid-July of 2011, had also seen M.N. in November of 2010 based on an earlier accusation. 7/15/13RP at 34-36. M.N. made a richly detailed claim of abuse by Mr. Lee allegedly occurring in early November. 7/15/13RP at 40-43, 65. Skomski could locate no indications of trauma in her examination of M.N.'s vaginal area, and testified that she had even doubted whether there was a "notch," which is an indentation that is consistent with both trauma and trauma's absence. 7/15/13RP at 78-84.

Ms. Newman-Skomksi also examined M.N. on July 2, of 2011, at which time M.N. had now alleged that Mr. Lee raped her. 7/15/13RP at

107. In this version, M.N. claimed this occurred weekly. 7/15/13RP at 108. Newman-Skomksi, then a nurse, did not utilize a colposcopic device during her exams, only unaided visual examination; M.N.'s hymen was intact such that the vagina could not be seen. 7/15/13RP at 190.

During the visual examination, M.N. appeared to have an area of erythema, "which means redness" from possible abrasion, on her labia minora, of .25 centimeters in size. 7/15/13RP at 116-17. There was also a tag, or extended piece of hymenal area, or a tear, which could result from genital anomaly, trauma, straddle injuries, or anything that irritates the hymenal tissue. 7/15/13RP at 120-21, 149. M.N. had a .25 centimeter area of erythema in her anal area. 7/15/13RP at 121-22. Newman-Skomksi stated these indices were consistent with sexual assault, and consistent with diarrhea or constipation, the latter of which the child had also reported. 7/15/13RP at 113, 126-28.

It also turned out that M.N. had physically scratched and harmed her own vaginal area in the past, including since before the time of her allegations against Mr. Lee. 7/11/13RP at 95. Ms. Newman-Skomski admitted that any vaginal indices could result from such self-harm. 7/15/13RP at 177-78. She agreed with her own report that there was apparent maceration or lack of smoothness in the fossa area of the vagina, which could result from any irritation including a yeast infection, and that

the asserted abrasion of the labia minora could be a mere discoloration; Newman-Skomski had relied on M.N.'s claim that the area hurt when touched. 7/15/13RP at 183, 187-89; Exhibit 24. Newman-Skomski admitted that a person who had been subjected to the many, many incidents of sexual abuse reported by M.N. would be expected to have a different appearance of her hymen than what Newman-Skomski observed. 7/15/13RP at 195.

Caryn Young, a nurse-practitioner at Providence Hospital, who also examined M.N. on July 2, 2011, and used a colposcopic examination, only observed an irregularity in the fossa area of the vagina, and erythema, or non-abrasion redness, neither of which, Young stated, was an indicator of trauma or sexual abuse. 7/12/13RP at 149-50, 155-56.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN ADMITTING THE HEARSAY STATEMENTS OF M.N. UNDER STATE V. RYAN.

a. The trial court admitted hearsay. A hearsay statement is one made by a declarant not testifying at trial, offered in evidence to prove the truth of the matter asserted. ER 801(c). Hearsay is generally inadmissible unless it falls within an exception to the rule barring hearsay. ER 802.

At issue here is the trial court's pre-trial ruling of July 12, 2013, admitting all the hearsay identified by the court and including testimony

and an interview tape-recording by child interviewer Amanda Harpell-Franz in 2010, and statements made by M.N. to her mother, and to Sandy Grant, a family friend, in 2010. 7/3/13RP at 191-95; 7/5/13RP at 105-18; 7/12/13RP at 25, 62, 105-06; see CP 113-26 (Defendant's Competency and Child Hearsay Brief); Supp. CP ___, Sub # 186, State's Exhibit 8. These assertions supported the child's claims at trial on all the charges that Mr. Lee abused her repeatedly over time on occasions supposedly "[t]oo many to count." 7/10/13RP at 137-38; see also 7/15/13RP at 195 (Newman-Skomski testimony).

b. The child hearsay was inadmissible by rule and not admissible by statutory exception where the *Ryan* factors were not substantially met. For cases alleging acts of sexual contact involving children under the age of 10, the Legislature has established a particular exception to the evidence rule barring hearsay. Under RCW 9A.44.120, certain child hearsay may be admitted if:

> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide **sufficient indicia of reliability**; and
> (2) The child either:
> (a) Testifies at the proceedings; or
> (b) [Is unavailable as a witness].

(Emphasis added.) RCW 9A.44.120.[6] First, the trial court erred to the extent it admitted hearsay of the child M.N. that occurred any time at all after she turned 10 years old, given her birthday of December 22, 2000. CP 121-22 (Defense hearsay brief); 7/5/13RP at 76-77; ER 801; ER 802; see RCW 9A.44.120.

Second, the trial court answers the RCW 9.94A.120 question of whether there are "sufficient indicia of reliability" under the statute by applying the test set forth in State v. Ryan, 103 Wn.2d 165, 173, 691 P.2d 197 (1984). State v. Woods, 154 Wn.2d 613, 623, 114 P.3d 1176 (2005).

In Ryan, the Supreme Court established a non-exclusive list of nine factors to consider when analyzing the reliability of child hearsay. Ryan, 103 Wn.2d at 175-76. Ryan instructed trial courts to consider: (1) whether the child had an apparent motive to lie; (2) the child's general character; (3) whether more than one person heard the statements; (4) the spontaneity of the statements; (5) whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness; (6) whether the statements contained express assertions of

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[6] Prior to admitting child hearsay, it must be shown that the child was competent at the time the statements were made. State v. Ryan, 103 Wn.2d at 173. During the combined hearings of July 3 and July 5, 2013, held on the issues of competency and hearsay, the court ruled that M.N. was competent to testify, and later ruled that the child's hearsay was admissible under Woods and Ryan. 7/3/13RP at 179-82.

past fact; (7) whether the child's lack of knowledge could be established through cross-examination; (8) the remoteness of the possibility of the child's recollection being faulty; and (9) whether the surrounding circumstances suggested the child misrepresented the accused's involvement. Ryan, 103 Wn.2d at 175-76.

In this case, analysis of these factors demanded that the court not find any reliability basis to avoid the standard hearsay bar. When answered, these questions of character, motive, trustworthiness, timing, and other circumstances showed a dramatic *lack of* reliability under Ryan, as defense counsel argued. 7/5/13RP at 82.

(1) Whether the child had an apparent motive to lie. The trial court found that this factor favored the defense. 7/5/13RP at 111. Motive to lie was immense. M.N.'s motive to lie in this case, at the time of her statements to her mother, and to both Ms. Harpell-Franz and Ms. Grant, was affirmatively apparent. M.N. hated Mr. Lee, for many reasons involving his entry into M.N.'s family life with the birth of his and Ms. Niehaus' daughter Autumn, who Mr. Lee treated with care as his biological daughter. 7/5/13RP at 30. This caused M.N. to be jealous of the time Mr. Lee spent with Autumn. 7/5/13RP at 30-31. As Ms. Niehaus admitted, including to CPS caseworkers, M.N. would do "anything" to get Mr. Lee out of the family. 7/5/13RP at 32.

(2) The child's general character. The trial court found that this factor also favored the defense. 7/5/13RP at 112-13. M.N.'s general character, as it specifically relates to the reliability focus of Ryan, was abysmally poor. Ms. Niehaus confirmed that M.N. was not a truthful child, stating, "If she doesn't like you, she may make up things and go from there." 7/5/13RP at 11-12. She also generally engaged in behavior designed to seek attention from adults, including being dishonest in order to gain that attention. 7/5/13RP at 36-37. Family friend Sandy Grant could only bring herself to tell the court, of this child, "I find her to be very truthful in some cases, yes." 7/3/13RP at 201.

M.N. was dishonest about her own dishonesty. For example, her mother admitted that when M.N. apparently used Ms. Niehaus's bank card to charge $100, M.N. told her multiple lies about why and how she did this, and Ms. Niehaus confirmed with other adults that M.N. was lying. 7/5/13RP at 12.

(3) Whether more than one person heard the statements. The trial court found that this factor favored the State. 7/5/13RP at 113. Repeatedly making consistent claims to different people favors Ryan reliability. State v. Lopez, 95 Wn. App. 842, 853, 980 P.2d 224 (1999). But the plethora of repeated claims in this case was reasonably shown by all the circumstances to involve retracted claims, denied claims, and

claims made by the child – such as to Harpell-Franz -- to remain consistent with allegations she had *already* made in apparent reaction to being accused of stealing and assault of her step-sister. As counsel argued, this factor, this case, weighs in favor of exclusion. See 7/5/13RP at 83-84. The child's 'multiplicity' of statements, to others, and about others, cannot be disconnected from the broad range of admittedly false accusations M.N. made about abuse by others, which accusations she persisted with, and which accusations she then *retracted* – but frighteningly, doing so only several years after originally making them 7/5/13RP at 42-43; 7/5/13RP at 51-56.

(4) The spontaneity of the statements. The trial court found that this factor favored the State because there were few leading questions posed by the receivers of the declarations. 7/5/13RP at 114. But there was no spontaneity when all the circumstances are considered. M.N.'s mother confirmed during the hearsay hearing that it was her questioning of her daughter *about possibly stealing property* that prompted M.N.'s initial statements, which marked the commencement of her making claims against Mr. Lee. 7/5/13RP at 29-30, 41-42. This was what led directly to M.N. being interviewed by Snohomish County Sheriff's Office child abuse interview specialist Ms. Harpell-Franz, in a law-enforcement arranged interview that was of course anything but spontaneous.

7/3/13RP at 138, 142-50; Pre-Trial exhibit 1 (2010 Harpell-Franz DVD) (Supp. CP ___, Sub # 183); and (attachment C to defense hearsay brief (agreed transcript of exhibit 1) (CP 113).

For her part, family friend Sandy Grant specifically noted that the child's initial claims to her were made during a conversation about them when Grant accompanied the child and her mother to the hospital, and she specifically testified that M.N.'s accusations were not spontaneous. 7/3/13RP at 197. The trial court erred by analyzing this issue as favoring the State simply because Ms. Grant did not put words in the child's mouth. 7/5/13RP at 115-16. Grant's hearsay hearing testimony indicated she actually heard M.N. say that Mr. Lee abused her when Grant was called by hospital staff to sit in with M.N.'s hospital *interview*. 7/3/13RP at 193-94. Then, subsequent to that, Grant heard statements from M.N. after she instructed her to be truthful with the police so they could help her. 7/3/13RP at 194-95. After that, Ms. Grant testified, she was talking with M.N. and M.N. complained that people should believe her accusations. 7/3/13RP at 196-97. This is not a child spontaneously claiming abuse under any reliability analysis. See State v. Borland, 57 Wn. App. 7, 15, 786 P.2d 810 (1990) ('spontaneous' for purposes of the Ryan analysis includes responses to questions that are neither leading nor suggestive), review denied, 114 Wn.2d 1026 (1990).

(5) Whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness. Officer Tara Hoflack was yet another witness who indicated that the 2010 allegations of abuse by Mr. Lee were made by the child in direct and immediate *response* to the mother's inquiry to M.N. about her "acting up" behavior, and the fact that property around the apartment had been going missing. 7/5/13RP at 59-61. M.N.'s mother confirmed this. 7/5/13RP at 29-30, 41-42. The timing of the child statements do not suggest any trustworthiness. Nor does the relationship between the declarant and her mother support trustworthiness, given that M.N.'s mother testified repeatedly that M.N. had made claims to her, from child to mother, motivated by hatred of Mr. Lee's entry into the family, and allegations toward others that were ruinous of the mother's relationships with these other people, but then turned out to be false. 7/5/13RP at 45, 56. This also included a false allegation against Ms. Niehaus's former husband, M.N.'s biological father. 7/5/13RP at 26. Furthermore, the evidence showed that M.N., in the past, had persisted with false allegations when she would make them, then later be interviewed by authorities and forensic child interviewers, such as Ms. Harpell-Franz. 7/5/13RP at 42-43; 7/5/13RP at 51-56.

[7] **(8). The remoteness of the possibility of the child's recollection being faulty.** This was deemed by the trial court to support admission because the allegations came soon after the alleged incidents; however, M.N. had repeatedly made allegations that she later retracted. 7/5/13RP at 45, 56, 116-17.

(9) Whether the surrounding circumstances suggested the child misrepresented the accused's involvement. The trial court found that this factor favored the defense. 7/5/13RP at 111-12. As noted, all the surrounding circumstances – including timing, motive, and specific reason to lie -- strongly suggested the child misrepresented the accused's conduct, supporting lack of Ryan reliability. Amanda Harpell-Franz's 2008 interview with M.N. – in which Harpell-Franz obtained the very same promises from M.N. that she understood the difference between the truth and a lie and was telling the truth as Harpell-Franz obtained from M.N. in her later interview – demonstrated that the circumstances of the current hearsay attested to non-reliability. 7/3/13RP at 154-56, 160-62; Supp. CP ___ and ___, Sub #'s 183 and 185 (Pre-trial exhibit 1 (2010 interview

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[7] Factor (6) (Whether the statements contained express assertions of past fact), was deemed unhelpful by the court per established case law so indicating, 7/5/13RP at 113; factor (7) (whether the child's lack of knowledge could be established through cross-examination), was deemed a non-factor since the child would be testifying, 7/5/13RP at 117-18.

DVD); exhibit 2 (2008 interview transcript); exhibit 3 (2010 interview transcript).

Given all these circumstances, the trial court abused its discretion. The introduction of child hearsay, specifically, is dependent on a trial court's tenable finding that the statements are sufficiently reliable. See State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A trial court need not determine that every Ryan factor is satisfied before admitting child hearsay, but the evidence before the trial court must show that the Ryan factors are "substantially met." State v. Swan, 114 Wn.2d 613, 652, 790 P.2d 610 (1990). They were not substantially met here. Rather, the Ryan factors weighed in favor of unreliability, and thus in favor of applying the general rule – hearsay is barred. Ryan, 103 Wn.2d at 175-76.

The trial court abused its discretion where its ruling lacked evidentiary support, was untenable, and was based on an erroneous interpretation of the law. State ex rel. Carroll v. Junker, supra; State v. Quismundo, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). Further, a court's evidentiary ruling is likewise an abuse of discretion if it is based upon facts that are not supported by the evidence. State v. Ramires, 109 Wn. 747, 757, 37 P.3d 343 (2002); see Quismundo, 164 Wn.2d at 504. The court abused its discretion.

c. The error in question requires reversal, under a non-constitutional harmfulness standard. A trial court's evidentiary error is reversible if it prejudices the defendant. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). Error is not prejudicial where, within reasonable probabilities, the outcome would have differed but for the error. State v. Bourgeois, 133 Wn.2d at 403.

Absent this error, Mr. Lee would have been found not guilty on all four counts, in the close competing facts of this case, see also Part D.5, and the proofs' dependence on M.N.'s credibility. The hearsay, offered at trial *through* concerned and caring responsible professional adults, and in particular the videotaped interview of M.N. by Ms. Harpell-Franz, State's Exhibit 8, in which M.N.'s allegations were elicited by a 'professional interviewer,' stood at trial as the signal evidence undergirding the claims and rescuing them from the jury's skeptical view of M.N. Reversal is required.

2. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE THAT M.N.'S ELEMENTARY SCHOOL HAD ORDERED THAT NO STAFF BE ALLOWED TO EVER BE ALONE WITH M.N. BECAUSE OF CONCERNS SHE WOULD ALLEGE SEXUAL ABUSE.

a. The court excluded evidence proffered through witness Shanks-Petrillo. The defense desired that Ms. Shanks-Petrillo, M.N.'s

school administrator, testify that Penny Creek Elementary School had instituted a policy that no staff were allowed to be alone with M.N. 7/15/13RP at 158-59, 163-64. This was based on M.N.'s repeat past allegations there, and her reputation for dishonesty. 7/15/13RP at 158-59, 163-64. The court appeared to state that the question would improperly seek a comment on veracity. 7/15/13RP at 164. This was error, because the witness was offering relevant evidence. ER 401; ER 402; State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002). The fact that the school's concrete actions also tended to cast M.N. in an unflattering light certainly did not render the offered testimony an improper act of the witness vouching for credibility so as to invade the jury's province. The court abused its discretion. State ex rel. Carroll v. Junker, supra.

b. The error in question requires reversal, under a non-constitutional harmfulness standard. A trial court's evidentiary error is reversible if it prejudices the defendant. State v. Bourgeois, 133 Wn.2d at 403. Error is prejudicial where, within reasonable probabilities, the trial's outcome would have differed had the error not occurred. Bourgeois, 133 Wn.2d at 403.

Absent this error, Mr. Lee would have been able to show, in a materially persuasive manner from an independent unrelated witness, that M.N.'s potentiality of making false accusations was deemed such a likely

and potentially highly damaging danger, that a public education facility had taken special precautions to protect its staff from that likelihood. This was highly probative, and would have been persuasive so as to raise reasonable doubt in a very close case. Reversal is required.

3. REVERSAL IS REQUIRED FOR AN IMPROPER DEFINITION OF THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT.

a. Objection. Mr. Lee took exception to the trial court's giving to the jury the WPIC 4.01 definition of reasonable doubt with the "abiding belief" language. The court gave the instruction and the prosecutor quoted and relied on the abiding belief language in closing argument. 7/17/13RP at 27-30, 61; see CP 67 (court's instruction); see CP 109 (defendant's proposed instruction).

b. Error. The court's instruction equating the reasonable doubt standard with an abiding belief in the truth of the charge along with the prosecutor's reliance on it closing argument diluted the State's burden of proof in violation of, *inter alia*, Mr. Lee's Due Process right to a fair trial. It is incorrect to assert that the jury's task in a criminal trial is to determine what it believes to be true – there is, constitutionally, more to it than that. State v. Emery, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (citing State v. Anderson, 153 Wn. App. 417, 431, 220 P.3d 1273 (2009)). Rather, "a jury's job is to determine whether the State has proved the charged

offenses beyond a reasonable doubt." Emery, 174 Wn.2d at 760. Deciding what it believes happened is the jury's job in a civil case.

Jury instructions that fail to properly state the criminal case standard raise a due process concern because they wash away or dilute the presumption of innocence. State v. Bennett, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007). The trial court bears the obligation to vigilantly protect the presumption of innocence. Id. This is so vital that "a jury instruction misstating the reasonable doubt standard is subject to automatic reversal without any showing of prejudice." Emery, 174 Wn.2d at 757 (quoting Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993)).

By equating proof beyond a reasonable doubt with a "belief in the truth" of the charge, the court confused the critical role of the jury. The "belief in the truth" language encourages the jury to undertake an impermissible search for the truth and invites the error identified in Emery, 174 Wn.2d at 741.

In Bennett, the Supreme Court found the reasonable doubt instruction derived from State v. Castle, 86 Wn. App. 48, 53, 935 P.2d 656 (1997) to be "problematic" because it was inaccurate and misleading. Bennett, 161 Wn.2d at 317-18. Exercising its "inherent supervisory powers," the Supreme Court directed trial courts to use WPIC 4.01 in

future cases. Id. at 318. WPIC 4.01 includes the "belief in the truth" language (used here in Mr. Lee's case) only as a potential option by including it in brackets. The pattern instruction as used in this case reads:

> The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.
>
> A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP 67; see WPIC 4.01. The Bennett Court did not comment on the "belief in the truth" language, which is bracketed as optional in the pattern instruction. Notably, this language was not a mandatory part of the pattern instruction the Court approved.

More recent cases demonstrate the erroneous nature of such language. In Emery, the prosecution effectively told the jury in closing argument that "your verdict should speak the truth," rather than determine the issue of reasonable doubt. State v. Emery, 174 Wn.2d at 751. The

Supreme Court clearly held these remarks to have misstated the jury's role. Bennett, at 764. However, in that case, the error was deemed harmless because the "belief in the truth" theme was not endorsed in the trial court's instructions and because the evidence was overwhelming. Bennett, at 764 and n.14.

The Supreme Court had to some degree looked at "belief in the truth" language, now almost twenty years ago in State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). However, in Pirtle the specific issue before the Court was whether the phrase "abiding belief" abridged the concept of proof beyond a reasonable doubt. Pirtle, 127 Wn.2d at 657-58. Thus the Court did not have occasion to assess whether the "belief in the truth" phrase does what Mr. Lee argues it did here -- minimize the State's burden and suggest to the jurors that they should decide the case based on what they think is true rather than whether the State proved its case beyond a reasonable doubt. Emery demonstrates the danger of injecting the inadequate idea of a search for the truth into the definition of the State's burden of proof in a criminal case. See also Sullivan, supra, 508 U.S. at 281-82.

This Court should find that directing the jury to treat proof beyond a reasonable doubt as the equivalent of having an "abiding belief in the truth of the charge" misstates the prosecution's burden of proof, confuses

the jury's role, and denies an accused person his Due Process right to a fair trial by jury, protected by the state and federal constitutions. U.S. Const. amends. 5, 14; Wash. Const. art. I, §§ 3, 21, 22. Reversal is per se required for the structural failure to provide the jury with a proper statement of proof beyond a reasonable doubt. See State v. McHenry, 88 Wn.2d 211, 212-14, 558 P.2d 188 (1977); Sullivan v. Louisiana, 508 U.S. at 281-82.

c. Reversal is also required for error below under any standard. The absence of any single error in this criminal case would have resulted – certainly within reasonable probabilities -- in four 'not guilty' verdicts for Mr. Lee, rather than just three. Constitutional error requires reversal unless the State can affirmatively meet its burden to prove, beyond a reasonable doubt, that the error was not harmful. State v. Guloy, 104 Wn.2d 412, 425–26, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). Non-constitutional error requires reversal if the outcome would have been different, within reasonable probabilities. State v. Bourgeois, 133 Wn.2d at 403.

Here, reversal is required. The materiality of error in this case is shown, first, by the weak nature of the State's affirmative case, and the conflicts in it, which came part and parcel with the State's presentation of that case. The child's diminished credibility in the eyes of the jury that

rejected her claims of multiple grave crimes also renders this error reversible. Further, in the context of the case and the victim's particular claims of repeated durational sexual intercourse, the equivocal medical indicators and the absence of scientific physical indicators leaves the case inadequate to withstand even the lowest, non-constitutional error standard. In these circumstances, when the State's case is considered in combination with the substantial factual competing evidence supporting the defense case, the error requires reversal of Mr. Lee's conviction.

4. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT.

a. Misconduct in closing argument is prohibited. A public prosecutor is a quasi-judicial officer charged with the duty to seek a verdict based upon reason. State v. Avendano-Lopez, 79 Wn. App. 706, 904 P.2d 324 (1995) (citing State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978)). Vigor is appropriate but improper argument can "undermine the fundamental fairness of the trial." United States v. Young, 470 U.S. 1, 6-7, 8-18, 105 S.Ct. 1038, 1042–48, 84 L.Ed.2d 1 (1985); see Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 74 L.Ed.2d 1314 (1935); U.S. Const. amend. 14, Wash. Const. art. 1, § 3. Thus a prosecutor's closing argument should be confined to the evidence and reasonable inferences. State v. Belgarde, 110 Wn.2d 504, 507, 755 P.2d

174 (1988). The prosecutor must act impartially and "with the object in mind that all admissible evidence and all proper argument be made, but that inadmissible evidence and improper argument be avoided." State v. Torres, 16 Wn. App. 254, 263, 554 P.2d 1069 (1976).

b. Misconduct – improper opinion and vouching for credibility. In rebuttal closing argument, the prosecutor stated an improper personal opinion and vouched for M.N.'s credibility when he stated that he was, as a prosecutor, unable to obtain victims from "central casting." 7/17/13RP at 120.

> I don't pick the folks who come here and talk about the things that have been done to them. I don't go to central casting and try to find cute seven-year-old kids who have no trauma – who have no previous trauma in their lives. I don't go to central casting.
>
> MS. HARDENBROOK: Objection, Your Honor. The first person is improper. Personal opinion is not allowed in argument.
>
> THE COURT: No personal attributions by either counsel are appropriate. Given the context, Mr. Cornell, I will have you continue with your argument.

7/17/13RP at 119-20.

c. Misconduct – arguing about what the jury did not hear from the defense. Second, also in rebuttal argument, the prosecutor faulted Mr. Lee for being silent or providing an explanation for the claims against him. The prosecutor stated,

> What was not discussed in closing argument, what we

> didn't hear about was what the defendant did. We didn't hear an explanation about what the defendant –
>
> MS. HARDENBROOK: Objection, Your Honor.
>
> MR. CORNELL: It's argument, Your Honor.
>
> THE COURT: I will sustain the objection to that last portion. The jury will disregard. Counsel, I will have you back up and begin this portion of your closing argument again.

7/17/13RP at 129.

Both of these instances were misconduct, and were so prejudicial in a close case that they require reversal of his conviction, despite any admonition given by the trial court.

d. Mr. Lee objected, and accordingly, he may appeal. Mr. Lee objected in both instances. 7/17/13RP at 119-20, 129. Where the defendant objects to closing argument misconduct, the error is preserved. State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984). Even a failure to request a curative instruction would not waive a claim of error. See State v. Claflin, 38 Wn. App. 847, 849 n. 2, 690 P.2d 1186 (1984). Further, the instruction that the court did orally give to the jury in one instance to disregard the prosecutor's comment could not cure the prejudice to him. For example, in the case of State v. Stith, the Court of Appeals held that the prosecutor's comment there, about the defendant's prior crimes and criminal propensity was so prejudicial that it was not

curable by cautionary instruction. State v. Stith, 71 Wn. App. 14, 856 P.2d 415 (1993).

> We applaud the trial court's effort to blunt the impact of these remarks but, even though the jury is presumed to follow the instructions of the trial court, State v. Guizzotti, 60 Wn. App. 289, 296, 803 P.2d 808, review denied, 116 Wn.2d 1026, 812 P.2d 102 (1991), we cannot conclude that these remarks did not result in prejudice.

State v. Stith, 71 Wn. App. at 22-23. Mr. Lee's case is the same.

e. Vouching and comment on witness credibility. It is misconduct for a prosecutor to state a personal belief as to either the defendant's guilt or as to the credibility of witnesses. State v. Warren, 165 Wn.2d 17, 30, 195 P.3d 940 (2008); accord, State v. Reed, 102 Wn.2d 140, 145–46, 684 P.2d 699 (1984) (comment on credibility of defense witnesses). It is specifically improper for the prosecutor to vouch for the victim's credibility, including by personal opinion. Improper vouching occurs when the prosecutor expresses a personal belief in the veracity of the witness. State v. Thorgerson, 172 Wn.2d 438, 443-44, 258 P.3d 43 (2011); State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010).

Here, the prosecutor's argument to the effect of, "I don't go to central casting" and the like was an opinion that improperly vouched for M.N.'s credibility, by the prosecutor indicating to the jury that he is required to prosecute cases even where the victimized person may not be

sympathetic. The use of the phrase "I" is discouraged, for these very reasons. See United States v. Freisinger, 937 F.2d 383, 386 (8th Cir.1991) (cautioning that phrases such as "I suggest" and "I submit" often, but not always, are used to inject prosecutor's personal belief and opinion); United States v. Younger, 398 F.3d 1179, 1191 (9th Cir.2005) ("We do not condone the prosecutor's use of 'we know' statements in closing argument, because the use of 'we know' readily blurs the line between improper vouching and legitimate summary.").

Here, the prosecutor's statements to the jury essentially indicated he had to prosecute because he had been presented with a harmed child even though she did not meet the criteria of a completely sympathetic and purely innocent victim. This was improper because it displayed the prosecutor's personal opinion and his belief in M.N. – in effect telling the jury, " 'I' went forward with this case because it happened like she said." This was vouching, and a personal opinion. Both were improper. No jury could ignore this 'inside information' that the State knew Mr. Lee was guilty and thus felt obligated to prosecute despite the victim being unsympathetic. The prosecutor committed misconduct.

f. Commenting on the defendant's silence and shifting the burden of proof is prohibited. The prosecutor committed further misconduct by faulting Mr. Lee and the defense for failing to provide an

explanation justifying acquittal. U.S. Const. amend. 5, and the Washington Constitution, article 1, § 9, prohibit a State's attempt, at trial, to use a defendant's silence against him by implying to the jury that such silence shows that he is guilty. Doyle v. Ohio, 426 U.S. 610, 617, 96 S.Ct. 2240 (1976); State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979). Thus the State may not attempt to prove guilt by commenting in front of the jury on the defendant's decision to exercise this constitutional privilege. Griffin v. California, 380 U.S. 609, 613, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

Relatedly, a prosecutor also commits misconduct by misstating the law regarding the burden of proof. State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996); U.S. Const. amend. 14. A prosecutor may not suggest to the jury that it should find the defendant guilty because he did not present evidence or explain away the charges. State v. Traweek, 43 Wn. App. 99, 106-07, 715 P.2d 1148 (1986), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991); U.S. Const. amend. 14. The prosecutor committed misconduct.

g. Reversal. To prevail on a claim of prosecutorial misconduct, the defendant must establish that the conduct was "prejudicial in the context of the entire record and the circumstances at trial." In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

Personal opinion and vouching require reversal where the case at trial hinged on whether or not the jury found the victim to be credible, as here. See State v. Fitzgerald, 39 Wn. App. 652, 657, 694 P.2d 1117 (1985). And it is highly prejudicial for the State to comment on the defendant's act of not testifying in his defense or failure to explain his innocence, because jurors expect an innocent person to do differently. See State v. Romero, 113 Wn. App. 779, 790, 54 P.3d 1255 (2002).

Here, reversal is required because of both improper comments. See, e.g., State v. Holmes, 122 Wn. App. 438, 447, 93 P.3d 212 (2004) (reversing molestation convictions for misconduct by the prosecutor, because although the victims' testimony was compelling, the defense's theory of the case was also believable). Given the errors below, and the competing factual assertions and arguments in the case, the misconduct was prejudicial. This Court should reverse.

5. CUMULATIVE ERROR REQUIRES REVERSAL.

The cumulative error doctrine allows this Court to reverse for multiple errors that together resulted in denial of the Due Process right of a fair trial, protecting a principle so important that it applies even in cases where some of the errors were inadequately preserved. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250

(1992); U.S. Const. amend. 14, Wash. Const. art. 1, § 3. This Court has discretion under RAP 2.5(a)(3) to review all errors as part of a cumulative error analysis to ensure that Mr. Lee was not deprived of a fundamentally fair trial. State v. Alexander, 64 Wn. App. at 150-51.

Considered in the context of the case, allowing M.N.'s hearsay to be repeated in court, preventing the jury from learning that the child's own school had instituted a policy to protect itself from M.N.'s harmful claims, diluting the reasonable doubt standard, and the prosecutor's misconduct, materially resulted in the State procuring the guilty verdict on count 1. These errors were interjected into a very close case, in terms not just of credibility, but also physical evidence. For example, Mariah Low, a forensic scientist from the Washington State Patrol Crime Laboratory, analyzed materials collected regarding the 2011 claim. No semen was located on swabs taken from MN's perineal area, or perianal area, or her breast area; no blood or material was located on her underpants, and no saliva was located in any of these samples. 7/16/13RP at 81-86. The only finding was an indication of a trace of blood, just as likely to have been a result of the child's normal menstrual cycle as anything else, and non-indicative of sexual conduct, much less trauma. 7/16/13RP at 87-88. There was simply no male DNA on any sample. 7/16/13RP at 88.

Next, the defense case, in cross-examination and in presenting its

defense, shows error below to be not harmless, within reasonable probabilities. In the area of physical evidence, Nurse Mary Jane Cole made clear that M.N. had a prior history of self-harm including aggressive scratching of her genital area, casting great doubt on the already tenuous and highly debated evidence that she had an indication in her vaginal area or one that showed sexual trauma. 7/12/13RP at 108-112. The visual sightings of erythema, or redness, in her vaginal area, stated to exist during various times of the child's prior overall history, were just as easily caused by that harm, or indeed a routine urinary tract infection -- and importantly. M.N.'s hymen was non-abnormal. 7/12/13RP at 115-25.

In the area of credibility, according to defense witness Shelley Shanks-Petrillo, an Everett Public Schools administrator, M.N., in 2010 and 2011, twice made claims of sexual abuse of her occurring at church, but her demeanor would change during interviews, transitioning from being excited to make the claims to becoming frustrated as she was doubted about the assertions. 7/15/13RP at 151, 155-58. M.N. had not been honest with Ms. Shanks-Petrillo several times before. 7/15/13RP at 161. Based on her interactions with M.N., her knowledge of M.N.'s disciplinary file, her discussions with CPS caseworkers and her previous principal, along with her teachers and the school social worker, Ms. Shanks-Petrillo described M.N. as having "a reputation for not being

honest." 7/15/13RP at 159-61. (The trial court did not allow the defense to elicit that the school had officially warned its staff to never be alone with M.N.).

The credibility of many of the witnesses, which was so pivotal to the outcome, was also weak in this trial and characterized by a paucity of legal adequacy to overcome any error, even before the defendant's own case, and all the more so afterwards. Mill Creek police officer Christine White interviewed M.N. and her mother following one of the series of M.N.'s scattershot allegations against seemingly randomly selected accusees. During this interview, M.N.'s family friend Sandy Grant repeatedly interrupted to make comments and interjections about facts, and M.N. appeared to follow Sandy's lead in giving answers, reasonably casting doubt on MN's general credibility in the entire case, as to whether she was a child who ever came forward with truthful allegations emanating from her own actual experience. 7/16/13RP at 71-74.

Joan Klorer, a teacher at Penny Creek Elementary School, participated in an early-2011 interview of M.N. by Child Protective Services, at which M.N. denied ever making allegations of sexual abuse, and specifically stated that no males coming to or present at her family home had ever engaged in sexual conduct with her. 7/16/13RP at 111, 112-15. M.N. was a child with a reputation for not being credible, and for

making non-credible allegations, and further, she would go so far as to make these allegations in official form, to Child Protective Services. 7/16/13RP at116-19.

Similarly, Katelyn Carr, a social worker who worked with foster families, noted the disturbing fact that M.N. made repeated allegations to her that she had been sexually abused, that she laughed while making these claims, and that she appeared to make them because she enjoyed that she got to talk to adults about them, and she enjoyed going to the hospital. 7/16/13RP at 126, 129-31. Her allegations came in late 2011. 7/16/13RP at 135.

With a deeply concerning similarity of description of MN's allegatory pattern, Celeste Gates, a special education teacher at the Everett Public Schools, testified that she worked with M.N. both before July of 2011, and after, thus again at the most critical time in this case where Mr. Lee's conviction was for the claim of July 2011. 7/16/13RP at 139, 141. Gates, who taught M.N. and observed her consistently during this period, gained such a particular understanding of M.N.'s patterns that, despite some objection by the prosecutor, the court allowed her to testify that M.N. would conspicuously listen to adult conversations. 7/16/13RP at 142-45. She seemed to learn how to, and enjoy initiating, the sort of disruption that would occur when other classmates were getting in trouble.

7/16/13RP at 150-51. As defense counsel argued in closing, this behavior was of a piece with M.N.'s pattern of making allegations that she knew would result in adult response and the institution of events, and trouble for others, that she desired to occur. 7/17/13RP at 111-18.

The multiple errors in this case, even if each individually might not require reversal, caused cumulative prejudice requiring reversal. Under this doctrine Mr. Lee asks, alternatively to his individual assignments of error, that this Court conclude that the plethora of errors in the context of the weakness of the overall evidence had a cumulative effect that rendered his trial constitutionally unfair. State v. Russell, 125 Wn.2d at 93-94.

6. THE COMMUNITY CUSTODY CONDITIONS REQUIRING PLETHYSMOGRPAH TESTING AND PROHIBITING INTERNET USAGE MUST BE STRICKEN FROM MR. LEE'S JUDGMENT AND SENTENCE.

a. Community Custody Provisions.

Internet usage. At sentencing, the court imposed a prohibition on accessing the internet from any computer, unless approved in advance by the defendant's CCO and his treatment provider. CP 29-30 (Judgment and sentence, Appendix 4.2 (11); 8/16/13RP at 45.

Plethysmograph. The court also imposed a condition of plethysmograph testing. CP 29-30 (Judgment and sentence, Appendix 4.2(14); 8/16/13RP at 43-44. The plethysmograph testing condition

required that Mr. Lee submit to such testing "to ensure [sic] conditions of community custody" and do so "as directed by the Supervising Community Corrections Officer [CCO]," with the approval of the Sexual Deviancy Therapist. CP 29-30.

Counsel objected to the condition, noting that unlike polygraph testing, penile plethysmograph testing of the defendant's penis could not be related to tracking compliance with community custody conditions generally, and was a constitutionally offensive and invasive procedure. 8/16/13RP at 34-39.

Counsel asked for two restrictions, in the alternative to her principal objection to the testing entirely: that the court only allow the testing to be ordered at the direction of the defendant's Sexual Offender Treatment Provider, and only for treatment purposes 8/16/13RP at 38-39, 43-44. These requests were also denied. CP 39-40; 8/16/13RP at 43-44.

b. The superior court may not impose a sentence that exceeds its statutory authority. The superior court's power to sentence a felony offender derives solely from the SRA. RCW 9.94A.505(1); In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007) (court has sentencing authority only as provided by Legislature). The defendant may challenge a sentence that does not comply with the SRA,

for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 452 (1999).

c. The internet usage restriction may must be stricken as not crime-related. There was no evidence presented at trial or sentencing that demonstrated that internet usage was involved in, or contributed to Mr. Lee's alleged offense. This condition is therefore not authorized by the SRA because it is not "crime-related."

RCW 9.94A.703 sets forth the conditions of community custody that may be imposed by the court. Among the discretionary conditions is that the defendant be ordered to "comply with any crime-related prohibitions." RCW 9.94A.703(3)(f). A "crime-related prohibition" is one that is directly related to the circumstances of the crime for which the offender is being sentenced. RCW 9.94A.030(10). The statute reads:

> "Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct.

RCW 9.94A.030(10). The burden is on the State to demonstrate that a condition of community supervision is statutorily authorized. See State v. McCorkle, 137 Wn.2d 490, 495-96, 973 P.2d 461 (1999) (SRA clearly places mandatory burden on State to prove nature and existence of out-of-

state conviction necessary to establish punishment); Ford, 137 Wn.2d at 480-81; United States v. Weber, 451 F.3d 552, 558-59 (9th Cir. 2006) (placing burden on government to demonstrate discretionary supervised release condition is appropriate in a given case).

Here, the State failed to prove that internet usage was involved in the offense, and in the absence of such proof in the record, that record is not sufficient to support the prohibition. State v. Johnson, ___ Wn. App. ___, ___ P.3d ___ (2014 WL 1226456) (Wash.App. Div. 2, March 25, 2014) (trial court exceeded its statutory authority when it imposed a condition of community custody that prohibited defendant from accessing a computer or the internet, absent any findings suggesting any nexus between the offense and any computer use or internet use); State v. O'Cain, 144 Wn. App. 772, 774-75, 184 P.3d 1262 (2008).

Therefore this condition of community custody, the judgment's Appendix 4.2, section 11, must be stricken. State v. Riles, 135 Wn.2d 326, 353, 957 P.2d 655 (1998) (striking condition of community placement not reasonably related to offense).

d. The plethysmograph condition is not crime-related and violates the State and federal constitutions. In the case of State v. Land, 172 Wn. App. 593, 295 P.3d 782 (2013), this Court of Appeals addressed a community custody condition that inspecifically required the defendant

to "[p]articipate in urinalysis, breathalyzer, polygraph and plethysmograph examinations as directed by your Community Corrections Officer." Mr. Land argued that requiring him to submit to intrusive plethysmograph testing at the discretion of a community corrections officer violated the SRA, and violated his related federal and state constitutional rights to be free from bodily intrusions, his private affairs, and his Fourteenth Amendment Due Process rights. RCW 9.94A.703(3)(f); see RCW 9.94A.030(10); U.S. Const. amends. 4, 14, Wash. Const. art. 1, § 3, § 7. This Court held that plethysmograph testing is extremely intrusive, and could only be ordered incident to crime-related treatment by a qualified provider. State v. Land, 172 Wn. App. at 606-06 (citing State v. Castro, 141 Wn. App. 485, 494, 170 P.3d 78 (2007)).

Here, despite the language in community custody condition 14 regarding approval by a therapist, the condition nonetheless allows the procedure at the direction of the CCO, and allows that it may be ordered for purposes of monitoring other community custody conditions. But this intrusion at the direction of the CCO is not related to treatment. State v. Land, 172 Wn. App. at 606.

Furthermore, Mr. Lee has a fundamental privacy interest in freedom from government intrusions into his body and private thoughts. The due process clauses of the state and federal constitutions include a

substantive component providing heightened protection against government interference with certain fundamental rights and liberty interests. Troxell v. Granville, 530 U.S. 57, 65, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000). And the right to privacy protects the right to non-disclosure of intimate information. Butler v. Kato, 137 Wn. App. 515, 527, 154 P.3d 259 (2007); see generally Jason R. Odeshoo, "Of Penology and Perversity: The Use of Penile Plethysmography on Convicted Child Sex Offenders," 14 Temp. Pol. & Civ. Rts. L. Rev. 1 (2004).

Additionally, both the Fourteenth Amendments and the Fourth Amendment protect a citizen from bodily invasion. Sell v. United States, 539 U.S. 166, 177-78, 123 S.Ct. 2174, 156 L.Ed.2d 197 (2003); Rochin v. California, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed.2d 183 (1952). Even people convicted of crimes retain certain fundamental liberty interests. Turner v. Safley, 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987); Weber, supra, 451 F.3d at 570-71 (Noonan, J., concurring) ("[A] prisoner should not be compelled to stimulate himself sexually in order for the government to get a sense of his current proclivities."). Penile plethysmograph testing violates these constitutional rights. In re Marriage of Ricketts, 111 Wn. App. 168, 43 P.3d 1258 (2002) (recognizing liberty interest); Coleman v. Dretke, 395 F.3d 216, 223 (5th Cir. 2004) (concluding that the "highly invasive nature" of this test implicates

significant liberty interests), cert. denied, 546 U.S. 938 (2005). And the reliability of penile plethysmograph testing, even for the purpose of determining proclivities, has been hotly debated. Weber, 451 F.3d at 562, 564 (explaining that plethysmograph testing is not a "run of the mill" procedure and studies have shown that it may be unreliable).

In this case, Mr. Lee's constitutional rights would certainly be violated by a requirement that he submit to penile plethysmograph testing for monitoring compliance with community custody conditions, even if this is done with the approval of a treatment provider. This Court should strike the requirement that Mr. Lee submit to plethysmograph testing during community custody. Riles, supra, 135 Wn.2d at 353.

7. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE "NON-MARRIAGE" ELEMENT OF MR. LEE'S COUNT OF CONVICTION.

a. The defendant's conviction under RCW 9A.44.073 required proof that Mr. Lee was not married to M.N. In every criminal prosecution, the State must prove all elements of the charged crimes beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Accordingly, the jury in Mr. Lee's trial was required to find that he was not married to M.N., an element of the offense that the Legislature has

allowed to remain in the definition of the crime. RCW 9A.44.073; State v. Chom, 128 Wn.2d 739, 911 P.2d 1014 (1996) (noting element); see CP 73, 76, 79 (instructions).

b. The defendant's conviction lacked proof that Mr. Lee was not married to the complainant M.N. In presenting its case on the charges of rape and child molestation, the prosecution did not ask the complainant, M.N., or her mother Rachel Niehaus, about any issue of non-marriage to Mr. Lee. Late in its case, the State sought to inquire of Detective Sergeant Kate Hamilton whether M.N. was married to Charles Lee, a question that the State admitted it had not posed to either the child or her mother. 7/15/13RP at 95-96. The prosecutor proposed to ask the Detective whether, as an enforcer of the laws, she "knows that a 10-year-old can't be married to an adult," and whether she had ever encountered a 10 year old that was married. 7/15/13RP at 95-98.

The defense objected. 7/15/13RP at 95-96. Ultimately, after further argument, the State expressly abandoned its intention to question Hamilton on this topic under any theory, preferring to rely on a circumstantial evidence theory. However, this was inadequate. Non-marriage is an essential element, and must be proved beyond a reasonable doubt. RCW 9A.44.073(1); In re Winship, 397 U.S. 358, supra. It is true that the Supreme Court has affirmed convictions where the State

supported the non-marriage element with evidence that the victim and the defendant, for example, were total strangers. State v. May, 59 Wash. 414, 415, 109 P. 1026 (1910); see also State v. Bailey, 52 Wn. App. 42, 50-51, 757 P.2d 541 (1988), aff'd, 114 Wn.2d 340, 787 P.2d 1378 (1990).

For example, in Bailey, it was circumstantial evidence, including testimony that the defendant Bailey "had served as [the complainant's] babysitter on several occasions," that defeated the appellant's sufficiency challenge. Bailey, 52 Wn. App. at 51. Also taking into account the fact that the complainant was a 3-year-old toddler, the Court stated that "[f]rom this evidence, the jury could properly conclude that [the victim] was not married to the defendant." Bailey, 52 Wn. App. at 51.

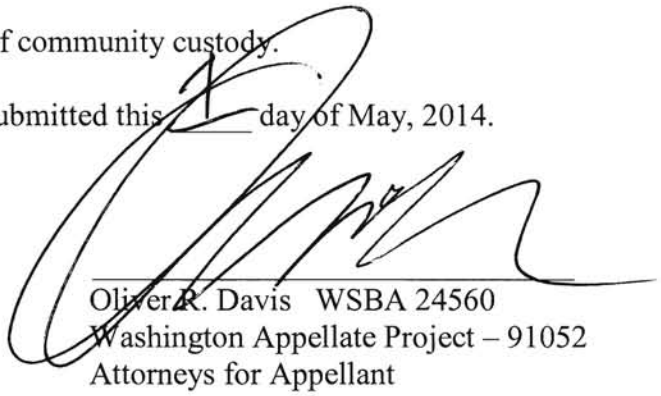
Mr. Lee argues that in the present matter, the State conceded there was no evidence sufficient to prove non-marriage. CP 79. The complainant did not testify to knowing the defendant for some period of time incompatible with marriage, and the State did not offer evidence that M.N. was married to a third party at the time of the alleged crime, such as would render the circumstances in total to be proof of non-marriage. Notably, the State conceded it had not presented evidence on this element. Non-marriage is an element of the crime charged and Mr. Lee argues it was not proved here. RCW 9A.44.073(1); U.S. Const. amend. 14; Wash.

Const. art. 1, § 3. Mr. Lee asks the Court to reverse his conviction. Jackson v. Virginia, supra, 443 U.S. at 319.

E. CONCLUSION

Based on all of the foregoing, Charles Lee respectfully argues that this Court should reverse the jury's verdict of guilty as to Count 1, and strike the conditions of community custody.

Respectfully submitted this 1st day of May, 2014.



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Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 70799-0-I
	)	
	)	
CHARLES LEE,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF MAY, 2014, I CAUSED THE ORIGINAL **CORRECTED OPENING BRIEF OF APPELLANT (AS TO MARGINS ONLY)** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	SETH FINE, DPA SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 1ST DAY OF MAY, 2014.

X_____

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