72210-7

No. 72210-7-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

VINCENT MELENDREZ,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Vincent Melendrez is the father of seven children, whom he raised alone following his divorce. As an employee for Microsoft, Mr. Melendrez worked long hours and relied on his older children to manage the household and care for the younger children in his absence. Much of this responsibility fell on his oldest child, R.M. However, as R.M. got older Mr. Melendrez became concerned about her behavior. After she ran away for several days, he required her to attend school online until her behavior improved. When he threatened to place her in the online program a second time, she made an allegation to her school counselor that Mr. Melendrez had regularly forced her to have sex.

The information was constitutionally deficient and the trial court erred when it denied Mr. Melendrez's request for a bill of particulars. At trial, the court violated Mr. Melendrez's constitutional rights when it required him to testify before the other defense witnesses, inadvertently informed the jury he was in custody, permitted a nurse to make a speculative statement beyond her area of expertise, and failed to make it clear to the jurors that they must agree on one specific act to find Mr. Melendrez guilty of incest. For these reasons, this Court should reverse.

B. ASSIGNMENTS OF ERROR

1. The court violated Mr. Melendrez's constitutional right to present a defense when it required him to testify before the other defense witnesses in order to admit relevant evidence.

2. The trial court violated Mr. Melendrez's privilege against self-incrimination when it required him to testify ahead of the other witnesses for the defense in order to admit relevant evidence.

3. The information violated the Sixth Amendment and article I, section 22 when it provided lengthy charging periods for the rape and incest charges.

4. The trial court erred when it denied Mr. Melendrez's request for a bill of particulars.

5. The *Petrich* instruction and trial court's response to the jury's question failed to make the relevant legal standard regarding jury unanimity manifestly apparent as to count IV.

6. The trial court violated Mr. Melendrez's right to a fair trial when it informed the jury he was in custody.

7. The trial court erred when it allowed the State's witness to adopt a speculative, conclusory statement outside her area of expertise.

8. Cumulative error denied Mr. Melendrez a fair trial under the Fourteenth Amendment and article I, section 3.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Pursuant to the Due Process Clause and the Sixth Amendment, a defendant must be given the opportunity to be heard in his defense and control the presentation of his defense. The Fifth Amendment and article I, section 9, also prohibit a defendant from being compelled to present evidence against himself. The trial court required Mr. Melendrez to testify before allowing him to question other defense witnesses about relevant evidence. Did this ruling violate Mr. Melendrez's right to present a defense and privilege against self-incrimination?

2. Under the Sixth Amendment and article I, section 22, a charging document must allege every element of the charged offense and the particular facts supporting the offense so that a defendant has sufficient notice to prepare an adequate defense. Where the lengthy charging periods provided in the information for the counts of rape of a child and one of the counts of incest made it impossible for Mr. Melendrez to present an alibi defense, was the information constitutionally deficient?

3. A defendant has a constitutional right to be informed of the nature and cause of the accusation against him, and an information that states each statutory element of the alleged crimes but is vague as to some other significant matter can be corrected with a bill of particulars. Where the State was permitted to amend the information approximately one month into trial, and the defense requested a bill of particulars in order to prepare its defense, did the trial court violate Mr. Melendrez's Sixth Amendment and article I, section 22, rights when it denied this request?

4. The jury instructions must make the relevant legal standard manifestly apparent to the average juror. The jurors submitted a question, pointing to the instructions containing the relevant *Petrich* language and asking the court whether they needed to agree on a specific incident in order to find Mr. Melendrez guilty of count IV, which alleged first degree incest. When the trial court refused to answer the question directly and instead directed the jurors to the instructions they had identified as confusing, did it violate Mr. Melendrez's right to due process and jury unanimity?

5. A defendant is entitled to both the presumption of innocence and the indicia of innocence. When the trial court inadvertently

informed the jury that Mr. Melendrez was in custody, did it violate his right to a fair trial?

6. Conclusory or speculative expert opinions lacking an adequate foundation should not be admitted at trial. Where a nurse was permitted to testify it would not be surprising to find the remnant of a hymen in a 16 year-old who had sex one hundred times, despite no evidence establishing the nurse had the knowledge, skills, or education to draw such a conclusion, is reversal required?

7. Even where no single error requires reversal, a conviction should nevertheless be reversed where the cumulative effect of non-reversible errors denied the defendant the fair trial guaranteed by the Fourteenth Amendment. Does the cumulative error doctrine mandate reversal?

D. STATEMENT OF THE CASE

1. SUBSTANTIVE FACTS

Vincent Melendrez joined the military at age 19 and served in the army for five years. RP 1804-05. He received training in computer networking and communications and used this skill to transition to a civilian position helping serve the military's technology needs. RP 1806. Mr. Melendrez worked long hours and traveled frequently for

his job. RP 1807. Married, and with a growing family, he accepted a position in Germany in 2001, which he hoped would allow him to spend more time at home. RP 1808.

The job originally offered him a more flexible schedule and the family was excited about exploring Europe together. RP 1808. However, after the 9/11 attacks, things quickly changed and Mr. Melendrez was required to work long hours six days a week. RP 1808. By the time his family returned to the United States three years later, he had seven children and his marriage was strained. RP 1808, 1810. The family eventually moved back to Alaska to be near his wife's family, but his marriage ended in divorce in 2007. RP 1812.

Mr. Melendrez was awarded custody of all seven children, all of whom were under the age of 12 and one of whom had Down syndrome. RP 1812, 1843. He moved the children to Bremerton, Washington, where his brother lived, and made arrangements to have his mother, Guadalupe,[1] come up from California to help out. RP 1812-13. Mr. Melendrez was able to slowly transition his job from Alaska to Washington, and began working full time in Washington in January 2008. RP 1818. He rented a house from his brother in Bremerton and

[1] For purposes of clarity, the other members of the Melendrez family will be referred to by their first names.

changed jobs, starting work at Microsoft in July 2008. RP 1820, 1824. In January 2009, the family moved into an apartment in Bremerton. RP 1820. In March of 2010, the family moved back into the brother's home until later that fall, when Mr. Melendrez moved everyone to an apartment in Renton after his mother returned to California. RP 822, 1824.

Mr. Melendrez typically worked twelve-hour days, five days a week, at Microsoft, and brought work home. RP 1828. Managing this work schedule while also caring for seven children, including one with special needs, required that he schedule the kids' daily routines carefully and rely on the older children to assist with household duties and childcare. RP 777, 1961. As the first-born, most of the responsibility fell on his daughter, R.M. RP 815, 826-830. R.M. helped her two younger sisters get ready for school, in addition to doing all of the laundry for the family, cooking dinner, and supervising the younger children's homework. RP 827, 830. She also laid out her father's clothes for work and got his bag ready when he worked the graveyard shift at Microsoft from September 2008 to April 2011. RP 828, 1824-25, 1827.

Because he was often gone in the evenings, Mr. Melendrez required his children introduce him to any friend they wanted to have over while he was gone, and that they ask permission before inviting the friend over. RP 1872. Upon meeting his children's friends, he confirmed the friend's parents knew where they were and provided his cell phone number so the parents could contact him with any concerns. RP 1872. However, the older kids, including R.M., did not always follow the rules. She invited boys to the home while her father was at work without his permission and reported to family members that she was sexually active with her boyfriend. RP 1537-43, 1925-26.

Mr. Melendrez became particularly concerned about R.M.'s behavior after he learned from his mother that R.M. was "sexting," or sending naked photos of herself to boys using her cell phone, and R.M. confirmed this was true. RP 1511, 1926, 1972. After the family moved to the apartment in Bremerton, Mr. Melendrez's sons reported R.M. was not sneaking out as often, but had begun inviting boys to the home and spending time alone with them behind closed doors. RP 1974. Mr. Melendrez then learned one of R.M.'s boyfriends had vandalized a car while the other kids watched. RP 1975.

Because he was increasingly concerned about what was happening in the home while he was gone, Mr. Melendrez pretended to leave for work one day in the summer of 2009, and surprised the kids by returning home an hour later. RP 1977-79. Upon entering his bedroom, he saw the sheets had been stripped and his two oldest sons, William and Daniel, informed him R.M. had smoked marijuana and had sex in his bed with her boyfriend after he left. RP 1978. R.M. continued to deny her brothers' reports, but several months later Mr. Melendrez found a note in R.M.'s handwriting in which she told a classmate she had sex with a specific boy. RP 1980. He quickly took her to a clinic so that she could speak with a medical professional about practicing safe sex. RP 1982. In the fall of 2010, Mr. Melendrez grew more concerned about his daughter's behavior. He found evidence R.M. was sexting again. RP 2014. He also received a report card from her school that indicated she was failing her math and science classes. RP 2016. Her teachers reported that she was not paying attention and talking excessively in class. RP 2016.

Mr. Melendrez grounded R.M. for most of November in response to the report card and sexting. RP 2017. On Thanksgiving Day 2010, the family had relatives over to celebrate. RP 1682. Mr.

Melendrez had to leave after dinner to go to work, and R.M. asked to go out with friends. RP 1682, 2017. He told her no, in part because she had been grounded and in part because he felt she needed to help her brothers clean up from the dinner. RP 2017. R.M. helped clean until her father left, at which point she told her brothers she was going outside to talk to friends and would be right back. RP 1682. The boys finished cleaning and, when R.M. did not return, one of them called Mr. Melendrez to notify him that R.M. was not home. RP 2018.

R.M. had gone to a classmate's apartment with friends. RP 873. Mr. Melendrez left work, went home, and texted her. RP 2019. When R.M. realized he had caught her lying, she became scared and decided to stay at her classmate's house rather than return home and face punishment. RP 874. She stopped responding to his text messages and phone calls. RP 875, 2019. She stayed up all night talking with her classmate, and told the classmate how difficult her life was at home, having to adhere to her father's rigid schedule and move around so often. RP 875. She also told her classmate that Mr. Melendrez had repeatedly sexually assaulted her. RP 875.

Mr. Melendrez took personal leave from work and reported R.M. missing. 2019-20. R.M. eventually called her father and told him

she planned to live with her classmate's family but wanted to return home to pick up her things. RP 881. Mr. Melendrez agreed in order to get her to return home, but as soon as she arrived, he called 911 and had an officer speak with her about running away. RP 2020.

In response to this incident, Mr. Melendrez pulled R.M. out of school and enrolled her in an online program, which she hated. RP 893. She spent the remainder of her sophomore year of high school in the online program, but Mr. Melendrez allowed her to return to school for the start of eleventh grade after her behavior improved and she excelled academically. RP 898, 2032.

However, by that fall, R.M. wanted badly to be free of her family. RP 918. Mr. Melendrez saw her behavior deteriorate. RP 2022. He asked her to go to the post office and she returned three hours later, apparently high. RP 2022-23. He caught her sexting again. RP 2025. On October 3, 2011, he received a call from the apartment manager, who informed him that she found R.M. performing oral sex on a boy in the complex's welcome center bathroom that afternoon. RP 919, 1901, 2026.

According to R.M., when Mr. Melendrez learned about this he beat her, made her apologize to her siblings while bloody, and forced

her to stay in his bedroom the next day by strategically placing a mattress, ironing board, and shoe against the outside of the door. RP 921, 925-26. However, according to William and Daniel, the door was never booby-trapped and R.M. was actually injured when she got into a physical altercation with another girl at school and a physical fight with Daniel, after she told him she was going to lie and say that Mr. Melendrez had raped her. RP 1516, 1690-92.

Concerned that R.M. had fallen in with a bad crowd, Mr. Melendrez kept R.M. home and contacted the school counselor to try and figure out an alternative to sending her back to the public high school. RP 1299, 2030. On October 5, 2011, R.M. disregarded her father's wishes and returned to school after he went to work, with plans to go live with the classmate she had stayed with the previous Thanksgiving. RP 929. After William confronted her at school and threatened to call Mr. Melendrez, she went to her school counselor and told the counselor Mr. Melendrez had been regularly having sex with her since 2008. RP 938. The counselor contacted child protective services. RP 1293.

2. PROCEDURAL FACTS

The State initially charged Mr. Melendrez with two counts of second degree rape of a child and one count of first degree incest. CP 1-2. However, the State moved to amend the information multiple times after the start of trial, in order to expand one charging period and the alleged location of the sexual assaults. CP 57-59, 66-68, 96-98. When the State moved to amend the information a second time, Mr. Melendrez moved for a bill of particulars, but the trial court denied his request. RP 1233, 1235.

At trial, the State presented evidence that Mr. Melendrez was extremely controlling, and restricted R.M.'s ability to leave the apartment and interact with others after he allegedly began having sex with her. RP 780, 835-37, RP 1121-23, 1221-22. Mr. Melendrez attempted to defend against the State's allegations by presenting evidence of R.M.'s misbehavior, which offered an explanation for why he put these limitations in place. RP 75, 112-14. However, the court found most of the evidence was only relevant if Mr. Melendrez first testified that he had imposed punishment as a result of R.M.'s actions. RP 1055, 1661. As a result, Mr. Melendrez was forced to limit his

direct examination of his sons, and present his testimony in fragments among the remainder of his witnesses. RP 1498, 1804, 1960, 2085.

While limiting Mr. Melendrez's ability to present evidence, the court permitted one of the State's witnesses, a "sexual assault nurse examiner," to speculate on whether it was unsurprising to see the remnant of a hymen in a 16 year-old who had engaged in sex one hundred times. RP 1402. During trial the court also inadvertently informed the jury that Mr. Melendrez was in custody when it asked, in front of the jurors, whether the jail had the staff available to enable the parties to stay later the following afternoon. RP 1374.

When the court permitted the State to amend its information for a second time, and denied Mr. Melendrez's request for a bill of particulars, it noted the importance of instructing the jury that it must unanimously agree on a specific act in order to find Mr. Melendrez guilty on the rape and incest charges. RP 1235. After the jury began its deliberations, it submitted a question to the court, citing these instructions as they related to one count of incest, and asking whether it needed to point to a specific incident or simply agree that an act occurred during the time frame. CP 103. Over Mr. Melendrez's objection, the court refused to answer the jury's question directly and

instead referred them back to the instructions the jurors had cited as confusing. RP 103-04.

Mr. Melendrez was found guilty of all five counts, including one count of second degree rape of a child, one count of third degree rape of a child, two counts of first degree incest, and one count of witness tampering. CP 138. The trial court imposed an indeterminate life sentence with a minimum term of 245 months. CP 142.

E. ARGUMENT

1. MR. MELENDREZ'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN THE COURT REQUIRED HIM TO TESTIFY BEFORE THE OTHER DEFENSE WITNESSES IN ORDER TO PRESENT RELEVANT EVIDENCE

a. The trial court's ruling violated Mr. Melendrez's constitutional right to present a defense.

"Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" Holmes v. South Carolina, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed. 636 (1986)). In essence, this is a defendant's "right to a fair opportunity to defend against the State's accusations."

Chambers v. Mississippi, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (2010); *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); U.S. Const. amends. VI, XIV; Const. art. I §§ 3, 22.

A defendant's right to an opportunity to be heard in his defense, including the right to offer testimony, "is basic in our system of jurisprudence." *Jones*, 168 Wn.2d at 720. In order for the jury to decide "where the truth lies," a defendant must be given the opportunity to present his version of the facts. *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967). Implicit in this Sixth Amendment right is the defendant's right to control his presentation of the defense. *State v. Lynch*, 178 Wn.2d 487, 491, 309 P.3d 482 (2013); *see also Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Of course, the defendant's right to offer testimony is not absolute. *Jones*, 168 Wn.2d at 720. "Evidence that a defendant seeks to introduce 'must be of at least minimal relevance.'" *Jones*, 168 Wn.2d at 720 (quoting *State v. Darden*, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002)). However, "[t]he threshold to admit relevant evidence is very low. Even minimally relevant evidence is admissible." *Darden*, 145 Wn.2d at 621. Where the evidence at issue is of high probative

value, "no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. art. 1, § 22." *Jones*, 168 Wn.2d at 720 (quoting *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983)).

The Court reviews the denial of this Sixth Amendment right de novo. *Jones*, 168 Wn.2d at 719.

i. *The State's theory of the case was that Mr. Melendrez was an incredibly controlling father who isolated R.M. in order to sexually assault her.*

At trial, the State presented evidence that Mr. Melendrez initiated sexual contact when R.M. was 13 years old, and thereafter he began to severely restrict her ability to leave the house or interact with others. RP 780, 835-37, RP 1121-23, 1221-22. Mr. Melendrez did not object to the State's introduction of testimony that he disciplined R.M., including evidence that he placed these restrictions on her. RP 110, 778-79, 893, 921, 925. His defense at trial was fabrication: R.M. had lied in order to get away from Mr. Melendrez because he forced her to shoulder enormous household and childcare responsibilities and limited her freedom to engage in social activities common among teenagers. RP 114, 2200-01.

The State argued R.M.'s version of events, in which Mr. Melendrez placed restrictions on her in order to maintain control and continue to sexually abuse her, was credible, given Mr. Melendrez's need for control more generally. It told the jury that this was not a vindictive child "out to get her dad" and that in order to understand R.M.'s story:

> you have to understand the context of that language, because the reality was is [sic] that everyone in that home was kind of on pins and needles, uncertain of his attitude, because Dad controlled that place really with militaristic zeal.

RP 2168.

The State argued that everything about Mr. Melendrez's life indicated he had a need for control, including his scheduling of the children's daily activities, the fact that he kept a clean home despite it being occupied by so many kids, and even the fact that he was a valuable Microsoft employee "because he's so organized and because he's so controlling." RP 2159-60, 2168. The prosecution repeated its theme of control throughout its closing argument, emphasizing this point to the jury over and over. *See* RP 2159, 2168, 2171 (Daniel's testimony demonstrated the control Mr. Melendrez had over the family), 2172, 2173 (William's testimony showed the control Mr.

Melendrez had over his family), 2174 (Mr. Melendrez revealed how controlling he was on the stand, by "controlling every question, always controlling every answer"), 2178 (Mr. Melendrez's actions showed he controlled access to R.M.'s body), 2179 (Mr. Melendrez's request that R.M. sign the affidavit demonstrated his desire to continue to exercise control even after she escaped the home), 2180.

This theme of control presented a compelling narrative to the jury. In order to make this argument, the State elicited testimony from R.M. regarding the increasing restrictions Mr. Melendrez placed on her after the sex allegedly began. R.M. testified that the summer after the first incident, he found out she and her brothers were allowing kids over to the house without his permission and sneaking out while he was at work. RP 832, 834-35. According to R.M., Mr. Melendrez sexually assaulted her as punishment and then began restricting her ability to leave the apartment. RP 835. He confiscated her cell phone and timed how long it took her to get home from school. RP 836.

R.M. acknowledged that he also placed restrictions on the boys, but claimed that, unlike her, the boys were allowed out of the home once their behavior improved. RP 837. R.M. then contradicted herself later, testifying that her movements were actually restricted from the

time Mr. Melendrez began having sex with her, rather than the following summer, and that the restrictions continued with only brief periods of leniency thereafter. RP 835-37. According to the narrative presented by R.M., when she threatened her father's power over her, by running away on Thanksgiving in 2010, or by performing oral sex on a boy in November 2011, he reacted by keeping her confined to the apartment, even pulling her out of school to achieve this goal. RP 893, 925.

ii. ***The court ruled that evidence of R.M.'s misbehavior, resulting in discipline, was irrelevant unless Mr. Melendrez testified first.***

In order to defend against this onslaught of allegations, Mr. Melendrez sought to introduce evidence that R.M.'s misbehavior offered an explanation for why he denied her cell phone privileges, why he required her to be home after school, and why he was concerned about her attending the public high school. RP 75, 112-14. This evidence explained both why Mr. Melendrez punished R.M. and why R.M. would have an incentive to falsely accuse her father of rape.

Specifically, Mr. Melendrez sought to elicit testimony from his sons, William and Daniel, and his mother, Guadalupe, that R.M. had used her cell phone to engage in sexting, that she had been sneaking out

of the house and inviting boys over, and that she was using marijuana. RP 112-14. The trial court considered the defense's request multiple times throughout the trial. RP 75, 115-17, 177-198, 244, 1016-1057, 1380-82, 1483-89, 1608-1617, 1628-1649, 1661, 1894-95.

After R.M. testified she had not had sex with anyone other than her father prior to the day she performed oral sex on a boy at the welcome center, the court found evidence R.M. engaged in sexual behavior with boys was admissible because the State had "opened the door" to this issue. RP 1044. It also found Mr. Melendrez could ask whether a particular text R.M. indicated Mr. Melendrez disciplined her for contained sexual images. RP 911, 1054. However, it ruled Mr. Melendrez could not question R.M. about the other incidents or elicit this evidence from his witnesses unless he *first* testified he knew about R.M.'s misbehavior and disciplined her in response to that behavior. RP 1055, 1661.

The trial court based its ruling on a finding that the evidence was irrelevant until Mr. Melendrez took the stand and testified to the connection between R.M.'s misbehavior and the resulting punishment for the jury. RP 1055-56, 1634-49, 1661-62. The court examined this

issue several times, as cited above, but summarized its ruling as follows:

> As I laid it all out before me and I looked at the rules of evidence, I think that we're kind of back to the same place we've always been, and no matter how packaged, it seems to come back to the same issue, which is whether it's relevant or not relevant, before we even get to the issue of whether it's hearsay or not hearsay, and as I have consistently said, the actions of [R.M.], whether it be sneaking out of the house or smoking marijuana or any other actions for which she may have been disciplined, are only relevant to the extent that Dad knew of them and that Dad took action because of them. And until those two things occur, his state of mind is not at issue, and, therefore, the acts are not relevant.

RP 1661-62. Earlier, the court acknowledged this evidence was "central to the defense" but only if it "comes from Mr. Melendrez." RP 1380-81.

Mr. Melendrez called William and Daniel as witnesses but limited his inquiry as a result of the court's rulings. RP 1498. Before calling Guadalupe, Mr. Melendrez took the stand. RP 1802. This forced him to begin his testimony before four of the defense witnesses testified and meant that, because of scheduling issues, Mr. Melendrez's testimony was repeatedly interrupted in order to allow these other witnesses to testify when they were available. RP 1379-80, 1837,

1898, 1922, 1995. His disjointed testimony took place over three days. RP 1804, 1960, 2085.

iii. *The court's ruling violated Mr. Melendrez's constitutional right to present a defense.*

When the trial court excluded evidence of R.M.'s behavioral issues, it found the evidence was only relevant if Mr. Melendrez specifically testified both that he was aware of the behavior and that he imposed the discipline because of the behavior. RP 1055, 1661-62. However, even minimally relevant evidence is admissible, and it makes no difference whether the evidence is circumstantial or direct. *Darden*, 145 Wn.2d at 621; *State v. Hudlow*, 182 Wn. App. 266, 288, 331 P.3d 90 (2014) ("elements of a crime may be established by either direct or circumstantial evidence, and one type of evidence is no more or less trustworthy than the other"); *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980) ("circumstantial evidence is not to be considered any less reliable than direct evidence").

Evidence that R.M. was engaged in concerning behavior involving other kids and using her cell phone during the same time period she complained her father was unfairly restricting her cell phone use and ability to socialize was circumstantial evidence suggesting that in fact there were legitimate reasons for the restrictions Mr. Melendrez

had placed on R.M. This met, and far exceeded, the threshold of minimal relevance regardless of whether Mr. Melendrez specifically testified he imposed the restrictions because of her actions. Indeed, as the trial court found, this evidence was central to Mr. Melendrez's defense given the State's theory of the case. RP 1381. Excluding this evidence unless and until Mr. Melendrez testified denied him a fair opportunity to defend against the State's accusations. *See Jones*, 168 Wn.2d at 719; *Chambers*, 410 U.S. at 294-95.

While the court placed conditions on how the evidence could come in, rather than prohibiting it entirely, Mr. Melendrez was forced to restrict his examination of William and Daniel, and testify before Guadalupe. RP 1498, 1802. Although Mr. Melendrez had the opportunity to testify about R.M.'s actions that resulted in punishment, the brothers' testimony was limited by the court's ruling and Mr. Melendrez was forced to present his own testimony in fragments. RP 1804, 1960, 2085.

These restrictions were constitutionally impermissible. Implicit in the Sixth Amendment right to a complete and meaningful defense is a defendant's right to control his defense. *Lynch*, 178 Wn.2d at 491; *see also Faretta*, 422 U.S. at 819. "To further the truth-seeking

function of trial and to respect the defendant's dignity and autonomy, the Sixth Amendment recognizes the defendant's right to control important strategic decisions." *State v. Coristine*, 177 Wn.2d 370, 376, 300 P.3d 400 (2013); *McKaskle v. Wiggins*, 465 U.S. 168, 177, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984). Given that the evidence met the threshold for relevancy and was in fact highly probative, Mr. Melendrez was entitled to present the evidence in the way he best saw fit. When the trial court prevented him from exercising this autonomy, it violated his constitutional right to present and control his defense. *Jones*, 168 Wn.2d at 719, *Lynch*, 178 Wn.2d at 491.

iv. *The court's error was not harmless beyond a reasonable doubt.*

When the defendant's constitutional right to present a defense is violated, reversal is required unless the State proves beyond a reasonable doubt the misconduct did not contribute to the verdict. *Jones*, 168 Wn.2d at 724; *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Such a finding cannot be made here.

Ultimately, Mr. Melendrez's only defense at trial was that his daughter fabricated the accusations against him. RP 114, 2200-01. This defense required he demonstrate to a jury why R.M. might be motivated to falsely accuse her father of terrible crimes. R.M.

presented a shocking story of abuse and isolation at trial, and the limitations the court placed on Mr. Melendrez eliminated his ability to present a compelling counter-narrative. Instead of eliciting all of the facts from his witnesses, he was forced to restrict the testimony of his sons and present his version of the events through his own intermittent testimony. RP 1379-80, 1498, 1837, 1898, 1922, 1995. Given this grave imbalance, it cannot be shown, beyond a reasonable doubt, that any reasonable jury would have reached the same result without the error. This Court should reverse.

b. <u>The trial court's ruling violated Mr. Melendrez's privilege against self-incrimination.</u>

The Fifth Amendment and article I, section 9, prevent the State from compelling a defendant to present evidence against himself.[2] This right "is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind or speak his guilt." *Mendes*, 180 Wn.2d at 195. "At trial, the right against self-incrimination generally prohibits the State from forcing the defendant to testify." *Id*.

[2] The Fifth Amendment states "[n]o person shall be compelled in any criminal case to be a witness against himself." Article I, section 9 provides that "[n]o person shall be compelled in any criminal case to give evidence against himself." Our Supreme Court has interpreted these two constitutional provisions consistently. *State v. Mendes*, 180 Wn.2d 188, 194, 322 P.3d 791 (2014).

When a court requires a defendant to testify before other defense witnesses, it unlawfully limits his freedom to decide whether to take the stand. *Brooks v. Tennessee*, 406 U.S. 605, 607, 92 S.Ct. 1891, 32 L.Ed.2d 358 (1972). "The decision as to whether the defendant in a criminal case shall take the stand is… often of utmost importance, and counsel must, in many cases, meticulously balance the advantages and disadvantages of the prisoner's becoming a witness on his own behalf." *Id*. at 607-08. As the United States Supreme Court explained in *Brooks*:

> a defendant may not know at the close of the State's case whether his own testimony will be necessary or even helpful to his cause. Rather than risk the dangers of taking the stand, he might prefer to remain silent at that point, putting off his testimony until its value can be realistically assessed.

Id. at 610. Pressuring the defendant to take the stand "fails to take into account very real and legitimate concerns that might motivate a defendant to exercise his right to silence." *Id*. at 611. Therefore, "the accused and his counsel may not be restricted in deciding whether, and *when in the course of presenting his defense*, the accused should take the stand." *Id*. at 613 (emphasis added).

Mr. Melendrez was pressured to take the stand before the rest of his witnesses testified after the trial court placed unconstitutional

restrictions on his ability to elicit evidence from the other defense witnesses prior to his testimony. RP 1661-62. Even if Mr. Melendrez anticipated eventually taking the stand in his defense, he had the right to reevaluate that decision after all of the evidence was presented. *See Brooks*, 406 U.S. at 610. When the court forced him to testify in order to admit relevant evidence through other defense witnesses, it violated Mr. Melendrez's constitutional privilege against self-incrimination. *Id*. at 613. Because the court's error was not harmless, as explained above, reversal is required. *See Brooks*, 406 U.S. at 613.

2. THE INFORMATION WAS CONSTITUTIONALLY DEFICIENT

a. The information must allege every element of the charged offense and the particular facts supporting them.

Pursuant to the Sixth Amendment and article I, section 22, a charging document must allege "all essential elements of a crime," in order to provide a defendant with sufficient notice of the nature and cause of the accusation against him. *State v. Zillyette*, 178 Wn.2d 153, 158, 307 P.3d 712 (2013) (quoting *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991)). To satisfy this requirement, the information must allege "every element of the charged offense" and the "particular facts

supporting them." *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010); *see also United States v. Zavala*, 839 F.2d 523, 526 (9th Cir. 1988).

The primary purpose of the rule is to give the defendant sufficient notice of the charges so he can prepare an adequate defense. *State v. Tandecki*, 153 Wn.2d 842, 846, 109 P.3d 398 (2005). The "goal is to ensure those accused by the State of crimes have a meaningful opportunity to defend against the accusation." *Id*. at 847. This Court reviews a constitutional challenge to the information de novo. *Zillyette*, 178 Wn.2d at 158.

b. <u>Because the information did not provide notice of the particular facts supporting the alleged offenses, Mr. Melendrez was unable to effectively defend against the charges.</u>

The State amended the charging document three times. It did so once at the start of trial and twice several weeks after the start of trial but before the State rested. CP 57-59, CP 66-68, CP 96-98. Initially, Mr. Melendrez was charged with two counts of second degree rape of a child and one count of first degree incest. CP 1-2. On the first day of trial, the State moved to amend the information to add three additional

charges: third degree rape of a child, tampering with a witness, and a second count of first degree incest.[3] CP 57-59.

Approximately one month after the start of trial, the State moved to amend the information again. RP 1219. Count I of the first amended information alleged Mr. Melendrez raped R.M. when she was 12 years old, and count II alleged Mr. Melendrez raped R.M. when she was 13 years old. RP 57. However, R.M. subsequently testified that the first rape occurred at a time when she was 13 years old. RP 1121-23, 1221-22. Initially the State sought to amend the information to allow the jury to find Mr. Melendrez guilty of two counts of second degree rape of a child, as long as it found R.M. was at least 12 years old, but less than 14 years old, at the time of two separate incidents. RP 1225. The court denied the State's motion, finding the amendment too prejudicial to the defense. RP 1229.

In response, the State moved to amend count I to encompass this entire time period, and dismiss count II. RP 1229. Mr. Melendrez provisionally agreed to this amendment and sought a bill of particulars.

[3] The State also amended the location of the alleged rapes in the first amended information, accusing Mr. Melendrez of sexually assaulting R.M. in King *or* Kitsap County instead of only King County. RP 57-58. Because the State's second amended information made this same error, the State fixed the error once again in a third amended information. CP 96-97.

RP 1233. The court permitted the amendment, and then denied Mr. Melendrez's request for a bill of particulars. CP 66-67; RP 1235.

Aside from counts V and VI, which alleged Mr. Melendrez committed incest on or about October 5, 2011, and witness tampering "between or about" October 4, 2011, and November 8, 2011, the remaining charges encompassed long periods of time. CP 96-98. Mr. Melendrez was accused of sexual contact with his daughter between January 1, 2008, and April 28, 2009, in count I, and between April 29, 2009, and April 28, 2011, in count III. CP 96-97. He was charged with committing incest between April 29, 2011, and October 4, 2011, in count IV. CP 97. The charging document provided no information about a specific incident the State alleged occurred during that time.

The South Carolina Supreme Court, which has similarly found an indictment is constitutionally sufficient only if the offense is (1) stated with sufficient certainty and particularity and (2) apprises the defendant of the elements of the offense intended to be charged, recently found an indictment was unconstitutional under similar circumstances. *State v. Baker*, __ S.E.2d __, 2015 WL 543493, at *3 (No. 2010-172951, February 11, 2015). Having previously alleged the defendant committed sex crimes against children during three discrete

summers, the State amended the information to allege the crimes were committed over a six-year period. *Id.*

The court reasoned a defendant could not effectively defend himself when faced with such little information about when the alleged crimes occurred. *Id.* at 4. The court specifically addressed the impossibility of presenting an alibi defense under these circumstances, noting that in order to establish an alibi defense, the defendant would have to present an alibi that covers "the entire time when his presence was required for accomplishment of the crime." *Id*. at 4. This is simply impossible when the defendant faces a charging period of years, or even months. While acknowledging "the difficulty the prosecution faces in identifying exact dates in child sexual abuse cases," the court held "the class of criminal case should not translate into an exception that operates to circumvent constitutional and statutory principles." *Id*.

Thus, the court's analysis and holding in *Baker* is instructive here, where the charging periods for the rape counts encompassed multiple years, Mr. Melendrez's motion for a bill of particulars was denied, and he sought to present an alibi in his defense. *Cf. State v. Hayes*, 81 Wn. App. 425, 440-41, 914 P.2d 788 (1996) (State's use of generic evidence did not violate defendant's right to present a defense

where defendant did not request a bill of particulars or present an alibi). R.M. testified Mr. Melendrez sexually abused her every day or multiple times each day. RP 863-64. Despite the fact Mr. Melendrez worked the night shift during most of the time period alleged in the information, R.M. repeatedly claimed he brought her into his bedroom at night to have sex and "transitioned to [her] sleeping in his bed every night." RP 839-40, 896. After the court denied his motion for a bill of particulars, Mr. Melendrez attempted to counter R.M.'s allegations by presenting evidence from his supervisor at Microsoft, who testified Mr. Melendrez was extremely dependable and always showed up for work. RP 1233, 1799.

However, because he had so little information about when the crimes supposedly occurred, Mr. Melendrez faced the impossible task of accounting for his whereabouts over a period of years, rather than on specific dates. Ultimately, the trial court denied his request for an alibi instruction. RP 2134. Because the lack of information contained in the charging document denied Mr. Melendrez a meaningful opportunity to defend against R.M.'s accusations, it was constitutionally deficient. *See Tandecki*, 153 Wn.2d at 847. This Court should reverse. *Zillyette*, 178 Wn.2d at 164.

3. IF THIS COURT FINDS THE INFORMATION WAS CONSTITUTIONALLY SUFFICIENT, REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED MR. MELENDREZ'S MOTION FOR A BILL OF PARTICULARS

An information that states each statutory element of a crime, but is vague as to some other significant matter, can be corrected with a bill of particulars. *State v. Leach*, 113 Wn.2d 679, 688, 782 P.2d 553 (1989). A criminal defendant "has a constitutional right to be informed of the nature and cause of the accusation against him" so that he may prepare a defense. *State v. Bergeron*, 105 Wn.2d 1, 18, 711 P.2d 1000 (1985); U.S. Const. amend. VI; Const. art. I, § 22. The function of the bill of particulars "is to amplify or clarify particular matters considered essential to the defense." *State v. Noltie*, 116 Wn.2d 831, 845, 809 P.2d 190 (1991). Thus, the court should order a bill of particulars if the defendant lacks enough information to adequately prepare a defense. *State v. Allen*, 116 Wn. App. 454, 460, 66 P.3d 653 (2003).

A trial court's denial of a bill of particulars is reviewed for an abuse of discretion. *Id.* A court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Dobbs*, 180 Wn.2d 1, 10, 320 P.3d 705 (2014).

Mr. Melendrez requested a bill of particulars after the State amended the information for the second time and expanded the charging period in count I to encompass approximately one year and four months instead of only four months. CP 57, 66; RP 1233. In first making the motion, defense counsel explained that as the State continued to lengthen the time period over which the State alleged the events occurred, a bill of particulars became increasingly important. RP 1227. Despite allowing the State to amend the information and lengthen the charging period as to count I, the trial court denied Mr. Melendrez's request, finding there was no value in the State providing a bill of particulars at that late stage of trial. RP 1234.

While it is true the State was permitted to amend the information late into the trial, this should not be held against Mr. Melendrez. Further, R.M. had not yet completed her testimony, the State still had additional witnesses to put on the stand, and the defense had not begun to put on its case. A bill of particulars remained necessary for the defense, as Mr. Melendrez lacked the information he needed to adequately prepare his case, including the presentation of an alibi defense. When the trial court allowed the State to amend the information at that late date, it should have granted Mr. Melendrez's

request for a bill of particulars. Its ruling to the contrary was an abuse of discretion. *See Dobbs*, 180 Wn.2 at 10. This Court should reverse. *Noltie*, 116 Wn.2d at 845.

4. THE COURT FAILED TO MAKE THE RELEVANT LEGAL STANDARD FOR COUNT IV MANIFESTLY APPARENT

Upon granting the State's motion for the second amended information, the trial court noted the importance of giving the jury a *Petrich* instruction.[4] RP 1235. This instruction was provided for the rape of a child and incest charges. CP 119, 122, 126-28. During deliberations, the jury submitted a question to the court regarding instructions 18 and 19 as they related to count IV, one of the incest charges. CP 103. The jurors asked:

> Do we need to point to a specific incident or just agree an act occurred during this time frame[?]

CP 103.

Mr. Melendrez requested the court respond by informing the jurors they needed to point to a specific incident. RP 2227. The court denied Mr. Melendrez's request, finding "it'll be more difficult for the Court at this time to explain it any more plainly than it exists in the jury

[4] *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

instruction." RP 2228. Instead of directly answering the jury's question, it referred the jury to "paragraphs 2 and 3 in instruction 18 and sub-paragraph 1 in instruction number 19 in context with the entirety of the Court's Instructions." CP 104. In replying to the jury's question in this way, the court referred the jurors back to the very instructions they had identified as confusing. CP 103.

Due process requires the State to prove every essential element of a crime beyond a reasonable doubt. *State v. Deal*, 128 Wn.2d 693, 698, 911 P.2d 996 (1996); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); U.S. Const. amend. V, XIV, Const. art. I, § 3. "Read as a whole, the jury instructions must make the relevant legal standard manifestly apparent to the average juror." *State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997); *see also State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). When the relevant legal standard is not made manifestly apparent to the jury, reversal is required. *State v. Cantabrana*, 83 Wn. App. 204, 208-09, 921 P.2d 572 (1996).

As defense counsel argued to the trial court, although the *Petrich* instruction seemed "pretty plain and explainable," the jury's question revealed that at least some jurors found the instruction

confusing. RP 2227. In submitting its question, the jury specifically cited to instructions 18 and 19. CP 103. This indicated the jurors had reviewed the instructions specifically addressing count IV, which stated "one particular act of Incest in the First Degree must be proved beyond a reasonable doubt" and that the jurors must find the act occurred "on an occasion separate and distinct from count V," but still did not understand what they were required to do. CP 126-27.

Given the jury's confusion, the trial court's response did not make the relevant legal standard manifestly apparent to the jury. More was required. Specifically, the trial court should have directly answered the jury's question, as Mr. Melendrez requested, and informed the jurors they needed to agree on a specific incident in order to find Mr. Melendrez guilty of count IV. The trial court's failure to make this legal standard manifestly apparent to the jury violated Mr. Melendrez's due process rights and reversal of count IV is required. *See Cantabrana*, 83 Wn. App. at 209.

5. MR. MELENDREZ'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN THE COURT INFORMED THE JURY MR. MELENDREZ WAS IN CUSTODY

a. Mr. Melendrez was entitled to the indicia of innocence.

Every defendant is entitled to a fair trial by an impartial jury, and "[t]he right to a fair trial includes the right to the presumption of innocence." *State v. Gonzalez*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005); *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); U.S. Const. Amends. VI, XIV; Const. art. I, § 3. "This constitutionally guaranteed presumption is the bedrock foundation in every criminal trial." *Gonzalez*, 129 Wn. App. at 900; *Morissette v. United States*, 342 U.S. 246, 275, 72 S.Ct. 240, 96 L.Ed. 288 (1952). Due process requires the trial court "give effect to the presumption by being alert to any factor that could 'undermine the fairness of the fact-finding process.'" *Gonzalez*, 129 Wn. App. at 900 (quoting *Williams*, 425 U.S. at 503).

The rule that one is innocent until proven guilty means a defendant is entitled to not only the presumption of innocence, but also to the indicia of innocence. *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999); *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25

L.Ed.2d 353 (1970). A defendant has "the right to appear in court without restraints and without manifestations he is being held in jail." *Gonzalez*, 129 Wn. App. at 897. Thus, the trial court is constitutionally required to shield the jury from routine security measures. *State v. Hutchinson*, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998).

This Court reviews a violation of the right to an impartial jury and the presumption of innocence de novo. *Gonzalez*, 129 Wn. App. at 900. The effects of the violation are evaluated "based on reason, principle, and common human experience." *Id*. at 900-01 (quoting *Williams*, 425 U.S. at 504).

b. <u>This Court should reverse because the trial court violated Mr. Melendrez's fair trial rights when it informed the jurors Mr. Melendrez was in custody.</u>

One afternoon of Mr. Melendrez's trial, as the court decided to break for the day, it inquired of the jurors whether they could stay later the following afternoon. RP 1374. In making a determination as to whether it would be possible to stay late, the judge stated, while still in the presence of the jury:

> Is the jail able to staff until 4:30 tomorrow afternoon? Excellent. Thank you.

RP 1374. The following day Mr. Melendrez moved for a mistrial, relying on *Gonzalez* and explaining Mr. Melendrez was unfairly

prejudiced by the fact the trial court revealed to the jury that he was in custody. RP 1390-91.

The trial court denied Mr. Melendrez's motion for a mistrial, finding that although the jurors could have inferred from his comment that Mr. Melendrez was in custody, the jurors could have also inferred that it was the jail's responsibility to provide an officer for courtroom security regardless of Mr. Melendrez's custody status. RP 1455. The court found there was "no evidence to – to indicate that the jury inferred it one way or the other." RP 1455. The court offered to give a curative instruction, and Mr. Melendrez elected to give a general instruction about custody status, directing the jury it was irrelevant, as part of the jury instructions. RP 1456; CP 114.

Basic reasoning and common human experience suggest the trial court's inadvertent comment caused at least some of the jurors to conclude Mr. Melendrez was in custody. Mr. Melendrez was entitled to the indicia of innocence. *Finch*, 137 Wn.2d at 844. Because the trial court abridged this this fundamental right, reversal is required. *Gonzalez*, 129 Wn. App. at 905.

6. THE TRIAL COURT SHOULD HAVE EXCLUDED THE NURSE'S EXPERT TESTIMONY

a. Susan Dippery's speculative expert opinion, which lacked adequate foundation, should have been excluded.

In a motion in limine, Mr. Melendrez moved to exclude Susan Dippery, a "sexual assault nurse examiner," from testifying about whether her observations of R.M.'s hymen were consistent with sexual assault. RP 51. Both parties agreed Ms. Dippery did not believe she could make this claim, and if this changed, it would need to be addressed outside the presence of the jury. RP 52.

At trial, Ms. Dippery testified that upon conducting an exam of R.M., she observed a remnant of R.M.'s hymen was intact. RP 1401. Over Mr. Melendrez's objection, the court permitted Ms. Dippery to testify it would not be surprising "in any way" to see a small remnant of the hymen in a 16 year-old girl who had engaged in sexual intercourse one hundred times. RP 1402. The trial court overruled the defense's objection that this testimony was beyond the scope of ER 702 or ER 703. RP 1402. Under ER 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or

> education, may testify thereto in the form or an opinion or otherwise.

When evaluating evidence under this rule, the trial court must determine that the witness qualifies as an expert and that the testimony will assist the trier of fact. *Lakey v. Puget Sound Energy, Inc.*, 176 Wn.2d 909, 918, 926 P.3d 860 (2013). "It is well established that conclusory or speculative expert opinions lacking an adequate foundation will not be admitted." *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001) (quoting *Safeco Ins. Co. v. McGrath*, 63 Wn. App. 170, 177, 817 P.2d 861 (1991)). The court must be cautious when evaluating even "somewhat speculative" testimony, as there is always a danger the jury "may be overly impressed with a witness possessing the aura of an expert." *Miller*, 109 Wn. App. at 148 (quoting *Davidson v. Municipality of Metro. Seattle*, 43 Wn. App. 569, 572, 719 P.2d 569 (1986)). This Court reviews the trial court's evidentiary ruling for an abuse of discretion. *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009).

Ms. Dippery's agreement with the deputy prosecutor's statement that it would not in any way be surprising to find a small remnant of the hymen in a 16 year-old girl who had engaged in sexual intercourse one hundred times was highly speculative and lacked

foundation. Ms. Dippery testified she had specialized training in the "evaluation, treatment, and care of patients… admitted to a hospital or another facility with reports of sexual assault." RP 1346. In her position as a sexual assault nurse examiner, she performed an initial assessment of patients to make sure they did not require immediate medical attention, collected the patient's history, performed physicals, and collected specimens for forensic testing. RP 1347. Nothing about her training or job description indicated she had the relevant knowledge, skill, training, experience, or education to allow her to testify about whether it would be surprising or unsurprising to find a remnant of a hymen in a teenager who had sex one hundred times.

Allowing this testimony violated the court's in limine ruling precluding Ms. Dippery from testifying about whether her observations of R.M.'s hymen were consistent with sexual assault. RP 51. The trial court abused its discretion when it overruled Mr. Melendrez's objection and permitted Ms. Dippery to make a conclusory statement about which she could only speculate.

b. <u>Reversal is required.</u>

Because improper opinion testimony invades the jury's province and therefore violates a constitutional right, the State must convince

this Court, beyond a reasonable doubt, that any reasonable jury would have reached the same result absent the error. *Hudson*, 150 Wn. App. at 656; *Chapman*, 386 U.S. at 24. Where a case turns on whether the jury believed the defendant or the complaining witness, as it did here, the court's error is not harmless under this standard. *Hudson*, 150 Wn. App. at 656; *see also State v. Barr*, 123 Wn. App. 373, 384, 98 P.3d 518 (2004) (constitutional error not harmless because "[a]t its heart, the ultimate issue here revolved around an assessment of the credibility of [defendant] and [complaining witness]"). This Court should reverse.

7. CUMULATIVE ERROR DENIED MR. MELENDREZ HIS FOURTEENTH AMENDMENT RIGHT TO A FAIR TRIAL

Under the cumulative error doctrine, even where no single error standing alone merits reversal, an appellate court may nonetheless find the errors combined together denied the defendant a fair trial. U.S. Const. amend. XIV; Const. art. I, § 3; *Williams v. Taylor*, 529 U.S. 362, 396-98, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (considering the accumulation of trial counsel's errors in determining that defendant was denied a fundamentally fair proceeding); *Taylor v. Kentucky*, 436 U.S. 478, 488, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978) (concluding that "the cumulative effect of the potentially damaging circumstances of this

case violated the due process guarantee of fundamental fairness"). The cumulative error doctrine mandates reversal where the cumulative effect of nonreversible errors materially affected the outcome of the trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

Although each of the errors detailed above supplies a stand-alone basis for reversal of Mr. Melendrez's convictions, this Court should conclude that their cumulative effect on his right to present a defense created an enduring prejudice that denied him a fair trial. His convictions should be reversed.

F. CONCLUSION

This Court should reverse Mr. Melendrez's convictions for several reasons. First, because his right to present a defense and privilege against self-incrimination were violated when the court required him to testify before other defense witnesses. Second, because the information was constitutionally deficient and the trial court improperly denied his request for a bill of particulars. Third, because the court inadvertently informed the jury Mr. Melendrez was in custody. And fourth, because the trial improperly permitted the State's witness to offer speculative testimony outside her area of expertise. Finally, the cumulative effect of these errors on Mr. Melendrez's right to present a defense denied him a fair trial.

The Court should also reverse Mr. Melendrez's conviction specifically as to count IV because the trial court failed to make the relevant legal standard manifestly apparent to the jury.

DATED this 6th of May, 2015.

Respectfully submitted,

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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 72210-7-I
v.	)	
	)	
VINCENT MELENDREZ,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 6TH DAY OF MAY, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** 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] KING COUNTY PROSECUTING ATTORNEY [paoappellateunitmail@kingcounty.gov] APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] VINCENT MELENDREZ 373005 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 6TH DAY OF MAY, 2015.

X_____

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