

FILED
COURT OF APPEALS
DIVISION II

2015 APR 29 PM 1:03

STATE OF WASHINGTON

BY Ca
DEPUTY

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent

v.

ENDY DOMINGO CORNELIO
Defendant/Appellant

Court of Appeals No. 46733-0-II

BRIEF OF APPELLANT

Sergio Armijo
Armijo Law Office
917 N. Second St.
Tacoma, WA 98403
Ph: (253) 770-0808
Fax: (253) 770-0259
sergio@armijolawoffice.com

ORIGINAL

TABLE OF CONTENTS

	<u>pp.</u>
I. Introduction.....	10
II. Assignments of Error.....	10
<i>Assignments of Error</i>	10
No. 1.: <i>The trial court abused its discretion, in admitting the testimony of ARNP Hannah-Truscott regarding the statements of A.C. under ER 803(a)(4) when the examination of A.C. did not include a physical examination, and its primary stated purpose was to identify potential perpetrators of abuse rather than diagnose a medical condition.</i>	
No. 2: <i>The testimony of ARNP Hannah Truscott violated the constitutional rights of the Defendant by violating the presumption of innocence, in that she stated as a given both the existence of abuse and the identity of the abuser, the Defendant.</i>	
No. 3: <i>The trial court abused its discretion in denying the defense the opportunity to cross-examine the alleged victim A.C. about prior statements made at the defense interview that were inconsistent with her testimony.</i>	
No. 4: <i>The trial court abused its discretion under RCW 9A.44.120 and under State v. Ryan, 103 Wn. 2d 165, 691 P.2d 197 (1984) when it allowed the admission of child hearsay statements, and did not fully address issues of A.C.'s character, trustworthiness, and the spontaneity of her statements before ruling that the statements were reliable.</i>	

No. 5: *Evidence was insufficient to support a finding of guilt when the alleged victim A.C. repeatedly denies the instances of first degree rape when she testified in court, which is inconsistent with statements she made in the forensic interview, and when the mother Ms. Croll testified that A.C. was exhibiting sexualized behavior several months before the Defendant allegedly molested and raped her.*

No. 6: *The prosecutor engaged in prosecutorial misconduct of a constitutional magnitude, in closing argument, denying Defendant his Sixth Amendment right to a fair trial, by impermissibly shifting the burdens of proof and ignoring the presumption of innocence, by commenting on alleged victim A.C.'s demeanor, by speculating on witness' motivations, and inviting the jury to speculate on such motives not in evidence.*

No. 7: *Counsel for defendant was ineffective, depriving him of his Sixth Amendment right to a fair trial, when he failed to raise the issue of alleged victim A.C.'s truthfulness, veracity, and trustworthiness prior to the admission by the Court of the child hearsay statements and the granting of the State's motion in limine to prevent testimony from mother Ms. Croll and father Mr. Cornelio regarding A.C.'s lying and stealing, when he failed to object to ARNP Hannah-Truscott's prejudicial statements about the finding of abuse and the identification of defendant as the abuser, and when he failed to object to several instances of prosecutorial misconduct in closing argument.*

No. 8: *There have been several trial errors which, even if standing alone would not constitute reversible error, are, taken together as cumulative error, mandating reversal for denial of a fair trial for Defendant under the Sixth Amendment.*

Issues Pertaining to Assignments of Error.....12

No. 1 *Did the trial court abuse its discretion in admitting the testimony of ARNP Hannah-Truscott regarding the statements of A.C. under E.R. 803(a)(4) when the examination of A.C. did not include a physical examination, and its primary stated purpose was to identify potential perpetrators of abuse rather than diagnose a medical condition?*

No. 2: *Did the testimony of ARNP Hannah-Truscott violate Defendant's Sixth Amendment right to fair trial and Fourteenth Amendment right to due process by violating the presumption of innocence, in that she stated as a given both the assumptions of abuse and the identity of Defendant as the abuser?*

No. 3: *Did the trial court abuse its discretion in denying the Defendant the opportunity to cross-examine the alleged victim about prior statements made in a defense interview that were inconsistent with her testimony ?*

No. 4: *Did the trial court abuse its discretion under RCW 9A.44.120 and State v. Ryan, 103 Wn. 2d 165, 691 P. 2d 197 (1984) when it allowed the admission of child hearsay statements and did not fully address issues of alleged victim A.C.'s character, trustworthiness, and the spontaneity of her statements in ruling that the statements were reliable ?*

No. 5: *Did the prosecutor engage in prosecutorial misconduct of a constitutional magnitude in closing argument, denying Defendant his Sixth Amendment right to a fair trial, by impermissibly shifting the burdens of proof and ignoring the presumptions of innocence, by commenting on alleged victim A.C.'s demeanor, by speculating on the witness' motivations, and by inviting the jury to speculate on such motives not in evidence.*

No. 6: *Was counsel for defendant ineffective, depriving him of his Sixth Amendment right to a fair trial, when he failed to raise the issue of alleged victim A.C.'s truthfulness, veracity, and trustworthiness prior to the admission by the Court of the child hearsay statements and the granting of the State's motion in limine to prevent testimony from mother Ms. Croll and father Mr. Cornelio regarding the alleged victim A;C.'s lying and stealing, when he failed to object to ARNP Hannah-Truscott's prejudicial statements about the finding of abuse and the identification of the abuser, and when he failed to object in several instances of prosecutorial misconduct in closing argument ?*

No. 7: *Whether there have been sufficient individual trial errors of such magnitude that, even if alone they would not constitute reversible error, taken together they constitute cumulative error, mandating reversal for denial of a fair trial for Defendant under the Sixth Amendment ?*

III. Statement of the Case..... 14

IV. Argument.....26

A. Standard of Review..... 26

B. The trial court abused its discretion, in admitting the testimony..28 of ARNP Hannah-Truscott regarding the statements of A.C. under ER 803(a)(4), when the examination of A.C. did not include a physical examination, and when the examination's primary stated purpose was to identify potential perpetrators of abuse rather than to diagnose a medical condition. The testimony of ARNP Hannah Truscott violated the Defendant's Sixth Amendment right to a fair trial and his Fourteenth Amendment right to due process by violating the presumption of innocence, in that she stated as a given both the existence of abuse and the identity of Defendant as the abuser.

- C. The trial court abused its discretion in denying the defense the opportunity to cross-examine the alleged victim A.C. about prior statements made at the defense interview that were inconsistent with her testimony.....30**

- D. The trial court abused its discretion under RCW 9A.44.120 and under *State v. Ryan*, 103 Wn. 2d 165, 691 P. 2d 197 (1984), when it allowed the admission of child hearsay statements, and did not fully address issues of alleged victim A.C.’s character, trustworthiness, and the spontaneity of her statements before ruling that the statements were reliable.....33**

- E. Evidence was insufficient to support a finding of guilt against the defendant when the alleged victim A.C. repeatedly denies the instances of first degree rape when she testified in court, which is inconsistent with statements that she made in her forensic interview, and when the alleged victim’s mother Ms. Croll testified that A.C. was exhibiting sexualized behavior several months before the time period in which the Defendant was alleged to have molested and raped her.....36**

- F. The prosecutor engaged in prosecutorial misconduct of a Constitutional magnitude, in closing argument, denying Defendant his Sixth Amendment right to a fair trial, by impermissibly shifting the burdens of proof and presumption of innocence, by commenting on alleged victim A.C.’s demeanor in court, by speculation on the motivations of witnesses and inviting the jury to speculate on such motives not in evidence.....40**

G. Counsel for defendant was ineffective, depriving Defendant of his Sixth Amendment right to a fair trial, when he failed to raise the issue of the alleged victim A.C.’s truthfulness, veracity, and trustworthiness prior to the admission by the Court of the child hearsay statements, and prior to the granting of the State’s motion in limine to prevent testimony from the mother Ms. Croll and the father Mr. Cornelio regarding A.C.’s lying and stealing, when he failed to object to ARNP Hannah-Truscott’s prejudicial statements about the finding of abuse and the identification of the abuser, and when he failed to object to several instances of prosecutorial misconduct in closing argument.....43

H. There have been several trial errors which, even if standing alone would not constitute reversible error, are, taken together would constitute cumulative error, mandating reversal for denial of a fair trial for Defendant under the Sixth Amendment.....46

V. Conclusion.....46

TABLE OF AUTHORITIES

Table of Washington Cases

State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992).....36,45

State v. Binh Thach, 126 Wn. App. 297, 106 P.3d 782 (2005).....27

State v. Brokob, 159 Wn. 2d 311, 150 P.3d 59 (2006).....43

State v. Cochran, 102 Wn. App. 480, 8 P.3d 313 (2000).....44

State v. Cord, 103 Wn. 2d 361, 693 P.2d 81 (1985).....36

State v. Emery, 174 Wn. 2d 741, 278 P.3d 653 (2012).....27

State v. Florczak, 76 Wn. App. 55, 882 P.2d 199 (1994).....28,29,31

<i>State v. Green</i> , 94 Wn. 2d 216, 616 P.2d 628 (1980).....	27
<i>State v. Greiff</i> , 141 Wn. 2d 910, 10 P.3d 390, 399 (2000).....	46
<i>State v. Guloy</i> , 104 Wn. 2d 412, 705 P.2d 1182 (1985).....	27
<i>State v. Harper</i> , 35 Wn. App. 855, 857, 670 P.2d 296 (1983).....	40
<i>State v. Horton</i> , 116 Wn. App. 909, 68 P.3d 1145 (2003).....	32
<i>State v. Kilgore</i> , 26 P.3d 308, 107 Wn. App. 160 (2001).....	28
<i>State v. Kirkman</i> , 159 Wn. 2d 918, 155 P.3d 125 (2007).....	27
<i>State v. Kunze</i> , 97 Wn. App. 832, 988 P.2d 977 (1999).....	44
<i>State v. Lopez</i> , 95 Wn. App. 842, 980 P.2d 224 (1999).....	28
<i>State v. O'Connor</i> , 119 P.3d 806 (2005).....	44
<i>State v. Pirtle</i> , 127 Wn. 2d 628, 904 P.2d 245 (1995).....	26
<i>State v. Ryan</i> , 103 Wn. 2d 165, 691 P.2d 197 (1984).....	33
<i>State v. Scoby</i> , 117 Wn. 2d 55, 810 P.2d 1358 (1991).....	36
<i>State v. Scott</i> , 110 Wn. 2d 682, 757 P.2d (1988).....	27
<i>State v. Smith</i> , 144 Wn. 2d 655, 30 P.3d 1245 (2001).....	40
<i>State v. Swan</i> , 114 Wn. 2d 613, 790 P.2d 610 (1990).....	26
<i>State v. Tharp</i> , 96 Wn. 2d 591, 637 P.2d 961 (1981).....	27
<i>State v. Thomas</i> , 150 Wn. 2d 821, 83 P.3d 970 (2004).....	27,36
<i>State v. Thorgeson</i> , 172 Wn. 2d 438, 258 P.3d 43 (2010).....	27
<i>State v. Warren</i> , 165 Wn. 2d 17 n. 3, 195 P.3d 940 (2008).....	40

pp.

State v. Woods, 154 Wn. 2d 612, 114 P.3d 1174 (2005).....33

State v. WWJ Corporation, 138 Wn. 2d 595, 980 P.2d 1257 (1999).....27

State v. Yates, 161 Wn. 2d 714, 168 P.3d 359 (2007).....27

Thomas v. French, 99 Wn. 2d 95, 659 P.2d 1097 (1983).....30

Table of Other Cases

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984).....43

Constitutional Provisions

Sixth Amendment of the U.S. Constitution.....

Statutes

RCW 9A.44.120.....26

Regulations and Rules

RAP 2.5(a)(3).....

ER 403.....30

ER 608(b).....44

ER 613(b).....32

ER 803(a)(4).....25.

I. INTRODUCTION

This is an appeal from a judgment and sentence after criminal jury trial and rendering of verdicts of guilty against the defendant, Endy Domingo -Cornelio (“Mr. Domingo”). The alleged child victim, A.C., was allegedly at ages four and five when the incidents purportedly occurred. She made her disclosure of the incidents at age eight and was forensically interviewed at that age, and testified in the trial at the age of 10. Mr. Domingo was sentenced to 240 months. Since the sentence was within the standard sentencing range, there is no appeal of the sentence. The issues on appeal strictly involve the fundamental fairness of the trial leading to conviction.

II. ASSIGNMENTS OF ERROR

Assignments of Error

No. 1: The trial court abused its discretion, in admitting the testimony of ARNP Hannah-Truscott regarding the statements of A.C. under ER 803(a)(4), when the medical examination of A.C. did not include a physical examination, and the examination’s primary stated purpose was to identify potential perpetrators of abuse rather than diagnose a medical condition.

No. 2: The testimony of ARNP Hannah-Truscott violated Defendant’s Sixth Amendment right to a criminal fair trial and his Fourteenth Amendment due process rights, by violating the presumption of innocence, in that she testified as a given both the existence of abuse and the identity of the abuser as Defendant.

No. 3: The trial court abused its discretion in denying the defendant the opportunity to cross-examine the alleged victim A.C. about prior statements made at the defense interview that were inconsistent with her testimony.

No. 4: The trial court abused its discretion under RCW 9A.44.120 and under *State v. Ryan*, 103 Wn. 2d 165, 691 P.2d 197 (1984), when it allowed the admission of child hearsay statements, and did not fully address issues of alleged victim A.C.'s character, trustworthiness, and the spontaneity of her statements before ruling that the statements were reliable.

No. 5: Evidence was insufficient to support a finding of guilt when the alleged victim A.C. repeatedly denied the alleged instances of first degree rape when she testified in court, which was inconsistent with statements she made in the forensic interview, and when the mother Ms. Croll testified that A.C. was exhibiting sexualized behavior several months before the Defendant allegedly molested and raped her.

No. 6: The prosecutor engaged in prosecutorial misconduct of a constitutional magnitude in closing argument, denying Defendant his Sixth Amendment right to a fair trial, by impermissibly shifting the burden of proof and ignoring the presumption of innocence by commenting on alleged victim A.C.'s demeanor while in court, by speculating on witness' motivations, and by inviting the jury to speculate on such motives not in evidence.

No. 7: Counsel for Defendant was ineffective, depriving him of his Sixth Amendment right to a fair trial, when he failed to raise the issue of alleged victim A.C.'s truthfulness, veracity, and trustworthiness, prior to the admission by the Court of the child hearsay statements and the granting of the State's motion in limine to prevent testimony from the mother Ms. Croll and the father Mr. Cornelio regarding A.C.'s lying and stealing, when he failed to object to ARNP Hannah-Truscott's prejudicial statements about the finding of abuse and the identification of Defendant as the abuser, and when he failed to object to several instances of prosecutorial misconduct in closing argument.

No. 8: There have been several trial errors, which, even if standing alone would not constitute reversible error, are, taken together, cumulative error, mandating reversal for denial of a fair trial for Defendant.

Issues Pertaining to Assignments of Error

No. 1: Did the trial court abuse its discretion in admitting the testimony of ARNP Hannah-Truscott regarding the statements of alleged victim A.C. under ER 803(a)(4), when the examination of A.C. did not include a physical examination, and its primary stated purpose was to identify potential perpetrators of abuse rather than diagnose a medical condition?

No. 2: Did the testimony of ARNP Hannah-Truscott violate Defendant's Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process by violating the presumption of innocence, in that she stated as a given both the assumptions of abuse and the identity of Defendant as the abuser?

No. 3: Did the trial court abuse its discretion in denying the Defendant the opportunity to cross-examine the alleged victim about prior statements made in a defense interview that were inconsistent with her testimony?

No. 4: Did the trial court abuse its discretion under RCW 9A.44.120 and *State v. Ryan*, 103 Wn. 2d 165, 691 P.2d 197 (1984), when it allowed the admission of child hearsay statements, and did not fully address issues of alleged victim A.C.'s character, trustworthiness, and the spontaneity of her statements in ruling that the statements were reliable ?

No. 5: Did the prosecutor engage in prosecutorial misconduct of a constitutional magnitude in closing argument, denying Defendant his Sixth Amendment right to a fair trial, by impermissibly shifting the burdens of proof and ignoring the presumptions of innocence by commenting on alleged victim A.C.'s demeanor in court, by speculating on the witness' motivations, and by inviting the jury to speculate on such motives not in evidence ?

No. 6: Was there insufficient evidence to support a finding of guilt against Defendant, when the alleged victim A.C. repeatedly denies the instances of first degree rape when she testified in court, which is inconsistent with statements she made in the forensic interview, and when the mother Ms. Croll testified that A.C. was exhibiting sexualized behavior several months before the Defendant allegedly molested and raped her ?

No. 7: Was counsel for Defendant ineffective, depriving him of his Sixth Amendment right to a fair trial, when he failed to raise the issue of alleged victim A.C.'s truthfulness, veracity, and trustworthiness prior to the admission by the Court of the child hearsay statements and granting of the State's motion *in limine* to prevent testimony from mother Ms. Croll and father Mr. Cornelio regarding the alleged victim A.C.'s lying and stealing, when he failed to object to ARNP Hannah-Truscott's prejudicial statements about the finding of abuse and the identification of the abuser, and when he failed to object to several instances of prosecutorial misconduct in closing argument ?

No. 8: Whether there had been sufficient individual trial errors of such magnitude, that even if alone they would not constitute reversible error, taken together they constitute cumulative error, mandating reversal for denial of a fair trial for Defendant under the Sixth Amendment ?

III. STATEMENT OF THE CASE

A. Procedural History

On July 9, 2013, an information was filed against defendant/appellant ("Mr. Domingo") by the State of Washington in Pierce County Superior Court, charging him with one count of rape of a child in the first degree and three counts of child molestation in the first degree. CP 1-2. The acts were alleged by the information to have occurred between November 9, 2007 and November 8, 2009. CP 1-2.

The affidavit of probable cause, also filed on July 9, 2013, alleged that Mr. Domingo was 20 years old and the victim A.C., was born on November 8, 2003, and therefore was between 4 years of age and 6 years of age when the crimes allegedly occurred. CP 3-4.

The State filed a memorandum giving notice that it intended to offer child hearsay statements at trial pursuant to RCW 9A.44.120 on January 13, 2014. CP 5-22.

Trial began on July 2, 2014, with a hearing on the admissibility of child hearsay evidence pursuant to RCW 9A.44.120. CP 33; RP 7-107; 132-148.

A CrR 3.5 hearing also was held, and it was determined that Mr. Domingo's statements were voluntary and given after proper advisement of Constitutional rights. RP 167-191. However, Mr. Domingo's statements were never offered to the jury. A jury was selected from a voir dire panel. RP 151-166; 212-401. The evidentiary portion of the trial was then conducted, including opening statements and closing arguments. RP 402-716. The jury rendered a verdict of guilty on all four counts on July 16, 2014. RP 717-725. Mr. Domingo was subsequently sentenced to 240 months on September 25, 2014. CP 42-56; RP 726-740.

Nature of Testimony

The mother of the alleged victim A.C., Tiffany Croll, was called to testify by the State. RP 542. She is 30 years of age. RP 543. She is recently divorced from the father of A.C., Jose Cornelio, and they were married between the years of 2003-2012. RP 543. She has three children, one boy and two girls. RP 543. The two girls were fathered by Jose Cornelio, and they are 10 years of age and 8 years of age, A.C.'s younger sister having been born 09/01/05. RP 544. A.C. is the 10 year old, and she just finished 4th grade. RP 544.

Ms. Croll currently lives in Tacoma, and has lived at there for one month. RP 545. According to Ms. Croll, A.C. and her son now live with her, and the other daughter now lives with Mr. Cornelio. RP 545. Ms. Croll relates that A.C. had lived with her father for the past two years, and moved in with her when she moved to Tacoma. RP 545. Mr. Cornelio lives in a mobile home park in Puyallup. RP 546. He has lived there since 2005. RP 546. Prior to A.C. moving in with her, Ms. Croll would have visitation with A.C. at least every other weekend. RP 546.

Ms. Croll separated from Mr. Cornelio at the end of the 2006 and beginning of 2007 and took the children when she moved out of Mr. Cornelio's mobile home. RP 546. She first moved to Vancouver, Washington, to live a couple of months with her cousin, and then moved to Oregon. RP 547. She stayed in Oregon with her mother and then returned to Washington in 2008. RP 547. During this period, the children would visit with Mr. Cornelio at his trailer every other weekend. RP 548. When she returned in 2008, she lived again with Mr. Cornelio in his trailer for a couple of months, and then moved back with her mother, who had moved to Duvall, Washington, in the interim. RP 548.

Ms. Croll then moved from Duvall back to Puyallup, and then to Tacoma, and then back to Puyallup, and then back to Duvall, and now to Tacoma. RP 549.

She noted that in 2012 the court awarded Mr. Cornelio custody of the two girls. RP 549.

When Ms. Croll moved back to Washington in 2008, A.C. started school. RP 551.. While Ms. Croll was living in Oregon, three Mr. Cornelio's nephews also stayed in the mobile home, the defendant, Mr.(Endy) Domingo; Edgar Domingo, and Edwin Savala. RP 552. The nephews stayed with Mr. Cornelio because they worked with him on construction. RP 553.

In October, 2012, A.C. heard Ms. Croll talking on the phone at her residence, and thought she was talking about her, and told her to get off the phone. RP 556. A.C. told Ms. Croll that she was going to tell her something important, and she did not want it recorded. RP 556. A.C. then announced to Ms. Croll that the person whom she thought had been abusing her was not the one, but that it was Mr. Domingo that had been "doing bad stuff" to her. RP 556.

A.C. did not provide much initial detail as to what happened, except to say he touched her on the private parts and she touched him on the private parts and they kissed, before she refused to talk any further about the incident. RP 557-58. She said that it happened at Mr. Cornelio's trailer. RP 558. She did not say when it happened. RP 558. Ms. Croll immediately called the police. RP 557.

Ms. Croll met Pierce County Sheriff's Deputy Pebley at the Fred Meyer in Puyallup. RP 559. After this meeting, Ms. Croll took A.C. to see Mr. Cornelio. RP 563. A.C., however, did not want to talk to Mr. Cornelio either about the incidents. RP 564.

Ms. Croll asked A.C. why she had not told her this before, as Ms. Croll had questioned her before about abuse. RP 561. Ms. Croll related that A.C. had acted out suspicious behavior in the past, and that not only she, but Ms. Croll's mother and Ms. Croll's sister, had also questioned A.C. about suspected abuse in the past. RP 561. Among other things, Ms. Croll had observed A.C. playing boyfriend and girlfriend with her older brother when she moved to Vancouver. RP 561. Further, when she first left Mr. Cornelio she was living with her cousin who had twins the same age, and A.C. was telling them how to play boyfriend and girlfriend, and she "was playing this a lot". RP 561-62. She would be on top of her sister when her sister was in diapers, and telling her "don't move" and be kissing her. RP 563.

Ms. Croll next took A.C. to the Child Advocacy Center, on direction of Detective Catey, for a forensic interview and physical examination. RP 563. Ms. Croll told the child interviewer what A.C. had told her. RP 563.

Under cross-examination, Ms. Croll stated that A.C.'s disclosures occurred on October 13, 2012, the day after her marital dissolution with Ms. Cornelio was finalized. RP 565. Ms. Croll said that the times she had questioned A.C. about abuse previously were "too many to count". RP 567.

Initially, A.C. said that she was acting out what she saw in a movie. RP 572.

She said that she saw the movies at her fathers. RP 573. She made this statement when Ms. Croll first returned from Oregon and moved to Duvall. RP 572.

The father, Mr. Cornelio, testified next. RP 575. He has worked construction for the last 14 years. RP 575. When A.C. would come to visit, however, she would not sleep in the living room with Mr. Domingo, because the girls had their own bedroom. RP 583. However, at night Mr. Cornelio would bring A.C. into his bedroom to sleep because she was afraid to sleep alone in her own bedroom. RP 583. A.C.'s sister would also sleep with Mr. Cornelio when they would come and visit. RP 586. Mr. Domingo and his brother Edgar would sleep on the living room couches. RP 584. A.C. was 4 or 5 years of age at this time. RP 584. A.C. never did not want to come to Mr. Cornelio's residence because Endy was there. RP 594.

Cheryl Hannah-Truscott testified next. RP 602. She is an Advanced Registered Nurse Practitioner (ARNP). RP 610. She retired from the Mary Bridge Child Abuse Intervention Department in the fall of 2012. RP 602. She had worked there for 20 years. RP 602. She obtained a bachelor's degree in nursing in 1974, and then received a master's degree in maternal child health in 1980. RP 602.

She had been trained at several workshops prior to doing child sexual abuse evaluations, of which she had done 1552 over 20 years. RP 602. She testified that a child who has been sexually assaulted may delay disclosure until he or she feels comfortable, or the child may want to put it out of his or her mind. RP 607.

The defense objects for lack of foundation due to Ms. Hannah-Truscott's lack of expertise for this type of testimony. RP. 609. Objection overruled. RP 609.

Ms. Hannah-Truscott testified that usually a physical exam is done in these cases for reassurance purposes only, as only 5 % or 6 % of the children examined have any physical evidence. RP 616. The primary purpose of the exam, given that it is difficult for children to talk about abuse in the first place, is to get the information that they can from the forensic interviewer and "add certain questions to make sure that we are identifying the person who may have committed the assault and to ask the child if there are any questions or concerns that they have". RP 614.

Ms. Hannah-Truscott further stated that she likes to "validate" the person who committed the assault and she likes to know if there is somebody else who may have done something to the child. RP 617.

Ms. Hannah-Truscott examined A.C. on October 31, 2012. RP 618. A.C. disclosed she had talked earlier to the forensic interviewer about Mr. Domingo touching her private parts, revealed to Ms. Hannah-Truscott as well that Mr. Domingo had touched her private parts. RP 623. A.C. refused the physical examination, and so none was performed. RP 624. Ms. Hannah-Truscott referred A.C. to counseling. RP 627. On cross examination, Ms. Hannah-Truscott stated her office is in the same building as the forensic interviewer Keri Arnold. RP 627.

Pierce County Sheriff Tom Catey testified next. RP 635. He has been with the Pierce County Sheriffs for 20 years, a detective for seven years, and assigned to the Special Assault Unit for the last 5 years. RP 635-36. After the child is interviewed at the Child Advocacy Center,

Detective Catey contacted persons of interest, including the alleged perpetrator and parents. RP 638. The instant case was assigned to him on October 16, 2012. RP 638. Detective Catey spoke to Mr. Cornelio by phone on November 27, 2012. RP 643. Detective Catey interviewed the Defendant Mr. Domingo on December 3, 2012. RP 645.

Child interviewer Keri Arnold had testified the day before. RP 423. She had been employed as a forensic child interviewer for 11 years. RP 424. She has a bachelor's degree in sociology with a concentration in criminology, and a minor in psychology. She has had extensive training (RP 425-27) and has conducted over 1800 interviews, the "vast majority" being sex abuse cases. RP 425. She discussed her training and experience in dealing with delayed disclosures, causes of sexualized behavior, suggestibility/coaching and memory issues in children. RP 425-433. She described the interviewing protocols and rationales for the protocols for suspected sexually abused children. RP 433-442. Ms. Arnold stated that Ms. Croll had expressed concern to her about A.C.'s sexualized behavior. RP 462-64. Ms. Arnold stated that A.C. said a person named "Endy" abused her and she detailed when it happened, how it happened, and what she felt about it. RP 465. ["Endy" is Mr. Domingo's first name].

On cross-examination, Ms. Arnold said that divorce and custody battles can be an issue when it comes to determining whether a child has been coached. RP 473. She was not aware that A.C. had made her disclosure during a custody battle. [*sic*—the dissolution decree had been entered one day before A.C.'s disclosures.]

Pierce County Deputy Pebley was the next witness. RP 477. He had been a deputy for almost 31 years. RP 477. On October 13, 2012 he responded to the call in the instant case. RP 480. Using standard protocol, he spoke to Ms. Croll but no A.C.

RP 481.

A.C. then testified. RP 484. She now lives with her mother, Ms. Croll, and her brother in Tacoma, and her sister lives with her father. RP 484. She has only been living with her mother for one month and before that she lived with her father, Mr. Cornelio. RP 484. She moved in with her father while she was in 2nd grade. RP 490. When Mr. Domingo would spend the night he slept on a couch, and A.C. would sleep on a little couch. RP 496. A.C.'s other sister would sleep with Mr. Cornelio. RP 497.

Mr. Domingo would tell A.C. to come over to his couch, would grab her in ways she didn't like. RP 498. He would grab her buttocks and touch her genital area. RP 498. A.C. was wearing her pajamas when Mr. Domingo would touch her, and she did not remember if her pajamas were on or a little bit down at the time. RP 499. Mr. Domingo touched A.C.'s genital area a couple of times. RP 499. However, A.C. also did not remember if Mr. Domingo touched her skin. RP 499.

A.C. said that Mr. Domingo would always tell her to lick his penis, and Mr. Domingo would try to make her, although she would say "no". RP 500. A.C. did not remember whether or not she saw Mr. Domingo's penis. RP 500. Mr. Domingo would grab A.C.'s hand and make her touch his penis. RP 500.

Mr. Domingo only made A.C. touch his penis but not do anything with it. RP 501. Nothing would come out of Mr. Domingo's penis when A.C. touched it. RP 502. A.C. was 4 or 5 years of age when she had to do this. RP 501.

Mr. Domingo would make A.C. touch his bare penis. RP 502, and she thought this happened "all of the time". RP 502. Mr. Domingo put his mouth on A.C.'s mouth and kissed her twice. RP 503.

A.C. recalled talking to child interviewer Keri Arnold about what happened between her and Mr. Domingo. RP 503. However, she neither recalled telling Ms. Arnold that Mr. Domingo licked her genitals ("her private parts") nor did she independently recalled that ever happening. RP 503-05. A.C. said that she touched Mr. Domingo's penis, and he touched her vagina more than twice. RP 508. Mr. Domingo did not put his penis anywhere else on A.C. nor did she recall telling the forensic interviewer that he did. RP 514.

On cross, A.C. said that she finally told her mother, Ms. Croll, what happened because she kept telling A.C. that she knew someone did something to her, and that every time Ms. Croll would see A.C. she would ask her who did something to her.

RP 518. A.C. said that Ms. Croll always thought it was Mr. Cornelio, her father, and then she told Ms. Croll who it was. RP 518. A.C. recalls when she told her mother that she, her brother, and her sister were playing in her room, and her mother was watching TV. RP 520. Ms. Croll then came in and again insisted that A.C. tell her if someone ever did anything to her, and A.C. kept denying that anyone had done anything to her. RP 520. But Ms. Croll kept asking A.C. until she then told her who it was. RP 520.

Defense counsel then began inquiring of A.C. regarding inconsistent out-of-court statements made to him, but the State objected to the inquiry as hearsay, and the Court sustained the objection . RP 522.

Pre-Trial Motions and Hearings

As stated before, a child hearsay hearing was held to determine the admissibility of A.C.'s out-of-court statements, including those on video. The State is the only part that called witnesses for that hearing, and called Mr. Cornelio, Ms. Croll, Ms. Arnold the forensic interviewer, and A.C. All testimony will not be repeated, since much of it is the same as what was presented to the jury. However, notable statements that are distinguishable from trial testimony will be presented,

Mr. Cornelio testified, contrary to A.C. and Ms. Croll, that A.C. and her sister live with him. RP 19. He also testified that when Mr. Domingo stayed over, that A.C. would sleep with him, Mr. Cornelio . RP 22. Mr. Cornelio indicated that he often caught A.C. telling lies. RP 24-25. He would admonish her for lying, but she would then lie again. RP 25.

Ms. Croll testified that she and Mr. Cornelio separated at the end of 2006. RP 87. Ms. Croll started having concerns about A.C. telling lies when she was 3 years of age, and she was hard to control because she was upset that Ms. Croll had separated from her father. RP 94. Ms. Croll testified that A.C. would frequently steal, "anything, candy from the store, or stuff from her cousin's house.[Ms. Croll] found out that she has stolen stuff from school, come home with things". RP95. The last weekend before trial Ms. Croll caught A.C. stealing from her father's girlfriend's daughter. RP 96.

Ms. Croll noted that A.C. had a lot of anger inside of her, and she has had this problem since she was three. RP 96. She also noted that she had been suspended from school a month ago. RP 97. Ms. Croll noted that when A.C. first disclosed the incident to her she said it wasn't Mr. Cornelio who had abused her, it was Mr. Domingo. RP 98.

Subsequent to the child hearsay hearing, the court determined that Ms. Hannah Truscott, the nurse practitioner, would not have to provide testimony at the hearing, as her testimony is permitted under ER 803(a)(4) as medical diagnosis and treatment. RP 113, despite the defense objection that the testimony is hearsay and cumulative.

Initially, defense counsel had concerns about the State's motion *in limine* to keep one client from commenting on the other's veracity, noting that the mother had testified that A.C. had been caught still stealing "as of this month" RP 118. However, subsequently, the defense counsel dropped any objection to the character of A.C. being an issue barring the admissibility of child hearsay statements under RCW 9A.44.120. RP 135.

The Court accordingly allowed the admission of the child hearsay from the State's witnesses, noting in particular the potential issues of A.C.'s character, and the spontaneity of her statements. RP 142. The Court noted that "The *Ryan* factor suggesting trustworthiness is certainly difficult with a ten year old, given the age of the alleged victim and the ability of the court to assess character evidence. She is or appears to be quite shy and quiet in her speech, both her in the courtroom and during the interview.

She appears to be bright and the Court finds no disputed testimony to suggest other than trustworthiness and considering the first factor on whether there was an apparent motive to lie". RP 142.

The Court also found that A.C.'s statements were spontaneous, noting that although the mother had questioned the child several times, that the focus did not suggest a perpetrator or coaching or that there were leading questions, and when the mother telephoned law enforcement, they instructed her to stop speaking to the child about the incident, which she did. RP 142.

Before the evidentiary portion of the trial began, the State move *in limine* to bar the defense from inquiring of Ms. Croll about any "inappropriate relationships" that Mr. Cornelio may or may not have had with Ms. Croll's younger sister when she was under 16, as this is something that Ms. Croll mentioned in her defense interview. RP 539-40. Defense indicated that it did not oppose the motion, which was granted.

IV. ARGUMENT

A. Standard of Review

A trial court decision to admit or exclude evidence is reviewed for abuse of discretion. *State v. Swan*, 114 Wn. 2d. 613, 658, 790 P.2d 610 (1990); *State v. Pirtle*, 127 Wn. 2d 628, 904 P.2d 245 (1995). The abuse of discretion standard is accordingly the appropriate standard to review for admissibility of child hearsay statements under RCW 9A.44.120. *State v. Swan, supra*, at 665. Error for violation of an evidentiary rule is prejudicial, mandating reversal, if, within reasonable probabilities, the trial outcome was materially affected by the error.

State v. Thomas, 83 P.3d 970, 995, 150 Wn. 2d 821 citing *State v. Tharp*, 96 Wn. 2d 591, 599, 637 P.2d. 961 (1981). Admission of expert testimony is reviewed for abuse of discretion. *State v. Yates*, 161 Wn. 2d 714, 762, 168 P.3d 359 (2007).

A jury verdict of guilty is upheld only if substantial evidence supports the verdict. *State v. Green*, 94 Wn. 2d. 216, 616 P.2d 628 (1980).

Issues may be raised for the first time on appeal when they involve a manifest error implicating a constitutional right. *State v. Kirkman*, 159 Wn. 2d 918, 155 P.3d 125, 130 (2007)citing *State v. WWJ Corp.*, 138 Wn. 2d 595, 602, 980 P.2d 1257 (1999);*State v. Scott*, 110 Wn. 2d 682, 688, 757 P.2d 492 (1988); RAP 2.5(a)(3).

Claims of constitutional error mandate reversal, unless the appellate court is convinced behind a reasonable doubt that without the error the jury verdict would have been the same. *State v. Guloy*, 104 Wn. 2d 412, 425, 705 P.2d 1182 (1985). Allegations of prosecutorial misconduct raised for the first time on appeal are reversible if the court determines that no curative instruction would have removed the prejudicial effect, and the prejudice was sufficient to create a substantial likelihood that the prejudice affected the verdict. *State v. Thorgeson*, 172 Wn. 2d 438, 258 P.3d 43, 53 (2010). Claims of ineffective assistance of counsel are reviewed *de novo*. *State v. Binh Thach*, 126 Wn. App. 297, 319, 106 P.3d 782 (2005). Cumulative error allegations require reversal if the trial was found to have been fundamentally unfair. *State v. Emery*, 174 Wn. 2d 741, 278 P.3d 653, 667 (2012).

B. The trial court abused its discretion, in admitting the testimony of ARNP Hannah-Truscott regarding the statements of A.C. under ER 803(a)(4) when the examination of A.C. did not include a physical examination, and its primary stated purpose was to identify potential perpetrators of abuse rather than diagnose a medical condition, and there was testimony regarding the child's dishonesty and the mother's pressuring the child to state she had been abused.

“Statements made for the purposes of medical diagnosis, or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as is reasonably pertinent to diagnosis or treatment are admissible”. *State v. Kilgore*, 26 P.3d 308, 320, 107 Wn. App. 160 (2001) quoting ER 803(a)(4). The general rule is that the declarant's motive to make the statements must be consistent with receiving treatment and the statements must be those that a physician reasonably relies on to make a diagnosis. *Id.* at 320 citing *State v. Lopez*, 95 Wn. App. 842, 849, 980 P.2d 224 (1999).

Courts have applied a modification of the general rule for very young children, given that by age alone they may not understand why they are at a doctor's office. *Id.* at 320 citing *State v. Florczak*, 76 Wn. App. 55, 65, 882 P. 2d 199 (1994). Accordingly, a very young child's statements are admissible if there is corroborating evidence of the statement and it appears unlikely that the child would fabricate the cause of the injury. *Id.* at 320 citing *Florczak, supra* at 65.

In the instant case, A.C. was 8 years of age, when she gave her statement.

Assuming this would make her a very young child, the mother reported as corroborating evidence A.C.'s precocious sexual behavior, so that prong of the requirement was satisfied. However, there was also substantial evidence that the child would fabricate the cause of the injury. Both father and mother reported issues with A.C.'s lying, the mother reporting it in greater detail. More serious is the mother's reports of A.C. stealing, with a theft as recent as the weekend before trial. In addition, both A.C. and the mother testified that the mother questioned A.C. constantly who was abusing her sexually, and for years A.C. denied anybody had done anything; in addition, the mother had communicated to A.C. for years that she suspected her father of having abused her. Accordingly, there was a substantial likelihood that the cause of injury would be fabricated.

If A.C. is considered older than a very young child at 8, her statements would fail to be admissible because they were not consistent with reception of treatment.

First of all, A.C. refused to undergo, and did not undergo, a physical examination.

The remainder of the examination, which were questions for A.C., were more of a nature of continued forensic investigation, rather than ascertaining physical and mental health issues, as this portion of the State's direct examination of Ms. Hannah-Truscott indicates:

Q. When you do this part of it, are you looking to actually re-interview them in a detailed fashion ?

A. ...Its difficult for them to talk about it in the first place and so we use what information we can from the forensic interviewer and add certain questions to make sure we are identifying the person that may have committed the assault, and to ask the child if there are any questions or concerns that they have. RP 614.

Ms. Hannah-Truscott in addition stated that “I like to validate the person who may have committed the assault. And I like to know if there is somebody else who may have done something to the child”. RP 617.

ARNP Hannah-Truscott is clearly not distinguishing her role as a medical role, but rather is assuming a role of an additional forensic investigator. Further, as defense counsel correctly raised in his objection, the statement by A.C. that Mr. Domingo abused her , made the same day as she made the same statement to the Prosecutor’s child interviewer Keri Arnold, is cumulative in that she imparts no additional evidence to that already found by Ms. Arnold. Given that repetition is not a valid test for veracity (*see Thomas v. French*, 99 Wn. 2d 95, 659 P. 2d 1097 (1983)), much of her testimony should have been excluded under ER 403 as its propensity to prejudice outweighed its probative value.

Further, her statement that her goal is to determine the individual who “may” be the perpetrator and her statement that she seeks to “validate” the person who may have committed the assault, and then her subsequent testimony that A.C. disclosed “Endy” [Mr. Domingo] is prejudicial in that it invades the province of the jury.

In *State v. Florczak*, a doctor examining the alleged victim stated, “when we give the child posttraumatic stress, it can be any traumatic event. It is secondary in this case...to sexual abuse”. *State v. Florczak, supra*, at 74. Since the two defendants in that case were the only individuals implicated as possible abusers, the above stated diagnosis amounted to an opinion that they were guilty, and “invaded the province of the jury”. *Id.* at 74. This was a manifest and constitutional error.*Id.* at 74.

In the instant case, Ms. Hannah-Truscott has implicitly diagnosed sexual abuse by stating that is seeking to determine who committed the assault, thereby rendering an opinion that abuse had occurred, and further she went beyond the doctor in *Florczak* by not only giving an opinion that abuse occurred, but by linking the defendant to the opinion but stating that she sought to “validate” the person who may have committed the assault and then by testifying that A.C. did identify the defendant.

C. The trial court abused its discretion in not allowing defense counsel to cross-examine the alleged victim A.C. about prior statements that she made at the defense interview that were transcribed that were inconsistent with her testimony.

Extrinsic evidence of a prior inconsistent statement is admissible once a proper foundation is laid. *State v. Horton*, 116 Wn. App. 909, 68 P.3d 1145 (2003);

ER 613(b). ER 613(b) states, in pertinent part, that extrinsic evidence of a prior inconsistent statement is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded the opportunity to interrogate the witness thereon....

On cross-examination of A.C. , defense counsel handed her Exhibit #5, which was entitled “Transcript of Interview of [A.C.]” and had her read the title. RP 518.

Defense4 counsel attempted to read from the transcript and question A.C. several times but the inquiry was objected to on hearsay grounds and the objection was sustained. RP 522-23. Defense counsel excepted to the ruling because he indicated because he was inquiring into testimony inconsistent with the document. RP 522. He had laid the foundation by identifying the document, A.C. was given the opportunity to explain or deny the statement, and the State’s prosecutor was available, in open court , to rehabilitate her testimony.

Defense counsel accordingly properly laid the foundation for A.C.’s prior inconsistent statements and yet was improperly not allowed to enter the statements on hearsay grounds.

D. The trial court abused its discretion under RCW 9A.44.120 and under *State v. Ryan*, 103 Wn. 2d 165, 691 P.2d 197 (1984) when it allowed the admission of child hearsay statements, and did not fully address issues of A.C.'s character, trustworthiness, and the spontaneity of her statements before ruling that the statements were reliable.

RCW 9A.44.120 state, in pertinent part relative to this case, the following:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another...not otherwise admissible by statute or court rule, is admissible in evidence in.....criminal proceedings...in the courts of the State of Washington 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 :

(a) Testifies in the proceedings.....

Nine factors are useful in determining reliability under RCW 9A.44.120.

State v. Ryan, 103 Wn. 2d 165, 691 P.2d 197 (1984). They are as follows:

(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)whether the statements were spontaneous;(5)whether trustworthiness is suggested by the timing of the statement and the relationship of the child and the witness; (6) whether the statement contains express assertions of past fact;(7)whether the child's lack of knowledge could be established through cross-examination; (8) whether the possibility of the child's recollection being faulty is remote; and (9) whether the surrounding circumstances suggest the child misrepresented the defendant's involvement. *Id.* Not every factor must be met, but

the factors as a whole must be substantially met. *State v. Woods*, 154 Wn. 2d 612, 623, 114 P.3d 1174 (2005).

In the instant case, the court admitted the child hearsay statement proffered by the State. The issue defendant has with the admission is not that not every factor was met, but that the court mischaracterized or ignored some of the evidence harmful to the State's case. In particular, both parents testified that A.C. had honesty issues. First, Mr. Cornelio testified that A.C. had been caught by him lying "in different types of lies" and that after being punished for lying she does it again. RP 24-25. His testimony could be considered unremarkable, except that it was corroborated in more strong and detailed terms by Ms. Croll. Mr. Croll noticed that A.C. had issues with lying since she was 3 years old. RP 94. She further noted in that context that she had a hard time controlling A.C.'s behavior because she was angry about her and Mr. Cornelio separating. RP 94. Ms. Croll also noted that A.C. steals "anything, candy from the store, or stuff from her cousin's house. I found out that she had stolen stuff from school, come home with things". RP 95. She further noted that this was a continuing problem and that "last weekend" (before the trial). she had been caught stealing from one of Mr. Cornelio's girlfriend's daughters. RP 96. Defense counsel then expressed concerns about this testimony, stating, "it's a definite mean point of this case....she is still stealing, which concerns the mother. And that goes to truth and veracity". RP 118.

Nevertheless, the next court date, when the court ruled on admissibility of A.C.'s hearsay statements, she stated, "The *Ryan* factor suggesting trustworthiness certainly is difficult with a 10 year old, given the age of the alleged victim and the ability of the court to assess character evidence...the Court finds no disputed testimony to suggest other than trustworthiness and the

first factor on whether there was an apparent motive to lie”. RP 142. The Court simply ignored this evidence.

The Court also had no comment as to the issue on the spontaneity of A.C.’s reporting of the abuse. Ms. Croll had testified that she had questioned A.C. “multiple times” ,prior to her disclosure of Mr. Domingo, if “anything had happened to her, or if anyone had done anything to her” because of her precocious sexual behavior. RP 99. Ms. Croll also said that her mother (A.C.’s maternal grandmother) had asked her also if she had been abused, and A.C. would deny any abuse and say she was acting out what she saw in movies. RP 100-01. Ms. Croll indicated that on the day that A.C. disclosed Mr. Domingo as the perpetrator, she had been on the phone talking about Mr. Cornelio to her sister and A.C. thought that she was accusing Mr. Cornelio of molesting her, causing her to say that it wasn’t her father that it was Endy. RP 98. The occurred the day after final dissolution papers were entered between A.C.’s mother and father. RP 87.

In the instant case, although A.C. repeated his identification of “Endy” [Mr. Domingo] as the perpetrator when her mother took her to forensic examinations, her initial identification of Mr. Domingo, her initial identification was made after years of pressure to admit she was sexually abused and to disclose the abuser. She disclosed Mr. Domingo’s name as a reaction to her misplaced thinking that her mother was accusing her father of molestation. A.C.’s statements accordingly were not spontaneous in that she had been told for years by both her mother and maternal grandmother that someone had molested her and that she was withholding information of molestation. In addition, given that A.C. thought her mother was

about to accuse her father of the molestation, she had a motive to lie—to protect her father. The court erred in not considering these circumstances in admitting the child hearsay.

E. There Is Insufficient Evidence To Support A Guilty Verdict When The Alleged Victim A.C. Repeatedly Denies The Instances of First Degree Rape When She Testifies In Court, Which Is Inconsistent With Her Statements In the Forensic Interview And When The Mother Testifies That A.C. Was Exhibiting Sexualized Behavior Several Months Before The Defendant Endy Allegedly Molested And Raped Her

In reviewing the sufficiency of the evidence in a criminal case, an appellate court views the evidence in a light most favorable to the State. *State v. Alexander*, 64 Wn. App. 147, 157, 822 P.2d 1250 (1992). If, under this standard, an appellate court concludes that any rational trier of fact could have made a finding of guilt beyond a reasonable doubt, it must uphold the verdict. *Id.* at 157 citing *State v. Scoby*, 117 Wn. 2d 55, 61, 810 P.2d 1358, 1362 (1991).

An appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of evidence. *State v. Thomas, supra*, at 996-97 (2004) citing *State v. Cord*, 103 Wn. 2d 361, 367, 693 P.2d 81 (1985).

Nevertheless, insufficiency of evidence has been found when the victim's testimony was inconsistent. See *State v. Alexander, supra*, at 158. In *Alexander*, the court found inconsistencies from the victim's testimony as to when the abuse occurred, and whether certain incidents that the victim had testified to, had occurred at all. *Id.* at 158.

In the instant case, A.C. had apparently told child interviewer Keri Arnold that Mr. Domingo had licked her vagina. RP 503. This was the basis for the first degree rape charge in this case. However, when A.C. testified in court, as the following portion of A.C.'s direct testimony indicates, she repeatedly denied that Mr. Domingo had touched any portion of her body with his mouth, as follows:

“ Q. Okay. Did he ever put his mouth or his tongue any place else on your body ?

A. Not that I remember.

Q. Do you remember talking to a woman with long hair and blue eyes in a room where it was video recorded ?

A. Yeah.

Q. About this?

A. Yeah.

Q. Okay. Do you remember talking to her about the things Endy did ?

A. Yeah.

Q. Do you remember if you told her that Endy licked you somewhere ?

A. Yeah.

Q. You do remember telling her that ?

A. Yeah

Q. OK. Where ?

A. Oh, I thought you meant like...like

Q. I probably didn't ask the question very well. But that's OK.
Did Endy lick you anywhere with his tongue ?

A. No.

Q. Okay. Do you remember telling the women in the room where it was recorded that he did lick you somewhere ?

A. No.

Q. So what is it that you thought that I meant ?

A. I thought that you meant like if I remembered that I said that he kissed me.

Q. Okay. So you do remember telling her that he kissed you ?

A. Yeah.

Q. But you don't remember telling her that he licked you somewhere ?

A. Yeah

Q. Do you remember telling her that he licked you in your private spot where you pee ?

A. No."

RP 503-505.

The filed Information indicates that the molestation and rape occurred between November 9, 2007 and November 8, 2009 (CP 1-2), which were the fourth and sixth birthdays of A.C. CP 3-4); RP 484. A.C. testified that she was four or five when these incidents occurred (RP 501), which is consistent with the Information.

Ms. Croll, however, observed precocious sexual behavior from A.C. several months before the alleged rape and molestation occurred. She had testified that she had moved out of Mr.

Cornelio's mobile home at the end of 2006 and the beginning of 2007. RP 546. She further testified that her first move was to her

cousin's home in Vancouver, Washington for a couple of months. RP 547.

Although she was only there for two months, she observed A.C. telling her cousin's children, who were about her age, how to play boyfriend and girlfriend

"telling them what to do", she observed A.C. "playing with herself" and she would play with her boyfriend/girlfriend dolls in bed together. RP 562.

Mr. Domingo did not start staying at Mr. Cornelio's home until Ms. Croll and the children moved out. RP 552. Accordingly, the sexual behavior of A.C. preceded the alleged dates of Mr. Domingo's sexual acts involving A.C.

F. The Prosecutor Engaged In Prosecutorial Misconduct In Closing Argument By Impermissibly Shifting The Burdens of Proof And Ignoring The Presumption Of Innocence, And By Commenting on the Alleged Victim's Demeanor, by Speculating On Witnesses' Motivations and Speculating on Witness' Knowledge of What Other Witnesses Would Be Testifying To and Inviting the Jury to Speculate On Such Motivation and Knowledge Not In Evidence.

Shifting the burden of proof in closing argument is prosecutorial misconduct.

State v. Warren, 165 Wn. 2d 17, 26 n. 3, 195 P.3d 940 (2008). In *Warren*, the prosecutor stated "And for them to ask you to infer everything for the benefit of the defendant is not reasonable" and she subsequently said, "Reasonable doubt does not give the defendant the benefit of the doubt and that is clear when you read the definition" and that the trial was a search for truth and not a search for doubt. *Id.* at 25. The court found this was prosecutorial misconduct, but that it was not sufficient for reversal because a curative instruction cured any possible prejudice. *Id.* at 455. Comments to the jury about circumstances outside of evidence, such as a witness' demeanor, are also improper. *State v. Smith*, 144 Wn. 2d 655, 30 P.3d 1245, 1252 (2001). A witness' statement is not corroborated or bolstered by the fact that he or she repeatedly made the same or similar statements out of court. *State v. Harper*, 35 Wn. App. 855, 857, 670 P.2d 296 (1983).

The prosecutor in the instant case stated as follows in her argument:

"...In considering [A.C.'s] credibility, that is central to this case, central to why we are here is [A.C.'s] credibility. Is she telling the truth ? Her demeanor, clearly, was quiet. She did not want to talk really at all unless she had to, but that was especially true, when she had to talk about the actual acts of abuse. Often, I submit to you, she would shut down, and, again, it is your job to determine her credibility. Its up to you to determine what you thought her demeanor was like.

But I submit to you that when it got to hard for her to talk any more, especially about what the Defendant did to her, she would kind of shut down, become closed off. And this is something that Ms. Croll testified that [A.C.] did back when [A.C.] told her and Ms. Croll tried to find out more. [A.C.] just kind of shut down. She didn't want to talk more about it. But consider this, her demeanor, contrast it to the forensic interview when you are thinking about this.....RP 676-77.

The prosecutor then notes, as if Endy is already presumed guilty that "...[A.C.] is having to talk about sexual acts that no one would want to talk about in front of others, especially strangers. She is having to talk about that here, and also *in front of the person that did it to her* [emphasis added]. So please keep that in mind when you are weighing how she appeared on the stand, and how she was able to testify, and things that she was able and not able to say". RP 677-78.

The prosecutor also argues improperly that A.C.'s delayed disclosure is evidence that (i) A.C. was abused and (ii) it was done by a close family member, which again improperly shifts the burden of guilt:

"There is also the issue of the family. This is another stem of the fear. Children sometimes have a fear that if I tell on this family member, what's it going to do to my family ? How is it going to affect how everyone acts around each other and the things that we do together. Everything will be different. It will change.....

So consider that the Defendant is [A.C.'s] father's nephew..." RP 681.

It is proper to argue that Mr. Domingo had proximity and opportunity, but it is not proper to imply that delayed disclosure and A.C.'s "fear" corroborates her testimony that she was abused and that it was done by a family member.

The prosecutor also improperly speculated on the thought processes and motives of State's witness Jose Cornelio, the uncle of Mr. Domingo, which thought processes and motives were not testified to, or even explored during trial, in explaining away why Mr. Cornelio stated that A.C. slept in his room with him when she stayed at his mobile home, rather than slept in the living room:

"[Mr. Cornelio] is certain, he maintained that [A.C.] always slept with him in his room, and the defendant, when he slept over, slept in the living room.....I submit to you that it is very likely, and again, this is up to you, its your decision to weigh people's credibility Mr. Cornelio does not want to believe that this could have happened. He does not want to believe that his daughter was touched by his nephew in his house. And so he want to make it seem as though it were not possible for it to happen..." RP 688.

The prosecutor earlier stated that A.C. knew that her father would contradict her testimony and tell "everyone" that she did not sleep in the living room, when there was no evidence of such knowledge on her part, and that somehow this knowledge was further evidence that she was not lying: "Why would [A.C.] lie about this if she knows obviously that her father was there as well and would be contradicting her, would be telling everyone that , no, A.C. slept in the bedroom at night with me, every single night that she was there?" RP 687-88.

On rebuttal, the prosecutor improperly tried to bolster A.C.'s testimony by relying on the repetition of her out-of-court statements: "[A.C] has continued to say over the years, and its been years, remember she is ten now, she has consistently said that she had been touched, she had to touch him, and he, the Defendant, is the one that did it". RP 711.

The numerous instances of prosecutorial misconduct are of a constitutional magnitude, denying Mr. Domingo the right to a fair trial, and mandating reversal, in that no curative instructions could have obviated the prejudice. This despite the fact that defense counsel failed to object to the misconduct.

G. Counsel Was Ineffective In His Representation of Defendant When He Failed To Raise The Issue of A.C.'s Truthfulness, Veracity, and Trustworthiness Prior To The Admission by the Court of the Child Hearsay Statements And The Granting of The State's Motion In Limine To Prevent Testimony From, Ms. Croll and Mr. Cornelio Regarding A.C.'s Lying and Stealing, When He Failed To Object To ARNP Hannah-Truscott's Prejudicial Statements About the Finding of Abuse And The Identification of Defendant As The Abuser, and When He Failed To Object To Prosecutorial Misconduct During Closing Argument.

To make a showing of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was deficient and (2) that counsel's deficient performance prejudiced him. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984); *State v. Brockob*, 159 Wn. 2d 311, 344-45, 150 P.3d 59 (2006).

In the instant case, as is evident above, defense counsel failed in numerous instances to properly challenge State motions and court orders that prevented him from inquiring into probative issues regarding A.C.'s credibility, or he failed to object to evidence that should not have been admitted, and prejudiced closing argument.

First off, the defense counsel did not object to the admission of A.C.'s child hearsay statements nor did he object to a motion in limine preventing him from inquiring of Ms. Croll and Mr. Cornelio regarding A.C.'s propensity to lie and steal, despite the fact that both testified that these were issues they observed in A.C. In preceding argument, counsel has already submitted that the court abused its discretion by admitting A.C.'s statement, despite these issues and despite evidence that the statements were not spontaneous, given Ms. Croll's constant pressure on A.C. to disclose an abuser.

In addition, the prosecutor filed a motion *in limine* to prevent any inquiry by defense counsel into A.C.'s propensity to lie and steal "as inadmissible character evidence". CP 35-39. Defense counsel indicated no objection. RP 146., A witness may not directly offer an opinion as to another witness' credibility. However, evidence of instances of prior misconduct related to truth and veracity may be introduced. ER 608 (b). *State v. O'Connor*, 119 P.3d 806, 814 (2005) *citing State v. Cochran*, 102 Wn. App. 480, 486-87, 8 P.3d 313 (2000); *State v. Kunze*, 97 Wn. App. 832, 859-60, 988 P.2d 977 (1999) ("specific instances of lying may be admitted whether sworn or unsworn, but their admission is highly discretionary under ER 608(b)).

An alleged child victims' propensity to lie and steal would be especially relevant in a child sexual abuse case, in which the credibility of the child witness is especially crucial. *See State v. Alexander, supra*, 64 Wn. App. 147 .

The prosecutor also divulged to the court, out of the presence of the jury, that Ms. Croll had stated in a defense interview that she suspected Mr. Cornelio of having had sexual relations with her sister Paige , who is under 16. RP 540. She moved to exclude a line of inquiry regarding this, and defense did not object. RP 540. This evidence may have potentially indicated a proclivity to suspect sexual abuse that was less than objective, which would go to the credibility of her testimony regarding A.C.'s purported sexualized behavior and her continued questioning of A.C. for years about abuse and an abuser before A.C. made a statement. Yet defense counsel failed to inquire.

As noted above, ARNP Hannah-Truscott made impermissible statements that amounted to a professional assumptions about the occurrence of both abuse and abuser that invaded the province of the jury. Defense counsel failed to object when Ms. Hannah-Truscott made those statements.

Finally, defense counsel failed to object to the prosecutor's several instances of prejudicial misconduct in closing argument, noted above.

As a result of these numerous failures to object by defense counsel, many important issues are being raised for the first time on appeal. Defendant was thus denied a fair trial and the trial court judgment should be reversed.

I. Cumulative Error Mandates a Reversal

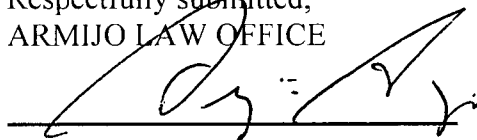
When there have been several trial errors that, standing alone, may not be sufficient to justify reversal, but together, deprive a defendant of a fair trial, reversal is in order. *State v. Greiff*, 141 Wn. 2d 910, 10 P.3d 390, 399, (2000). In the instant case, even if the errors presented individually, are insufficient to justify reversal, taken together, they mandate a new trial for the defendant Mr. Domingo.

V. CONCLUSION

Wherefore, appellant/defendant Mr. Domingo prays that the Court grant his appeal and reverse the judgment and sentence in this matter.

Date: April 16, 2014.

Respectfully submitted,
ARMIJO LAW OFFICE

A handwritten signature in black ink, appearing to read 'Sergio Armijo', is written over a horizontal line.

Sergio Armijo, WSBA #8663
Attorney for Defendant-Appellant
Endy Domingo-Cornelio

CERTIFICATE OF SERVICE

I, Sergio Armijo certify that I am counsel for defendant/appellant Endy Domingo-Cornelio, and in that capacity, I served counsel for plaintiff/appellee State of Washington with a copy of defendant/appellant's opening brief by placing it in a sealed envelope, with first class postage prepaid, and depositing it in the U.S. Mail on April 28, 2015, addressed as follows:

Kathleen Proctor
Pierce County Prosecuting Attorney Office
930 Tacoma Avenue South, Rm. 946
Tacoma, WA 98402-2171

Date: April 28, 2015

Sergio Armijo

Sergio Armijo
Certificant/Declarant

FILED
COURT OF APPEALS
DIVISION II
2015 APR 29 PM 1:03
STATE OF WASHINGTON
BY DEPUTY

I, Sergio Armijo, again certify that I am counsel for defendant/appellant Endy Domingo-Cornelio, and in that capacity, I served defendant/appellant Endy Domingo-Cornelio with a copy of defendant/appellant's opening brief by placing it in a sealed envelope, with first class postage prepaid, and depositing it in the U.S. Mail on April 28, 2015, addressed as follows:

Endy Cornelio, Inmate #375893
CA #47
Coyote Ridge Correction Center
P.O. Box 769
Connell, WA 99326

Date: April 28, 2015.

Sergio Armijo

Sergio Armijo
Certificant/Declarant