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No. 98544-8  
COA No. 78823-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

DOUGLAS JOSEPH WAMBA,

Petitioner.

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

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PETITION FOR REVIEW

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**RULES**

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A. IDENTITY OF PETITIONER

Douglas Wamba asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Douglas Joseph Wamba*, No. 78823-0-I (April 27, 2020). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. A defendant has a Sixth Amendment and article I, section 22 to the effective representation of counsel. A defendant is denied the effective assistance of counsel and is prejudiced by where his attorney failed to object to the testimony of a detective regarding the results of a cellphone examination where the analyst who tested the phone did not testify. Is a significant issue of law presented under the United States and Washington Constitutions where Mr. Wamba's attorney's failure to object resulted in the loss of his right to confront witnesses which prejudiced him?

2. The Confrontation Clause requires the prosecution offer an accused person the opportunity to cross-examine a witness who created incriminating testimonial evidence. Here, the prosecution failed to call the person who conducted the actual testing on the cellphone to testify at trial, but instead admitted the results through the investigating detective, who had nothing to do with the testing. The detective could only relate the testing and conclusions reached by the expert who actually conducted the testing. Is a significant issue presented under the United States and Washington Constitutions where Mr. Wamba's right to confront the witnesses against him was violated requiring reversal of his convictions?

#### D. STATEMENT OF THE CASE

Kelly Wamba was a mother of two young girls, S.L. and O.L., from a previous marriage that ended in 2011. RP 908-09. In 2010, Ms. Wamba met Douglas Wamba and the two were married in 2013. RP 910-13.

S.L. was a gymnast and Mr. Wamba would frequently give her back massages. RP 935, 1534-35. Most of these times S.L. would ask for the massages. RP 1535.

In December 2014, S.L. disclosed to a friend that Mr. Wamba had inappropriately touched her. RP 1540. In addition, S.L. sent a text to her mother, which Ms. Wamba forwarded to Mr. Wamba. RP 958, 1559.

Shortly after S.L.'s disclosure, Child Protective Services (CPS) and the police became involved. RP 967, 1562-63. Mr. Wamba was subsequently charged, but this case was dismissed in 2015 when S.L. recanted her allegations. RP 1031-32, 1585-86.

In July 2016, Ms. Wamba went to Yakima for a week long business trip leaving S.L. and O.L. with Mr. Wamba. RP 1047, 1593. While on this business trip, O.L. texted Ms. Wamba and disclosed Mr. Wamba had engaged in inappropriate conduct with her. RP 1439-40.

In August 2016, at the behest of O.L. and S.L., Mr. Wamba allegedly disclosed to Ms. Wamba that he had touched and acted inappropriately with the girls. RP 1081-83, 1473-74, 1647. O.L. also told a friend which resulted in a police investigation. RP 1477-81.

Mr. Wamba was subsequently charged with one count of second degree rape of a child, four counts of third degree rape of a child, two counts of second degree child molestation, and two counts of third

degree child molestation. CP 118-20. Following a jury trial, Mr.

Wamba was subsequently found guilty as charged. CP 83-91.

On appeal, Mr. Wamba argued his trial counsel was ineffective because he did not object to the violation of his right to confrontation when an investigating detective testified about the results of an examination of his cellphone by a lab technician.<sup>1</sup> The Court of Appeals rejected the argument, finding the attorney's decision not to challenge the testimony was tactical and that it would not have changed the result. Decision at 6-8. The Court also rejected a challenge to the prosecutor's closing argument. Decision at 3-4.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

**Mr. Wamba's attorney's ineffectiveness resulted in a violation of his Sixth Amendment right to confrontation.**

A criminal defendant has a Sixth Amendment and art. I, § 22 right to counsel. *Gideon v. Wainwright*, 372 U.S. 335, 343-44, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 58, 77 L.Ed. 158 (1932). The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397

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<sup>1</sup> This issue was raised in Mr. Wamba's Statement of Additional Grounds and decided by the Court of Appeals. Mr. Wamba relies on his Statement for the facts underlying his claim and incorporates them by reference herein.



U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

When raising an ineffective assistance of counsel claim, the defendant must meet the requirements of a two prong test: the defendant must show counsel's performance was deficient and, that the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687.

An attorney's decision is not a permissibly tactical or strategic one if it is not reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). While an attorney's decisions are treated with deference, his actions must be reasonable under all the circumstances. *Wiggins v. Smith*, 539 U.S. 510, 533-34, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003).

Further, the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee criminal defendants the right to confront and cross-examine witnesses. The Confrontation Clause "applies to 'witnesses' against the accused - in other words, those who 'bear testimony.'" *Crawford v. Washington*, 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (citation

omitted). It also “bars ‘admission of testimonial statements of a witness who did not appear at trial unless [the declarant] was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.’” *Davis v. Washington*, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), quoting *Crawford*, 541 U.S. at 53-54.

When a forensic analyst tests evidence and prepares a report for use in a criminal investigation, the substance of that report is “‘testimonial,’ and therefore within the compass of the Confrontation Clause.” *Bullcoming v. New Mexico*, 564 U.S. 647, 658-59, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011), quoting *Melendez-Diaz*, 557 U.S. 305, 317-21, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). The Confrontation Clause guarantees the defendant the opportunity to test through cross-examination the “honesty, proficiency, and methodology” of the analyst who actually performed the forensic analysis. *Melendez-Diaz*, 557 U.S. at 317-20. Accordingly, an analyst’s report may not be introduced into evidence by another witness who did not personally observe the testing of the substance. *Bullcoming*, 564 U.S. at 665.

Mr. Wamba contends his attorney rendered ineffective assistance which led to a violation of his constitutionally protected right

to confrontation. Further, Mr. Wamba contends his attorney's actions were not tactical and prejudiced him.

Mr. Wamba's trial attorney failed to object to the police detective's recitation of the results of the lab technician's analysis, thus constituting deficient performance. The failure to object was not tactical as the cellphone evidence formed the basis of the State's closing argument.

This Court should grant review to determine under circumstances such as here, when an attorney renders ineffective assistance for failing to object to the results of a lab technician's analysis where the lab technician does not testify.

#### F. CONCLUSION

For the reasons stated, Mr. Wamba asks this Court to grant review and reverse his convictions.

DATED this 14<sup>th</sup> day of May 2020.

Respectfully submitted,

*s/Thomas M. Kummerow*

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## APPENDIX

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

STATE OF WASHINGTON,  
  
Respondent,  
  
v.  
  
DOUGLAS WAMBA,  
  
Appellant.

No. 78823-0-I  
  
DIVISION ONE  
  
UNPUBLISHED OPINION

LEACH, J. — Douglas Wamba appeals his convictions for varying degrees of child rape and child molestation of his two stepdaughters. We affirm his convictions but remand to strike the community custody condition prohibiting him from searching the internet without permission, and strike the interest accrual on unpaid legal financial obligations.

**BACKGROUND**

Douglas Wamba's two stepdaughters, S.L. and O.L., accused Wamba of raping and molesting them several times. The State charged Wamba with multiple counts of child rape and child molestation. The jury convicted Wamba of nine counts of varying degrees of child rape and child molestation.

Wamba appeals. Additional facts related to the issues Wamba raises are set forth in the discussion of that issue.

## ANALYSIS

Wamba claims the prosecutorial conduct denied him a fair trial. He also challenges a community custody provision limiting access to the internet and a sentence provision imposing interest on unpaid financial obligations. Wamba received a fair trial, but his challenges to the sentence have merit.

### Prosecutorial Misconduct

Wamba claims the prosecutor acted improperly during closing arguments by commenting on evidence that the court did not admit for the truth of the statement's content and by commenting on the victims' credibility.

This court reviews a claim of prosecutorial misconduct under an abuse of discretion standard.<sup>1</sup> We evaluate the propriety of the prosecutor's conduct and whether any improper conduct prejudiced a defendant by reviewing a prosecutor's challenged statements in the context of the entire case.<sup>2</sup> To show prejudice, a defendant must demonstrate a substantial likelihood that the prosecutor's misconduct affected the outcome of the trial.<sup>3</sup> When a defendant fails to object to the challenged conduct, the defendant must show the conduct was so flagrant and ill-intentioned that a jury instruction could not have cured any resulting prejudice.<sup>4</sup> A prosecutor's misconduct may deny a defendant his or her constitutional right to a fair trial.<sup>5</sup>

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<sup>1</sup> State v. Ish, 170 Wn.2d 189, 195–96, 241 P.3d 389 (2010).

<sup>2</sup> State v. Thorgerson, 172 Wn.2d 438, 442–43, 258 P.3d 43 (2011).

<sup>3</sup> In re Glasmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012).

<sup>4</sup> Thorgerson, 172 Wn.2d at 443 (quoting State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994)).

<sup>5</sup> Glasmann, 175 Wn.2d at 703–04.

During closing arguments, the prosecutor referred to a text message that S.L. sent to her mother discussing Wamba's molestation of her:

We have the message that a 12-year-old [S.L.] sent her mother on December the 4th of 2014 that was subsequently forwarded from Kelly to the defendant. And this is one of several poignant moments in this case, when you look at the evidence, the way she described it, what she was concerned about.

DJ touched me inappropriate three times since the last time it was a dream, in quotes. I'm uncomfortable to be around him, knowing that he's touched me there. I get really nervous around him. I don't like to be alone with him. The reason it's happened so many times is because he didn't want me telling you and because I'm so nervous to tell him to stop. I like when he gives me back massages but he just goes too far. I don't like it. Never have. Never will. It's just so irritating. I'm 12. This is a 12-year-old, describing being molested and raped by her stepfather.

Wamba did not object.

The text message the prosecutor described was introduced through testimony from S.L.'s mother, Kelly. The court instructed the jury it was not to consider the text as proof of the truth of its contents. The prosecutor did not refer to S.L.'s text message for the truth of the matter asserted, but to show that Wamba had a pattern of trying to exert control over the victims. So, Wamba fails to show that the prosecutor made any improper argument about the text message.

Wamba next claims the prosecutor impermissibly commented on the victims' credibility. A prosecutor commits misconduct by personally vouching for a witness's credibility or veracity.<sup>6</sup> "Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) if the prosecutor indicates that evidence not presented at trial supports the

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<sup>6</sup> Ish, 170 Wn.2d at 196.

witness's testimony.”<sup>7</sup>

Wamba alleges these comments improperly vouched for the victims' veracity:

[S.L.] also, to a certain extent, not as marked as [O. L.] And before I move on, just a caution about that. And I don't even know if this is something I need to say, but I'm going to say it anyway. Please be careful in using your own preconceptions or assumptions about how someone should or would react to trauma.

And I don't know if you came into this experience with an idea in mind of how you think someone who had been raped or molested would react, how you think they would talk about it, how you think they would appear on the stand.

There was some discussion about that jury selection [sic] way back three weeks ago when we were talking about what do you do when you are assessing testimony from somebody you don't know, and some of your fellow prospective jurors reasonably said, well, I would pay attention to body language and how they react. And those are fair observations to make. But be real careful that you're not using your own preconceptions or your own notions about how you think someone should act or should react in assessing the testimony from the witnesses in this case.

The prosecutor's comments, of telling the jurors to be careful of their preconceptions or assumptions about how someone should react to trauma, does not express belief about the veracity of the victims or indicate that evidence not presented supports either victim's testimony. So, the prosecutor did not comment improperly. Wamba has not shown any prosecutorial misconduct.

#### Community Custody

Wamba next claims the community custody condition barring him from

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<sup>7</sup> Ish, 170 Wn.2d at 196.



access to the internet violates his constitutional right because it is unconstitutionally vague. He also claims the condition exceeds the trial court's sentencing authority because it is not crime related. Because the State fails to persuade us, that the condition is crime related, we do not reach Wamba's constitutional argument.

At sentencing, the court imposed the following condition of community custody:

Do not access the Internet on any computer, phone, or computer-related device with access to the Internet or on-line computer service except as necessary for employment purposes (including job searches) in any location, unless such access is approved in advance by the supervising Community Corrections Officer and your treatment provider. The CCO is permitted to make random searches of any computer, phone, or computer-related device to which the defendant has access to monitor compliance with this this condition.

The State agrees this condition must be crime related to survive Wamba's challenge.<sup>8</sup> We note the trial court did not make any finding that this condition was crime related. In State v. O'Cain, the court struck a condition prohibiting O'Cain from unapproved Internet access:<sup>9</sup>

There is no evidence in the record that the condition in this case is crime related. There is no evidence that O'Cain accessed the Internet before the rape or that Internet use contributed in any way to the crime. This is not a case where a defendant used the Internet to contact and lure a victim into an illegal sexual encounter. The trial court made no finding that Internet use contributed to the rape.<sup>[10]</sup>

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<sup>8</sup> RCW 9.9A703(3)(f).

<sup>9</sup> 144 Wn. App. 772, 774-75, 184 P.3d 1262.

<sup>10</sup> O'Cain, 144 Wn. App. at 775.

Similarly as here, the record contains no evidence that Wamba's criminal conduct was related to his use of the Internet. The State claims the use of internet contributed to his crimes because he talked to the mother through text messages and showed the victims inappropriate photos. The State does not explain how phone texting or photos on a cell phone equate to internet use. Because none of the events it relies on is specific to internet use, we remand to strike this community condition because it is not crime-related.

#### Legal Financial Obligations

Wamba challenges a provision providing for the accrual of interest on unpaid legal financial obligations (LFOs). Because the State concedes that this provision should be stricken, and since the law requires it,<sup>11</sup> we remand to strike the interest accrual on the LFOs.

#### Statement of Additional Grounds

Wamba claims, in his statement of additional grounds, that he received ineffective assistance of counsel when his attorney failed to examine the analyst, Tracy Youmans, who helped officers extract information from his cellphone. We review ineffective assistance of counsel claims de novo.<sup>12</sup> To establish such a claim, Wamba must show (1) defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness and (2) that the deficient performance prejudiced him: that there is a reasonable possibility that, but for counsel's deficient performance, the outcome of his trial would have been

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<sup>11</sup> State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

<sup>12</sup> In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

different.<sup>13</sup> Our scrutiny of defense counsel's performance is highly deferential, and we employ a strong presumption of reasonableness.<sup>14</sup> "To rebut this presumption, the defendant bears the burden of establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance.'"<sup>15</sup> Failure to satisfy either prong of the test defeats an ineffective assistance of counsel claim.<sup>16</sup>

Wamba states his counsel provided ineffective assistance by failing to call Youmans as a witness. But, he fails to establish the absence of any conceivable legitimate tactic explaining counsel's performance. First, Detective Steve Paxton testified for the State regarding Youmans' training and the report about the cellphone information. And, Wamba fails to explain how testimony from Youmans would not have been duplicative. Also, given the contents found on his cellphone, like text messages, his defense counsel may reasonably have decided not to revisit this subject or focus the jury's attention on the cellphone evidence. Wamba does not show that his attorney lacked any conceivable legitimate tactic for not calling Youmans.

Wamba next asserts that the State's failure to call Youmans to testify about the work she did in preparing her analysis of the cellphones deprived him of his constitutional right to confront his accuser. Wamba asserts that while the court in

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<sup>13</sup> State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing State v. Thomas, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987)).

<sup>14</sup> Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995).

<sup>15</sup> State v. Grier, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). (2011) (quoting Reichenbach, 153 Wn.2d at 130).

<sup>16</sup> Strickland, 466 U.S. at 697.

State v. Lui<sup>17</sup> would “most likely not have considered [Youmans] a ‘witness’ . . . for confrontation purposes,” her work “created factual information for use by the investigating detective” and later used by the State at trial. But, the court in Lui held that only an analyst who testifies about facts adverse to a defendant triggers a confrontation clause issue.<sup>18</sup> Because Youmans only created the report, and Paxton testified about adverse facts, Wamba’s argument fails. Also, Wamba fails to explain how Youmans’ testimony would have changed the outcome of the trial. So, the ineffective assistance of counsel claim fails.


CONCLUSION

We affirm in part and remand with instructions to strike consistent with this opinion. Wamba does not establish any prosecutorial misconduct. He also does not establish any absence of effective assistance of counsel. So, his challenges to his convictions fail. Because the community custody condition about internet use was unrelated to his criminal conduct, the condition is invalid. The condition providing for interest on unpaid legal obligations violates current law. We affirm Wamba’s convictions but remand to the trial court to strike the community custody condition and to strike the interest accrual on the LFOs.

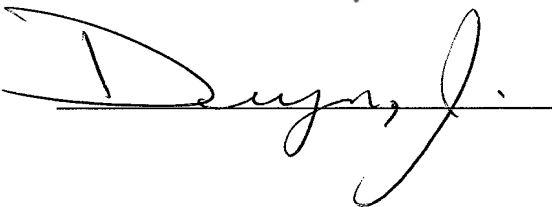
WE CONCUR:



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<sup>17</sup> State v. Lui, 179 Wn.2d 457, 315 P.3d 493 (2014).

<sup>18</sup> Lui, 179 Wn.2d at 489-90.

## DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 78823-0-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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