

70144-4

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NO. 70144-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

BRANDON EARL,

Appellant.

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

The Honorable Thomas J. Wynne, Judge

BRIEF OF APPELLANT

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COURT OF APPEALS
STATE OF WASHINGTON

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. <u>Procedural Facts</u>	2
2. <u>Substantive Facts</u>	2
a. <u>Witness Testimony</u>	2
b. <u>Forensic Evidence</u>	7
C. <u>ARGUMENT</u>	11
1. BY EXCLUDING IMPEACHMENT EVIDENCE SUPPORTING EARL’S THEORY OF THE CASE, THE COURT VIOLATED HIS RIGHT TO PRESENT A DEFENSE.....	11
a. <u>The Details of A.M.’s Childhood Abuse Were Relevant to Both A.M.’s and S.M.’s Credibility.</u>	13
b. <u>No Compelling Interest Justified This Infringement of Earl’s Right to Cross-Examine the State’s Witnesses.</u>	17
2. PROSECUTORIAL MISCONDUCT VIOLATED EARL’S RIGHT TO A FAIR TRIAL.	21
a. <u>A Prosecutor’s Repeated Use of “We” Statements Can Amount to Improper Vouching</u>	22
b. <u>The Repeated References to What “We Know” or “We Learned” During Closing Argument Were Prosecutorial Misconduct</u>	25

TABLE OF CONTENTS (CONT'D)

	Page
c. <u>Reversal Is Required Because the Theme of Closing Argument Aligned the Jury with the Prosecutor Against the Defendant in a Way that Could Not Be Cured by Instruction</u>	29
3. CUMULATIVE ERROR DEPRIVED EARL OF A FAIR TRIAL.....	32
D. <u>CONCLUSION</u>	33

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Hizey v. Carpenter</u> 119 Wn. 2d 251, 830 P.2d 646 (1992).....	19
<u>In re Pers. Restraint of Glasmann</u> 175 Wn.2d 696, 286 P.3d 673 (2012).....	22, 23, 25, 30
<u>Slattery v. City of Seattle</u> 169 Wn. 144, 13 P.2d 464 (1932).....	30
<u>State v. Allen S.</u> 98 Wn. App. 452, 989 P.2d 1222 (1999).....	14
<u>State v. Buttry</u> 199 Wn. 228, 90 P.2d 1026 (1939).....	31
<u>State v. Case</u> 49 Wn.2d 66, 298 P.2d 500 (1956).....	23, 30, 31
<u>State v. Charlton</u> 90 Wn.2d 657, 585 P.2d 142 (1978).....	21, 31
<u>State v. Coleman</u> 155 Wn. App. 951, 231 P.3d 212 (2010) <u>review denied</u> , 170 Wn.2d 1016, 245 P.3d 772 (2011)	23
<u>State v. Darden</u> 145 Wn.2d 612, 41 P.3d 1189 (2002).....	12, 17, 19
<u>State v. Davenport</u> 100 Wn.2d 757, 675 P.2d 1213 (1984).....	30
<u>State v. Dickenson</u> 48 Wn. App. 457, 740 P.2d 312 (1987).....	19
<u>State v. Emery</u> 174 Wn.2d 741, 278 P.3d 653 (2012).....	29, 30

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Fisher</u> 165 Wn.2d 727, 202 P.3d 937 (2009).....	29
<u>State v. Foster</u> 135 Wn.2d 441, 957 P.2d 712 (1998).....	14
<u>State v. Hudlow</u> 99 Wn.2d 1, 659 P.2d 514 (1983).....	12, 18
<u>State v. Ish</u> 170 Wn.2d 189, 241 P.3d 389 (2010).....	23
<u>State v. Johnson</u> 90 Wn. App. 54, 950 P.2d 981 (1998).....	13, 21, 32
<u>State v. Jones</u> 168 Wn.2d 713, 230 P.3d 576 (2010).....	11, 13, 16
<u>State v. Mak</u> 105 Wn.2d 692, 718 P.2d 407 (1986).....	14
<u>State v. Monday</u> 171 Wn.2d 667, 257 P.3d 551 (2011).....	23, 28
<u>State v. Newbern</u> 95 Wn. App. 271, 975 P.2d 1041 (1999).....	19
<u>State v. Peterson</u> 2 Wn. App. 464, 469 P.2d 980 (1970).....	19, 32
<u>State v. Reed</u> 102 Wn.2d 140, 684 P.2d 699 (1984).....	22, 24, 28
<u>State v. Rice</u> 48 Wn. App. 7, 737 P.2d 726 (1987).....	14
<u>State v. Rose</u> 62 Wn.2d 309, 382 P.2d 513 (1963).....	31

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Smith</u> 130 Wn.2d 215, 922 P.2d 811 (1996).....	19
<u>State v. Stith</u> 71 Wn. App. 14, 856 P.2d 415 (1993).....	30
<u>State v. Suarez-Bravo</u> 72 Wn. App. 359, 864 P.2d 426 (1994).....	30
<u>State v. Walker</u> 164 Wn. App. 724, 265 P.3d 191 (2011).....	30, 31
<u>State v. Wilder</u> 4 Wn. App. 850, 486 P.2d 319 (1971).....	12
 <u>FEDERAL CASES</u>	
<u>Berger v. California</u> 393 U.S. 314, 89 S. Ct. 540, 21 L. Ed. 2d 508 (1969).....	18
<u>Berger v. United States</u> 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314 (1935).....	21, 22
<u>Chambers v. Mississippi</u> 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).....	11, 18
<u>Crane v. Kentucky</u> 476 U.S. 683, 106 S. Ct. 2142, 90 L. Ed. 2d 636 (1986).....	16
<u>Davis v. Alaska</u> 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974).....	14
<u>Rock v. Arkansas</u> 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987).....	12
<u>Smith v. Phillips</u> 455 U.S. 209, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)	30

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>Taylor v. Illinois</u> 484 U.S. 400, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).....	17
<u>United States v. Barnard</u> 490 F.2d 907 (9th Cir. 1973)	20
<u>United States v. Bentley</u> 561 F.3d 803 (8th Cir. 2009)	27
<u>United States v. Brooks</u> 508 F.3d 1205 (9th Cir.2007)	23
<u>United States v. Edwards</u> 154 F.3d 915 (9th Cir. 1998).	24
<u>United States v. Nixon</u> 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).....	17
<u>United States v. Prantil</u> 764 F.2d 548 (9th Cir. 1985)	24
<u>United States v. Roberts</u> 618 F.2d 530 (9th Cir. 1980)	23
<u>United States v. Scheffer</u> 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998).....	20
<u>United States v. Younger</u> 398 F.3d 1179 (9th Cir. 2005).	26
 <u>OTHER JURISDICTIONS</u>	
<u>People v. Johnson</u> 149 Ill. App. 3d 465, 102 Ill. Dec. 835, 500 N.E.2d 728 (1986).....	25
<u>State v. Mayhorn</u> 720 N.W.2d 776 (Minn. 2006)	24, 28

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>State v. Spencer</u>	
81 Conn. App. 320, 840 A.2d 7 (Conn. Ct. App. 2004)	
<u>reversed in part on other grounds</u>	
275 Conn. 171, 881 A.2d 209 (Conn. 2005).....	25, 28

RULES, STATUTES AND OTHER AUTHORITIES

ER 401	13
U.S. Const. amend. V	11
U.S. Const. amend. VI	11
U.S. Const. amend. XIV	11, 22
Wash. Const. art. 1 § 3.....	22
Wash. Const. art. 1, § 22.....	11, 22

A. ASSIGNMENTS OF ERROR

1. The court violated appellant's constitutional right to present a defense when it excluded evidence that would have impeached the credibility of an essential state witness.

2. The prosecutor committed misconduct in closing that denied appellant a fair trial when he expressed a personal opinion on guilt, placed the prestige of his office in play, and unfairly aligned himself with the jury against appellant.

3. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. M.F.'s mother, who had been molested herself as a young child, accused appellant of molesting her daughter. The court permitted evidence that M.F.'s mother had been molested, but excluded the fact that her molester was a family member present the night she accused appellant. When this evidence would have corroborated the defense theory that the mother's accusation was the result of overreaction based on her own experience, did the court violate appellant's constitutional right to present a defense by excluding it?

2. In closing argument, the prosecutor told the jury it boggles the mind "that these crimes happened at all. We know it did. It happened to M.F." On several other occasions, the prosecutor's argument referred

to what “we know” about the case. Did the prosecutor unfairly align himself with the jury, invite the jury to consider the prestige of his office, and offer a personal opinion on guilt, thereby committing misconduct and violating appellant’s right to a fair trial?

3. When the prosecutor unfairly aligned himself with the jury and appellant was denied the ability to fully test the credibility of two crucial state’s witnesses, did cumulative error deprive appellant of the constitutional right to a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Snohomish County prosecutor charged appellant Brandon Earl with one count of first-degree rape of a child. CP 269. The jury found him guilty. CP 76. The court imposed an indeterminate sentence with a standard range minimum of 113 months and a maximum term of life. CP 33. Notice of appeal was timely filed. CP 1.

2. Substantive Facts

a. Witness Testimony

Until Christmas of 2010, there were no significant disputes or bad feelings between Earl’s family and his wife’s cousin A.M. RP 254, 351, 453, 506-07. The families spent holidays together and generally got on well. RP 255-57. On Christmas Eve 2010, Earl had worked part of the day and

wanted a quick nap in the midst of the family gathering taking place at the home he shared with his wife and her mother. RP 461, 482, 488, 502-03. He retired upstairs to his bedroom to rest and watch cartoons with the kids. RP 464.

Although they were not supposed to be upstairs, the children, including Earl's son Brandon and A.M.'s daughter M.F., had gathered in his bedroom. RP 371-72, 461, 508. According to his former wife, Earl was a "great daddy" and a "fun uncle," who played and wrestled with his son and the children in the extended family. RP 454, 499. Before settling in to rest, Earl played and wrestled with the children on the bed, blowing what he called "raspberries" on their bellies. RP 321; CP 208-09. The children were all called downstairs, but three-year-old M.F. apparently returned. RP 273; CP 209. A few minutes later, M.F.'s mother A.M. burst through the bedroom door. RP 274-75.

When A.M. realized M.F. was alone upstairs with Earl, she was immediately suspicious. RP 274-75. She purposely approached the room quickly and opened the door with no warning. RP 323-24. She "knew" something was wrong even before entering the room. RP 325. She claimed there was a commotion and she saw Earl readjusting himself on the opposite side of the bed from M.F. RP 279. Although everything looked normal and they were just watching television, A.M. was uneasy. RP 280, 324.

A.M. picked up her daughter and left. RP 284. On the way downstairs, M.F. said to her mother, "Brandon told me not to tell." RP 284. For A.M., this statement confirmed her suspicions. RP 327. She testified that, at that moment, "my heart is dying inside." RP 284. She took M.F. into the bathroom to talk to her privately, but M.F. did not reveal any more information. RP 284-85. A.M. said her daughter's clothing and demeanor were both normal. RP 285, 326.

A.M. then took her daughter into the kitchen, sat her on a stool next to A.M.'s mother, S.M., and told them not to move. RP 286. She then went to confront her cousin, Earl's wife, with her accusation. RP 286-87.

S.M. testified that she sat with M.F. for a few minutes and asked her what was going on or what she was doing. RP 360. M.F. gave an unremarkable answer such as "playing" or "watching t.v." RP 360. But when her grandmother continued to look at her quizzically, M.F. then leaned in and whispered, "He licked my pee-pee." RP 360. S.M. asked who, and M.F. answered, "Brandon." RP 362.¹

S.M. immediately left M.F. and went to find A.M. RP 365. She found her in the garage talking with Earl and his wife. RP 365. S.M. told them what M.F. said. RP 365. Earl repeatedly said, "No," and explained he

¹ A.M. testified there was no reason M.F. should be familiar with oral sex. RP 345.

was merely blowing raspberries on the children's tummies. RP 292, 365, 380.

Within 45 minutes of walking into the bedroom and finding M.F. alone with Earl, A.M. and her daughter went home. RP 337. As she got M.F. ready for bed, M.F. told her mother something about Earl getting up to close the door and said something to the effect of, "he made a mess down there." RP 296. A.M. saw nothing about M.F.'s clothing that would indicate any type of mess. RP 338.

A.M. also testified about another family gathering a few weeks before, a birthday party, during which M.F. and Earl were watching television in the bedroom shared by Earl, his wife, and their two-year old son. RP 274-75. A.M. testified she had a weird feeling on that occasion as well, but everything looked normal and she thought perhaps she was being ridiculous. RP 274-75, 340-41. Her unease was not due to anything Earl did. RP 341-42. She was not suspicious enough to try to keep M.F. away from Earl. RP 341. On the contrary, Earl and his wife babysat M.F. on a few occasions. RP 341. S.M. also recalled the birthday party where M.F. and Earl were in the bedroom. RP 367. She testified it was a general rule, nothing specific to Earl or M.F., that the doors be kept open. RP 368, 370-71. She testified it was not a big deal that M.F. and Earl were watching t.v. together. RP 367-68.

Despite her suspicions, neither A.M. nor her mother called the police or took M.F. to the hospital that night. RP 384. The next day, Christmas, they also did nothing. It was not until at least the day after Christmas that A.M. called CPS and, on the advice of an advocate there, took M.F. to the hospital for an examination. RP 298, 303, 344. A mandatory reporter, the nurse called law enforcement. RP 426. There were no physical findings. RP 398-99.

A.M.'s uncle molested her when she was a child. RP 135. After serving his sentence, the uncle was forgiven by the family and is now welcome at family gatherings. Id. Pre-trial exhibit 4 is a photograph of Christmas Eve, and shows the uncle who abused A.M. was present at the gathering. RP 136-37.

The State moved to exclude the evidence out of concern that another suspect would confuse the jury. Id. Defense counsel agreed this would not be used as other suspect evidence and suggested a limiting instruction to protect against jury confusion. RP 185, 200-02. The trial court limited Earl's cross-examination of A.M. to the fact of the abuse, excluding all details. RP 187.

Immediately after learning of the accusation, Earl called 911 requesting to give his side of the story. RP 534. He was interviewed several days later and voluntarily gave a DNA sample. RP 541, 640. His audio-

recorded statement was played for the jury. RP 551. He explained he was blowing raspberries on all the children's tummies, but M.F. is very small, and his mouth may have accidentally come into contact with her genitals for 30 seconds. He explained this would have been over her clothing. He lifted up her shirt to blow on her belly but otherwise M.F. remained clothed at all times. CP 222-31.

b. Forensic Evidence

A.M. also turned over to the Snohomish County Sheriff's Office the tights M.F. wore that night and two pairs of M.F.'s underwear. She was not certain which, if either, was the pair M.F. had worn on Christmas Eve. RP 303-04, 320.

Initially, the detective deemed M.F. too young for a forensic interview. RP 605-06. By the time she had become old enough, her memory was tainted by leading questions and suggestive interviewing by her mother. RP 605-06. By the time of trial, M.F. was five, but was found incompetent to testify due to her lack of independent recollection of the events. RP 35. The State relied on her statements to her mother and grandmother, Earl's interview with Detective Quick, and the DNA evidence.

The interior of one of the pairs of underwear tested positive for amylase, which indicates the presence of saliva or possibly other bodily fluids such as feces, breast milk, or urine. RP 667, 669, 672. The weakness

of the result could mean the amount of saliva detected was small, that the amylase was from another body fluid, or that the sample was insufficient. RP 748. The underwear were yellow stained and smelled noticeably of urine. RP 670-72. The other underwear were similarly stained but tested negative for amylase and no male DNA was found. RP 664, 682.

The exterior crotch area of M.F.'s tights was found to have mixed profile DNA from at least four sources. RP 686. The DNA was consistent with both M.F. and Earl, with one in 29 people being a possible contributor to the profile found on the tights. RP 686-88.

The ratio of female to male DNA found on the underwear was such that traditional DNA typing was impossible. RP 682-83. So the specimen was sent for Y-STR testing, which is limited to the Y chromosome found only in males. RP 683, 654-55. Forensic scientist Michael Lin testified the profile obtained from the underwear matched the reference sample from Earl, and the frequency of that profile in the general population, based on the database used, was no more frequent than one in 2,800. RP 781, 838, 845. Lin explained there was a 95% confidence interval, which meant that 95% of the time, this profile would be found less frequently than one in 2,800. RP 845-47. No more frequent than one in 2,800 includes the possibility that the profile is rarer. RP 845-46. Five percent of the time, it might be found to be more frequent than 1 in 2,800. RP 845-47.

The Y-STR database changes regularly as more samples are added. RP 817. With the addition of new samples, the frequency of a given profile can be more precisely stated. RP 818. The day trial began, Lin ran the profile again. This time, the result was a frequency of one in 4,400, nearly twice as rare as the initial finding. RP 847-48.

As the trial continued longer than expected, the database was updated again. RP 848. Lin conceded that if one of the new samples added to the database were similar or identical to Earl's, the frequency may very well increase. Over defense objection, Lin was permitted to run the profile against the database again and testify to the new frequency, no more than one in 5,200. RP 896-902.

The defense argued there were any number of ways Earl's DNA could have been transferred to M.F.'s underwear. First of all, his saliva may have been on her shirt from the raspberries, and all of her clothing spent four days together in a hamper before being turned over to the police. RP 297, 302. Witnesses also testified the upstairs was off-limits during the festivities because Earl's mother in law keeps a very clean house and has been very frustrated in the past with copious amounts of urine on the toilet and floor during family gatherings. RP 371-72, 478-79, 520-21. In using the same toilet, with her tights and underwear lowered, M.F.'s clothing could also have come into contact with Earl's bodily fluids. Hoffman agreed partly

dried urine on the outside of a toilet could transfer to clothing it came into contact with. RP 751. Finally, there were opportunities for cross-contamination while both Earl's reference sample and the sample from M.F.'s underwear were in the custody of the Washington State Patrol Crime Laboratory. The two samples were mailed from the Seattle lab to the Cheney lab in the same packaging. RP 773-74. The swabs were placed in paper envelopes, rather than being hermetically sealed. RP 595-96. In part of the DNA testing procedure Lin placed Earl's reference sample and the evidence in separate tubes that were in the amplification instrument at the same time. RP 778-79.

The scientists testified to various procedures they used to prevent cross-contamination, and defense expert Donald Riley conceded there was no actual evidence of cross-contamination in this case. RP 776, 950. However, Riley explained that when cross-contamination from a scientist occurs, it is often caught as an error because there is no reason the scientist's DNA should be in the evidence from the crime scene. RP 933. But when the cross-contamination involves the suspect's reference sample, there is no way to tell whether that is the result of cross-contamination. Any error is likely never to be discovered. RP 960.

Riley and the scientists who testified for the State were also in dispute over the implications of the quantity of male DNA found on the

underwear. Riley argued mere touch can account for relatively large amounts of DNA including up to 50 or 75 ng. RP 939, 957. Hoffman and Lin testified the 7 ng found on the underwear was significantly more than they would expect to find in a case where the only contact was touch, and was more consistent with transfer of bodily fluid. RP 693-96; 890.

Earl and his wife were already having marital problems when these accusations emerged. RP 477. The couple has since divorced and their separation dates from Christmas 2010. RP 453. Earl's former wife testified though the divorce was difficult, she and Earl now get along well. RP 454. She does not want to see him get in trouble and wants him to continue to be involved in their son's life. RP 454, 499.

C. ARGUMENT

1. BY EXCLUDING IMPEACHMENT EVIDENCE SUPPORTING EARL'S THEORY OF THE CASE, THE COURT VIOLATED HIS RIGHT TO PRESENT A DEFENSE.

Criminal defendants have the constitutional right to present evidence in their own defense and confront the State's witnesses. Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973); State v. Jones, 168 Wn.2d 713, 720, 230 P.3d 576 (2010); U.S. Const. amend. V, VI, XIV; Wash. Const. art. 1, § 22. In light of this essential constitutional due process protection, the trial court's exclusion of defense

evidence is subjected to a higher level of scrutiny, and whether the exclusion of defense evidence violates the right to present a defense is reviewed de novo. Jones, 168 Wn.2d at 719-20.

To protect the right of accused persons to defend themselves, courts have declared that relevant defense evidence is admissible unless the State can show a compelling interest to exclude it. State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002); State v. Hudlow, 99 Wn.2d 1, 15-16, 659 P.2d 514 (1983). Additionally, courts should grant defendants “great latitude in the cross-examination of prosecuting witnesses to show motive or credibility.” State v. Wilder, 4 Wn. App. 850, 854, 486 P.2d 319 (1971).

Defense evidence may not be excluded solely on the basis of procedural or evidentiary rules. Darden, 145 Wn.2d at 621-22. If the court believes defense evidence is barred by such rules, “the court must evaluate whether the interests served by the rule justify the limitation.” Rock v. Arkansas, 483 U.S. 44, 56, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). The restriction on defense evidence must not be arbitrary or disproportionate to its purpose. Id.

Once it is shown that the evidence is minimally relevant, the jury must be permitted to hear it unless the State can show it is “so prejudicial as to disrupt the fairness of the fact-finding process at trial.” Darden, 145 Wn.2d at 622. When evidence is of high probative value, “no state interest

can be compelling enough to preclude its introduction.” Jones, 168 Wn.2d at 720. Error in excluding relevant defense evidence or limiting cross-examination is presumed prejudicial unless no rational juror could have a reasonable doubt as to guilt. State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998).

The court ruled Earl could not cross-examine A.M. or her mother about several facts relevant to the credibility of their accounts of that evening. Although the court permitted the fact that A.M. had herself been sexually abused as a child, the court excluded the facts that 1) A.M.’s abuser was a family member, 2) A.M.’s mother had walked in on the abuse in much the same way A.M. walked in on Earl alone with M.F., and 3) A.M.’s abuser was present at the family gathering the night she and her mother heard M.F. accuse Earl. RP 183-87, 200-06. This unwarranted limitation on Earl’s ability to fully cross examine two crucial State’s witnesses regarding circumstances impacting the credibility of their interpretation of events violated his right to a fair trial and requires reversal.

a. The Details of A.M.’s Childhood Abuse Were Relevant to Both A.M.’s and S.M.’s Credibility.

Evidence is relevant when it has “any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401.

Relevance depends on “the circumstances of each case and the relationship of the facts to the ultimate issue.” State v. Rice, 48 Wn. App. 7, 12, 737 P.2d 726 (1987) (citations omitted). “Facts tending to establish a party’s theory of the case will generally found to be relevant.” Id. (citing State v. Mak, 105 Wn.2d 692, 703, 718 P.2d 407 (1986)).

Evidence offered to impeach a witness is relevant if it tends to cast doubt on the credibility of the person being impeached and the credibility of the person being impeached is a fact of consequence to the action. State v. Allen S., 98 Wn. App. 452, 459-460, 989 P.2d 1222 (1999).

While trial courts generally have wide discretion to rule on relevance, that discretion does not extend to excluding evidence directly relevant to impeaching the credibility of crucial state witnesses. The primary and most important component of the confrontation right is the right to conduct meaningful cross-examination as to circumstances affecting credibility. State v. Foster, 135 Wn.2d 441, 456, 957 P.2d 712 (1998); Davis v. Alaska, 415 U.S. 308, 315-18, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). The excluded evidence here was relevant because it casts doubt on the child hearsay testimony that formed the basis for the charge.

Earl’s theory of the case included that A.M. and her mother were predisposed to believe the worst and jump to conclusions because of abuse A.M. had suffered herself as a child. But the court excluded several of the

most relevant details of that prior abuse. A.M.'s abuser was a family member. RP 183. This fact was relevant to A.M.'s credibility, as well as her mother's because it makes it more likely they were predisposed to believe a family member could or would do something like this.

Also, the incident in A.M.'s childhood was stopped when her mother walked in. RP 186. That scenario that is so akin to what happened in this case that it also makes it more likely A.M. and her mother, faced with nearly identical circumstances, jumped to the same conclusion in this case.

Most importantly, the uncle who abused A.M. years ago, and was discovered by her mother, was present in the home that evening. RP 136-37. That fact makes it far more likely that the prior abuse was in the forefront of their minds, putting A.M. and her mother on high emotional alert and making them more likely to interpret events in light of what happened years ago instead of what was actually happening at the time.

The presence of A.M.'s abuser in the home would also have impeached A.M. and her mother regarding their supervision of M.F. that evening. A.M. testified that for 15 minutes she did not know the whereabouts of her own daughter. RP 200-02. S.M. later left the child in the kitchen to find A.M. and report what she had heard. RP 365. Given that the very man who abused A.M. as a child was present in the house that evening,

the jury could have questioned whether A.M. and her mother would really have left M.F. unsupervised. RP 202.

This evidence should have been permitted because it related directly to the circumstances in which the allegations arose. See Jones, 168 Wn.2d at 717, 721 (defense's account of events "contemporaneous with an alleged criminal act" was highly relevant and should not have been excluded under rape shield statute). Evidence about the circumstances of the allegations is akin to testimony "about the physical and psychological environment in which [a] confession was obtained." Crane v. Kentucky, 476 U.S. 683, 684, 106 S. Ct. 2142, 2143, 90 L. Ed. 2d 636 (1986). Such evidence is "germane to its probative weight." Id. at 688. Similarly, Earl was entitled to elicit, from A.M. and her mother, their testimony about the psychological environment in which they came to believe he had molested M.F. The manner in which the accusation arose is germane to the probative weight of their testimony.

The evidence was directly relevant to the credibility of both A.M. and her mother. It was necessary to show how their previous experience and emotional state was likely to color their perception of events and their interpretation of M.F.'s statements. The jury was entitled to have that information when it assessed the credibility of their testimony. Without it,

Earl was denied a meaningful ability to cross-examine a crucial state's witness.

b. No Compelling Interest Justified This Infringement of Earl's Right to Cross-Examine the State's Witnesses.

Relevant defense evidence must be admitted unless there is a compelling state interest to exclude prejudicial or inflammatory evidence. Darden, 145 Wn.2d at 621-22. “[T]he burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial.” Id. The court must then balance the state's interest against the defendant's need for the information, and may not exclude it unless the state's interest outweighs the defendant's need. Id. Here, the evidence would have enhanced, rather than disrupted, the factfinding process and there is no state interest that could match the defense's need to test the credibility of these crucial witnesses.

In general, limiting cross-examination does not improve the accuracy of the fact-finding process. “The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.” Taylor v. Illinois, 484 U.S. 400, 408-09, 108 S. Ct. 646, 653, 98 L. Ed. 2d 798 (1988) (quoting United States v. Nixon, 418 U.S. 683, 709, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974)). Any “significant diminution” of the right to cross-examine adverse

witnesses “calls into question the ultimate ‘integrity of the fact-finding process’ and requires that the competing interest be closely examined.” Chambers, 410 U.S. at 295 (quoting Berger v. California, 393 U.S. 314, 315, 89 S. Ct. 540, 541, 21 L. Ed. 2d 508 (1969)).

The prosecutor argued the State would be prejudiced because if the jury were to hear a convicted sex offender was present at the Christmas Eve gathering, it would wonder what was wrong with this family. RP 203. The State’s concern for the family is an improper consideration: “[T]he balancing process should focus not on potential prejudice and embarrassment to the complaining witnesses, but instead should look to potential prejudice to the truthfinding process itself.” Hudlow, 99 Wn.2d at 13. That the circumstances of the allegation reflect poorly on the family making the allegations does not disrupt the fairness of the fact-finding process.

The prosecutor also argued, and the trial court appeared to agree, the jury would be confused by the seeming presentation of another suspect. RP 183, 187. This decision was manifestly unreasonable in light of defense counsel’s agreement not to use this as other suspect evidence and offer of a limiting instruction to ensure the jury was not confused. RP 185, 200-02, 205. The jury is presumed to follow the court’s instructions not to be swayed by passion or prejudice, to disregard excluded information, and to

use information only for limited purposes. RP 205; Hizey v. Carpenter, 119 Wn. 2d 251, 271, 830 P.2d 646 (1992) (jury presumed to follow curative instruction if judge inadvertently comments on the evidence); State v. Newbern, 95 Wn. App. 271, 297, 975 P.2d 1041, (1999) (jury presumed to follow curative instructions). The possibility that the jury might, contrary to legal presumption, disregard these instructions is not a state interest that could warrant limiting Earl's right to defend himself.

Even assuming there was some minimal prejudice to the State from this information, it cannot begin to outweigh Earl's need to fully test the credibility of the only witnesses who heard M.F.'s descriptions of what happened. "[T]he more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters." Darden, 145 Wn.2d at 619 (citing State v. Dickenson, 48 Wn. App. 457, 466, 740 P.2d 312 (1987)).

The opportunity to challenge witness credibility is particularly critical in two circumstances: (1) where a case rests essentially on the trier of fact believing or disbelieving one witness or (2) where the offense at issue is a sex offense. State v. Smith, 130 Wn.2d 215, 227, 922 P.2d 811 (1996); State v. Peterson, 2 Wn. App. 464, 469 P.2d 980 (1970). For sex crimes, the opportunity to challenge credibility is particularly important because "owing

to natural instincts and laudable sentiments on the part of the [trier of fact], the usual circumstances of isolation of the parties involved . . . and the understandable lack of objective corroborative evidence the defendant is often disproportionately at the mercy of the complaining witness' testimony." Id. at 466- 467. Both of these circumstances exist in this case.

Because M.F. was not competent to testify, the verdict rested on the credibility of one witness who could not be cross-examined at all. A.M. and her mother were critical witnesses for the State because they were the only two people to hear M.F.'s statements about what happened. After such a long passage of time, they did not always recall her exact words. RP 325-26, 346, 377, 415, 445. Thus, it was essential for the jury to see the emotional backdrop to the evening's events and the lens through which these adults interpreted a child's statements.

"A fundamental premise of our criminal trial system is that "the *jury* is the lie detector." United States v. Scheffer, 523 U.S. 303, 313, 118 S. Ct. 1261, 1266-67, 140 L. Ed. 2d 413 (1998) (quoting United States v. Barnard, 490 F.2d 907, 912 (9th Cir. 1973)). Defendants must be able to fully cross-examine witnesses so that the jury may properly perform that function. The court did not identify a compelling interest that required limiting Earl's cross-examination of M.F.'s mother or excluding the fact that her own abuser was present the night she accused Earl. Depriving the jury of factual

evidence directly relevant to bias and credibility of these crucial state witnesses violated Earl's Sixth Amendment rights to present a defense and to confront witnesses.

This violation is presumed prejudicial unless the evidence is so overwhelming that no reasonable juror could have come to any other conclusion. Johnson, 90 Wn.App. at 54, 69. That is not the case here. M.F.'s description of events was cobbled together from ambiguous statements made at different times that may not have even referred to the same incidents. Earl provided reasonable alternate explanations for the forensic evidence and his conduct that evening. The presence of A.M.'s abuser that evening was likely to affect both A.M.'s and S.M.'s perception and interpretation of events and the credibility of their testimony. This denial of Earl's constitutional right to defend himself requires reversal.

2. PROSECUTORIAL MISCONDUCT VIOLATED EARL'S RIGHT TO A FAIR TRIAL.

The prosecutor, as an officer of the court, has a duty to see the accused receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). When there is a substantial likelihood the prosecutor's misconduct affected the jury's verdict, the right to a fair trial and the right to be tried by an impartial jury are violated. Charlton, 90

Wn.2d at 664-65; State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984); U.S. Const. amend. XIV; Wash. Const. art. 1, §§ 3, 22.

The prosecutor here committed misconduct in closing argument by improperly aligning himself with the jury, placing the prestige of his office in the balance, and expressing a personal opinion on the complainant's credibility and Earl's guilt. Reversal is required, despite the lack of objection, because the misconduct was incurable by instruction and substantially likely to affect the verdict.

a. A Prosecutor's Repeated Use of "We" Statements Can Amount to Improper Vouching.

Prosecutors are prohibited from using the power and prestige of their office to sway the jury. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 706, 286 P.3d 673 (2012). The average jury has confidence the prosecutor will fulfill her duty to refrain from methods calculated to produce a wrongful result. Berger, 295 U.S. at 88. "Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Id. What the prosecutor says, and how it is said, is likely to have significant persuasive force with the jury. Glasmann, 286 P.3d at 679.

A prosecutor commits misconduct in vouching for a witness. State v. Coleman, 155 Wn. App. 951, 957, 231 P.3d 212 (2010), review denied, 170 Wn.2d 1016, 245 P.3d 772 (2011). Improper vouching occurs when the prosecutor places the prestige of the government behind the witness or expresses a personal belief as to the witness' truthfulness. Id. (citing United States v. Roberts, 618 F.2d 530, 533 (9th Cir. 1980); State v. Ish, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (citing United States v. Brooks, 508 F.3d 1205, 1209 (9th Cir.2007))).

Nor may the prosecutor invoke the prestige of his or her office to vouch for the strength of the State's case against the defendant. A fair trial "certainly implies a trial in which the attorney representing the state does not throw the prestige of his public office . . . and the expression of his own belief of guilt into the scales against the accused." State v. Monday, 171 Wn.2d 667, 677, 257 P.3d 551 (2011) (quoting State v. Case, 49 Wn.2d 66, 71, 298 P.2d 500 (1956)). Specifically, in a criminal case, the prosecutor is forbidden from expressing a personal opinion on, or using the prestige of his or her office to vouch for a defendant's guilt. Glasmann, 286 P.3d at 679.

"Akin to the rule against vouching is the advocate-witness rule, under which attorneys are generally prohibited from taking the witness stand to testify in a case they are litigating." United States v. Edwards,

154 F.3d 915, 921 (9th Cir. 1998). Both rules are “designed to prevent prosecutors from taking advantage of the natural tendency of jury members to believe in the honesty of lawyers in general, and government attorneys in particular, and to preclude the blurring of the ‘fundamental distinctions’ between advocates and witnesses.” Id. at 922 (citing United States v. Prantil, 764 F.2d 548, 554 (9th Cir. 1985)). Vouching is inappropriate because it invites the jury to assume the State’s witnesses bear a special seal of trustworthiness.

It is also misconduct for the prosecutor to make comments “calculated to align the jury with the prosecutor and against the [accused].” Reed, 102 Wn.2d at 147. Such alignment also blurs the proper roles of neutral factfinder and zealous advocate in the adversary process. This alignment may occur in an obvious manner. See id. at 147 (prosecutor argued defendant’s counsel and expert witnesses were outsiders driving expensive cars). Or it may occur by subtler but no less effective means.

For example, it is improper for a prosecutor to align herself with jurors by making continuous references to “we” and “us” as though jurors and the prosecutor were one and the same or on the same side. State v. Mayhorn, 720 N.W.2d 776, 790 (Minn. 2006); State v. Spencer, 81 Conn. App. 320, 329, 329 n.6, 840 A.2d 7 (Conn. Ct. App. 2004), reversed in

part on other grounds, 275 Conn. 171, 881 A.2d 209 (Conn. 2005); People v. Johnson, 149 Ill. App. 3d 465, 468, 102 Ill. Dec. 835, 500 N.E.2d 728 (1986) (prosecutor unfairly aligned himself with jury by referring to “our job” to find the facts).

b. The Repeated References to What “We Know” or “We Learned” During Closing Argument Were Prosecutorial Misconduct.

The presence of misconduct and its prejudicial effect are determined in the context of the record and the circumstances of the trial as a whole. Glasmann, 286 P.3d at 678. During closing argument, the prosecutor committed misconduct in repeatedly using the personal pronoun “we” in a manner that amounted to improper expressions of vouching, personal opinion and alignment.

First, the prosecutor made several “we” statements regarding what “we” know, based on witness testimony, thereby suggesting to the jury that “we,” i.e. the prosecutor and his office, know which witness is telling the truth:

- “I know it’s hard to wrap your mind around the fact that how could someone be so bold and so stupid to do this during a Christmas party. That does boggle the mind, but so does the fact that these crimes happened at all. *We know* it did. It happened to [M.F.]” RP 977.

- “He said he had never been alone with [M.F.] ever before this incident. It’s on the tape. You can hear it for yourself. *We know* that’s not true because of what *we learned* about that birthday party in the garage that happened a few weeks before all this in which *we have multiple witnesses* saying that [Earl] was alone with [M.F.] during that time. RP 981.
- “The defendant said that there were jeans or slacks on that child. *We know* that’s not the case.” RP 989.
- “The defendant said that there would be no reason – no reason – for his saliva, for his DNA, to be on the inside of that little girl’s underwear. What have *we just found out* through a meticulous, rigorous course of testimony over the past week? *We found out* that, in fact, the defendant was wrong about that.”

The repeated use of the phrase “we know,” “we learned,” “we found out,” suggests the jury need not even consider the credibility of these witnesses because “we know” what happened. A prosecutor’s use of “we know” statements in closing argument is not condoned because such statements blur the line between legitimate summary and improper vouching. United States v. Younger, 398 F.3d 1179, 1191 (9th Cir. 2005). “The question for the jury is not what a prosecutor believes to be true or

what ‘we know,’ rather, the jury must decide what may be inferred from the evidence.” Id. The prosecutor may summarize evidence admitted at trial and draw reasonable inferences from that evidence. But the use of “we know” is improper “when it . . . carries an implied guarantee of truthfulness, or expresses a personal opinion about credibility.” United States v. Bentley, 561 F.3d 803, 812 (8th Cir. 2009). The repeated use of “we know” conveyed the prosecutor’s opinion and guarantee in this case, thereby tainting the jury against Earl.

The prosecutor’s use of “we” also appears to include the jury in that first person plural, aligning the prosecutor and the jury on the same side as investigators out to find the truth. Several other examples demonstrate how the prosecutor’s use of “we” unfairly aligned him with the jury against Earl, thereby drawing the jury toward partiality and bias:

- “She happened to describe, over the course of that evening, an act which, as adults, *we probably all recognize* to be something that happened, but *we probably don’t recognize* that it happens all the time to little kids.” RP 971.
- “Sometimes it’s difficult to talk about these things, and I hope you can get over that in your deliberations, but *we need to confront* what this allegation is.” RP 990.

- “So this is an illustrative graph of those three data points. *Are we starting to see a trend* here? What’s that number going to look like in five years from now or 10 years from now when the database is significantly bigger?” RP 996-97.

These arguments blur the line between advocate and fact-finder by repeatedly identifying the prosecutor with the jury and uniting their two perspectives by referring to what “we know” and what “we” can “see.” A prosecutor cannot describe herself and the jury as a group of which the accused is not a part. Reed, 102 Wn.2d at 147; Mayhorn, 720 N.W.2d at 790. Because a prosecutor is not a member of the jury, a prosecutor’s use of pronouns like “we” and “us” is inappropriate and may be an effort to appeal to the jury’s passions. Mayhorn, 720 N.W.2d at 790; Spencer, 81 Conn. App. at 329, 329 n.6. Such phrasing is also inappropriate because the prosecutor makes an issue of his own credibility and belief in the State’s witnesses.

A prosecutor functions as the representative of the people in a quasi-judicial capacity in a search for justice. Monday, 171 Wn.2d at 676. “Defendants are among the people the prosecutor represents.” Id. By repeated use of the pronoun “we,” the prosecutor made clear he was part of a group that included his office, the witnesses, and the jury, but not the defendant.

- c. Reversal Is Required Because the Theme of Closing Argument Aligned the Jury with the Prosecutor Against the Defendant in a Way that Could Not Be Cured by Instruction.

In many instances the prosecutor's choice of language, taken in isolation, does not amount to much. But considered as a whole, the repeated use of such language creates a consistent theme with inflammatory effect. It creates an environment in which the prosecutor not only injects his personal beliefs and the prestige of his office into the trial, but also sets up the jurors against Earl by aligning them with the prosecutor's perspectives and opinions before deliberations even begin.

Defense counsel did not object to any of the argument cited above. In the absence of objection, appellate review of prosecutorial misconduct appropriate when the misconduct is so flagrant and ill intentioned that no curative instruction could have erased the prejudice. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). The focus is "less on whether the prosecutor's misconduct was flagrant or ill intentioned and more on whether the resulting prejudice could have been cured." State v. Emery, 174 Wn.2d 741, 762, 278 P.3d 653 (2012). The touchstone of due process analysis is the fairness of the trial: regardless of whether the prosecutor deliberately committed misconduct, did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process

clause? State v. Davenport, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984) (citing Smith v. Phillips, 455 U.S. 209, 219, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)).

“The criterion always is, has such a feeling of prejudice been engendered or located in the minds of the jury as to prevent a [defendant] from having a fair trial?” Emery, 174 Wn.2d at 762 (quoting Slattery v. City of Seattle, 169 Wn. 144, 148, 13 P.2d 464 (1932)). Even though the jury is presumed to follow the instructions of the trial court, prosecutorial misconduct in some circumstances can be so prejudicial that neither objection nor instruction can cure it. State v. Stith, 71 Wn. App. 14, 23, 856 P.2d 415 (1993) (prosecutor’s personal assurance of defendant’s guilt was flagrant misconduct requiring reversal). The cumulative effect of misconduct can overwhelm the power of instruction to cure. Glasmann, 286 P.3d at 679; Case, 49 Wn.2d at 73; State v. Walker, 164 Wn. App. 724, 737, 265 P.3d 191 (2011); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Looking at each individual comment in isolation, a case could be made that instruction could have cured any prejudice. But that is not how repetitive misconduct is reviewed on appeal. Repeated instances of misconduct and their cumulative effect must be considered as a whole.

See Walker, 164 Wn. App. at 738 (improper comments used to develop theme in closing argument impervious to curative instruction).

The prosecutor here made the improper comments not just once or twice, but frequently. She used them to develop a theme of vouching for the State's witnesses, expressing personal opinions on their truthfulness and Earl's guilt, and aligning the prosecutor and his office with the State's witnesses and the jury against Earl.

"The best rule for determining whether remarks made by counsel in criminal cases are so objectionable as to cause a reversal of the case is, Do the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by these remarks." State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963) (quoting State v. Buttry, 199 Wn. 228, 251, 90 P.2d 1026 (1939) (internal quotation marks omitted)). If this Court is unable to conclude from the record whether the jury would or would not have reached its verdict but for the misconduct, then it may not deem it harmless. Charlton, 90 Wn.2d at 664. To determine whether misconduct warrants reversal, the courts consider its cumulative effect on the jury. Case, 49 Wn.2d at 73.

The cumulative effect is magnified when the criminal charge is sexual abuse of a child. Such cases readily inflame the jury's passion and

prejudice, which can arise at the very thought that such a thing could happen to a child. Peterson, 2 Wn. App. at 466- 467. The prosecutor's argument subtly tapped into and made use of the jury's natural inclination towards hatred and fear of the child molester.

These improper considerations may have tipped the scales, when there were reasonably possible explanations for the presence of Earl's DNA, which could have come from contamination from the toilet used by the entire family or from saliva from the raspberries he blew on her shirt being transferred in the laundry pile to the underwear. The evidence was not overwhelming, and there is a substantial likelihood that the improper arguments caused subtle prejudice that could not have been cured by instruction and that tipped the scales against Earl. His conviction should be reversed.

3. CUMULATIVE ERROR DEPRIVED EARL OF A FAIR TRIAL.

Even if, taken individually, the errors complained of above would not warrant reversal, their cumulative effect does. The cumulative effect of denial of right to impeach State's witnesses combined with improper admission of evidence that undermines defense credibility can amount to cumulative error that requires reversal. Johnson, 69 Wn. App. at 74. Here, the scale upon which the jury weighed the evidence was not even. The

prosecutor's improper argument placed a thumb on the scale on the State's side. And the exclusion of relevant impeachment evidence for a crucial State's witness deprived the defense of heft it could have placed on Earl's side. Taken together, the prosecutorial misconduct and the violation of Earl's right to present a defense rendered his trial unfair and reversal is required.

D. CONCLUSION

The infringement of Earl's right to present a defense and the prosecutor's misconduct during closing argument rendered his trial unfair. He requests this Court reverse his conviction.

DATED this 17th day of July, 2013.

Respectfully submitted,

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 70144-4-1
)	
BRANDON EARL,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 17TH DAY OF JULY, 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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- [X] BRANDON EARL
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SIGNED IN SEATTLE WASHINGTON, THIS 17TH DAY OF JULY, 2013.

X *Patrick Mayovsky*