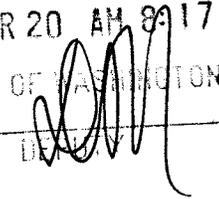


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STATE OF WASHINGTON  
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NO. 37309-2-II  
Cowlitz County No. 06-1-00634-5

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**AMBROGINO G. FANELLI**

**Appellant.**

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**BRIEF OF APPELLANT**

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*P.M. 4/13-2009*

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**A. ASSIGNMENTS OF ERROR**

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**IV. CUMULATIVE ERROR DENIED MR. FANELLI A FAIR TRIAL.**

**C. STATEMENT OF THE CASE**

The Cowlitz County Prosecuting Attorney charged Ambrogino

“Gio” Fanelli with Child Molestation in the First Degree. CP 30-31. For

reasons not germane to this appeal, the pre-trial litigation of the case lasted for quite some time. The alleged victim in this case was Mr. Fanelli's step daughter, H.W. RP (10-9-06), p. 113. Amber Fanelli is H.W.'s mother and Ian Wood is H.W.'s father. RP (10-9-06), p. 128. Amber was sixteen when she had H.W. RP (10-9-06), p. 112-13. Amber and Ian were briefly married but the marriage ended after about three months. RP (10-9-06), p. 128. Their divorce was extremely contentious. RP (10-9-06), p. 128-137, RP (12-18-07), p. 68, 160. Amber called CPS to allege abuse by Ian against H.W. RP (10-9-06), p. 128-139. Amber also took H.W. to the emergency room when she was two because she feared she was being molested. Id. at 115, 134. Amber began a relationship with Gio in February of 2004 and they later married. RP (12-18-07), p. 152. Ian had primary physical custody of H.W. after Amber voluntarily relinquished it. RP (12-18-07), p. 160. She relinquished custody because she didn't have a job or a house or any means of support. RP (12-18-07), p. 161. Amber had visitation with H.W. RP (12-18-07), p. 69. Amber had visitation from Monday through Friday every other week. RP (12-18-07), p. 69.

When H.W. was four years-old she allegedly told her father that Gio "choked" her. RP (10-6-06), p. 89-90. When questioned by her father, she said that Gio chokes her with his "weenie." RP (10-6-06), p. 90. Ian waited three weeks to report the allegation to the police because

he wasn't sure he believed H.W. RP (12-18-07), p. 84, 94 . In fact, Ian continued to send H.W. back to Amber and Gio's home for visitation until he called the police. RP (12-18-07), p. 84. After reporting the allegation to the police H.W. was interviewed twice by Detective Shallert of the Cowlitz County Sheriff's Department. RP (10-9-06), p. 8-70. A second interview was conducted because the Cowlitz County Prosecuting Attorney insists on having a deputy prosecutor present for interviews of child victims but no deputy prosecutor showed up for the first interview, forcing H.W. to submit to a second interview. RP (12-19-07), p. 120-21. Neither of these interviews was recorded by audio or video because the Cowlitz County protocol won't allow it. RP (12-20-07), p. 98. Ian did not take H.W. for a medical examination at any time in response to these allegations. RP (12-18-07), p. 85.

At the Ryan and competency hearing Mr. Fanelli was represented by a different attorney than the one who eventually represented him at trial. H.W. had just turned five at the time of the Ryan/competency hearing in October of 2006. RP (10-6-06), p. 10. She testified that Gio hurt her with his "circle thing." RP (10-6-06), p. 22. The circle thing is where "his legs come together." RP (10-6-06), p. 24. She said he put the circle thing in her mouth. RP (10-6-06), p. 28. When it was in her mouth it choked her. RP (10-6-06), p. 30. She said she was four when this

occurred. RP (10-6-06), p. 31. H.W. said her mother was at work when this happened. RP (10-6-06), p. 32. H.W. said it happened ten times, but then immediately changed her answer and said it happened one hundred times. RP (10-6-06), p. 33. H.W. alluded to Gio having also hurt her in her bottom, calling it her “back patty.” RP (10-6-06), p. 34. H.W. said she was wearing her Blues Clues nightgown when Gio touched her. RP (10-6-06), p. 38. H.W. testified that she saw Gio anally rape her mother. RP (10-6-06), p. 44-46. She said she was sleeping on the living room couch at the time and that her mother was crying during the rape. RP (10-6-06), p. 46.

When she was cross examined at the Ryan/competency hearing, she talked about some of the things she watches on television. RP (10-6-06), p. 56. Although only four, she watched Harry Potter movies and was scared of the dementors. RP (10-6-06), p. 56. She testified that the dementors can be in the real world sometimes, and they suck up your mind. RP (10-6-06), p. 57. She also watched Hell Boy and Edward Scissorhands. RP (10-6-06), p. 57. H.W. said she only told her father about Gio once. RP (10-6-06), p. 58. During a pre-trial interview H.W. told defense counsel that Gio turned into a spider, and speaks to her in a spider voice. RP (10-6-06), p. 59. Gio showed her his “weenie” when he was a spider. RP (10-6-06), p. 59. H.W. also said that Gio hurt her with

his crab claws, by chopping her with the claws. RP (10-6-06), p. 62. She said Gio was turning into a crab then and he drank crab juice. RP (10-6-06), p. 63. When Gio turned into a spider lots of baby spiders came at her as well. RP (10-6-06), p. 67. H.W. recounted a scene from Harry Potter where baby spiders ran all over one of the characters. RP (10-6-06), p. 67. H.W. said Gio has turned into a crab at least one hundred times. RP (10-6-06), p. 68. H.W. said that Gio made a big spider web and put her into it until she turned into a unicorn and threw up, and she got away from the big crab. RP (10-6-06), p. 68. H.W. also told defense counsel that Gio did these things to her at Ian and Robin's house (Robin is her step-mother). RP (10-6-06), p. 68-69. H.W. also watches Jurassic Park. RP (10-6-06), p. 69.

At trial, Mr. Fanelli was represented by a different attorney. H.W. testified at trial that Gio touched her butt and her mouth with his "weenie." RP (12-18-07), p. 31-32. She testified that he put his weenie in her "whaty-whaty," which she clarified was her butt. RP (12-18-07), p. 34, 36-37. She said that it hurt. RP (12-18-07), p. 34. She further testified that Gio put his weenie inside of her mouth. RP (12-18-07), p. 35. When asked if she had ever seen anything between her mother and Gio that was similar to the way Gio touched her, she said she didn't think so. RP (12-18-07), p. 47.

On cross examination, defense counsel asked H.W. when her birthday is and what presents she received for her last birthday. RP (12-18-07), p. 53. His next question was: “I know we’ve never talked before, H.W., but were there times when Gio turned into or talked like a spider; do you remember that?” The prosecutor objected, saying “This is what you—can we have a sidebar?” The Court said “Counsel, we need to talk.” RP (12-18-07), p. 53. The sidebar was not reported and it was never memorialized at any time. Trial Report of Proceedings. The Court did not state for the record whether the objection was overruled or sustained, but it was obviously sustained because defense counsel moved on to a new topic. RP (12-18-07), p. 53-54. Defense counsel then asked H.W. if she remembered being interviewed by the officers, lawyers, and investigators, if she remembered making a comment about pizza and if she remembered making a comment about fingernails. RP (12-18-07), p. 54. Defense counsel then asked how old H.W.’s sister Orie was and then ended his cross-examination. RP (12-18-07), p. 53-55.

At trial, Ian Wood testified that H.W. made the disclosure to him in late March/early April of 2006. RP (12-18-07), p. 72. When H.W. told him about Gio choking her, H.W. also told him that Gio told her she would never get to see her mother again if she told anyone. RP (12-18-07), p. 74. When asked by the prosecutor why he waited three weeks to

call the police, he said “We wanted to get as close to the truth as we could. I mean, there’s a lot of children involved, and we didn’t want to accuse an innocent person of something they—they didn’t do.” RP (12-18-07), p. 84. He also said that he spoke to a counselor after the disclosure because “We wanted to search more for the truth.” RP (12-18-07), p. 76. On cross-examination, defense counsel explored this further by asking why Ian didn’t call the police when H.W. made the accusation against Gio. RP (12-18-07), p. 94. Ian said they wanted to get as close to the truth as possible, that there were a lot of children and a lot of “mental states” involved, and “we just wanted to make sure she was telling the truth before we went forward.” RP (12-18-07), p. 94. He further testified that rape is a “very huge accusation” to throw out on the word of a three or four year-old. RP (12-18-07), p. 95. Defense counsel asked “Was there a reason, in your mind, to wonder if what she was saying was true?” RP (12-18-07), p. 95. The prosecutor objected and the objection was sustained. RP (12-18-07), p. 95.

Robin Wood testified at the trial. She testified that she was the one who ended visitation between Amber and H.W. after the accusation was brought to light. RP (12-18-07), p. 110-11.

Amber Fanelli testified at the trial. The State sought to sanitize her prior testimony at the Ryan hearing, in which repeatedly lied. RP (12-18-

07), p. 154-55. She testified that lied because she was afraid the defendant's mother would take away her baby son with Gio. RP (12-18-07), p. 156. Although defense counsel initially objected to this testimony he withdrew the objection. RP (12-18-07), p. 156. Amber went on to testify that Gio's mother told her he would take away her baby if she didn't testify (at the Ryan hearing) exactly as she (Gio's mother) wanted her to. RP (12-18-07), p. 156. Specifically, that Gio's mother told Amber to say that Gio had never been alone with H.W., which wasn't true. RP (12-18-07), p. 157. Amber denied that she and Gio ever had any sexual intercourse in a van. RP (12-19-07), p. 16, 28.

Detective Pat Shallert conducted both interviews of H.W. RP (12-19-07), 44-103. During the second interview, Shallert asked Holly what should happen to Gio and H.W. responded that "He should go down." RP (12-19-07), p. 100.

Detective Fred Taylor was the primary investigator on this case. RP (12-18-07), p. 118. The prosecutor asked Detective Taylor about why H.W. was interviewed twice and he said:

...I was told that that the prosecuting attorney that was supposed to have been there had shown up and then had left, but he hadn't stayed for the entire interview, and one of the reasons that we have a prosecutor observe the interview is to help determine the child's credibility. So, I talked to you and we decided that somebody from the prosecutor's office needed to talk to H.W. to determine that.

Defense counsel did not object but the Court took the attorneys into the hall to remind the prosecutor that such testimony is highly improper. RP (12-19-07), p. 121. Later, Detective Taylor testified about his interview with Gio Fanelli. RP (12-19-07), p. 131. He testified that when he confronted Gio with H.W.'s accusation, Gio denied it but did so with a flat affect and he failed to be confrontational and "pound the table" or "come across the table" at him or "stand and yell." RP (12-19-07), p. 131.

Defense counsel did not object to this testimony. *Id.* The prosecutor asked Taylor how Gio responded when he asked Gio how he felt about the accusation, and Taylor said he had a flat affect, and said it was impossible that it happened. RP (12-18-07), p. 133. The prosecutor asked Taylor if at any point Gio became put off by his (Taylor's) aggressiveness during the interview and Taylor replied "It was at the end, after I had confronted him with the specific allegations and given him a couple of reasons, you know, why I thought he wasn't being truthful with me, and—" RP (12-19-07), p. 133. The prosecutor cut him off at that point and asked a different question. RP (12-19-07), p. 133-34. The prosecutor asked Taylor "Did you ever receive information from Ian Wood about an additional disclosure of possible anal penetration in August of '07?" Taylor replied "I don't remember if it was—there was something with another child this summer." RP (12-19-07), p. 136. The prosecutor quickly said "Not that,"

and defense counsel objected and the Court instructed the jury to disregard the statement.” RP (12-19-07), p. 137. While ruling on a different objection out in the hallway, the Court scolded the prosecutor and told her it would declare a mistrial if there were further transgressions. RP (12-19-07), p. 140-41. Defense counsel moved for a mistrial and the Court denied it and invited defense counsel to propose a limiting instruction if he wanted to risk bringing it up again. RP (12-19-07), p. 141. But the Court emphasized its concern that there had two instances of prejudicial misconduct before the jury. *Id.*

Gio Fanelli testified in his defense. The prosecutor asked him about the time period between when he learned about the accusation and when he spoke to Detective Taylor. RP (12-19-07), p. 208.

Prosecutor: “Now, you knew about the potential allegations before you talked to Detective Taylor; right?”

Mr. Fanelli: “Yes.”

Prosecutor: “And you knew they were about inappropriate touching?”

Mr. Fanelli: “Yes.”

Prosecutor: “And you knew several days, if not a week, in advance?”

Mr. Fanelli: “Yeah. Yes.”

Prosecutor: “You never sought him out; did you?”

Mr. Fanelli: “Did I seek him out?”

Prosecutor: “You never sought Detective Taylor out; did you?”

Mr. Fanelli: “I didn’t have to. He spoke to my wife and asked my wife if I’d be willing to meet with him, and told me—gave her a time, actually, to give me if I would come and meet with him.”

Prosecutor: “So that’s a ‘no’?”

Mr. Fanelli: “No, I did not seek him out.”

RP (12-19-07), p. 208-09.

During closing argument, defense counsel argued that H.W.’s statement that Gio “should go down” strongly suggested that her statements and testimony had been influenced by the adults in her life. RP (12-20-07), p. 36. In response, the prosecutor said “Defense said H.W. said ‘Gio must go down.’ Didn’t tell you also, as Detective Schallert did, “Gio must go down, he must go to heaven.” RP (12-20-07), p. 48. The prosecutor then went on to say that Heaven is a good place where people go where they are no longer in your life, suggesting to the jury that H.W. had not been influenced by the adults in her life and was merely processing Gio’s absence in her life in a normal way. RP (12-20-07), p. 48. Detective Schallert never testified that H.W. said Gio should go to Heaven, nor did any other witness. Report of Proceedings. The prosecutor also made the following argument:

You saw H.W. on that stand. How many times did she wave to Robin? At least two. She was scared here of the Defendant. Several times, she's up here coloring. Think about it, I gave her the choice, you could do it up there or over here. No. Bring her to the center. She is here coloring and what does the Defendant do? He moves around and sits right here, and H.W. looked at him several times, and when she looked at him she paused. She was scared. That was the first time that he has been that close to her in years.

RP (12-20-07), p. 46. Defense counsel objected to facts not in evidence, and the Court sustained the objection. *Id.* The prosecutor argued to the jury that they should impute Ms. Gallear's (Gio's mother) supposed intimidation of Amber Fanelli to influence her testimony to Mr. Fanelli; she implied that Mr. Fanelli was a co-actor in that supposed transgression.

RP (12-20-07), p. 28. The prosecutor also argued: "They have private talks, and if H.W. tells she's never going to see her mom again. You know what? That one came true. She has not seen her mom. The Defendant delivered on that promise." RP (12-20-07), p. 19. Defense counsel did not object.

The jury returned a verdict of guilty. CP 205. Mr. Fanelli was given a sentence under RCW 9.94A.712. CP 211-225. This timely appeal followed. CP 228.

#### **D. ARGUMENT**

##### **I. MR. FANELLI WAS DENIED THE RIGHT TO A FAIR TRIAL AND HIS RIGHT OF CONFRONTATION WHEN**

**THE TRIAL COURT IMPROPERLY LIMITED DEFENSE  
COUNSEL’S CROSS-EXAMINATION OF H.W.**

The Sixth Amendment to the United States Constitution provides: “In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and caused of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.” The Washington State Constitution also guarantees the right of confrontation in a criminal proceeding at Article 1, Section 22. The right of confrontation allows a criminal defendant to confront and cross-examine witnesses against him. *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920 (1967); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105 (1974); *State v. Hudlow*, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); *State v. Dolan*, 118 Wn.App. 323, 73 P.3d 1011 (2003). The most important part of the right of confrontation is the right to conduct meaningful cross examination. *Davis* at 316; *State v. Foster*, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998); *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

The purpose of cross-examination is not only to flesh out the facts, but to test the perception, memory, and credibility of witnesses. *Darden* at 620. “Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question...As such, the right to confront must be zealously guarded.” *Darden* at 620 (internal citations omitted). The rights to confrontation and cross-examination are limited by general considerations of relevance. *Darden* at 621; *Hudlow* at 15, ER 401, ER 403.

In *Darden*, the Supreme Court summarized the three part test set forth in *Hudlow* for the allowable limitation of cross-examination. *Darden* at 621-22. Under *Hudlow*, the right of confrontation can be limited if the State can show a compelling interest to exclude prejudicial or inflammatory evidence. *Darden* at 621; *Hudlow* at 16. “Thus, the *Hudlow* test requires a three-prong approach. First, the evidence must be of at least minimal relevance. Second, if relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial. Finally, the State’s interest to exclude prejudicial evidence must be balanced against the defendant’s need for the information sought, and only if the State’s interest outweighs the defendant’s need can otherwise relevant information be withheld.” *Darden* at 622.

Here, Mr. Fanelli faced life in prison based upon statements made by a four year-old child. There was no physical evidence. There were no eyewitnesses. There was no corroboration whatsoever. H.W.'s statements, both in court and to others, comprised the sole evidence against Mr. Fanelli. At the Ryan/competency hearing, H.W. was cross-examined about statements she made to defense counsel during a pre-trial interview. Among the subjects she was cross-examined on were the fact that as a three and four year-old she watched violent programming on television, that she supposedly witnesses her mother being violently anally raped by Mr. Fanelli in a van (a fact which both Amber and Mr. Fanelli denied), that she saw Mr. Fanelli turn into both a spider and a crab, that Mr. Fanelli talked to her in a spider voice, that he chopped at her with his crab claws, and that baby spiders ran all over her while she was being sexually abused.

At trial, defense counsel asked a few preliminary questions and then asked "I know we've never talked before, H.W., but were there times when Gio turned into or talked like a spider; do you remember that?" The prosecutor immediately objected and the Court summoned defense counsel to the bench, saying "Counsel, we need to talk." Defense counsel, after the bench conference, did not return to the question but rather asked a few more largely irrelevant questions and then stopped his cross-

examination. It is not clear what the Court wanted to talk to defense counsel about, or why the prosecutor objected to this question. This evidence was absolutely admissible. There is no justification for disallowing defense counsel to ask this question. The State's entire case hinged on H.W.'s statements. H.W.'s ability to remember and perceive these events bore directly on her credibility. If she was unable, during and around the time she made these allegations, to separate reality from fantasy that was critical information the jury was entitled to hear.

Applying the *Hudlow* test, this evidence was admissible. First, it was more than minimally relevant. It was, in fact, critical to a determination of H.W.'s credibility. Second, the burden was on the State to demonstrate that this area of questioning was so prejudicial as to disrupt the fairness of the fact-finding process at trial. The record reveals the State did not meet this burden. Indeed, it is not even clear why the State objected to this line of questioning. Finally, the State's interest in excluding this line of questioning must outweigh the defendant's need to bring out the information. The exclusion of evidence in this case fails the *Hudlow* test. Impeaching or calling into question H.W.'s perception, memory, and veracity was the only defense available to Mr. Fanelli. H.W. was the most important witness in the case and she effectively escaped cross-examination. Her Ryan/competency hearing testimony was nothing

short of surreal. The State likely argued to the Court at the sidebar its opinion that all of the spider/crab/anal rape testimony H.W. previously gave was the product of her dreams, an opinion it expressed when it argued H.W.'s competency to the Court. Be that as it may, H.W. testified about these matters at the Ryan/competency hearing as though they were facts, not dreams. The State's disagreement notwithstanding, that was a factual determination to be made by the jury.

In *Darden*, the State argued the error was harmless because the defense failed to show how discovering the sought information on cross-examination would have aided him in cross-exam. *Darden* at 625. The *Darden* Court observed

“It is no answer to say, as the government does, that the defense has failed to cast substantial doubt on the accuracy of [the observer's] testimony. Creating such doubt would have been one of the objectives of cross-examination following the revelation of the ...[relevant information].”

*Darden* at 625, citing *State v. Reed*, 101 Wn.App. 704, 709, 6 P.3d 43 (2000). “The State cannot meet its burden by blaming the defense for not achieving the very objective the State seeks to prevent the defense from achieving.” *Darden* at 625-26.

In *Darden*, the State's entire case hinged on the testimony of the witness whose cross-examination the Court limited. *Darden* at 626. The error was therefore not harmless. Such is the case here. The State could

have presented its case without the testimony of every witness it presented save for one: H.W. The entire case rested on her statements. The error was not harmless and Mr. Fanelli's conviction should be reversed and his case remanded for a new trial.

Mr. Fanelli submits that the Court's limitation of defense counsel's cross-examination standing alone warrants a new trial, but Mr. Fanelli also assigns error to the Court's limitation of defense counsel's cross examination of Ian Wood. The State inquired of Ian Wood why he failed to report the alleged sexual abuse for three weeks after H.W. first told him about it. He said that he wasn't sure he believed her, and couldn't imagine relying on the word of a three or four year-old without seeking more facts. Thus, the State opened the door to further inquiry of Ian as to why he might not have believed H.W. When defense counsel asked "Was there a reason, in your mind, to wonder if what she was saying was true?" he was shut down. Although witnesses are generally prohibited from commenting on the veracity of other witnesses, this situation was different: First, H.W. was four years-old at the time of the alleged disclosure and there was no physical or testimonial evidence to corroborate her claim. Second, Ian was the custodial parent and in a unique position to know whether she had a propensity to lie. Third, the State opened the door to this testimony. Where the entire case rested on the statements of a four year-old who

watches violent movies, imagined the violent rape of her mother and believes that a man can turn into a spider and a crab, and whose own father gave so little credence to her accusation that he didn't report it and continued to send his daughter back to the home of her alleged rapist, it would seem that Mr. Fanelli's right to due process would trump the general concern about witnesses touching on the veracity of other witnesses. This is particularly so where the State opened the door to this testimony. Adopting the reasoning and authority set forth above, the trial court erred in preventing defense counsel from asking this question to Ian Wood and the error was not harmless.

**II. MR. FANELLI WAS DENIED A FAIR TRIAL BY REPEATED INSTANCES OF PROSECUTORIAL MISCONDUCT THAT WERE NOT HARMLESS.**

The prosecutor committed several instances of misconduct during the trial.

**a. Detective Taylor's testimony**

First, the prosecutor elicited testimony from Detective Taylor in which he commented on Mr. Fanelli's truthfulness and on H.W.'s credibility. Regarding Mr. Fanelli's credibility, Taylor testified that "It was at the end, after I had confronted him with the specific allegations and given him a couple of reasons, you know, why I thought he wasn't being

truthful with me, and—.” This testimony was an impermissible comment on Mr. Fanelli’s credibility. Allowing one witness to testify about the truthfulness of another witness invades the fact-finding process of the jury and violates a defendant’s right to a jury trial. *State v. Dolan*, 118 Wn.App. 323, 73 P.3d 1011 (2003).

It is a recognized tactic in law enforcement to accuse a suspect of lying during the interrogation. *State v. Demery*, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001). There is a difference between playing a videotape of the interrogation where the officer accuses the suspect of lying at trial, as occurred in *Demery*, and eliciting live testimony at trial where the officer opines that the suspect was lying. See e.g. *State v. Jones*, 117 Wn.App. 89, 68 P.3d 1153 (2003). In the former, it is recognized that the officer confronts a suspect with his opinion the suspect is lying in order to see if the suspect will change his or her story in response; it does not necessarily mean the officer believes the suspect actually is lying. *Demery* at 760, 765. In contrast, when an officer testifies under oath at trial, as Detective Taylor did here, in such a way that the officer suggests he *actually* didn’t believe the suspect, such testimony invades the province of the jury and denies the defendant his right to a jury trial. *Jones* at 92, *Demery* at 760.

In *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001), the court outlined five factors a reviewing court should look at to determine

whether testimony constitutes impermissible opinion testimony. Those factors are: (1) the type of witness involved; (2) the specific nature of the testimony; (3) the nature of the charges; (4) the type of defense; and (5) the other evidence before the trier of fact. *State v. Demery* at 759.

Regarding the type of witness, the Court noted that such testimony from law enforcement officers is especially prejudicial because it carries a special aura of reliability. *Demery* at 765. With regard to the second prong, the nature of this testimony was especially damaging to Mr. Fanelli because Detective Taylor was the only one to offer specific statements of Mr. Fanelli. Taylor was the one who interrogated Mr. Fanelli. As the State went to great pains to point out, this was Mr. Fanelli's opportunity to satisfy the police that he was innocent and he failed that test. As to the third prong, the nature of the charge, Mr. Fanelli reiterates what he said in Part I: This accusation depended solely on the statements of four year-old (at the time of the initial accusation) H.W. A child who was impressionable, watched violent movies, was the subject of a vitriolic custody dispute between her parents and had an apparent inability to separate fantasy from reality at or around the time of the accusation. There was no physical evidence; no corroboration. While corroboration is certainly not required, it is imperative that where corroboration is lacking

a defendant is not subjected to an unfair trial in which a law enforcement witness opines he is lying.

In this same vein, the prosecutor committed misconduct by repeatedly soliciting testimony from Taylor about Mr. Fanelli's reaction to his questions. Specifically, the prosecutor elicited testimony that when faced with this horrific accusation, Mr. Fanelli had a flat affect and failed to yell, scream, and pound his fists on the table the way an innocent person would be expected to do. There was no reason to elicit this testimony other than to imply that Mr. Fanelli was guilty because an innocent person would yell, scream, and pound his fists. This was an improper comment on Mr. Fanelli's veracity.

Defense counsel did not object at this point. However, it is well settled that prosecutorial misconduct which is so flagrant and ill-intentioned that it could not be remedied by a curative instruction may provide grounds for reversal in the absence of an objection. *State v. Boehning*, 111 P.3d 899, 903 (2005); *Jones* at 90-91; *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994); *State v. Suarez-Bravo*, 72 Wn.App. 359, 367, 864 P.2d 426 (1994). Here, defense counsel clearly should have objected to this obviously improper testimony. This case boiled down to a swearing contest between Mr. Fanelli and the State's witness. Again, no physical or other corroborative evidence exists. Detective Taylor's

expression of his opinion that Mr. Fanelli was not credible destroyed his ability to receive a fair trial and denied him his right to a trial by jury.

The prosecutor further committed misconduct by eliciting testimony from Detective Taylor which vouched for the credibility of H.W. The prosecutor had already elicited testimony from Detective Schallert about the need for a second law enforcement interview of H.W. It was wholly unnecessary and repetitive to ask Taylor about it, as the Court noted when it nearly threw the State's case out of court. Nevertheless, the prosecutor asked Taylor about it anyway and Taylor testified that it was necessary for a prosecutor to observe the interview so that he or she could satisfy him or herself (in this case, the very prosecutor who tried the case) that the child is credible. This was flagrantly improper. The rule prohibiting witnesses from commenting on the credibility of other witnesses applies with equal force whether the witness opines another witness is lying or is truthful. *State v. Kirkman*, 159 Wn.2d 919, 155 P.3d 125 (2007). Again, this case boiled down to H.W.'s word versus Mr. Fanelli's. Combined with Taylor's opinion that Mr. Fanelli was not credible, Mr. Fanelli was denied a fair trial. As the court ruled in *State v. Boehning*, supra, "In determining whether the misconduct warrants reversal, we consider its prejudicial nature and its cumulative

effect.” *Boehning* at 903, citing *State v. Suarez-Bravo*, 72 Wn.App. 359, 367, 864 P.2d 426 (1994).

Here, the accumulated errors which occurred during Taylor’s testimony standing alone warrant reversal. In addition to the errors noted above, the prosecutor recklessly asked Taylor about another allegation of anal penetration that may have been brought to him by Ian Wood and Taylor testified about “another child.” The prosecutor clearly knew what Taylor was referring to because she immediately said “not that one.” Defense counsel was obviously caught off guard and objected. When taken out to the hallway and scolded by the Court the prosecutor claimed she was not responsible because she didn’t know Taylor would say that. As the Court noted, however, basic trial preparation includes speaking to your witnesses prior to trial and knowing what they will say. It would seem this maxim would apply with particular force where a law enforcement officer is involved who has information about other allegations involving the defendant. Instructing such a witness to refrain from testifying about other inadmissible acts is crucial. The open-ended question the prosecutor asked, combined with the obvious knowledge both she and Taylor possessed about other acts makes her conduct reckless in this instance. Further, this testimony had a cumulative effect on the other prejudicial aspects of Taylor’s testimony. Viewing the cumulative effect

of Taylor's testimony, the errors outlined here were not harmless and Mr. Fanelli should be granted a new trial.

**b. Cross-examination of Mr. Fanelli**

The prosecutor questioned Mr. Fanelli about his failure to seek out Detective Taylor as soon as he learned he was being accused of sexually abusing H.W, instead waiting until his scheduled interview. The prosecutor sought to imply that an innocent man would have run straight to the police in the face of such an accusation in order to tell his side of the story. It is well settled that a defendant's pre-arrest silence cannot be used by the State in its case in chief as substantive evidence of a defendant's guilt. *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996); *State v. Easter*, 130 Wn. 2d. 228, 922 P.2d 1285 (1996). Commenting on a defendant's pre-arrest silence is constitutional error which must be proven harmless beyond a reasonable doubt to avoid reversal. *State v. Easter*, 130 Wn.2d at 242. The State bears this burden of proof, not the defendant. *Id.*

In *Easter*, an officer testified that when he asked the defendant, who had been in a traffic accident, what happened, the defendant "totally ignored him." *State v. Easter*, 130 Wn.2d at 232. He further testified that when he continued to ask questions, the defendant looked down and ignored his questions. *Id.* He also said the defendant "was evasive, wouldn't talk to me, wouldn't look at me, wouldn't get close enough for

me to get good observations of his breath and eyes, I felt that he was trying to hide or cloak.” *State v. Easter*, 130 Wn.2d at 233. The Supreme Court held this testimony was an improper comment on the defendant’s pre-arrest silence. *State v. Easter*, 130 Wn.2d at 241. Further, the error was not harmless because there was not overwhelming untainted evidence of the defendant’s guilt. *State v. Easter*, 130 Wn.2d at 242.

Such is the case here. There was not overwhelming untainted evidence of Mr. Fanelli’s guilt. This trial was tainted by prosecutorial misconduct, Court error in limiting cross examination, and ineffective assistance of counsel. The whole proceeding was tainted. Standing alone, the particular exchange at issue here between the prosecutor and Mr. Fanelli might be viewed as harmless, but when coupled with the testimony of Detective Taylor in which he opined that Mr. Fanelli was untruthful and his actions were consisted with guilt, this error is not harmless and Mr. Fanelli should be granted a new trial.

*c. Closing argument*

During closing argument the prosecutor argued that Mr. Fanelli intimidated H.W. by moving in such a way in the courtroom that he could see her testimony. The prosecutor stated: “Think about it, I gave her the choice, you could do it up there or over here. No. Bring her to the center. She is here coloring and what does the Defendant do? He moves around

and sits right here, and H.W. looked at him several times, and when she looked at him she paused. She was scared.” When the prosecutor went on to state that H.W. had not seen Mr. Fanelli in years, a fact not in evidence, defense counsel objected and the objection was sustained. Defense counsel did not object to the most flagrantly improper part of what the prosecutor said, however, that being that Mr. Fanelli was deliberately trying to intimidate H.W.

Mr. Fanelli has a Sixth Amendment right to be present at trial. He has a right to confront witnesses at trial. The right to confrontation is not just a right to cross-examine, it is a right to physically face one’s accuser. *Davis* at 315. “A prosecutor is prohibited from, however, from arguing unfavorable inferences from the exercise of a constitutional right and may not argue a case in a manner which would chill a defendant’s exercise of such a right.” *State v. Johnson*, 80 Wn.App. 337, 339-40, 908 P.2d 900 (1996), citing *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984), and *State v. Fiallo-Lopez*, 78 Wn.App. 717, 728, 899 P.2d 1294 (1995). Here, Mr. Fanelli had a right to look at the witnesses against them and watch them testify. To suggest that he was deliberately trying to intimidate H.W. by exercising this right was unfair and prejudicial and, combined with the other errors outlined here, denied Mr. Fanelli a fair trial.

The prosecutor committed further misconduct when she suggested that Mr. Fanelli was at fault for H.W. no longer having visitation with Amber. This was flagrantly improper and not based on the evidence. It was Robin who cut off Amber's visitation, and if Amber felt that was improper she had any number of remedies available in civil court to address that. The prosecutor said: "They have private talks, and if H.W. tells she's never going to see her mom again. You know what? That one came true. She has not seen her mom. The Defendant delivered on that promise." Not only was this not supported by the evidence it was totally unrelated to the truth of the charge. This comment did not support any issue to be decided by the jury. It was solely intended to engender sympathy for H.W. and to make the jury seethe with anger at Mr. Fanelli. In short, it was designed to appeal to the jury's passion rather than reason, which is flagrantly improper. "References to evidence outside of the record and bald appeals to passion and prejudice constitute misconduct." *State v. Belgarde*, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988).

The prosecutor committed further misconduct when she alluded to evidence outside of the record to bolster H.W.'s credibility. Defense counsel made a compelling case that H.W.'s comment that Mr. Fanelli should "go down" for what he did strongly suggests she was being influenced or coached by the adults in her life. This is a bizarre comment

for a four year-old to make, and wholly age-inappropriate. To rebut this, the prosecutor told the jury that what H.W. really said in the interview was that Mr. Fanelli should go to Heaven. There was no testimony to that effect and the prosecutor knew or should have known that. The prosecutor effectively minimized one of the strongest indicators of witness interference and coaching by introducing a “fact” (we don’t know that it’s true; there was no testimony about this) that Mr. Fanelli never had the chance to rebut, either through argument or cross-examination.

In *State v. Boehning* the prosecutor argued that the victim had made out-of-court statements which were consistent with her trial testimony, thereby improperly bolstering her credibility and “instilling inadmissible evidence in the juror’s minds...” *Boehning* at 905. Further, the Court held that by repeatedly arguing that Boehning’s counsel had failed to establish the victim’s out-of-court statements about the abuse were inconsistent with her trial testimony, “the jury could infer that H.R.’s hearsay statements were consistent with her trial testimony and that she was a credible witness.” *Boehning* at 905. This, the Court ruled, improperly shifted the burden of production to present evidence from the State to the defense. *Id.* In addition to shifting the burden, referencing new facts in closing is fundamentally unfair because there is no opportunity for the defense to answer that fact. The prosecutor was put on

notice that the defense would use this information and chose not to bring out this supposed “Heaven” comment during Schallert’s testimony. The prosecutor chose instead to bring it out during rebuttal closing argument which this Court should view as presumptive bad faith and flagrant misconduct. Again, references to matters outside the record is misconduct. *Belgarde* at 507-08.

**III. MR. FANELLI WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS COUNSEL FAILED TO OBJECT TO THE STATE’S INFERENCE THAT MR. FANELLI TRIED TO INTIMIDATE AMBER FANELLI.**

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel’s performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

An attorney is deficient if his performance falls below a minimum objective standard of reasonableness. “Representation of a criminal

defendant entails certain basic duties...Among those duties, defense counsel must employ ‘such skill and knowledge as will render the trial a reliable adversarial testing process.’” *State v. Lopez*, 107 Wn.App. 270, 275, 27 P.3d 237(2001), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984).

Here, the State, without objection, argued that Mr. Fanelli’s mother forced her to lie during her pre-trial testimony on threat of taking her infant son away from her. There was no evidence that Mr. Fanelli was involved in such a scheme, even assuming it was true (Ms. Gallear denied it). The State brought out this allegation as a means of sanitizing Amber’s questionable credibility. However, during closing argument the State used this information not for the purpose of asking the jury to believe Amber, but rather for the purpose of suggesting that Mr. Fanelli, together with his mother, had engaged in witness tampering. When this evidence was first introduced defense counsel should have sought a limiting instruction that would tell the jury they could only consider this allegation for the purpose of evaluating Amber’s testimony. It was not proper substantive evidence of Mr. Fanelli’s guilt. Yet that is precisely how the State used it during closing argument. Defense counsel should have objected and sought both a limiting and a curative instruction.

Counsel was also ineffective for failing to object to several of the repeated instances of prosecutorial misconduct outlined above. The prejudice to Mr. Fanelli was substantial: Witness tampering is nearly irrefutable evidence of guilt. This, combined with the errors outlined in Parts I and II, denied Mr. Fanelli a fair trial.

#### **IV. CUMULATIVE ERROR DENIED MR. FANELLI A FAIR TRIAL.**

The cumulative error doctrine applies to cases in which "there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390, 399-400 (2000) (citing *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Badda*, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during voir dire required reversal); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); *State v. Whalon*, 1 Wn. App. 785, 804, 464 P.2d 730 (1970) (reversing conviction because (1) court's severe rebuke of the

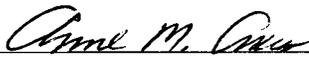
defendant's attorney in the presence of the jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel). *State v. Fisher*, No. 79801-0 (March 12, 2009), p. 17.

Here, Mr. Fanelli argues that the trial court's improper limitation of defense counsel's cross examination of H.W. alone warrants reversal of his conviction. Likewise, the repeated instances of prosecutorial misconduct warrant reversal standing alone. The combined errors in this case unquestionably denied Mr. Fanelli a fair trial and constitute cumulative error warranting a new trial.

**E. CONCLUSION**

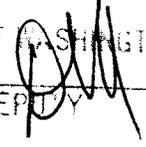
Mr. Fanelli's conviction should be reversed and he should be granted a new trial.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of April.

  
\_\_\_\_\_  
ANNE M. CRUSER, WSBA#27944  
Attorney for Mr. Fanelli

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DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

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

STATE OF WASHINGTON,	)	Court of Appeals No. 37309-2-II
	)	Cowlitz County No. 06-1-00634-5
Respondent,	)	
	)	
vs.	)	AFFIDAVIT OF MAILING
	)	
AMBROGINO G. FANELLI,	)	
	)	
Appellant.	)	

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ANNE M. CRUSER, being sworn on oath, states that on the 13<sup>th</sup> day of April 2009,  
affiant placed a properly stamped envelope in the mails of the United States addressed to:

Susan I. Baur  
Cowlitz County Prosecuting Attorney  
312 S.W. 1st  
Kelso, WA 98626

AND

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

AND

Mr. Ambrogino Fanelli

AFFIDAVIT OF MAILING - 1 -

**Anne M. Cruser**  
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DOC #899330  
Washington Corrections Center  
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Shelton, WA 98584

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10 (TO MR. FANELLI)
- (3) AFFIDAVIT OF MAILING

Dated this 13<sup>th</sup> day of April 2009,

  
 ANNE M. CRUSER, WSBA #27944  
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: April 13, 2009, Kalama, WA

Signature: Anne M. Cruser