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DIVISION II

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STATE OF WASHINGTON
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NO. 37414-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

WENDEL WAYNE JOHNSON,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated Washington Constitution, Article 4, § 16, when it gave two jury instructions that commented on the evidence. CP 40-41, RP 236-240.

2. Trial counsel's failure to object when the state elicited irrelevant, prejudicial evidence denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. RP 114-124, 140-141.

Issues Pertaining to Assignment of Error

1. Does a trial court violate Washington Constitution, Article 4, § 16, if it gives two jury instructions that comment on the evidence and induce the jury to enter verdicts of guilty when they would have otherwise entered verdicts of acquittal?

2. Does a trial counsel's failure to object when the state elicits irrelevant, prejudicial evidence deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment, when the exclusion of that evidence following a timely objection would have resulted in a verdict of acquittal in stead of a verdict of guilt?

STATEMENT OF THE CASE

Factual History

In October of 1998, Corina Comstock moved to Alaska from Vancouver, Washington, with her then 10-year-old daughter Kristen. RP 35-36, 90-93. Within a little over a year later, Corina began a romantic relationship with a man named Ken Comstock, became pregnant, and married him just before their son was born. RP 35-36, 90-93. Although Kristen “loved her brother” and had a good relationship with her step-father, she had a very hard time adjusting to her brother being a part of her family. RP 70-71, 74, 110-111. She believed that he got all of her mother and step-father’s attention and that she had to constantly “compete with him.” RP 70-71. Eventually she began to treat her brother “like crap” and act out. RP 110-111. By her mother’s description, Kristen became so completely out of control that they had to have her arrested. RP 112-113.

By 2005, Kristen was living in a juvenile youth facility called Miller House in Ketchikan, Alaska. RP 64-67. However, in November of 2005, she got kicked out of Miller House and sent to the Johnson Youth Center, which was a locked down juvenile facility. RP 68-69. During this period of time, Kristen attended group therapy sessions with a number of other juvenile females. RP 66-67. During some of these therapy sessions, she heard some of these girls claim that they had been sexually abused, that they had reported

the abuse, and that they had been about to get their abusers sent to prison. *Id.* After hearing this, Kristen first made an allegation that she had been sexually abused when she was seven or eight-years-old and living in Vancouver in a duplex with her mother. *Id.*

Following Kristen's initial claims, authorities in Alaska interviewed her, and during these interviews Kristen elaborated upon her claims of sexual abuse. RP 68-69. During these interviews, Kristen claimed that her abuser had grey hair, that he had a hairy chest, and that during one of a number of instances of abuse he had ejaculated on her. RP 74-78. Her specific words to the interviewer in Alaska were: "He jizzed on me." RP 80. Following these interviews, a pediatrician in Alaska performed a physical examination on Kristen, and noted that while Kristen was already sexually active, she did show some scarring to her hymen that could have been the result of sexual abuse as a pre-pubescent child. RP 156-157.

In fact, for about a six month period prior to Corina and Kristen's move to Alaska, they had lived in a loft apartment that was part of a house on N.E. Benton Street in Vancouver. RP 37-42, 90-96, 165-178, 196-201, 209-213. At the time, a person by the name of William Caughell lived in the other half of the house, along with the defendant Wendel Johnson and Wendel's two teenage sons Timothy and Nicholas. *Id.* William Caughell owned the house, worked nights, and slept in one of the bedrooms. *Id.*

Timothy and Nicholas slept in the other bedroom, and the defendant slept on the couch. *Id.* The structure they lived in was originally a two-story house, that was converted to two apartments by building a wall between the two units and building a second bathroom on the other side of the original bathroom. RP 165-178.

Procedural History

By information originally filed March 1, 2007, and later amended during trial to expand the time of the alleged events, the state charged the defendant with four counts of first degree rape of a child. CP 1-2, 31-32. The case later came on for trial, with the state calling Kristen Dillon as its first witness. RP 35. In her testimony, Kristen, who was by this time 19-years-old, claimed that when she lived in Vancouver, the defendant would come over to her apartment at night when her mother was gone to work and sexually abuse her. RP 45-46. During her testimony, she alleged the four distinct instances of alleged abuse. RP 46-58. In the first, she claimed that late one evening after her mother left for work, she was sitting on the couch watching television when the defendant entered the apartment and put his hands down her pants, penetrating her vagina with his finger. RP 45-47. He then pulled her pants off and performed oral sex on her. *Id.*

Kristen testified that on another occasion, when her mother was at work, the defendant came over to her apartment, pulled down his pants,

pulled out his penis, and asked her to put it in her mouth “like it was a lollipop.” RP 49-53. When she refused, the defendant offered her a candy bar if she would put his penis in her mouth when he put it through the wall between their two bathrooms. *Id.* According to Kristen, the defendant then went into his bathroom, stuck his penis through a hole in the wall under the sink, and that she got under the sink in her bathroom and was able to put his penis in her mouth as it protruded through the wall. *Id.*

Kristen’s third accusation was that on one occasion when her mother was at the store, the defendant told her to go out into the hot tub and that when did the defendant was in it and he put his hand up her swimming suit and penetrated her vagina with his fingers. RP 53-56. On cross-examination, Kristen stated that during this instance, the defendant did not have a shirt on. RP 87-88. Kristen’s fourth claim of abuse was that after the incident in the hot tub, the defendant came over to her apartment, took her over to his sons’ bedroom, took off her clothes and penetrated her vagina with his finger, and then took his penis out and tried to penetrate her vagina with his penis. RP 56-58. According to Kristen, when he started to penetrate her she screamed because it hurt, and that the defendant then stopped, saying “Shit, my sons are home.” *Id.* Kristen also claimed on direct examination that she did not remember whether or not the defendant had ever ejaculated on any occasion when he abused her. RP 51-52.

On cross-examination, Kristen denied that she had ever told any of the interviewers in Alaska that the person who abused her had grey hair, that he had a hairy chest, or that he had ever ejaculated on her. RP 74-75, 80. However, when the defendant's attorney confronted her with a copy of the transcript of an interview she gave in Alaska after first making her claims of abuse, she admitted that during that interview she had indeed said that her abuser had grey hair, that he had a hairy chest, and that he had "jizzed on me." RP 75-80. As to the last statement, she admitted that she had further said during the interview in Alaska that "white stuff came out of the thing." RP 80.

In addition to Kristen Dillon, the state also called Cynthia Bull as a witness. RP 114. Ms Bull testified that she is a deputy sheriff assigned to the "Children's Justice Center", which used to be the "Children's Abuse Intervention Center." RP 114-118. According to Deputy Bull, she investigates claims of physical and sexual abuse of children, and that she gets referrals from child protective services, the prosecutor's office, and police agencies. *Id.* She was assigned to this case as a referral from the Juneau Police Department, who had already done a videotaped "victim interview," which Deputy Bull reviewed. RP 116-117. During this testimony, the defense attorney failed to make an objection that this evidence was irrelevant and unfairly prejudicial. RP 114-124.

Following Deputy Bull's testimony, the state called a pediatrician by the name of Amy Dressel to testify concerning her physical examination of Kristen Dillon. RP 137. According to Dr. Dressel, she does volunteer gynecological examinations for the "Safe Advocacy Center" on children who may have been abused. RP 137-138. In addition to testifying to the results of her examination, which are mentioned in the preceding factual history, Dr. Dressel told the jury that Kristen Dillon had told her the following: that "she was having memories of having a history of abuse when she was younger," that this occurred when she was 6 or 7-years-old, that this happened when she was sharing a duplex with the landlord, that her mother had been working nights and her abuser had been taking care of her, that he began fondling her and then eventually penetrated her vagina with his penis, and that she remembered that it had hurt for a long time. RP 140-141. The defense made no objection during this testimony that it was inadmissible hearsay. *Id.*

After the state rested, the defense called three witnesses: William Caughell, Timothy Johnson, the defendant's son, and the defendant. RP 164, 196, 208. They all testified that the defendant did not have and never did have any hair on his chest. RP 187, 201, 216. They then all testified that there had been a small hole under the sink in the bathroom where a pipe led into the wall, but that it was so small that it would have been hard to get a finger into it. RP 174-176, 206, 224, 227, 230. In addition, it was in such

a position as to make it impossible for a person to stick his penis in it. RP 224-227. The defendant also testified that he had brown hair and that it had never been gray. RP 215-216. Finally, the defendant denied that he had ever agreed to watch after Kristen, or that he had ever physically or sexually abused her in any manner. RP 212-213, 220.

After the defense rested its case, the court instructed the jury, with the defense objecting to instructions 5 and 6 as a comment on the evidence. RP 236-240. The former instruction stated as follows:

In order to convict a person of a sexual offense against a child, it shall not be necessary that the testimony of the alleged victim be corroborated.

CP 40.

The latter instruction stated:

In order to convict a person of Rape of a Child in the First Degree, it shall not be necessary that the testimony of the alleged victim be corroborated.

CP 41.

During deliberation, the jury sent out a number of notes concerning questions about the evidence and its difficulty in reaching a verdict. CP 52-54. Eventually, the jury returned verdicts of guilty on Counts III and IV. CP 55-56. However, the jury was unable to reach a verdict on the first two counts, which the court later dismissed. RP 306-313, CP 81. The court thereafter sentenced the defendant within the standard range, after which the

defendant filed timely notice of appeal. CP 79-91, 94.

ARGUMENT

I. THE TRIAL COURT VIOLATED WASHINGTON CONSTITUTION, ARTICLE 4, § 16, WHEN IT GAVE TWO JURY INSTRUCTIONS THAT COMMENTED ON THE EVIDENCE.

Under Washington Constitution, Article 4, § 16, “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” A statement made by the court in front of the jury constitutes an impermissible “comment on the evidence” if a reasonable juror hearing the statement in the context of the case would infer the court’s attitude toward the merits of the case, or would infer the court’s evaluation relative to the disputed issue. *State v. Hansen*, 46 Wn.App. 292, 730 P.2d 670 (1986). In *State v. Crotts*, 22 Wash. 245, 60 P. 403 (1900), the Washington Supreme Court wrote the following concerning the purpose behind this constitutional provision.

The constitution has made the jury the sole judge of the weight of the testimony and of the credibility of the witnesses, and it is a fact well and universally known by courts and practitioners that the ordinary juror is always anxious to obtain the opinion of the court on matters which are submitted to his discretion, and that such opinion, if known to the juror, has a great influence upon the final determination of the issues.

State v. Crotts, 22 Wash. at 250-51.

The courts of this state “rigorously” apply the prohibition found in Article 4, § 16, and presume prejudice from any violation of this provision.

State v. Bogner, 62 Wn.2d 247, 382 P.2d 254 (1963). In *State v. Lane*, 125

Wn.2d 825, 889 P.2d 929 (1995), the court puts the matter as follows.

Our prior cases demonstrate adherence to a rigorous standard when reviewing alleged violations of Const. Art. 4, Sec. 16. Once it has been demonstrated that a trial judge's conduct or remarks constitute a comment on the evidence, a reviewing court will presume the comments were prejudicial. *State v. Bogner*, 62 Wash.2d 247, 249, 253-54, 382 P.2d 254 (1963). In such a case, "[t]he burden rests on the state to show that no prejudice resulted to the defendant unless it affirmatively appears in the record that no prejudice could have resulted from the comment". *State v. Stephens*, 7 Wn.App. 569, 573, 500 P.2d 1262 (1972), *aff'd in part, rev'd in part*, 83 Wash.2d 485, 519 P.2d 249 (1974); *see also Bogner*, 62 Wash.2d at 253-54, 382 P.2d 254.

State v. Lane, at 838-839.

In the case at bar the trial court violated this constitutional provision when, over defense objection, it gave instructions 5 and 6. These instructions stated the following:

Jury Instruction No. 5

In order to convict a person of a sexual offense against a child, it shall not be necessary that the testimony of the alleged victim be corroborated.

Jury Instruction No. 6

In order to convict a person of Rape of a Child in the First Degree, it shall not be necessary that the testimony of the alleged victim be corroborated.

CP 40-41.

In a recent case, *State v. Zimmerman*, 130 Wn.App. 170, 121 P.3d 1216 (2005), this court addressed both the advisability and the legitimacy of

a similar, though not identical, instruction. In this case, the defendant appealed his conviction for first degree child molestation, arguing in part that the trial court violated Washington Constitution, Article 4, § 16, when it gave an instruction that the statements of the complaining witness need not be corroborated in order to sustain a conviction. In rejecting this argument, the court felt bound by a 1949 decision of the Washington Supreme Court. This court noted the following on this issue:

The Washington Supreme Court in *State v. Clayton*, 32 Wn.2d 571, 202 P.2d 922 (1949), also held that such an instruction was not an improper comment on the evidence. The instruction challenged in *Clayton* provided:

You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

32 Wn.2d at 572, 202 P.2d 922. The Supreme Court held that the trial court expressed no opinion as to the truth or falsity of the testimony of the alleged victim or as to the weight that the court attached to her testimony, but properly submitted the questions involving credibility and weight of the evidence to the jury. *Clayton*, 32 Wn.2d at 573-74, 202 P.2d 922.

State v. Zimmerman, 130 Wn.App. at 181-182.

Although this court affirmed the conviction in *Zimmerman*, it did express grave concerns about such an instruction. The opinion in

Zimmerman ends with the following:

We observe, however, that the Washington Pattern Criminal Jury Instructions (WPIC) do not contain the challenged corroboration instruction. We also note that the Washington Supreme Court Committee on Jury Instructions recommends against such an instruction:

The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this subject would be a negative instruction. The proving or disproving of such a charge is a factual problem, not a legal problem. Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness or the uncorroborated testimony of the defendant is best left to argument of counsel.

11 WPIC, § 45.02, cmt. at 561 (2nd ed.1994). Although we share the Committee's misgivings, we are bound by *Clayton* to hold that the giving of such an instruction is not reversible error.

State v. Zimmerman, 130 Wn.App. at 182-183.

The case at bar is distinguishable from *Clayton* and *Zimmerman* on two important points: (1) the text of the instructions in the case at bar do make an incorrect statement at law, unlike the text of the instruction in *Clayton*, and (2) the repetition of the instruction constituted a comment on the evidence by the court, unlike the instruction in *Clayton*, which specifically disavowed any comment on the weight of the evidence. The following addresses these two distinctions.

The first distinction between the decision in *Clayton* lies in the language of the two instructions. In *Clayton*, the trial court was careful in the instruction to specifically tell the jury that the issue of credibility was a

question of fact for the jury to determine, not for the judge. This occurred in the second half of the instruction, wherein the court stated:

That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilty, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

State v. Clayton, 32 Wn.2d at 572.

The absence of this second half of this instruction in the case at bar left the jury to infer that the trial court was favorably commenting on the credibility of the complaining witness, and was implying that the jury should believe her testimony and convict the defendant. Thus, the instruction in the case at bar, unlike the instruction in *Clayton*, constituted a comment on the evidence in violation of Washington Constitution, Article 4, § 16.

The instructions in the case at bar also suffer from a defect that did not occur in either *Clayton* or *Zimmerman*: the court in the case at bar gave the offending instruction twice in a slightly modified form to the jury. This repetition of the instruction had the effect of unduly emphasizing it to the jury, thus implying to the jury that the court favored the testimony of the complaining witness and desired that the jury return a verdict of guilty. Even were this court to find either instruction a correct statement of the law, and thus not violative of Washington Constitution, Article 4, § 16, the joint use of both instructions does constitute such a violation. As the following

examination of the decision in *State v. Music*, 79 Wn.2d 699, 489 P.2d 159 (1971), explains, even an instruction that correctly states the law can, by its language, create undue emphasis and thus violate Washington Constitution, Article 4, § 16. The following examines this case.

In *State v. Music, supra*, the defendant was charged with first degree murder with the state seeking the death penalty. The charge arose out of an incident in which the defendant, who was one of four people in a car, shot and killed the decedent while trying to rob him. At trial, two co-defendants who had pled to second degree murder testified that the defendant had been the one with the rifle and did the shooting. In fact, the defendant did not seriously dispute guilt. However, he did claim that (1) he was not guilty by reason of mental defect, and (2) that even if guilty, a sentence of life in prison was more just than a sentence of death.

At the end of the trial, the defense proposed an instruction that informed the jury of the process under which a person sentenced to life in prison would undergo before possibly being released on parole. The state also proposed a similar instruction. The defense additionally proposed an instruction that explained the steps that would first occur before a defendant acquitted by reason of mental defect could be considered for release. Both the defendant's proposed instructions and the state's proposed instruction were correct, balanced statements of the law on the issues addressed.

However, the trial court refused to give either the defendant's instructions or the state's instruction, holding that they would put undue emphasis on two of the four alternatives the jury had to decide: (1) not guilty, (2) guilty with death sentence imposed, (3) guilty with life in prison imposed, or (4) not guilty by reason of mental defect. Following conviction and imposition of the death sentence, the defendant appealed, arguing in part that the trial court erred when it refused to give the defendant's two instructions or the state's proposed instruction.

The Washington Supreme Court rejected this argument, quoting from its previous decision in *State v. Todd*, 78 Wn.2d 361, 474 P.2d 542 (1970).

The court held:

However, both [the defendant's first and the state's] proposed instructions, in our judgment, suffer from the same vice which convinces us that the trial court was correct in refusing their adoption:

This argument * * * leads us to what we consider the most serious vice of an instruction of this kind. It sets a standard where none has been set by the legislature and thus places undue emphasis upon one factor which the jury, whether or not it should do so, is bound to take into account. All other factors come before the jury in the form of evidence or of their own experience and knowledge. By instructing the jury concerning the possible minimum sentence which the defendant might serve, the court suggests to the jury that it should give great weight to that possibility in reaching its verdict.

Todd, supra, 78 Wn. 2d at 375, 474 P.2d at 550. It is obvious that appellant's proposed instruction No. 9 – relating to the consequences of a verdict of not guilty by reason of mental irresponsibility – suffers from the same type of defect as that

described in the *Todd* opinion.

State v. Music, 79 Wn.2d at 709-710.

The jury instruction in the case at bar, twice repeated by the trial court, suffers from the same defect as the instructions in *Music* and *Todd*: by using it “the court suggests to the jury that it should give great weight to that possibility in reaching its verdict.” As the decision in *Zimmerman* suggests, this court obviously has grave concerns about using instructions commenting that the testimony of a complaining witness in a sex charge does not have to be corroborated. While this court obviously felt compelled by *Clayton* to allow the use of the disfavored instruction, neither the decision in *Clayton* nor this court’s decision in *Zimmerman* should control the decision in the case at bar. Just why the trial court in this case decided to twice give this disfavored instruction is unclear from the record. However, what is clear is that by twice giving this same instruction, the court did what Washington Constitution, Article 4, § 16 forbids: it suggested to the jury that the court found the evidence of the complaining witness credible and believed the jury should convict.

As an error of constitutional magnitude, the defendant is entitled to a new trial unless the state can prove beyond a reasonable doubt that the error was harmless. *State v. Brown*, 147 Wn.2d 330, 58 P.3d 889 (2002). “An error is not harmless beyond a reasonable doubt where there is a reasonable

probability that the outcome of the trial would have been different had the error not occurred. A reasonable probability exists when confidence in the outcome of the trial is undermined.” *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). As the following explains, in this case the state cannot meet this heavy burden.

In the case at bar, the fact that the jury was unable to reach a verdict on Counts I and II suggests that they were troubled by the inconsistencies in Kristen Dillon’s testimony and the fanciful nature of at least one of the allegations. This claim was that the defendant got under a bathroom sink in the bathroom and was able to put his penis through a hole in the wall and have it protrude through a hole in the bathroom on the opposite side of the wall. It was improbable at best. In addition, Kirsten’s claims that her abuser had grey hair and a hairy chest was flatly refuted by evidence at trial that the defendant had brown hair and a hairless chest. Finally, her testimony at trial that she didn’t know if her abuser had ever ejaculated was indeed suspect in light of the fact that she had previously given a recorded interview in which she unequivocally stated that “he jizzed on me” and that she saw “white stuff” come out of it. This testimony does not meet the “overwhelming evidence of guilt” standard for overcoming non-constitutional errors. Much less does it meet the “harmless beyond a reasonable doubt” standard. Thus, the defendant is entitled to a new trial.

II. TRIAL COUNSEL’S FAILURE TO OBJECT WHEN THE STATE ELICITED IRRELEVANT, PREJUDICIAL EVIDENCE DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v.*

Kinchelse, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object when Deputy Bull testified to irrelevant, prejudicial matters and gave an opinion that the defendant was guilty, and when trial counsel failed to object that Dr. Dressel's rendition of Kirsten Dillon's statements to her were inadmissible hearsay. The following presents these arguments.

(1) Trial Counsel's Failure to Object When Deputy Bull Gave Irrelevant, Prejudicial Evidence, Including an Opinion of Guilt, Fell below the Standard of a Reasonably Prudent Attorney.

Under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment, every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result, no witness, whether a lay person or expert, may give an opinion as to the defendant's guilt, either directly or inferentially, "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State*

v. *Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

“[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... ‘merely tells the jury what result to reach.’ “ (Citations omitted.) 5A K.B. Tegland, *Wash.Prac., Evidence Sec.* 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. “Personal opinions on the guilt ... of a party are obvious examples” of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant’s guilt is an improper lay or expert opinion because the determination of the defendant’s guilt or innocence is solely a question for the trier of fact.

To the expression of an opinion as to a criminal defendant’s guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury.

State v. Carlin, 40 Wn.App. 701 (some citations omitted).

For example, in *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial, the dog handler testified that his dog found the defendant after following a “fresh guilt scent.” On appeal, the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed, noting that “[p]articularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial.” *State v. Carlin*, 40 Wn.App. at 703.

Similarly, in *State v. Haga*, 8 Wn.App. 481, 506 P.2d 159 (1973), the defendant was convicted of murder, and appealed, arguing, in part, that he was denied his right to an impartial jury when the court allowed an ambulance driver called to the scene to testify that the defendant did not appear to show any signs of grief at the death of his wife and daughter. The Court of Appeals agreed and reversed, stating as follows.

A witness may not testify to his opinion as to the guilt of a defendant. *State v. Harrison*, 71 Wash.2d 312, at page 315, 427 P.2d 1012, at page 1014 (1967), said:

Finally, it is contended that the trial court erred in refusing to permit the proprietor of the burglarized tavern to give his opinion as to whether or not appellant was one of the parties who participated in the burglary. The proprietor of the tavern was in no better position than any other person who investigated the crime to give such an opinion. To the question literally asked the witness to express an opinion on whether or not the appellant was guilty of the crime charged. Obviously this question was solely for the jury and was not the proper subject of either lay or expert opinion.

This recognized the impropriety of admitting the opinion of any witness as to guilt by direct statement or by inference as *Harrelson* likewise clearly points out. *See also State v. Norris*, 27 Wash. 453, 67 P. 983 (1902); 5 R. Meisenholder, Wash. Prac. s 342 (1965).

To the testimony of the ambulance driver was wrongfully admitted. It inferred his opinion that the defendant was guilty, an intrusion into the function of the jury.

State v. Haga, 8 Wn.App. At 491-492. *See also State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state's expert to testify in a rape case that the

alleged victim suffered from “rape trauma syndrome” or “post-traumatic stress disorder” because it inferentially constituted a statement of opinion as to the defendant’s guilt or innocence).

In the case at bar, the prosecutor intentionally injected both her and Deputy Bull’s opinion that the defendant had sexually abused Kristen Dillon through the following question and answer during the direct examination of Deputy Bull.

Q. How did you get this case in particular?

A. This particular one was given to me to follow up on from Juneau police.

Q. Alaska?

A. Yes.

Q. And so when you received it, had the interviews already been done?

A. The – yes.

Q. As far as they had – *the victim interview* had been done and some follow-up had been done?

A. Right. As far as I could see, that pretty much the only thing left was –

Q. But did you – what did you do when you received the case?

A. Well, I received the information that they gave me, which was *the videotape and audiotape of the victim interview*, and then I attached the incident reports that they gave me.

I eventually had the information transcribed so that we can get it into a written form.

And then over a long period of time, I made other attempt at contacts.

RP 116-117 (emphasis added).

As the court mentioned in *State v. Black, supra*, the trial court denied the defendant an impartial jury when it allowed a state's expert to testify in a rape case that the alleged victim suffered from "rape trauma syndrome" or "post-traumatic stress disorder" because it inferentially constituted a statement of opinion as to the defendant's guilt or innocence. The identical thing happened in this case when the court allowed both the prosecutor and a deputy sheriff to characterize Kristen Dillon as the "victim," because there is only one way that she was a victim: by the defendant having sexually abused her. In fact, the state's primary purpose in calling Deputy Bull as a witness was to interject irrelevant, inadmissible opinion evidence on guilt. The following examines this evidence and explains why it is irrelevant on the one hand, and prejudicial as opinion of guilt on the other.

Under ER 401, "relevant evidence means evidence having 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." Under ER 402, "all relevant evidence is admissible" with certain limitations. By contrast, under this same rule "[e]vidence which

is not relevant is not admissible.” Thus, before testimony can be received into evidence, it must be shown to be relevant and material to the case. *State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951). Finally, the “existence of any fact” as that term is used in these two rules cannot rest upon guess, speculation, or conjecture. *State v. Golladay*, 78 Wn.2d 121, 470 P.2d 191 (1970) .

For example, in *State v. Thamert*, 45 Wn.App. 143, 723 P.2d 1204 (1986), the defendant was charged with two counts of robbery, and he offered a diminished capacity defense, arguing that his voluntary drug usage prevented him from forming the requisite intent to commit the crime. During trial, he attempted to call a jail nurse as a lay witness to testify concerning her personal observations of the defendant following his arrest. However, the court excluded this witness and the defendant was convicted. The defendant then appealed, arguing that the trial court denied him a fair trial when it excluded his proposed witness.

In addressing the defendant’s arguments, the court first noted that lay witnesses may testify concerning the mental capacity of a defendant so long as the witness’ opinion is based on facts the witness personally observed. The court then noted that the trial court did not abuse its discretion when it excluded the defendant’s proposed witness because she did not meet these criteria as she had never observed the defendant when he was abusing drugs.

In the case at bar, when the state initially called Deputy Bull as a witness, the prosecutor elicited the fact that Deputy Bull was currently assigned as a detective at the “Children’s Justice Center” which used to be called the “Children’s Abuse Intervention Center.” In fact, the state further elicited the fact that Deputy Bull had been on this assignment for “three tours” and was in her “eighth year” at this post. RP 114. The state then elicited the fact that Deputy Bull has over 350 hours in specialized training when interviewing children in child abuse cases. RP 115. Indeed, she is “assigned to investigate physical and sexual abuse on kids under the age of sixteen, sometimes under the age of eighteen years of age.” RP 115. In addition, the state elicited the fact that she receives these cases as referrals from the prosecutor’s office, from child protective services, and from other police agencies. RP 115-116.

One is left to ask the question as to the relevance of the following facts: (1) that Deputy Bull worked with the “Children’s Justice Center,” (2) that this agency was formerly called the “Children’s Abuse Intervention Center,” (3) that Deputy Bull had done “three tours” at this assignment, (4) that Deputy Bull had over 350 hours training in interviewing the child victims of sexual abuse, (5) that she was specifically assigned to investigate cases of child sexual abuse, (6) that she was assigned to investigate this case, and (7) that she had viewed videotape and audiotape of the “victim interview” in this

case. What fact at issue did this evidence make even slightly or minimally more or less likely in the case? The answer was that there was no fact at issue to which this evidence even related. Indeed, Deputy Bull did not even do the interviews in this case.

The fact that this evidence was irrelevant does not mean that the jury did not infer a meaning in it, improper and prejudicial though it was. The obvious meaning to the jury was that since Deputy Bull was only assigned to cases in which children had been sexually abused, and that since, in the prosecutor and Deputy Bull's opinion, the interview with Kristen Dillon was a "victim" interview, it must necessarily follow that Kristen was the "victim" of the defendant's sexual abuse. In other words, the defendant must be guilty because in the prosecutor and Deputy Bull's opinion the defendant was guilty. Thus, this evidence was improper because it was both irrelevant and prejudicial. In addition, there was no reason at all for the defense to refrain from making an objection to this evidence. It provided the defense with no tactical advantage. It provided no facts from which the defense could make a positive argument on the defendant's behalf. Thus, this failure to object fell below the standard of a reasonably prudent attorney.

(2) Trial Counsel's Failure to Object When Dr. Dressel Testified to Statements Kirsten Dillon Made to Her Fell below the Standard of a Reasonably Prudent Attorney.

Under ER 801(c) hearsay is defined as "a statement, other than one

made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Under ER 802 hearsay is “not admissible except as provided by these rules, by other court rules, or by statute.” One of these exceptions is found in ER 803(a)(4), which allows the admission over a hearsay exception of a “Statement for Purposes of Medical Diagnosis or Treatment.” The following examines this hearsay exception.

Under ER 803(a)(4) statements made for the purpose of medical diagnosis or treatment are considered an exception to the hearsay rule. This rule states:

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

. . .

(4) Statement for Purposes of Medical Diagnosis. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

ER 803(a)(4).

Traditionally, this exception “applies only to statements ‘reasonably pertinent to diagnosis or treatment.’ Thus, statements as to causation (“I was hit by a car”) would normally be allowed under this exception, while statements as to fault (“. . . which ran a red light”) would not. 5A K. Tegland, *Washington Practice* § 367 at 224 (2d ed. 1982).

However, over the last few decades, the courts of this state have carved out an exception which allows a health care provider, under appropriate circumstances, to testify to a child's identification of the perpetrator of a crime against the child and a child's description of the alleged abuse. In a 1993 case, Division I of the Court of Appeals described this exception as follows:

ER 803(a)(4) allows the admittance of hearsay testimony if the statement was made for the purpose of a medical diagnosis or treatment. Normally, such testimony is not admissible if it identifies the perpetrator of a crime, but an exception has arisen to this rule when the victim is a child. *State v. Butler*, 53 Wn.App. 214, 766 P.2d 505, review denied, 112 Wn.2d 1014 (1989).

In *Butler*, this court examined at length the purposes of ER 803(a)(4) and the times when hearsay evidence concerning the identity of the perpetrator of a crime can be admitted when the victim is a child. This court ruled that such statements could be admitted as part of the doctor's testimony regarding medical treatment if the information was necessary for diagnosis and treatment. In ruling that the incriminating identification was necessary for diagnosis and treatment in that case, we reasoned that, in abuse cases, it is important for the child to identify the abuser in seeking treatment because the child may have possible psychological injuries and also may be in further danger, due to the continued presence of the abuser in the child's home. *Butler*, 53 Wn.App. at 222-23, 766 P.2d 505; see also *In re Dependency of S.S.*, 61 Wn.App. 488, 503, 814 P.2d 204, review denied, 117 Wn.2d 1011, 816 P.2d 1224 (1991).

State v. Ashcraft, 71 Wn.App. 444, 456, 859 P.2d 60 (1993).

As is apparent from the court's comments in *State v. Butler*, 53 Wn.App. 214, 766 P.2d 505 (1989), and *Ashcraft*, the justification for allowing a treatment provider to testify to the child's identification of the

alleged perpetrator of abuse lies within the court's belief that part of the treatment provider's duty and function is to identify the abuser, thereby allowing the treatment provider to gauge what type of psychological damage occurred, what type of treatment is necessary, and what steps will be necessary to prevent future abuse. As such, the courts have held that these statements, in the context of child abuse cases, fall generally within the category of those made "for the purpose of diagnosis or treatment."

For example, in *State v. Butler*, *supra*, the babysitter of a 2½-year-old child took the infant to the hospital after noting several bruises about the child's face. During the examination the child told the attending physician that his "daddy" (meaning his mother's boyfriend) had thrown him off the bunk bed. When questioned about this, the defendant stated that the child, whom he had been watching, fell off the bed. At trial the court allowed the physician to testify to the child's statement of who caused her injuries. Following conviction the defendant appealed, arguing that the trial court erred when it allowed the physician to testify as to what the child said.

On appeal the court of appeals first reviewed the similar fact patterns in *State v. Bouchard*, 31 Wn.App. 381, 639 P.2d 761 (1982), and *State v. Robinson*, 44 Wn.App. 611, 722 P.2d 1379 (1986). The *Butler* court stated the following concerning these cases:

In *State v. Bouchard*, 31 Wn.App. 381, 382, 639 P.2d 761,

review denied, 97 Wn.2d 1021 (1982), Bouchard was convicted of indecent liberties with his 3-year-old granddaughter. The child suffered a perforated hymen. The incident occurred when the child was visiting her grandparents. *Bouchard*, at 382, 639 P.2d 761. When the child returned home, her mother noticed blood on her daughter's body. Her mother testified that when she questioned her daughter, she told her mother that "grandpa did it." The attending physicians also testified that the child made similar statements to them. *Bouchard*, at 383, 639 P.2d 761.

Bouchard argued on appeal that the child's statements to the physicians were inadmissible hearsay. *Bouchard*, at 383, 639 P.2d 761. Without analysis, the court held that "[t]he statements to the attending doctors are clearly admissible under ER 803(a)(4) as statements 'of the cause or external source' of the injury and as necessary to proper treatment." *Bouchard*, at 384, 639 P.2d 761.

In *State v. Robinson*, 44 Wn.App. 611, 722 P.2d 1379, *review denied*, 107 Wn.2d 1009 (1986), the facts were very similar. Robinson was found guilty of indecent liberties with a 3-year-old girl. *Robinson*, at 615, 722 P.2d 1379. Robinson argued on appeal that admission of the child's statements made to the nurse and doctor at the hospital where she was treated were inadmissible hearsay. *Robinson*, at 615, 722 P.2d 1379. The statements to the nurse and doctor identified Robinson as the abuser. The court disposed of Robinson's argument in a footnote by holding that "[t]he statements to Nurse Billings and Dr. Kania are also admissible as statements made for purposes of diagnosis and treatment. ER 803(a)(4)." *Robinson*, at 616 n. 1, 722 P.2d 1379.

State v. Butler, 53 Wn.App. 219-220 (footnotes omitted).

In *Butler* the court went on to examine the application of the rule under analogous federal cases. The court noted:

This approach to child hearsay in the context of ER 803(a)(4) was further refined in *United States v. Renville*, 779 F.2d 430 (8th Cir.1985). *Renville* was convicted by a jury of two counts of sexual abuse of his 11-year-old stepdaughter. *Renville*, at 431. *Renville* argued on appeal that the trial court erred by permitting a physician

to testify to statements by the victim during his examination identifying Renville as her abuser. *Renville*, at 435. Specifically, Renville argued that the hearsay exception found in Fed.R.Evid. 803(4) did not encompass statements of fault or identity made to medical personnel. *Renville*, at 435-36.

The *Renville* court pointed out that the crucial question under the rule was whether the out-of-court statement of the declarant was "reasonably pertinent" to diagnosis or treatment. *Renville*, at 436. The court began its analysis by stating the two-part test for the admissibility of hearsay statements under Fed.R.Evid. 803(4) that the court set forth in *United States v. Iron Shell*, 633 F.2d 77 (8th Cir.1980), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1709, 68 L.Ed.2d 203 (1981).

"[F]irst, the declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be such as is reasonably relied on by a physician in treatment or diagnosis." *Renville*, at 436.

The test reflects the twin policy justifications advanced to support the rule. First, it is assumed that a patient has a strong motive to speak truthfully and accurately because the treatment or diagnosis will depend in part upon the information conveyed. The declarant's motive thus provides a sufficient guarantee of trustworthiness to permit an exception to the hearsay rule. *Iron Shell*, 633 F.2d at 84. Second, we have recognized that "a fact reliable enough to serve as the basis for a diagnosis is also reliable enough to escape hearsay proscription.

State v. Butler, 53 Wn.App. at 219-220.

After reviewing these cases, the court in *Butler* went on to affirm, noting that, as in *Bouchard* and *Robinson*, the child's statements to the treatment provider were necessary to determine the source of the injuries, and thereby determine what treatment to provide and what steps to take to protect the child from further injury.

Similarly, in *State v. Ashcraft, supra*, the babysitter of a 3-year-old child called the police after she discovered a number of bruises on the infant. After the initial investigation, CPS took custody of the child and had her examined by a physician. During this examination, the physician found numerous injuries and bruises of a type commonly associated with physical abuse. The state then charged the mother with numerous counts of assault after the child told the physician that her mother had hurt her. Following conviction, the mother appealed, assigning error to the court's admission of the physician's testimony that the child told him that "My mama did it."

After reviewing the history behind ER 803(a)(4), and the recent expansion of it for child abuse cases, the court held as follows:

Similarly, in the present case, the victim lived in the accused's home. The child had been determined to be the victim of probable abuse, raising questions of possible psychological injuries, as well as questions with respect to her safety. Therefore, as in *Butler*, [the child's] identification was necessary to allow for her proper diagnosis and treatment.

State v. Ashcraft, 71 Wn.App. at 456-67.

In each of these cases just cited, *Butler*, *Robinson*, *Bouchard*, *Renville*, and *Ashcraft*, the common thread that runs throughout is the immediate need to determine the source of the injuries in order to determine what treatment is appropriate, and what steps are necessary to shield the child from further abuse. As the court notes in both *Butler* and *Renville*, "first, the

declarant's motive in making the statement must be consistent with the purposes of promoting treatment; and second, the content of the statement must be consistent with the purposes of promoting treatment or diagnosis." *Butler*, 53 Wn.App. at 220.

In each of these cases these two criteria were met in that the suspicious injuries had just been discovered and the placement of the child back into the home of the alleged perpetrator was an imminent possibility. By contrast, in the case at bar, unlike any of the cited cases, there was no question as to the identity of the alleged perpetrator. Neither was there a need to protect the young woman from the alleged perpetrator because CPS had moved her out of her home. In addition, the young woman had repeatedly identified the defendant to the police.

Finally, unlike the cited cases in which the children were taken to a treating physician for treatment, in this case the then 17-year-old Kirsten Dillon child was specifically sent to Dr. Dressel by the police for the sole purpose of gaining the physician's opinion as an expert witness for the prosecution. In other words, Dr. Dressel was performing a forensic examination, not an examination for the purpose of treating the person examined. Thus, neither of the criteria required under *Butler* and *Renville* or any of the other cases cited was present in the cause currently before this court.

In other words, in this case Kirsten Dillon did not go to Dr. Dressel to get a diagnosis or to get treatment. Rather, she went to the physician because the police told her to in order to aid their preparation for the state's case against the defendant. Under these circumstances the then 17-year-old young woman's statements to the physician were not "consistent with the purposes of promoting treatment" as is required under *Butler and Renville*. Neither were her statements "consistent with the purposes of promoting treatment or diagnosis" since the young woman was not going to Dr. Sterling for diagnosis or treatment.

Far from a medical examination intended to promote the health and well being of the young woman, the examination in this case was solely a forensic exercise in the pursuit of evidence to use against the defendant contrived by the state to circumvent the hearsay rule. To sanction the use of such evidence invites the state to preface every claim of sexual abuse with a trip to the state's special consulting physician during which the child will be asked to repeat his or her prior claims of abuse to the physician, and thereby overcome the fundamental principles of the hearsay rule under the magic wand of ER 803(a)(4).

Under the facts of this case, the young woman's statements to the physician as to who the abuser was and what he did do not meet the requirements of the ER 803(a)(4) exception to the hearsay prohibition. Thus,

they were not admissible to prove the identity of the perpetrator and the facts of the alleged molestations. Neither was there any possible tactical advantage for the defense to refrain from objecting. Allowing Dr. Dressel to repeat what Kirsten Dillon told her had the effect of bolstering Kirsten's credibility in front of the jury, thereby damaging the defendant's case without any possible benefit to the defense. Thus, trial counsel's failure to object fell below the standard of a reasonably prudent attorney.

(3) Trial Counsel's Failures to Object to this Inadmissible, Irrelevant Evidence Caused Prejudice.

Under the doctrine of harmless error, a trial court's error of a non-constitutional magnitude such as occurred in this case warrants reversal if the defendant can show a reasonable probability that but for the error, the jury would have returned a verdict of acquittal. *State v. Hamlet*, 133 Wn.2d 314, 327, 944 P.2d 1026 (1997). As the following explains, in the case at bar the defendant can meet this burden.

In this case, Kristen Dillon testified to numerous instances of sexual abuse that she claimed happened over a relatively short period of time a number of years ago. One of these claims, that the defendant got under a bathroom sink in the bathroom and was able to put his penis through a hole in the wall and have it protrude through a hole in the bathroom on the opposite side of the wall bordered on the absurd. In addition, Kirsten's

claims that her abuser had grey hair, a hairy chest, and “jizzed” on her, was flatly refuted by evidence at trial that the defendant had brown hair, had a hairless chest, and had allegedly never ejaculated during any claimed instance of abuse. This evidence seriously undermined Kirsten Dillon’s credibility.

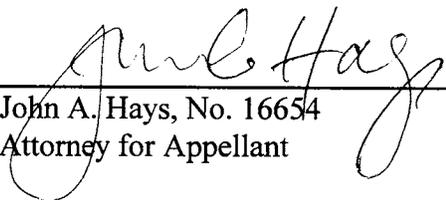
The jury obviously had a difficult time in finding that these claims and the state’s remaining evidence constituted proof beyond a reasonable doubt in that (1) the jury could not agree on Counts I and II, and (2) the jury three times sent out notes asking for clarification and stating that they could not agree on verdicts. Under these facts, the improper admission of any evidence would be sufficient to change what would have been an acquittal to a conviction. The defendant argues that this is precisely what happened in the case at bar. As a result, the improper admission of this evidence in this case, and trial counsel’s failure to object, caused prejudice and denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22 and United States Constitution, Sixth Amendment. Consequently the defendant is entitled to a new trial.

CONCLUSION

The trial court's use of two instructions commenting on the credibility of the state's complaining witness violated Washington Constitution, Article 4, § 16, and entitles the defendant to a new trial. In the alternative, trial counsel's failure to object to the admission of irrelevant, inadmissible, prejudicial evidence constituted ineffective assistance of counsel. As a result, the defendant is entitled to a new trial.

DATED this 11th day of August, 2008.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**WASHINGTON CONSTITUTION
ARTICLE 4, § 16**

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

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 cause 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.

Jury Instruction No. 5

In order to convict a person of a sexual offense against a child, it shall not be necessary that the testimony of the alleged victim be corroborated.

Jury Instruction No. 6

In order to convict a person of Rape of a Child in the First Degree, it shall not be necessary that the testimony of the alleged victim be corroborated.

