

No. 37930-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

The person identified by the state in this
persistent offender proceeding as

EDDIE L. TRICE,

Appellant.

FILED
CLERK OF COURT
SUPERIOR COURT
PIERCE COUNTY
WASHINGTON
JAN 21 2011
K. RUSSELL SELK

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

APPELLANT'S OPENING BRIEF

The Honorables Beverly G. Grant (trial and sentencing), Lisa Worswick
(motions) and John Hickman (motions),
Judges

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to prove the essential “entering” or “remaining” unlawfully element of first-degree burglary.

In the alternative, appellant Eddie Lee Trice’s Sixth Amendment and Article 1, §21 rights to jury unanimity were violated.

2. The prosecutor committed constitutionally offensive and flagrant, prejudicial misconduct which cannot be proven harmless.
3. Trice was deprived of his Article 1, §22, rights to effective assistance of counsel.
4. Trice’s Sixth Amendment and Article I, § 21, rights to trial by impartial jury were violated by the repeated admission of improper opinion testimony.
5. The “Two Strikes” Persistent Offender sentence was improperly based upon a foreign conviction not proven comparable.
6. The sentencing court imposed conditions of community custody which were not statutorily authorized and which violated Trice’s First Amendment and due process rights. Trice assigns error to the following conditions contained in Appendix H:

14. Do not possess or peruse pornographic materials. Your community corrections officer will define pornographic material.

...

25. You shall not have access to the internet unless the computer has child blocks in place and active.

CP 233-34.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. To prove first-degree burglary, the prosecution had to establish that Trice entered or remained unlawfully with the intent to commit a crime. Was there insufficient evidence to prove that Trice entered unlawfully where the victim let him into the home?

2. A person does not “remain” unlawfully in a home simply because he forms the intent to commit or commits a crime inside. Was there insufficient evidence that Trice “remained” unlawfully in a home he was let into when the prosecution relied solely upon this rejected idea that the formation of the intent rendered the remaining “unlawful?”
3. In the alternative, even if there was sufficient evidence to support either the “entering” or “remaining” means of committing the burglary, were Trice’s rights to jury unanimity violated because the prosecutor relied on both means of committing the offense but no unanimity instruction was given?
4. Did the prosecutor commit constitutionally offensive, flagrant and prejudicial misconduct by
 - a) comparing the certainty jurors needed to convict with the certainty they needed to do everyday things such as crossing the street or knowing the picture depicted on a puzzle, thus minimizing and misstating his constitutionally mandated burden;
 - b) focusing on whether the certainty was enough to cause people to act, rather than hesitate to act;
 - c) telling the jurors they should find Trice guilty because he had provided “no other explanation” for certain evidence when only Trice would have been able to provide that explanation and he had exercised his right not to testify; and
 - d) misstating the jurors’ role and duties by repeatedly saying they had to determine and declare “the truth” with their verdict?
5. Was counsel ineffective in failing to propose a proper unanimity instruction and failing to object and attempt to mitigate the corrosive impact of the repeated acts of prejudicial misconduct?
6. Did officers and a school counselor give explicit or near explicit improper opinion testimony when they testified a) that the victim’s statement to police was very credible and believable, b) that she had made that statement quite “correctly,” c) that the officers “knew” what Trice was

saying when he denied involvement was not “the truth” and that the police could “prove” it, d) that the lead detective was “very good” and his police report saying Trice had confessed was “accurate and well-written,” e) that Trice had details about the crimes that the officers believed he could not have gotten unless he had committed the crimes and f) that they “felt” that the claims against Trice were true?

7. Trice was sentenced under the “Two Strikes” Persistent Offender statute, which required the prosecution to prove a prior conviction for a specific, qualifying crime. Must the sentence be reversed where the prior crime upon which the prosecution relied was an out-of-state conviction for an offense which the prosecution failed to prove was legally or factually comparable to a Washington “two strikes” crime?
8. In *State v. Bahl*,¹ the Supreme Court held that a condition of community custody prohibiting possessing or perusing “pornography” and delegating to the CCO to define what constituted “pornography” was in violation of due process mandates and First Amendment rights. Did the trial court err in imposing an essentially identical condition?
9. Was a condition limiting the defendant’s access to the Internet similarly in violation of Trice’s First Amendment rights where it infringes on his right to unfettered access to ideas and protected speech but is completely unrelated to the crimes?
10. Were the pornography and Internet conditions unauthorized by statute where there was absolutely no evidence that pornography or internet access were in any way related to or involved in the crimes with which Trice was charged?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Eddie Lee Trice was charged by information with three counts of first-degree rape of a child, one count of first-degree child molestation and one count of first-degree burglary. CP 1-3; RCW 9A.44.073, RCW 9A.44.083, RCW 9A.52.020(1)(b). After motions and

¹164 Wn.2d 739, 193 P.3d 678 (2008).

pretrial proceedings before the Honorable Judges John Hickman (July 5, 2006) and Lisa Worswick (August 31, 2006, April 26, 2007, May 21, 2007), pretrial and trial proceedings were held before the Honorable Judge Beverly Grant on June 4, 25, August 1 and November 9, 2007, February 5, on April 1, 7-9, and 14-17, 2008, after which the jury found him guilty as charged.² CP 105-109. After sentencing proceedings on June 13 and July 1, 2008, Trice was ordered to serve a standard-range sentence for the burglary and a Persistent Offender sentence of life without the possibility of parole under the “two strikes” law for each of the child rape convictions and the child molestation. CP 211-27. Trice appealed and, after further proceedings on remand for reconstruction of missing records on April 30 and June 4, 2010, this pleading follows. See CP 237-52, 259-60, 272-75.

2. Testimony at trial

In 2006, 11 year-old A.L. lived with her dad, Bill Luedke, his girlfriend, Sandra Vogt, and Vogt’s three children, all in the same two-bedroom apartment. RP 152-53, 235-36. Carol Jean Ramm-Gramenz, a

²The verbatim report of proceedings consists of 20 volumes, some of which contain multiple dates which are separately paginated. In an effort to render this confusion of records more clear, they will be referred to as follows:

the volume containing the proceedings of July 5, 2006, as “1RP;”
the volume containing August 31, 2006, as “2RP;”
the volume containing April 26, 2007, contained in the same volume as August 31, 2006, as “3RP;”
the volume containing May 21, 2007, contained in the same volume as August 31, 2006, as “4RP;”
the 11 chronologically paginated volumes containing the proceedings of June 4 and 25, August 1 and November 9, 2007, February 5, April 7, 8, 15-17 and July 1, 2008, as “RP;”
April 1, 2008, as “5RP;”
April 9, 2008, as “6RP;”
April 14, 2008, as “7RP;”
June 13, 2008, as “8RP;”
the volume containing the proceedings of April 30 and June 4 2010, as “9RP.”

counselor at A.L.'s school, had listened to A.L.'s complaints about this home situation being chaotic and causing A.L. a lot of stress. RP 117-18. Ramm-Gramenz had told A.L. that she needed to talk to her father about "what was going on" and how it was affecting her. RP 118. Ramm-Gramenz also noted there were issues of poverty involved. RP 110-11. A.L. did not have "good" school attendance and the counselor had helped as she could with such things as getting A.L. clothing she needed. RP 110-19. Indeed, Ramm-Gramenz said, A.L. had repeatedly been in the counselor's office, talking about the difficulties she had at her home, getting help getting clothing and getting help with conflicts with other fifth grade girls. RP 110-19.

A.L. had gone to Ramm-Gramenz and talked about her stress with her family situation a few weeks before May 9, 2006, when A.L. came into the counselor's office and said that someone had touched her inappropriately at the home the day before. RP 110-11, 119. A.L., who appeared nervous, was worried about getting in trouble with her dad for having let someone in when her dad had left her at the apartment alone. RP 112-13. Ramm-Gramenz, who had no training in forensic interviewing, asked A.L. questions about the allegations, then called police. RP 112-14. A patrol officer responded and took the report and the case was ultimately assigned to Detective Jeffrey Turner of the Tacoma Police Department. RP 259.

The patrol officer did not testify at the later trial regarding those claims, nor did Ramm-Gramenz details those claims in her testimony. See RP 259. In a defense interview, Ramm-Gramenz admitted that, when A.L.

related her claims to the officer, what A.L. said was basically “verbatim” to the account as she had given it to Ramm-Gramenz. RP 116.

At trial, A.L. testified that she had gone home from school early on May 8, 2006, because she had felt sick. RP 156-57, 176-77. She said her dad and his girlfriend, Vogt had picked her up and, after stopping at a food bank on the way home, dropped her off, leaving her at the apartment alone. RP 156-57, 176-77. She also said she had put on her pajamas and looked out the window, seeing her dad and Vogt in the parking lot talking to a homeless friend. RP 178.

On cross-examination, however, A.L. admitted that she had said in a pretrial interview that Luedke and Vogt had not dropped her off but had instead stayed at the apartment for about an hour, during which time A.L. took a bath. RP 185. She then changed her testimony and said they had not left right away. RP 186.

At some point while Luedke and Vogt were gone, A.L. said, Eddie Lee Trice came and knocked on the door. RP 158. Trice was someone A.L. had previously met, because her dad had introduced them. RP 155-56. Trice was working at the complex and A.L. said Luedke was working with him. RP 171. Indeed, A.L. said Trice was at the apartment probably once a week, usually when Vogt or Luedke were home. RP 171. At the same time, A.L. said that she had only known Trice for about a month and her dad had been working with him during that time. RP 171.

A.L.’s dad, Luedke, denied working with Trice during that time, saying he had only worked with him once. RP 203-204, 209.

A.L. said that Trice asked if he could use the bathroom and she

said yes, giving him permission to come inside. RP 158. After he went to the bathroom, he left the apartment. RP 158. A little while later, he returned, saying he had forgotten his keys and thought they were somewhere by the bathroom. RP 158. Again, A.L. let him in. RP 158.

At trial, A.L. maintained both that Trice left with his keys after doing nothing and that something happened. RP 158-60, 187, 189. When she said something happened, she said it was that he asked her if she wanted \$50 and told her to go put on her bathing suit. RP 158. She said no and he then asked her to go into her room and put on two pairs of underwear. RP 158. She agreed and walked with him to her room, where she went inside and he shut the door behind her, going by himself into the living room. RP 159. A.L. said that, at that point, she thought about jumping out her window but it was too high. RP 159.

A.L. testified that she was wearing her shirt and her jacket and the underwear during the incident. RP 160, 189. She did not explain how she had gotten from the pajamas she had previously testified that she had put on when she got home, into the other clothes, or when or why such a change might have occurred. RP 160-69.

A.L. conceded that, in a pretrial interview, she had claimed that she was, in fact, wearing a skirt. RP 386. Although she recalled that point in the interview, at trial she said it was not correct. RP 386.

The clothes later taken into custody were not tested or admitted at trial. See RP 358-59.

A.L. said that, after she got into the underwear, Trice called to her, asking if she was ready. RP 159. When she said yes, he opened the door

and came inside, then asked her to take off first one pair and then the other of the underwear. RP 160. She did so, also sitting on the bed as he suggested. RP 160.

At that point, A.L. testified, he started “doing things” to her “private areas” and did not stop when she said he should. RP 160. More specifically, she said he was “[k]issing and licking and things” on her vagina. RP 161. She said it happened for about five minutes and she kept telling him she was scared her dad would come home and blame it all on her. RP 161.

A.L. testified that Trice did not say anything but then he told her to get up and bend over. RP 161. When she did so, she said, he started touching her in her vagina and anus with his finger. RP 162. She did not remember saying anything at that point but said he asked if it hurt. RP 162. She also thought it happened for about five minutes. RP 163. After that, she said, he left. RP 163.

When prompted by the prosecutor at trial, A.L. remembered telling police that she saw Trice ejaculate. RP 163. She said while she was bent over, she looked underneath her legs to see what he was doing and saw “it” come down. RP 163. She was positive that it went straight down onto the floor. RP 163. He left after that, still not saying anything. RP 164.

According to A.L. Trice called on the phone a little later, asking if she wanted some food from McDonald’s. RP 164. She said yes and he came by a little while later. RP 164. Again, she opened the door for him, this time taking the food. RP 164. He left and she locked the door and

shut all the windows. RP 164. When asked about the money she said Trice had offered, A.L. said that he did not give her \$50 but he gave her some money before he left the second time, after the incident. RP 196.

An interviewer who talked with A.L. the day after the alleged incident conceded that A.L. said she was offered \$21, not \$50. 7RP 38-39. The amount also changed in that interview, so that initially A.L. said it was \$21, “and then it ended up being \$47, and then \$2. So \$39 total.” 7RP 38-39.

A.L. said that Trice called “[l]ike five” times after he left the second time and she only answered once, for the McDonald’s question. RP 164. According to A.L., he also said something like, “[d]o not tell no one because I do not want to go to jail.” RP 164-65.

A little later, A.L.’s dad came home. RP 165. A.L. did not say anything to him because she knew her dad was going to blame her and say it was her fault for letting Trice in. RP 165. She also said her dad would not “really care.” RP 165.

A.L. testified that she told M.V., Vogt’s then 9-year old daughter, what had happened and M.V. suggested that A.L. should talk to her dad. RP 165. A.L. told M.V. she did not want to do that because she thought she would get into trouble. RP 165, 7RP 10-11. A.L. said they talked about it for about 25 minutes and distinctly remembered that they were on her bed at the time. RP 167-68. After about an hour, A.L. asked M.V. if she thought she should tell her counselor at school and they agreed that was what she would do. RP 165.

Despite making this decision, A.L. categorically denied knowing

the counselor at all “from being around her before.” RP 166. In contrast, Ramm-Gramenz talked at length about her repeated interactions with A.L., describing how A.L. had come to seek the counselor’s assistance in getting some clothes, that Ramm-Gramenz had helped A.L. “on several occasions” with other fifth grade girls and conflicts, and had worked with A.L. about the home difficulties just prior to this disclosure. RP 111-20.

At a defense interview prior to trial, A.L. had been sure that she and M.V. had gone into A.L.’s room and sat in the closet to talk about the allegations. RP 184. At trial, however, A.L. denied that it had happened that way. RP 184. Indeed, she did not remember saying anything like that in a defense interview. RP 184.

For her part, M.V. testified about having a conversation with A.L. about something A.L. was uncomfortable about but was not sure if that happened in A.L.’s room. 7RP 10. When asked to say what it was that A.L. and M.V. had discussed, M.V. declared it was “[a]bout the molestation.” 7RP 10. M.V. then admitted that “molestation” was a word she had learned since then in discussions with various people about what A.L. said had occurred. 7RP 10-11.

At trial, A.L. admitted that, at the time she said the incident occurred, Vogt’s older children were also living with A.L. and one of them was 17. RP 169. A.L. did not explain why she talked only to someone two years younger, instead of someone older. RP 170.

In the forensic interview only a day after the alleged incident, A.L. never said anything about talking to M.V. about the allegations. 7RP 36.

Jennifer Knight, a “forensic therapist” who conducted that

interview, said A.L. had a “flat affect,” actually was kind of “to the point” in the interview and was “really, really demonstrative,” mimicking the positions she said she had been in when the incident occurred. 7RP 28. Knight admitted that A.L. was “very intelligent for her age” and that she was very “street smart,” with verbal abilities above average. 7RP 28-29.

Ultimately, at trial, A.L. admitted that she did not really remember a lot of what happened during the incident. RP 197. She was positive, however, that, when he ejaculated, no sperm got on her or on her clothes. RP 174, 198. Instead, she said, it had fallen on the carpet without getting on her in any way. RP 197-98.

The day after the incident, however, A.L. specifically told the forensic interviewer that, when the semen had come out, it had gone onto A.L., on her butt and back. RP 331. An on-call nurse practitioner at the hospital confirmed that A.L. had told the interviewer those claims and the interviewer had passed them on to the nurse. RP 331. When conducting a physical examination of A.L. that same day, the nurse therefore specifically asked A.L. if the sperm went “anywhere else” on A.L.’s body besides her butt and back and A.L. responded, “[i]t just went on my butt and on the floor.” RP 331. The nurse took a swab of A.L.’s buttocks, where A.L. said the semen went, because A.L. also said she had not bathed since the incident and was wearing the same exact clothes. RP 331-32.

That swab was never tested. RP 355, 359. Nor was the “rape kit” and clothing that A.L. was wearing, although those items were taken into custody. RP 355, 359. A lab scientist said that the lab was busy and had a backlog so it did not test everything in every case. RP 355, 359. He was

unable to say whether the materials he received included a swab from A.L.'s buttocks or what clothing was sent because he never opened the relevant bags. RP 358-59.

A.L. was physically completely normal, with no findings indicating any suspected injuries on her hymen. RP 312-13. The nurse who examined her said that the lack of "findings" was not surprising because "[t]he vast majority of children that have just had digital penetration would have normal findings." RP 315.

A.L.'s version of what had happened changed during her testimony. RP 187. Initially, she said the incident had occurred when Trice came back for his keys and that he had brought her food from McDonald's later. RP 187. But on cross-examination, she said that he had brought the food when he came to get his keys. RP 187, 191. She said he was not there when she ate the food, having left after getting his keys. RP 191. But she then said that the McDonald's had sat on the dresser in her bedroom during the alleged incident and she ate it later, after everything had happened. RP 192.

A.L. first flatly denied at trial that there were any police officers at the apartment complex that day, after the alleged incident had occurred. RP 193. When asked about a story that had come up about someone having been hit by a rock and a police investigation, A.L. declared it was a "made up story" about why the police were there. RP 194. She was clear that she did not recall anything about any such incident or police being there, nor did she recall anything about some conflict between "Shawn and Chequila" leading to police being at the apartment, outside and where A.L.

could have talked to them. RP 195-96.

Later at trial, after being confronted with and apparently reviewing her statement, A.L. changed her testimony again. RP 386. She now recalled being outside after the incident, playing with some friends, talking and having fun when there was an incident with a rock. RP 386. She said they were all playing and “Shawn had decided to throw a rock at Joquala, and Joquala started crying.” RP 387. A.L. described going to get Joquala’s mom, the mom saying she thought Joquala was injured, the kids getting talked to about the rock incident, and the police responding. RP 387.

Ultimately, A.L. conceded that she was outside, in the courtyard, at the same time as police, on the same day she said Trice had touched her inappropriately. RP 387. She said nothing to those officers about anything improper having happened to her earlier in the day.

Bill Luedke, A.L.’s dad, testified that he was introduced to Trice as the “right-hand” of Mike Wright, one of the people who owned the apartment complex, during a “walk through” Wright did at some point. RP 203, 208. Luedke said Trice had been in his apartment a few times to use the phone, including once when the kids were home. RP 203. Luedke also said he had worked with Trice in pulling some carpets out of some apartments they were renovating, but that he had only done so one day - the day of the alleged occurrence. RP 203.

Luedke said that A.L. came home on May 8, 2006, because of an asthma attack. RP 204. Unlike A.L., Luedke was sure that he did not pick her up at school, instead thinking someone at school had brought her

home. RP 204, 216. A few moments later, however, Luedke brushed off his earlier certainty that someone had brought A.L. home, saying that he had so testified because he had thought that was what had happened but he had changed his mind. RP 228. He then said that he and Vogt had gone to pick A.L. up at school. RP 228.

Luedke, who admitted he had left A.L. home alone in the past, said he only left for a few minutes that day and “always” called and checked in on A.L. when he did so. RP 204, 230. He said that, when they left the girl home alone, she was in her room playing, having taken some medicine they had given her. RP 217. Unlike A.L., Luedke said the homeless friend came over to the apartment and they all left from there. RP 227. But a moment later, he changed his testimony again, saying that they had gone and picked up A.L. and just walked her into the apartment while the homeless friend waited for them in Vogt’s van. RP 229.

Luedke testified that while he, Vogt and the homeless friend were at the scrapyard several miles away, he called A.L. on the phone to ask if everything was okay. RP 229. In his statement to police, Luedke had said that he had not called A.L. until they were driving back. RP 380. Luedke said that A.L. reported letting Trice in twice, once to use the bathroom and another time to pick up the keys. RP 230. She never said anything in that call about anything improper occurring. RP 229-31.

When they got home about five or ten minutes after that call, A.L. came outside and started playing with other kids. RP 230-31. Luedke testified that he had immediately went to see Trice, to find out what work they were going to do at the apartment. RP 230. They went to talk to

Mike Wright and Luedke was shown where the tools were for the work that needed to be done. RP 230. Luedke only worked for a short time that day because he “wasn’t feeling so hot” and was “kind of having some personal problems with what was going on,” by which he meant he was upset with A.L. for having let someone into the apartment. RP 380.

At trial, Luedke testified that he was hollering at A.L. about letting someone into the apartment while he was gone when Trice, who was working outside, too, intervened, saying no, it was “part of his fault.” RP 231, 381. Luedke said Trice then offered to take A.L. to McDonald’s but Luedke demurred, instead saying it would be okay for Trice to bring food back to her. RP 381. In contrast to A.L.’s testimony, Luedke said all of this happened *after* Luedke had gotten home from the scrapyard, including A.L. being given the McDonald’s food. RP 381.

After being confronted with and reviewing her statement to police, A.L. first said she now recalled the food from McDonald’s was given to her before the incident. RP 385. She then said it was after. RP 385.

According to Luedke, when police brought A.L. home after she talked to the counselor at school, Trice called Luedke and asked why the police were at his house, so Luedke lied and told Trice one of the neighbor kids had broken one of the windows. RP 205.

Luedke admitted to having filed a lawsuit against the apartment owners and Mike Wright over the allegations. RP 205, 233. Indeed, he and A.L. went to talk to an attorney about doing so the very next day. RP 234. That attorney admitted to talking to them about suing for money based on the allegations and said that Luedke wanted not only to make

sure any treatment for A.L. was paid for but also wanted money so they could move. RP 364. The attorney told Luedke that any claim had to be A.L.'s and was subject to court approval because of her age, although he thought a parent might be able to access any money in certain situations. RP 365-37. The attorney opined that Luedke did not appear to be trying to "hit the jackpot" for himself. RP 366-68.

Although she did not initially mention it at trial, on cross-examination, A.L. admitted telling police about using a towel on the carpet after Trice left, wiping up what she said he had "ejaculated on the carpet." RP 388. The towel was taken into evidence by police and tested. RP 138. The state forensic scientist admitted, however, that there was no semen or anything similar found on that towel. RP 341, 355, 359.

The day after the alleged incident, A.L. pointed police to a spot on the floor where she said the sperm had fallen. RP 166-67. It had no such stain. RP 122-29. About a half a foot away, there was something the forensic specialist was able to find, although he had to use an ultraviolet light source to see it and had to play with different lights to "bring out the stain better" and make it somewhat visible. RP 129, 131, 141. The piece of carpet where the specialist saw a stain was cut out and sent for processing as evidence. RP 133. The same forensic scientist who found no semen on the towel A.L. claimed to have wiped up the semen with tested the carpet sample and a reference sample from Trice and said the stain on the carpet matched Trice's DNA. RP 335-48. That scientist could not say, however, whether it had fallen there as A.L. claimed or been placed there in some other way. RP 360.

After watching the interview of A.L. and talking to people at the apartment complex, Detective Turner ultimately found Trice in Los Angeles, California, and flew there with another officer, Keith Holden, to interrogate Trice at a local police station where he was being held at Turner's behest. RP 261-67. During the interrogation, Trice had confirmed that he did odd jobs at the various properties Wright owned and was allowed to sleep in vacant apartments and given a little money for his work. RP 273, 6RP 28. The officers said that Trice told them he knew why they were there and that Luedke was "into drugs" in such a significant way that the FBI should be involved. 6RP 28, 30, 35. Turner said Trice accused Luedke of doing some "inappropriate things" to A.L., noting that Luedke was often home alone with his daughter. RP 275, 6RP 29. Turner opined that it was "interesting" that Trice was trying to say that "Bill is the bad person" but could not come up with specifics. RP 276.

Turner asked Trice about whether he had been inside the Luedke apartment and Trice responded that he thought he had been to the door twice but only inside once, when he was asking for a key from Luedke. RP 279, 288, 6RP 32. At that point, Turner said, "[i]f everything you are telling me is the truth, then why did you leave Tacoma and go down to California?" RP 280. Trice explained that the complex owner, Wright, had called and told Trice that there was a warrant out for his arrest for raping a girl at the apartment complex, describing the accusations as "penetrating the little girl, then masturbating." RP 280, 6RP 35. Trice then said, "[i]f I put my stuff in that little girl, you would know it. I would have hurt it." RP 280.

Trice gave a written statement reflecting the interrogation thus far. RP 283. According to the officer, Trice then asked if the statement was going to “help him or hurt him.” RP 288. At that point, Turner “confronted” Trice with the allegations that A.L. had made, in detail. RP 288-29, 6RP 44. Holden described it as telling Trice the officers “knew” what had happened, including the details. 6RP 44.

According to the officers, Trice’s demeanor changed “[l]ike night and day,” with tears welling up in his eyes. RP 289. Turner told Trice that he thought Trice was, in a “sense not a monster because had he put his penis inside, he most likely would have injured her.” RP 289. He also told Trice that he felt Trice was being “compassionate towards her” when he limited himself to what he did and because he had given her money and bought her food. RP 289. The officers said that it was just a matter of time before they got his DNA from the sperm on the floor. RP 291, 6RP 44-46. At that point, the officers said, Trice “made a spontaneous statement,” saying, “I did it. I am sick. I did it. I did what you said I did, and you’re right. I didn’t want to hurt that little girl. I’m fucked.” RP 291, 6RP 46.

Turner admitted that his memory of events was better in 2006 than by the time he testified at trial, and that they could have taped Trice in the interview. 6RP 9, 19. Holden also admitted that interviews of children are always recorded because of the importance of having an accurate record of what is said and that Trice could have been taped as well. 6RP 50-53.

Both officers admitted that Trice told them about a sexual incident

Trice had with Vogt just before the incident. RP 276, 6RP 30. The sex was by arrangement with her and Luedke in exchange for crack cocaine. RP 276, 6RP 30. Luedke and Vogt came to the vacant apartment Trice was sleeping in and they all went into the bedroom. RP 276, 6RP 30. Trice wanted to have sex with Vogt but she did not have a condom and would not have sex without one. RP 276. She pulled her pants down and bent forward while he masturbated. RP 276. Trice told the officers he had ejaculated on the carpet in that bedroom. RP 277.

Vogt, who was still unemployed and whose children were in foster care at the time of trial, admitted that she had talked to Trice about getting one of the apartments for herself, even though she was unemployed. RP 235-37. She wanted an apartment which was across from Luedke's and talked to Trice about it several times, applying to rent that apartment although someone already lived there. RP 237, 241. Vogt admitted there were 8 people living in Luedke's two bedroom apartment and it was not a good situation. RP 239.

Vogt testified that she thought Trice was interested in her and said he seemed "overly friendly" when she asked about renting the apartment. RP 351. Although she did not recall discussing how she would manage to pay the \$785 a month it would cost, she thought she could have paid with what she got from "DSHS" and her son's "SSI." RP 239-40, 251-52. She denied that she had arranged with Trice to pay half of the rent in cash and the other half was by having sex with him. RP 254. She also denied that she had agreed to have sex with Trice in return for drugs. RP 254.

Vogt admitted, however, that she was, in fact, a drug addict. RP 255. She said she had been through rehab since the incident. RP 255.

Initially, Vogt admitted she had gone to one of the empty apartments with Trice and Luedke. RP 241. She then backtracked, saying it was with Luedke alone. RP 241. She admitted that “sometimes” she had “a hard time remembering things,” and then they would “come to” her all of a sudden and she would remember. RP 244.

D. ARGUMENT

1. THE BURGLARY CONVICTION MUST BE REVERSED AND DISMISSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE ESSENTIAL ELEMENTS. IN THE ALTERNATIVE, THE CONVICTION WAS IN VIOLATION OF TRICE’S RIGHTS TO JURY UNANIMITY

Under the state and federal due process clauses, the prosecution bears the constitutional burden of proving every element of the crime charged, beyond a reasonable doubt. See In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). Where the state fails in this duty, reversal and dismissal with prejudice is required, because the state, with all its resources, is not allowed a second chance to meet its burden. See, e.g., State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

In this case, this Court should reverse and dismiss the first-degree burglary conviction, because there was insufficient evidence to prove an

essential element of that crime under either of the alternative means. Further, the trial court erred in repeatedly denying Trice's motions to dismiss based upon this insufficiency. See RP 395-400, 468-70. Finally, in the unlikely event this Court finds that one of the means was supported by sufficient evidence, reversal would still be required, because the conviction was in violation of Trice's rights to jury unanimity.

a. There was insufficient evidence to prove either entering or remaining unlawfully

Reversal and dismissal of the burglary conviction is required, because the prosecution failed to present constitutionally sufficient evidence to prove all the essential elements of that crime. Evidence is only sufficient if, viewed in the light most favorable to the prosecution, any rational trier of fact could have found guilt beyond a reasonable doubt. Green, 94 Wn.2d at 221-22. What constitutes sufficient evidence in a particular case begins with the question of what elements are required to prove the crime. For first-degree burglary, RCW 9A.52.020 provides those elements, so that a person is guilty of the offense when, as relevant to this case:

with intent to commit a crime against a person or property therein, he or she enters or remains unlawfully in a building and if, in entering or while in the building or immediate flight therefrom, the actor or another participant in the crime. . .(b) assaults any person.

Thus, to prove Trice guilty, the prosecutor had to prove, *inter alia*, that he either entered or remained unlawfully. Each of these is a separate means of committing the same crime. See State v. Klimes, 117 Wn. App. 758, 767-68, 73 P.3d 416 (2003), overruled in part and on other grounds by, State v. Allen, 127 Wn. App. 125, 110 P.3d 849 (2005). While they are

not necessarily repugnant to each other, these means are different, factually, and require proof of different things. See Allen, 127 Wn. App. at 127-28.

More specifically, a person enters unlawfully only if they enter without invitation, license or privilege. See RCW 9A.52.010(3). Thus, a person who breaks and climbs through a window of a stranger's home (without invitation, obviously) will have entered that home unlawfully, as will a child whose parents have kicked him out of the house, thus revoking his privilege to enter, so long as other arrangements for parental duties have been made. See State v. Howe, 116 Wn.2d 466, 805 P.2d 806 (1991). In contrast, a person remains unlawfully if they have lawfully entered a building but 1) that invitation, license or privilege has been expressly or impliedly limited, 2) the person's conduct violates the limits, and 3) the person acts with intent to commit a crime in the building. See State v. Thomason, 71 Wn. App. 634, 861 P.2d 492 (1993); RCW 9A.52.010(3). Thus, a person who goes into a building open to the public but enters into an employee area and steals a purse there has exceeded the invitation the public has been granted and has remained unlawfully. See Allen, supra.

In this case, the prosecutor's theory was that Trice was guilty under RCW 9A.52.020(1)(b) either for entering or remaining unlawfully. According to the prosecutor either a) Trice entered lawfully but his privilege to be there was automatically revoked once he formed the intent to commit a crime or started committing one, i.e. "[h]e did not have permission to stay there and do that," or b) he did not enter lawfully in the

first place because, even though A.L. lived there and invited him in, because she was 12 years old she really did not have the authority to extend such an invitation. RP 395-97, 425. And the trial court essentially adopted both of these theories in refusing to dismiss the burglary charge, both before and after it was submitted to the jury. See RP 395-400, 470.

But both of those theories fall with the barest scrutiny.

First, Washington courts have repeatedly rejected the notion that a person who enters a building lawfully remains unlawfully once he or she forms the intent to or actually commits a crime inside. See State v. Collins, 110 Wn.2d 253, 751 P.2d 837 (1988); Allen, 127 Wn. App. at 136-37; Klimes, 117 Wn. App. at 766-78. Prosecutors have repeatedly tried to convince the courts to follow this theory, with no success. See, e.g., Allen, supra; Klimes, supra; see also, State v. Miller, 90 Wn. App. 720, 954 P.2d 925 (1998). Instead, courts have rejected the idea that all indoor crimes are also burglaries. Collins, 110 Wn.2d at 261-62; Allen, 127 Wn. App. at 137; Klimes, 117 Wn. App. at 767. There must be separate evidence of unlawful remaining, rather than just the assumption that one's permission to be somewhere would automatically be revoked once a crime was involved, the courts have held, otherwise all crimes committed inside would suddenly be burglaries. See Allen, 127 Wn. App. at 137; Miller, 90 Wn. App. at 723.

Put another way, lawful entry, even with nefarious intent, is not by itself a burglary, nor is it converted to one by that intent or by commission of an indoor crime. See Allen, 127 Wn. App. at 137; Miller, 90 Wn. App. at 724-26. As the Miller Court noted, nothing in the law “supports the

argument that the harboring of criminal intent is in itself sufficient to violate an implied limitation or to establish revocation of any license, invitation or privilege.” 90 Wn. App. at 727.

The courts have reached these conclusions for several important reasons. Interpreting the statute to accept the prosecution theory would render superfluous an entire section of the burglary statute, the “remains unlawfully” provision. Collins, 110 Wn.2d at 261-62. In addition, the result of accepting the theory is extreme - it would convert every crime inside a building into the very serious class B felony of burglary. Miller, 90 Wn. App. at 725; see Klimes, 117 Wn. App. at 767. This is a something, the Miller Court noted, that the Legislature could not have intended. Miller, 90 Wn. App. at 725.

Thus, the prosecutor’s theory here that Trice had automatically exceeded any permission or limit placed on a lawful entry - and thus was “remaining unlawfully” - the moment he contemplated or committed a crime retains no currency. Instead, there must have been evidence of some other limit on the permission or license given at the lawful entry, which is then exceeded - for example, a limitation on loitering or skateboarding. See, State v. R.H., 86 Wn. App. 807, 812, 939 P.2d 217 (1997). But other than that theory, there was no evidence that Trice had “unlawfully remained.”

The second theory of the prosecution is equally unsound. That theory was that, even though A.L. let Trice into the home not once but several times, Trice somehow “entered unlawfully,” because she was a minor and everyone knows that a kid should not be allowed to open the

door and let someone inside. See RP 395-97, 425. But again, this theory is in conflict with the law. An “unlawful” entry is by definition, “uninvited.” See e.g., State v. McNeese, 892 P.2d 304, 312 (Colo. 1995). In contrast, a person enters lawfully when they are licensed, privileged or invited to do so. RCW 9A.52.010(3). This is consistent with the common law concept of a “breaking” in burglary which remains despite the absence of a requirement of proof:

In the modern American criminal codes, only seldom is there a requirement of a breaking. This is not to suggest, however, that elimination of this requirement has left the “entry” element unadorned, so that any type of entry will suffice. Rather, at least *some* of what was encompassed within the common law “breaking” element is reflected by other terms describing what kind of entry is necessary. The most common statutory term is “unlawfully.”

LaFave and Scott, *Substantive Criminal Law*, § 8.13(a) (1986 & 1995 Supp.) (emphasis in original; footnotes omitted).

Put simply, Trice was invited in by A.L. She opened the door to him. She said yes when he asked to come inside. She moved out of the way and let him in. And she did this not once but several times. RP 158, 164.

Indeed, the prosecution never argued that A.L. did not give Trice permission to come inside. Instead, the prosecution argued that, despite that permission, Trice nevertheless entered unlawfully because we, as a society, do not approve of allowing children to open the door to let people in when they are home alone and “most of us know that.” RP 425.

Regardless whether it is a good idea for an 11 year-old to let someone into an apartment where her father has left her alone, however,

that is what she did. Several times.

Even if she broke her father's rules or the societal norms the prosecutor urged the jury to apply, A.L. still clearly had the authority to invite someone into the home. A person who resides in or has authority over or even simple temporary occupancy of a property is able to grant permission for someone to enter or remain for the purposes of the burglary statutes. See State v. J.P., 130 Wn. App. 887, 892, 125 P.3d 215 (2005), disagreed with in part and on other grounds by, State v. Jensen, 149 Wn. App. 393, 401, 203 P.3d 393 (2009).

And indeed, the person extending the invitation need not be an owner of the property or even a person on the lease. J.P., 130 Wn. App. at 894. Instead, it is only necessary that the person have "possession or **occupancy**" of the property, as compared with the alleged burglar. 130 Wn. App. at 894 (emphasis added). This is because "[t]he law of burglary was designed to protect the **dweller**, and hence, the controlling question" is "**occupancy** rather than ownership." State v. Schneider, 36 Wn. App. 237, 241, 673 P.2d 200 (1983) (emphasis added).

Recently, this Court examined the purpose of the burglary statute in a case in which the defendant had broken into a house where he lived and committed a crime against his co-resident, who had a no contact order prohibiting him from being near her. State v. Wilson, 136 Wn. App. 596, 150 P.3d 144 (2007). The prosecution argued that, because the co-resident was present at the time, the no-contact order rendered his entry and remaining in the home, near her, unlawful for the purposes of the burglary

statute. 136 Wn. App. at 608. This Court noted:

[a]lthough the purpose of a no-contact order is to prevent a victim from having to face her batterer, the burglary statute's intent is to allow an occupant to prevent all those who are unwelcome from entering the premises. **It is the consent, or lack of consent, of the residence possessor, not the State's or court's consent or lack of consent, that drives the burglary statute's definition of a person who "is not then licensed, invited, or otherwise privileged to so enter or remain" in a building.**

136 Wn. App. at 608 (emphasis added).

A.L. was living at the home. She granted permission for Trice to enter. Regardless whether she *should* have, the fact that she did so negated the argument that the entry, made with her permission, was "unlawful."

Because there was insufficient evidence to support a finding that Trice had entered or remained unlawfully, reversal and dismissal of the burglary conviction is required. This Court should so hold.

b. In the alternative, Trice's right to jury unanimity was violated

In the unlikely event that this Court finds that one of the means of committing the burglary was supported by sufficient evidence, reversal would nevertheless be required, because the conviction violated Trice's rights to a unanimous jury. Under Article 1 § 21 of our constitution and the Sixth Amendment, a defendant cannot be convicted of a crime unless the jury is unanimous in concluding that the criminal act for which he has been charged was committed. See State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Where the state presents evidence of multiple means of committing the crime but brings only one charge, one of two things must happen; either the prosecution must specifically and clearly elect

means upon which it is relying for the charge, or the trial court must instruct the jury that it has to be unanimous as to which means it finds has been proven and constitutes the crime. See State v. Whitney, 108 Wn.2d 506, 511-12, 739 P.2d 1150 (1987). If neither occurs and only a general verdict is rendered, reversal is required unless the reviewing court can find the error harmless. See State v. Ortega-Martinez, 124 Wn.2d 702, 707-708, 881 P.2d 231 (1994).

Here, the two means were the “entering” or “remaining” unlawfully means of committing burglary. Although those means are not necessarily repugnant, they are separate and usually require different proof. See Allen, 127 Wn. App. at 127. As a result, if the jury is not instructed specifically on one means over the other, a unanimity instruction is required if the prosecution argues both means of the crime’s commission and there is insufficient evidence to prove both means. Id.; see also, State v. Howard, 127 Wn. App. 862, 113 P.3d 511, review denied, 156 Wn.2d 1014 (2005).

Thus, in Allen, the Court reversed where the prosecutor argued in rebuttal that the defendant was guilty of unlawful entry because he had the intent to steal when he went into the relevant buildings. 127 Wn. App. at 137. After first noting that the prosecutor’s argument was “inconsistent with long-standing Washington law,” the Allen Court declared, “[a] lawful entry, even one accompanied by nefarious intent, is not by itself a burglary.” Id. Because the prosecutor’s argument had invited the jury to find the defendant guilty if he entered lawfully but intended to commit a crime, the Court could not “be certain that the jury relied solely on the

unlawful remaining alternative,” the only alternative for which there was evidence, and reversal and remand for a new trial was required. *Id.*

Similarly, here, the jury was instructed on both means of committing burglary. *See* CP 99 (Instruction 24). But jurors were not told that they had to be unanimous as to the means upon which they relied in convicting. *See* CP 75-104. Further, the prosecutor argued guilt based upon both means. *See* RP 425. As a result, as in *Allen*, it is not possible to determine upon which theory the jurors rested their conviction.

It is Trice’s position that neither means was supported by constitutionally sufficient evidence and reversal and dismissal of the burglary conviction is therefore required. But in the alternative, in the unlikely event that this Court finds that one of those theories was sufficiently supported, reversal is still required because that conviction violated Trice’s rights to jury unanimity.

2. THE REMAINING CONVICTIONS SHOULD BE REVERSED BECAUSE THE PROSECUTOR COMMITTED FLAGRANT, ILL-INTENTIONED MISCONDUCT; IN THE ALTERNATIVE, COUNSEL WAS INEFFECTIVE

Unlike other attorneys, prosecutors are “quasi-judicial” officers, with a special duty to act in the interests of justice at trial. *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by *Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). As part of that duty, prosecutors are required to refrain from engaging in conduct which is likely “to produce a wrongful conviction.” *State v. Claflin*, 38 Wn. App. 847, 850,

690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). Further, because the words of a prosecutor carry great weight with the jury, those words may ultimately deprive the defendant of his state and federal constitutional due process rights to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); Suarez-Bravo, 72 Wn. App. at 367; Fifth Amend.; Sixth Amend.; 14th Amend.; Art. I, § 22.

In this case, reversal is required, because the prosecutor repeatedly committed flagrant, constitutionally offensive and ill-intentioned misconduct in multiple ways and Trice's rights to a fair trial before an impartial jury were violated as a result. In the alternative, counsel was ineffective in his handling of the misconduct.

a. Relevant facts

In initial closing argument, the prosecutor told the jurors that the standard of proof beyond a reasonable doubt is "a standard we have probably heard since we were probably about M[]'s age." RP 425. The prosecutor declared that "[t]he whole element of abiding belief is, do you still believe that it was the proper verdict? Do you still **believe that it was the truth, that your verdict was the truth, that it spoke the truth?**" RP 426 (emphasis added).

At that point, the prosecutor went on:

So the question really is, is it reasonable, is the doubt reasonable? There is an example that's often used to describe beyond a reasonable doubt. **You have a jigsaw puzzle. You don't have the cover on the box, so you don't exactly know what the picture is. And you start to put together pieces, and after a while you put together enough pieces to realize, okay,**

this is a city. And maybe a little bit later you have got a few more pieces in. This is - - you have a waterfront, so this is a place that is on the water somewhere. A few more pieces go in and you see a big mountain, kind of looks like Rainier. I don't know though. Could be Hood. Maybe it's Portland or Hood River, and you get the Space Needle and you plug that down. **You put all those pieces together and you know beyond a reasonable doubt that that is a picture of Seattle. You might have half the pieces missing, but you know that it's Seattle.**

RP 426 (emphasis added).

Next, the prosecutor said that “[o]ur cases don’t come to us in a box from the store” but “[w]hat we know is that all the pieces show you a picture of what happened on May 8th, 2006.” RP 426. He then returned to the standard the jury should apply to determine if the state had met its burden of proving its case beyond a reasonable doubt:

Actually, this is a standard you use everyday.

Some of you guys are parked probably in the garage up the hill. You go up the hill, you get to the crosswalk, you wait for the light to change. You see a car coming to you from your left as you are about to cross the crosswalk, and you see he looks at you, you look at him. He slows down, and he is clearly stopping as you walk through the crosswalk. **Is it possible that he looks at you a second time, and decides, you know what, I am running that woman down. Yes, it's possible. Is it possible the guy behind him rams into him and runs you over as a result? Sure, it's possible. But they are not reasonable conclusions And they don't paralyze you from making decisions.**

You step into that crosswalk, because you reasonably believe you are going to safely cross the street, because if you didn't do that, you would never get to your car. We make decisions like this every day. It's not an impossible standard.

In fact, it's one used in courtrooms all over this country for the last 200 years.

RP 427-28 (emphasis added).

At that point, the prosecutor repeated that the jurors were required

to ask themselves, under the instructions, “is the doubt reasonable, is it reasonable that this didn’t happen,” “that A[] at the age of 11 would fabricate this story,” that “dad was part of the conspiracy,” that Bill and Sandra “would put this whole conspiracy in the hands of their 11-year old,” and that Trice would have fled if he had done nothing. RP 428. The prosecutor went on:

Is it reasonable to conclude any of these things? No. And it’s because those doubts aren’t reasonable doubts. **There is no reasonable doubt as to what happened here. There is no explanation, other than the one that Auburn gave you for the Defendant’s sperm being on her bedroom floor, and because of that, you know, you have one choice here: Convict the defendant of rape of a child in the first degree. Convict him for child molest in the first degree and burglary first degree.**

RP 428-29 (emphasis added).

Later, after counsel argued the theory that Trice was being setup by Luedke to get money out of the apartment owners, the prosecutor declared that “pitch” to be “disgusting,” opining that jurors “know it’s not **true.**”

RP 441 (emphasis added). The prosecutor also said, if the defense argument “sounded offensive” to jurors, it was because “you know in your heart **the truth.**” RP 441 (emphasis added).

The prosecutor went on:

And from that we are told that his girlfriend had sex, and we have yet - - the State has the burden of proving every element of the crime. Let me make that perfectly clear, it is isn’t already. The State accepts that burden. No problem.

But when we put on a case, when the defense puts on a case you look at that case and at what they are trying to tell you really happened with this same skeptical eye that you look at the State’s evidence. **And when they tell you what really happened and there ain’t nothing there to support it, you dismiss it.**

RP 442 (emphasis added). Counsel’s objection to “burden shifting” was sustained. RP 442. The prosecutor then continued:

The State has the burden to prove it, but there is nothing that says you got to believe that garbage, because there is no evidence to back it up. **And that’s why you should be disgusted with it, because you know the truth of this case.**

. . . There is only one truth here. You know it. Simply return verdicts that reflect it.

RP 443 (emphasis added).

- b. The arguments were constitutionally offensive and flagrant, ill-intentioned misconduct

These arguments were completely improper, flagrant and ill-intentioned misconduct, all of which was constitutionally offensive and relieved the prosecution of the full weight of its mandated burden and caused the jury to find no reasonable doubt where one existed.

First, the prosecutor’s argument that the jury should convict because the defense failed to present evidence to rebut A.L.’s testimony about why Trice’s sperm was on the bedroom floor was serious, constitutionally offensive misconduct. See RP 428-29. When a prosecutor’s comments invite the jury to draw a negative inference from a defendant’s exercise of a constitutional right, those comments are constitutionally offensive misconduct because they “chill” the defendant’s free exercise of that right. State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988); United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). As a result, it is grave misconduct for the prosecutor to make such arguments. State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); see Griffin v. California, 380 U.S. 609, 614, 85 S.

Ct. 1229, 14 L. Ed. 2d 106 (1965).

Both the state and federal constitutions guarantee the accused the right to remain silent and to be free from self-incrimination. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); Doyle v. Ohio, 426 U.S. 610, 619-20, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); Fifth Amend.; Art. I, §9. As part of these rights, a defendant is entitled to choose whether to testify at a trial in which he is the accused. See State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987); Griffin, 380 U.S. at 614-15. A prosecutor need not directly declare that the defendant should have taken the stand in his defense in order for the prosecutor to have made an improper comment on the defendant's right to remain silent. Ramirez, 49 Wn. App. at 336. Instead, such a comment is made when the prosecutor makes arguments which are "of such character that the jury would naturally and necessarily accept it as a comment on the defendant's failure to testify." State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442, review denied, 91 Wn. 2d 1013 (1978); State v. Sargeant, 40 Wn. App. 340, 346, 698 P.2d 595 (1985).

Thus, if the prosecutor comments on the defendant's failure to present evidence on a particular issue, those comments are improper comments on the defendant's exercise of his right to decide not to testify if the only person who could have provided the missing testimony was the defendant. See State v. Ashby, 77 Wn.2d 33, 38, 459 P.2d 409 (1969); see also, State v. Fiallo-Lopez, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995).

Here, there can be no question that the prosecutor made comments on Trice's decision to exercise his rights to remain silent and decide not to

testify. The prosecutor told the jury that they had only one choice (i.e. to convict) because there “is no explanation, other than the one A[L.] gave,” for Trice’s sperm being on the bedroom floor. RP 428-29. Trice was the only person who could have disputed A.L.’s claim and thus given the other “explanation.” In such a situation, the prosecutor’s argument is a comment on the defendant’s exercise of the right to remain silent. See Fiallo-Lopez, 78 Wn. App. at 729. As a result, the prosecutor’s comments were improper attempts to have the jurors draw a negative inference from Trice’s failure to testify. These arguments were constitutionally offensive misconduct.

Second, the prosecutor’s arguments repeatedly comparing the certainty jurors needed to convict to the certainty they would need to do everyday things like crossing the street was constitutionally offensive misconduct in violation of Trice’s due process rights. The prosecution bears the due process burden of proving every element of the crime charged beyond a reasonable doubt. Cleveland, 58 Wn. App. at 648. Further, it is serious misconduct for a public prosecutor, with all of the weight of his office behind him, to misstate the applicable law when arguing the case to the jury, especially where the misstatements affect the defendant’s constitutional rights. See, e.g., State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

That is exactly what the prosecutor did in this case when he made his lengthy “puzzle” and “crossing the street” analogies. Recently, in, State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), review

denied, ___ Wn.2d ___ (November 2, 2010), this Court condemned the very same kind of argument:

The prosecutor's comments discussing the reasonable doubt standard in the context of everyday decision making were also improper because they minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden. **By comparing the certainty required to convict with the certainty people often require when they make everyday decisions-both important decisions and relatively minor ones-the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case against Anderson.** This was improper.

153 Wn. App. at 431 (emphasis added). And in State v. Johnson, ___ Wn. App. ___, 243 P.3d 936 (November 24, 2010), this Court agreed and further held that such misconduct was so flagrant and ill-intentioned that it could not have been cured by instruction. 243 P.3d at 940. Coupled with one other type of misconduct misstating the proper standard for the state's burden of proving reasonable doubt, this Court found the misconduct compelled reversal even absent an objection by counsel. Id.

Indeed, many courts have disapproved of comparing the decision-making which occurs in a criminal case with the decision-making that jurors engage in on a daily basis, even regarding important matters. More than 40 years ago, a federal court recognized that, while “[a] prudent person” acting in “an important business or family matter would certainly gravely weigh” the considerations and risks of such a decision, “such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment.” Scurry v. United States, 347 F.2d 468, 470 (U.S. App. D.C. 1965), cert denied sub nom Scurry v. Sard, 389 U.S. 883 (1967). Just a few years later, the highest court in Massachusetts

found that comparing everyday decisions to the decision of a jury about whether the state had met its constitutional burden “understated and tended to trivialized the awesome duty of the jury to determine whether the defendant’s guilt was proved beyond a reasonable doubt.”

Commonwealth v. Ferreira, 364 N.E.2d 1264, 1272 (Mass. 1977). These cases recognize that “[t]he degree of certainty required to convict is unique to the criminal law” and that people do not “customarily make private decisions according to this standard nor may it even be possible to do so.” 364 N.E.2d at 1273 (quotation omitted) (emphasis added).

Here, the prosecutor did not compare the certainty required to decide the case with that required to make *important* personal decisions such as whether to get a divorce - he compared it to the much more trivial matters of whether to cross a street at a light and deducing what picture is shown on a jigsaw puzzle. Rather than reflecting the gravity of the decision the jurors had to make and the true weight of the prosecutor’s constitutional burden, the prosecutor’s arguments trivialized the juror’s decision into something far less. As a result, the jurors were misled about the proper standard to apply, believing they only had to be as sure of guilt to convict as they were sure when they crossed the street everyday or when they decided that it a puzzle depicted a certain picture when there was only half of the puzzle completed.

The prosecutor’s arguments thus told the jury that it effectively had to be convinced of guilt only by a preponderance i.e., that it was more likely than not that Mr. Trice was guilty - the same standard they would use in deciding the incredibly trivial question of what picture was on a

puzzle.

Further, the prosecutor's arguments improperly focused on the degree of certainty jurors would have to have to be *willing* to act, rather than that which would cause them to *hesitate* to act. The U.S. Supreme Court has condemned the "willing to act" language, declaring that, instead, it is far more proper to talk about the degree of certainty which would cause jurors to "hesitate to act." See Holland v. United States, 348 U.S. 121, 140, 75 S. Ct. 127, 99 L. Ed. 150 (1954). And since Holland, "courts have consistently criticized the 'willing to act' language" as inviting the jury to render a decision based upon a standard far less than that constitutionally required, because people are willing to take great risk in personal matters and thus take action sometimes even on a whim. See, e.g., Tillman v. Cook, 215 F.3d 1116, 1126-27 (10th Cir. 2000). As a result, "[b]eing convinced beyond a reasonable doubt cannot be equated with being 'willing to act. . . in the more weighty and important matters in your own affairs.'" Scurry, 347 F.2d at 470. By focusing on the degree of certainty jurors would need to take action, rather than that which would cause them to hesitate to act, the prosecutor again misstated and minimized his constitutionally mandated burden of proof.

These arguments - and the misstatements - were not trivial. Unlike other misstatements of the law, misstatement of the correct standard of proof beyond a reasonable doubt is especially egregious because of its impact on the constitutional rights of the defendant and the very core of our criminal justice system. The correct standard of proof beyond a reasonable doubt is the "touchstone" of that system. Cage v. Louisiana,

498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by *Estelle v. McGuire*, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Further, as this Court noted in *Anderson*, the correct standard of reasonable doubt is the means by which the presumption of innocence is guaranteed, so that it absolutely essential to ensure that the jury is not misled as to the correct standard. *Anderson*, 153 Wn. App. at 431-32; see *State v. Bennett*, 161 Wn.2d 303, 315-16, 165 P.3d 1241 (2007).

Notably, in *Bennett*, fully a year before the trial in this case, the Supreme Court specifically cautioned against giving in to the “temptation to expand upon the definition of reasonable doubt” because such expansion so clearly runs the risk of impermissibly reducing the prosecution’s constitutionally mandated burden of proof. 161 Wn.2d at 318.

The prosecutor further misstated and minimized his burden of proof by repeatedly telling the jury it had to decide the “truth” and declare that “truth” with their verdict. After telling the jury that the requirement for them to have an “abiding belief” as required to convict was if they would “**believe that it was the truth, that your verdict was the truth, that it spoke the truth?**” RP 426 (emphasis added). Then, in rebuttal, the prosecutor again incited jurors to decide what was “true,” focusing on whether they knew in their hearts “the truth” and telling them there was only “one truth” in the case and they should “return verdicts that reflect” the truth and be “disgusted” with the defense. RP 441-43.

But it is not the jury's function, role or duty to decide or declare "the truth." Anderson, 153 Wn. App. at 429. As this Court noted in

Anderson:

A jury's job is not to "solve" a case. It is not, as the State claims, to "declare what happened on the day in question." Resp't's Br. at 17. **Rather, the jury's duty is to determine whether the State has proved its allegations against the defendant beyond a reasonable doubt.**

153 Wn. App. at 429 (emphasis added).

Casting the jurors' role as deciding and declaring the "truth" not only misstates that role but also improperly dilutes the prosecution's constitutionally mandated burden of proving guilt beyond a reasonable doubt. When the jury is told that their job is to decide the "truth," that invites a decision improperly based not upon the constitutional standard but rather on the jury's conclusion of which "side" the jurors believed. See, e.g., United States v. Pine, 609 F.2d 106, 108 (3rd Cir. 1979). Such arguments suggest "determining whose version of events is more likely true, the government's or the defendant's." See United States v. Gonzalez-Balderas, 11 F.3d 1218, 1223 (5th Cir.), reh'g. denied, 15 F.3d 1081, cert. denied, 511 U.S. 1129 (1994). As a result, the jury is misled into thinking they simply must decide which version of events is more likely and then base their decision on that determination, based upon a preponderance of the evidence. Id.

Thus, by repeatedly invoking the idea that jurors were supposed to decide and declare the "truth," the prosecutor not only misstated the jury's role but also his own burden of proof. As noted above, misstating and

minimizing that constitutional burden is not just misconduct, it is misconduct directly impacting a constitutional right, which is presumed prejudicial. See, e.g., Easter, 130 Wn.2d at 242.

Because this misconduct misstated and minimized the prosecutor's constitutionally mandated burden of proof and the jury's proper role, it directly affected Trice's constitutional due process rights to have the prosecution shoulder the burden of proving its case against him. Further, the prosecutor's incitement to the jury to penalize Trice for failing to disprove its case and failing to testify was constitutionally offensive. As a result, the constitutional "harmless error" standard should apply. See, Easter, 130 Wn.2d at 242.

It is important to note that this Court uses a different standard and test for review of this issue than those employed when the issue on review is the sufficiency of the evidence to support a conviction. Where the question is sufficiency of the evidence, this Court uses a relatively deferential standard, looking to see if the evidence, taken in the light most favorable to the state, would be enough for *any* rational fact-finder to convict. Green, 94 Wn.2d at 221. The burden is on the defendant to prove that the evidence was so deficient that no reasonable fact-finder could have made the required findings below. See, e.g., State v. Eckenrode, 159 Wn.2d 488, 496, 150 P.3d 1116 (2007).

In stark contrast, to prove a constitutional error "harmless," the prosecution bears the burden of showing that *every* reasonable fact-finder would have convicted even if the error had not occurred. Easter, 130 Wn.2d at 242. Indeed, constitutional error is presumed prejudicial. Id.

Rather than being deferential, the standard for constitutional harmless error, the “overwhelming evidence” test, requires the Court to reverse unless it is convinced beyond a reasonable doubt that the constitutional error could not have had *any* effect on the fact-finder’s decision to convict. Easter, 130 Wn.2d at 242.

Thus, even when there is enough evidence to uphold a conviction against a “sufficiency of the evidence” challenge, that is not enough to meet the “overwhelming evidence” test. See, e.g., State v. Romero, 113 Wn. App. 779, 783-85, 65 P.3d 1255 (2005) (evidence found sufficient to uphold the conviction was insufficient to meet the “overwhelming evidence” test). Even where there is significant evidence of guilt, where there are issues of credibility and evidence is disputed, the jury is presented “with a credibility contest” and constitutional error such as improper opinion testimony cannot be said to be “harmless.” Id. Put another way, when the jury is faced with having to make a credibility determination, it is not likely the state can show that every single jury faced with such a decision would still have reached the same conclusion absent the constitutional error, i.e., could not possibly have been swayed by whatever evidence that error allowed.

Here, there is no way the state can meet its burden of proving that the misconduct was “harmless” beyond a reasonable doubt. And this is true even though Trice allegedly confessed and his DNA was found in the room. The presence of the DNA, of course, was also explained by Trice’s defense - which was supported by the strange facts that it was not where A.L. said it was and was barely even there. Further, the question with

constitutional harmless error is not whether there was still sufficient evidence for a jury to have found guilt, or even whether the state's case was strong. See Romero, 113 Wn. App. at 783-85. Instead, it is whether that evidence was so completely overwhelming that no jury would have failed to convict.

Thus, in Romero, the same evidence which was sufficient to withstand an insufficiency challenge on review was not enough to satisfy the constitutional harmless error test. 113 Wn. App. at 783-95. The defendant had been arrested and charged with first-degree unlawful possession of a firearm after there were reports of shots fired at a mobile home park in the middle of the night. He was seen coming around the front of that mobile home holding his right hand behind his body and refused to stop and show his hands but instead ran away. The home he was later found in had shell casings on the ground outside. Descriptions of the shooter matched him and a witness identified him, although she got the color the shirt he was wearing wrong. 113 Wn. App. at 783-95. While the Court found that a reasonable jury could have convicted based upon that evidence, the answer was far different when the question was whether the constitutional error of an officer's comment on the defendant's right to remain silent was harmless. 113 Wn. App. at 794. Because the state's evidence was disputed and the improper comments "could have" had an effect on the jury's verdict, the constitutional harmless error test was not met and reversal was required. 113 Wn. App. at 794; see also, State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997) (despite the strength of the case against the defendant, because there was some evidence in the

defendant's favor, constitutional harmless error test could not be met).

Here, while there was evidence to support the prosecution's version of events, there was also conflicting evidence. The versions of events given by A.L. were significantly different and in many points incompatible. The day after the alleged incident, she told two state investigators that the sperm went on her back and buttocks. RP 331. RP 174, 198. At trial, she was adamant that had not happened. RP 197-98. And the swab taken of her back and buttocks - which would have validated or disproven her claim - was never tested. RP 331-32, 355, 359.

In contrast, the towel she claimed she used to wipe up the sperm from the floor was tested - and it had no sperm. RP 341, 355, 359. The sperm was not in the place on the carpet where she said it was and it was so light a stain that the tech had to use special lighting to make it show up. RP 122-29, 131, 141, 166-67. And this would be consistent with Trice's defense that the sperm on the floor was rubbed on there by Luedke and Vogt after a consensual sexual encounter between Trice and Vogt, on or about the same day.

Further, the other witnesses also had credibility problems, too, such as Vogt, who first admitted having been in an apartment alone with Luedke and Trice before backpedaling and denying that contact, and who admitted to the drug addiction which supported the defense position that Vogt had agreed to exchange sex for drugs and the sperm in question had come from a sexual act with Vogt. RP 355.

Given these inconsistencies and issues with the state's case, a reasonable jury could have had a reasonable doubt even with the alleged

confession. Indeed, Washington recognizes a great distrust of confessions and has enacted rules in order to protect against unjust convictions based solely upon confessions. See, e.g., State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996). Further, because there was no recording of the interrogation, it is only the testimony of the officers and their own report which establishes that such a confession occurs. Even with the confession, because there was conflicting evidence and because the state's evidence was not overwhelming, the constitutionally offensive misconduct cannot be deemed "harmless" and this Court should so hold.

Indeed, even under non-constitutional standards regarding misconduct, reversal would be required. Applying those standards, reversal will be required even absent objection below if the misconduct was so flagrant and ill-intentioned that it could not have been cured by instruction. See, e.g., State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). Further, reversal is required based on counsel's ineffectiveness if the misconduct could have been cured by instruction but counsel failed to object or seek such instruction, there is no legitimate tactical reason for that failure and the failure is prejudicial. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989).

Here, the misconduct was all clearly flagrant and ill-intentioned. This Court has recently held that the misconduct in comparing the certainty the jurors had to have to convict to the certainty they needed to make everyday decisions was just such misconduct. See Johnson, supra, 243 P.3d at 937-38. Further, none of the misconduct could have been

“cured” by instruction. The ideas behind the misconduct - that jurors are to declare the “truth,” that a defendant should have to present his version of events and would do so if he was not guilty, that jurors should simply decide between “sides” and that deciding a criminal case should be the same as deciding whether to cross the street - are highly evocative concepts, likely to stay with the jury, regardless of any attempt at a “cure.” And as this Court has noted, these arguments are particularly damaging, because people are willing to make decisions in their personal lives even when they have a great deal of uncertainty. Anderson, 153 Wn. App. at 417. This is why such argument is so effective in minimizing the prosecutor’s burden of proof. See, e.g., Holland, 348 U.S. at 140.

Indeed, all of the misconduct in this case went directly to the jury’s ability to properly evaluate whether the prosecution had, in fact, met its burden. And it is well-recognized that “[p]rosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels those tactics are necessary to sway the jury in a close case.” See State v. Fleming, 83 Wn. App. 209, 215, 921 P.2d 1076 (1996). In addition, even if each individual act of misconduct did not compel reversal, the cumulative effect of the misconduct, taken together, would. Such a result is required where there is a substantial likelihood that the cumulative effect of the misconduct affected the verdict. State v. Jones, 144 Wn. App. 284, 300-301, 183 P.3d 307 (2008). And there is more than such a likelihood in this case, because all of the misconduct went directly to the jury’s ability to fairly and impartially decide this case. This Court should so hold and should reverse.

c. In the alternative, counsel was ineffective

In the alternative, even if this Court were to find that the constitutional harmless error test was met or that the multiple acts of misconduct were not so flagrant and ill-intentioned that they could not have been cured by instruction, reversal is still required because counsel was prejudicially ineffective in failing to object and at least try to mitigate the serious prejudice the improper argument caused his client. Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); Sixth Amend.; Art. I, §22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

While in general the decision whether to object or request instruction is considered "trial tactics," that is not the case in egregious circumstances if there is no legitimate tactical reason for counsel's failure. Madison, 53 Wn. App. at 763-64; see also Hendrickson, 129 Wn.2d at 77-78. In such cases, counsel is shown ineffective if there is no legitimate

tactical reason for counsel's failure to object, an objection would likely have been sustained, and an objection would have affected the result of the trial. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Here, those standards have been met. There could be no legitimate tactical reason for counsel to have failed to object to any of the misconduct. Indeed, counsel obviously had a willingness to object and interrupt the flow of the prosecutor's argument - because he did. See RP 442. While it is true that it may be "tactical" to decide not to object to and thus emphasize misconduct which occurs in passing, here, this misconduct was not fleeting - it was pervasive and occurred over and over. There could be no tactical reason for counsel to let the prosecutor's repeated, flagrant misconduct to go so unchecked. And the court would have erred if it had not sustained any objections and properly instructed the jury. Even if this Court finds that the misconduct could somehow have been "cured," reversal is still required based on counsel's ineffectiveness in failing to make such attempts. Reversal is required.

3. IMPROPER OPINION TESTIMONY DEPRIVED TRICE OF HIS RIGHTS TO TRIAL BY JURY

Reversal of the remaining convictions is also required because of the repeated admission of improper opinion testimony. Both the Sixth Amendment and Article 1, § 21, guarantee a defendant the right to trial by jury, which includes the right to have the jurors serve as the sole arbiters of the weight and credibility to give to testimony at trial. See State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). As a result, it is impermissible for any witness to give an opinion about the guilt, veracity or credibility of

witnesses or the defendant. State v. Montgomery, 163 Wn.2d 577, 591-94, 183 P.3d 267 (2008). In this case, there was repeated admission of such impermissible opinion.

a. Relevant facts

At trial, both detectives Turner and Holden testified about what Trice had said - and their opinions about it - during the interrogation. After Trice told the officers that he had fled because he had learned from the apartment owner, Wright, that he had been accused of penetrating A.L. and masturbating, Turner then testified that the officer thought Trice was “giving information that I am fairly confident that Mr. Wright wouldn’t have.” RP 281. The officers then testified about confronting Trice with the “truth” after Trice had given an inculpatory version of events, with Turner stating that, when he confronted Trice, “we were directly confronting him with **what we felt was the facts[.]**” RP 290 (emphasis added). Detective Holden similarly said that he told Trice “**I knew that this handwritten statement wasn’t the truth and we could prove that it wasn’t the truth and - -.**” 6RP 4. Counsel objected that the testimony was “a comment on credibility” and the prosecutor said he would “move on.” 6RP 4.

Holden also gave his opinion of Turner, declaring him “a very good detective.” 6RP 24. The court sustained Trice’s objection and granted a motion to strike. 6RP 24. A few moments later, however, Holden said he had reviewed Turner’s police report to make sure that Turner did a good job and that it was “an accurate and well-written report.

He did a great job.” 6RP 52-53. Counsel’s objection and motion to strike was overruled, as was a further objection that it was a comment on the credibility of Turner as a witness. 6RP 53.

Also at trial, Ramm-Gramenz, the school counselor, stated her belief that A.L.’s story to officers was “consistent” with what A.L. had told the counselor. RP 113. When asked about an interview in which she had said A.L. had used language “basically verbatim” to how she had related the claims to Ramm-Gramenz, the counselor then declared that A.L. had told police her story “**quite well, and correctly, and credibly**” and that A.L.’s story “**was very credible.**” RP 116 (emphasis added). Counsel’s objection that the answer was “non-responsive” was sustained. RP 116.

b. The improper opinions compel reversal

All of these comments were improper opinion testimony. To amount to an impermissible opinion, testimony need not be a direct comment; an “inference” of guilt or on credibility or veracity is enough. See State v. Farr-Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999). It is only when counsel fails to object below that a higher standard is required. State v. Kirkman, 159 Wn.2d 918, 936-38, 155 P.3d 125 (2007). If there is no objection, unless a comment is an “explicit or almost explicit” comment on guilt, veracity or credibility, the issue will not be deemed manifest constitutional error which can be raised for the first time on appeal. Kirkman, 159 Wn.2d at 936-38.

Here, Trice specifically objected, on these grounds, to 1) Holden’s

testimony that the detective “knew that this handwritten statement wasn’t the truth” and that the officers could “prove” it (6RP 4), 2) Holden’s opinion that Turner was “a very good detective” (6RP 24), and 3) Holden’s opinion that Turner’s police report was “accurate and well-written” and that Turner had done “a great job” (6RP 52-53). Counsel also objected to 4) the school counselor’s opinion that A.L. had told police her story “quite well, and correctly, and credibly” and 5) the counselor’s opinion that A.L.’s story “was very credible,” albeit on the grounds that testimony was “non-responsive.” RP 116. The only opinions not objected to on any grounds were 1) Turner’s declaration that Trice had details about the crimes that the officer was “fairly confident” he could not have gotten from the apartment owner (RP 281) and 2) Turner’s statement that the officers confronted Trice with “what we felt was the facts” (RP 290).

For the opinions to which counsel objected, there can be no question that they were more than mere “inference” on guilt, veracity or credibility. Holden, a police officer, specifically declared that Trice’s initial statement denying any crime “wasn’t the truth.” 6RP 4. Further, he declared that the police could “prove” it. 6RP 4. As if there was any doubt of Holden’s opinion about Trice’s guilt and lack of credibility or veracity in his initial denials, Holden then made sure the jurors knew Holden’s opinion that Turner, whose police report and testimony was the sole evidence along with Holden that Trice had later confessed, was “a very good detective,” that his police report containing that confession was “accurate and well-written” and that Turner had done “a great job” (6RP 52-53). These comments cannot be seen as anything other than opinions

on Trice's guilt and lack of credibility or veracity and Turner's credibility and veracity as well.

For the comments to which counsel did not object or did not object on these grounds, there is similarly little question that can be raised about whether they were explicit or near explicit comments on credibility, veracity or guilt. To make the determination, the Court looks at the type of witness involved, the nature of the testimony, the charges and the defense, and the other evidence before the jury. State v. Demery, 144 Wn.2d 743, 759, 30 P.3d 1278 (2001). Taking Turner's statements first, it is well-recognized that testimony of officers is especially likely to hold sway with jurors, because it carries an "aura of reliability" and because of the status of officers in our society. See Montgomery, 163 Wn.2d at 594; Demery, 144 Wn.2d at 765. Further, those statements went directly to the issues in the case. If Turner was correct and the apartment owner could not have told Trice the details Trice related, then Trice must have known those details because he committed the crimes. And Turner clearly conveyed his belief on that point with his comment, as well as his belief that what A.L. had said was true i.e., was "the facts."

Similarly, the counselor's opinion that A.L. had told police her story "quite well, and correctly, and credibly" and that the story itself "was very credible" cannot be seen as anything other than what it was - the counselor's personal opinion about the accuser's veracity and credibility and by extension, Trice's guilt. This Court should so hold.

Reversal is required. As noted, *infra*, under the constitutional harmless error test, prejudice is presumed and reversal is required unless

the prosecution can prove the error “harmless” by showing, beyond a reasonable doubt, that every reasonable jury would have reached the same result, absent the error. See State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). And again, the standard used by this Court is not the relatively deferential standard of whether any rational fact-finder could have convicted, taking the untainted evidence in the light most favorable to the state; rather it is whether the prosecution can show that every single reasonable fact-finder would have convicted, even absent the error. See Romero, 113 Wn. App. at 783-85.

Put another way, this Court must reverse unless it is convinced beyond a reasonable doubt that the constitutional error could not have had *any* effect on the fact-finder’s decision to convict. Easter, 130 Wn.2d at 242.

That standard cannot be met here. As noted, *infra*, the versions of events given by A.L. were significantly different and in many points incompatible and the evidence also conflicting, such as A.L. telling two state investigators that the sperm went on her back and buttocks but denying that it happened at trial; claiming she had wiped up sperm from the floor with the towel but no sperm was found on the trial; the state failing to test the swab allegedly of the back and buttocks; the sperm stain on the carpet being so weak and not where A.L. pointed; and the credibility problems with Vogt and Luedke, whose versions of events also had serious inconsistencies. The improper opinions went directly to the heart of the state’s case - A.L.’s credibility in her claims against Trice, Trice’s credibility when he initially denied the crime, the credibility of the

officers when they said Trice had confessed, etc. In short, the prosecution cannot meet the heavy burden of proving that the improper opinions had no effect whatsoever on the jurors' verdicts. This Court should so hold and should reverse.

4. THE PROSECUTION FAILED TO ESTABLISH THAT THE PRIOR OUT-OF-STATE CRIME WAS COMPARABLE TO A WASHINGTON "TWO STRIKES" OFFENSE

For the molestation and child rape convictions, Trice was sentenced to life in prison without the possibility of parole under the "two strikes" provisions of the Persistent Offender statute. See CP 211-227. Those sentences must be reversed, because the sentencing court erred in concluding that a Florida conviction was comparable to a Washington felony and a "strike" crime under the "two strikes" statute.

a. Relevant facts

At sentencing, the prosecutor argued that Trice should be sentenced to life without the possibility of parole as either a "two-strike" and "three-strike" offender. RP 486, 488; CP 118-125. For the "three strikes" claim, the prosecutor relied on two prior out-of-state convictions: a 1995 "sexual battery in the second degree out of Florida" and a 1987 aggravated robbery conviction from Arkansas. RP 486, 488; CP 118-125. After hearing argument regarding the Arkansas conviction, the sentencing court found it was not comparable to a Washington felony and thus was not a "strike" crime. RP 497-499.

For the "two strikes" sentence, the prosecutor argued that the second-degree sexual battery in Florida was comparable to a Washington

second-degree rape, “indecent liberties with forcible compulsion” or a third-degree rape. RP 487. He also argued that, even if the Florida statute was more broad, the court could find “factual comparability,” based upon the information, police reports and statements he said Trice made to the community corrections officer. RP 491; see CP 118-125.

Trice, however, had specifically objected to the court considering any such outside evidence. RP 491. Indeed, the court decided it would not consider the CCO’s testimony at sentencing, because she failed to warn Trice that anything he said to her could be used against him. RP 485. Counsel argued that the sexual battery statute was more broad than Washington’s second-degree rape statute. RP 494-95. After brief discussion, the court ruled in the state’s favor. RP 494-95. The parties next addressed the alternative argument that the Florida sexual battery could also be found comparable to a Washington indecent liberties with forcible compulsion. RP 496-99. Although counsel noted that the Washington crime required that the perpetrator and victim were not married as required and that “forcible compulsion” was not required for the Florida crime, the court again ruled in the state’s favor. RP 496-97. A “two strikes” conviction was imposed on each of the child rape charges, as well as the child molestation. CP 211-27.

- b. The Florida sexual battery conviction was not legally comparable and cannot be determined to be factually comparable

Under former RCW 9.94A.030(32)(b) (2006), a “two strikes” persistent offender is someone who has a current conviction for, *inter alia*, first-degree child rape or first-degree child molestation and has been

convicted on a separate occasion of one of the enumerated sex crimes, whether in this state or elsewhere. For this case, the relevant prior “two strike” crimes were:

(A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (B) any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, or burglary in the first degree; or (C) an attempt to commit any crime listed in this subsection.³

Former RCW 9.94A.030(32)(b)(ii)(2006). Thus, in order to prove that Trice was subject to a “two strikes” Persistent Offender sentence, the prosecution had to prove that the Florida conviction upon which it relied was comparable to one of those “two strike” crimes.

The prosecution failed to meet that burden in this case. Under RCW 9.94A.525(3), when a prior conviction is from out-of-state, the prosecution bears the burden of proving not only the existence of that conviction but also that the conviction was “comparable” to a Washington state felony and, in a case involving a persistent offender allegation, that it was comparable to a “strike” crime. See State v. Ford, 137 Wn.2d 472, 475-76, 973 P.2d 452 (1999)⁴; see State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). This is not simply a matter of form but is instead a “mandatory step in the sentencing process” which the court is required to

³Certain age limits also apply for certain offenses but are not relevant here.

⁴A different part of Ford regarding whether additional evidence can be presented on remand for resentencing has been cast into doubt by statutory changes not at issue in this case. See, Laws of 2008, ch. 231, § 1.

engage. Ford, 137 Wn.2d at 482; see RCW 9.94A.525(3).

There are two questions when examining “comparability.” Morley, 134 Wn.2d at 605-606. The first is whether there is “legal comparability,” i.e., if the elements of the out-of-state and in-state crimes at the time of the out-of-state crime were “substantially similar.” See, In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If there is legal comparability, the out-of-state conviction is properly counted in the offender score and the inquiry ends. Id. If, however, the elements of the two crimes are not “substantially similar,” the second question is asked: is there “factual comparability?” Id. To answer that question, the sentencing court looks at information regarding the out-of-state crime in order to determine if the conduct committed out-of-state would have violated a comparable Washington statute. Lavery, 154 Wn.2d at 255.

In this case, the prosecution alleged - and the sentencing court found - that the 1995 Florida second-degree sexual battery conviction was comparable to either a 1995 second-degree rape or a 1995 indecent liberties with forcible compulsion in Washington state. See CP 118-125; RP 480-97. The court erred in making those rulings, because the Florida crime was not legally comparable to either of those two Washington crimes and no factual comparability could be established.

First, the court erred in finding the offense legally comparable to a Washington “two strikes” crime. To decide legal comparability, the sentencing court “must compare the elements of the out-of-state offense with the elements of potentially comparable Washington crimes.” Ford, 137 Wn.2d at 479. The relevant crime in this case was a 1995 Florida

second-degree sexual battery. In 1995, “sexual battery” was defined as:

oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object; however, sexual battery does not include an act done for a bona fide medical purpose.

Former Fla. Stat. 794.011(1)(h)(1995). To amount to second-degree sexual battery, in 1995 a person had to commit sexual battery on someone 12 years or older:

without that person’s consent, and in the process thereof [the perpetrator] does not use physical force and violence likely to cause serious personal injury.

Former Fla. Stat. 794.011(5)(1995).

This statute does not require force or violence to cause submission to the crime. State v. Sedia, 614 So. 2d 533 (Fla. 1993), overruled in part and on other grounds by, Seagrave v. State, 802 So. 2d 281 (Fla. 2001). Instead, the only force required is that used to cause penetration or to cause “union,” with “union” defined only as “contact.” Id.; see Reyes v. State, 709 So.2d 181, 181-82 (Fla. 1998). Thus, to prove someone guilty of second-degree sexual battery in Florida in 1995, the prosecution had to prove only contact of a person’s sexual organ with another’s oral, anal or vaginal openings, without physical force other than that required to commit the act of “union” or penetration. Reyes, 709 So.2d at 181-82.

The 1995 Washington second-degree rape statute was not so broad. That crime was defined in former RCW 9A.44.050(1995) in relevant part as follows:⁵

(1) . . . under circumstances not amounting to rape in the first degree,

⁵The other possible means of commission involve facts not at issue in this case.

the person engages in sexual intercourse with another:

(a) by forcible compulsion.

“Sexual intercourse” was defined in former RCW 9A.44.110(1995), which provided:

“Sexual intercourse”

(a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

Thus, in Washington, second-degree rape without penetration required proof of sexual contact between the sexual organs of one person and the mouth or anus of another -unlike in Florida, which more broadly included any contact of sexual organs with the mouth, anus or vagina.

Further, unlike for the Florida crime, for the Washington crime of second-degree rape, “forcible compulsion” was required. And forcible compulsion requires more force than that which is required to achieve penetration or contact. State v. McKnight, 54 Wn. App. 521, 528, 774 P.2d 532 (1989). Instead, there must be proof the force was used to overcome resistance. Id. Indeed, former RCW 9A.44.010(6)(1995) defined “forcible compulsion” as “physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.”

Thus, the 1995 Florida second-degree sexual battery statute relevant to Trice's prior conviction is far broader than the Washington 1995 second-degree rape crime. The Florida crime required only force sufficient for the actual act, without more, while the Washington crime required the force used to be greater than and separate from the force inherent in the act of penetration. The Florida crime can be committed by "oral, anal or vaginal union" (contact) with another's sexual organs, while the Washington crime more narrowly addressed only sexual organs and mouth or anus. A person could commit the Florida crime without using forcible compulsion and would be guilty if they touched their sexual organs to someone's vagina or touched their vagina to someone's sexual organs, without penetration. But in Washington, the touching of a vagina by a sexual organ without penetration would not be second-degree rape under the 1995 statute. The 1995 second-degree sexual battery conviction in Florida was thus not legally comparable to a Washington state second-degree rape.

Nor was it legally comparable to an indecent liberties with forcible compulsion. That crime, defined in RCW 9A.44.100, requires the same elements today as in 1995, which include that the victim is not the spouse of the perpetrator and that there be "sexual contact" "[b]y forcible compulsion." RCW 9A.44.100. Again, the Florida second-degree sexual battery was far more broad. It did not require that the perpetrator and victim were not married to each other. Former Fla. Stat. 794.011(5) (1995); see In re Personal Restraint of Crawford, 150 Wn. App. 787, 796-97, 209 P.3d 507 (2009) (Kentucky conviction not legally comparable where Washington offense requires proof of lack of marriage while

Kentucky offense does not). Further, the Florida crime did not require “forcible compulsion;” indeed, it did not require force or violence at all, beyond that which inhered in the sexual act. See Sedia, 614 So.2d at 535, quoting, Fla. Stat. 794.005 (1992) (which declared that the legislature never intended the second-degree sexual battery offense to require any force or violence beyond the force and violence that is inherent in the accomplishment of ‘penetration’ or ‘union’”).

Because the Florida statute was more broad than either the second-degree rape or indecent liberties by forcible compulsion statutes in Washington, the Florida offense was not legally comparable to either of those Washington crimes and thus could not be counted as a “strike” - or even in the offender score - unless it was proven factually comparable. See Lavery, 154 Wn.2d at 258. To determine whether a conviction is factually comparable, a sentencing court looks at the defendant’s conduct in the foreign state, asking if it would have violated the comparable Washington statute. See Crawford, 150 Wn. App. at 797. In reaching this conclusion, however, the sentencing court is limited to looking at and relying on only those facts presented by the prosecution which were admitted, stipulated to or proven beyond a reasonable doubt in the other state. Lavery, 154 Wn.2d at 258. Further, “the elements of the charged crime remain the cornerstone of the comparison,” because, where a foreign statute is more broad, the defendant may not have had any incentive to prove that he did not commit a more narrow offense. Crawford, 150 Wn. App. at 794; see Lavery, 154 Wn.2d at 257. Only if the record establishes that the out-of-state court necessarily found facts that would support each element of the comparable

Washington crime can the out-of-state conviction count towards the offender score. See State v. Russell, 104 Wn. App. 422, 442-43, 16 P.3d 664 (2001).

The record did not establish such facts in this case. Below, the evidence the prosecution presented of the Florida sexual battery was contained in Exhibit B of the state's sentencing memorandum. See CP 118-209. That evidence consisted of 1) the charging document, 2) a document titled "judgment" which was filed in June of 1996 and declared that a plea of "nolo contendere" had been entered for second-degree sexual battery and set forth the sentence, a "change of plea form" which contained no facts, a police information form with statements about what was alleged and a follow up police form and documents such as receipts for evidence. CP 142-184.

It is well established, however, that a trial court may not consider police reports and similar documents in the factual comparability analysis - or even the allegations contained in the complaint - unless those facts are otherwise admitted, stipulated to or proven beyond a reasonable doubt in the foreign prosecution. See State v. Bunting, 115 Wn. App. 135, 142, 61 P.3d 275 (2003); Lavery, 154 Wn.2d at 255, 258. There is nothing in the record indicating that Trice stipulated or admitted to the claims set forth in the documents submitted by the prosecution - indeed, he specifically objected to the court even considering those documents, as well as the PSI and testimony of the CCO. RP 485, 490-91. And the court specifically excluded that report and testimony, because the CCO never told Trice that anything he said could and would be used against him. RP 491.

Further, even though, in Florida, a plea of *nolo contendere* is considered to admit the facts charged in the information, that document does not establish factual comparability. See State v. Moore, 854 So.2d 832 (2003). Without naming the victim, the information declared the allegations that Trice

did commit a sexual battery upon _____, to-wit, the penis of EDDIE LEE TRICE in contact or union with the vagina of _____, without the consent of _____ and in the process thereof used physical force and violence not likely to cause serious personal injury, to-wit: holding down, thereby causing _____ to submit to said sexual battery.

CP 142-45 (blanks in the original).

Nothing in that information establishes that the offense in Florida was factually comparable to a Washington second-degree rape or indecent liberties with forcible compulsion. In fact, to the contrary. The Florida information makes it clear that Trice was alleged to have committed the second-degree sexual battery by the very means which is not a Washington second-degree rape, i.e., having the penis in contact or union with the victim's vagina. Further, the information established absolutely nothing about whether Trice was married to the victim, as required to prove indecent liberties with forcible compulsion.

As a result, even if the trial court had properly found that there was not legal comparability, it could not have found factual comparability. The 1995 Florida second-degree sexual battery conviction was neither legally nor factually comparable to a Washington state "two strikes" crime and the Persistent Offender sentence thus must be reversed.

On remand for resentencing, the court should also be ordered to

exclude from the offender score calculation the Arkansas robbery. It appears that conviction was calculated in the offender scores, although the focus of the court was obviously the Persistent Offender sentence rather than getting the right scores. See CP 214-19. But the court specifically held that the Arkansas offense was not comparable to a Washington felony. See RP 497-99. Whether remanding for a new trial as discussed, *infra*, or remanding simply for resentencing, this apparent error should be corrected.

5. UNCONSTITUTIONAL AND UNAUTHORIZED
CONDITIONS OF COMMUNITY CUSTODY WERE
IMPOSED

The sentencing court further erred in imposing conditions of community placement/custody which violated Trice's First Amendment and due process rights and were not statutorily authorized. As a threshold matter, these issues are properly before the Court. Where the lower court imposes an illegal or erroneous condition, that issue may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-46, 193 P.3d 678 (2008). Further, a challenge to such a condition may be made "preenforcement" if the challenge raises primarily a legal question and no further factual development is required. Id.

In this case, the relevant conditions meet those standards. Those conditions were contained in Appendix H and provided, as follows:

14. Do not possess or peruse pornographic materials. Your community corrections officer will define pornographic material.
- ...
25. You shall not have access to the internet unless the computer has child blocks in place and active.

CP 233-34.

Both of these conditions were improper. First, the “pornography” condition violates Trice’s due process and First Amendment rights. The due process rights guaranteed under the state and federal constitutions prohibit imposition of conditions which are unconstitutionally vague. See State v. Sansone, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005). In addition, where a condition infringes upon First Amendment rights, it must meet greater requirements for specificity in order to be narrowly tailored to serve an important governmental interest. Bahl, 164 Wn.2d at 757-58.

The “pornography” condition does not meet those standards. A condition is vague and in violation of due process if 1) it is not set forth with sufficient definiteness so that an ordinary person could discern what conduct was prohibited or 2) if it “does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” Sansone, 127 Wn. App. at 639, citing, Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). In this case, Bahl, supra, controls. In Bahl, the relevant condition mandated that Bahl refrain from “possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer.” 164 Wn.2d at 754. After first noting that adult pornography is protected speech under the First Amendment, the Supreme Court found the condition unconstitutionally vague. 164 Wn.2d at 758. Indeed, the Court declared, “[t]he fact that the condition provides that Bahl’s community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent,” because, with that language, the condition “virtually acknowledges on its face [that] it does not provide ascertainable

standards for enforcement.” 164 Wn.2d at 758; see also, Sansone, 127 Wn. App. at 639 (vagueness of similar condition was made clear by the delegation of defining “pornography” to DOC - “a requirement that would be unnecessary if ‘pornography’ was inherently definite”).

The “pornography” condition in this case suffers from the same defects as those in Bahl and Sansone. Further, just as in Bahl and Sansone, the delegation of the definition to DOC makes clear that the condition fails to sufficiently define the prohibited conduct and to provide ascertainable standards for enforcement. In addition, because adult pornography is protected speech as noted in Bahl, the condition infringes upon Trice’s fundamental rights under the First Amendment without being “clear . . . and . . . reasonably necessary to accomplish essential state needs and public order.” See Bahl, 164 Wn.2d at 758. And the delegation to DOC to define what amounted to “pornography” was wholly improper, because it amounted to an abdication of the sentencing court’s judicial responsibilities. See Sansone, 127 Wn. App. at 642; see former RCW 9.94A.700(5) (2006) (court’s responsibility to set conditions of sentence).⁶

The condition limiting Trice’s right to internet access is similarly in violation of his First Amendment rights. The First Amendment protects material disseminated over the internet, as well as the rights of adults to access such material in general. See Reno v. ACLU, 521 U.S. 844, 868-70, 117 S. Ct. 2329, 138 L. Ed.2d 874 (1997). As a result, limits on such access must be narrowly tailored, clear and “reasonably necessary to

⁶This statute was renumbered effective August 1, 2009, as RCW 9.94B.050. See Laws of 2008, ch. 231, § 56.

accomplish essential state needs and public order.” See Bahl, 164 Wn.2d at 758.

That standard is far from met by the internet access limits in this case. Indeed, neither this nor the pornography condition was even authorized by statute. Under RCW 9.94A.715, the sentencing court was permitted to impose conditions set forth in RCW 9.94A.700(5)⁷, if it so chose. RCW 9.94A.715(2)(a). The version of former RCW 9.94A.700(5) (2006) applicable in this case provided, in relevant part, that the court could order that “[t]he offender shall comply with any crime-related prohibitions.” Former RCW 9.94A.700(5)(e)(2006).

But neither condition here was “crime-related.” To meet that standard, a prohibition must forbid conduct that “directly relates to the circumstances of the crime.” State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006). Thus, when the defendant possessed drugs and paraphernalia and was convicted of drug possession, a condition prohibiting possession of paraphernalia was sufficiently “crime-related.” State v. Zimmer, 146 Wn. App. 405, 413, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). In contrast, a condition prohibiting the defendant from possessing or using certain communications technologies was not “crime-related,” despite the sentencing court’s apparent belief that such devices “can be used to facilitate the sale or transfer of controlled substances[.]” 146 Wn. App. at 411-12. Regardless whether *some* defendants might employ such items in their crimes, without evidence that

⁷This statute was renumbered effective August 1, 2009, as RCW 9.94B.050. See Laws of 2008, ch. 231, § 56.

Zimmer had done so, the prohibition was not “crime-related” and thus not statutorily authorized. 146 Wn. App. at 414; see also, State v. O’Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

Put simply, even if, in general, allowing a defendant “unfettered internet access to inappropriate sexual material would increase his risk of reoffending and thus endanger the community,” unless there is evidence that internet use was in any way connected to a sex crime, it cannot be ordered by the court as a “crime-related” prohibition. O’Cain, 144 Wn. App. at 775-76.⁸

Here, there was no evidence of internet use or pornography being at all related to any of the crimes with which Trice was charged. Indeed, Trice was effectively homeless, living in empty apartments. There was no evidence he even had access to a computer, let alone that internet access was related to the crime. Regardless whether some other defendant might use pornography or internet access in committing similar crimes, because there was a complete absence of any evidence whatsoever that pornography or internet access was in any way, shape or form involved in the crimes in this case, the pornography and internet conditions in this case were not “crime-related.” Thus, even if any or all of the convictions could somehow be affirmed, this Court should strike the improper conditions.

⁸The O’Cain Court did not preclude the possibility of an internet access restriction being imposed as part of sex offender *treatment* if a proper evaluation so recommended.. 144 Wn. App. at 775-77.

CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;

to Mr. Eddie Lee Trice, DOC 317682, Clallam Bay CC, 1830 Eagle
Crest Way, Clallam Bay, WA. 98326.

DATED this 18th day of February, 2011.



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E. CONCLUSION

For the reasons stated herein, reversal and dismissal of the burglary conviction is required. Reversal of the remaining counts is also required, based upon the prosecutor's constitutionally offensive, flagrant, prejudicial misconduct and the admission of the improper opinion testimony, as well as counsel's ineffectiveness. Because the prosecution failed to properly, sufficiently prove that Trice was a Persistent Offender, the Persistent Offender sentence must be reversed, and the improper conditions of community custody should be so deemed and should be stricken or the trial court ordered not to reimpose them after any further proceedings on remand.

DATED this 18th day of February, 2011.

Respectfully submitted,



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