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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY
DEPUTY

No. 38550-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON

Respondent

v.

ROBERT DOBYNS

Appellant

APPEAL FROM THE SUPERIOR COURT OF LEWIS COUNTY

The Honorable James Lawler

Appellant's Opening Brief

(AMENDED)

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PM 7/23/09

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- VII. The jury instructions potentially created confusion within the jury as to the issue of aggravating factors. 49

STATEMENT OF THE CASE

The appellant was charged by Information with multiple sex offenses involving the same minor victim. CP198-203. On September 19, 2007, the state filed "Notice of Aggravating Factors" citing a high offender score, ongoing pattern of abuse, a violation of a position of trust, and a sentence that was too lenient as aggravating factors justifying an exceptional sentence. CP193-194.

The appellant, through his trial attorney, sought to suppress a taped telephone conversation between the victim and the appellant. CP192. The motion was denied and the jury was allowed to hear the taped conversation, despite the fact that the tape was never admitted into evidence. In fact, the taped played a major role in both the state's and the defense's case.

During voir dire, a potential juror requested that he be allowed to answer some

questions "in private." RP-16. The judge affirmed that the request would be honored. *Id.* After additional questioning of other jurors, the judge excused other jurors to allow the juror who requested to be questioned in public to be questioned. RP-76. As indicated in separate declarations, public spectators felt they were also required to vacate the court room to allow questioning of some potential jurors as a result of the judge's response to the potential juror's request. This matter was the subject of a post-trial motion in light of a recent court decision. The motion for a new trial was denied.

Also during voir dire, defense's attempt to disqualify a juror who, during questioning, admitted that he could not be fair, was denied. RP55-57. As a result of the denial, the juror was placed on the jury. While another juror who indicated he could also not be fair was excused after a for cause challenge. CP17-24.

Trial counsel for appellant also made issue of the Judge's comments towards counsel and how such comments and tone would be interpreted by the jury. RP544. Defense counsel ultimately brought the issue to the attention of the court. *Id.*

After trial, the jury returned a verdict of guilty with a special finding of aggravating factors. CP107-136. Based upon the factors found by the jury, the defendant was sentenced to an exceptional sentence. CP21-38. The defendant now appeals. CP1-20.

I. **FIRST ASSIGNMENT OF ERROR: COURT'S
FAILURE TO SUPPRESS TELEPHONE CONVERSATION**

The court erred in failing to suppress an improperly obtained taped telephone conversation of the defendant.

On March 3, 2006, JUDGE NELSON HUNT authorized an Order of Interception and Recording of Communications or Conversation Pursuant to RCW

9.73.090. CP192. The Order was from March 4, 2006 to March 11, 2007. *Id.* Subsequent to March 3, 2006, there were two (2) telephone calls to appellant, one on March 4, 2006 and one on March 5, 2005. *Id.*

1. LAW ENFORCEMENT DID NOT COMPLY WITH RCW 9.73.130 PRIOR TO INTERCEPTING AND RECORDING PRIVATE TELEPHONE CONVERSATIONS WITH THE DEFENDANT.

Washington has long recognized and protected the privacy interest of its citizens. *State v. Clark*, 129 Wn.2d 211, 916 P.2d 384 (1996); and *Peninsula Counseling Center v. Rahm*, 105 Wn.2d 296 (1986). One method of protecting that privacy was the adoption of the Privacy Act (RCW 9.73) in 1967. The primary purpose of the act was to protect privacy and to prevent the distribution of improperly obtained information. *State v. Fjermestad*, 114 Wn.2d 828, 791 P.2d 897 (1990), and *State v. Baird*, 83 Wn.App. 477, 922 P.2d 157 (1996). The act's purpose is "to preserve as

private those communications intended to be private." *State v. Baird, supra.* The Act prohibits a number of things. Items prohibited are divulging the contents of a telegram (RCW 9.73.010), opening sealed letters (RCW 9.73.020) and intercepting and recording private communications, such as we have here (RCW 9.73.030 and RCW 9.73.040).

The threat to privacy was so great that the United States Supreme Court warned that "[f]ew threats to liberty exist which are greater than that posed by the use of eavesdropping devices," In *Berger v. New York*, 388 U.S. 41, 63, 41 L.Ed2 1040, 87 S.Ct. 1873 (1967).

The underlying theme of the act is to prohibit the recording and disclosure of private conversations and, for purposes of this case, telephone conversations with specific exceptions. That tone is set by RCW 9.73.030(10), which states in part:

(1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the State of Washington, its agencies and political subdivisions to intercept, or record any:

(a) Private communication transmitted by telephone...

Much on the remainder of the act addresses a multitude of closely guarded exceptions and the consequences for violating the act.

Certain exceptions include communications of an emergency nature, the conveyance of threats, of extortion, blackmail, bodily harm, etc. The act also allow those communications that occur anonymously, repeatedly, or ones that relate to a hostage holder, as long as there is the consent of one party to the conversation. See RCW 9.73.030(2). There also is an exception to news agencies. See RCW 9.73.030(4).

The basic rule is that private telephone conversations should not be recorded or divulged without having the consent of both parties to the conversation.

In the present case, there is nothing in the records that even suggests that the Defendant gave his consent, impliedly, see RCW 9.73.030(3) or otherwise to the recording or reporting of his conversations at issue here.

In that context, RCW 9.73.090 must be analyzed. The title of that section should not go unnoticed:

§ 9.73.090 Contains certain emergency response personnel exempted from RCW 9.73.030 through 9.73.080... standards... court authorizations... admissibility...

Subsection 1 then addresses the substance of the title, exemptions from the act for emergency communications. Subsection 2 is the heart of the

statute, as it relates appellant. Subsection 2 allows law enforcement, while acting in their official capacity, to, among other things, record a conversation if one of the parties to the conversation has given prior approval to the interception and recording of the conversation.

However, law enforcement must first obtain judicial approval upon a showing that there is "probable cause to believe that the non-consenting party has committed, is engaged in, or is about to commit a felony." See RCW 9.73.090(2). In the present case, there is no question that law enforcement was acting in his official capacity and he had the victim's consent to record the calls.

More specific requirements of the application for judicial approval are contained in RCW 9.73.130. In this case, law enforcement applied for, and was granted, an order authorizing the interception and recording of conversations between the Defendant and the victim. The application must

be carefully scrutinized under the requirements of RCW 9.73.130.

The first two requirements of RCW 9.73.130(3)(a) and (b) are met in that the applications do identify the appellant and describe the details of the offense the appellant is supposed to have committed. However, failed to provide any corroboration, whatsoever, that a crime was, in fact, committed.

It is the third requirement as contained in RCW 9.73.130(3)(c) that presents the first problem. That section requires that the application provides:

"3. A particular statement of facts relied upon by the applicant to justify his belief that an authorization should be issued, including:

(c) The particular type of communication or conversation not be recorded **and** a showing that there is probable cause to believe such communication

will be communicated on the wire communication facility involved or at a particular place where the oral communication is to be recorded. (emphasis added).

This is significant in the present case because this section emphasizes, somewhat, why this process is not intended to be used as it was used in this case. Law enforcement in this case simply wanted to get a confession. Within its application, law enforcement states, "I asked both (mother and daughter) if they thought ROBERT would admit to me if he had done these things to NICHOLE or not. They both agreed that he would never admit it to me."

While the statute speaks in terms of a suspect "has committed, is engaged in, or is about to commit a felony," it is clear from a close reading of the statute itself, as well as the case law, that it was intended to be used in situations involving an informant and an ongoing criminal enterprise or activity; not to simply obtain

confessions and avoid advising a suspect of his constitutional rights two or three years after the alleged crime.

What is missing under this section, in the present case, is the lack of any factual background that would establish probable cause to believe there will be an incriminating disclosure on the tape. The sole motivation to seeking judicial approval was the fact that law enforcement believed that appellant would not talk to the police. If that is the standard, than nearly every criminal investigation would benefit from taped telephone conversations.

Law enforcement chose to seek a recording prior to attempting to obtain any corroboration. Law enforcement advised the judge, "I anticipate that if NICHOLE called ROBERT and informed him about the sexual abuse under the pretense that she has been thinking about it and wants to tell her counselor at school about what happened ROBERT will

talk freely about the incident." While law enforcement may have had those beliefs, the application was totally void of any facts establishing probable cause for him to have those beliefs. More than the officer's opinions and boilerplate assertions are needed. *State v. Manning*, 81 Wn.App. 714, 915 P.2d 1162 (1996).

Here, law enforcement hoped the appellant would apologize or confess to something he was supposed to have done approximately three (3) to seven (7) years ago without having to advise the appellant of his constitutional rights. The alleged victim was 16 when the application was made. According to the application itself, they were seeking to obtain statements from a suspect on allegations that were not ongoing, but were several years old.

A. There is an insufficient factual background establishing other investigative background either failed or would not work, and other techniques normally used that were not attempted.

The State failed to satisfy subsection (c) of RCW 9.73.130(3).

Subsection (f) of RCW 9.73.130 requires:

A particular statement of facts showing that other normal investigative procedures, with respect to the offense, have been tried and have failed or reasonably appear to be unlikely to succeed if tried, or to be too dangerous to employ.

In the present case, law enforcement neither provided "a particular statement of facts," which would indicate that other methods failed or would not work, but they also didn't try other methods and ignored a number of other methods that have been used in hundreds of other cases in the past. Boiler plate assertions that other techniques did not or would not work, is not sufficient by the very terms of the statute as it is not case specific. Law enforcement advised the judge in essence that regular techniques would not work, yet no particularized proof of attempt or failure was

provided. The simple assertions fall well short of the "particular statement of facts" requirement of the statute.

As the courts have held, the police do not need to have exhausted all alternatives, but they need to have, at least, seriously considered other alternatives and inform the court of the reasons why the other alternatives would not likely work. See *Sate v. Cisneros*, 63 Wn.App. 724, 821 P.2d 1262 (1992), and *State v. Knight*, 54 Wn.App. 143, 772 P.2d 1042 (1995). Opinion that another method would not work is not sufficient to satisfy the statute.

It has been held that the failure to comply with the statutory requirements of RCW 9.73.090 and RCW 9.73.130, renders any order allowing the interception and recording unlawful and the recording inadmissible. *State v. Mayes*, 20 Wn.App. 184, 79 P.2d 999 (1978), and *State v. Kichinko*, 26 Wn.App. 304, 613 P.2d 792 (1980).

"Mere conclusions by the affiant are insufficient to justify a search warrant, *Aguilar v. Texas*, 378 U.S. 108, 12 L.Ed.2d 723, 84 S.Ct. 1509 (1964), or a wiretap order." *United States v. Kalustian*, 529 F.2d 585 (9th Cir. 1975). The *Kalustian* case is instructive on why the application in this case falls woefully short of satisfying, not only the statute, but meeting constitutional muster.

In analyzing the statute and case law as it applies here, it is important to keep in mind that the statute itself represents an invasion of an individual's constitutional privacy rights and must, therefore, be closely scrutinized. Although the 9th Circuit Court was discussing the federal statute in *Kalustian, supra*, the same rationale would apply to the State statute. In the *Kalustian* case, the court states: "The act had been declared constitutional only because of its precise requirements and its provisions for close judicial scrutiny." 529 F.2d at 589. If recordings and the

invasions of an individual's rights, based on the opinion, hope, and speculation of an officer is allowed, then the very protections that make the statutes constitutional is rendered pointless.

2. THE USE OF THE VICTIM BY LAW ENFORCEMENT TO ATTEMPT TO OBTAIN A CONFESSION FROM THE APPELLANT ON TAPE WITHOUT HIS PERMISSION OR KNOWLEDGE VIOLATED HIS RIGHT TO COUNSEL AND HIS RIGHT NOT TO INCRIMINATE HIMSELF.

The Washington State and United States Constitutions have various provisions that are applicable to this case. Article 1, Section 7 of the Washington State Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded without authority of law."

While this provision generally is looked upon as keeping the citizens of this state free from unreasonable searched and seizures, similar to the Fourth Amendment of the United States Constitution, the first part keeps a person's private affairs free from invasions. The recorded conversations in

this case certainly constitutes an intrusion, but one that would be allowed if done within the "authority of law." It has already been demonstrated that the "authority of law" here was not valid.

This provision must be kept in mind when considering this case along with the provisions of Article 1, Section 9 of the Washington State Constitution, which says announces that "[n]o person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense."

So a person's private affairs are to be safe from invasion and a person need not give evidence against his or herself. In addition, under Article 1, Section 22 of the Washington State Constitution, and the Fifth and Sixth Amendments of the United States Constitution, a person also has the right to an attorney. This constitutional right to counsel has been deemed to be "a categorical requirement

necessary to give substance to other constitutional procedural protection afforded criminal defendants." Yet, these rights were ignored in the case at hand.

Further, a criminal defendant is entitled to the representation of counsel at all critical stages of the proceedings. *Garrison v. Rhay*, 75 Wn.2d 98, 449 P.2d 92 (1968); and *Maine v. Moulton*, 474 U.S. 159, 88 L.Ed.2d 481, 106 S.Ct. 477 (1985).

When law enforcement was informed of the alleged sexual abuse by appellant, there was probable cause to arrest the appellant, and certainly to bring him in for questioning. Had this been done, appellant would have had the right to attorney, a fact known to law enforcement. Rather than honor the appellant's constitutional rights, law enforcement circumvented the rights and used the victim to ask its questions.

The right to counsel, as stated, is mandated by the 6th Amendment to the United States

Constitution, and Article 1, Section 22 of the Washington State Constitution. Procedurally, whether that right is violated is often determined by the standards set forth in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1964); and *State v. Stewart*, 113 Wn.2d 462, 780 P.2d 844 (1989).

There is no question that if this were strictly a private action, with no state involvement there would be no constitutional issue, although there may still be an admissibility issue. *Burdeau v. McDowell*, 256 U.S. 465, 415 S.Ct. 574, 65 L.Ed 1048 (1921); and *State v. Ludisk*, 20 Wn.App. 257, 698 P.2d 1064 (1985). However, there is no doubt that the caller was acting as an agent of the police and, therefore, stood in their shoes. *State v. Heritage*, 114 Wn.App 591, 61 P.3d 1190 (2002).

As the U.S. Supreme Court stated in *Moulton*, *supra*:

"...the Court has also has recognized that the assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, "critical" stages in the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality.

474 U.S. at 170.

The facts of the *Moulton* case are very similar to the facts in this case, in that the issue involved intercepted and recorded conversations.

After analyzing a series of similar cases, *Messiah v. United States*, 377 U.S. 201, 12 L.Ed.2 246, 84 S.Ct. 1199 (1964); *United States v. Henry*,

447 U.S. 264, 65 L.Ed.2 115, 100 S.Ct 2183 (1980);
and *Spano v. New York*, 360 U.S. 315, 3 L.Ed.2 1265
79 S.Ct. 1202 (1959); the *Moulton* court concluded:

However, knowing exploitation by the state of an opportunity to confront the accused without counsel being present is as much a breach of the state's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the state obtains incriminating statements by knowingly circumventing the accused's right to have counsel present with a confrontation between the accused and a state agent.

Applying this principle to the case at hand, it is clear that the state violated Moulton's Sixth Amendment right when it arranged to record conversations between Moulton and its undercover informant, Colson. It was the police who suggested to Colson that he record his telephone conversations with Moulton. Having learned from those

recordings that Moulton and Colson were going to meet, the police asked Colson to let him put a body wire transmitter on him to record what was said.. The police thus knew that Moulton would make statements that he had a constitutional right not to make to their agent prior to consulting with counsel.

474 U.S. at 176-177.

II. SECOND ASSIGNMENT OF ERROR: ALLOWING THE
JURY TO HEAR TAPE NOT ADMITTED INTO
EVIDENCE:

The trial court erred in allowing the jury to hear the taped telephonic conversation when the tape had not been admitted into evidence.

A jury is instructed that it can only consider:

[t]he evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have

admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict."

WPIC 1.02. The taped played in this case satisfies none of the criteria set forth within the instruction.

Testimony is defined as: Evidence given by a competent witness under oath or affirmation; as distinguished from evidence derived from writings, and other sources. Testimony is [a] particular kind of evidence that comes to [a] tribunal through live witnesses speaking under oath or affirmation . . . Black's Law Dictionary 1324 (5th ed. 1979).

Wildman v. Taylor, 46 Wn. App. 546, 552, 731 P.2d 541 (1987). The tape does not satisfy the "testimony" definition and cannot be properly considered under that prong.

Nor was this a stipulation. The parties did not stipulate to the playing of the tape. Rather, the tape in question was the subject of a

pretrial motion to suppress brought trial counsel and was denied.

Finally, this was not an exhibit either. RP-720. While counsel may have assumed it was, does not make it so. Rather, the jury was allowed to hear a tape that was not "...testimony that [was] heard from witnesses, stipulations, and the exhibits that [were] admitted during the trial." WPIC 1.02. Both counsel relied on the tape heavily; albeit for different interpretations. However, that does not change the effect in the case at hand.

"When evidence is improperly admitted, the trial court's error is harmless if it is minor in reference to the overall, overwhelming evidence as a whole. *State v. Yates*, 161 Wn.2d 714, 764, 168 P.3d 359 (2007), cert. denied, 128 S. Ct. 2964 (2008) (quoting *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997))." *State v. George & Wahsise*, No. 36039-0-II, Consolidated

With No. 36095-1-II, Linked With No. 36032-2-II (2009).

Here, the court allowed the jury to hear the tape prior to it being admitted as an exhibit and this, without question, cannot be considered a "minor reference to the overall, overwhelming evidence as a whole." *Id.* As a result, the error was not harmless and the conviction must be overturned.

III. THIRD ASSIGNMENT OF ERROR: FAILING TO
CONDUCT REQUIRED BONE CLUB ANALYSIS BEFORE
INDIVIDUAL QUESTIONING OF POTENTIAL

JURORS:

The trial court violated the Constitutional rights, both federal and state, of the defendant by closing the courtroom to the public during a portion of voir dire. The only remedy for such a violation is reversal.

During the court's question of the jury, the following took place:

COURT: Before you answer these next few questions, they are -given the nature of this case, if there are things that you would like to have discussed outside the presence of the jurors, let us know, we can make arrangements for that. So again, based on what you know about this case, do you know of any reason why you should not be allowed to serve on this case. RP-16

JUROR 16: Well, I'd like to tell you in private. RP-16.

COURT: Alright. RP-16

COURT: I'm going to excuse the jury panel at this time to go back to the jury assembly room to wait for a few moments. I don't believe we'll take too long and then I'll have you come back and then we'll do the rest of the jury selection. Number 16 can stay here. RP-76

During the Motion for a New Trial, which was based upon this issue, defense counsel argued that the court, closed the court room because spectators believed they were required to vacate the court room along with other potential jurors.

RP2-4¹. Without question, the court did not conduct the *Bone Club* analysis.

"Whether a trial court procedure violates the right to a public trial is a question of law we review *de novo*. *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The remedy for such violation is reversal and remand for new trial. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). A defendant who fails to object at the time of the closure does not waive the right. *Brightman*, 155 Wn.2d at 514-15." *State v. Heath*, Docket No. 36885-4-II(2009).

The access to an open and public trial is fundamental and "[w]hat transpires in the court room is public property." *State v. Coe*, 101 Wn.2d 364, 380, 679 P.2d, 353 (1984); other citation omitted. Because the guarantee of open criminal proceedings extends to jury selection

¹ RP2 refers to Report of Proceedings of October 24, 2008 Motion Hearing.

and some pretrial motions, the trial court must engage in a *Bone-Club* analysis before closing the court to such proceedings. *Heath*. The *Bone Club* analysis requires the court to:

1. The proponent of closure . . . must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a 'serious and imminent threat' to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

In re Orange, 152 Wn.2d 795, 806-807, 100 P.3d 291 (2004); quoting *State v. Bone-Club*, 128 Wn.2d 254, 258-259, 906 P.2d 325 (1995); other citations omitted.

When looking at the required steps, it is apparent that the steps were not considered in the case at hand and, as a result, the conviction must be reversed and remanded.

In the case at hand, the party requesting the closure of the court room was the juror. RP-16. The court then affirmed the request by responding "[a]llright" after the request to "...tell you in private." RP-16. There was no request, inquiry or offer of any interest that was at stake if such a request was not granted. The trial court failed to satisfy the first of five *Bone Club* prongs.

The court also failed to give anyone present the opportunity to object to the closure of the court room. As trial counsel argued at the Motion for a New Trial that some of those present

believed, based upon the court's ruling, they were required to leave. RP2-4. At no time did the court offer anyone, parties, attorneys or otherwise, the opportunity to object to the closure. The second prong of the required *Bone Club* analysis was also left unsatisfied by the trial court.

The court also failed to ensure that the method used is the least restrictive available. Although the questioning took place in the courtroom, it was done after the exclusion of others. The circumstances, not the location, should dictate and, as a result, this prong was also not satisfied by the trial court.

To satisfy the fourth prong, the court must weigh the competing interest. Such was not done in this case. Not only were the competing interests not weighed, they were not even identified.

Finally, the order cannot be any broader in scope or duration than absolutely necessary. Arguably, this is the closest the trial court comes to satisfying any of the *Bone Club* requirements, but this too falls short.

The court failed all five prongs of the *Bone Club* analysis and, further failed to make specific findings that formed the basis of its order, as required. *Haley*; other citations omitted.

This case is nearly indistinguishable from *State v. Erickson*, 146 Wn. App. 200, 189 P.3d 245 (2008). In that case, as here, the court recognized that the subject matter of the trial may cause discomfort for some prospective jurors. *Id* at 247; RP-16. "A closed jury selection process prevents a defendant's family from contributing their knowledge or insight during jury selection. And closure also prevents other interested members of the public, including the

press, from viewing the proceedings." *Id* at 248; other citations omitted. Given the fact that others in the court room felt compelled to leave given the court's order confirms the fears outlined in *Erickson*. As in *Erickson*, the conviction must be overturned and a new trial ordered.

IV. FOURTH ASSIGNMENT OF ERROR: FAILING TO STRIKE, FOR CAUSE, A JUROR WHO AFFIRMED THAT HE COULD NOT BE FAIR:

The court erred in failing to strike a potential juror for cause who affirmed, during voir dire, that he could not be fair.

'[I]f a defendant believes that a juror should have been excused for cause and the trial court refused his for-cause challenge, he may elect not to use a peremptory challenge and allow the juror to be seated. After conviction, he can win reversal on appeal if he can show that the trial court abused its discretion in denying the for-cause challenge.'

State v. Gonzales, 111 Wash. App. 276, 281, 45 P.3d 205 (2002), review denied, 148 Wash.2d 1012, 62 P.3d 890 (2003); other citations omitted.

Juror 43, during voir dire, admitted that he was prejudiced against the defendant because of the crime charged. RP-55. "For sex crimes, that's the top of my list. You know, I just don't like that at all..." RP-56. When asked if he could try and set that aside, Juror 35 responded "It's going to be hard...I don't know. I just—like I say, one of the top things I just—just do not like it at all." RP-56. Further, Juror 35 admitted that he could not assure impartiality. RP-57.

While refusal to removal a juror for cause is reviewed for a manifest abuse of discretion, "...appellate deference to trial court determinations of the ability of potential jurors to be fair and impartial is not a rubber stamp..." *Id.* at 281; other citations omitted. As in

Gonzales, Juror 35, expressed absolutely no confidence in the "...ability to deliberate fairly or to follow the judge's instructions regarding the presumption of innocence." *Id* at 282. Given that, the juror should have been removed for cause. The only remedy available for a denial of an impartial jury is reversal. *Id*.

**V. FIFTH ASSIGNMENT OF ERROR: COURT'S
TREATMENT OF DEFENSE COUNSEL IN THE
PRESENCE OF THE JURY:**

The court erred in its treatment of defense counsel in the presence of the jury, thereby making an improper comment on the evidence and, potentially, improperly influencing the jury.

Throughout the trial, defense counsel was dealt with sternly by the trial judge and, as a result, counsel's credibility was called into question for the jury. Such comments by the judge did not go unnoticed and, in fact, defense counsel was compelled to comment "...this jury is

seeing you jump me here in public continuously and I'm afraid they're going to get prejudiced and I don't want that to occur... But it's getting to be where I can't even get a word out where people are starting to laugh now." RP-544.

"`All remarks and observations as to the facts before the jury are positively prohibited.'" *State v. Francisco*, 148 Wn. App. 168, 178-79, 199 P.3d 478 (2009) ; citing *State v. Bogner*, 62 Wash.2d 247, 252, 382 P.2d 254 (1963) (emphasis added) (quoting *State v. Walters*, 7 Wash. 246, 250, 34 P. 938 (1893)). The court's repeated comments, short retorts and attitude was a comment on the defense, his case and the veracity of the state's witnesses. Such comments are absolutely prohibited. A more serious effect of the rebuke was the reflection it cast on the integrity of the defense attorney. *State v. Whalon*, 1 Wn. App. 785, 798, 464 P.2d 730 (1970).

Unlike *Francisco*, the court here made no attempt to limit the damage, potential, real or perceived that resulted from the comments made.

**VI. SIXTH ASSIGNMENT OF ERROR: THE STATE
COMMITTED PROSECUTORIAL MISCONDUCT DURING
ITS CLOSING ARGUMENT TO THE JURY:**

The state committed prosecutorial misconduct in its closing arguments by improperly commenting regarding reliability and trustworthiness of witnesses.

Given the nature of the case, the defendant had a difficult task only to be made more difficult by the intentional acts of the prosecutor and his comments to the jury during his closing arguments.

The following occurred during the state's closing argument:

Prosecutor: If they were making this thing up -- well, they were straight shooters, both of them, when they were on the stand --

Defense Counsel: Objection, Your Honor. He's now vouching for the credibility.

THE COURT: Sustained. RP-650.

"It is improper for a prosecutor personally to vouch for the credibility of a witness." *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (citing *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)); see also RPC 3.4(e). A prosecutor may argue reasonable inferences from the evidence, but a prosecutor may not make a "'clear and unmistakable'" expression of personal opinion.

Brett, 126 Wn.2d at 175 (quoting *Sargent*, 40 Wn. App. at 344)."
State v. Warren, 195 P.3d 940, 951 (2008) (Justice Sanders in Dissent).

While the court sustained the above objectionable comment, it failed to sustain

objections on others and allowed several, improper, comments, vouching for the credibility of state witnesses.

"People who are making things up don't have a problem talking about it." RP-645. "This is a normal response for a parent who's just learned this kind of information." RP-645. "...[S]he shot me looks like please don't make me talk about this." "People fabricating stories can't come up with those kinds of vivid details." RP-647. "...[Y]ou can't make up that stuff, the detail, unless you're telling the truth." RP-647. "If she was making it up, she would have said, yeah, I saw him ejaculate every time. Instead she said well, no, but she remembered that she saw his penis wet. Why. . . She's telling us the truth." RP-650.

These are all comments vouching for credibility and are improper. Defense counsel attempted to cease such arguments, but was

rebuked by the court. It was not as if the comments were isolated. Rather, the state continually and repeatedly interjected personal opinion and vouched for witnesses.

The prosecutor then went on to discuss delayed reporting and the "reasons" while a child may not report in a timely manner. "It's confusing for kids, conflicting feelings, so they don't really know what they should do. And she was, by the way, nine when this started. Nine-year-olds are a nine-year-old. They don't -- how are they supposed to understand this kind of thing? You can't hold a nine-year-old to the same standard as an adult. It's ridiculous to do so." RP-710.

"This line of argument would have been proper had the State offered some expert testimony on the claimed phenomenon of delayed reporting of sexual abuse. But as it was, the prosecutor impermissibly argued prejudicial facts not in the record, permitting the jury

to speculate on facts not before it. See *State v. Rose*, 62 Wash.2d 309, 312, 382 P.2d 513 (1963); see also *Belgarde*, 110 Wash.2d at 508, 755 P.2d 174 ("A prosecutor has no right to call to the attention of the jury matters or considerations which the jurors have no right to consider.").

Warren at 951 (Justice Sanders in Dissent).

The errors committed by the prosecutor in this case were numerous and flagrant. The trial court sustained one objection, but the state simply "rephrased" to get the same idea, thought and theme to the jury.

To make a bad situation worse, the state also brought up information that was not mentioned at trial. "If you have an ongoing case, a trial, hearings, random hearings getting reset, appointments to come and talk to attorneys, things like that, you're going to have to talk about the case, "Oh, hey, we have to go in and talk to the lawyer next week." RP-649. This evidence, not heard by the jury during trial, was

another attempt to increase the credibility of the state's witness. Such action is not permissible. As a result, the defendant was prejudiced and reversal is necessary.

**VII. SEVENTH ASSIGNMENT OF ERROR: IMPOSITION
OF AN EXCEPTIONAL SENTENCE:**

The jury instructions, potentially, created confusion within the jury as to the issue of aggravating factors.

Jury Instruction Number 27 potentially misled the jury and, as a result, the exceptional sentence imposed in this matter must be vacated. Instruction 27's last sentence indicates that "[i]f you unanimously have a reasonable doubt as to this question, you must answer no." While the prior sentence indicates "no" is the appropriate answer if any one person has a reasonable doubt, the final sentence contradicts that and, thereby, may be confusing to jurors.

A jury is entitled to instructions which are clear, concise statements of the issues before it, the standards that must be applied, the method by which those standards are to be applied. Such did not occur here. As a result, the exceptional sentence must be vacated.

The exceptional sentence imposed her was clearly excessive and without justification. Even if, *arguendo*, the exceptional sentence in this matter was a result of proper instructions, the sentence imposed was such that it is not appropriate under the facts of this case.

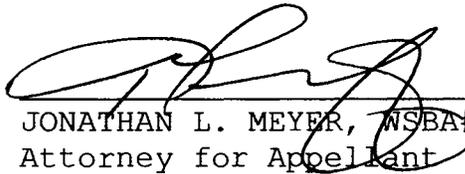
CONCLUSION

The conviction in this matter cannot stand. When the court looks at the totality of the errors before it, only one conclusion can be reached and reversal is mandated.

Evidence was heard that should have been suppressed, was not properly before the court or was not introduced until closing arguments.

The public was excluded and jurors were not stricken when doing so would have been proper. Treatment of trial counsel was improper as were the comments by the state during its argument to the jury. Finally, the sentence is not one supported in this matter. Reversal is the only appropriate remedy in this matter.

Respectfully submitted this 20th day of July, 2009.



JONATHAN L. MEYER, WSBA# 28238
Attorney for Appellant

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY KSC
DEPUTY

No. 38550-3-II
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

State of Washington)
) Declaration of Mailing
) (Amended)
vs.)
)
ROBERT DOBYNS)

)

The undersigned is now and at all times herein mentioned was a citizen of the United States and a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-entitled action, and competent to be a witness therein.

I declare that on July 20, 2009, I deposited in the U.S. Mail, postage prepaid, properly addressed envelope containing the Appellant's Opening Brief (Amended) to the following:

Robert Dobyns, Appellant
DOC # 319952
191 Constantine Way
Aberdeen, WA 98520

Signed at Centralia, Washington, on the 23rd day of July, 2009.



JONATHAN L. MEYER, Declarant

ORIGINAL

DECLARATION OF MAILING - 1

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DIVISION II

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No. 38550-3-1
COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON
STATE OF WASHINGTON
BY DEPUTY

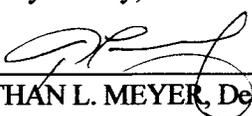
State of Washington)
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vs.)
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_____)

The undersigned is now and at all times herein mentioned was a citizen of the United States and a resident of the State of Washington, over the age of 18 years, not a party to or interested in the above-entitled action, and competent to be a witness therein.

I declare that on July 2, 2009, I deposited in the U.S. Mail, postage prepaid, properly addressed envelope containing the Appellant's Opening Brief to the following:

Lewis County Prosecutor's Office, Attorney for Respondent

Signed at Centralia, Washington, on the 20th day of July, 2009.



JONATHAN L. MEYER, Declarant