

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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No. 39293-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Theresa Hutton,

Appellant.

Lewis County Superior Court Cause No. 08-1-00491-5

The Honorable Judge Nelson Hunt

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. The prosecutor committed misconduct that violated Ms. Hutton's Sixth and Fourteenth Amendment right to counsel.
2. The prosecutor committed misconduct that violated Ms. Hutton's Fourteenth Amendment right to due process.
3. The prosecutor committed misconduct by making a plea offer contingent on Ms. Hutton's agreement to forgo an interview with K.
4. The prosecutor committed misconduct in closing by vouching for prosecution witnesses.
5. The prosecutor committed misconduct in closing by expressing personal opinions about the evidence.
6. The prosecutor committed misconduct in closing by making legal arguments not supported by the instructions.
7. The trial judge abused his discretion by allowing K.'s counselor to testify that K.'s sister C. also had PTSD.
8. The trial judge abused his discretion by allowing K.'s friend to testify that K. had never lied to her.
9. The trial judge abused his discretion by allowing profile testimony about abused children.
10. The trial judge abused his discretion by allowing the grandmother to testify that K. had a "beautiful relationship" with her father.
11. The trial court violated Ms. Hutton's Sixth Amendment right to confront witnesses by restricting cross-examination of K.'s counselor.
12. Ms. Hutton was denied her right to the effective assistance of counsel under the Sixth and Fourteenth Amendments.
13. Defense counsel was ineffective for failing to object to all instances of the prosecutor's misconduct in closing.

14. The trial judge violated Ms. Hutton's Sixth and Fourteenth Amendment right to confront witnesses.
15. The trial judge failed to place C. under oath prior to her testimony.
16. The trial judge erred by imposing an exceptional sentence in violation of Ms. Hutton's Sixth and Fourteenth Amendment right to a jury trial.
17. The trial judge erred by imposing an exceptional sentence in violation of Ms. Hutton's Fourteenth Amendment right to due process.
18. The trial court erroneously failed to define the "deliberate cruelty" aggravating factor for the jury.
19. The trial court failed to make the relevant legal standard for the "deliberately cruel" aggravating factor manifestly clear to the average juror.
20. Cumulative error requires reversal.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A prosecutor commits misconduct by making a plea offer contingent on forgoing an interview with a prosecution witness. The prosecutor offered Ms. Hutton 75 days in jail if she would forgo interviewing K. and plead guilty to criminal mistreatment. Did the prosecutor's misconduct violate Ms. Hutton's Sixth and Fourteenth Amendment rights to counsel and to due process?
2. A prosecutor may not vouch for a witness nor express a personal opinion about the evidence. In this case, the prosecutor vouched for the state's witnesses and expressed his personal opinion that Ms. Hutton's witnesses were not credible. Did the prosecutor commit misconduct requiring reversal?
3. A prosecutor may not make a legal argument that is not supported by the court's instructions. Here, the prosecutor made arguments that were not supported by the court's instructions. Did the prosecutor commit misconduct that requires reversal?

4. Specific instances of conduct relating to credibility may not be proved by extrinsic evidence. Here, the trial judge allowed K.'s friend to testify that K. had never lied to her. Did the trial judge err by admitting irrelevant and prejudicial testimony into evidence?

5. Profile testimony is inherently prejudicial and has very little probative value. Here, the trial judge allowed a social worker to testify that abused children often don't report the abuse. Did the trial judge err by allowing the state to introduce irrelevant and prejudicial profile testimony?

6. Evidence that is irrelevant and prejudicial should not be admitted at trial. Here, the trial judge allowed K.'s counselor to testify that K.'s sister had PTSD from witnessing the mother's mistreatment of K. Did the trial court err by admitting irrelevant and prejudicial evidence?

7. Evidence that is irrelevant and prejudicial should not be admitted at trial. Here, the trial judge allowed the paternal grandmother to testify that K. had a "beautiful relationship" with her late father. Did the trial court err by admitting irrelevant and prejudicial evidence?

8. An accused person has a constitutional right to confront witnesses. Here, the trial court refused to allow Ms. Hutton to cross-examine K.'s counselor about her emails with a detective, aimed at improving her resume so she could present expert testimony at trial. Did the restriction on cross-examination to show bias violate Ms. Hutton's Sixth Amendment confrontation right?

9. An accused person has a constitutional right to the effective assistance of counsel. Ms. Hutton's attorney failed to object to some instances of misconduct committed by the prosecutor in closing arguments. Was Ms. Hutton denied her right to the effective assistance of counsel under the Sixth and Fourteenth Amendments?

10. The right to confront witnesses requires that witnesses be administered an oath prior to testifying. Here, the trial judge failed to administer an oath prior to C.'s testimony. Did the trial judge violate Ms. Hutton's Sixth and Fourteenth Amendment right to confront witnesses?

11. A court must instruct the jury on all essential elements of an aggravating factor, including common-law elements. Here, the court failed to instruct the jury on the Supreme Court's definition of "deliberate cruelty." Did the exceptional sentence violate Ms. Hutton's Sixth and Fourteenth Amendment rights to a jury trial and to due process?

12. Errors may be aggregated and considered together to determine whether or not the accused received a fair trial. Ms. Hutton's trial was infected with numerous errors. Does cumulative error require reversal?

SUMMARY

Criminal mistreatment of a child is such a heinous charge that the accusation by itself is likely to prejudice jurors. Because of this, a parent facing criminal mistreatment charges must be ensured the fairest of proceedings. In this case, many irregularities—including prosecutorial misconduct during plea bargaining, the erroneous admission of evidence at trial, the exclusion of relevant and admissible evidence offered by the defense, errors in the jury instructions, prosecutorial misconduct in closing, and ineffective assistance of counsel—contributed to undermine the fairness of Theresa Hutton’s trial.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

I. BACKGROUND

Theresa Hutton and her two children lived in rural Toledo in Lewis County from 2001 on. RP (4/14/09) 31. K. was born in 1995, and C. was born in 2001. RP (4/15/09) 22.

Their neighbor was Brook Blessum, who lived about a mile away, next to where Ms. Hutton pastured her twenty-plus horses. RP (4/14/09) 31-32. Ms. Blessum was an elementary school teacher, and so therefore it was her statutory obligation to call Child Protective Services if she had any information regarding child abuse. RP (4/14/09) 40, 44. She lived next to the Huttons for three-to-four years, and never had a reason to call CPS. RP (4/14/09) 31, 44, 51. She even had Ms. Hutton baby-sit her own child. RP (4/14/09) 47-48.

K. Hutton started first grade at Toledo Elementary School in 2001. The school secretary, Kim Satcher, worked there for all of K.'s five years at the school. RP (4/15/09) 8-9. She did not contact CPS regarding K. during any of that time. RP (4/15/09) 13, 20. Leslie Wood was K.'s teacher in first grade. RP (4/15/09) 150-151. At her direction, the school counselor called CPS once, because K. had a toothache that lasted more than a day. RP (4/15/09) 154-156, 168. A social worker contacted Ms. Hutton, who took K. in for treatment. RP (4/15/09) 177. K. told Ms. Wood that her mother had hit her on January 10, 2003, but CPS was not contacted until March. Even then, it was to discuss the toothache. RP (4/15/09) 169.

Deborah Taylor was K.'s second grade teacher. She did not contact CPS with any concerns about K., and did not raise any concerns with Ms. Hutton during the parent-teacher conferences. RP (4/15/09) 172-173, 180.

Catherine DeFord worked in the school cafeteria while K. attended Toledo Elementary. While not a mandatory reporter, she did not contact CPS with any concerns. RP (4/15/09) 186. She served K. breakfast and lunch every day. RP (4/15/09) 188-189.

Chief Civil Deputy Sheriff Stacy Brown met with K. at school in the spring of 2003, but could not establish a rapport with K. and did not

get any information about Ms. Hutton or K.'s home life. RP (4/16/09) 55-59. She went to the home with a CPS worker, and described it as cluttered and smelling strongly of urine. RP (4/16/09) 61-63. She saw that the home had adequate food and no basis to remove either child. RP (4/16/09) 65, 69.

Toni Nelson, a social worker and advocate, attempted to help Ms. Hutton repeatedly in 2004 with food and supplies and referrals, but was rebuffed. RP (4/15/09) 205-218. Ms. Nelson said that in 2004 she contacted CPS with her concerns about the condition of the home, which she thought was dirty, cold, and uninhabitable. RP (4/15/09) 208-212, 217.

Tonja Nichols was Ms. Hutton's neighbor. As a registered nurse, she was also a mandatory reporter. RP (4/16/09) 5, 15. Ms. Nichols never contacted law enforcement or Child Protective Services with any concerns about the home or K. RP (4/16/09) 15.

Paula Warne was the school counselor during K.'s time at Toledo Elementary. RP (4/16/09) 72. She contacted CPS regarding the toothache, and the worker with whom she spoke told her that it was important that Ms. Hutton get her support since she was working very hard to improve her family's situation. RP (4/16/09) 77-79, 92.

Randall Apperton was K.'s fifth grade teacher at Toledo Elementary School during the 2006-2007 school year. RP (4/15/09) 1-2. While he did not mention his concerns to Ms. Hutton, he did contact CPS with his concerns that K. was filthy and neglected, without appropriately warm clothing, and smelling of urine. RP (4/15/09) 2-3.

CPS worker Jeffrey Copeland conducted an investigation from this referral, which included at least five unannounced visits. RP (4/16/09) 144-145, 151, 157. He concluded that the house was adequate and appropriate. RP (4/16/09) 146, 152, 158-159. He found no evidence of abuse, and did not see a reason to remove K. or enter into a voluntary agreement with Ms. Hutton as a result of this information. RP (4/16/09) 146, 161, 164. Another worker went to some of the home visits with him, and said in June of 2007 that the house was clean but smelly, and had no hazards but was adequate and safe. RP (4/17/09) 121-131.

K. ran away from home on July 1, 2007, and was found by police. RP (4/16/09) 130-131, RP (4/17/09) 16-17. She and C were placed in her paternal aunt's home. RP (4/15/09) 22.

II. CHARGING AND PLEA OFFER

The state charged Theresa Hutton with Criminal Mistreatment in the Second Degree, and alleged the aggravating factor of deliberate

cruelty. CP 21; Notice of Aggravating Factor for Purposes of Imposing Exceptional Sentences, Supp. CP.

The prosecutor made a plea offer on September 8, 2008, after the defense asked to set up an interview with K. Motion to Dismiss, Supp. CP. This offer was to allow Ms. Hutton to plead to the charge without the aggravator and the state would recommend a sentence of 75 days under the first-time offender sentencing option. Included in the offer was a notice that the offer would expire if the victim were interviewed. Exhibit B, Motion to Dismiss, Supp. CP. Ms. Hutton's attorney told the state that she could not accept the offer since the attorney could not evaluate the case without a victim interview. Exhibit C, Motion to Dismiss, Supp. CP.

The defense brought a motion to dismiss, arguing that the state committed misconduct by attempting to prevent Ms. Hutton from investigating the case against her, and thwarting her attorney's ability to meet his ethical obligations. Memorandum in Support of Motion to Dismiss, Supp. CP. The prosecutor responded that he had withdrawn the offer after interviewing K. himself, but maintained that it was appropriate to make an offer contingent on not interviewing the alleged victim. State's Response to Defendant's Motion to Dismiss, State's Supplemental Response to Defendant's Motion to Dismiss, Supp. CP; RP (11/19/08) 5-10.

At the hearing, the court noted that this kind of offer put the defense attorney in a no-win situation since there is an ethical duty to investigate the case. RP (11/19/08) 5-6. The judge suggested that defense counsel should take up the issue with the bar association and not with the trial court. RP (11/19/08) 11-13, 21. Finding that the state's action was appropriate in this particular case, the court denied the motion. RP (11/19/08) 19-24.

After the entry of stipulations regarding the admissibility of child hearsay and Ms. Hutton's statements, the case proceeded to a jury trial. Agreed Stipulation Regarding Admissibility of CrR 3.5 and Child Hearsay Statements, Supp. CP; RP (1/16/09) 1-4; RP (4/14/09) 2.

III. STATE'S EVIDENCE AT TRIAL

Although most of the people who had contact with K. did not see any reason to call CPS, all of them claimed to have witnessed severe mistreatment when they testified at trial.

Brook Blessum said that K. was always cold, dirty, and smelly, and always doing chores in deep mud, hauling hay bales bigger than she was, fixing pallets with rusty nails without gloves, fixing fences, and cleaning stalls. RP (4/14/09) 34-37. She saw K. waiting for the bus without having eaten, without a hat or gloves, and even in the snow while soaked to the bone. RP (4/14/09) 37-39.

Ms. Nichols told the jury that, based on her nursing training, K. was not well nourished and could be a “failure to thrive” child. RP (4/16/09) 8-10. She also noted that she was dirty and did not have appropriate clothing for the cold weather. RP (4/16/09) 7-8. She testified that she often heard Ms. Hutton yelling at K. and calling her vulgar names, and that Ms. Hutton did not seem upset when K. ran away. RP (4/16/09) 11, 13.

School secretary Kim Satcher testified that she was also quite concerned about K. She said K. had repeated problems with lice, which were finally solved when her mother cut her hair humiliatingly short. RP (4/15/09) 9-10, 14, 16-18. According to Ms. Satcher’s trial testimony, K. was always dirty and smelly, with feces on her inadequate clothing almost daily. RP (4/15/09) 10-11, 16. She indicated that K. was always hungry, was not allowed to wear the clothing they offered her, and that she often had trouble at school because she was teased. RP (4/15/09) 12-14, 16.

Teacher Wood testified that K. was always hungry and dirty, with ill-fitting clothes not appropriate for the weather. RP (4/15/09) 152-154.

Teacher Taylor told the jury that she kept a notebook with her concerns regarding K., including that she was small for her age, unkempt and unclean, had lice repeatedly, and was often hungry. RP (4/15/09) 172-175. She said that she was so concerned about K.’s swollen mouth at

one point that she took her to the principal's office. According to Ms. Taylor, the principal took K. home and she was seen by a dentist not long after. RP (4/15/09) 177.

Ms. DeFord (the lunch lady) was called by the state, and she said that K. was always hungry, dirty, and smelly, but that she was highly loving. RP (4/15/09) 182-184. She told the jury that she was very concerned for K., since her hands were warty and red from cleaning cages with bleach, she wore a bathrobe to school one day, and none of these issues improved over the years K. attended school. RP (4/15/09) 184-186.

After K. was placed with her paternal aunt she started seeing Venus Masters for counseling in the fall of 2007. RP (4/14/09) 58. Ms. Masters told the jury that it had taken her seventeen years to get her undergraduate degree, and that she had been a licensed mental health counselor since 2004. RP (4/14/09) 51-52. She explained to the jurors that she had diagnosed K. with Post-Traumatic Stress Disorder. RP (4/14/09) 59-62.

Ms. Masters indicated that it was common for children to delay disclosure of abuse. RP (4/14/09) 65-66. She acknowledged that she was not qualified to do any psychological testing. RP (4/14/09) 89. Ms. Masters told the jury of several statements K. had made to her about what she suffered at her mother's hands. According to her, K. said that she had

been disciplined by being made to hold a body position for hours, to sleep outside, and to skip meals, as well as being locked in a closet. RP (4/14/09) 60-62, 69. K. also said that gifts given to her were taken by her mother and packed away for C. to use when she grew older. RP (4/14/09) 63.

The prosecutor asked Ms. Masters if she was able to reach any conclusions as to whether she had also been traumatized from her work with C., which started in February of 2008, and consisted of twelve sessions. RP (4/14/09) 70. Over defense objection, Ms. Masters opined that C. also suffered from PTSD. RP (4/14/09) 70-82. The defense objection was based on relevance and hearsay. RP (4/14/09) 71-77. Ms. Masters confirmed that she had never made any notes regarding this diagnosis, which had apparently occurred to her during her testimony. RP (4/14/09) 94-96.

In order to challenge Ms. Masters's credibility, the defense sought to bring out that she had worked with the detective on the case to prepare her resume and make sure that she could testify about what K. and C. had told her. RP (4/14/09) 83-85. The court ruled that this testimony was not relevant. RP (4/14/09) 85. The defense also wanted to ask about times K. had told her things that were demonstrably incorrect, but the court sustained the state's objection to the testimony. RP (4/14/09) 90-91.

K. testified at trial. She told the jury that she had to feed the horses and dogs and clean up after the dogs, as well as stack bales of hay that were larger than she was and was injured by it. RP (4/15/09) 25, 28-29. She said that her mother made her move crates bigger than she was, carry 25-gallon water buckets, dig a hole for a horse that died, and clean dog cages without gloves using bleach. RP (4/15/09) 36-37, 45. According to K., she did not get to eat very often, and sometimes only ate rotten food or dog food. RP (4/15/09) 40-42, 61. She said she did not get a jacket, hat, gloves, or shoes, even when it was cold, and that she did not get to use the toilet. RP (4/15/09) 35-36, 43, 48, 76, 81. She claimed Ms. Hutton called her vulgar names and never expressed any affection for her. RP (4/15/09) 43-44.

For punishment, K. said that she had to hold a position called “cockroach” for hours, and that twice her mother instructed her sister C. to hit her with a brush or spatula. RP (4/15/09) 25-27. She said she was also forced to sleep outside, without blankets or a coat, and locked in a closet at night (when sleeping inside). RP (4/15/09) 29-31. According to K., she was never allowed to sleep in a bed for the entirety of the five years she lived with her mother in Toledo. RP (4/15/09) 67. K. also said her mom hit her and kicked her. RP (4/15/09) 34.

At school, K. got extra food regularly and tried to hide it from her mother. RP (4/15/09) 52-53. K. said that C. also tried to bring her food. RP (4/15/09) 55.

K. acknowledged that she had read *A Child Called It*, and noted that it was a lot like what had happened to her. RP (4/15/09) 71.

The state called seven-year-old C. to testify. RP (4/14/09) 104. The court did not administer an oath before, during, or after her testimony. RP (4/14/09) 104-112. The prosecutor asked her about the difference between the truth and a lie, and about the meaning of the word “promise,” and he obtained C.’s promise to tell the truth. RP (4/14/09) 105-106. She told the jury that her mother was mean to K., and made her do “cockroach,” go without food, sleep outside, and do chores. RP (4/14/09) 106-110. She also said that her mother forced her to hit K. with a spatula while in “cockroach,” and that this happened almost every day. RP (4/14/09) 108, 112.

Outside the presence of the jury, defense counsel objected to C.’s testimony and raised the issue of the oath. The judge indicated that an oath was not necessary and that the defense should have objected during the testimony; however, he also told the defense that it was wise not to raise the issue during the testimony. RP (4/14/09) 113-114.

Amanda Coday supervised visits between Ms. Hutton and the children after they were removed from her home. RP (4/15/09) 90-91. She testified that Ms. Hutton was warm and affectionate with C., but did not interact at all with K. RP (4/15/09) 94-101.

The state called three doctors to testify. Dr. Reiswig, a radiologist, reviewed films of K.'s hands and stated that her skeletal age was years younger than her chronological age. RP (4/15/09) 105-110. Dr. Hall, a pediatrician, said that K. suffered from "psychosocial dwarfism," which she defined as stunted growth caused by a lack of nurturing. RP (4/15/09) 129-148. Dr. Newman, an endocrinologist, confirmed the diagnosis of psychosocial dwarfism. RP (4/16/09) 25.

The state called several relatives of K.'s late father, who testified that they had tried to help the family but were rebuffed by Ms. Hutton. RP (4/14/09) 110-129; RP (4/16/09) 171-198; RP (4/17/09) 2-13, 36-75. K.'s grandmother stated that K.'s relationship with her deceased father had been "beautiful." RP (4/7/09) 38. The jury also heard from K.'s friend (and her mother), who testified that K.'s head had been shaved at one point, that K. had cuts and bruises, and that K. had said that she had to do a lot of chores and sleep outside. RP (4/16/09) 35-54. The prosecutor asked her if K. ever told her anything that was untrue. RP (4/16/09) 53.

Ms. Hutton's objection was overruled, and the 13-year-old answered no. RP (4/16/09) 53-54.

Other witnesses also said that K. was dirty, cold, and hungry. RP (4/16/09) 101-107. The prosecutor introduced photos of the house and property and testimony that the inside of the house smelled like urine and contained animal feces. RP (4/16/09) 112-119, 136-138; RP (4/17/09) 18-23. The state played Ms. Hutton's 911 call for the jury, and presented the testimony of deputies who interviewed Ms. Hutton when K. was missing, who described Ms. Hutton as frantic at times and casual at times. RP (4/16/09) 129, 130-132; RP (4/20/09) 65-67. Social worker Copeland testified—over defense objection—that it was fairly common for children to deny that they had been abused. RP (4/16/09) 167.

IV. DEFENSE EVIDENCE AT TRIAL

Ms. Hutton presented the testimony of her boyfriend Ernest Oberloh, who lived with the family during most of the time at issue. RP (4/17/09) 77-79. He told the jury that K. made things up to get attention and sympathy, that she was not abused or denied food, and that she had few chores. RP (4/17/09) 77-114. He described family outings of picnics, garage sales, and parties, as well as “pony parties” Ms. Hutton threw for the children at their home. RP (4/17/09) 87-91. Ms. Hutton's sister

likewise described fun family events and denied that K. slept outside, was abused, or denied food. RP (4/17/09) 140-148.

Ms. Hutton introduced several photos showing K. wearing a hat and coat and boots appropriate for playing in the snow, enjoying herself at various parties with family and friends, and opening a digital camera at Christmas. RP (4/17/09) 89-90, 164-189; RP (4/20/09) 4-5.

Ms. Hutton testified in her own defense. RP (4/17/09) 151-206; RP (4/20/09) 1-62. She said that K.'s allegations came from the book *A Child Called It*, and denied the accusations: she did not have K. sleep outside, did not punish K. by having her stand in the same uncomfortable position for hours, did not withhold food from her, did not keep her from using the bathroom, did not shave her head, did not withhold appropriate clothing, and did not assign her unsuitable chores. RP (4/17/09) 151-153, 160, 188, 190-198; RP (4/20/09) 2-3, 8-12, 27, 33, 50, 52, 56-59.

Ms. Hutton testified that K. and she had argued often just before K. ran away, and said the arguments began because K.'s horse was gone and so was Mr. Oberloh, and K. blamed her mother for both losses. RP (4/17/09) 199-200; RP (4/20/09) 21-24. She said K. had started lying, making demands, and threatening to run away if she did not get her way. RP (4/17/09) 199-200; RP (4/20/09) 23-24.

V. JURY INSTRUCTIONS, CLOSING, VERDICT, AND SENTENCING.

The court gave the jury an instruction and a special verdict form relating to the “deliberate cruelty” aggravating factor. Instruction No. 21 reads as follows:

You will also be furnished with Special Verdict Form A. If you find the defendant not guilty of Criminal Mistreatment in the Second Degree, do not use Special Verdict Form A. If you find the defendant guilty, you will then use Special Verdict Form A and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer Special Verdict Form A “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you have a reasonable doubt as to the question, you must answer “no.”
Instruction No. 21, Court’s Instructions to the Jury, Supp. CP.

The operative language of Special Verdict Form A reads as follows:

QUESTION: Did the conduct of the defendant, THERESA ANN HUTTON, manifest deliberate cruelty to [K.] during the commission of the crime of Criminal Mistreatment in the Second Degree as charged?
Special Verdict Form A, Supp. CP.

In closing argument, the prosecutor made the following comments about the witnesses’ credibility:

The witnesses you heard from the state are believable, the law enforcement, teachers, neighbors, they’re all believable, they have no real stake in this.... They also have nothing to gain by falsifying the testimony in this case. They have done nothing but be honest with us about everything.
RP (4/20/09) 75-76.

The defendant’s witnesses, on the other hand, not believable.

RP (4/20/09) 76.

And a lot of defense counsel's arguments are based on what the defendant has told us. I would say credibility of Mr. Oberloh and the defendant is right around zero. Anything they say you need to take with an extremely large grain of salt.

RP (4/20/09) 139

When defense counsel objected to this last comment, the trial court overruled the objection:

THE COURT: Mr. Meyer, didn't I just tell you that the jury will sort this out. That's what they're supposed to do. I'm not going to comment on the evidence and there was no mention of your client in that remark. It was Mr. Oberloh he was talking about. Go ahead, Mr. Hayes.

RP (4/20/09) 139

He later repeated that Ms. Hutton's testimony (and that of Mr. Oberloh) should "be taken with a grain of salt." RP (4/20/09) 151.

Defense counsel subsequently noted an objection for the record. RP (4/20/09) 157. The prosecutor then went on with additional comments about the children's credibility:

MR. HAYES: C. and K. are very believable. It took incredible courage to come in this room face-to-face with her mother and tell the horrible stories and what they had to live through. That was believable and incredibly brave to come to a room of strangers, all of us, and share those horrific details.

RP (4/20/09) 139.

The prosecutor used the following language to characterize defense counsel's closing argument:

That's what we just heard, a lot of grasping at straws that was unreasonable and really out there suggestions. And the reason why that is is because defense counsel is doing the best with what he has. He doesn't have a leg to stand on. So we come up with this kind of theory of misdirection, smoke and mirrors... [L]ike K. has been outwitting us as if she is a diabolical, criminal mastermind who just woke up one morning and said, I'm going to do all this and lead us to where we are today. That's ridiculous to think that. The assertion that I didn't put someone up there to rebut everything that the defense said must mean it is true. That also is ridiculous... Suggesting that K. is trying to outwit us all is really out there.

RP (4/20/09) 137-139

The prosecutor also urged the jury to consider their feelings in deciding the case:

Counsel said a lot about heartstrings and don't let this pull your heartstrings. The instructions don't say you have to act like robots... When you look at the case in the eyes of a reasonable human being, you may still be outraged by what you heard. It doesn't mean you're disobeying what the law told you. It does not say you can't have human feeling and emotion when you evaluate the conduct of the defendant, it doesn't say that. You can't decide what a reasonable person would do without using your own emotions and feelings. The instructions do not say you can't be outraged by what we have heard during this trial. And I argue to you that after hearing all that, we should all be outraged.

RP (4/20/09) 153.

If the facts in this case haven't tugged at your heartstrings a little bit, reevaluate the evidence when you go back there.

RP (4/20/09) 155.

The prosecuting attorney also explained how he interpreted the phrase "necessities of life," which, according to him, included love and affection:

It has to be done by withholding the basic necessities of life, which the instruction tells us is food, water, clothing, shelter, medically necessary health care. Most people think health care is going to the doctor. This is open for your interpretation. Health care can mean anything a human needs to be healthy, being loved and nurtured. Medically necessary health care, including but not limited to health related treatment or activity. So it's really a very, very broad term. We heard both doctors state that nurturing, love and affection from a parent, they consider that to be basic necessity of life. So all these things, food, water, shelter, love, if you don't give those things to a child, it is not going to grow. You don't have to have a Ph.D. to know that.
RP (4/20/09) 96.

The jury returned a verdict of Guilty, and answered "yes" on Special Verdict Form A.¹ Verdict Form A, Special Verdict Form A, Supp. CP.

At sentencing, the state sought an exceptional sentence of 60 months, and Ms. Hutton sought a standard-range sentence. RP (5/4/09) 3-4. The court gave an exceptional sentence of 48 months. CP 10-20. Ms. Hutton timely appealed. CP 4, 8-9.

¹ The jurors also answered "yes" on Special Verdict Form B. Supp. CP.

ARGUMENT

I. THE PROSECUTOR COMMITTED MISCONDUCT THAT VIOLATED MS. HUTTON’S RIGHT TO COUNSEL AND TO DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS BY MAKING A PLEA OFFER CONTINGENT ON HER AGREEMENT TO FORGO AN INTERVIEW WITH K.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *In re Detention of Strand*, ___ Wn.App. ___, ___, 217 P.3d 1159, 1162 (2009).

B. The Sixth and Fourteenth Amendments guarantee Ms. Hutton the effective assistance of counsel and due process of law.

The Fourteenth Amendment provides (in part) that no state shall “deprive any person of life, liberty, or property, without due process of law...” U.S. Const. Amend. XIV. The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI.² The right to an attorney guaranteed by the Sixth Amendment is the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970). It has been described as “one of the most fundamental and cherished rights guaranteed by the

² This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

C. The prosecutor’s contingent plea offer violated Ms. Hutton’s right to the effective assistance of counsel and her right to due process.

To provide constitutionally adequate assistance, defense counsel must, “at a minimum, conduct a reasonable investigation.” *In re Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Without doing so, counsel cannot make informed decisions about how best to represent the client. *Brett*, at 873.

In addition, defense counsel has certain obligations that arise when the government makes a plea offer. First, the attorney must communicate the offer to the accused; failure to do so “constitutes unreasonable conduct under prevailing professional standards.” *United States v. Blaylock*, 20 F.3d 1458, 1466 (9th Cir. 1994); *see also Cullen v. United States*, 194 F.3d 401, 404 (2nd Cir. 1999). Second, “[a] reasonably competent counsel will attempt to learn all of the facts of the case, make an estimate of a likely sentence, and communicate the results of that analysis” before advising a client whether or not to plead guilty.³ *Moore v. Bryant*, 348 F.3d 238, 241

³ An accused person’s right to the effective assistance of counsel during the plea stage of a case survives even after the accused has had a fair trial, because the Sixth Amendment right guarantees more than the right to a fair trial. *Blaylock*, at 1466-1467.

(7th Cir. 2003); *In re McCready*, 100 Wn.App. 259, 263, 996 P.2d 658 (2000). The goal is to “equip the client with the tools needed to make a knowing, voluntary and intelligent decision.” *State v. Stough*, 96 Wn.App. 480, 487, 980 P.2d 298 (1999). Counsel may even be required to consult with experts prior to making a recommendation. *See, e.g., Dando v. Yukins*, 461 F.3d 791, 799 (6th Cir. 2006).

To demonstrate prejudice resulting from ineffective assistance during the plea bargaining stage, the accused must show a reasonable probability that she would have taken a different course had her attorney provided adequate assistance. *Bryant*, at 241; *Yukins*, at 799; *Pham v. United States*, 317 F.3d 178, 182 (2nd Cir. 2003). A significant sentencing disparity is one factor that bears on this issue. *Id.*, at 182. Furthermore, any uncertainty as to whether negotiations “would have resulted in a consummated bargain... should not prevent reversal where ‘confidence in the outcome’ is undermined.” *State v. James*, 48 Wn.App. 353, 364, 739 P.2d 1161 (1987).

A prosecutor may not interfere with defense counsel’s investigation. *State v. Burri*, 87 Wn.2d 175, 550 P.2d 507 (1976). It is likewise unethical for a prosecutor to “discourage or obstruct communication between prospective witnesses and defense counsel” (ABA Standards for Criminal Justice: Prosecution Function and Defense

Function § 3-3.1(d), at 47 (3d ed.1993)), or to advise witnesses “to refrain from discussing the case with opposing counsel.” CrR 4.7(h)(1). In addition, a prosecutor should not use a plea bargain as a coercive tool. *See State v. Hofstetter*, 75 Wn.App. 390, 402, 878 P.2d 474 (1994) (holding “it is improper for a prosecutor to instruct or advise a witness not to speak with defense counsel except when a prosecutor is present,” and “*a fortiori*, that it is improper for a prosecutor to plea bargain in such a way as to impose such instructions or advice on a witness.”)

A plea offer conditioned on a limited investigation infringes the Sixth Amendment right to effective assistance of counsel. *State v. Zhao*, 157 Wn.2d 188, 205-206, 137 P.3d 835 (2006) (Sanders, J., concurring). An attorney who is prevented from making a reasonable investigation cannot make informed decisions on how best to represent the client, and cannot give proper advice on whether to accept or reject a plea offer. *Brett, supra; Bryant, supra*.

In this case, the prosecuting attorney offered to recommend 75 days incarceration if Ms. Hutton pled guilty, and threatened to request a 30-month exceptional sentence if she went to trial. The state’s offer was contingent on Ms. Hutton’s agreement to forgo a defense interview with K. Exhibit B, Motion to Dismiss, Supp. CP.

Under these circumstances, Ms. Hutton was denied the effective assistance of counsel the moment the offer was conveyed to her attorney, because he was unable to provide competent advice regarding the plea offer. Without interviewing K., counsel could not make an objective and professional assessment of the child's credibility, could not test the strengths and weaknesses of her story, and could not uncover facts that might help or hurt Ms. Hutton's case at trial. In the absence of an interview, any advice the defense attorney gave Ms. Hutton was meaningless. The advice he apparently gave—to proceed with the investigation despite the consequences—may have seemed the best advice before he had an opportunity to meet K. In light of the outcome, including the finding of guilt, the verdict on the aggravating factor, and the 48-month exceptional sentence, his advice was incorrect.

At the time defense counsel apparently advised Ms. Hutton to proceed with the investigation, he could not realistically and objectively assess his client's chances at trial, nor could he realistically and objectively assess the state's threat to seek an exceptional sentence. Without having had the chance to interview the child victim—the person who was the most important individual at trial—the defendant's lawyer could not learn all the facts, make an estimate of a likely sentence, and communicate the results of his analysis. *Bryant, supra*. This was

deficient performance, brought on by the parameters of the contingent plea offer.

Ms. Hutton was prejudiced by her lawyer's inability to investigate. Had counsel interviewed K., he would have been able to give a more realistic assessment of his client's chances at trial and the likelihood of an exceptional sentence. There is a reasonable probability that Ms. Hutton would have accepted a plea offer that involved only 75 days in custody. Furthermore, because the sentencing court could not *sua sponte* convene a jury to determine the existence of aggravating factors, Ms. Hutton would not have even faced the possibility of an exceptional sentence had she accepted the state's offer and pled guilty. *See* RCW 9.94A.537.

Because the state's offer denied Ms. Hutton the effective assistance of counsel, her conviction must be vacated and the case remanded to the trial court. *Bryant, supra*.

II. THE PROSECUTOR COMMITTED MISCONDUCT IN CLOSING ARGUMENT.

A. Standard of Review

Prosecutorial misconduct requires reversal whenever there is a substantial likelihood that the misconduct affected the verdict. *State v. Henderson*, 100 Wn. App. 794, 800, 998 P.2d 907 (2000). In the absence of an objection, misconduct requires reversal if it is "so flagrant and ill-

intentioned” that no curative instruction would have negated its prejudicial effect. *Id.*, at 800.

- B. The prosecutor committed flagrant and ill-intentioned misconduct by vouching for state witnesses and expressing personal opinions about the evidence.

It is misconduct for a prosecutor to express a personal opinion as to the credibility of a witness. *State v. Horton*, 116 Wn.App. 909, 921, 68 P.3d 1145 (2003) (“Horton I”); *State v. Reed*, 102 Wn.2d 140, 684 P.2d 699 (1984) (“Reed I”); *United States v. Frederick*, 78 F.3d 1370, 1378 (9th Cir. 1996), *citing United States v. Roberts*, 618 F.2d 530, 533 (9th Cir.1980), *cert. denied*, 452 U.S. 942, 101 S.Ct. 3088, 69 L.Ed.2d 957 (1981). Misconduct occurs when it is clear that counsel is expressing a personal opinion rather than arguing an inference from the evidence. *State v. Price*, 126 Wn.App. 617, 653, 109 P.3d 27 (2005); *State v. Swan*, 114 Wn.2d 613, 790 P.2d 610 (1990); *State v. Robinson*, 44 Wn.App. 611, 722 P.2d 1379 (1986).

In this case, the prosecutor expressed his personal opinion numerous times in closing. First, he told the jury that the state’s witnesses—especially K. and C.—were “believable” or “very believable,” and described them as “incredibly courage[ous]” and “incredibly brave” for testifying. RP (4/20/09) 76, 139. The prosecutor made no effort to tie

these pronouncements to the evidence produced at trial; instead, he was clearly expressing a personal opinion. RP (4/20/09) 76.

Second, the prosecutor made the following statement:

I would say credibility of Mr. Oberloh and the defendant is right around zero. Anything they say you need to take with an extremely large grain of salt.

RP (4/20/09) 139. He later repeated that their testimony should “be taken with a grain of salt.” RP (4/20/09) 151. He made no effort to relate this statement to the evidence, but instead clearly conveyed to the jury his personal belief in the witnesses’ lack of credibility. RP (4/20/09) 139. The problem was exacerbated when the court overruled defense counsel’s objections. RP (4/20/09) 139, 157.

Third, the prosecutor characterized defense counsel’s argument as “grasping at straws,” “unreasonable,” “really out there,” suggested that defense counsel “does not have a leg to stand on,” accused defense counsel of “misdirection” and of “[using] smoke and mirrors,” and described the defense theory as “ridiculous.” RP (4/20/09) 137-139. He made no attempt to tie these characterizations to the evidence, but instead made clear he was expressing his personal opinion about the merits of Ms. Hutton’s case. RP (4/20/09) 137-139.

This misconduct was flagrant, ill-intentioned, and prejudicial. Credibility was a central issue in this case: Ms. Hutton and her witnesses

denied that she had mistreated her daughter, while the state's witnesses claimed that she had severely mistreated her daughter. By putting his thumb on the scale, the prosecutor tipped the jury's assessment in favor of conviction. Accordingly, Ms. Hutton's conviction must be reversed and the case remanded for a new trial. *Henderson, supra*.

C. The prosecutor committed flagrant and ill-intentioned misconduct by making arguments that were not supported by the instructions.

A prosecutor's statements to the jury upon the law must be confined to the law set forth in the instructions. *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 1213 (1984); *State v. Huckins*, 66 Wn. App. 213, 218-219, 836 P.2d 230 (1992). Any statement of law not contained in the instructions is improper, even if it is a correct statement of law. *Davenport*, at 760. Such misconduct is a "serious irregularity having the grave potential to mislead the jury." *Id.*, at 764. Reversal is required whenever there is a substantial likelihood that the misconduct affected the jury's verdict. *Id.*, at 762.

In this case, the prosecutor made two critical statements on the law that were not contained in the instructions. First, the prosecutor claimed that "growing is a bodily function." RP (4/20/09) 95. Second, the prosecutor claimed that "nurturing, love, and affection" are included in the definition of medically necessary health care. RP (4/20/09) 96. Neither of

these statements are supported by the law, and neither were supported by the court's instructions.

Because the misconduct may have affected the verdict, the conviction must be reversed and the case remanded for a new trial.

Henderson, supra.

D. The prosecutor committed flagrant and ill-intentioned misconduct by appealing to the passions and prejudices of the jurors.

A prosecutor's "bald appeals to passion and prejudice constitute[s] misconduct." *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Here, the prosecutor made direct appeals to the juror's sympathies when he told the jurors not "to act like robots," to "have human feeling and emotion," to "use your own emotions and feelings," to allow the facts to "tug[] at your heartstrings," and when he urged them—three times in a short period—to "be outraged." RP (4/20/09) 153, 155. Although the prosecutor was responding to defense counsel's admonition to the jury (not to let the case tug at their heartstrings), defense counsel's argument was a legitimate reference to the court's instructions;⁴ the prosecutor's response crossed the line by appealing to the jury's sympathy. *See, e.g.*,

⁴ See Instruction No. 1, Supp. CP.

State v. Jones, 144 Wn.App. 284, 295, 183 P.3d 307 (2008) (“A defendant has no power to “open the door” to prosecutorial misconduct.”)

This case involved highly disturbing allegations. By asking the jury to “be outraged,” the prosecutor committed misconduct that was flagrant and ill-intentioned. Accordingly, Ms. Hutton’s conviction must be reversed, and the case remanded for a new trial. *Henderson, supra*.

E. Cumulative misconduct requires reversal.

Cumulative misconduct by a prosecutor may be aggregated, and evaluated for its overall effect. *Henderson, at 804-805*. In this case, the prosecutor’s numerous instances of misconduct (amplified by the trial court’s erroneous decision overruling Ms. Hutton’s objections) require reversal of the conviction. The case must be remanded for a new trial. *Id.*

III. THE TRIAL JUDGE ERRONEOUSLY ADMITTED IRRELEVANT AND PREJUDICIAL EVIDENCE.

A. Standard of Review

Evidentiary rulings are reviewed for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009); *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This

includes when the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Hudson*, at 652.

An erroneous ruling requires reversal if it is prejudicial. *State v. Asaeli*, 150 Wn.App. 543, 579, 208 P.3d 1136 (2009). An error is prejudicial if there is a reasonable probability that it materially affected the outcome of the trial. *Id.*, at 579.

B. The trial judge abused his discretion by admitting evidence that was irrelevant, prejudicial, and inadmissible under the rules of evidence.

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Under ER 403, even relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

ER 608 is captioned “Evidence of Character and Conduct of Witness,” and provides (in relevant part):

Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise.
ER 608(a).

In this case, the trial court admitted evidence that was irrelevant and prejudicial. First, the trial judge allowed K.'s friend Elizabeth to testify that K. had never lied to her. RP (4/16/09) 53-54. Such testimony is inadmissible under ER 608: A witness may not testify about a person's character for truthfulness except through reputation evidence. ER 608(a). Furthermore, the evidence is irrelevant under ER 401, because it has no tendency to make any fact of consequence more or less probable; accordingly, it is inadmissible under ER 402. Finally, the evidence is unfairly prejudicial under ER 403, because it is an improper attempt to bolster K.'s statements.

Second, the trial judge should not have allowed K.'s counselor to testify that C. suffered from PTSD. RP (4/14/09) 70-82. Such evidence had little, if any, probative value, and had great potential for prejudice: the evidence was likely to further inflame the passions and prejudices of the jury.

Third, the social worker to provide profile testimony (that it is common for abused children to deny abuse). Victim profile evidence is “highly undesirable as substantive evidence,” because it is inherently prejudicial and has very little probative value. *State v. Suarez-Bravo*, 72 Wn. App. 359, 365, 864 P.2d 426 (1994) (citations omitted); *see also State v. Braham*, 67 Wn. App. 930, 937, 841 P.2d 785 (1992), *State v. Black*, 109 Wn.2d 336, 348-350, 745 P.2d 12 (1987). The evidence should have been excluded under ER 401 and ER 403. *Suarez-Bravo*, at 365; *Black*, at 348-350.

Fourth, the trial judge should have excluded the grandmother’s testimony that K. had a “beautiful relationship” with her father. RP (4/17/09) 38. This evidence was irrelevant, and should have been excluded. ER 401, ER 402. Furthermore, this evidence created unfair prejudice by inviting the jury to compare Ms. Hutton’s relationship with her daughter to the one K. had with her father before he died. Accordingly, the evidence should also have been excluded under ER 403.

These errors require reversal, because there is a reasonable probability that they materially affected the outcome of the trial. *Asaeli*, at 579.

IV. THE TRIAL COURT VIOLATED MS. HUTTON'S RIGHT TO CONFRONT WITNESSES BY RESTRICTING CROSS-EXAMINATION OF K.'S COUNSELOR.

A. Standard of Review

Constitutional violations are reviewed *de novo*. *Strand, supra*.

Evidentiary rulings are reviewed for abuse of discretion. *Fisher*, at 750.

A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *Depaz*, 858.

B. The Sixth and Fourteenth Amendments guarantee the right to confront witnesses.

A criminal defendant also has a constitutional right to confront witnesses against him. U.S. Const. Amend. VI; U.S. Const. Amend. XIV; Wash. Const. Article I, Section 22. The primary and most important aspect of confrontation is the right to conduct meaningful cross-examination of adverse witnesses. *State v. Foster*, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L. Ed. 2d 347 (1974). Our Supreme Court has stated that the purpose of cross-examination

...is to test the perception, memory, and credibility of witnesses. Confrontation therefore helps assure the accuracy of the fact-finding process. Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. As such, the right to confront must be zealously guarded.

State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citations omitted).

Where credibility is at issue, the defense must be given wide latitude to explore matters affecting credibility. *State v. York*, 28 Wn.App. 33, 621 P.2d 784 (1980). The only limitations on the right to confront adverse witnesses are (1) that the evidence sought must be relevant and (2) that the right to admit the evidence “must be balanced against the State’s interest in precluding evidence so prejudicial as to disrupt the fairness of the trial.” *Darden*, at 621.

The threshold to admit relevant evidence is very low, and even minimally relevant evidence is admissible unless the state can show a compelling interest to exclude prejudicial or inflammatory evidence. *Id.*, at 621. Where evidence is highly probative, no state interest can be compelling enough to preclude its introduction. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983); *State v. Reed*, 101 Wn.App. 704, 709, 6 P.3d 43 (2000) (“Reed II”); *State v. Barnes*, 54 Wn.App. 536, 538, 774 P.2d 547 (1989).

- C. Ms. Hutton should have been allowed to cross-examine K.’s counselor to show her bias.

An accused person “has a constitutional right to impeach a prosecution witness with bias evidence.” *State v. Spencer*, 111 Wn.App.

401, 408, 45 P.3d 209 (2002). Here, the trial judge violated Ms. Hutton's confrontation right by excluding evidence that K.'s counselor had sought help with her resume from Detective Nieser. According to Ms. Hutton's offer of proof, the counselor's goal in doing so was to ensure that she would be allowed to provide expert testimony at trial. RP (4/14/09) 83-85. This suggests that the counselor was more than just a neutral witness, but rather was an advocate with an agenda.

The cross-examination should have been allowed to show the counselor's bias; the trial court's ruling violated Ms. Hutton's confrontation right. *Spencer, supra*. Accordingly, Ms. Hutton's conviction must be reversed and the case remanded for a new trial. *Spencer, supra*.

V. MS. HUTTON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006) ("Horton II").

B. Ms. Hutton is guaranteed the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, *supra*. Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004), *citing Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

C. Defense counsel should have objected to all instances of the prosecutor's misconduct in closing.

A failure to object to improper closing arguments is objectively unreasonable "unless it 'might be considered sound trial strategy.'"

Hodge v. Hurley, 426 F.3d 368, 385 (C.A.6, 2005) (quoting *Strickland*, at 687-88). Under most circumstances,

At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

Hurley, at 386 (citation omitted).

In this case, defense counsel objected to some of the prosecutor's misconduct in closing, but failed to object to all of it. RP (4/20/09) 76, 137-139, 151, 157. Ms. Hutton's attorney should have objected when the prosecutor expressed his personal opinion that K. and C. were "very believable," "incredibly courage[ous]," and "incredibly brave." He should also have objected to the prosecutor's statements that the defense was "grasping at straws," "unreasonable," "really out there," without "a leg to stand on," using "misdirection," guilty of "[using] smoke and mirrors," and "ridiculous." RP (4/20/09) 137-139. Finally, he should have objected

when the prosecutor made erroneous legal arguments that were not supported by the court's instructions.

Defense counsel should have objected to each instance of misconduct and requested a mistrial. *Hurley, supra*. His failure to do so constituted deficient performance, and prejudiced Ms. Hutton; accordingly, she was deprived of the effective assistance of counsel. Her conviction must be reversed and the case remanded for a new trial.

Reichenbach, supra.

VI. THE TRIAL JUDGE VIOLATED MS. HUTTON'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO CONFRONT WITNESSES BY FAILING TO PLACE C. UNDER OATH PRIOR TO HER TESTIMONY.

A. Standard of review

Constitutional violations are reviewed *de novo*. *Strand, supra*.

B. The Sixth and Fourteenth Amendments require the trial judge to place witnesses under oath.

The protections secured by the confrontation clause "include the right to have... testimony offered under oath." *State v. Foster, at 456*.

This requirement is intended to impress each witness "with the seriousness of the matter and guarding [sic] against the lie by the possibility of a penalty for perjury..." *Maryland v. Craig*, 497 U.S. 836, 846, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (quoting *California v.*

Green, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970)). Due process also requires that testimony be offered under oath when a person's liberty is at stake.⁵ See, e.g., *In re M.B.*, 101 Wn.App. 425, 470-472, 3 P.3d 780 (2000) (applying balancing test and concluding oath is required in juvenile contempt hearings); *State v. Zamorsky*, 387 A.2d 1227, 1233 (N.J. 1978); *State v. Ballou*, 254 N.E.2d 697, 699 (Ohio 1969).

In Washington, the requirement is implemented by ER 603, which reads as follows:

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

ER 603.⁶ Although the form of an oath may vary, it may only be administered by a "court, judge, clerk of a court, or notary public..."
RCW 5.28.010.

⁵ Failure to administer an oath may also constitute reversible error in a purely civil context. See, e.g., *Estate of Bell*, 292 S.W.3d 920 (Mo. 2009);

⁶ Under the state constitution, a trial judge may tailor the oath to make it appropriate to the witness on the stand: "The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered." Wash. Const. Article I, Section 6.

In this case, despite defense counsel's objection, the trial court failed to administer an oath to C..^{7,8} RP (4/14/09) 104. This violated Ms. Hutton's Sixth and Fourteenth Amendment rights to confrontation and to due process. Accordingly, her conviction must be reversed and the case remanded to the trial court for a new trial. *In re M.B., supra*.

VII. THE EXCEPTIONAL SENTENCE WAS IMPOSED IN VIOLATION OF MS. HUTTON'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A JURY TRIAL AND TO DUE PROCESS.

A. Standard of Review

Jury instructions are reviewed *de novo*. *State v. Gordon*, ___ Wn.App. ___, ___, ___ P.3d ___ (2009). Instructions "must make the relevant legal standard 'manifestly apparent to the average juror.'" *State v. Watkins*, 136 Wn.App. 240, 240-241, 148 P.3d 1112 (2006) (quoting *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)).

⁷ Defense counsel objected and brought the error to the court's attention outside the presence of the jury. RP (4/14/09) 113. If this objection was too late, as the trial court ruled, then the error should be reviewed as a manifest error affecting Ms. Hutton's confrontation right under RAP 2.5(a).

⁸ Mr. Hayes obtained C.'s promise "to tell the truth about everything;" however, the court was not involved in this exchange. RP (4/14/09) 106.

B. The trial court's failure to instruct the jury on the essential elements of the "deliberate cruelty" aggravating factor violated Ms. Hutton's Sixth and Fourteenth Amendment rights.

The Sixth Amendment guarantees an accused person the right to a trial by jury. U.S. Const. Amend. VI. Any fact which increases the penalty for a crime must be found by a jury by proof beyond a reasonable doubt. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004). In Washington, failure to submit such facts to the jury is not subject to harmless error analysis. *State v. Recuenco*, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (citing Wash. Const. Article I, Section 21).⁹

Jury instructions, when taken as a whole, must properly inform the jury of the applicable law. *State v. Douglas*, 128 Wn.App. 555, 562, 116 P.3d 1012 (2005). An omission or misstatement of the law in a jury instruction that relieves the state of its burden to prove every element of an enhancement is erroneous and violates due process. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004); *State v. Randhawa*, 133 Wn.2d 67, 941 P.2d 661 (1997).

Failure to adequately instruct the jury on the elements of an aggravating factor is manifest error affecting a constitutional right, which

⁹ By contrast, harmless error analysis *does* apply under federal law. *Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006).

may be argued for the first time on appeal. *Gordon*, at _____. This includes the definitions of aggravating factors given by the Supreme Court. *Id.*, at _____.

Under RCW 9.94A.535, an exceptional sentence may be imposed if the offender's conduct during the commission of the current offense manifested deliberate cruelty to the victim. RCW 9.94A.535(3)(a). The phrase "deliberate cruelty" means " 'gratuitous violence or other conduct which inflicts physical, psychological, or emotional pain as an end in itself.'" *Gordon*, at _____ (quoting *State v. Tili*, 148 Wn.2d 350, 369, 60 P.3d 1192 (2003)). The conduct "must be significantly more serious or egregious than typical in order to support an exceptional sentence." *Id.*

In this case, the court failed to instruct the jury on the elements of the "deliberate cruelty" aggravating factor; instead, the court gave only a generic instruction relating to the special verdict form. Instruction No. 21, Court's Instructions to the Jury, Supp. CP. A special verdict form mentioned the phrase "deliberate cruelty," but did not inform the jury that they were required to find beyond a reasonable doubt that Ms. Hutton's gratuitous violence or other conduct inflicted "physical, psychological, or emotional pain as an end in itself." *Id.* Nor did the court explain that the jury was required to find that the conduct was significantly more serious or egregious than typical. *Id.*

The court's instructions did not make the relevant legal standard manifestly clear to the average juror. *Gordon*, at _____. Accordingly, the instructions were deficient, and violated Ms. Hutton's Sixth and Fourteenth Amendment rights. *Id.* The aggravated sentence must be vacated, and the case remanded to the trial court for sentencing within the standard range. *Id.*

VIII. CUMULATIVE ERROR REQUIRES REVERSAL

Reversal may be required due to the cumulative effects of more than one error, even if each error examined on its own would otherwise be considered harmless. *State v. Chamroeum Nam*, 136 Wn. App. 698, 708, 150 P.3d 617 (2007); *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984).

Given the heinous nature of the accusation in this case, very little error would be sufficient to render Ms. Hutton's trial unfair. Even if each error were considered harmless when considered in isolation, cumulatively, they require reversal. *Nam, supra.* Accordingly, Ms. Hutton's conviction and sentence must be reversed and the case remanded for a new trial.

CONCLUSION

For the foregoing reasons, Ms. Hutton's conviction must be reversed and her case remanded for a new trial. In the alternative, her sentence must be vacated and the case remanded for sentencing within the standard range.

Respectfully submitted on December 18, 2009.

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DIVISION II

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STATE OF WASHINGTON
BY C
DEPUTY

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Theresa Hutton, DOC #330586
Mission Creek CC for Women
3420 NE Sand Hill Rd.
Belfair, WA 98528

and to:

Lewis Co. Prosecuting Atty. Office
345 W Main St Fl 2
Chehalis WA 98532-4802

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 18, 2009.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 18, 2009.



Jodi R. Backlund, WSBA No. 22917
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