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COURT OF APPEALS

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STATE OF WASHINGTON NO. 40143-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

RYAN NICHOLAS FARRIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Barbara Johnson, Judge

BRIEF OF APPELLANT

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A. SUMMARY OF THE CASE

This case is an example of how the presumption of innocence fails when (1) a prosecutor oversteps his bounds in closing argument committing multiple acts of prosecutorial misconduct, and (2) defense counsel fails to object to the misconduct denying his client his constitutional guarantee of effective counsel.

B. ASSIGNMENT OF ERROR

1. Appellant Ryan Farris was denied a fair trial by repeated instances of prosecutorial misconduct during closing argument that were not harmless.

2. The prosecutor committed flagrant misconduct during closing argument.

3. Defense counsel's failure to object to the prosecutor's flagrant and repeated misconduct in closing argument denied Farris effective counsel.

4. The trial court erred in issuing a sexual assault protection order that exceeds its allowable maximum term.

C. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

1. Was Ryan Farris denied a fair trial when, in a first degree rape of a child trial, where the child's credibility was key, the prosecutor committed flagrant misconduct affecting the verdict by (1) arguing facts

outside of the record, (2) personally vouching for the child's credibility and testifying without an oath and without being subject to cross-examination, and (3) making up a story of what the child "really meant" by a statement made during a forensic examination repeating over and over to the jury what the child "really meant" by the statement?

2. Was Farris denied effective assistance of counsel when his counsel failed to object to the prosecutor's flagrant misconduct in closing argument?

3. The maximum term of a sexual assault protection order issued in conjunction with a felony sentence is two years beyond the expiration of the total sentence including any term of community custody. Farris was sentenced to a determinate sentence of 93 months plus 36 months of community custody. Yet, the court entered a sexual assault protection order with an expiration date of November 29, 2099. Does the order exceed its allowable maximum term?

D. STATEMENT OF THE CASE

i. Procedural overview

In 2008, Ryan Farris¹ was charged with first degree rape of a child. Clerk's Papers (CP) 1, 2. He was accused of having sexual intercourse with his step-sister, A.L. CP 1, 2. The incident purportedly occurred

between June 1, 2002, and September 1, 2003.² CP 2. A jury found Farris guilty. CP 54. Farris now appeals all portions of his judgment and sentence. CP 37-55.

ii. Trial testimony of witnesses other than A.L.

A.L.'s parents separated when she was about 3 years old and later divorced. Report of Proceedings (RP)³ at 21, 55. After her parents split, A.L. lived with her mother, Karen Marchun, in Colorado, and visited with her dad, Deon Love, who also lived in Colorado. RP at 22. Her dad later moved to Vancouver, Washington, and married Tanya Gainer. RP at 22, 115. Tanya had two children, Nicole⁴ Keith and Ryan Farris. RP at 95, 114, 116. During the summers and at least once at Christmas, A.L. visited her dad and his new family in Vancouver. RP at 123, 125.

A.L.'s brother, Justin, also went on the visits so he too could visit his dad, Deon. RP at 124. Justin was very protective of A.L. RP at 99. He essentially stepped into the role of father to his younger sister when their parent's divorced. RP at 125.

During these visits, especially in 2002 and 2003, the Vancouver home was busy. In addition to Deon, Tanya, Nicole and Farris, Deon's

¹ Hereafter "Farris"

² Farris was tried on and Amended Information.

³ The Report of Proceedings (RP) is contained in a single volume. The single volume contains two days of trial and sentencing.

⁴ Nicole Keith is sometimes referred to in testimony as "Nickie."

brother, Darrin Love, also lived in the home. RP at 123. Darrin's two children lived with Darrin during the summer months. RP at 123. During 2002-2003, A.L. was 9 or 10 years old, Justin was 13 or 14, Farris was 14 or 15, and Nicole was 16 or 17. Darrin's children were younger still. RP at 31, 62, 100, 114.

The extended family enjoyed camping and boating together. RP at 126. Everybody got along. RP at 99, 125. When the family was not in the camp or on the river, the days at home were orderly. The girls slept in Nicole's room. RP at 97. A.L.'s bed was on the floor and put together to accommodate a bed-wetting problem. RP at 97, 115. The boys slept in Justin's room. RP at 97, 115. The parents made sure all of the kids were tucked into their respective rooms at night. RP at 120, 126.

Making sure the kids bathed regularly was something the adults supervised as well. RP at 131. A.L. was the person in the house who bathed exclusively rather than showering. RP at 116. Deon was responsible for overseeing A.L.'s baths. RP at 131. Tanya described how the children all showered or bathed separately. RP at 116. "When kids get to a certain age, you don't let them bathe together anymore, you know?" RP at 116. For her own children, Nicole and Farris, joint bathing ended when they were about 6 and 4 years old, respectively. RP at 116. A.L. certainly did not bathe with Farris, her 14 or 15 year old step-brother.

RP at 116, 130. Deon would not allow that and it was just not otherwise acceptable in this home. RP at 126. Farris never asked to bathe with A.L. RP at 116, 126. As A.L. did not bathe with Farris, Deon was obviously never in the bathroom with A.L. and Farris when they took a bath together. Deon described Farris as very modest. RP at 126.

A.L. last visited with Deon and her step-family in Vancouver in 2003.⁵

While in 8th grade, A.L. told her friend, Natasha, something that might have been about Farris. RP at 32. A.L. did not testify about what she specifically told Natasha. RP at 32. Natasha did not testify.

In 2007 or 2008, when she was a freshman, A.L. told her mother that something had happened between herself and Farris. RP at 32-33, 60. When A.L. told her mother about it, A.L. was very upset, crying, and scared. RP at 60. There was no trial testimony about what A.L. actually told her mother. RP at 60-61.

During the talk, A.L. told her mother that she, A.L., needed to go to counseling. RP at 61. A.L. and her mother met with a counselor. RP at 63. Either A.L. or her mother told the counselor certain things. There was no trial testimony detailing what was said. The counselor told A.L. and her mother that he, as a counselor, had a mandatory duty to report to law

enforcement something that was told to him by either A.L. or her mother. RP at 64. The record does not specify what that something was. The counselor offered to contact law enforcement, but he also gave A.L. the option of making the contact herself. RP at 64. There was no testimony that A.L. ever attending any other counseling session. The counselor did not testify.

A.L. called a law enforcement agency and reported something. RP at 64. No details about who she called or what she said were disclosed during testimony. The report to law enforcement apparently prompted a Colorado police detective to talk to A.L. RP at 34. A.L. told the detective something but there was no testimony as to what A.L. said. The Colorado detective did not testify. The Colorado detective made a report which was passed along to Clark County Sheriff's Detective Cindy Bull. RP at 48-50.

Detective Bull worked out of the Children's Justice Center. RP at 67. She had specialized training in investigating physical and sexual abuse of children. RP at 47. Detective Bull spoke with both A.L.'s mother and A.L. over the phone. RP at 49. There was no testimony detailing what was said during these conversations. Based on information gathered during her conversation with A.L., Detective Bull decided that A.L. should have a forensic medical examination. RP at 50-51.

⁵ The record does not specify why that was the case.

A.L. was referred to forensic investigator Dr. Mary Vader for the exam. RP at 76. The referral came from the Dolphin House, a child advocacy center near A.L.'s Colorado home. RP at 34, 77. Per Detective Bull, the Colorado police detective made the arrangements for the exam. RP at 49-50.

Dr. Vader examined A.L. on June 26, 2008. RP at 86. By that time, A.L. was 15 years old. RP at 20. Although Dr. Vader had no recollection of the examination, she did complete a written report. RP at 85. Prior to the forensic examination of A.L. the doctor asked A.L. general questions about her medical history. RP at 86. Dr. Vader and the prosecutor engaged in the following exchange:

PROSECUTOR: Okay. And when – when the female comes into your examination, do you – do you explain to them that you know they're there because there's been some report of sexual abuse of some kind?

DR. VADER: Right.

PROSECUTOR: Okay. So they understand that's why they're there?

DR. VADER: Right.

PROSECUTOR: And then you also ask them after that if there's been previous sexual activity.

DR. VADER: I do.

PROSECUTOR: Okay. And in this case, did you ask [A.L.] if there'd been previous sexual activity?

DR. VADER: I did.

PROSECUTOR: And what'd she tell you?

DR. VADER: Denies previous sexual activity. RP at 87.

During the forensic examination, Dr. Vader found that A.L.'s hymen was notched at the 11 o'clock and the 4 o'clock positions. RP at 88. "Notching" means that there is a nick or a small piece of missing tissue. RP at 88-89. The 11 o'clock notching was of no particular significance because of how bodies change over time. RP at 90. But the 4 o'clock notch meant that something penetrated A.L.'s vagina and stretched the hymen enough to tear it. RP at 90. Specifically, the 4 o'clock notch was consistent with "penetrating vaginal trauma." RP at 90, 92. Dr. Vader could not say with any medical certainty if the notch was due to sexual activity. RP at 93.

Farris did not testify. RP at 135. He presented his defense through the various family members who were living in the Vancouver house when A.L. accused him of wrongdoing.

iii. A.L.'s testimony

A.L. testified that she was 9 or 10 years old one summer when she visited her father in Vancouver. RP at 30-31, 35. It was dark outside. RP at 29. She was lying on the floor in Nicole's room with Farris. No one else was in the room. RP at 29. She asked Farris what sex was. RP at 26.

Farris said that he would show her. RP at 26. A.L. was wearing a skirt. RP at 27. Farris asked her to pull the fabric that covered her vagina to the side. RP at 27. She did so and Farris got on top of her. RP at 27. Farris put his penis in her vagina. RP at 28. A.L. testified, it felt “scary and hurt.” RP at 29. Farris spent the night with her in Nicole’s room. RP at 30. No one else came into the room that night. RP at 30. She doesn’t like to talk about the incident because it makes her feel dirty. RP at 33.

A.L. also remembered taking baths with Farris during the Vancouver visits. RP at 36, 38. She does not remember Ryan doing “anything to her” during these baths. RP at 36. These baths occurred before the incident in Nicole’s bedroom. RP at 37. Farris asked Deon if it was okay for him to bathe with A.L. RP at 36. Sometimes Deon was in the bathroom when A.L. and Farris bathed together. RP at 39.

A.L. once asked Farris if he remembered what happened in the bedroom. He said, “No.” RP at 37.

iv. Credibility is key (closing argument)

The prosecutor noted in his rebuttal closing argument, “So you’re left with, was there sexual intercourse? And for that, it is all about credibility. It’s exactly what it is. And on that, the State and the Defense agree it’s about credibility.” RP at 175.

v. Deliberation.

The jury deliberated for 4.5 hours, from 12:26 p.m. to 4:58 p.m., before returning its verdict. RP at 180.

vi. Sentencing.

Farris received a 93 month sentence plus 36 months of community custody. In conjunction with the sentence, the court entered a sexual assault protection order with a November 25, 2099, expiration date. Supp. Designation of Clerk's Papers (sub non. 83).

E. ARGUMENT

1. THE PROSECUTOR'S FLAGRANT MISCONDUCT IN CLOSING ARGUMENT DENIED FARRIS A FAIR TRIAL.

Prosecutorial misconduct is established when a defendant shows that the prosecutor's conduct was improper and prejudiced his right to a fair trial. State v. Dhaliwal, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established where “ ‘there is a substantial likelihood the instances of misconduct affected the jury's verdict.’ ” Dhaliwal, 150 Wn.2d at 578 (quoting State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)).

Farris did not object to the prosecutor's closing arguments. A defendant who fails to object to an improper remark waives the right to

assert prosecutorial misconduct unless the remark was so “flagrant and ill intentioned” that it causes enduring and resulting prejudice that a curative instruction could not have remedied. State v. Russell, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S.Ct. 2004, 131 L.Ed.2d 1005 (1995). In determining whether the misconduct warrants reversal, the court considers its prejudicial nature and its cumulative effect. State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994).

Here, the prosecutor’s misconduct consisted of: (1) adding material to the record that was never testified to; (2) personally vouching for A.L.’s credibility; and (3) explaining what “A.L. really meant” in an effort to negate negative testimony.

The prosecutor’s misconduct was so flagrant and ill intentioned it caused enduring and resulting prejudice that no curative instruction could have remedied. Farris’ conviction must be reversed.

i. The prosecutor added material to the record in an effort to support his unfounded claim that “the core of [A.L.’s] account remain[ed] unchanged.”⁶

In closing argument, the prosecutor told the jury, “[A.L. is] doing each step and she’s telling the same thing each step.” RP at 150. But nothing in the record comes even close to supporting such a bald assertion.

The implication from that statement is that A.L. is credible because her story never changed. While there was testimony that A.L. may have talked to various people – her friend Natasha, her mother, a counselor, a Colorado detective, a doctor, a Clark County detective – there was no specific testimony about what she told any of them with the exception of one statement to the doctor. Thus, it was a gross exaggeration to suggest that A.L. was a particularly credible witness because, “[S]he’s telling the same thing each step.” RP at 150. What makes this argument particularly egregious is that the prosecutor personally added material to the record to support his unfounded claim. References to evidence outside of the record is misconduct. State v. Belgarde, 110 Wn.2d 504, 507-08, 755 P.2d 174 (1988). For example, the prosecutor argued:

PROSECUTOR: There’s no incentive for [A.L.] to be anything but truthful in this situation where the first information she provided was to a counselor providing her with help to get her through her issues.

RP at 151.

There was no testimony that A.L.’s first disclosure was to a counselor who was “providing her with help to get through her issues.” There was testimony that A.L. saw a counselor once with her mother, Karen Marchun. But there was no testimony A.L. personally told the

⁶ RP at 151

counselor anything. The extent of A.L.'s involvement with a counselor was testified to by Marchun:

“I went with her with – in to talk with the therapist and, uhm, he said that when something like that is reported, by law it has to be reported to law enforcement. And he asked [A.L.] what she wanted and she said, I – he said, do you want me to make the call or do you want to make the call, and she said, I will make the call.”

RP at 64. When A.L. testified, she was never asked about counseling. No counselor testified.

The prosecutor's statement is so inaccurate, yet said with the assurance of truth, that the jury was undoubtedly left with the belief that A.L. must have been seeing a counselor and must have told the counselor certain things consistent with her trial testimony.

The actual “disclosure” testimony was that A.L. testified the “first time I told anyone was in eighth grade during basketball season”. A.L. allegedly told her friend Natasha. RP at 32. A.L. did not testify about what she had actually told Natasha. RP at 32. Natasha did not testify.

The first adult, and presumably the second person A.L. told, was her mother. RP at 32. A.L. testified she did this in her freshman year. RP at 32. A.L. did not testify about what she told her mother. Although her mother testified, she did not say what A.L. told her. Marchun only testified, “I put my arms around her and told her I was sorry that this had happened. I told her it was not her fault, that she was just a baby. And I

asker her what she wanted to do.” RP at 61. A.L. told her mother that she “needed to go in counseling.” RP at 61.

Whether A.L. went to more than one counseling session or ever personally told a counselor anything is not in the record. Or, more accurately, it wasn’t in the record until the prosecutor added it to the mix in closing argument. The prosecutor just couldn’t seem to leave the inaccuracy alone.

PROSECUTOR: [O]nly years later you heard – only years later that when she started to feel throughout her counseling session that, you know, this was in fact wrong, I’m uncomfortable with this, this is affecting my day-to-day life and my relationships. You hear that in a counseling session she in fact disclosed it.

RP at 148. And,

PROSECUTOR: She disclosed in a setting that’s made to help her, a counseling setting that’s made to work through issues in her life. What incentive does she have to say anything but the truth to the counselor? It’s to help her.

RP at 149.

The prosecutor repeats the same inaccurate retelling of the testimony and adds information to the record as to the Colorado detective. A.L. did not testify about what she told the detective. The detective did not testify. But in an all out push to assure the jury that A.L. was credible because she was consistent, the prosecutor took it upon himself to again mischaracterize the testimony in closing argument.

PROSECUTOR: And in Colorado, she has to talk to a detective. So she has an interview with a detective in Colorado and has to tell this stranger what happened to her, and that her 15-year-old stepbrother forced his penis inside her ten-year-old vagina, to a stranger, the detective.

RP 149. But that information about what A.L. supposedly told the detective is not in the record.

A.L. testified. The prosecutor could have asked her, “Did you talk to a detective in Colorado?” And if so, “What did you tell the detective?” Instead, the prosecutor simply makes up what A.L. told the detective, assures the jury that it is true, and argues that A.L. is credible because she is consistent in the retelling of her story. Granted, a prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury. State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). But the inferences have to be reasonable and based on actual testimony. And not from what the prosecutor might want – or, in hindsight, need - the record to be. A prosecutor may not make statements that are unsupported by the evidence and prejudice the defendant. State v. Jones, 71 Wn. App. 798, 808, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994). A prosecutor may not suggest that evidence not presented at trial provides additional

grounds for finding a defendant guilty. United States v. Garza, 608 F.2d 659, 663 (5th Cir.1979); State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994).

Despite the fact that no one testified as to what A.L. actually told them, and only A.L. testified to what allegedly happened between herself and Farris, the prosecutor assures the jury in closing argument, that A.L. has told everyone a consistent story. “The core of [A.L.]’s account remains the same.” RP at 151. The prosecutor explained that the “core” means the “core of the issues.” RP 151. The core of the issues, the prosecutor explained, are that (1) the incident occurred in Nicole’s bedroom; (2) that A.L. and Farris were alone in the bedroom; and that (3) A.L. was wearing a skirt that Farris asked her to pull to the side in response to A.L.’s question about what sex was. RP at 152.

The prosecutor chose to present the case in such a way that A.L.’s consistency was never put to the test. No one testified to what A.L. told them. A.L. did not testify about what she told others. Only A.L. testified to any part of the so-called “core of the issue.” Given that that’s the way that the prosecutor chose to present the case, it is particularly egregious that in closing, the prosecutor mischaracterized A.L.’s untested testimony as “telling the same thing each step.” RP at 150.

Reversal is necessary to correct the unfairness inherent the prosecutor's closing arguments.

ii. The prosecutor personally and improperly vouched for A.L.'s credibility.

In addition to the other inappropriate and prejudicial statements made by the prosecutor already argued above, the prosecutor also personally vouched for A.L.'s credibility in closing argument.

PROSECUTOR: Not only does [A.L.] go to this doctor and go through this procedure where she has this essentially little tube inserted in her vaginal canal and opening up the hymen – not only does she do that, but then, after all that, after the reports are created for that, she comes to Vancouver, Washington, to speak with – well, *there's a meeting with the prosecutor where she tells the prosecutor what happened*, another stranger.

RP at 150 (emphasis added).

This statement goes beyond what the prosecutor has already inappropriately assured the jury: i.e., that A.L. has been “telling the same thing each step.” RP at 150. In the above quote, the prosecutor is telling the jury that A.L. even told him the same story. Where the prosecutor during closing argument gives a personal opinion on the credibility of witnesses, misconduct occurs. State v. Copeland, 130 Wn.2d 244, 290, 922 P.2d 1304 (1996); State v. Swan, 114 Wn.2d 613, 664, 790 P.2d 610 (1990); State v. Reed, 102 Wn.2d 140, 145, 684 P.2d 699 (1984).

There is additional error in that the prosecutor is, for all intents and purposes, testifying about events he personally witnessed. And although he is testifying, it is without the benefit of an oath. ER 603.⁷ The prosecutor is also not subject to cross-examination in violation of Farris' right of confrontation.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions the accused shall enjoy the right ... to be confronted with the witnesses against [him]." The Washington State Constitution also guarantees the right of confrontation in a criminal proceeding. Wash. Const., Art. I, § 22. The right of confrontation allows a criminal defendant to confront and cross-examine witnesses against him. Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920 (1967); Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105 (1974); State v. Hudlow, 99 Wn.2d 1, 15, 659 P.2d 514 (1983); State v. Dolan, 118 Wn.App. 323, 73 P.3d 1011 (2003). The most important part of the right of confrontation is the right to conduct meaningful cross examination. Davis, at 316; State v. Foster, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998); State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002).

⁷ Rule 603. Oath or Affirmation 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.

The purpose of cross-examination is not only to flesh out the facts, but to test the perception, memory, and credibility of witnesses. Darden, 145 Wn.2d at 620. “Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. As such, the right to confront must be zealously guarded.” Darden, 145 Wn.2d at 620 (internal citations omitted).

Here Farris’ right to confrontation was violated when he had no opportunity to cross examine the prosecutor about his assurance that A.L. was, “telling the same thing each step,’ even to him.

iii. The prosecutor made up a story about what A.L. really meant in response to a harmful answer A.L. gave during a forensic medical examination.

It is misconduct for a prosecutor to make statements that he cannot prove or for which proof is not admissible. State v. Alexander, 64 Wn. App. 147, 155, 822 P.2d 1250 (1992). Yet, here the prosecutor did just that when he argued what A.L. really meant when she gave an unhelpful answer during a forensic medical examination.

Dr. Mary Vader testified for the State. She did a forensic medical examination of A.L. in 2008, when A.L. was 15 years old. As part of the examination, Dr. Vader asked A.L. some general questions about her health and one specific question about previous sexual activity. The prosecutor and doctor engaged in the following exchange:

PROSECUTOR: Okay. And when – when the female comes into your examination, do you – do you explain to them that you know they're there because there's been some report of sexual abuse of some kind?

DR. VADER: Right.

PROSECUTOR: Okay. So they understand that's why they're there?

DR. VADER: Right.

PROSECUTOR: And then you also ask them after that if there's been previous sexual activity.

DR. VADER: I do.

PROSECUTOR: Okay. And in this case, did you ask [A.L.] if there'd been previous sexual activity?

DR. VADER: I did.

PROSECUTOR: And what'd she tell you?

DR. VADER: Denies previous sexual activity.

RP at 87.

A.L.'s denial of previous sexual activity is inconsistent with A.L.'s testimony that she had penile-vaginal sex with Farris when she was 9 or 10 years old. In other words, it suggests that maybe she wasn't telling the truth when she gave her testimony. Rather than recalling A.L. to the stand to have her explain what she meant by that answer, the prosecutor just made up an answer that favored him and his claim that A.L. was a credible witness.

PROSECUTOR: But it doesn't stop there. At that point, shortly after that she actually has to go to a medical doctor, who you heard testify on the stand today, and have a physical sexual assault exam done. Again, not a comfortable place. In a place where you would assume, reasonably so, that a patient would tell their doctor the truth, wanting the best possible treatment. *So she tells the doctor, tells the doctor that she never had sex before other than this incident.*

RP at 149 (emphasis added).

Given that there is no basis in the record for this explanation, it is quiet fanciful.

But the prosecutor is not done putting his own spin on what A.L. *really meant* when she told Dr. Vader she'd not had any previous sexual activity.

PROSECUTOR: [S]o she tells the doctor, tells the doctor that she never had sex before other than this incident.

This is not something [A.L.] really considers sex because this is not by any remote imagination a consensual type encounter. This is an encounter that, by definition, cannot be consensual.

So she tells the doctor that she's never had any sort of sexual activity before.

RP at 149-50 (emphasis added).

The prosecutor's statement is simply untrue. A.L. never told Dr. Vader that "she never had sex before other than this incident." A.L. never testified that she, at age 15, did not think of what alleged happened years before with Farris was sexual activity, "*So she tells the doctor that she's*

never had any sort of sexual activity before". RP at 149-50. That is an unreasonable inference from the evidence. But that doesn't stop the prosecutor from saying it again.

PROSECUTOR: In jury selection we talked about things you might like to see as jurors. One of the things that you all said you might like to see is physical evidence, medical evidence.

Well, in this case, a medical exam, a sexual assault exam was done...Now, in that medical exam the doctor asked, have you had any sexual activity *other than this incident*, and the answer was no.

So there's no other explanation under that account --- there's no other explanation before you jurors for those notches, those missing pieces of the hymen.

RP at 154 (emphasis added).

But Dr. Vader never asked A.L. if she had "any sexual activity *other than this incident*." The prosecutor is just making that up. Per Dr. Vader, A.L. denied any sexual activity. No sexual activity. At all. Ever. None. Not with Farris. Not with anyone.

Apparently the prosecutor is convinced that if he tells the jury something different than was actually testified to enough times, the jurors will come to believe it.⁸

PROSECUTOR: This injury, according to the doctor, is highly consistent with penetration, vaginal penetration, forced vaginal penetration, okay. So that is consistent with the statements that [A.L.]'s giving, that there's this healed injury there and that she's

⁸ Based upon the verdict, apparently they do.

never had sex before the time, according to the doctor through her statements from [A.L.], at the time of that exam in June of 2008.

RP at 155.

There is a big problem with the prosecutor's theory that A.L. *really meant* something different than what she told Dr. Vader. A.L.'s statement to Dr. Vader denying previous sexual activity is 100% consistent with the evidence. Dr. Vader never testified that the notching was consistent with "forced vaginal penetration." Dr. Vader could not say with any medical certainty that the notching was even caused by sexual activity. RP at 93.

DEFENSE COUNSEL: Okay. And you said that this was consistent with some hard object being placed inside the vaginal canal; is that correct?

DR. VADER: (No audible answer.)

DEFENSE COUNSEL: Can you say with any medical certainty that that hard object was – or that this was due to sexual activity?

DR. VADER: No.

RP at 93.

Based upon the testimony given, the prosecutor was stuck with the "denied sexual activity" answer A.L. gave to Dr. Vader. The prosecutor's conduct in telling the jury what A.L. *really meant* without any basis in the record for doing so, personifies prosecutorial misconduct.

The prosecutor could not leave it alone. The following is from the last few words of the prosecutor's rebuttal closing:

PROSECUTOR: Then you have the consistent injuries the doctor testified to – the notches, missing pieces of the hymen, consistent with some sort of intercourse. And [A.L.]’s statement that she had never had intercourse *other than this incident*. Corroborative. It’s the piece that you asked for in jury selection.

RP at 176 (emphasis added).

It is untrue. A.L. never said that the single incident of intercourse she claimed during trial was the only time she’d ever had intercourse prior to her forensic medical examination at age 15. Rather, to Dr. Vader, A.L. denied any prior sexual activity. To the jury, A.L. was completely silent on this issue.

iv. Farris is entitled to a new trial.

Based upon the above arguments, Farris has met his burden of proving that the prosecutor’s improper conduct denied his right to a fair trial. State v. Boehning, 127 Wn. App. 511, 518, 111 P.3d 899 (2005). There is a substantial likelihood the above-argued instances of misconduct affected the jury’s verdict.

A prosecutor’s comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. Dhaliwal, 150 Wn.2d at 578; State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998).

To prove Farris guilty of rape of a child in the first degree, the State had to prove just two elements: that A.L. and Farris had sexual intercourse in the State of Washington. CP 15 (Instruction 15). Farris stipulated to the remaining elements: that during the charging period, A.L. was less than 12, he was not married to A.L., and that he was at least 24 months older than A.L. CP 50. It truly wasn't an issue that if they had intercourse, it happened in Vancouver, Washington.

The sole issue in this case was A.L.'s credibility. A.L. testified that Farris showed her what sex was when she asked him what it was. She, while wearing a skort, pulled the fabric over exposing her vagina. Farris put his penis in her vagina. They were alone in Farris' sister's room in Vancouver. Afterwards, Farris spent the night with A.L. Farris' family testified that the single encounter, as described by A.L., could not have happened because Farris would not be allowed to spend the night with A.L.

A.L. also testified that she periodically bathed with Farris with the blessing and presence of her father. Her father, and other family members, adamantly denied that A.L. and Farris ever bathed together or would have been allowed to bathe together.

A.L. had a forensic medical examination about 5 years after the alleged incident. The examination revealed that A.L.'s hymen had

notching at the 11 o'clock and 4 o'clock positions. The examining doctor, Dr. Vader, testified that the 11 o'clock notching was insignificant but the 4 o'clock notching suggested that a hard object had stretched the hymen and caused tearing. Dr. Vader could not say with any reasonable medical certainty if the notching was caused by sexual activity. During the examination, A.L. denied any prior sexual activity. A.L. was not questioned about any prior sexual activity other than the alleged incident.

With only credibility to go on, the prosecutor pulled out all the stakes in an attempt to bolster A.L.'s credibility.

The prosecutor argued that A.L. maintained a consistent version of events when she talked to seven people as the case developed. Three of those persons testified: A.L.'s mother; Clark County Sheriff's detective Cindy Bull; and Dr. Vader. With one exception, the denial of prior sexual activity statement to Dr. Vader, none of those witnesses testified what A.L. told them. Three other prospective witnesses were not called to testify; A.L.'s friend Natasha; an unnamed Colorado police detective; and an unnamed counselor in Colorado. No statements were attributed to any of those three witnesses. Yet the prosecutor argued over and over again that, "[A.L. is] doing each step and she's telling the same thing each step." RP at 150.

Curiously, the prosecutor identified a seventh witness to A.L.'s "telling the same thing each step." Himself. Yet the prosecutor was not placed under oath and was not subject to cross examination.

The prosecutor's final attempted bolstering push was to convince the jury that what A.L. had actually told Dr. Vader is that she had not engaged in sexual activity since the alleged incident with Farris. Apparently, during voir dire, the jury had expressed a desire to see corroborating medical evidence. But when the medical evidence didn't rise to the helpful level the prosecutor thought it would, he just made up a whole new version of what A.L. told Dr. Vader. The prosecutor argued when A.L. told Dr. Vader that she had not engaged in previous sexual activity, what she really meant is that she hadn't had intercourse with anyone but Farris.

None of what the prosecutor did in an effort to bolster A.L.'s credibility was supported by any reasonable inference from the record. All of what the prosecutor argued was flagrant misconduct. The defense attorney objected to none of it. The jury deliberated for a long 4.5 hours. It was not an easy decision for them. They obviously struggled over who to believe.

Every prosecutor is a quasi-judicial officer of the court, charged with the duty of insuring that an accused receives a fair trial. Boehning, 127 Wn. App. at 518.; State v. Coles, 28 Wn.App. 563, 573, 625 P.2d 713, review denied, 95 Wn.2d 1024 (1981); State v. Huson, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), cert. denied, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). In this instance, the prosecutor violated his duty. Farris' conviction must be reversed.

2. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTOR'S FLAGRANT MISCONDUCT IN CLOSING ARGUMENT DENIED FARRIS EFFECTIVE COUNSEL.

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

An attorney is deficient if his performance falls below a minimum objective standard of reasonableness. “Representation of a criminal defendant entails certain basic duties...Among those duties, defense counsel must employ ‘such skill and knowledge as will render the trial a reliable adversarial testing process.’” State v. Lopez, 107 Wn.App. 270, 275, 27 P.3d 237(2001), citing Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984).

Here, the prosecutor, without objection, flagrantly committed misconduct in closing argument. The prosecutor’s effort to bolster’s A.L.’s credibility was all based on matters outside the record and on gross misstatements of the record (as argued in Issue 1).

Effective defense counsel would have objected and sought, at the very least, both a limiting and a curative instruction. But Farris was not represented by effective defense counsel.

3. THE SEXUAL ASSAULT PROTECTION ORDER ISSUED IN CONJUNCTION WITH FARRIS’ SENTENCE IS ILLEGAL BECAUSE IT EXCEEDS THE STATUTORY MAXIMUM TERM.

The trial court erred in setting an expiration date of November 25, 2099, for the sexual assault protection order. Supp. Designation of Clerk’s Papers (sub non. 83). This Court should vacate the order and remand for determination of a lawful expiration date.

The trial court's authority to impose conditions of sentence is limited to the authority provided by statute. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Sentencing provisions outside the authority of the trial court are illegal. State v. Pingle, 83 Wn.2d 188, 193-94, 517 P.2d 192 (1973).

When an offender is found guilty of a sex offense, any sentencing condition that restricts an offender's ability to contact the victim is referred to as a "sexual assault protection order." RCW 7.90.150(6)(a). By the statute's plain language, "[a] final sexual assault protection order entered in conjunction with a criminal prosecution shall remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole." RCW 7.90.150(6)(c).

At Farris' sentencing on November 25, 2009, the trial court entered a sexual assault protection order set to expire November 25, 2009. Supp. Designation of Clerk's Papers (sub non. 83). Farris was sentenced to 93 months in prison with 69 days of credit for time served. CP 22. Farris is also subject to 36 months of community custody. CP 22. The protection order must expire two years after expiration of Farris' period of community custody. The maximum expiration falls well before the November 25, 2009, date set by the court.

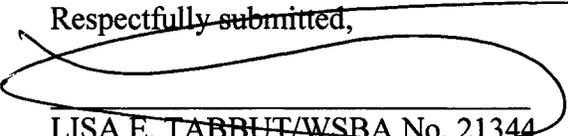
Sentencing errors can be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). This Court should therefore vacate the sexual assault protection order and remand for imposition of an order that contains a lawful expiration date.

F. CONCLUSION

Because the prosecutor committed flagrant misconduct in closing argument, Farris' conviction must be reversed. Defense counsel's failure to object to the prosecutor's flagrant misconduct denied Farris effective counsel and similarly requires reversal. Finally, on the odd chance that Farris' conviction is not reversed, the sexual assault protection order entered against Farris exceeds the allowable maximum term and should be remanded for modification.

DATED this 8th day of July 2010.

Respectfully submitted,


LISA E. TABBUT/WSBA No. 21344
Attorney for Ryan Farris

CERTIFICATE OF MAILING

State of Washington, Respondent, v. Ryan Nicholas Farris, Appellant
No. 40143-6-II

I certify that I mailed a copy of the Brief of Appellant to:

Ryan N. Farris/DOC#334566
Washington Corrections Center
P.O. Box 900
Shelton, WA 98584

And a copy of the Brief of Appellant and Supplemental Designation of Clerk's Papers to:

Michael C. Kinnie
Clark County Prosecutor's Office
P.O. Box 5000
Vancouver, WA 98666-5000

And the original Supplemental Designation of Clerk's Papers to:

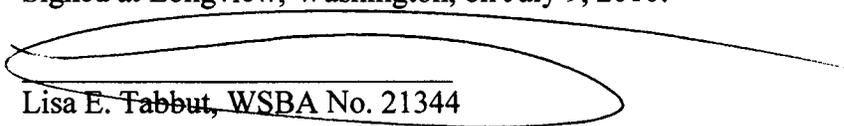
Charlene Huffman
Clark County Superior Court Clerk's Office
P.O. Box 5000
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And the original Brief of Appellant plus one copy, and a copy of the Supplemental Designation of Clerk's Papers to the Court of Appeals, Division II .

All postage prepaid, on July 9, 2010.

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

Signed at Longview, Washington, on July 9, 2010.


Lisa E. Tabbut, WSBA No. 21344
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