

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

STATE OF WASHINGTON,

Respondent,

v.

FOREST EVANS GILL,

Appellant.

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

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DIVISION TWO
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The Honorable Frederick W. Fleming (trial and sentencing) and the
Honorable Kitty-Ann Van Doorninck (continuance), Judges

APPELLANT'S OPENING BRIEF
(AMENDED)

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed constitutionally offensive misconduct and nonconstitutional misconduct which was flagrant, prejudicial and ill-intentioned.

2. Appellant Forest Gill was deprived of his Article 1, § 22 and Sixth Amendment rights to effective assistance of counsel.

3. The trial court abused its discretion in admitting inadmissible evidence of prior, uncharged claims of sexual misconduct.

4. Condition 14 of the community placement/custody conditions violated Gill's due process rights and was not statutorily authorized. That condition provides:

Do not possess or peruse pornographic materials. Your Community Corrections Officer will consult with the identified Sexual Deviancy Treatment Provider to define pornographic material.

CP 82, 95.

5. Community placement/custody conditions 24, 26 and 27 were not statutorily authorized. Condition 24 provides:

You shall not have access to the Internet without childblocks in place.

CP 83, 96. Condition 26 provides:

Obtain a Chemical Dependency Evaluation and comply with follow-up treatment.

CP 83, 96. Condition 27 provides:

Obtain a Mental Health Evaluation and comply with follow-up treatment.

CP 83, 96.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In closing argument, the prosecutor a) repeatedly declared that the jury could not consider the lack of evidence in deciding whether the prosecution had met its constitutionally mandated burden of proof, b) told the jurors the instructions so provided, c) told jurors that they were not allowed to ask questions about what was missing from the prosecutor's case, d) said jurors had to convict if they thought that "this happened," even if they had a "but," i.e., a doubt and e) objected when defense counsel tried to correct these misstatements.

Were these repeated, deliberate misstatements of the proper standard of proof beyond a reasonable doubt and minimization of the constitutionally mandated burden constitutionally offensive misconduct which compels reversal because the evidence against Gill was far from overwhelming and the prosecution cannot prove the misconduct harmless?

2. A prosecutor improperly comments on the defendant's exercise of his right to decide not to testify when the prosecutor comments that testimony is "undisputed" and the only person who could have provided disputing testimony is the defendant. In closing argument, the prosecutor repeatedly argued that there was no testimony presented by the defense to establish either that the victim was making up her claims or had been coached to do so and repeatedly declared that the testimony of the victim, about what happened when she and Gill were alone together - when the abuse allegedly happened - was "unrefuted." Is reversal required because this constitutionally offensive misconduct cannot be deemed "harmless"?

3. A prosecutor shifts a burden of proof to the defense when he implies that the defendant had some duty to either explain why he was not guilty or rebut the state's evidence. Further, such comments and comments that the defense had to prove that the victim was not telling the truth also amount to violations of due process. In this case, the prosecutor a) repeatedly drew a negative inference from Gill's failure to testify and rebut the claims made by the child about what she said happened when she and Gill were alone together, b) repeatedly told the jurors that they had heard no evidence to prove that the victim was making up the claims and c) argued that the jurors had not been presented with any evidence creating a "reason to doubt" the victim's claims. Is reversal required for this constitutionally offensive misconduct Gill where the entire case against Gill was based solely upon the claims of the child and the prosecution cannot prove the misconduct harmless?

4. It is flagrant, prejudicial and ill-intentioned misconduct to tell the jurors they must find that the victim is lying in order to acquit or to incite them to decide a case based upon emotion rather than the evidence actually presented. In this case, the prosecutor repeatedly told the jury that they had only three choices: a) the victim was "coached" to make up the claims, b) she was making them up on her own, or c) she was telling the truth and Gill was guilty. The prosecutor also exhorted the jurors to consider how much "fun" the child had to go through as a result of the case against Gill, urging jurors to "tell" the child that they believed her by convicting. Is reversal required for this flagrant, prejudicial and ill-intentioned misconduct? In the alternative, was counsel prejudicially

ineffective in failing to object to the bulk of the misconduct?

5. Does the cumulative effect of the misconduct compel reversal where it directly affected the jury's ability to fairly and properly decide the case and the evidence against Gill was extremely thin?

6. Was counsel prejudicially ineffective in a) failing to be aware of and failing to move to exclude evidence that the child had previously claimed that Gill had abused her, even though that claim was apparently investigated and dismissed and that evidence was highly prejudicial "propensity" evidence, b) asking a question at trial which appeared to "open the door" to the admission of the evidence which would otherwise have been inadmissible under ER 403, ER 404(b) and RCW 10.58.090? Further, did the trial court err in refusing to exclude the evidence even though its probative value was substantially outweighed by its prejudice?

7. Was community custody condition 14 unconstitutionally vague and improper where it prohibited possession and perusal of "pornography" but delegated the definition of what amounted to pornography to Department of Corrections (DOC) and treatment personnel? Further, did it amount to an improper, excessive delegation of the sentencing court's authority?

8. A condition of community custody is not valid unless it is statutorily authorized. Under the statutes applicable to Gill's case, a prohibition could only be ordered if it was "crime-related." Was condition 14 not statutorily authorized where there was no evidence whatsoever that pornography was involved in any way in the crimes but

the condition prohibited possession and perusal of pornography? Was condition 24 not statutorily authorized where that condition prohibited access to the Internet without “childblocks” even though there was no evidence that the Internet was in any way involved in the crimes?

9. Community custody conditions of treatment and counseling is only statutorily authorized if such affirmative acts were “crime-related.” Was condition 26 not statutorily authorized where it required Gill to undergo chemical dependency evaluation and treatment even though there was no evidence that Gill had chemical dependency issues or that such issues had anything to do with the crimes? Was condition 27 not statutorily authorized where it required Gill to undergo mental health evaluation and treatment even though there was no evidence that Gill had any mental health issues or that mental health issues contributed to the commission of the crimes? Further, was condition 26 not statutorily authorized under the relevant statutes regarding mental health treatment and evaluation because those statutes require specific findings which the court here did not make and also require support for such orders which did not exist in this case?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Forest E. Gill was charged by corrected information with three counts of first-degree child rape and one count of first-degree child molestation. CP 40-41; RCW 9A.44.073; RCW 9A.44.083. After a continuance, trial was held before the Honorable Frederick W. Fleming on November 9-10, 12-13, 2009, after which Gill was found guilty as

charged. CP 67-70; RP 1, 95. On January 15, 2010, Judge Fleming ordered Mr. Gill to serve indeterminate sentences with a mandatory minimum term of 318 months. CP 97-110; RP 249. Gill appealed and this pleading follows. See CP 113-27.

2. Testimony at trial

Forest Gill and Dawn Rodrigues¹ met when Gill was about 15 years old, in about 1999. RP 174, 178. When Dawn's then-husband, Albert, was in jail, she fell behind on rent and so Gill's family let her move into their home. RP 174. Dawn had her daughter, S,² stay with Dawn's mother, although S would visit at Gill's family home about one day a week and on weekends. RP 175.

During those visits, Michael³ and Karen Lawrence, Gill's parents, were often home. RP 175-76. Michael said S seemed to be happy, had a good time and expressed no reluctance whatsoever to being there. RP 176. S also seemed to have a good relationship with Gill, who would go with her to do things such as fishing and playing at the park. RP 177. In fact, many times S would "kind of bow her head" and whine about having to leave when it was time for her to go home. RP 176-77. This continued after S's father, Albert, now divorced from S's mom, got out of prison. RP 177.

¹Because Rodrigues and her ex-husband share the same last name, they will each be referred to herein by their first names i.e., Dawn and Albert. No disrespect is intended.

²Because of their ages and the nature of the allegations, initials will be used to refer to children involved in the case.

³Because they share the same last name, they will be referred to by their first names.

Leslie Lawrence,⁴ Gill's sister, was also there when S came over. RP 184. Leslie played with S all the time and they would talk, with S acting like Leslie was a big sister and sleeping in Leslie's room. RP 184-88. Leslie said S seemed to be happy to be there. RP 184-88.

Leslie was clear that S never gave her any hint that she was not completely comfortable with Gill. RP 185. In addition, Leslie said, S never said anything or did anything to indicate there was any problem or that she had any concern about Gill, nor did S have any hesitation in visiting if Gill was there. RP 185. Leslie confirmed that, when it was time for S to return home to her father, S would "whine and throw a fit," and would even sometimes "cry and scream and kick." RP 185. This happened "more frequent than not." RP 185.

Leslie said that S was a "good kid" but S sometimes got into trouble and made up stories against others. RP 186. For example, Leslie was with S and Leslie's cousin, A⁵, once when S falsely accused A of hitting S. RP 186-87. This got A into trouble. RP 186-87.

At some point, a romantic relationship started between Dawn and Gill and they moved out of his parents' house together. RP 126, 129, 178. They lived in an apartment for about a year and a half before moving back in with the Lawrence family. RP 179. Ultimately, Gill and Dawn also got married.

S's visits continued at the apartment and through their return to the

⁴Leslie and her father share the same last name, so Leslie will be referred to by her first name, with no disrespect intended. At the time of the trial, Leslie was 18. RP 183-84.

⁵Because it is unclear how old this child is, she will be referred to only by her initial.

Lawrence home, spanning from sometime in 2001 until sometime in 2008. RP 103. S would go stay with her mom every other weekend and summers. RP 103. S's stepmother, Angela Cayo, would drop S off where Dawn was living or else Dawn and Gill would pick S up. RP 106-107.

At some point, S started saying that she wanted to go stay with Dawn and Gill more, so Albert and Cayo agreed. RP 103.

Cayo said that she had never dropped S off at Gill's parents' home when Gill was the only one there. RP 107-108. Cayo could only recall two times when she went to pick up S and Gill was the only person there. RP 107-108, 124. Both times were in about 2005. RP 107-108, 124. For his part, Albert stayed in the car during pickups, although he thought he had dropped S off upon occasion when Gill was the only one home. RP 126, 129.

When Cayo picked S up those two times she thought Gill was the only one there, S never said anything like, "I'm never going back to that house," or "I will never go there if Forest is the only one home." RP 124. S also never said anything about anything improper or uncomfortable happening with Gill. RP 124. Indeed, Cayo admitted, S never even expressed dislike towards Gill. RP 113.

Albert conceded that S never said anything about not wanting to go back or being scared of Gill, whether at the times when she was apparently alone with Gill or otherwise. RP 139. Instead, the only complaint S had about going to Dawn and Gill's home was that Dawn was more strict than Cayo and Albert. RP 112-13. Cayo admitted there were some disagreements about discipline, but usually it was just Albert, Dawn

and Cayo who had those disagreements; Gill was not involved. RP 113.

Just before Christmas of 2008, S said she did not want to go over to visit Dawn any more. RP 113. When Cayo and Albert asked why, S complained about Dawn being too strict. RP 114. S also claimed that Dawn had put hot sauce in S's nose for not listening or doing what she was supposed to do. RP 112-14, 125.

When S was suddenly reluctant to go visit her mom, Cayo tried talking to S, encouraging her to go. RP 114. Cayo said that Albert, in contrast, was not going to force the issue. RP 114. Albert testified that he had first told S "you got to go," but changed his mind when S raised the "hot sauce" claim. RP 132. In contrast to her testimony, S told Albert that Dawn made S "snort hot sauce" for swearing, not failing to listen. RP 133.

Albert confronted Dawn about the "hot sauce" claim and she admitted using that technique for discipline. RP 133. When Albert told Dawn his opinion on that, it caused tension. RP 114. Despite this, Dawn never made any threats about trying to change the custody arrangement in order to have more time with her child. RP 114, 134. Instead, she came over and spoke with Albert and Cayo about S not wanting to visit. RP 114, 134. Dawn was upset, with Gill there as well, supporting her and saying that S should visit with her mom. RP 114, 134.

Either right before Christmas of 2008 (according to Cayo) or in early January of 2009 (according to when police reports were made), L⁶,

⁶This child's age is unclear from the record so her first initial only will be used.

Cayo's daughter with Albert, came downstairs with S and Cayo saw that L had a "very scary" face. RP 115-16. The girls then told Cayo that S had told L that she been improperly touched by Gill. RP 115-16. Although Cayo said she was in "shock," she did not call Albert to tell him of S's claims. RP 116, 124. Instead, she just waited for Albert to get home a little later, then told him. RP 116, 124.

For some reason never explained at trial, Albert and Cayo did not call police right away, instead waiting a day or so. RP 117, 134. About a month later, they were told to take S down to the "victim's place" to be evaluated. RP 118, 135.

At trial and in her statements, S claimed that the first "bad touch" happened when she was about six years old, at the apartment. RP 32. S said that Gill told her to set up a game for them to play while he showered. RP 32. When he came out wearing only a towel, S said, he told her to come over to him. RP 33. S said no and said that he "insisted." RP 33. According to S, when she walked over, he told her to take off her pants, took them off for her, took off her underwear and used his finger to play with her "tutu." RP 36. S was not sure if his finger went inside her private parts but said she could "[k]inda" feel it and it hurt. RP 36-37. S also claimed that Gill tried to get her to play with his penis, telling her to "suck it and stuff." RP 37. At trial, S, then 12 years old, said she told him "no" but could not remember what happened then. RP 38. At some point, S said, Gill had rubbed his penis around her crotch and it would "still stay on the outside, but sometimes it would go inside," which she knew had happened because of "the pressure" she felt. RP 38.

S also said “white stuff” came out of his penis onto her and the couch and he cleaned it up with the towel. RP 39.

According to S, Gill told her not to say anything because “he would be in big trouble.” RP 40. After a little while, they got their clothes on and went to pick up Dawn from work. RP 41.

S said she did not tell anyone about this because she was scared. RP 41. She clarified that she was scared only that her mom would be mad at her, but did not know why she thought that. RP 42.

S claimed there was a second incident after Gill and Dawn had moved back in with his parents. RP 42. S did not know how old she was at the time or how much time had passed since the first alleged incident. RP 43. S described this second incident as occurring in the garage room that Dawn and Gill had moved into. RP 46. S thought her mom had gone somewhere, like to the store and S was watching a movie alone when Gill came into the room and “did the same thing.” RP 48. S did not remember if he was wearing clothes or a towel but she said he took off her pants and underwear and she thought he took his off, too. RP 49. According to S, Gill touched her in her “crotch” and his finger went inside a couple of times, but no other part of his body went inside. RP 51. S said that Gill had tried to put his penis in but she struggled and would not let him do so. RP 51. S did not remember if Gill said anything about that and said the incident ended when Gill’s mom knocked on the door. RP 51-52.

Again, S said, Gill did not threaten her but just told her not to “tell” because he would be in trouble. RP 52. S also said she did not tell her mom anything about this alleged assault, because she was scared. RP

52. S admitted that she did not call her dad and tell him anything about what she said was happening, nor did she tell any friends, teachers or others. RP 53.

S said there were two other incidents which occurred a little later, when Dawn and Gill were living in a duplex. RP 53, 55. One of them happened when Dawn was at work and S was watching TV. RP 57-58. According to S, Gill came out of the shower with only a towel on and she knew something “bad” was going to happen. RP 57-58. S said Gill touched her and took off her pants even though she was struggling. RP 59-60. According to S, Gill then touched her like he had last time and tried to put his penis inside her but it did not go in very far. RP 59-60. S testified that white stuff then came out of his penis and went on her legs. RP 61. Gill cleaned it up and then told S again not to tell anyone because he would be in “big trouble.” RP 61.

Again, S never said anything to anyone about this alleged assault, nor did she try to stay away or ask not to go to visit her mom or anything like that. RP 61. She testified she was going to try to tell her sister but thought her sister would not believe her. RP 61. S did not explain, however, what would make her sister fail to believe her. RP 61.

The other incident at the duplex occurred, S said, when she had been lying down with a headache. RP 62-63. S went in to take a bath and Gill came in and got into the bathtub with her. RP 62-63. S said he had no clothes on and some “bad touching” happened but she was half asleep at the time. RP 64. S said that she woke up because she hit her head on the bath and Gill was then playing around with her “crotch” with his

penis. RP 64. This time, S said, his penis stayed on the outside of her body and nothing came out of it. RP 65. S did not describe having to struggle or fight or anything like that; instead, she said, she just got up and left. RP 65.

According to S, the same day as that incident, she told her sister what had been happening. RP 66, 82-83. S was sure that incident happened “around Thanksgiving” or just before, in November of 2008. RP 83. On cross-examination, however, S conceded that, in fact, she did not tell her sister about the alleged incidents until sometime around January of 2009. RP 83.

S admitted that she used to get in trouble at her mom’s house but said it was “[n]ot that much.” RP 73. She remembered her mom putting hot sauce up her nose once but admitted it was Dawn, not Gill, who had done that and Gill had never done anything similar. RP 73.

S conceded that she trusted her dad, mom and stepmom and did not keep secrets from them. RP 78. She had also already been talked to about “good touch and bad touch” by the time of the first alleged incident. RP 77-78. She nevertheless never told her mom, her dad or her stepmom anything about Gill doing anything improper after it happened the first time. RP 78.

Cayo admitted that her relationship with S is a good one and S trusted and confided in Cayo in general. RP 123. Cayo also thought S was close to her half-sisters and brothers and got along fine with Dawn and Gill and the extended family. RP 124. Albert said that it appeared to him that S got along “normal” with her mother and before the “hot sauce”

stuff was revealed, he thought everything was fine. RP 137.

At the time when she said the second incident occurred, S's grandparents were in the Gill home, as were several other people she loved and trusted. RP 78-80. S admitted she had never told any of them anything about being improperly touched by Gill at that time, either. RP 80.

Regarding the third incident, S had told defense counsel that it happened when she was 10 but during her testimony had said she was 11. RP 80. When confronted about that difference on cross-examination, S said she "accidentally misspoke" and meant to say 10. RP 80.

S also claimed, when she spoke to defense counsel, that Gill had slapped her on the cheek, hard, during the third incident. RP 80. She said nothing like that at trial. RP 80. When asked about this claim, S remembered making it but admitted she did not remember it actually happening. RP 80. S conceded that, as she was not often slapped hard, it would have been a significant event - one she would have remembered had it occurred. RP 81.

At the time of the third incident, S conceded, she was living with her dad, whom she loved and trusted. RP 81. Indeed, she admitted, she had no reason to be scared that anybody could "get to" her when she was with him or her stepmom. RP 82. S nevertheless never said anything to either of them or her sister when she went home the day she said the third incident had occurred, even though she claimed that Gill was now not only sexually abusing her but had progressed to physically assaulting her, too. RP 81.

Indeed, over the five years she said this happened four times, S never told anyone anything improper had occurred, even though she testified that, during the incidents, she would “struggle” and thus knew what was happening was wrong. RP 85-86. S said she was a strong girl when she wanted to be and knew how to take steps to protect herself. RP 86. She conceded that she had told someone right away when her mom had put the hot sauce in her nose, yet she never said or did anything about the alleged sexual abuse she said she was suffering at Gill’s hands over all of the years she said it had occurred. RP 86-88.

When asked why she finally told her sister, S had admitted to defense counsel that it was because she was mad at her mom for being pregnant. RP 84, 86. At trial, S only “kind of” remembered making that admission, although she remembered her anger at her mom for being pregnant and also remembered her mom miscarrying. RP 84. When asked why, if she was mad at her mom, she would have tried to get Gill in trouble, S said it was because she “just really wanted to get everything out of my mind.” RP 89.

S also told defense counsel she was mad at her mom for not letting her pick out the movies she wanted at the video store. RP 85. S complained that she would want to watch certain movies but her mom would say “no,” instead picking out and renting movies her mom wanted. RP 85. S confirmed her anger about this at trial but said she was not making things up against Gill because of it. RP 85.

Cayo took S to counseling once a week, but S needed it only for about two months. RP 121.

Michelle Breland, a child abuse investigator and nurse practitioner, conducted a physical evaluation of S after the allegations were made. RP 150-54. Using a “colposcope,” Breland examined S’s genital area on January 28, 2009. RP 156. Breland testified that she also elicited statements from S, which Breland repeated at trial, indicating that S was there “because of what Forest did” and that it hurt when he tried to put his “private” inside her. RP 161-67.

In contrast, Cayo, who was at that physical examination, said that there was, in fact, no discussion about the allegations during the exam. RP 121.

S’s hymen was completely intact, all the way around. RP 169. There were no injuries in the vaginal area at all. RP 169. Breland said that this was possible even if there had been “slight penetration” because of the ability of the hymen to stretch. RP 169. Breland said that her findings were “consistent” with what S was claiming had occurred but also admitted the findings were also consistent with “nothing having happened.” RP 170. Ultimately, Breland admitted, it was not possible to say that any abuse had occurred based upon the physical exam, because there was no evidence from that exam to prove it. RP 170-71.

D. ARGUMENT

1. REVERSAL IS REQUIRED BECAUSE OF THE PROSECUTOR’S CONSTITUTIONALLY OFFENSIVE AND NONCONSTITUTIONAL MISCONDUCT WHICH ALSO DEPRIVED GILL OF A FAIR TRIAL, AND COUNSEL WAS INEFFECTIVE

As quasi-judicial officers, prosecutors have a duty to ensure that an accused receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55

S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by *Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). As part of that duty, prosecutors are required to refrain from engaging in conduct at trial which is likely “to produce a wrongful conviction.” *State v. Claflin*, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), review denied, 103 Wn.2d 1014 (1985). Because of her role, the words of a prosecutor carry great weight with the jury, so misconduct does not just violate her duties but may also result in deprivation of a fair trial. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); *Suarez-Bravo*, 72 Wn. App. at 367; 5th Amend.; 6th Amend.; 14th Amend.; Art. I, § 22.

In addition, when a prosecutor’s comments invite the jury to draw a negative inference from a defendant’s exercise of a constitutional right, those comments are constitutionally offensive misconduct because they “chill” the defendant’s free exercise of that right. *State v. Belgarde*, 110 Wn.2d 504, 512, 755 P.2d 174 (1988); *United States v. Jackson*, 390 U.S. 570, 581, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). As a result, it is grave misconduct for the prosecutor to make such arguments. *State v. Rupe*, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); see *Griffin v. California*, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

In this case, reversal is required, because the prosecutor committed serious, prejudicial misconduct, much of it constitutionally offensive. Further, counsel was prejudicially ineffective in failing to at least attempt to mitigate the serious, corrosive impact of the misconduct.

a. Relevant facts

In initial closing argument, the prosecutor told the jury that the instructions “are the law” and that those instructions established “exactly what evidence is and how to evaluate that evidence.” RP 201. The prosecutor then said that the instructions provided that the only thing they could consider was the testimony from witnesses who “took an oath to swear to tell the truth, that testified,” because no exhibits and no stipulations had been entered. RP 201. Indeed, he said, “the only evidence” jurors could consider came from the witness chair, and jurors could not consider “all sorts of things that we’d like to be presented that, for whatever reason, weren’t presented,” which the prosecutor said could not be considered under the instructions. RP 202.

At that point, the prosecutor said the testimony was that Gill had had sexual contact or intercourse with “that little girl” on four occasions. RP 202. The prosecutor then declared, “[t]hat’s what you heard. **It was unrefuted. Right?**” RP 202 (emphasis added).

Next, the prosecutor told jurors they had a choice about the testimony of S: either “give it no weight at all” or say “I believe what she told me.” RP 203. The prosecutor gave jurors three options: 1) decide that S was “coached to say these things,” 2) decide that she “is making this entire thing up herself,” or 3) decide that she was telling the truth. RP 204-206. Regarding her being “coached,” the prosecutor told jurors to ask themselves “what evidence has been presented through the testimony, direct examination, cross-examination, or any exhibits or stipulations, that she was coached.” RP 204. The prosecutor then declared there had been

“[n]ot one piece of evidence” that S had been coached, because “[n]ot one witness” had said anything to prove it. RP 204. The prosecutor concluded, “you have no evidence, under Jury Instruction No. 1,” to believe that S had been coached, because “there’s no evidence to support that.” RP 204.

For option 2, whether S was making the “entire thing up herself,” again, the prosecutor again told jurors to ask themselves, “what evidence did you hear that she made this up?” RP 204. Answering his own question, the prosecutor declared, “[y]ou didn’t hear any. You didn’t hear one single piece of evidence.” RP 204. Indeed, the prosecutor implied, the fact that the case was being brought against Gill was evidence that S was not making up the allegations:

If she was going to make something like this up - - remember, she’s 12 - - I would suspect adults would be able to tell, gee, there’s an apparent motive for her to make this up, I would expect that attorneys, who are allowed to cross-examine and direct-examine [sp] this little girl, would be able to establish, well, there’s an apparent motive, there’s a red flag, that leads me to believe that she can make this up.

Ask yourselves, what evidence did you hear of that?
What motive have you heard for her to make this up? You didn’t hear one, did you?

RP 205 (emphasis added). After telling the jurors S would not make up the allegations because she would then not get to see her mom, the prosecutor repeated, “[s]o, what evidence have you heard that she is making this up by herself? You haven’t heard any. None.” RP 205-206.

Thus, the prosecutor concluded, because of the lack of evidence that S had been coached to lie or was making thing up, the only option for the jurors was to conclude that “[s]he’s telling you the truth.” RP 206.

After telling the jurors they needed to ask “what evidence did we hear that tells us that this is the truth,” the prosecutor said that S not having recanted was evidence the claims were “true.” RP 206-207.

At that point, the prosecutor turned to arguing about what S had gone through, such as being asked “to describe in detail each of the acts” she claimed had occurred and having to take her clothes off and “have some strange lady use a colposcope to examine her vagina,” both of which the prosecutor sarcastically said, “sounds like fun, right?” RP 207. Counsel’s objection that this was “an attempt to have undue sympathy” towards S was overruled and the prosecutor again returned to the same theme, describing what S had gone through such as being interviewed by defense counsel and testifying “in front of all of these people” as not “fun.” RP 207. The prosecutor then declared, “[w]ould she go through all of that if this wasn’t the truth?” RP 208-209.

A few moments later, the prosecutor asked the jurors “[w]hat reasons are you given or were you presented **to doubt that this is the truth?**” RP 209 (emphasis added). Answering his own question, the prosecutor said, “I don’t think any credible ones.” RP 209. After some further argument, the prosecutor declared that S “[t]old every single person what happened to her,” that what she said was consistent with the medical evidence and that what she said was “**unrefuted, right?**” RP 212 (emphasis added).

Regarding the specifics of each incident, for count 1, the prosecutor went through the elements of the crime, then said:

Those are the elements. If her testimony, along with

all the other circumstances that we know to be true, establish those four [elements], then he's guilty. And I'm submitting to you, it does. **It's unrefuted.**

RP 213 (emphasis added). Again, after going through the elements of each of the other offenses, the prosecutor returned to the "options" he had given the jury, saying the only thing S's testimony "supports is that she is telling you the truth." RP 215. The prosecutor went on:

And if she is telling you the truth, what she said happened, then he is guilty of all four counts. It is that simple. So, tell her that you believe her. Tell her you believe she is telling you the truth, she is telling you the truth in light of what everybody else told you.

RP 215 (emphasis added).

For his part, in his closing argument, defense counsel argued that reasonable doubt could come "from the evidence or the lack of evidence," contrary to what the prosecutor had claimed. RP 216. Counsel told the jurors that the prosecutor "misspoke" when he said that all the jury was allowed to consider "is what was said from the witness chair." RP 216. Counsel pointed to Instruction 2, arguing that Mr. Gill was presumed innocent and that the instruction told the jurors that reasonable doubt "may exist from the evidence or lack of evidence." RP 217.

When counsel told the jurors that the law allowed the jurors to question whether there was a lack of evidence to prove guilt, the prosecutor objected, "[t]hat's a misstatement of the law and it is an inappropriate argument." RP 217. The objection was overruled. RP 217. Counsel then reminded the jury that Gill was not forced to prove anything and that the job of the jurors was "not to fill in the missing pieces of the State's case" because they had sympathy for S. RP 117, 224.

In rebuttal closing argument, the prosecutor faulted counsel for noting S's failure to tell anyone anything about being abused throughout the years and the lack of evidence of any acting out or similar conduct which would be expected, saying counsel was arguing that "because that's all he has." RP 226.

Next, the prosecutor next told jurors that defense counsel was wrong in arguing that the prosecutor had misled them about what they were allowed to consider, again repeating that the mandate of the instructions prohibited them from considering anything other than the testimony they had heard. RP 226. He then declared that Instruction 2 meant:

The only evidence that you can consider during your deliberations consists of the testimony, the exhibits, and the stipulations. You don't get a free pass to go back there, like [defense counsel suggests], and start speculating, well, where was the neighbor? Where was this person. Where was that person? You don't get to speculate. You don't get to let that influence you. You don't get to go back there and say, "I would like towels [with evidence on them] . . . That's not how it works. That's not what the law tells you.

RP 227 (emphasis added). The prosecutor also said that there was no evidence "that little girls make this up all the time," faulting counsel for making the argument and saying that "[t]he instructions say now you must disregard that. You can consider the evidence presented. Those are the instructions." RP 229.

Finally, the prosecutor belittled counsel's argument that the testimony did not establish beyond a reasonable doubt that Gill was guilty. RP 229. Ultimately, the prosecutor said, the question before the jurors was whether they had "an abiding belief in the truth of the charges." RP

229. The prosecutor then defined that as follows:

What does that mean? Abiding belief means you have a lasting belief in the truth of these charges. Right? That's what it means, if you go back in there and you say, "You know what? I believe this happened. I believe the evidence presented to me gives me a lasting belief that this happens. Yeah, I would like more evidence." Of course you would like more evidence. But, if you can say to yourself, I have a belief that this happened, I have an abiding belief in the truth of the charge," then I carried the burden in this case, the State has carried the burden. **If you go back there and you say, "I believe what she told me. I believe that this happened." And then you say, "but." Okay, ask yourselves, if you have reached the point before you say, "but," then you have an abiding belief. Now it's okay to say "but," because we all would like more evidence in any criminal case. But, if you get to the point where you say, I believe that this happened, I believe what she told me," then you are satisfied beyond a reasonable doubt. That's the instruction. That's the law.**

RP 230 (emphasis added).

b. The arguments were all serious, prejudicial misconduct

By making these arguments, the prosecutor committed serious, prejudicial misconduct, the bulk of which was constitutionally offensive and the remainder of which was so flagrant and prejudicial that it could not have been cured by instruction.

As a threshold matter, these issues are properly before the Court. Where the prosecution makes comments infringing upon the exercise of a constitutional right, that involves a "claim of manifest constitutional error, which can be raised for the first time on appeal" under RAP 2.5(a)(3). State v. Curtis, 110 Wn. App. 6, 9, 11-12, 37 P.3d 1274 (2002). Further, when a prosecutor commits serious, prejudicial and flagrant misconduct, the issue may be raised on appeal despite the failure of counsel to object below if the misconduct is so flagrant and prejudicial that it could not

have been cured by corrective instruction. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994), cert. denied sub nom Russell v. Washington, 514 U.S. 1129 (1995).⁷

On review, this Court should reverse, based upon either the effect of each single type of misconduct or the cumulative effect of it all. First and most egregious, the prosecutor committed serious, constitutionally offensive misconduct in repeatedly, deliberately misstating and minimizing his burden of proof and telling the jury that it could not consider the lack of evidence in deciding whether the state had met that burden. It is well-settled that reasonable doubt can arise not only from the evidence but also from the lack of evidence, such as when the prosecution fails to present sufficient evidence to prove guilt. See, e.g., State v. Castle, 86 Wn. App. 48, 59, 935 P.2d 656, 133 Wn.2d 1014 (1997); State v. Cleveland, 58 Wn. App. 634, 638, 79 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied sub nom Cleveland v. Washington, 499 U.S. 948 (1991); see also, United States v. Rogers, 91 F.3d 53, 57 (8th Cir. 1996) (as a matter of “common sense,” lack of evidence can raise a reasonable doubt and can be considered in deciding case). Indeed, as Division One has specifically declared, “[c]ertainly reasonable doubt can arise from a lack of evidence,” and it is preferred that jurors be so informed. Castle, 86 Wn. App. at 59.

Here, while instruction 2, properly told the jurors that reasonable doubt could arise from lack of evidence, the prosecutor repeatedly

⁷Those failures are an independent grounds for reversal, as discussed, *infra*.

misstated the meaning of this instruction and the role of the jurors. See CP 50; RP 226-27. Over and over, the prosecutor told jurors they could only consider what they heard in the testimony and were not allowed to consider a lack of evidence in deciding the case. RP 201-202, 204, 226, 227, 229, 230. And over and over, the prosecutor told the jurors that this mandate against considering the lack of evidence was actually required by law, set forth in the instructions. RP 202, 226, 227, 229. Indeed, the prosecutor told jurors they did not have a “free pass” under the law to consider the prosecution’s failure to present evidence even if the jurors would “like” to have such evidence to support a finding of guilt. RP 227, 230. And the prosecutor specifically objected that counsel was making an “inappropriate argument” and a “misstatement of the law” in telling jurors to the contrary, that the lack of evidence could be considered in deciding the case. RP 217.

These arguments were serious, constitutionally offensive misconduct, because they improperly minimized the prosecution’s constitutionally mandated burden of proof and misstated the crucial standard of reasonable doubt. Despite the “wide latitude” given to prosecutors in closing argument, no attorney is permitted to misstate the law and thus mislead the jury. See State v. Davenport, 100 Wn.2d 757, 763, 675 P. 2d 1213 (1984). This is especially true of the prosecutor, whose status as a quasi-judicial officer entrusts him with not only special authority in the eyes of the jury but also with a special responsibility to ensure the defendant receives a fair trial. State v. Reeder, 46 Wn.2d 888, 892-93, 285 P.2d 884 (1955).

Further, the correct standard of proof beyond a reasonable doubt is the “touchstone” of the criminal justice system. Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990), overruled in part and on other grounds by Estelle v. McGuire, 502 U.S. 62, 73, 112 S. Ct. 475, 116 L. Ed. 2d 385 (1991). Correct application of the standard is in fact the “prime instrument for reducing the risk of convictions resting on factual error.” Id. Indeed, reasonable doubt is so vital to our system that failure to properly define it and the “concomitant necessity for the state to prove each element of the crime by that standard” is not just error, it is “a grievous constitutional failure.” State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977).

As the Supreme Court has recently noted, because the correct standard of reasonable doubt is the means by which the presumption of innocence is guaranteed, courts must resist the “temptation to expand upon the definition of reasonable doubt” because it risks dilution of the prosecution’s burden and the presumption of innocence. See State v. Bennett, 161 Wn.2d 303, 315-18, 165 P.3d 1241 (2007).

Here, the prosecutor did not just “expand upon” the definition of reasonable doubt - he repeatedly, explicitly *misstated* it. As a result, the jury was told that it could not find reasonable doubt based upon the state’s failure to provide sufficient evidence to prove its case. These arguments were serious misstatements and minimization of the prosecutor’s constitutionally mandated burden and were constitutionally offensive misconduct.

The damage wrought by this misconduct was only exacerbated by

the prosecutor's implication, in rebuttal closing argument, that Gill should not receive the benefit of the doubt and jurors should convict based upon whether they "believed" the crimes had occurred, despite any doubts. After first telling the jurors they did not get a "free pass" to ask questions about the failure of the state to present certain evidence and that they were not allowed, under the law, to "let that influence" them, the prosecutor then told jurors they could find he had met his burden of proof if the jurors simply "believe" that the crimes happened, even if they would "like more evidence." RP 227, 230. It was enough, the prosecutor declared, if they simply had "a belief that this happened," even if they followed their belief with a "but," because they had to ignore the "but" even though they might "like more evidence." RP 230.

With this argument, the prosecutor not only misstated, again, the law and repeated, again, the improper claim that the jurors could not consider the lack of evidence in deciding if the state had proven its case beyond a reasonable doubt - he also effectively told the jurors that Gill was not entitled to the benefit of any doubt the jurors might have. In addition, he watered down the prosecution's burden further, telling jurors he only had to make them have a "belief" in Gill's guilt. But the presumption of innocence mandates that the defendant is, in fact, entitled to the benefit of any reasonable doubt. State v. Warren, 165 Wn.2d 17, 25-26, 195 P.3d 940 (2008), cert. denied sub nom Warren v. Washington, ___ Wn.2d ___, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009). Further, a juror could have a "belief" in Gill's guilt if the prosecution had only proven its case by a preponderance of the evidence, rather than the higher, required

standard. See, e.g., Commonwealth v. Ferreira, 364 N.E.2d 1264, 1272 (Mass. 1977).

The impact of this misconduct was magnified a thousandfold when coupled with the prosecutor's comments which both repeatedly drew negative inferences from Gill's exercise of his constitutional right not to testify and shifted a burden to Gill to disprove the state's case. Both the state and federal constitutions guarantee the accused the right to remain silent and to be free from self-incrimination. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1991); Doyle v. Ohio, 426 U.S. 610, 619-20, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); 5th Amend.; Art. I, § 9. As part of these rights, a defendant is entitled to choose whether to testify at a trial in which he is the accused. See State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987); Griffin, 380 U.S. at 614-15. Further, under the state and federal due process clauses, the prosecution bears the burden of proving every element of the crimes charged beyond a reasonable doubt, while the defendant has no obligation to produce any evidence of his innocence. See Cleveland, 58 Wn. App. at 648.

Both Gill's rights to choose not to testify and his rights to be free from having any burden to disprove the case against him were repeatedly violated by the prosecutor's comments. Taking the former first, a prosecutor need not directly declare that the defendant should have taken the stand in his defense in order for the prosecutor to have made an improper comment on the defendant's right to remain silent. Ramirez, 49 Wn. App. at 336. Instead, such a comment is made when the prosecutor makes arguments which are "of such character that the jury would

naturally and necessarily accept it as a comment on the defendant's failure to testify." State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442, review denied, 91 Wn. 2d 1013 (1978); State v. Sargeant, 40 Wn. App. 340, 346, 698 P.2d 595 (1985).

Thus, if the prosecutor comments on the defendant's failure to present evidence on a particular issue, those comments are improper comments on the defendant's exercise of his right to decide not to testify if the only person who could have provided the missing testimony was the defendant. See State v. Ashby, 77 Wn.2d 33, 38, 459 P.2d 409 (1969); see also, State v. Fiallo-Lopez, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995). Further, the prosecutor improperly shifts a burden to the defendant to disprove the prosecutor's case if he tells the jury that the lack of evidence to prove that the victim was not telling the truth or was making up the allegations shows that the defendant is guilty. See State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997).

Here, the prosecutor engaged in both of these types of misconduct. First, the prosecutor commented on Gill's right to be free from testifying and shifted the burden of proof to Gill by telling jurors they had to decide the case based solely upon the testimony they had heard rather than the lack of evidence, repeatedly commenting on how the testimony that Gill had engaged in sexual acts with S on four occasions was "unrefuted," and telling the jurors they had been given no "reason to doubt" S's claims. RP 202, 204, 206, 212, 213. Second, the prosecutor committed misconduct in telling the jurors, repeatedly, that there was "no evidence presented" and

“[n]ot one piece of evidence” that S was “coached,” and also “no evidence to support” the jury finding such coaching, “not one single piece of evidence” that S was making up the allegations, and that jurors had to ask themselves what evidence had been presented to prove coaching or lying, with the answer always the same: “none.” RP 203, 204, 205, 206, 213.

Indeed, the prosecutor went further, declaring that “adults” would be “able to tell” if S was making it up, and “attorneys” allowed to “cross-examine and direct-examine” S would have been able to “establish” a motive for her to have made up the claims if there was such a motive - but they had not. RP 205-206.

These arguments were clearly comments on Gill’s failure to testify which also shifted a burden to Gill to disprove the state’s case. Fleming, *supra*, is instructive. In Fleming, also a sex crime case, the prosecutor made the following argument:

There is absolutely no evidence . . . that [the victim] has fabricated any of this or that in any way she’s confused about the fundamental acts that occurred upon her back in that bedroom. And because there is no evidence to reasonably support either of those theories, the defendants are guilty as charged.

83 Wn. App. at 213-14. On review, the Fleming Court held that these arguments improperly shifted the burden to the defense, because they implied that the defendants had to provide evidence to disprove the victim’s claims or be found guilty. Id. Further, the Court declared, the arguments improperly commented on and violated the defendants’ rights to remain silent because the defendants had not taken the stand to rebut the victim’s claims. Id.

Here, the prosecutor's arguments went even further than those in Fleming. Unlike the single improper argument in that case, here the prosecutor emphasized over and over that there was no evidence presented that S was coached or had made up the claims, with the result that, because there was no such evidence, Gill must be guilty. Further, there can be no question that the prosecutor's repeated arguments about the lack of anything to contradict or refute S's claims of what she said happened when she and Gill were alone together amounted to a comment on Gill's failure to testify. Fiallo-Lopez, supra, makes this point. In that case, the defendant was accused of having been involved in a drug deal negotiated by another at two separate locations, and the prosecutor pointed out in closing argument that there was "absolutely no evidence" to explain why Fiallo-Lopez had been present and had contact with the person negotiating the deal at both locations and no attempt by Fiallo-Lopez to rebut the evidence which showed that he had been involved in the deals. 78 Wn. App. at 717, 728. Regardless of the prosecutor's declaration that the defense "had no burden to explain Fiallo-Lopez' actions," on appeal, the prosecutor's arguments were deemed misconduct in violation of the defendant's rights to remain silent and to be free from having to testify. Id. Because no one other than the state's witnesses and Fiallo-Lopez were present at the relevant times, the Court held, "no one other than Fiallo-Lopez himself could have offered the explanation the State demanded." 78 Wn. App. at 728. As a result, the prosecutor's arguments "improperly commented on the defendant's constitutional right not to testify," as well as "impermissibly" shifting a burden of proof to the defendant to disprove

the state's case. 78 Wn. App. at 728.

Here, just as in Fleming and Fiallo-Lopez, only Gill could have “refuted” the “unrefuted” testimony and claims of S. Only he and S were present when the alleged sexual conduct occurred. The prosecutor’s repeated comments on the “unrefuted” nature of the claims was clearly a comment on Gill’s failure to take the stand and explain that the incidents had *not* occurred. And the prosecutor went even further in implying that Gill had a burden to disprove the state’s case - a burden he had which he had somehow failed to meet. Not only was the jury repeatedly reminded that there was no evidence presented to prove that S was making up the claims or had been coached to do so, the prosecutor specifically told the jurors that “adults” and “attorneys” who were given the chance to examine S *would have been able to present evidence* of a motive for S to “make this up” if one existed. RP 205. The jurors were again told to “ask yourselves, what evidence did you hear of that?” RP 205. And only a few moments later, the jurors were told to ask, what “reasons” they had been given “to doubt” that S was telling the truth. RP 209.

Thus, the prosecutor effectively turned the presumption of innocence on its head, shifting the burden to Gill to supply not only evidence to prove that S was making up the claims or was coached to do so but also a “reason. . .to doubt” S’s claims altogether. But Gill had no duty to present such a reason. Nor did the jury have to find such a reason in order to acquit. Instead, the jury was required to acquit unless it decided the state had proven its case beyond a reasonable doubt. See Fleming, 83 Wn. App. at 213. The prosecutor’s arguments were serious,

prejudicial and constitutionally offensive misconduct.

In addition, the prosecutor's "three choices" arguments were further serious, flagrant misconduct. It is well-settled that it is "misleading and unfair to make it appear that an acquittal requires the conclusion" that the prosecution's witnesses are lying. State v. Castaneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 117 Wn.2d 1007 (1991); United States v. Richter, 826 F.2d 206, 209 (2nd Cir. 1987). The argument is improper and misstates the burden of proof and the jury's role, because the jury is *not* required to determine who is telling the truth and who is lying in order to perform its duty. State v. Boehning, 127 Wn. App. 511, 524, 111 P.3d 899 (2005). Instead, it is only required to determine if the prosecution has proven its case beyond a reasonable doubt. State v. Wright, 76 Wn. App. 811, 824-26, 88 P.2d 1214, review denied, 127 Wn.2d 1010 (1995).

Further, the argument incorrectly gives the jury the "false choice" between believing the witnesses are lying or telling the truth, whereas the "testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved." Wright, 76 Wn. App. at 824-26; see Fleming, 83 Wn. App. at 213. It is therefore improper not only to tell jurors they need to decide who is telling the truth and who is lying but also to tell them that they must convict unless they find the state's witnesses are lying. Wright, 76 Wn. App. at 824-25.

Thus, in Fleming, the Court found such arguments to be misconduct in a case where the defendants were accused of raping the

victim in her home and the sole issue was whether the sexual contact was consensual. 83 Wn. App. at 213. The victim testified that it was not; the defendants said that it was. The prosecutor told the jury it would have to find that the victim lied, was confused, or just fantasized what had happened in order to find the defendants not guilty. 83 Wn. App. at 213.

In finding that the argument was both a misstatement of the law and a misrepresentation of the role of the jury and the prosecutor's burden of proof, the Fleming Court declared:

[t]he jury would not have had to find that D.S. was mistaken or lying in order to acquit; instead, it was *required* to acquit *unless* it had an abiding conviction in the truth of her testimony. Thus, if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened in light of her level of intoxication on the night in question, it was required to acquit. In neither of these instances would the jury also have to find that D.S. was lying or mistaken, in order to acquit.

83 Wn. App. at 213 (emphasis in original).

The prosecutor's "three choices" arguments were similarly improper. Contrary to the prosecutor's arguments, the jury was not limited to the "choices" of finding 1) that S was being coached to lie, 2) that S was making the claims up on her own or 3) that S was telling the truth. Just as in Fleming, here the jury did not have to decide that S was lying or coached in order to acquit Gill. It did not have to make a "choice" between either S lying/being coached to lie or S telling the truth in order to decide the case. Instead, jurors could have been unsure whether S was able to accurately recall and recount what happened, might have questioned whether she was mistaken, or might have thought that she had, without malice on anyone's part, been unintentionally led by

suggestive interviewing techniques.

Further, the jury did not have to “have reason to doubt” that S was telling the truth in order to acquit. Instead, all that was required was that the jury find the prosecution had simply not presented sufficient evidence to prove its case. And of course, Gill had no duty to supply any such “reason to doubt.”

The prosecutor thus misstated not only the evidence but also the jury’s role - and his own burden - by telling the jury it had to find Gill guilty unless it found S had made up the claims by herself or under coaching.

Finally, the prosecutor committed flagrant, prejudicial and ill-intentioned misconduct by trying to manipulate the jury into deciding the case based upon emotion and sympathy for S. It is flagrant, prejudicial misconduct to try to sway the jurors by inciting their passions and prejudices. See State v. Bautista-Caldera, 56 Wn. App. 186, 195, 783 P.2d 116 (1989), review denied, 114 Wn.2d 1011 (1990). Such arguments are misconduct because they invite the jury to decide the case based upon emotion, not the evidence. Belgarde, 110 Wn.2d at 510-512.

Here, the prosecutor made just such improper appeals first by using the “I bet that was fun” theme when describing the trauma that S had to undergo as a result of reporting the incidents, and then by telling the jury to use the verdict to “tell” the child that the jurors “believe” she was telling the truth by finding Gill guilty. RP 207, 215. With these arguments, the prosecutor tried to bolster the testimony of the only real witness against Gill - and the source of all of the claims - by igniting the

jurors' strong sympathy on behalf of the child for all she had gone through as a result of the allegations. See Bautista-Caldera, 56 Wn. App. at 195. And the prosecutor specifically linked S's credibility to those emotional appeals. Further, the obvious corollary of that prosecutorial argument was to remind the jurors that it was Gill who was alleged to have *caused* all this trauma to the child who did nothing to "ask" for this suffering.

Reversal is required based upon this misconduct. It is well-recognized that "[p]rosecutors presumably do not risk appellate reversal of a hard-fought conviction by engaging in improper trial tactics unless the prosecutor feels those tactics are necessary to sway the jury in a close case." Fleming, 83 Wn. App. at 215. Even where, as here, counsel failed to object to the bulk of the misconduct below, a reviewing court will still reverse if the misconduct is so flagrant and prejudicial it could not have been cured by instruction. Belgarde, 110 Wn.2d at 507.⁸ Further, constitutionally offensive misconduct is presumptively prejudicial and compels reversal unless the prosecution can meet the heavy burden of proving the misconduct meets the high standard of "constitutional harmless error." Easter, 130 Wn.2d at 242.

Here, both the constitutional and nonconstitutional misconduct compel reversal. Taking the former first, where, as here, the prosecutor commits misconduct infringing on a constitutional right, the prosecution bears a very heavy burden in trying to prove that constitutional error harmless. Easter, 130 Wn.2d at 242. It can only meet that burden if it can

⁸Counsel's ineffectiveness in failing to object to the misconduct is discussed, infra.

convince this Court that any reasonable jury would have reached the same result, absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied sub nom Guloy v. Washington, 475 U.S. 1020 (1986). And that standard is only met if the untainted evidence was so overwhelming that it “necessarily” leads to a finding of guilt. Id.

The prosecution cannot meet that burden in this case. As a threshold matter, it is important to note that this Court uses a different standard for review of this issue than that which is employed when the issue is review of the sufficiency of the evidence to convict. Where the question is sufficiency, this Court uses a relatively deferential standard, looking to see if the evidence, taken in the light most favorable to the state, would be enough for *any* rational fact-finder to convict. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). In addition, the burden is on the defendant to prove that the evidence was so deficient that no reasonable fact-finder could have made the required findings below. See, e.g., State v. Eckenrode, 159 Wn.2d 488, 496, 150 P.3d 1116 (2007).

In stark contrast, to prove a constitutional error “harmless,” the prosecution bears the burden of showing that *every* reasonable fact-finder would have convicted even if the error had not occurred. Easter, 130 Wn.2d at 242. Indeed, constitutional error is presumed prejudicial. Id. Rather than being deferential, the standard for constitutional harmless error, the “overwhelming evidence test, requires the Court to reverse unless it is convinced - beyond a reasonable doubt - that the constitutional

error could not have had *any* effect on the fact-finder's decision to convict. Easter, 130 Wn.2d at 242.

Thus, even when there is enough evidence to uphold a conviction against a "sufficiency of the evidence" challenge, that is not enough to meet the "overwhelming evidence" test. See, e.g., State v. Romero, 113 Wn. App. 779, 783-85, 54 P.3d 1255 (2002). Romero is instructive. In Romero, the defendant was accused of having shot a gun in a mobile home park. 113 Wn. App. at 783. The evidence established that he had run from officers, had been seen in the area just after the shooting, was found hiding in a mobile home where a shotgun was found and where shell casings were found outside, and eyewitness identifications indicated Romero as the shooter, although the witness who was "one hundred percent positive" it was Romero got the wrong color for the pattern on his shirt. Romero, 113 Wn. App. at 783-84.

In reversing, the court of appeals rejected Romero's argument that the evidence was insufficient, applying the sufficiency standard of review. 113 Wn. App. at 794. But that same evidence was *not* enough to uphold the conviction against the constitutional error which had occurred when the officer had commented on Romero's exercise of his right to remain silent and be free from self-incrimination. Id. Despite there being significant evidence that Romero was guilty, that was not sufficient to amount to "overwhelming" evidence of guilt, sufficient to find the constitutional error harmless. 113 Wn. App. at 795-96. Indeed, the Court held, because the evidence was disputed, the jury was "[p]resented with a credibility contest," and "could have been swayed" by the sergeant's

comment, “which insinuated that Romero was hiding his guilt.” 113 Wn. App. at 795-96.

The Romero decision serves to highlight the differences between the amount of proof of guilt required to be sufficient to support a conviction on review and the amount required to be “overwhelming evidence” which renders a constitutional error harmless. 113 Wn. App. at 797-98. Further, it indicates that, even when there is strong evidence of guilt, a reviewing court will not affirm a conviction tainted by constitutional error if the jury’s decision could have been affected by the error. Id.; See also, Easter, 130 Wn.2d at 242 (although evidence of guilty was significant, there was disputing evidence so the “overwhelming evidence” test was not satisfied).

Here, there was far less evidence of Mr. Gill’s guilt than there was in Romero and Easter. Indeed, the only evidence of the claims of S were her own declarations. There was no corroborating evidence. There was no medical evidence. And there were serious questions about S’s credibility, given the inconsistencies in her story and the facts 1) that she had never said anything to anyone during the five years she said she was abused, 2) that she had never expressed reluctance to go where she would be with Gill, 3) that she had asked to spend *more* time at the home where Gill and her mom were during the time she said she was being abused against her will and 4) that she had never even expressed *dislike* of him despite the heinous sexual and even physical abuse she said he had committed against her. The jury’s ability to fairly and impartially evaluate the case against Gill was directly impacted by the serious,

constitutionally offensive misconduct and the untainted evidence in this case was not so overwhelming that it necessarily led to a finding of guilt. The very grave constitutionally offensive misconduct here cannot be deemed “harmless” and reversal is required.

In addition, the nonconstitutional error was so flagrant and ill-intentioned that it could not have been cured by instruction. Not only was the jury given the “false choice” of finding that S was telling “the truth,” or that she was “coached” or making it up on her own, it was also reminded of all of the indignities and difficulties S had suffered as a result of the prosecution, with the implication that, if the jury did not convict, it would essentially be saying S had *wanted* to go through all of them. The effect of these arguments went far beyond just misstating the jury’s role and the burden of proof - it also clearly invoked the jury’s strong passions for S and against Mr. Gill. The arguments were exactly the kind which create such strong emotional reactions that they amount to a “bell” which, once sounded, cannot be unringed - especially in a case already fraught with high emotion because of the heinous nature of the crimes.

Indeed, ten years ago, the Fleming Court held that it is so well-established that arguments such as those made here are misconduct that the very fact the prosecutor made such arguments demonstrates that they are flagrant and ill-intentioned. Fleming, 83 Wn. App. at 214.

Notably, “improper suggestions” made by a prosecutor “carry much weight against the accused,” because the average juror will believe that a prosecutor will act in the interests of justice, as befits an officer of the court and people. Berger, 295 U.S. at 88. The prosecutor fell far short

of that standard here and the result was that Mr. Gill was deprived of his state and federal constitutional rights to a fair trial. This Court should so hold and should reverse.

In the alternative, even if there had not been constitutionally offensive misconduct, in the unlikely event that the Court believes that the enduring prejudice caused by the nonconstitutional misconduct could have been erased by instruction, this Court should reverse based on counsel's ineffectiveness in failing to object to the bulk of that misconduct and request curative instructions. Both the state and federal constitutions guarantee the accused the right to effective assistance. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), overruled in part and on other grounds by Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006); 6th Amend; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). If Mr. Gill can show that, but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different, reversal is required. Strickland, 466 U.S. at 694.

Gill can easily meet that standard. The misconduct went to the heart of the prosecution's case against him. It misstated the jury's role, relieved the prosecution of the full weight of its burden of proof, and invoked strong feelings against Gill and for the victim. Yet counsel made no objection to the bulk of the prosecutor's repeated acts of misconduct

despite their very clear prejudice to his client.

It is Gill's position that the enduring prejudice caused by the prosecutor's multiple acts of non-constitutional misconduct could not have been erased by even the most strongly worded instruction. If, however, such erasure was even possible, reasonably competent counsel would have made the attempt to do so on his client's behalf. The failure was unprofessional, and it clearly prejudiced Mr. Gill in this case. This Court should so hold and should reverse, not only based upon the constitutionally offensive misconduct but also the nonconstitutional misconduct. Further, because counsel was prejudicially ineffective in failing to object below to the bulk of the nonconstitutional misconduct, new counsel should be appointed on remand.

Finally, even if the individual acts of misconduct did not compel reversal in this case, reversal would be required because of the cumulative effect of all of the misconduct taken together. See State v. Jones, 144 Wn. App. 284, 301, 183 P. 3d 307 (2008). All of the misconduct directly impacted the jury's ability to fairly and impartially decide the case using the proper standard of proof and causing the jury to convict regardless of the thinness of the prosecution's case. Reversal is required.

2. COUNSEL WAS PREJUDICIALLY INEFFECTIVE IN
RELATION TO INADMISSIBLE PRIOR ALLEGATIONS
OF SEXUAL ABUSE WHICH THE COURT THEN
ERRED IN ADMITTING

Reversal is also required because of counsel's prejudicial ineffectiveness in failing to be sufficiently aware of the discovery and, as a result, opening the door to highly prejudicial, inadmissible "propensity"

evidence. Further, the trial court erred in admitting that evidence, which was inadmissible under ER 403, ER 404(b) and RCW 10.58.090.

a. Relevant facts

Before trial, the prosecutor successfully moved to exclude evidence that S's mother had been accused of having inappropriate sexual contact with the son of her ex-husband, Albert. RP 12. Later, in cross-examination of Albert, counsel asked him to confirm that S had never, "at any time" in the past, indicated in any way "that Forest Gill was not treating her properly." RP 139. Albert responded, "[u]m, to me, no, she hasn't." RP 139. On redirect examination, the prosecutor asked if S had expressed any reluctance to be around Gill prior to these allegations and Albert said she had not. RP 140. The prosecutor then asked if there had been "any issues between her and Mr. Gill prior." RP 140. After first saying "no," Albert then said, "[o]h, a long time ago it was brought up, but not to me. It was to [S's] . . . grandmother." RP 140.

At that point, counsel objected. RP 140. With the jury out, counsel argued that the evidence of "earlier investigations into this family dynamic" had been excluded at the request of the prosecutor and asked for an offer of proof on the direction the prosecution was headed. RP 141. The prosecutor responded that he was going to introduce evidence that, when S "[w]as three years old there was allegations of sexual abuse" against Gill - something the prosecutor said "wasn't the subject of any motion in limine." RP 141.

Counsel objected under ER 403, arguing "this is way more prejudicial than it is remotely probative." RP 141. The prosecutor

declared that counsel had “asked the question” himself, and counsel disagreed, arguing that it would deny Gill a fair trial for the prosecutor “to go fishing for some way-in-the past matter that’s not part of this litigation.” RP 142. The prosecutor countered that counsel had opened the door when he asked about any “other cause of concern.” RP 142. The court reporter read back the relevant part of the record, and counsel then said he “still” objected to the “fishing expedition of matters that are not before the court.” RP 143. He also declared that he was unaware of the existence of any prior allegations, saying, “I don’t know what this witness is going to say. This is news to me[.]” RP 143. The prosecutor interrupted, saying, “[i]t’s in discovery.” RP 143.

Further argument and an additional offer of proof ensued, after which counsel again objected that the evidence would deny Gill his right to a fair trial and that the probative value of the evidence was substantially outweighed by its prejudice. RP 143-46. At that point, the prosecutor countered, “I’m not sure why [counsel]. . . asked the question, then, if it is so prejudicial and not probative.” RP 146. Without further discussion or analysis, the court held the evidence was admissible. RP 146.

In front of the jury, the prosecutor then elicited testimony from Albert that there had been another investigation involving allegations that Gill had sexually abused S when S was about three or four years old. RP 147-48. In cross-examination, counsel established that, due to the investigation, S had stopped visitations with her mother, but that visitation had started up again later, “[s]o, the investigation went nowhere[.]” RP 148. In redirect examination, the prosecutor asked, “[w]hy did the

investigation go nowhere?” RP 149. The following exchange then occurred:

A: Um, I believe - - I don't know. The courts - -

[DEFENSE COUNSEL]: I'll object. He answered he doesn't know, so the rest is speculation.

THE COURT: Sustained.

[THE PROSECUTOR]: How old was your daughter at the time?

A: I believe she was about four.

Q: All right. Was she able to talk?

A: A little bit, yeah.

Q: Okay.

RP 149. The topic was returned to later when the nurse practitioner was testifying about what S had said during her exam and the prosecutor elicited testimony reminding the jury that S had been to the “Safe and Sound House” before and, when she was there before, had “told a lady what Forest did to me.” RP 162, 166.

b. Counsel was utterly ineffective and the court erred in admitting the highly prejudicial evidence

Reversal is required because counsel was completely ineffective in his handling of the allegations of prior abuse and the trial court erred in admitting this highly prejudicial evidence. At the outset, there can be no question that counsel was ineffective on this issue. In addition to the rights to effective assistance of counsel, a defendant's due process rights to a fair trial can be denied when counsel fails to meet minimum standards of competence and thus fails to serve his crucial role. See State

v. Webbe, 122 Wn. App. 683, 694, 94 P.3d 994 (2004). Here, both Gill's rights to effective assistance and his due process rights were violated by counsel's unprofessional failures.

First, counsel was ineffective in failing to move prior to trial to exclude the irrelevant, prejudicial evidence as any reasonably competent counsel would have done. While "propensity" evidence of uncharged, unproven allegations of prior abuse of the same victim is obviously "logically" relevant, it is highly prejudicial and likely to cause the jury to "prejudge" the defendant, thus denying him a fair opportunity to defend against the state's case. See Michelson v. United States, 335 U.S. 469, 475-76, 69 S. Ct. 213, 93 L. Ed 168 (1948). Such evidence is akin to "superglue" in jurors' minds, so likely is it to stick in their memory and cause them to convict the defendant based upon the belief he is a bad person who is "by propensity" a probable perpetrator of the crime. Id.; see also, State v. Kelly, 102 Wn.2d 188, 199-200, 685 P.2d 564 (1984). For these reasons, a court may only admit evidence of prior crimes, wrongs or acts under ER 404(b) if the court first carefully 1) identifies the purpose for the evidence, 2) find it materially relevant to that purpose, and 3) balances the probative value of the evidence with the unfair prejudicial effect it will cause. State v. Kilgore, 147 Wn.2d 288, 292, 53 P.3d 974 (2002). Indeed, because of the inherent prejudice of "propensity" evidence, a court must not simply find the evidence "relevant" but must find it has "substantial probative value" to prove a necessary part of the state's case, considering other evidence available and erring on the side of exclusion. State v. Lough, 125 Wn.2d 847, 863, 889 P.2d 487 (1995).

In sexual abuse cases, evidence of a previous claim by the same victim - a claim which was apparently investigated but never charged or proven - was obviously highly prejudicial, propensity evidence likely to cause the jury to convict based upon the belief that Gill was a “bad man” who was likely guilty of the current charged crimes. Any reasonably competent counsel would have moved to exclude such evidence because of the extremely corrosive effect the admission of the evidence would have had on his client’s rights to a fair trial. Indeed, it was incumbent on counsel to make such a motion even if he mistakenly thought the court would deny it. See State v. Dawkins, 71 Wn. App. 902, 863 P.2d 124 (1993).

Here, however, counsel made no such motion. And the reason for that failure - and counsel’s later error in opening the door to the admission of the highly prejudicial evidence - was clear - **counsel did not know the evidence existed**. Indeed, he admitted as such to the court, declaring that he was unaware of the existence of any prior allegations, saying, “[t]his is news to me[.]” RP 143.

Thus, counsel did not make a tactical decision not to move to exclude the improper evidence prior to trial. He simply failed to review the discovery carefully - or, perhaps, failed to review it all. Indeed, the fact that he made no effort to deny that evidence of the prior allegation was disclosed in discovery when the prosecutor said it was indicates that counsel knew he had either failed to read all of the discovery or had not read it carefully - otherwise, he certainly would have demanded that the prosecutor identify the location of the information which his careful

review had somehow overlooked.

Counsel's unprofessional failure to be aware of the potential evidence against his client was clearly ineffective and prejudicial. An attorney is put on notice that any evidence mentioned in discovery may be sought to be introduced by the prosecution at trial without further notice. See Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); see also, State v. Smith, 15 Wn. App. 716, 721, 552 P.2d 1059 (1976). Indeed, counsel's failure to be aware of evidence revealed in discovery was condemned as ineffectiveness more than thirty years ago, in Kimmelman. In that case, the Court declared that the "adversarial testing process" does not work unless defense counsel "has done some investigation into the prosecution's case and into various defense strategies." 477 U.S. at 384-85. Failing to inform himself of the possible evidence against his client and take appropriate measures in relation to that evidence was below the prevailing professional minimums counsel is expected to meet and falls well below an objective standard of reasonableness. Id.

In addition, counsel's failure to be aware of the prior allegations not only manifested itself in a failure to move to exclude the evidence but actually resulted in admission of the inadmissible, highly prejudicial evidence. Had counsel been aware of the prior claim, he certainly would not have asked a question which would *elicit* evidence of that claim, as he arguably did here.

The result of counsel's unprofessional failures was admission of evidence which was inadmissible under ER 403, ER 404(b) and the

recently enacted RCW 10.58.090. The prosecution could not have met the burden of proving that the evidence was relevant and necessary to its case so that the incredible prejudice it engendered was outweighed by that relevance as required under ER 403 and ER 404(b). Nor was the evidence admissible under RCW 10.58.090, which allows admission of evidence of prior sex offenses notwithstanding ER 404(b), under certain circumstances. RCW 10.58.090 has mandatory prerequisites, including that the prosecutor must give notice, 15 days in advance of trial, of both the intent to proffer the evidence and what the evidence will be. RCW 10.58.090(2). Further, evidence is not admissible under the statute unless and until the trial court considers a host of factors, including the need for the prior acts testimony, whether the allegations resulted in a criminal conviction and, again, as under ER 403 and ER 404(b), “whether the probative value is substantially outweighed by unfair prejudice or confusion of the jury.” RCW 10.58.090(6). Because the prosecutor had not given the required notice and the court engaged in no analysis of the required factors, the evidence was inadmissible under RCW 10.58.090. In addition, because the probative value of the evidence was substantially outweighed by its extreme prejudice, it would have been inadmissible under either the rule or the statute.

Notably, Division One has rejected the idea that RCW 10.58.090 permits admission of uncharged, unproven sexual misconduct. See State v. Scherner, 153 Wn. App. 621, 634, 225 P.3d 248 (2009), review granted, 168 Wn.2d 1036 (2010). Instead, the proponent of the evidence is required to prove, by a preponderance of the evidence, that the prior

crime(s) occurred before evidence of them can be admitted under RCW 10.58.090. Id. Here, the prosecution made no effort to prove the prior allegation occurred. And because the facts regarding that allegation were that no charges were pursued, it is questionable whether the evidence would have been admissible under RCW 10.58.090, even if the other statutory prerequisites had been met.

The trial court erred in admitting the evidence despite counsel's unprofessional, ineffective failures in failing to move to exclude it and "opening the door." Even evidence which is relevant should be excluded when it is too prejudicial to the fairness of the proceedings. Again, the extremely prejudicial "propensity" nature of the evidence admitted here was such that its admission tainted the entire deliberative process and deprived Gill of a fair trial.

Reversal is required. Improper admission of evidence will compel reversal where there is a reasonable probability that its admission affected the outcome of the case. See State v. Justesen, 121 Wn. App. 83, 86 P.3d 1259, review denied, 152 Wn.2d 1033 (2004). Further, where "much of the [state's] evidence involves credibility determinations" or is circumstantial, it cannot be said that improperly admitted evidence did not have any effect on the jury's decision. 121 Wn. App. at 94-95.

Here, there can be no question that there is more than a reasonable probability that the improperly admitted evidence affected the outcome of the case. The evidence against Gill was based completely upon the allegations of S. There was no medical evidence. There were no other witnesses who saw the alleged abuse. And the testimony of S was subject

to serious question as to its credibility, given that she never told anyone anything about being abused for years and years, continued going, happily, over to her mom's place, had no problems in school to indicate that she was suffering abuse and never said anything to any of the people she trusted. In short, had the jury's ability to fairly and impartially evaluate the evidence not been tainted by the admission of this extraordinarily prejudicial evidence, there is more than a reasonable probability that the verdict would have been different, given the thinness of the state's case. Reversal is required.

3. THE SENTENCING COURT ERRED IN ORDERING CONDITIONS OF COMMUNITY CUSTODY WHICH VIOLATED DUE PROCESS OR WERE NOT STATUTORILY AUTHORIZED

Even if this Court does not reverse the convictions based upon the serious, prejudicial misconduct or counsel's ineffectiveness and the improperly admitted, highly prejudicial propensity evidence, Mr. Gill should be granted relief from several of the conditions of community placement/custody, because those conditions either were in violation of Gill's state and federal constitutional rights to due process or were not statutorily authorized.

As a threshold matter, these issues are properly before the Court. Where the lower court imposes an illegal or erroneous condition, that issue may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-46, 193 P.3d 678 (2008). Further, a challenge to such a condition may be made "preenforcement" if the challenge raises primarily a legal question and no further factual development is required. Id.

The conditions Gill is challenging meet those standards. The relevant conditions in this case were contained in “Appendix H,” which was supposed to be attached as an appendix to the judgment and sentence but was apparently filed only as an attachment to a report. See RP 250; CP 97-110. Despite this filing error, Appendix H was clearly intended by the court to be part of the judgment entered. RP 250; CP 97-110.

On review, this Court should strike conditions 14, 24, 26 and 27. First, condition 14 was not statutorily authorized and was in violation of Gill’s due process rights. A sentencing court is limited to imposing only those conditions which are authorized by statute. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). Further, the due process rights guaranteed under the state and federal constitutions prohibit imposition of conditions which are unconstitutionally vague. See State v. Sansone, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005). A condition is vague and in violation of due process if it either is not defined with sufficient definiteness so that an ordinary person could discern what conduct was prohibited or if it “does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” Sansone, 127 Wn. App. at 639, citing, Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990). Further, where a condition infringes upon First Amendment rights, it not only must be “sensitively imposed” but is also subject to greater requirements for specificity under the due process vagueness analysis. Bahl, 164 Wn.2d at 757-58.

Condition 14 did not meet any of those requirements. That

condition provided:

Do not possess or peruse pornographic materials. Your Community Corrections Officer will consult with the identified Sexual Deviancy Treatment Provider to define pornographic material.

CP 82, 95. Taking the constitutional issue first, this condition fails on both prongs of the due process analysis, because it fails to define the prohibited conduct sufficiently and fails to provide ascertainable standards to prohibit arbitrary or discriminatory enforcement.

Bahl, supra, controls. In Bahl, the relevant condition mandated that Bahl refrain from “possess[ing] or access[ing] pornographic materials, as directed by the supervising Community Corrections Officer.” 164 Wn.2d at 754. After first noting that adult pornography is protected speech under the First Amendment, the Supreme Court found the condition unconstitutionally vague. 164 Wn.2d at 758. Indeed, the Court declared, “[t]he fact that the condition provides that Bahl’s community corrections officer can direct what falls within the condition only makes the vagueness problem more apparent,” because, with that language, the condition “virtually acknowledges on its face [that] it does not provide ascertainable standards for enforcement.” 164 Wn.2d at 758.

Similarly, in Sansone, supra, the Court struck down as unconstitutionally vague a condition which mandated that the defendant not possess or peruse pornographic materials “unless given prior approval by [his] sexual deviancy treatment specialist and/or Community Corrections Officer” and what constituted “pornography” was to be “defined by the therapist and/or Community Corrections Officer.” 127

Wn. App. at 634-35. On review, the term “pornography” was deemed unconstitutionally vague in violation of due process, because the term was not “defined with sufficient definiteness such that ordinary people can understand what it encompasses.” 127 Wn. App. at 639. Further, the vagueness of the condition was made clear by the delegation of defining “pornography” to DOC - “a requirement that would be unnecessary if ‘pornography’ was inherently definite.” 127 Wn. App. at 639. Indeed, the Court noted, a defendant could be found in violation for simply bringing in materials to see if they were prohibited. And the delegation of the authority to define what is prohibited to the CCO was especially improper because it creates “a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds” to be so - even if it is not, legally, pornography. Id., quoting, United States v. Guagliardo, 278 F.3d 868, 872 (9th Cir.), cert. denied, 537 U.S. 1004 (2002) (citations omitted). Finally, that delegation was found to be an improper abdication of judicial responsibility for setting the terms of community custody, especially because DOC has several very different definitions of “pornography” in the various statutes and rules it applies. Sansone, 127 Wn. App. at 641-42.

The condition in this case falls squarely in the same category as those in Bahl and Sansone. As in those cases, the condition here fails to define what is prohibited and fails to provide ascertainable standards for enforcement, because it prohibits “pornography,” a term which the court then left wholly undefined. Further, just as in Bahl and Sansone, the delegation of the definition to DOC makes clear that the condition fails to

sufficiently define the prohibited conduct and to provide ascertainable standards for enforcement. In addition, because adult pornography is protected speech as noted in Bahl, condition 14 infringes upon Gill's fundamental rights under the First Amendment without being "clear . . . and . . . reasonably necessary to accomplish essential state needs and public order." See Bahl, 164 Wn.2d at 758. Condition 14 must thus be stricken.

In addition, condition 14 was not statutorily authorized. The relevant statutes governing imposition of conditions in this case start with former RCW 9.94A.712⁹, which governed the sentencing of sex offenses not involving a persistent offender allegation. Under that statute, in addition to other conditions, the sentencing court was permitted to impose conditions set forth in former RCW 9.94A.700(5)¹⁰, if it so chose. Former RCW 9.94A.700(5)(2007) provided, in relevant part, that the court could order that "[t]he offender shall comply with any crime-related prohibitions." Former RCW 9.94A.700(5)(e).

Because it prohibits Mr. Gill from possessing or perusing certain materials, condition 14 is a "prohibition." As such, it is only statutorily authorized under former RCW 9.94A.700(5)(e) if it was "crime-related." A prohibition only meets that standard if it forbids conduct that "directly relates to the circumstances of the crime." State v. Autrey, 136 Wn. App. 460, 466, 150 P.3d 580 (2006). While it need not be "causally" connected

⁹This statute was renumbered effective August 1, 2009, as RCW 9.94A.507. See Laws of 2008, ch. 231, § 56.

¹⁰This statute was renumbered effective August 1, 2009, as RCW 9.94B.050. See Laws of 2008, ch. 231, § 56.

to the crime, any prohibition must still address conduct directly related to the crime. Zimmer, 146 Wn. App. at 413.

Thus, in Zimmer, when the defendant was convicted of methamphetamine possession and had been found with drug paraphernalia, a condition prohibiting possession of such paraphernalia while on community custody was sufficiently “crime-related.” 146 Wn. App. at 413. In contrast, a condition prohibiting the defendant from possessing or using cellular phones, pagers and hand-held electronic scheduling and data storage devices was not “crime-related,” despite the sentencing court’s apparent belief that such devices “can be used to facilitate the sale or transfer of controlled substances[.]” 146 Wn. App. at 411-12. Because there was no evidence that the defendant was found with any such devices in her possession when she was arrested or had used any such device to facilitate her crime, this Court held, the prohibition was not “crime-related” even though it might seem so related at first glance:

We acknowledge that defendants may employ cellular phones or data storage devices to further their illegal drug possession, particularly if they intend to distribute or to sell the drug. We also note that cellular phones and data storage devices have become common place [sp].

But there is no evidence in the record that Zimmer possessed or used a cellular phone or data storage device in connection with possessing methamphetamine, and no evidence that she intended to distribute or sell methamphetamine using such devices.

146 Wn. App. at 414. As a result, this Court held, the trial court had abused its discretion in ordering the prohibition and it had to be stricken.

Id.

Similarly, here, there was no evidence that possession or viewing

of pornography was in any way related to any of the crimes. Regardless whether some other defendant might use such materials in committing similar crimes, because there was a complete absence of any evidence whatsoever that pornography was in any way, shape or form involved in the crimes in this case, condition 14 was not “crime-related” and thus was not statutorily authorized.

Conditions 24, 26 and 27 were similarly imposed without statutory authority. Condition 24 prohibited Gill from having access to the Internet “without childblocks in place.” CP 83, 96. Again, under former RCW 9.94A.700(5)(e), that prohibition was not authorized unless it was “crime-related.” And again, there was no evidence the Internet was in any way involved in the crimes - it was not even mentioned at trial.

Conditions 26 and 27 were not prohibitions but were instead orders of affirmative conduct. Condition 26 required Gill to “[o]btain a Chemical Dependency Evaluation and comply with follow-up treatment.” CP 83, 96. Condition 27 required him to “[o]btain a Mental Health Evaluation and comply with follow-up treatment.” CP 83, 96. Under former RCW 9.94A.700(5)(c), the court had the authority to order such affirmative conduct under a provision allowing the court to order that “[t]he offender shall participate in crime-related treatment or counseling services.” But again, these conditions were not “crime-related.” There was no evidence that chemical dependency or mental illness was in any way involved in these crimes. Indeed, there was not even an allegation that Gill had a problem with drugs, alcohol or mental illness. Conditions 26 and 27 were thus completely unrelated to the alleged crimes.

Condition 27 was further improper as unauthorized under former RCW 9.94A.505(9)¹¹. That statute provided authority to order a mental health evaluation and participation in outpatient mental health treatment only “if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.035, and that this condition is likely to have influenced the offense.” Former RCW 9.94A.505(9). Further, under the statute, any condition for mental health evaluation or treatment was required to be “based upon a presentence report and, if applicable, mental status evaluations that have been filed with the court to determine the offender’s competency or eligibility for a defense of insanity.” Id.; see State v. Jones, 118 Wn. App. 199, 209, 76 P.3d 258 (2003). The sentencing court here made no finding of “reasonable grounds” to believe Gill was mentally ill and that this illness “influenced the offense.” Nor did the court rely upon any mental status evaluations or the presentence report. Indeed, there were no such evaluations, and the presentence report said nothing about mental illness playing any part in the commission of the alleged crimes. See CP 71-96. Where the trial court does not consider a presentence report or mental status evaluation or make the required findings, the court errs in ordering mental health treatment and counseling because it has done so “without following statutory prerequisites.” Jones, 118 Wn. App. at 209.

Finally, neither condition was authorized by the general provision

¹¹This provision was removed from the statute in 2008. See Laws of 2008, ch. 231, § 25.

of former RCW 9.94A.715(2)(b),¹² which authorized ordering participation in rehabilitative programs or engaging in affirmative conduct “reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” Rehabilitative programs and/or affirmative conduct under that statute are only “reasonably related” to the circumstances of the offense if the evidence shows that the defect or problem for which the programs or conduct are being ordered somehow contributed to the offense of conviction. Jones, 118 Wn. App. at 208. This requirement stems from the need to harmonize the provisions of former RCW 9.94A.715(2)(b) with the other relevant sentencing statutes. Jones, 118 Wn. App. at 209-210. As this Court noted in Jones

If we were to characterize mental health treatment and counseling as “affirmative conduct reasonably related to the offender’s risk of reoffending, or the safety of the community,” with or without evidence that the offender suffered from a mental illness that had influenced his crimes, we would negate and render superfluous [former] RCW 9.94A.700(5)(c)’s requirement that such counseling be “crime-related,” and also [former] RCW 9.94A.715(2)(b)’s . . . requirement that the trial court find, based on a presentence report and any applicable mental status evaluation, that the offender is a mentally ill person whose condition influenced the offense.

118 Wn. App. at 210. As a result, this Court concluded, mental health treatment and counseling only “reasonably relates” to the offender’s “risk of reoffending, and to the safety of the community,” if the trial court “obtains a presentence report or mental status evaluation and finds that the offender was a mentally ill person whose condition influenced the offense.” Jones, 118 Wn. App. at 210.

¹²This statute was repealed in 2008 and 2009. See Laws of 2008, ch. 231, § 57; Laws of 2009, ch. 28, § 42.

Again, the sentencing court in this case had no mental status evaluations before it, nor did the presentence report contain any information indicating that Gill was mentally ill and that mental illness contributed to the commission of the crimes. See CP 71-96. And there was no evidence, evaluation or report indicating that chemical dependency was in any way involved, either. Conditions 26 and 27, like conditions 14 and 24, must be stricken.

E. CONCLUSION

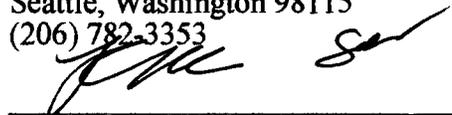
For the reasons stated herein, this Court should reverse and remand for a new trial and strike the improper conditions of community custody/supervision.

DATED this 7th day of September, 2010.

Respectfully submitted,



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

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Forest Gill, DOC 335904, 191 Constantine Way, Aberdeen,
WA. 98520.

DATED this 7th day of September, 2010.


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