

FILED

MAY 13 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Court of Appeals No. 328252

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION THREE

STATE OF WASHINGTON,
Respondent,

V.

ANTHONY BLAUERT,
Appellant

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove the essential element of the date of the alleged incident beyond a reasonable doubt.
2. There is insufficient evidence to establish sexual contact, an essential element that must be proved beyond a reasonable doubt.
3. Mr. Blauert was denied his right to a fair trial and the constitutional requirement of jury unanimity.
4. The trial court abused its discretion when it permitted a witness to testify using special dispensation without a record revealing a need.
5. Mr. Blauert was denied his right to a fair trial and effective assistance of counsel when defense counsel failed to object, request a hearing, or require facts to be presented to justify a witness testifying while holding comfort items.
6. Mr. Blauert's right to a fair trial was denied when the prosecutor elicited improper, irrelevant and prejudicial testimony that invaded the province of the jury.
7. Mr. Blauert was denied effective assistance of counsel when defense counsel failed to object to improper opinion testimony about the truthfulness of another witness.
8. Mr. Blauert's right to a fair trial and effective assistance of counsel was denied when defense counsel failed to object to improper and unfounded expert opinion testimony; failed to raise competence of a four year old witness; and failed to object to improper hearsay.
9. Trial court committed error when it admitted prejudicial hearsay statements under RCW 9A.44.120.
10. Cumulative error denied Mr. Blauert a fair trial.

B. STATEMENT OF THE CASE

On February 7, 2014, the Grant County Prosecutor charged Anthony Blauert with one count of Rape of a Child in the First Degree. CP 1.¹ The allegation was based exclusively on statements of AMS, a four-year old girl.² No corroborating evidence existed. VRP 7/23/14, pg. 6.

1. RCW 9A.44.120 Hearing

On July 23, 2014, a pre-trial hearing was held to determine the admissibility of child hearsay statements under RCW 9A.44.120. The prosecutor presented testimony and argument that the alleged incident occurred on October 15, 2013, a few days before disclosure. VRP 7/23/14, pg. 3-4.

Rickiesha Bagwell (Bagwell), a family friend, testified that around 4:30 p.m. on October 15, 2013, she took AMS to the Blauert's house so that Mrs. Blauert could watch her. VRP 7/23/14, pg. 9. Bagwell returned around 6:00 p.m., and according to Bagwell, who only knew AMS for a few months, AMS appeared quiet and not energetic. VRP 7/23/14 pg. 13.

¹ Clerk's papers are referenced as "CP" and citations to transcripts as VRP [date, pg].

² It is unclear whether initials should be used to reference the four-year old child since portions of the Clerk's Papers refer to her as AMS (see CP 1), but she is named throughout the trial proceeding. VRP, 7/23/14, pg. 3. For purposes of privacy and consistency, initials are used throughout this brief. No disrespect is intended.

Although AMS didn't say anything and Bagwell didn't inquire, Bagwell sent a text to AMS's mother, Kristina Sutton (Sutton) to let her know that AMS was acting strangely. VRP 7/23/14, pg. 13-14. Bagwell's reason for texting Sutton (*i.e.*, concern over AMS's demeanor) was different than the reason expressed by Sutton, who said she became outraged over a text from Bagwell that AMS was left unattended with an unknown male (later identified as Dustin Cruz). VRP 7/23/14, pg. 29-30; VRP 8/14/14, pg. 133. Bagwell testified that she believed something must have happened to AMS on October 15, 2013, since AMS was acting normal when she was dropped off. VRP 7/23/14, pg. 20.

Sutton testified that on October 15, 2013, she received a text message from Bagwell. VRP 7/23/14, pg. 30. When she arrived at Bagwell's house, AMS was there and was acting normal. *Id.* Neither Bagwell nor Sutton asked AMS about why she may have been acting different earlier in the day, and AMS did not mention anything.

The following day, Sutton was assisting AMS in the bathroom when AMS winced. Sutton testified that she didn't observe any rashes, scrapes or rug burns. VRP 7/23/14, pg. 30. Sutton testified that when she asked AMS why she was hurting, AMS said that she had been touched in her no-no by Blauert. VRP 7/23/14, pg. 30. Bagwell was not in the bathroom and thus didn't see or hear any of this. *Id.* Bagwell testified that

Sutton came out of the bathroom crying; and when asked what was wrong, Sutton could not answer. *Id.* Bagwell testified that she just knew something was wrong. VRP 7/23/14, pg. 26.³ Bagwell said she called AMS out of the bathroom and asked what happened to her. VRP 7/23/14, pg. 15.⁴ Sutton called the police and the following day took AMS to see a doctor. VRP 7/23/14, pg. 33.

AMS testified at the “child hearsay” hearing. After some preliminary questions about AMS’s birthday party, the prosecutor asked whether she knew the difference between the truth and a lie. AMS replied by shaking her head negatively. VRP 7/23/14, pg. 45-47. The prosecutor asked AMS again whether she knew the difference between the truth and a lie, and again AMS shook her head negatively, and then said “no”. *Id.* The prosecutor continued to inquire whether AMS knew the truth and a lie:

Prosecutor: What color is the pen?

AMS: Pink.

Prosecutor: Do you know what color my dress is?

³ Bagwell later explained that she knew because she had been a victim of molestation. VRP 7/23/14, pg. 27.

⁴ AMS testified that she never talked to Bagwell about the alleged incident. VRP 7/23/14, pg. 55; VRP 8/14/14/, pg. 160. See Section C-6(a), pg. 54, *infra*.

AMS: Blue.

Prosecutor: Blue. If I said my dress was pink, would that be the truth or would that be a lie?

AMS: A lie.

Prosecutor: Why would that be a lie?

AMS: Because if it was blue, it would be a lie.

Prosecutor: Okay. Well, if I said my dress was blue, would that be the truth or would that be a lie?

AMS: It would be a truth if you said the truth first.

Prosecutor: Okay. If I said there were alligators in the courtroom, would that be a truth or would that be a lie?

AMS: A truth.

Prosecutor: There are alligators in the courtroom?

AMS: No.

VRP 7/23/14, pg. 48.

AMS testified that she knew her mother, her dad, Bagwell and Bagwell's husband, who were in the courtroom, but she didn't know anyone else, including Mr. Blauert. VRP 7/23/14, pg. 50. After some leading questions by the prosecutor, AMS said that she knew Mr. Blauert and that he touched her and made her bleed. VRP 7/23/14, pg. 51-52. There was no medical or physical evidence to support this assertion.

The state also introduced a DVD tape of an interview conducted by a child interviewer (Winston). Pre-Trial Exh. 1. VRP 7/23/14, pg. 58.

The defense did not give an opening statement or call any witnesses. The court concluded statements to Bagwell, Sutton and Winston were admissible. VRP 7/24/14, pg. 63-71; CP 48.

2. Pre-Trial Matters

On August 13, 2014, prior to *voir dire* and before the Honorable John Knodell, a different judge than the one who presided over the “child hearsay” hearing, the state amended the charge to include a charge of child molestation. VRP 8/13/14, pg. 74; CP 34.

And although the prosecutor had previously presented testimony and argument that the alleged incident occurred on October 15, 2013, (VRP 7/23/14/, pg. 3; 7-28), at the pre-trial hearing (and before a different judge), the prosecutor brought a motion to preclude the defense from presenting testimony that the alleged incident occurred on that date. VRP 8/13/14, pg. 86-87. The prosecutor’s position seemed to baffle the judge:

THE COURT: So there was no other occasion between July 1st and October 15th in which the child appeared upset. We're not going to have any evidence of any kind of change or significant change in the child's demeanor during that period?

Prosecutor: Not that I'm aware of. But I would -- and perhaps I'm misanticipating [sic] the court. I

don't believe just the fact that she was upset that day indicates that it happened that day. The child has been consistent in her -- in her statements that it was the defendant that did this to her. She has been just absolutely consistent that no one else but the defendant did this to her.

THE COURT: Yeah. I'm just -- but I'm assuming that you're going to be relying upon this change in the child's demeanor to suggest that the demeanor was caused by being abused?

Prosecutor: No.

THE COURT: You're not?

Prosecutor: No.

THE COURT: Then why is it relevant?

Prosecutor: It isn't relevant other than it was kind of the catalyst for -- it was the catalyst -- well, I don't even know that it was a catalyst. Because what happens is that Miss Bagwell perceives that there's some change in the demeanor, for whatever reason, the child could have had a stomachache, the child could have seen a scary cartoon. We don't know why the child was upset. We do know that Mr. Blauert wasn't in the home until early evening on the 15th. He was down in Portland for a medical examination per National Guard. So he got home around 8:15 or 8:30. And we know that Miss Bagwell picked the child up around I think 6:45, somewhere in there, so before Mr. Blauert got home. We know Mr. Blauert wasn't there that day.

The prosecutor acknowledged that because Mr. Blauert wasn't home on October 15, 2013, the alleged incident did not occur on that date; but also conceded that the state "didn't know when it happened." VRP 8/13/14, pg. 105. The trial court provisionally granted the state's motion. VRP 8/13/14, pg. 107.⁵

After the jury was selected, but before opening statements, the defense provided the prosecutor the text messages dated October 15, 2013, which were referenced by Bagwell. VRP 8/14/14, pg. 133. The prosecutor moved to exclude the text messages as irrelevant, claiming that she spoke with Bagwell that morning and asked her whether the incident occurred on October 15, 2013:

[Ms. Bagwell] said, I didn't think anything had happened on the 15th. The child was disturbed when I saw her, she was upset when I picked her up. But she said she was also upset when I took her there. Which made me think that she didn't want to go there. And so when Miss -- when Miss Bagwell appeared at our office this morning, Mr. -- and I don't know his last name, but Brigham was also -- accompanied her. And I said, well, you had gone over that night, and did you think that the children had been sexually abused? And he said no. He said all I knew was that Aline had gone over on the 15th --

⁵ The prosecutor also moved to exclude the defense from inquiring of Bagwell about her allegation that Mr. Blauert's wife's step-father molested her. VRP 8/13/14, pg. 108. The trial court granted the motion. VRP 8/13/14, pg. 110.

So this whole business about October 15th is kind of a red herring. It has nothing to do with the date of the offense. Except that it's within -- I mean it's within the included time. But I mean as far as being the date of the offense, it's a total red herring. And so these text messages between Ms. Bagwell, Ms. Blauert, Ms. Blauert, Miss Sutton, no matter who instigated them, really have no relevance. All they are complaints about babysitting.

VRP 8/14/14, pg. 135-136.

The prosecutor said the first time she heard Bagwell make this claim was the morning after *voir dire* and before opening statements. *Id.* The judge acknowledged it was a big difference between testimony that AMS had only been upset on October 15, 2013 and no other time. VRP 8/14/14, pg. 142. The court withheld its decision whether to grant state's motion to exclude. VRP 8/14/14, pg. 146.

Defense counsel did not seek a continuance, raise concerns about AMS's competence or make any pre-trial motions.

3. Trial

The state's case was based exclusively on statements made by AMS. The state acknowledged there was no corroborating evidence. VRP 7/23/14, pg. 6. At trial, the state called six witnesses: AMS; Sutton; Bagwell; Ryan Green (detective); Tamera Nolan (nurse); and Karen Winston (child interviewer).

In response to questioning by the prosecutor, AMS said that Mr. Blauert pinched her “no-no”, under her clothes but did not touch her skin. VRP 8/14/14, pg. 156-158.

Sutton, AMS’s mother, testified that on October 16, 2013, the day after AMS was at the Blauert’s house, AMS winced while Sutton was helping her in the bathroom. VRP 8/14/14, pg. 168. Sutton testified that AMS said that Mr. Blauert touched her while playing, didn’t say whether the touching occurred over or under her clothes, and did not give a date or time of the alleged incident. VRP 8/14/14, pg. 169.

The state called Bagwell. The state did not ask Bagwell, as it did during the pre-trial hearing, about taking and picking up AMS from Mr. Blauert’s house on October 15, 2013 and her observations and concerns of AMS’s behavior on that date. Instead, the state limited its direct examination to her brief interaction with AMS after the encounter in the bathroom. VRP 8/14/14, pg. 177 – 180. According to Bagwell, she confronted AMS and AMS said that petitioner touched her “no’no” with his finger. This was inconsistent with AMS’s testimony that she [AMS] never talked to Bagwell about the alleged incident. VRP 7/23/14, pg. 55; VRP 8/14/14/, pg. 160.

Ryan Green, a detective with the Grant County Sheriff’s Office, testified that Sutton contacted the police on October 17, 2013, and that he

became involved in the case on October 23, 2013. VRP 8/14/13, pg. 189. Detective Green's involvement was limited. He obtained Blauert's date of birth and learned that Mr. Blauert had no criminal history. VRP 8/14/14, pg. 187-192.

Tamera Nolan (Nolan), a nurse practitioner, testified that she had contact with AMS on October 17, 2013. VRP 8/14/14/, pg. 201. She obtained some history of AMS, and AMS described that her "no-no" hurt and said that Mr. Blauert touched her. VRP 8/14/14, pg. 203. The prosecutor recalled Nolan and asked a leading question whether AMS mentioned any activities that she and Mr. Blauert engaged in, to which Nolan responded that AMS said that she climbed in bed with Mr. Blauert, cuddled and played patty cake. VRP 8/14/14, pg. 215. This version of events was never mentioned to anyone else.

The state's final witness was Karen Winston (Winston), a forensic child interviewer employed by Partners with Families and Children. Winston testified about her videotaped interview with AMS. The prosecutor admitted the videotape into evidence and published it to the jury. VRP 8/14/14, pg. 225-226; Trial Exhibit 3 (video). The interview occurred on November 15, 2013, at approximately 11:20 a.m. and ended at 11:40 a.m. Trial Exhibit 3. Often AMS could not track the questions

asked, but did indicate that she liked going to the Blauert's house. Trial Exhibit 3.

When Winston asked AMS whether Mr. Blauert did anything that she didn't like, AMS replied no. Trial Exhibit 3. Winston took a different approach, asking AMS whether she told her mother that someone touched her. *Id.* To this, AMS replied that she did. AMS said that Mr. Blauert touched her "pee-pee" with his hand, underneath her clothes and inside her body. Trial Exhibit 3. There was no physical and medical evidence corroborating this assertion. AMS was asked, but could not answer, where this occurred. *Id.*

The state rested.

The defense called two witnesses: Stephanie Blauert (Mrs. Blauert) and Dustin Cruz (Cruz). Mrs. Blauert testified that Mr. Blauert was not home on October 15, 2013 - when AMS was at her house - because he was at the military reserve training center in Portland, Oregon. VRP 8/15/14, pg. 244. Mrs. Blauert also testified that Mr. Blauert was never alone with AMS, never cuddled and never played patty cake games with AMS. VRP 8/15/14, pg. 245.

Cruz testified that on October 15, 2013, he was asked to watch AMS. VRP 8/15/14, pg. 248. He also testified that Mr. Blauert was not at the house when AMS was being watched. *Id.* The only question asked by

the prosecutor was whether the witness had ever watched AMS before, to which he responded that he had met her before but had not babysat her before October 15, 2013. VRP 8/15/14, pg. 249.

Mr. Blauert was found not guilty of Count I and guilty of Count II. CP 43, 44.

4. Sentencing.

Sentencing occurred on October 7, 2014. Because Mr. Blauert had no prior criminal convictions, the standard range was from 51 – 68 months. VRP 10/7/14, pg. 3. The state requested a sentence of 60 months and the department of corrections in its pre-sentence report recommended 51 months. VRP 10/7/14, pg. 7-9. The court imposed 60 months. VRP 10/7/14, pg. 11, 13.

C. ARGUMENT

1. THE PROSECUTOR FAILED TO PROVE EACH ESSENTIAL ELEMENT BEYOND A REASONABLE DOUBT.

The due process clause of the Fourteenth Amendment of the United States Constitution and Article I, section 3 of the State of Washington's Constitution guarantees, "No state shall ... deprive any person of life, liberty, or property, without due process of law." The United States Supreme Court has interpreted this due process guaranty as requiring the State to prove "beyond a reasonable doubt ... every fact

necessary to constitute the crime with which [a defendant] is charged.” *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), *State v. W.R., Jr.*, 181 Wn. 2d 757, 761-62, 336 P.3d 1134, 1136 (2014).

In criminal a criminal proceeding, “a defendant may challenge the sufficiency of the evidence (a) before trial, (b) at the end of the State’s case in chief, (c) at the end of all the evidence, (d) after verdict, or (e) on appeal.” *State v. McReynolds*, 142 Wn.App. 941, 947, 176 P.3d 616 (2008) quoting *State v. Jackson*, 82 Wn.App. 594, 607-08, 918 P.2d 945 (1996)(footnotes omitted). The evidence is reviewed using the most complete factual basis available at the point in time the sufficiency challenge is raised. *Id.* At each juncture, the court considers the evidence and all reasonable inferences from that evidence in the light most favorable to the State. *Id.* The inquiry is whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

The conviction should be reversed because the state did not present sufficient evidence to prove each element beyond a reasonable doubt.

a. The state did not present evidence to establish when the alleged incident occurred.

The jury was instructed that:

To convict the defendant of the alternate crime of child molestation in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That between July 1, 2013 and October 23, 2013, both days inclusive, the defendant had sexual contact with A.M.S.;

CP 42 (Instruction No. 12). Thus, the state is constitutionally obligated to prove every element beyond a reasonable doubt, including that the alleged incident occurred within the alleged dates.

Here, the state did not satisfy its constitutional requirement since no witness testified about when the alleged incident occurred. AMS was asked whether the alleged incident occurred in the summer, in the wintertime, or whether she just didn't remember. VRP 8/14/14, pg. 160. She didn't know. *Id.* As such, she could not provide evidence to establish the essential element.

AMS's mother testified that AMS never told her a date or time of the alleged incident. VRP 8/14/14, pg. 169. Similarly, when Bagwell confronted AMS about the alleged incident, AMS did not provide any information about a date or time of alleged incident occurred. VRP

8/14/14, pg. 179. Thus, neither witness provided any evidence to establish the element.

Detective Green's involvement was limited. Since he didn't interview AMS, he, too, did not provide any evidence establishing when the alleged incident occurred. VRP 8/14/14, pg. 187-192.

Nolan, the nurse practitioner, testified that she had contact with AMS on October 17, 2013. VRP 8/14/14, pg. 201. She obtained some history of AMS, but could not – and did not - provide any testimony as to a date or time of this alleged incident. *Id.*

The state's final witness, Winston, testified about her videotaped interview of AMS. VRP 8/14/14, pg. 216-226; Trial Exhibit 3. There were no questions about dates or times of the alleged incident. Trial Exhibit 3. As such, neither Winston nor the videotape interview, which was admitted into evidence, established the date of an alleged incident.

During closing argument, the prosecutor conceded that she did not prove beyond a reasonable doubt when the alleged incident may have occurred:

We know it didn't happen on October 15, because Mr. Blauert wasn't in town while the child was at the Blauerts. *But we don't know when this happened. The child never gave a date, never gave a time.*

VRP 8/15/14, pg. 264-265 (emphasis added). In an attempt to sidestep its constitutional obligation, the state provided the following analogy:

I have a friend who a couple years ago slipped on the ice and she hit her head. She went to the doctor and it turned out she had a brain tumor. That slip on the ice saved her life. Doesn't know when the cancer started, knows when she found out about it. We don't know when this abuse happened. We don't know when this violation happened. What you did learn was when Miss Sutton learned of it.

VRP 8/15/14, pg. 278-279.

The state's argument conflates the date of disclosure with the date of the alleged incident. As noted in Jury Instruction No. 12 (CP 42), the former is not an element, but the latter is and as such is constitutionally required to be proven beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364, *State v. W.R., Jr.*, 181 Wn. 2d at 761-62. Because the state did not meet this constitutional requirement, the conviction must be reversed.

b. There is insufficient evidence to establish element of "sexual contact".

Mr. Blauert maintains his innocence and denies ever touching AMS. The state is still required to prove every element beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364, *State v. W.R., Jr.*, 181 Wn. 2d at 761-62.

The jury was instructed that the charge of child molestation in the first degree prohibits sexual contact with a person who is under the age of

12 where the perpetrator is at least 36 months older. CP 42 (Instruction No. 12). “Sexual contact” was defined as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” CP 42 (Instruction No. 13). “Sexual gratification” is not an essential element of first degree child molestation, but clarifies the meaning of the term “sexual contact.” *State v. Lorenz*, 152 Wn.2d 22, 34-35, 93 P.3d 133 (2004). A showing of sexual gratification is required “because without that showing[,] the touching may be inadvertent.” *State v. T.E.H.*, 91 Wn.App. 908, 916, 960 P.2d 441 (1998).

This case is similar to *State v. Powell*, 62 Wn.App. 914, 816 P.2d 86 (1991), where the court found the evidence insufficient when the defendant hugged the child around the chest, touched her groin through her underwear when helping her off his lap, and touched her thighs. The court noted that each touch was outside the child’s clothes and was susceptible to an innocent explanation, and the touching was described as “fleeting” and the evidence of the defendant’s purpose was “equivocal.” *Powell*, 62 Wn.App at 917-918.

Here, there was no evidence to establish the essential element of sexual contact. The state’s case was based entirely on statements of AMS, which ranged from being pinched on her “no-no”, under her clothes but

not on her skin (VRP 8/14/14, pg. 156-158), to being touched with fingers (CRP 8/14/14, pg. 169), to being touched on “pee-pee” with a hand, underneath her clothes and inside her body (Trial Exhibit 3). There was no physical or medical evidence corroborating any of these allegations.⁶

There was insufficient evidence presented to establish the essential element of sexual gratification. The conviction must be reversed.

2. MR. BLAUERT WAS DENIED THE RIGHT TO A FAIR TRIAL AND THE CONSTITUTIONAL REQUIREMENT OF JURY UNANIMITY.

Criminal defendants have a right to a unanimous jury verdict. Wash. Const. art. I, § 21; *State v. Ortega–Martinez*, 124 Wn.2d 702, 707,

⁶ Moreover, it is unclear whether the state tried to argue that Mr. Blauert was a caretaker (e.g., babysitter), which would require “additional evidence of sexual gratification” which is lacking here. *See Powell*, 62 Wn.App. at 917, citing *State v. Camarillo*, 115 Wn.2d 60, 63, 794 P.2d 850 (1990) (“The defendant then rubbed the zipper area of the boy's pants for 5 to 10 minutes.”); *State v. Johnson*, 96 Wn.2d 926, 639 P.2d 1332 (1982) (evidence of an unrelated male with no caretaking function wiped a 5-year-old girl's genitals with a wash cloth might be insufficient to prove he acted for purposes of sexual gratification had that act not been followed by his having her perform fellatio on him); *State v. Wilson*, 56 Wn.App. 63, 782 P.2d 224 (1989)(both incidents occurred where they would not be easily observed, and defendant was only partially clothed; victim of second incident was disrobed); *State v. Brown*, 55 Wn .App. 738, 780 P.2d 880 (1989) (multiple incidents including one in which defendant had victim operate a “penis enlarger”), *review denied*, 114 Wash.2d 1014, 791 P.2d 897 (1990); *State v. Brooks*, 45 Wn.App. 824, 727 P.2d 988 (1986) (whitish liquid found on infant's face, chest, and stomach; stain on infant's rubber booties identified as semen); *In re Adams*, 24 Wn.App. 517, 601 P.2d 995 (1979) (defendant removed victim's pants and was on top of her when discovered).

881 P.2d 231 (1994). In cases where several acts could form the basis of one charged count, in order to convict the defendant on that count either the State must elect the specific act on which it relies for conviction or the court must instruct the jury that it must unanimously agree that a specific criminal act has been proved beyond a reasonable doubt. *State v. Noltie*, 116 Wn.2d 831, 842–43, 809 P.2d 190 (1991); *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984); *State v. Borsheim*, 140 Wn. App. 357, 365, 165 P.3d 417, 421 (2007). Failure to elect the act, coupled with the court's failure to instruct the jury on unanimity, is constitutional error because of “the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *State v. Kitchen*, 110 Wn.2d 403, 409, 411, 756 P.2d 105 (1988).

The jury was instructed, in part, that the state had to prove “[t]hat between July 1, 2013 and October 23, 2013, both days inclusive, the defendant *had sexual contact* with A.M.S.” CP 42, Instruction No. 12. (Emphasis added).

The state called Winston, a forensic child interviewer, who testified that she conducted a videotaped interview with AMS. VRP 8/14/14/, pg. 216. The videotaped interview was admitted and played for the jury. VRP 8/14/14, pg. 225; Trial Exhibit 3 (video). The jury was also

instructed that the content of the videotape was evidence to be considered when deciding whether the state proved each element beyond a reasonable doubt.⁷

During the videotaped interview, Winston asked AMS how many times Mr. Blauert touched her. Trial Exhibit 3, time 11:36:09. AMS replied twice. *Id.* Winston then followed up by asking when the two incidents took place. AMS could not provide any specific dates, but replied that the first occurred when she was 3-years- old and last was when she was 4-years-old.⁸ *Id.*, time 11:36:09 – 11:36:35.

The jury therefore heard evidence of multiple acts that could form the basis of the one charged count. As such, the state was required to elect the specific act on which it relied for the conviction or the court was obligated to instruct the jury that it must unanimously agree that a specific criminal act has been proved beyond a reasonable doubt. And since

⁷ CP42, Instruction No. 1 (“The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations and exhibits that I have admitted during the trial); Instruction No. 14 (“You will be given the exhibits admitted into evidence... The exhibits that have been admitted into evidence will be available to you in the jury room.”).

⁸ No specific dates were given for either alleged incident. Moreover, the allegation is factually impossible since AMS’s mother testified that AMS wasn’t going over to the Blauert’s house when she was 3 years old. VRP 8/14/14, pg. 165. Nevertheless, the jury heard this information and was instructed to consider it as evidence.

neither occurred, Mr. Blauert's right to a unanimous jury was violated. *Noltie*, 116 Wn.2d at 843; *Kitchen*, 110 Wn.2d at 411; *State v. Irby*, No. 70418-4 (Division I, April 20, 2015).

The error was not harmless. Error is "not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt." *Kitchen*, 110 Wn.2d at 411, quoting *State v. Loehner*, 42 Wn.App. 408, 411, 711 P.2d 377 (1985)(Scholfield, J., concurring). This approach presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged. *Id.*; *State v. Burri*, 87 Wash.2d 175, 181, 550 P.2d 507 (1976). This standard best ensures that when constitutional error occurs, a conviction will not be upheld unless the error is "harmless beyond a reasonable doubt". *Id.*; *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The state's case rested solely on statements attributed to AMS. There was no physical or medical evidence to corroborate AMS's statements. Moreover, state conceded that it could not prove the essential element of when the alleged incident occurred. Given that AMS gave inconsistent assertions, including being touched on two separate occasions with no corroborating evidence or specificity as to date and time, a juror

could have easily entertained a reasonable doubt as to the state's claim that Blauert molested AMS. On this record, the failure to ensure that Mr. Blauert was afforded a unanimous jury verdict was not harmless, warranting reversal of the conviction.

3. MR. BLAUERT'S RIGHT TO A FAIR TRIAL WAS VIOLATED WHEN A WITNESS WAS PERMITTED TO TESTIFY WHILE HOLDING COMFORT ITEMS.

Some trial procedures, such as providing a child witness with a toy on the stand or shackling a defendant at trial, may risk coloring the perceptions of the jury. *State v. Dye*, 178 Wn.2d 541, 543-544, 309 P.3d 1192 (2013). Here, without factual support, court finding or an objection from defense counsel, a four-year-old witness was permitted to testify while holding a comfort item. VRP 8/14/14, pg. 150-152. This was error, prejudicial, and warrants a new trial.

a. Trial court abused its discretion.

Trial courts have broad discretion to make a variety of trial management decisions. However, a trial court abuses its discretion if: (1) the decision falls "outside the range of acceptable choices, given the facts and the applicable legal standard"; (2) the decision is based on "factual findings are unsupported by the record"; or (3) the decision "based on an incorrect standard or the facts do not meet the requirements of the correct

standard.” *Dye*, 178 Wn.2d at 554, quoting *In re Marriage of Littlefield*, 133 Wn.2d 39,46-47, 940 P.2d 1362 (1997).

In *Dye*, the court set out the legal standard for a witness to testify using special courtroom procedures:

Our confrontation clause analysis in Foster, and our fair-trial analysis in Finch, show that where special courtroom procedures implicate constitutional rights, it is not the defendant's burden to prove that he or she has been prejudiced, but the prosecution's burden to prove that a special dispensation for a vulnerable witness is necessary. The present context is no different. However, we do not require a showing of “substantial need” or “compelling necessity”. Trial courts have a unique perspective on the actual witness that an appellate court reviewing a cold record lacks; because the trial court is in the best position to analyze the actual necessity of a special dispensation, we will not overrule the trial court's exercise of discretion unless the record fails to reveal the party's reasons for needing a support animal, or if the record indicates that the trial court failed to consider those reasons.

Dye, 178 Wn.2d at 553 (citations omitted)(emphasis added).

In *Dye*, the record sufficiently established the need for special dispensation. The witness was a “developmentally disabled individual who has . . . had some significant emotional trauma”; the comfort dog would be unobstrusive; and the witness feared the defendant. *Dye*, 178 Wn.2d at 554 – 555. Accordingly, the Washington Supreme Court concluded:

Because the trial court held a hearing on the permissibility of Ellie's [service dog] presence, and because the record

showed why Ellie's presence was needed to facilitate Lare's [witness] testimony, the trial court did not rely on untenable reasons.

Dye, 178 Wn.2d at 555.⁹

Here, no such record exists. The trial court did not hold a hearing, make findings, or require the prosecutor to present evidence to establish that special dispensation for a vulnerable witness was necessary. The record actually shows that special dispensation was unnecessary. No expert testified that AMS needed special dispensation. Neither the nurse practitioner nor the child interviewer – both of whom interviewed AMS– expressed any concern. VRP 8/14/14, pg. 199-207; 216 – 220. *Hakima*, 124 Wn.App. at 21 (expert in child interviewing testified that doll could put young girl at ease). In fact, the nurse practitioner described AMS's demeanor as a normal four-year-old. *Id.*, pg. 207. Nor did any lay witness, such as AMS's mother, provide a basis for the court to permit AMS to testify using special dispensation. Additionally, the court did not find that AMS was crying, fearful, hesitant, or uncomfortable leading up

⁹ Similarly, in *State v. Hakimi*, 124 Wn.App. 15, 21, 98 P.3d 809 (2004), the record showed that the trial court weighed the interest of the witnesses and potential prejudice to the defendant in allowing the witnesses to testify while holding a doll.

to and during her testimony.¹⁰ VRP 8/14/14, pg. 149 – 161. Trial court abused its discretion since there is no record to establish that special dispensation was necessary.

Even when the record supports the use of special dispensation for a vulnerable witness, courts often fashion procedures to balance fairness in the courtroom with minimizing the prejudicial impact associated with symbols that convey powerful messages about the criminal defendant's guilt. In *Hakimi*, the trial court sought to preserve the defendant's right to a fair trial by ordering that the "doll not be the subject to any questioning, at least in terms of the State's case in chief." *Hakimi*, 124 Wn.App at 20

No such caution was employed here. Instead, the prosecutor brought immediate attention to the items on direct examination when she made the dolls a primary focus of her questioning:

¹⁰ Other factual support discussed in *Dye* was also not present here. See e.g., *Dye*, 178 Wn.2d at 551, citing; *State v. Perovich*, 632 N.W.2d 12, 17 (witness refused to come to the stand when called, remaining in the back of the courtroom and crying); *State v. Cliff*, 116 Idaho 921, 923, 782 P.2d 44 (Ct.App.1989) (child had dry heaves while testifying at preliminary hearing and had to be taken to restroom); *State v. Dompier*, 94 Or.App. 258, 260, 764 P.2d 979 (1988) (witness began crying on the stand and was unable to answer questions until foster mother was permitted to enter the stand with her); *Brooks v. State*, 24 Md.App. 334, 341, 330 A.2d 670 (1975) (witness "virtually fainted after being removed from the courtroom").

Prosecutor: What did you do for your birthday?

Witness: Toys

Prosecutor: You got toys. What kind of toys did you get?

Witness: Barbies, new Barbies.

Prosecutor: Do you like Barbies?

Witness: (Nods head affirmatively)

Prosecutor: Who are your friends up there with you today?

Witness: Anna and Elsa.

Prosecutor: Anna and Elsa. Are they twins?

Witness: (Nods head affirmatively).

VRP 8/14/14, pg. 150-151.

Further compounding the prejudicial impact was the failure to provide any cautionary instruction – either orally or written – directing the jury not to make any assumptions or draw any conclusions from the witness testifying with comfort items. *See e.g., Dye*, 178 Wn.2d at 556 (“whatever subconscious bias may have befallen the jury was cured by the trial court’s limiting instruction, which cautioned the jury not to ‘make any assumptions or draw any conclusions based on the presence of the service dog.’”).

There was no evidence presented or relied upon to justify a witness be permitted to testify while holding dolls that “conveyed a deeply reassuring, yet, silent, message of comfort, security, and support.” *Dye*, 178 Wn.2d at 558 (Gordon McCloud, J., concurring). Moreover, no precautionary measures were taken to ensure the jury decided the case on the facts, rather than based – even in part – on the dolls “silent message about the [witnesses] status as a sympathetic and truthful victim who is worthy of support.” *Id.* The prejudice is further magnified since there the state’s case was based entirely on the credibility of the witness.

Mr. Blauert’s right to a fair trial was denied, warranting a new trial.

b. Ineffective Assistance of Counsel

The federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. article I, § 22. A defendant claiming ineffective assistance of counsel must show deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Trial counsel’s performance was deficient when he failed to demand that the state present - and the court find - evidence to justify the powerful symbolism. Counsel was also ineffective when he did not object or request a limiting instruction be given to minimize the prejudicial

impact associated with symbols that convey powerful messages about the criminal defendant's guilt. *See e.g., Hakimi*, 124 Wn.App at 20.

The deficient performance was prejudicial. The state's entire case rested on the credibility of a four-year-old witness. "A verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Strickland*, 466 U.S. at 696. Thus, permitting AMS to testify while holding dolls, and without any precautionary measures, denied Mr. Blauert the right to have a trial free from improper assumptions or conclusions based on unwarranted and unjustified special courtroom procedures that implicate constitutional rights.

4. MR. BLAUER WAS DEINED A FAIR TRIAL WHEN THE PROSECUTOR, TWICE, ELICITED TESTIMONY THAT INVADED THE PROVINCE OF THE JURY.

Under the Sixth Amendment, the jury must remain "the sole judge of the weight of the testimony and of the credibility of the witnesses." *State v. Lane*, 125 Wash.2d 825, 838, 889 P.2d 929 (1995) (quoting *State v. Crotts*, 22 Wash. 245, 250–51, 60 P. 403 (1900)). Therefore "[n]o witness, lay or expert, may testify to his opinion as to the guilt of a defendant, *whether by direct statement or inference.*" *State v. Black*, 109

Wn.2d 336, 348, 745 P.2d 12 (1987) (emphasis added) (citing *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967)).

Because the state's entire case was based on statements attributed to AMS, her credibility and truthfulness was crucial. On at least two separate occasions the prosecutor, even after being warned by the court, asked adult witnesses to testify about their opinion of AMS's truthfulness. Even when the court expressed concern, the defense did nothing. The prosecutor's misconduct and defense counsel's deficient performance denied Mr. Blauert's state and federal constitutional right to a fair trial.

The state called AMS's mother as a witness. The prosecutor blatantly asked the witness to opine about AMS's truthfulness:

Prosecutor: What kind of child is [AMS]?

Witness (mother): A very friendly, outgoing, very bubbly.

Prosecutor: **Is she a truthful child?**

Witness: **Yes.**

The court immediately expressed concern over the improper questioning:

THE COURT: Counsel -- could counsel approach, please?

Prosecutor: Of course, your Honor.

(At side bar.)

THE COURT: Isn't it highly improper to ask a witness to express an opinion about the truthfulness of another witness? This invades the province of the jury, doesn't it?

Prosecutor: I think that as far as a child, the reputation of the child is the parents' knowledge.

THE COURT: You did not object.

Defense counsel: No. I believe she's expressing an opinion based upon her observations of her child.

VRP 8/14/14, pg. 165-166. (emphasis added).

The court then warned both parties about improper vouching questions and directed them to Evidence Rule 608 and *State v. Smith*, 162 Wn.App. 833, 262 P.3d 72 (2011). VRP 8/14/14, pg. 195. Ignoring the court's warning, the prosecutor did it again with a different witness:

Prosecutor: Did she give you any occasion to believe that she had a motive in making this -- in telling you this?

Witness (Nurse): No.

Prosecutor: **Did she appear to be forthcoming in her statements?**

Witness: **Yes.**

Prosecutor: Was there anybody else in the room while she made these statements?

Witness: Her mother.

Prosecutor: **And was her mother -- what was her mother's role in this?**

Prosecutor: **Encouraging the patient to be honest and to be forthcoming and supporting her.**

VRP 8/14/14, pg. 211 (emphasis added).

The court admonished the prosecutor the first time, and when it happened again the judge expressed frustration over the prosecutor's conduct and bewilderment over the defense counsel's inaction:

I'm not trying to insert myself into this thing. We've got one more state's witness coming here. Let me just urge counsel to remember any time you have a witness expressing anything that appears to be an opinion about the credibility of the witness, it's a big, big problem.

- - -

You know, you asked Mrs. Sutton first . . . is she a truthful child. And then you asked her if she can tell when she's making up a story. . . . And then we have testimony that the child's forthcoming. . . . *I'm just saying there has not been an objection by counsel, but it appears to me that we've had the witness -- we've had at least two witnesses express at least an indirect opinion about the credibility of the witness, the witness that is complaining here.*

VRP 8/14/14, pg. 210-212. (emphasis added) (Jury not present).

As the court pointed out, asking two witnesses to opine whether AMS was truthful was misconduct. A prosecutor commits misconduct when her cross examination seeks to compel a witness' opinion as to whether another witness is telling the truth. *State v. Suarez-Bravo*, 72

Wn.App. 359, 366, 864 P.2d 426 (1994); *State v. Padilla*, 69 Wn.App. 295, 299, 846 P.2d 564 (1993). Such questioning invades the jury's province and is unfair and misleading. *State v. Jerrels*, 83 Wn. App. 503, 507, 925 P.2d 209, 211 (1996). Washington case law is replete with examples of witnesses offering improper opinion testimony. *See, e.g., State v. Dolan*, 118 Wn.App. 323, 329, 73 P.3d 1011 (2003) (where only mother and father-defendant could have assaulted child, improper for witnesses to testify that they did not believe mother was the perpetrator); *Jerrels*, 83 Wn.App. at 508 (mother testified that she believed her children were telling the truth when they accused their father of sexual abuse); *State v. Carlson*, 80 Wn.App. 116, 125–29, 906 P.2d 999 (1995) (witness opined that child had been sexually abused due to her behavior at interview).

Additionally, as the court warned, the prosecutor's questions eliciting witnesses to testify about AMS's reputation for truthfulness also violated Evidence Rule (ER) 608.¹¹ Evidence of truthful character is only permitted if and when the witness's character has been attacked by

¹¹ ER 608 reads, in part: "The credibility of a witness may be attacked or supported by evidence in the form of reputation, but subject to the limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by reputation evidence or otherwise."

reputation or otherwise. *State v. Deach*, 40 Wn.App.614, 699 P.2d 811 (1985). Here, the questions and answers about AMS' truthful character were done in the state's case in chief, on direct-examination, and without the prerequisite that the witness's character for truthfulness was attacked. In fact, the prosecutor sought, and the court granted, a pre-trial motion "to prohibit defense witnesses from testifying about the reputation of the alleged victim." VRP 8/13/14, pg. 85. Yet, the prosecutor violated the court's order and ER 608 by asking state witnesses to opine about AMS's reputation for truthfulness even though the defense never sought to attack it.¹²

The prosecutor committed misconduct. However, since no objection was made the misconduct is reversible error only if it is material to the trial's outcome and could not have been remedied. *Jerrels*, 83 Wn. App. at 508. The misconduct must have been "so flagrant and ill intentioned that a curative instruction could not have obviated the resulting prejudice." *Suarez-Bravo*, 72 Wn.App. at 367; *see also State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988). To determine whether the

¹² The defense theory was that Mr. Blauert could not have committed this offense because he was out of state. The defense never challenged the credibility or truthfulness of the child. In fact, in response to the state's motion, the defense stated: "No objection, you Honor . . . I was never going to pursue that line of questioning. Obviously, because you're not allowed to attack the reputation of a child." VRP 8/13/14, pg. 85.

misconduct warrants reversal, the court considers its prejudicial nature and its cumulative effect. *Id.*

The prosecutor's misconduct was flagrant and ill intentioned. The court not only warned the prosecutor – and alerted defense counsel – about the improper questioning, it “urged” them to review case law and court rules, and cautioned that “any time you have a witness expressing anything that appears to be an opinion about the credibility of the witness, it’s a big, big problem.” VRP 8/14/14 pg. pg. 210-212. The court also observed how the improper questioning happened on more than one occasion and even after the court’s warning. *Id.*

A curative instruction could not alleviate the taint. This case is akin to *State v. Jerrels*, where the court reversed a molestation conviction because of similar improper questioning. The *Jerrels* court noted that, like here, there was no medical, physical or corroborating evidence, and concluded:

Because credibility played such a crucial role, the prosecutor's improper questions were material and highly prejudicial. A mother's opinion as to her children's veracity could not easily be disregarded even if the jury had been instructed to do so. Also, the improper questions were asked three different times, giving them a cumulative effect.

Jerrels, 83 Wash. App. at 508.

Finally, the “error is of constitutional magnitude because it invades the providence of the jury, therefore it is harmless only if the untainted evidence is so overwhelming that it necessarily supports a guilty verdict.” *State v. Jones*, 71 Wn.App. 798, 813, 863 P.2d 85 (1993). The evidence in this case was not overwhelming. The state’s case rested exclusively on AMS’s statements. There was no corroborating evidence. The entire case was based on AMS’s credibility, thus having witnesses vouch for her truthfulness, in this context, goes to the core of the state’s case and cannot be deemed harmless.

Additionally, defense counsel provided ineffective assistance of counsel when he failed to object to the prosecutor’s misconduct, even after the court brought the misconduct to counsel’s attention. There is nothing strategic to allow witnesses testify about the credibility and truthfulness of another witness, especially when, as here, the credibility of the witness was crucial to the state’s case. Counsel’s performance was deficient and prejudicial.

The court warned both parties about the dangers of asking a witness to vouch for the credibility of another witness. The prosecutor ignored the court; and defense counsel did nothing. As a result, Mr. Blauert was denied a fair trial, warranting a new trial.

5. OTHER EXAMPLES OF INEFFECTIVE ASSISTANCE OF COUNSEL

The federal and state constitutions guarantee a criminal defendant the right to effective assistance of counsel. U.S. Const. amend. VI; Wash. Const. article I, § 22. A defendant claiming ineffective assistance of counsel must show deficient performance and resulting prejudice. *Strickland*, 466 U.S. at 687. To prove “deficient” performance, the defendant must show that counsel's performance fell “below an objective standard of reasonableness.” *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. “There is a strong presumption that counsel's performance was reasonable.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). “When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient.” *Kylo*, 166 Wn.2d at 863, 215 P.3d 177. To satisfy the prejudice prong, the defendant must show that the outcome of the proceedings would have differed but for counsel's deficient performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011), *on remand*, 168 Wn.App. 635, 278 P.3d 225 (2012). “[T]he proper standard for attorney performance is that of reasonably effective assistance.” *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052, *State v. Edwards*, 171 Wn. App. 379, 393, 294 P.3d 708, 715 (2012).

Defense counsel was deficient when he failed to object to improper and unfounded expert testimony; failed to raise a challenge to the competence of a four-year-old witness; and failed to object to the identity of the defendant under the medical exception to the hearsay prohibition. Counsel's deficient performance, both individually and collectively, was prejudicial and warrants a new trial.

a. Defense counsel was ineffective for failing to object to improper and unfounded expert testimony.

The prosecutor called Detective Ryan Green. VRP 8/114/14, pg. 188 – 193. Detective Green never met, interviewed or interacted with AMS. *Id.* Nonetheless, after some preliminary questions about his background, the prosecutor elicited irrelevant, unfounded, and prejudicial testimony about how common it is for children to delay reporting:

Prosecutor: And if you can estimate, how many of these types of cases -- and when I say these types of cases, I'm talking about rape of a child, child molestation cases -- have you handled in your career as a detective with the sheriff's office?

Det. Green: Probably close to a hundred, if not more.

Prosecutor: And in your experience, is it unusual for children to delay reporting?

Det. Green: Yes, most often so.

Prosecutor: It's unusual for them to delay reporting?

Det. Green: No. It's very common, and most of the time children have a hard time understanding what has happened to them, so they do delay in reporting.

VRP 8/14/14, pg. 189.

Counsel did not object to the improper testimony. The decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel. *State v. Madison*, 53 Wn.App. 754, 763, 770 P.2d 662 (1989)(citing *Strickland*, 466 U.S. 668; *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980)), *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989).

Defense should have objected to the detective's testimony because no witness may testify as to an opinion on the guilt of the defendant, whether directly or inferentially. *Jones*, 71 Wn.App. at 798. Here, the detective's comment that children sexually assaulted have a "hard time understanding **what happened to them so they delay in reporting**" inferred to the jury that if AMS delayed reporting it was due to "what happened" to her. This inference is prohibited as it invades the province of the jury, is therefore error of constitutional magnitude and harmless only if the untainted evidence is so overwhelming that it necessarily supports a guilty verdict. *Id.*

Additionally, defense counsel should have objected to the detective's comments as unfounded expert testimony under ER 702. ER702 addresses two questions: the permissible means by which an expert is qualified and the admissibility of the expert's opinion. Practical experience may qualify a witness as an expert. *State v. Ortiz*, 119 Wn.2d 294, 341, 745 P.2d 12 (1992). But, "[w]hen personal experience is used as a basis for generalized statements regarding the behavior of sexually abused children as a class the testimony crosses over to scientific testimony regarding a profile or syndrome, whether or not the term is used, and therefore should be subject to the standard set forth in *Frye*¹³." *Jones*, 71 Wn.App. at 818. Under *Frye*, generalized testimony regarding a profile of behaviors of victims of sexual abuse must be sufficiently established to have gained general acceptance by the scientific community. *Jones*, 71 Wn.App. at 818. Furthermore, experts and authorities in the field have cautioned against the unfettered admissibility of the child sexual abuse profile testimony. *Id.* (extended citations to authority omitted).

Detective Green used his personal experience as a basis for two generalized opinions regarding the behavior of sexually abused children. First, he claimed that it is "very common" for sexually abused children to

¹³ *Frye v. United States*, 293 F.1013 (D.C.Cir. 1923).

delay reporting; and second the reason for delay is due to children's' difficult time understanding the sexual abuse that occurred to them. VRP 8/14/14, pg. 189. This was impermissible, and defense counsel was deficient for not objecting.

Finally, defense counsel should have objected to the detective's unacceptable opinion testimony as irrelevant. The testimony was not relevant, for example, to rebut an allegation by the defendant that the victim's behavior (*i.e.*, delay in disclosure) was inconsistent with abuse. *Jones*, 71 Wn.App. at 819. The defense did not present such an argument.

The failure to object, and thus permit a jury to rely on an expert's unproven scientific opinion that children of sexual abuse delay reporting because they don't understand what happened to them, which bolsters otherwise uncorroborated child testimony is an egregious circumstance constituting ineffective assistance of counsel.

b. Defense counsel was ineffective for failing to raise competence.

Even with ample evidence raising concern over the child's competence, defense counsel did nothing. Counsel's deficient performance was prejudicial because had she been deemed incompetent, and thus unavailable to testify, her hearsay statements, which was the state's only evidence, was inadmissible under RCW 9A.44.120.

Judge Sperline, who presided over the “child-hearsay” hearing, did not address the issue of competence, concluding that it was premature and better suited at a subsequent hearing:

If the child is competent, meets a legal test of competence, and is here, available, then the child is available to testify at trial. If the child is unavailable, not present, not competent as a witness, ill, whatever it is, then the hearsay statements, even if they're reliable, don't come into evidence, unless there is corroboration for the acts, such as physical findings by a doctor, something to that effect.

The competency determination is actually not made at the time of this hearing. It's actually made at the time a person is called to testify at trial.

VRP 7/23/14, pg. 65-66; CP 48, pg. 2, ¶1.

When defense counsel finally tried to raise the issue, the trial court said it was too late. VRP 8/14/14, pg. 162-163. At trial, the prosecutor indicated that AMS would testify. Judge Knodell, who did not preside over the “child hearsay” hearing, asked the parties how they proposed a competence determination of the four-year-old witness. VRP 8/14/14, pg. 145. The prosecutor requested it be done as part of her testimony in front of the jury. *Id.* When asked whether competence was being challenged, defense counsel replied “not at this point, your Honor. Can I wait and see how - - - depending how she testifies today.” *Id.*, pg. 146. The court indicated that AMS would testify and if the defense had a challenge to the competence he should “raise an objection.” *Id.*

After AMS testified, defense counsel asked the court whether it “wish[ed] to consider the issue of competency at this time before any potential hearsay testimony is given?” VRP 8/14/14, pg. 161. The following occurred outside the presence of the jury:

COURT: I thought competency was basically conceded. Did I --

Defense Counsel: I believe at that time Judge Sperline (the judge who presided over the pre-trial hearing) in his findings was not making a finding as to competency, but was leaving that to the --

THE COURT: I thought earlier today you told me that you were conceding competency. Did I misunderstand you?

Defense Counsel: I believe what I said was we'd wait until she testified.

THE COURT: The testimony has already been heard.

Defense Counsel: The testimony has been entered. But if the court finds her not to be competent, then the hearsay testimony as to statements made to Ms. Sutton and Ms. Bagwell --

THE COURT: I don't mean to pick nits, but is that what the statute says, or does it say simply that the child has to testify?

Prosecutor: I don't believe the competency is the issue for the *Ryan* (hearing). It's whether or not the child will actually testify. And the child actually did testify. She was subject to examination and cross-examination about

the specific incident, not just peripheral issues.

THE COURT: I had thought -- I had thought, and maybe I'm wrong, what I thought Mr. Anderson [defense counsel] told me was that if there was a question about competency in the ensuing testimony, he'd raise an objection. There was no objection.

Prosecutor: Right.

THE COURT: I don't know that there's anything for me to do at this point.

Defense Counsel: Okay.

THE COURT: Do you agree with that?

Prosecutor: I do, your Honor.

THE COURT: Okay. I'm sorry, Mr. Anderson?

Defense Counsel: I just wanted to make sure that the -- that that was addressed and it seems the court has addressed the issue.

THE COURT: All right.

Defense Counsel: So I am satisfied at this point.

VRP 8/14/14, pg. 162-163.

Ineffective assistance of counsel for failing to request a competency hearing requires that the trial court would have likely found the witness incompetent. *State v. Johnston*, 143 Wn.App. 1, 18, 177 P3d 1127 (2007). An individual who is incapable of receiving just impressions

of the facts, respecting which they are examined, or of relating them truly are incompetent to testify. RCW 5.60.050.¹⁴ Factors set out in *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967), still guide a court's determination of competence. *State v. S.J.W.*, 170 Wn.2d 573, 239 P.3d 568 (2010). Those factors include: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it. *Allen*, 70 Wn.2d at 692.

Here, AMS would not have satisfied these factors. At the “child hearsay” pre-trial hearing, the prosecutor asked whether she knew the difference between the truth and a lie, to which she replied by shaking her head negatively. VRP 7/23/14, pg. 45-47. When asked again whether she knew the difference between the truth and a lie, AMS shook her head negatively and then said “no”. *Id.* The prosecutor continued to inquire

¹⁴ Criminal Rule (CrR) 6.12(c) has similar language: “(c) Persons Incompetent To Testify. The following persons are incompetent to testify . . . ; and (2) children who do not have the capacity of receiving just impressions of the facts about which they are examined or who do not have the capacity of relating them truly. This shall not affect any recognized privileges.

whether AMS could distinguish between the truth and a lie:

Prosecutor: What color is the pen?

AMS: Pink.

Prosecutor: Do you know what color my dress is?

AMS: Blue.

Prosecutor: Blue. If I said my dress was pink, would that be the truth or would that be a lie?

AMS: A lie.

Prosecutor: Why would that be a lie?

AMS: Because if it was blue, it would be a lie.

Prosecutor: Okay. Well, if I said my dress was blue, would that be the truth or would that be a lie?

AMS: It would be a truth if you said the truth first.

Prosecutor: Okay. If I said there were alligators in the courtroom, would that be a truth or would that be a lie?

AMS: A truth.

Prosecutor: There are alligators in the courtroom?

AMS: No.

VRP 7/23/14.

When asked whether she knew anyone in the courtroom, AMS said she knew her mother, her dad, Ms. Bagwell and Ms. Bagwell's husband.

VRP 7/23/14, pg. 48. When asked whether she knew anyone else in the courtroom – including Mr. Blauert – AMS shook her head negatively. *Id.* The prosecutor continued to try to have AMS identify Mr. Blauert, but to no avail until she was lead the way:

Prosecutor: You don't know anybody else. Have you ever seen that man before? I'm pointing to Judge Sperline. Have you ever seen him before today?

AMS: It's probably yes.

Prosecutor: Probably yes. Okay. But do you know him?

AMS: (No audible response.)

Prosecutor: Have you ever met me before today?

AMS: Yes.

Prosecutor: When did you meet me before?

AMS: Maybe today.

Prosecutor: What's that?

AMS: Maybe today.

Prosecutor: You met me today. Okay. Have you ever met this man in the striped suit?¹⁵

AMS: No.

¹⁵ Presumably, this refers to defense counsel.

Prosecutor: Okay. Do you know this guy seated next to him? Do you know him? Do you know who that is?¹⁶

AMS: (Shakes head negatively.)

THE COURT: Can you say yes or no?

AMS: No.

Prosecutor: Have you ever seen him before?

AMS: (Shakes head negatively.)

Prosecutor: What's his name?

AMS: I don't know.

Prosecutor: Okay. Have you ever seen him with --- do you know Stephanie?

AMS: Yes.

Prosecutor: Okay. Is Stephanie here?

AMS: I don't know.

Prosecutor: You don't know. Do you know somebody named Andy? Is Andy here? Can you just point him out to us if he's here?

AMS: (Points)

THE COURT: For the record, the witness gestured toward the defendant.

VRP 7/23/14, pg. 49-51.

¹⁶ Presumably, this refers to Mr. Blauert.

After being led, AMS indicated that petitioner touched her. VRP 7/24/14, pg. 51.

AMS did not possess the mental capacity, a sufficient memory or capacity to express such memory of the occurrence. For example, AMS was asked whether this occurred in the summer, in the wintertime, or whether she just didn't remember, to which she replied that she "don't remember". VRP 8/14/14, pg. 160. AMS also didn't remember living in Moses Lake or living with Mrs. Bagwell. VRP 8/14/14, pg. 152. She also claimed that the touching was under her clothes, but her skin was not touched. VRP 8/14/14, pg. 158. During the videotaped interview, which was played to the jury, AMS had a difficult time tracking questions. Trial Exhibit 3.

Counsel failed to properly raise the issue of competence. Had he done so, the witness would have been deemed unavailable to testify and since it was conceded that no corroboration existed, the hearsay statements would not have been admissible under RCW 9A.44.120. But defense counsel did not understand the statute or the proper timing or mechanism to raise the issue.

c. Defense counsel was ineffective for failing to object to identity testimony under the guise of Evidence Rule 803(a).

Nolan, a nurse practitioner, testified that she met with AMS on October 17, 2013, to conduct a physical examination for concerns of inappropriate contact. VRP 8/14/14, pg. 199 - 201. In response to the prosecutor's questioning, Nolan testified that AMS identified the person who touched her was Mr. Blauert. *Id.*, pg. 203. The prosecutor followed up by asking, "did she (AMS) make any statements about any other individuals?", to which Nolan responded, "She said that it wasn't Dustin." *Id.* The prosecutor again returned to the question of identity: "And who first mentioned the name Andy?". Nolan responded, "[t]he patient." *Id.*, pg. 204.

Defense counsel did not object to the hearsay testimony.¹⁷ Presumably, the state sought to admit Nolan's testimony under ER 803(a)(4).¹⁸ The exception only applies to statements "reasonably pertinent to diagnosis and treatment", thus statements concerning the identity of a perpetrator of a crime are normally not admissible. *State v. Ashcraft*, 71 Wn.App. 444, 446, 859 P.2d 60 (1993). Even though

¹⁷ AMS's statements to Nolan were not part of the "child-hearsay" hearing. VRP 7/24/14, pg. 5.

¹⁸ See VRP 7/24/14, pg. 5.

statements of identification may be admissible when the victim is a child, they must still be necessary for diagnosis and treatment. *Id. Ashcraft*, 71 Wn.App at 456-457, *State v. Butler*, 53 Wn.App. 214, 222-223, 766 P.2d 505, *review denied*, 112 Wn.2d 1014 (1989)(identification may be necessary or relevant to diagnosis and treatment when there is concern of possible psychological injuries and further danger due to the continued presence of the abuser in the child's home).

The rationale permitting the admissibility of identification under ER 803(a)(4) are not present here. First, there was no evidence, testimony, or expert opinion expressing concern of possible psychological injuries. In fact, the nurse practitioner described AMS as normal four-year-old child. VRP 8/14/14, pg. 204. Second, there was no evidence to suggest further abuse due to continued presence of the abuser in the child's home: Mr. Blauert does not live with AMS.

Finally, it is clear from the record that identification was for purposes of medical treatment. This is apparent given the number of times the prosecutor asked questions about identity. VRP 8/14/14, pg. 203 (“Did she make any statements about any other individuals?”); pg. 204 (“And who first mentioned the name Andy?”); pg. 206 (“Was [AMS] consistent it was Andy who touched her?”).

Defense counsel was ineffective for not excluding or objecting to the inadmissible identification hearsay statements. Additionally, defense counsel compounded the prejudice by eliciting similar improper, inadmissible answers. VRP 8/14/14, pg. 205. Defense counsel's deficient performance was prejudicial and warrants a new trial.

Courts review trial counsel's performance in the context of the entire record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Kolesnik*, 146 Wash. App. 790, 800, 192 P.3d 937, 943 (2008). Defense counsel's deficient performance permeated the trial. defense counsel did not file any pleadings, pre-trial motions, or lodge a single objection at trial. He did not, for instance, object, require factual findings or seek cautionary instructions before a witness testified while holding powerful symbols that conveyed the defendant's guilt; did not object to improper questioning by the prosecutor that elicited witnesses to vouch for the credibility of another witness; did not object to improper opinion testimony that invaded the province of the jury and was not based on scientific or medical support; and did not object questions and answers that elicited the identity of Mr. Blauert under the improper guise of a medical diagnosis exception to the hearsay prohibition. Finally, defense counsel inexplicably failed to timely challenge the competence of a four-year old witness and when he did it was too late. These deficiencies were

prejudicial and violated Mr. Blauert's right to a fair trial and warrant a new trial.¹⁹

6. THE TRIAL COURT ERRED FOR ADMITTING HEARSAY STATEMENTS UNDER RCW 9A.44.120.

On July 23, 2014, Judge Sperline held a hearing to determine whether AMS's statements to Bagwell, Sutton, and Winston were admissible under RCW 9A.44.120. To admit a hearsay statement made by a child under the age of 10 related to sexual contact, the court must find that the statements are reliable; and if so, the statements are admitted if the child testifies at trial or the child is "unavailable as a witness," and there is "corroborative evidence of the act." *State v. Beadle*, 173 Wn.2d 97, 111-112, 265 P.3d 863 (2011); RCW 9A.44.120. To determine reliability, courts consider a handful of factors.²⁰ Appellate courts review a trial

¹⁹ This is not the first time defense counsel has demonstrated such deficient performance. *See State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010).

²⁰ These factors include: (1) whether the declarant, at the time of making the statement, had an apparent motive to lie; (2) whether the declarant's general character suggests trustworthiness; (3) whether more than one person heard the statement; (4) the spontaneity of the statement; (5) whether trustworthiness is suggested from the timing of the statement and the relationship between the declarant and the witness; (6) whether the statement contains express assertions of past fact; (7) whether the declarant's lack of knowledge could be established by cross-examination; (8) the remoteness of the possibility that the declarant's recollection is faulty; and (9) whether the surrounding circumstances suggest that the declarant misrepresented the defendant's involvement. *State v. C.J.*, 148

court's admission of child hearsay statements for abuse of discretion. *Id.*

Trial court erred when it concluded that the alleged statements by AMS were admissible under RCW 9A.44.120.

a. Trial court erred in finding AMS's statements to Rickiesha Bagwell were admissible under RCW 9A.44.120.

Judge Sperline found that AMS's statements to Bagwell were admissible under RCW 9A.44.120. CP 48, pg. 3, ¶2. But, AMS repeatedly said that she did not talk to Bagwell about the alleged touching. VRP 7/24/14, pg. 55 ("child-hearsay" hearing); VRP 8/14/14, pg. 160. As such, the court's finding that Bagwell could testify to statements attributed to AMS, when AMS did not provide any such statements to her, was error. It is inconsistent for the court to find AMS reliable and her recollection not faulty, but then ignore her testimony that she never made any such statements to Bagwell.

The error was prejudicial. First, the court concluded that the hearsay statements were admissible under RCW 9A.44.120 in part because of "the consistent disclosure to three people." CP 48, pg. 2, ¶7. Thus, the court's conclusion was based on findings that were inconsistent with – and not established by – the record.

The court's conclusion was also prejudicial because the jury heard

Wn. 2d 672, 683-84, 63 P.3d 765, 770 (2003).

testimony from Bagwell about statements attributed to AMS. As repeatedly noted, the state's entire case revolved around statements attributed to AMS, thus her credibility was erroneously bolstered when the jury heard testimony that she made consistent statements to three different people. This is exactly how the prosecutor presented its case. VRP 8/15/15/, pg. 268-269 ("And she told her, consistent with what she had told her mother and Rickiesha Bagwell, that her no-no hurt."); pg. 280 ("But the statements of this child have consistently indicated that the defendant violated her . . .").

The court erred in concluding that Bagwell could testify under RCW 9A.44.120 about statements attributed to AMS when in fact AMS said on multiple occasions that she did not tell Bagwell anything. Given the facts of this case, the error was prejudicial and warrants a new trial.

b. Trial court erred in finding AMS's statements were admissible under RCW 9A.44.120.

In determining the statements were admissible under RCW 9A.44.120, the court concluded that: (a) AMS showed the probability of being competent; (b) the timing of the disclosures suggest reliability and belie any assertion that her recollection is faulty; (c) statements to Winston were in response to questioning, they appeared to be spontaneous; (d) the content of the disclosures contain express assertions; (e) AMS

demonstrated the mental capacity to receive an accurate impression of the event as it occurred, and demonstrated sufficient memory and an independent recollection of the alleged occurrence; (f) testimony showed that AMS had no apparent motive to lie and general character for being truthful; and (g) the disclosures were consistent, and did not appear to have misrepresented the Defendant's involvement. VRP 7/23/14, pg. pg. 65-70; CP 48, pg. 2, ¶¶1-7. The trial court erred.

(1) Probability competent.

Judge Sperline did not determine whether AMS was competent at the "child-hearsay" proceeding, but concluded without taking evidence, that she was probably competent. For the reasons demonstrated above in section C-5(b), pg. 41-49 *supra*, this was error.

(2) The timing of disclosure does not support reliability.

At the pre-trial hearing, the prosecutor presented testimony and argument that the alleged incident occurred on October 15, 2013, only a few days before disclosure. VRP 7/23/14, pg. 3-4. Based on this testimony and argument, the court found that the timing of AMS's disclosure suggested reliability and belied any assertion that her recollection is faulty. CP 48.

This finding was based on a false premise, however. After the "child-hearsay" hearing, and the court's finding, the prosecutor changed

its argument. Instead of claiming that the alleged incident and disclosure were close in time, the prosecutor argued that the alleged incident could not have occurred on October 15, 2013. VRP 8/15/14, pg. 264-265. Thus, due to the prosecutor's misleading argument, the court's finding that the timing of AMS's disclosure suggested reliability was based on untenable reasons and grounds.²¹

(3) AMS had no apparent motive to lie and had a general character for being truthful.

Based on three witnesses (Bagwell, Sutton and AMS), the trial court concluded that AMS had no motive to lie and had a general character for being truthful. The court's finding was erroneous.

Bagwell only knew AMS for a few months. VRP 7/23/14, pg. 13. Nevertheless, she testified that AMS was a truthful child. *Id.* pg. 34. Bagwell also testified, however, that AMS made up stories that were untrue, stories about fairies, being a doctor and just kid stuff. VRP 7/23/14, pg. 18. Sutton, AMS's mother, testified that witness was a truthful child, but did tell tall tales. VRP 7/23/14, pg. 34.

²¹ It was improper for the prosecutor to argue inconsistent positions, before two separate judges. See *Russell v. Rolfs*, 893 F.2d 1033 (1990) (Judicial estoppel, also referred to as doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process); quoting *Religious Technology Center v. Scott*, 869 F.2d 1306, 1311 (Hall, J., dissent)(9th Cir. 1989).

Although testimonial competence, which includes the ability to understand the difference between the truth and a lie and obligation to speak truthfully, is not a factor in determining reliability under RCW 9A.44.120, the court could consider the child's testimony to determine a general character of being truthful. *C.J.*, 148 Wn.2d at 683-684. Here, the judge did not administer AMS the oath pursuant to ER 603.²² After some preliminary questions about AMS's birthday party, the prosecutor asked whether she knew the difference between the truth and a lie, to which AMS replied by shaking her head negatively. VRP 7/23/14, pg. 45-47. When asked again whether she knew the difference between the truth and a lie, AMS shook her head negatively, and then said "no". *Id.*²³

There were insufficient facts to make a factual finding that AMS had a general character for being truthful.

(4) AMS demonstrated mental capacity to receive accurate impression of events and consistent disclosures.

As noted above, AMS did not demonstrate the mental capacity to receive accurate impressions of events. Section C-5(b), pgs. 41-50, *supra*.

²² ER 603, Oath or Affirmation, reads: "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so."

²³ *See also* VRP 7/24/13, pg. 48, when AMS said it would be true that there were alligators in the courtroom.

Nor were her disclosures consistent. AMS, when asked whether she knew anyone in the courtroom, said she knew her mother, her dad, Ms. Bagwell and Ms. Bagwell's husband. VRP 7/23/14, pg. 48. When asked whether she knew anyone else in the courtroom, including Mr. Blauert, AMS shook her head negatively. *Id.* It wasn't until the prosecutor lead AMS did she identify Mr. Blauert. VRP 7/23/14, pg. 49-51.

The disclosures were not consistent either. For instance, AMS indicated the touching was over her clothes, and then underneath, but did not touch her skin (VRP 8/14/14, pg. 156-158); that it was inside her body and made her bleed, an assertion not made to Bagwell or her mother, and an assertion not corroborated by either physical or medical evidence or testimony. VRP 7/23/14, pg. 52-53; pre-trial exhibit 1/trial exhibit 3. AMS also said that she was touched over her clothes and that she was bleeding. VRP 7/23/14, pg. 52; 55.²⁴

The court erred when it relied on statements allegedly made to Bagwell when AMS repeatedly denied ever making such statements. Additionally, for the reasons discussed above, the trial court's finding to admit the hearsay statements under RCW 9A.44.120 were erroneous.

²⁴ No evidence supported that she was bleeding. For instance, AMS later indicated that this occurred in the Mr. Blauert's bed, but no sheets or other physical evidence was admitted into evidence to support her assertion.

7. CUMULATIVE ERROR DENIED MR. BLAUERT A FAIR TRIAL

This trial was fundamentally unfair for the numerous reasons set forth above. However, the cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal. *Chambers v. Mississippi*, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d297 (1973); *Parle v. Runnels*, 505 F.3d 922 (9th Cir., 2007). The combined effects of error may require a new trial even when those errors individually might not require reversal. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a constitutionally fair trial under the federal and state constitutions. *Mak v. Blodgett*, 970 F.2d 614 (9th Cir. 1992); *United States v. Frederick*, 78 F.3d 1370, 1381 (9th Cir. 1996).

Although, here, each error challenged on appeal, including the insufficient evidence to establish essential elements, denial of the constitutional right to a unanimous jury, denial of a fair trial by allowing a witness special dispensation without factual findings, improper vouching and expert testimony, inadmissible hearsay statements, and deficient counsel, should result in a new trial or dismissal of a conviction; the

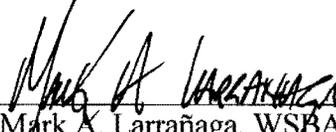
combined and overwhelming prejudice of all the errors considered together should require a new trial even if the individual errors do not.

D. CONCLUSION

Mr. Blauert respectfully submits that his conviction should be reversed and remanded for dismissal or a new trial.

Respectfully submitted,

DATED this 11th day of May 2015



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Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 2015, I served via United States mail the

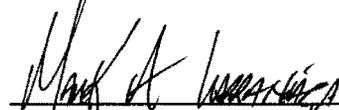
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