

No. 96034-8

No. 48855-8-II

#15-1-00660-8

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

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STATE OF WASHINGTON,

Respondent,

v.

RICHARD IVER SVALESON, JR.,

Appellant.

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

---

The Honorable Kathryn J. Nelson, Judge

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*APPELLANT'S OPENING BRIEF*

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A. ASSIGNMENTS OF ERROR

1. The prosecution failed to prove all the essential elements of first-degree child molestation and reversal and dismissal is required.
2. The prosecution used an improper presumption and effectively shifted a burden of proof to appellant, in violation of appellant's state and federal due process rights.
3. Instruction 9 was an unconstitutional comment on the evidence, in violation of Article 4, § 16. Instruction 9 provides:

In order to convict a person of child molestation in the first degree as defined in these instructions, it shall not be necessary that the testimony of the alleged victim be corroborated. The jury is to decide all questions of witness credibility.

CP 56.

4. Mr. Svaleson, Jr., was deprived of his rights to a fair trial and trial by jury by admission of improper opinion testimony on guilt, veracity and credibility, and the state cannot meet its heavy burden of proving the constitutional error "harmless."
5. The prosecutor committed repeated, flagrant, ill-intentioned and prejudicial misconduct which could not have been cured by instruction.
6. Mr. Svaleson, Jr., was deprived of his Article 1, § 22, and Sixth Amendment rights to effective assistance of counsel.
7. Even if reversal and dismissal for insufficiency was not required and even if each individual error standing alone would not compel reversal, the cumulative effect of the trial error denied appellant a fair trial.
8. The sentencing court acted outside its statutory authority and in violation of Mr. Svaleson, Jr.'s First Amendment and due process rights in ordering conditions of community custody 14, 15, 21, 23, 27 and 29, contained in Appendix H to the judgment and sentence, which provide:
  14. Do not purchase, possess, or consume alcohol.
  15. Do not enter into any location where alcohol is the

primary product, such as taverns, barns, and/or liquor stores.

...

21. Submit to polygraph testing upon direction of your community corrections officer and/or therapist at your expense.

...

23. Do not go to or frequent places where children congregate, (I.E. Fast-food outlets, libraries, theaters, shopping malls, play grounds and parks, etc.) unless otherwise approved by the Court.

...

27. You are also prohibited from joining or perusing any public social websites (Face[sic]book, Myspace, *Craigslist*, etc.), Skyping, or telephoning any sexually-oriented 900 numbers.

...

29. Do not patronize prostitutes or any businesses that promote the commercialization of sex.

CP 100-102.

9. The sentencing court did not follow the mandates of RCW 10.01.160 and failed to consider appellant's actual ability to pay prior to imposing legal financial obligations, contrary to *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

B. QUESTIONS PRESENTED

1. An essential element of first-degree child molestation is that the touching must be for the purposes of "sexual gratification."

Did the state fail to meet this burden of proof and improperly shift a burden to appellant when it presented no evidence of such intent except for the "common sense" idea that the touching alone proves the intent unless the defendant has sufficiently explained it away?

2. The only evidence presented by the prosecution was based on the declarations of the alleged victim that there had been a fleeting touch on her private parts by her great-uncle when she was on his lap in the kitchen one day. Two of the three touches were over clothing. There was no other evidence to support the state's case, such as a threat,

demand or request “not to tell,” or behavior by the victim consistent with being touched improperly.

Was Instruction 9 an improper comment on the evidence where it effectively told the jury that the testimony of a particular witness is legally sufficient to convict, when the weight, sufficiency and credibility of evidence is exclusively the province of the jury and was the sole issue at trial?

3. Was direct or near-direct improper opinion testimony on guilt, veracity or credibility elicited when expert witnesses testified that they used interviewing techniques designed to provide “accurate” information, then reported the claims made by the victim? Was it further improper opinion testimony when a therapist gave a diagnosis indicating her belief that abuse had occurred?
4. Did the prosecutor commit serious, flagrant and prejudicial misconduct in misstating crucial law to the jury which went directly to the only issue in the case?
5. Was counsel ineffective in failing to object to repeated improper opinion testimony and highly prejudicial misconduct?
6. Did the sentencing court err in imposing conditions of community custody which were not statutorily authorized or “crime-related,” and several of which violate the First Amendment and due process?
7. Did the sentencing court err in failing to follow the mandates of RCW 10.01.160 and not considering appellant’s actual ability to pay prior to imposing legal financial obligations?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Richard I. Svaleson, Jr., was charged by information with first-degree child molestation. CP 1; RCW 9A.44.083. Pretrial and trial hearings were held before the Honorable Judge Kathryn Nelson on January 6, February 23-25 and 29, March 1-3 and April 15, 2016, after

which the jury found appellant guilty as charged. CP 60.<sup>1</sup> On April 15, 2016, Judge Nelson imposed a standard-range indeterminate sentence. CP 82-96. Mr. Svaleson, Jr., appealed and this pleading follows. See CP 103.

2. Relevant facts

E. B. was 10 years old and in fifth grade on December 30, 2014, when she told her mom Richard Svaleson, her dad's nearly 70-year old uncle, touched her under her shirt and over her jeans on her "private parts" after she sat on his lap. RP 501-502.

E.B. and her older sister A.B., then 14, had been spending time at their "grandmother's" house, where Svaleson lived. RP 340-41. This was nothing new, they had been doing it for years. RP 340-41, 347, 380-82. Teresa and Gary<sup>2</sup> Brandt, their parents, would call E.B.'s great-grandmother and dad's mother, Margaret Svaleson, to arrange it. RP 340-41, 347, 380-82, 391-92.

Both girls had been going there for years, since E.B. was about 8 or 9 and A.B. was about 11. RP 393. From about 7 in the morning to about 4:45 or 5 in the afternoon, with some frequency, Margaret took care of them. RP 392-93, 424-25. Richard, Gary's uncle, was not involved in the babysitting, although he was usually there and lived there with his mom.

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<sup>1</sup>The verbatim report of proceedings consists of 10 volumes, which will be referred to as follows:  
pretrial proceedings of January 6, 2016, as "PRP;"  
the chronologically paginated proceedings of the jury trial of February 23, 24, 25, 29, March 1 and March 2 (2 volumes), 2016, as "RP;"  
the verdict on March 3, 2016, as "2RP;"  
the sentencing on April 15, 2016, as "SRP."

<sup>2</sup>Witnesses who share the same last name (such as the parents) - including the appellant - will be referred to herein by their first names for clarity. No disrespect is intended.

RP 391-94.

On December 30, 2014, the day E.B. would later say involved improper touching, Richard, who had not gone to high school, was nearly 70 years old. RP 623. That day, Teresa dropped the kids off as usual at about 7 a.m. RP 349, 399.

At trial, E.B.'s memory of the events at trial was sparse and she did not remember many facts. RP 351-52. She did not remember whether it was before or after lunch when they arrived that day. RP 352. She did not remember what she and her sister watched on T.V., or what they usually watched there. RP 350. At one point, she appeared not to remember where the T.V. was even situated in the house. RP 350-51. While she ultimately was able to identify sets in two different rooms, she could not remember where she watched T.V. that day. RP 350-51.

At some point, however, E.B. was in the kitchen getting something to eat. RP 352-53. Richard was also there, sitting on a "spinning chair," reading the newspaper. RP 352-53, 379. E.B. sat down on his lap. RP 352-53, 379. She liked to sit on the spinning chair, because it was "[k]ind of fun." RP 379-80. It was not unusual for the 10-year-old to sit on her great-uncle's lap. RP 353. Although she did not do it every time she went to the house, her mom had even noticed E.B. there several times when she came to pick the girls up after work. RP 410.

Never had E.B. said anything about anything happening or making her uncomfortable or feeling improper with Richard in any of the many times she had sat on his lap before. RP 410. At trial, however, the prosecutor asked if something had happened that late December day. RP

353-54. E.B. responded, “[h]e was touching my private areas,” which she said were “[n]ear my chest, near my legs, and near my back.” RP 353-54. She then identified each for their “restroom” purpose, except for the chest. RP 354.

According to E.B., Richard’s hand touched her skin near her chest, under her shirt. RP 357-58. She did not remember if she was wearing anything under or over the shirt. RP 357-58. When asked if his hand touched “the skin of your private area that is your chest,” she responded, “yes.” RP 358.

E.B. said that she then pushed his hands down. RP 358. She did not remember if it was right away or a moment or a “few minutes” later. RP 358. She was sure, however, that she did not say anything to him. RP 358. And she did not remember him saying anything or doing anything else at the time. RP 358.

At that point, E.B. testified, he rubbed “near my legs.” RP 358-59. When asked for further information, she said it was “[i]n between my kneecap.” RP 358-59. The prosecutor then asked, “[w]hen he did that, did he touch near or on your private area where you go number one,” but E.B. responded, “[n]o.” RP 359.

The prosecutor pursued, asking, “[a]re you saying you don’t remember because you don’t want to talk about it or because you really don’t remember?” RP 359. E.B. then said that she really did not remember. RP 359.

A little later, however, when the prosecutor asked if “he touched any of your other private areas other than your chest,” E.B. now said,

“[y]es.” RP 369. When asked “[w]hich private areas,” she said, “[a]ll of them.” RP 369. She then said it happened on the same day. RP 369. But when the prosecutor asked if it was that “same time” as the alleged touching in the kitchen, she said, “[n]o.” RP 369. E.B. at first did not remember what she was wearing but after saying she “used to always wear jeans,” she then agreed that she was wearing them that day. RP 360-61. She then said both of those touches were in the kitchen, on her “number one and number two” areas, and over her jeans. RP 369. The touches made her uncomfortable because she knew her private places. RP 378-79.

E.B. knew that A.B. and Margaret were right nearby, watching T.V. in the living room. RP 360-363. The kitchen was open and there was no door between that and the living room, so anyone could have walked into the kitchen at any moment. RP 385.

When E.B. left the kitchen and went into the living room, she said nothing to either Margaret or A.B. about anything weird or improper she thought had just occurred. RP 362-63. E.B. and her sister both had their mom’s phone number but E.B. made no effort or request to call. RP 381. At trial, E.B. admitted that she knew how to get ahold of her parents when she needed to or was afraid. RP 383-84. She did not remember why she said nothing to Margaret or A.B., and remembered nothing about being scared, even when asked very directly at trial. RP 384.

Teresa Brandt came and picked up the girls at the usual time that evening. RP 364-65. As they were driving home, E.B. said something about what she thought had occurred. RP 364-65. E.B. did not remember exactly what she said. RP 364-65. Teresa called her husband on the phone

to say the kids would not be going over to Margaret's house the next day and, when he wanted to know why, she demurred, not wanting to say anything over the speakers in her car. RP 401.

Gary Brandt said his "first instinct" when he heard what might have happened was to grab his gun. RP 431, 453. He telephoned his mom in Nebraska, he said, for a "calming voice." RP 431, 453. When Teresa and the girls got home, they all ended up on the phone. RP 365-66, 403, 431.

Gary admitted his mom had no counseling, treatment or therapy experience. RP 453-54. Neither did Gary or his wife. RP 454. They nevertheless gathered around the phone with E.B. and discussed her claim with her, all together. RP 402, 454-55. Teresa admitted that her husband was visually upset when they were all gathered around the phone. RP 454-55. She also conceded that "nana's" voice was also clearly upset. RP 420. E.B. heard all and saw all of that. RP 402.

When asked about that phone call and whether the whole family was "involved in what steps should be taken now," Gary corrected, "[n]o." RP 453. He then declared, "[t]he family **was involved with my daughter's recollection of what transpired.**" RP 453 (emphasis added).

At some point, when they started talking about the alleged touching, Gary felt he could listen no more so he left with his gun. RP 433, 455. He was headed there but spoke to his wife and mother in several phone calls and they talked him into calling police, who then talked him into coming to report the claims to them instead. RP 433, 454-55. Once at the police station, Gary spoke to Tacoma Police Department ("TPD") Sergeant Eric

Roberts, who suggested bringing E.B. in. RP 367, 405, 515. Teresa brought both girls and, at Roberts' request, took E.B. into a private room to examine her physically. RP 515-18. Teresa found no injuries, marks, bruises, redness, irritation or anything similar. RP 515-18.

Apparently while this was going on at the station, Roberts told an officer, Jesse Jahner, to go "keep an eye on" the Svaleson house while a "possible crime" of "child molest of some sort" was being investigated. RP 482, 484-86. Eventually, Roberts joined Jahner and they approached the house. RP 487, 509. After a brief conversation with "a woman" at the door - presumably Margaret - the officers entered the house. RP 488. Richard approached, identifying himself and telling them, "I know why you're here." RP 488.

By that time, the officers would later learn, Richard had gotten a phone call from his sister in Nebraska. RP 502-503. After the speakerphone conversation with E.B. and her parents, Richard's sister had apparently hung up, called Richard and accused him of improper touching, then hung up. RP 502-503.

Even though he knew he was facing a heinous claim, Richard had not fled. RP 503. In fact, an officer admitted, Richard spoke with the officers freely. RP 503. While he declined to write a handwritten statement, he explained that his writing and spelling were so bad "it would look Chinese." RP 488-89. Because the officers did not have a recording device, however, Jahner just took notes. RP 491.

Jahner said Richard described E.B. as "a real pain in the ass," because she always followed him around the house, sat on his lap and

bugged him. RP 493. It often occurred when he was sitting in the recliner chair in the living room, and she would also lean back and rub his head and face with her hands. RP 493. It made him annoyed and he would get up and move. RP 493-94.

That day, he told the officer, he was in the living room in his recliner and she climbed up. RP 494. It bugged him, so he got up to get a cup of tea. RP 493-94. E.B. followed him into the kitchen, where he sat on a wooden chair. RP 494. She then sat on his lap or left knee and started leaning back and playing with his face and hair again. RP 495.

E.B. said she was “ticklish,” so Richard tickled her around her ribcage area under her shirt, where she was ticklish. RP 495-96. After a moment, he pushed her off and got up to pour some more tea. RP 495-96. She followed him and, when he sat back down, she sat on him again, saying, “I’m ticklish everywhere,” so he tickled her back and she laughed and squirmed around. RP 496.

At this point, Officer Jahner asked Richard if E.B. had said anything and Richard said she had mentioned his hands were cold, which was true. RP 496. Richard said her back was warm and felt nice. RP 496. Jahner asked if Richard had felt a “bra strap” but Richard had not noticed anything like that. RP 496.

Jahner then asked specifically if Richard “may have accidentally grazed the juvenile’s breast area or accidentally touched her nipple.” RP 496. Richard responded, “[y]eah, my left thumb did,” and, when asked again, said it “touched the edge” of where her “tit area” would be if she had any. RP 497. When that touch occurred, Richard said, E.B. was still

laughing and squirming at being tickled. RP 498. The officer asked if Richard had tickled her anywhere else and he said he had, on her upper leg. RP 498-99. The officer then asked him to clarify and established that the tickling had been over clothing and on the leg. RP 499.

When asked if “he may have touched near her vagina on accident,” Richard was clear in his “no.” RP 498. The officer also said Richard had pinched her butt through her jeans and told her to get off his lap because she had a “bony ass.” RP 498. The officer then asked Richard if “he was turned on or got aroused” by E.B. RP 498. Richard said he was not. RP 498. In fact, the officer recalled, Richard said E.B. was “not womanly” in comparison with her older sister, A.B., who was not so skinny. RP 498.

At first, the officer claimed he had asked about if Richard was “aroused” because of the “womanly comment,” which the officer then had wanted to clarify. RP 503-504. But the officer then admitted that, in fact, he had asked the “arousal” question *before* the “womanly” comment had been made. RP 504. Counsel then tried several different ways of asking why the officer had asked the question, but the prosecution’s objections were sustained until counsel asked point blank, “[w]hy did you ask him that question?” RP 505. The officer then returned to his claim that it was in follow up to the “womanly” comment - even though the “womanly comment” was made in *response* to the “arousal” question itself. RP 505.

Ultimately, confronted again with the accuracy of that claim in light of the timing, the officer agreed that his testimony could not be correct. RP 505-506.

Finally, the officer just said he had asked the “arousal” question as

“a part of the investigation,” and that “something that obviously triggered” him to “investigate to see if he was turned on by it.” RP 506. The officer said he was asking a variety of questions to try to see if a crime had been committed. RP 506-507.

Richard told the officer that, after E.B. got up, Richard went upstairs for awhile, then went out to eat. RP 499. The girls were still there when he returned, about 2:30 p.m., and he sat in his reclined in the living room. RP 499-503. E.B. came over and sat on his left knee until he eventually pushed her off and went upstairs. RP 499. He did not tickle her that time. RP 499. Later that evening, he got a phone call from his sister in Nebraska, who accused him of “molesting the child.” RP 499.

Richard told the officer, “[i]f tickling her was molestation, then I guess I learned my lesson.” RP 499. The officer clarified and Richard said, “I was just tickling her. I guess I won’t tickle kids anymore.” RP 499-500.

A few days after the incident, E.B. was taken to speak to a forensic interviewer for the prosecutor’s office, Stacia Adams. RP 368, 408. With Adams, E.B. pointed to her chest as a place that Richard had touched and said also that her private areas were involved, where she peed and pooped from. RP 592. Yolanda Duralde, medical director of the Child Abuse Intervention Department at Mary Bridge Hospital, conducted a physical on E.B. that same day and found nothing. RP 600-602, 618. Nevertheless, Duralde asked E.B. questions about the allegations and E.B. repeated them, reported a nightmare and talked about wanting to sleep with her older sister since. RP 609.

E.B. was also referred for ongoing therapy with Linda Skinner. RP

530-31. Over defense objection, Skinner was allowed to tell the jury that E.B. had been brought in for treatment because she had reported an incident of her great-uncle “touching her inappropriately,” and “Mom reported concerns and changes in behavior, difficulty with sleeping, nightmares, worry, difficulty controlling worry, fears of returning to her great-grandmother’s house, and some restlessness.” RP 536-37.

E.B. started therapy in mid- to late-January. RP 546. At an appointment in February, Skinner admitted, the therapist specifically discussed with E.B. what criminal charges would likely be brought against Richard. RP 546. Teresa was also present and participated in that conversation, explaining to her daughter “the meaning of the charge.” RP 546.

At another appointment, on February 9, Skinner gave the child a worksheet on sexual abuse. RP 552-53. The worksheet had a list of different types of sexual acts and the child was told to read the list and then “choose from things that she may have experienced.” RP 542, 552-53. At trial, the therapist admitted that E.B. had “circled” an example of abuse of the list which then that led Skinner to question E.B. further about “sexual abuse by finger penetration.” RP 552-53. It was at that point that E.B. first made the claim that “her uncle grabbed her butt and squeezed it and grabbed her vagina and squeezed that with both of his hands.” RP 544, 553. Skinner also testified that E.B. told her at some point, contrary to what E.B. and Richard said at trial, that “her great uncle called her over.” RP 543.

E.B. saw Skinner from January 15 to April 6, 2015, about once a

week. RP 544-45. She came back a few times before trial due to anxiety about testifying. RP 544-45. Both Teresa and Gary mentioned some small changes in E.B.'s behavior and Gary thought they lasted about four weeks. RP 422, 449-450. His wife told him E.B. said she had nightmares and Gary thought the pre-teen seemed a "little more" moody and withdrawn, but only "at times." RP 448-49.

Richard Svaleson, Jr., confirmed the events as he told them to the officer. RP 629-634. He testified that E.B. climbed in his lap a little more than usual that day, he had gone into the kitchen, she had followed and that she had then sat on his lap. The touching occurred when he tickled her after she said something about being ticklish. RP 630. He went up under her armpit, she turned at the same time and, he said, "that was it." RP 630. At trial, he said he had not tickled or touched her rear end, though he had pinched her bottom to get her to climb off his lap. RP 631. His knees were hurting because she was sitting on them and she was "bony." RP 631.

The entire incident lasted maybe ten seconds. RP 631.

Richard went upstairs after that, then out to lunch. RP 631-32.

When he returned, after the girls were picked up by their mom, Richard got a phone call from his sister in Nebraska, accusing him of improper things before hanging up on him. RP 632-33. Richard was clear that he not touch E.B. to satisfy "any sexual desires" on his part or hers. RP 634.

D. ARGUMENT

1. THE CONVICTION SHOULD BE REVERSED AND DISMISSED

There is no right to a "perfect trial," but the accused are entitled to a

fundamentally fair proceeding and conviction based on constitutionally sufficient evidence. See In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Cleveland, 58 Wn. App. 634, 648, 794 P.2d 546, review denied, 115 Wn.2d 1029 (1990), cert. denied, 499 U.S. 948 (1991). In addition, a fair trial requires an impartial jury, untainted by improper instruction or misconduct. See Smith v. Phillips, 455 U.S. 209, 102 S. Ct. 949, 71 L. Ed. 2d 78 (1982) (fairness of trial is a “touchstone of due process”).

The trial in this case fell far short. First, reversal and dismissal is required, because the state failed to present sufficient evidence to prove all the essential elements of the crime, beyond a reasonable doubt. Second and in the alternative, Mr. Svaleson, Jr., was denied a fundamentally fair proceeding below, because there was improper comment on the evidence, the jury repeatedly heard improper opinion testimony on guilt, veracity and credibility, the prosecutor committed multiple acts of flagrant, serious and prejudicial misconduct and counsel was prejudicially ineffective. Either separately or taken together, these errors would compel reversal and remand for a new, fair trial, even if insufficiency did not compel reversal.

- a. The prosecution failed to prove the essential “intent” element of the crime and used an improper presumption to shift the burden of proof

Due process mandates that the state bear the burden of proving a citizen’s guilt beyond a reasonable doubt. See, Winship, supra; State v. Farnsworth, 185 Wn.2d 768, 374 P.2d 1152 (2016). It is also well-settled that, where the state fails to meet its burden of proof, this Court is required to reverse and dismiss. See State v. Green, 94 Wn.2d 216, 221, 616 P.3d

628 (1980).

In this case, Mr. Svaleson, Jr., was charged with first-degree child molestation. CP 1. That crime is defined in RCW 9A.44.083 as follows:

A person is guilty of child molestation in the first degree when the person has, or knowingly causes under person under the age of eighteen to have, sexual contact with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.083(a). “Sexual contact” is further defined as a touching of sexual or other intimate parts “for the purposes of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2); see In re Welfare of Adams, 24 Wn. App. 517, 520, 601 P.2d 995 (1979).

Thus, to meet its constitutionally mandated burden of proof, the prosecution was required to prove not only that there was a “touch” on “sexual or other intimate parts” but also that the touching was with the intent of “gratifying sexual desire.” State v. Stevens, 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006).

The prosecution failed to meet that burden here, even taking the evidence in the light most favorable to the state, applying all reasonable inferences therefrom and asking if any rational trier of fact could have found the essential elements to have been proven, beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Green, 94 Wn.2d at 221-22.

In some situations, where there is an unrelated adult who is not a caretaker and that person touches the intimate parts of a child under their clothes, courts have held those facts *may* support an inference that the touching is for sexual gratification. See, e.g., State v. Wilson, 56 Wn. App.

63, 68, 782 P.2d 224 (1989), review denied, 114 Wn.2d 1010 (1990).

But such an inference is *not* proper where the touching is through clothing, or involves “intimate parts of the body other than the primary erogenous areas.” State v. Powell, 62 Wn. App. 914, 917, 816 P.2d 86 (1991); State v. Johnson, 96 Wn.2d 926, 639 P.2d 1332 (1982), overruled in part and on other grounds by, State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995) (unrelated male with no caretaking function wiped the genitals of a 5-year-old girl with a washcloth, that alone likely would have been insufficient to prove he acted with the required purposes of “sexual gratification,” had he not also then made the girl perform fellatio).

Instead, where the touching is over clothing or involves areas other than the “primary erogenous” spots, there must be more than just evidence of touching for there to be sufficient evidence to support an inference that the touching was for sexual gratification. For example, the evidence was sufficient to prove the required intent when there were three incidents, one involving touching was on a boy’s “zipper area” on the outside of his pants and 5-10 minutes of “rubbing.” State v. Camarillo, 115 Wn.2d 60, 63, 794 P.2d 850 (1990). It was also enough where semen stains were found on the infant’s “booties” and “whitish liquid” on the face, chest and stomach. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986).

In contrast, in Powell, the evidence was not constitutionally sufficient to prove the essential element of intent of sexual gratification. 62 Wn. App. at 916. In that case, the victim testified that the unrelated defendant, a man she knew as “Uncle Harry,” had hugged her chest and touched her thighs and underwear while she was seated on her lap and in

assisting her off. 62 Wn. App. at 916. She also disclosed another incident where he had touched both of her thighs over her clothes when alone with her in his car. Id. At trial, Mr. Powell testified that he might have touched the child but not with the required intent. 62 Wn. App. at 917-18.

On review, Powell argued that the state had not met its constitutionally mandated burden of proving the required essential element of intent, and the Court of Appeals agreed. 62 Wn. App. at 917. The evidence was “equivocal,” the Court noted, the touches “fleeting,” the child was “clothed on each occasion and the touch was on the outside of her clothes.” 62 Wn. App. at 917-18. The Court also found it significant that there were “[n]o threats, bribes or requests not to tell [which] were made.” 62 Wn. App. at 918.

Just as in Powell, here the evidence was highly equivocal. The incident occurred in a kitchen which had no door, steps away from both Richard’s mom and E.B.’s older sister, who may have been able to see in, depending on who you asked. There was no claim that Richard tried to take E.B. upstairs where they could have been more private. There was no evidence that he tried to get E.B. to touch him in any way, or that he was aroused in any way. The touches were fleeting and two of the three outside the clothes. And just as in Powell, there was no evidence of any threats or promises or even a request to “keep quiet.”

Even more than in Powell, here there was simply insufficient evidence to prove the essential element that the touching was done with the intent of sexual gratification. Although she recognized the relevant parts of her body and that touching them was improper, the touching did not make

E.B. so concerned, uncomfortable or upset that she sought help from her “grandmother” or her older sister after it happened. In fact, she did not even mention it - even though they were right there. She did not seek to call her mom, even though she knew how to do that if she needed help or felt scared or unsafe. There was no evidence whatsoever that she did anything different the rest of the hours and hours she remained in the home.

Unlike in Powell, of course, here there was an allegation of a momentary touching under the shirt in addition to the two fleeting alleged touches over the clothes. But Powell also involved an additional claimed incident in a truck. 62 Wn. App. at 918. Here, there was one incident. There were no other claims or accusations involving E.B. or her older sister A.B. - and that was despite both girls having been in the home on a regular basis for at least 11 *years*. No claims of anything improper had ever been raised with either girl, in all that time, until this day.

If anything, the facts of this case compel reversal even more so than in Powell. Even applying the relatively forgiving standard of review used on appeal, the Powell Court was compelled by due process and its constitutional duties to reverse and dismiss the unsupported conviction. This case compels such reversal as well.

Indeed, the prosecutor’s arguments below actually prove this point. Instead of citing evidence proving such intent, the prosecution relied on an improper effective presumption and shifted the burden to Mr. Svaleson, Jr., to *disprove* the required intent. The presumption the prosecution urged was that *any* touching of areas like this on a youth is *necessarily* for “sexual gratification” because “what other reason could there be?” RP 651. Put

another way, the prosecutor said, the jury should assume based on “common sense” that the touching was for “sexual gratification” because there was “no reasonable explanation” for why it would have occurred *if not* for that purpose. RP 678. And in rebuttal closing argument, the prosecutor again urged the jurors to rely on “reasonable inference based on your common experience” in finding the touching was for sexual gratification, noting it had not been sufficiently explained away. RP 686-87.

The inference that the touching must have been for sexual gratification simply because it occurred does not withstand review under Powell. Further, it amounted to an effective improper presumption. While the prosecution may use evidentiary presumptions to prove its case, constitutional limits still apply. See State v. Cantu, 156 Wn.2d 819, 822, 142 P.3d 725 (2006); Sandstrom v. Montana, 442 U.S. 510, 523-24, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979). A mandatory presumption requiring the jury to presume a fact based upon a proved fact may not be used to relieve the state of its constitutionally mandated burden of proof. See State v. Hayward, 152 Wn. App. 632, 642, 126 P.3d 354 (2009); Sandstrom, 442 U.S. at 514. And even permissive inferences - those allowing but not requiring the jury to presume a fact based upon one which is proved - can run afoul of the constitution. State v. Deal, 128 Wn.2d 693, 699-700, 911 P.3d 996 (1996).

As a result, where a permissive inference is only *part* of the state’s proof of an element, “due process is not offended if the prosecution shows that the inference more likely than not flows from the proven fact.” Deal,

128 Wn.2d at 699-700. Where, however, the inference is being used as the “sole and sufficient” proof of an essential element of the crime, there must be proof that the presumed fact is true, beyond a reasonable doubt, as an inference from the proven fact. See State v. Brunson, 128 Wn.2d 98, 107, 905 P.2d 346 (1995).

The inference here was that any time the state has proved that touching of the relevant areas has occurred, the jury should presume the state has also met its burden of proof of the required intent. Not only does that run afoul of the holding of Powell and due process it effectively rewrites the law. First-degree child molestation is not a strict liability crime. See, e.g., State v. Deer, 175 Wn.2d 725, 731, 287 P.3d 539 (2012). Proof that the touching was done with intent to gratify sexual desire was required. RCW 9A.44.010(2).

The prosecutor also shifted a burden to Mr. Svaleson, Jr., by repeatedly telling jurors that he had not sufficiently explained the touching to rebut the “common sense” apparent presumption that such touching is for the required intent. *See argument re: misconduct, infra.*

There is no question that child molestation is an abhorrent crime. That is why the consequences include potentially life in prison for even a first offense. But our zeal to protect must not overcome our duty to the law and justice. The Legislature made the crime of child molestation a specific intent crime, requiring the state to prove more than just a touch in a private place but also, beyond a reasonable doubt, that the touch was done with the intent of “sexual gratification.” The prosecution simply failed to present constitutionally sufficient evidence that the fleeting touches in the open

kitchen here were done with the required intent. This Court should reverse and dismiss the resulting conviction for first-degree child molestation as constitutionally infirm.

b. In the alternative, reversal and remand for a new trial is required based on the other trial errors

Even if there had been sufficient evidence, reversal and remand for a new trial would be required based on the multiple trial errors, either separately or based on their corrosive cumulative effect.

i. Instruction 9 was an unconstitutional comment on the evidence

Article 4, § 16 of the Washington Constitution prohibits a judge from making a “comment on the evidence.” See State v. Jacobsen, 78 Wn.2d 491, 495, 477 P.2d 1 (1970). Under that provision, “judges shall not charge the jury with respect to matters of fact, nor comment thereon, but shall declare the law.” Art. 4, § 16; State v. Brush, 183 Wn.2d 550, 353 P.3d 213 (2015). The purpose is to prohibit a judge from “conveying to the jury his or her personal attitudes toward the merits of the case” or “instructing a jury that matters of fact have been established as a matter of law.” See State v. Jackman, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006). Further, it prevents a judge from providing instructions which single out specific evidence or emphasize particular facts of the case. See State v. Lewis, 6 Wn. App. 38, 41-42, 491 P.2d 1062 (1972).

In this case, reversal and remand would be required even if the evidence had been sufficient, because Article 4, § 16, was violated when the court gave jury instruction 9, over defense objection.

a) Relevant facts

Instruction 9 was proposed by the prosecutor, who admitted it was a non-standard instruction she herself had drafted and never given before.

RP 524. The instruction provided:

In order to convict a person of child molestation in the first degree as defined in these instructions, it shall not be necessary that the testimony of the alleged victim be corroborated. The jury is to decide all questions of credibility.

RP 524. Counsel objected, noting that the jury instruction committee had itself recommended against giving such an instruction. RP 524, 559-60. Further, he pointed out, the issue was more of a question of “sufficiency of the evidence” rather than a legal issue which required instruction RP 524, 559-60. When the judge expressed concern that some prospective jurors had said they might need more than just one person’s word to convict, counsel responded that, while that was true, the parties had then selected jurors who had said they could follow the law. RP 560. The law was set forth in the “to-convict,” counsel argued, so the additional instruction was not necessary. RP 561-62.

The prosecutor said she had based her instruction on a statute but admitted that the issues was an issue of sufficiency of the evidence. RP 562. She argued that the instruction was “acknowledging here the hurdle that the State faces in proving these types of cases.” RP 562-63. The prosecutor complained that jurors “don’t like” when there is no evidence other than one person’s word. RP 562-63. As a result, the prosecutor argued, the court should give the instruction so the jury is “properly instructed that they don’t need other evidence” to convict. RP 562.

The prosecutor admitted that the instruction was “discouraged by” the Washington Supreme Court Pattern Jury Instruction Committee. RP 562. Nevertheless, she said, the trial judge should give the instruction because the Court of Appeals would not reverse for doing so. RP 563-64. She also disputed that the instruction was “a comment on the evidence” and counsel’s argument that the instruction should not be given “in the interest of a fair trial.” RP 564, 566.

In ruling, the judge said her first instinct was to refuse to give any non-WPIC instruction. RP 568. Based on her experience in other cases, however, the judge said she could understand why the prosecutor wanted to have the instruction “in order to be able to argue its case.” RP 569. After saying she did not “want to,” she decided to give the instruction. RP 568-69.

After the instruction was read to the jury, in closing argument, the prosecutor repeatedly relied on the “non-corroboration” instruction in arguing guilt. First, the prosecutor said that if jurors believed E.B., they were “satisfied beyond a reasonable doubt.” RP 652. She then reminded the jury that the lack of corroborating evidence should not be “surprising” given the allegations, and that the testimony of E.B. was “enough.” RP 655-56. Emphasizing the “non-corroboration” instruction, she reminded the jurors, “[y]ou are being told in these instructions it is the law. That’s Instruction No. 9. That is enough. No corroboration is necessary. To convict the defendant of committing this crime, no corroboration is necessary.” RP 658.

For his part, counsel argued there was insufficient evidence to prove

the crime, such as E.B.'s conduct after she said she had been improperly touched, including not being "withdrawn or angry or confused or hiding," not going to her caregiver who was right there, not trying to use a phone with her sister to get help, and other facts. He also noted there was no evidence of threats, promises or requests to "keep silent," that Richard had not fled after learning what he was accused of and freely talking to the police. He suggested that E.B. misinterpreted things and concluded that there was a lack of evidence, the jury's "job is not to fill in the missing pieces of a puzzle," and the prosecution had failed to prove its case. RP 660-81.

In rebuttal closing argument, the prosecutor dismissed the defense questions about the lack of evidence and evidence inconsistent with guilt by reminding the jurors of the non-corroboration instruction. RP 684-85. The prosecutor declared:

And who knows why people do what they do or don't do what they do. That's actually one of the questions that maybe you all might have is the why of lots of things. **Even like why would the defendant do this, why did the defendant do this. That's not an element. You don't have to prove it. It may be a question that you all have, but it doesn't have to be answered.**

RP 685 (emphasis added). The prosecutor again said all the jury had to decide was "do you believe E[.]B. that her private parts were touched?" RP 688. The prosecutor went on:

Finally, defense counsel said there are reasonable doubts about this case. I submit to you there is not. **Once again, the instructions tell you there's no need for corroboration. It's not required. There's no reason E[.]B. would have made these things up about him touching her other private parts. How she described the touching of her breast area is not consistent with what he said happened in tickling. If you believe her, you're convinced**

**beyond a reasonable doubt, and that's all that's necessary. I ask that you hold him responsible.**

RP 689 (emphasis added).

- b) The instruction was an unconstitutional comment on the evidence

Instruction 9 was in violation of Article 4, § 16, an error which would compel a new trial on its own. As an initial matter, this issue is properly before the court. Not only did Mr. Svalesson object below, a comment on the evidence is of such constitutional magnitude it may be raised for the first time on appeal. State v. Lampshire, 74 Wn.2d 888, 893, 447 P.2d 727 (1968). Judicial comments on the evidence are prohibited by our constitution in order to prevent the jury from being influenced by the trial court's opinion of the evidence presented. Jacobsen, 78 Wn.2d at 495. When a comment occurs, it is presumed prejudicial and the prosecution bears the burden of showing that the defendant was not prejudiced, "unless the record affirmatively shows that no prejudice could have resulted." State v. Levy, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006).

In this case, Instruction 9 was an unconstitutional comment on the evidence and the prosecution cannot meet its heavy burden of proving that the error was "harmless." In examining an instruction, this Court applies de novo review. Jackman, 156 Wn.2d at 742. An instruction amounts to an improper comment on the evidence if it resolves disputed issues of fact which are the province of and should be left to the jury. State v. Becker, 132 Wn.2d 54, 64-65, 935 P.2d 1321 (1997). A court also improperly comments on the evidence if it gives an instruction which appears to convey the court's attitude towards the merits of the case. In re W.R.G.,

110 Wn. App. 318, 326, 40 P.3d 1177 (2002).

As our state's highest Court said nearly fifty years ago, to avoid improper comment on the evidence, a court should not provide instructions which "point up," "underline" or "buttress" one party's theory of the case over another. See State v. Carpenter, 78 Wn.2d 92, 101, 457 P.2d 1004 (1969). Thus, it was a violation of Article 4, § 16, where a judge gave the jury an instruction on how much weight to give to certain evidence. In re Det. Of R.W., 98 Wn. App. 140, 144, 988 P.2d 1034 (1999) (telling jury that "great weight" should be given regarding a defendant's prior history of mental illness). It was also a violation when an instruction to the jurors that the defense being raised was "easily fabricated, easy to prove, and hard to disprove." State v. Thompson, 132 Wn.124, 125-26, 231 P. 461 (1924). And it was a violation to instruct the jury to "be slow to believe that any witness has testified falsely in the case." State v. Faucett, 22 Wn. App. 869, 875, 593 P.2d 559 (1979); see also, State v. Mellis, 2 Wn. App. 859, 470 P.2d 558 (1970) (proper to refuse instruction rape charge is easily made and hard to disprove; instruction would be unconstitutional comment on the evidence).

These kinds of instructions are improper in part because they have "the effect of focusing the attention of the jurors" on one particular part of the state's case as if it was more important. R.W., 98 Wn. App. at 144. In addition, the jury, not the judge, "is the sole judge of the weight of the testimony," so that it is improper when the judge "instructs the jury as to the weight that should be given certain evidence." Id.

Thus, in City of Kirkland v. O'Connor, 40 Wn. App. 521, 522, 698

P.2d 1128 (1985), an instruction was an improper comment on the evidence where it told the jury not to hold the lack of particular evidence against the state. The defendant was convicted of driving while intoxicated but had not been given a breathalyzer test. Based on experience with similar cases, the trial judge was concerned that the jury might speculate why that evidence had not been admitted, so he instructed the jury, “[y]ou are not to draw any conclusions or inferences whatsoever from the absence of a breathalyzer test result in this case nor are you to speculate on the reasons for the absence of such a test result.” 40 Wn. App. at 522-23.

In reversing, the court of appeals noted that the instruction was relating to the *absence* of evidence. *Id.* Further, the court pointed out, the trial court gave the instruction in “reacting to its apprehension of widespread public knowledge about breathalyzers and speculation by jurors” about why such evidence might not be admitted in some cases. *Id.* The reviewing court found that, while the “desire to avoid confusion” was commendable, the comment amounted to a comment on the evidence because “it was possible that the jury understood the instruction to mean it was not to consider that the evidence might be insufficient without a breathalyzer test result.” *Id.* As a result, the instruction “prohibited the jury from considering a lack of evidence about a material element of the charge” and it was therefore was a comment upon the evidence. *Id.*

The Court was also concerned that the jury had been given an instruction on reasonable doubt which included the provision, “[a] reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence.” 40 Wn. App. at 523. Read together with the

instruction on the breathalyzer evidence, the Court held, the two instructions “permitted the jury to believe that the court wanted them to give the City the benefit of the doubt concerning the absence of breathalyzer to demonstrate intoxication.” Id.

In this case, the jury instruction saying that the testimony need not be corroborated was a comment on the evidence. With the instruction, the court appeared to express an attitude towards the merits of the case and the strength of the evidence, indicating that E.B.’s testimony, alone, was enough to support the conviction. Further, the “reasonable doubt” jury instruction in this case had the same language as in O’Connor.

Thus, in this case, as in O’Connor, the jury was improperly instructed in a way which permitted them to believe the court wanted them to give the prosecution “the benefit of the doubt concerning the absence” of evidence to support the conviction. The instruction here was an improper comment on the evidence.

In response, the prosecution is likely to argue, as it did below, that Instruction 9 is proper based on prior caselaw. More than 10 years ago, in State v. Zimmerman, 130 Wn. App. 170, 181, 121 P.3d 1216 (2005), this Court “reluctantly approved” a similar instruction, based on a court of appeals decision, State v. Malone, 20 Wn. App. 712, 714, 582 P.2d 883 (1978), and one from the Supreme Court in 1949, State v. Clayton, 32 Wash.2d 571, 572, 202 P.2d 922 (1949). Those cases, however, are distinguishable or no longer good law.

In Clayton, the Supreme Court upheld as proper an instruction which provided:

You are instructed that it is the law of this State that a person charged with attempting to carnally know a female child under the age of eighteen years may be convicted upon the uncorroborated testimony of the prosecutrix alone. That is, the question is distinctly one for the jury, and if you believe from the evidence and are satisfied beyond a reasonable doubt as to the guilt of the defendant, you will return a verdict of guilt, notwithstanding that there be no direct corroboration of her testimony as to the commission of the act.

Clayton, 32 Wn.2d at 572.

That instruction, however, is fundamentally different from the instruction given here. The Clayton instruction leaves the weight and consideration of the victim's testimony where it belongs - with the jurors. It tells the jury that a person "may be convicted" based on uncorroborated testimony as a *possibility*, instead of telling the jury as a matter of law that the testimony of the alleged victim is by definition legally sufficient.

Malone, supra, involved an adult rape case with an instruction which was similar to the one in this case. The instruction was found to be a "correct statement of that law" and further declared not to be a comment on the evidence in a cursory ruling, based on State v. Louie, 68 Wn.2d 304, 413 P.2d 7 (1966), cert. denied, 386 U.S. 1042 (1967). Malone, 20 Wn. App. at 714. Louie involved a defendant who failed to object below, unlike here, and the instruction in question was different.

In Zimmerman, this Court recognized that the instruction was highly problematic, noting that the Supreme Court committee responsible for drafting the pattern jury instructions had "misgivings" about such an instruction, which the court of appeals said it shared. 130 Wn. App. at 182-83. That Committee had declined to craft an instruction like the one given here, declaring instead:

The matter of corroboration is really a matter of sufficiency of the evidence. An instruction on this subject would be a negative instruction. The proving or disproving of a charge is a factual problem, not a legal problem. Whether a jury can or should accept the uncorroborated testimony of the prosecuting witness is best left to the argument of counsel.

11 Washington Practice, WPIC 45.02, Rape - No Corroboration Necessary (2005).

In State v. Johnson, 152 Wn. App. 924, 219 P.3d 958 (2009), this Court suggested that it might be an “impermissible comment on the alleged victim’s credibility” to give the instruction without added language that credibility issues remained with the jury. And it again found itself bound by Clayton and, by extension, Malone. Johnson, 152 Wn. App. at 927.

More recently, the Court discussed a similar instruction in State v. Chenoweth, 188 Wn. App. 521, 354 P.3d 13, review denied 184 Wn.2d 1023 (2015). After first deciding to reverse based on admission of improper opinion testimony, the Court then addressed an instruction very similar to the one in this case. 188 Wn. App. at 535. Two of the judges were unconcerned by the decision, but one would have held that it was a comment on the evidence if the lower appellate court was not bound by Clayton and its progeny.

But again, Clayton was a markedly different instruction than the one given here. Further, our Supreme Court has recently made the distinction between deciding whether evidence is sufficient and a legal definition, taking the opportunity to “clarify that legal definitions should not be fashioned out of courts’ findings regarding legal sufficiency.” Brush, 183 Wn.2d at 558-59. The Court was concerned that such conversion can result

in an improper instruction which can have the effect of relieving the state of the full weight of its burden of proof. Brush, 183 Wn.2d at 558.

Washington is not the only state struggling with this issue. Recently, the highest court in Florida struck down a similar instruction based on a similar statute. Gutierrez v. State, 177 So. 3d 226, 229 (Fla. 2015). In Gutierrez, the Court noted that the instruction may correctly state the law it amounts to an improper comment on the evidence and “presents an impermissible risk that the jury will conclude it need not subject the victim’s testimony to the same tests for credibility and weight” generally applicable. 177 So.2d at 230. The Court declared that the instruction “has the unfortunate effect of bolstering that witness’s testimony by according it special status,” effectively placing “the judge’s thumb on the scale to lend an extra element of weight to the victim’s testimony.” 178 So.2d at 232. Indiana, too, has rejected a “non-corroboration” instruction which provided that a conviction may be based on the alleged victim’s uncorroborated testimony “if such testimony establishes each element of any crime charged beyond a reasonable doubt.” Ludy v. State, 784 N.E. 2d 459, 460 (Ind. 2003). Overruling multiple cases to the contrary, the Court found the instruction problematic because 1) “it unfairly focuses the jury’s attention on and highlights a single witness’s testimony,” 2) “it presents a concept used in appellate review” - the sufficiency of the evidence - which “is irrelevant to a jury’s function as fact-finder,” and 3) it can be misleading or confusing because it can lead the jury to apply the wrong standard of proof. 784 N.E.2d at 461. “[J]urors may interpret the instruction to mean that baseless testimony should be given credit and that they should ignore

inconsistencies,” not question the witness’s testimony and ignore conflicting evidence. Id.

More recently, South Carolina’s highest Court rejected a similar instruction as an unconstitutional comment on the evidence. See, State v. Stukes, 416 S.C. 493, 787 S.E.2d 480 (2016). The relevant instruction provided that “[t]he testimony of a victim in a criminal sexual conduct prosecution need not be corroborated by other testimony or evidence.” 416 S. C. at 497. Like our state, South Carolina has a statutory provision preventing courts from finding lack of sufficient evidence simply because testimony of a victim is uncorroborated. In finding the instruction based on that law an improper comment on the evidence, the Court noted the risk:

The charge invites the jury to believe the victim, explaining that to confirm the authenticity of her statement, the jury need only hear her speak. Moreover, . . .[s]pecifically this qualification applies to one witness creates the inference the same is not true for the others.

416 S. C. at 499.

This recognition by other state’s courts that instructions such as the one given here are improper further reinforces the error in giving the non-WPIC Instruction 9 at the prosecutor’s behest. The prosecution cannot meet the heavy burden of proving this error constitutionally harmless, given that the instruction went to the only issue in the case - the sufficiency of the evidence. This Court should so hold and reverse.

ii. Improper opinion testimony on guilt, credibility and veracity denied a fair trial by jury

Reversal and remand for a new trial would also be required because improper opinion testimony on guilt, credibility and veracity was admitted and again the prosecution cannot meet its heavy burden of proving the error

harmless. Both the state and federal constitutions guarantee the right to trial by jury, which includes the right to have the jurors serving as sole judge of the evidence, the weight of the testimony and credibility of witnesses. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); Sixth Amend. Art. I, § 21. As a result, it is improper to admit evidence from a witness about their opinion on guilt, veracity or credibility. See State v. Montgomery, 163 Wn.2d 577, 591-94, 183 P.3d 267 (2005). Improper opinion testimony is reversible error because it violates the defendant's rights to a jury's trial. State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

Even if reversal and dismissal was not required based on the insufficiency of the evidence, reversal and remand would be required based on improper opinion testimony and evidence.

a) Relevant facts

At trial, the only evidence came from E.B. - her testimony and her prior statements to others. The prosecutor's forensic interviewer, Adams, talked about using "foundations" in her interviews - a technique she said "we know" makes an interview "**more accurate. . .statistically.**" RP 584-85 (emphasis added). The interviewer also said the goal was to "solicit narrative events" and that "**[w]e know that that's more accurate**" than other forms of questioning. RP 585 (emphasis added). She then related the claims E.B.had made. RP 585-88.

Also at trial, child sex-abuse therapist Skinner related several "concerns and changes in behavior" the therapist said "[m]om" (Teresa) had reported regarding E.B., then told the jury these were the "types of things" she had seen before when she had seen patients for therapy. RP 537. The

therapist also said these problems she had “identified” with E.B. were problems that, in Skinner’s “education, training, and experience, **are common in people who have been sexually abused.**” RP 537 (emphasis added).

Skinner also testified that she had diagnosed E.B. with “acute stress disorder.” RP 538. She then told jurors that was “a diagnosis that we use **when a traumatic experience has occurred,**” or someone has witnessed or learned about such an experience. RP 538 (emphasis added).

In addition, the therapist read treatment plan information into the record at trial. RP 539-40. As part of that, she testified about E.B. “having intrusive thoughts and nightmares **and having difficulty talking about the sexual abuse that occurred.**” RP 539-40 (emphasis added). She also said the goal was for E.B. to learn skills to “stop or manage” the symptoms “**and to also provide a safe place for her to talk about the abuse.**” RP 540 (emphasis added).

b) The testimony was improper opinion

This testimony was all improper explicit or near explicit comments on credibility, veracity or guilt, and once again, the prosecution cannot prove the constitutional error “harmless.” At the outset, this issue is properly before the Court. Where a witness makes an explicit or near explicit comment on guilt, veracity or credibility, that is manifest error affecting a constitutional right. Kirkman, 159 Wn.2d at 936-37. To determine if such a comment has occurred, this Court looks at 1) the type of witness involved, 2) the nature of the testimony, 3) the nature of the charges, 4) the nature of the defense and 5) the other evidence before the trier of fact. See State v.

Demery, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

Here, examining all of these factors leads to the conclusion that the testimony was improper opinion on guilt, veracity or credibility. Both of the witnesses were “experts.” Both bolstered that status - with the help of the prosecutor. The prosecutor’s forensic interviewer, Adams, said the technique she used produced interviews which were “more accurate” statistically,” then testified that E.B. had disclosed abuse. RP 584-85. Therapist Skinner confirmed that the “concerns” Teresa had reported about E.B. were the “types of things” she had seen before when she had seen patients for therapy. RP 537. She also said these problems she had “identified” with E.B. were problems that, in her “education, training, and experience, are common in people who have been sexually abused.” RP 537. The prosecutor, in closing, talked again about how Adams was a “professional” investigator, “trained to ask questions in a certain way,” saying that makes it “as accurate as possible.” RP 656-57.

Most egregious was Skinner’s testimony about diagnosing “acute stress disorder,” telling jurors that was a diagnosis used “**when a traumatic experience has occurred,**” or someone has witnessed or learned about such an experience, and repeatedly referring to the abuse as having occurred in discussing the “treatment plan.” RP 538-40 (emphasis added).

State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987), is instructive. In Black, a rape case, it was improper opinion testimony when an expert told the jury that the victim suffered from “rape trauma syndrome.” 109 Wn.2d at 338-40. Such testimony constituted “in essence” a statement that the defendant was guilty. Id. Given that E.B.’s claims were the only evidence

against Richard and the lack of evidence in support, the potential impact of this improper testimony indicating that these “experts” believed E.B.’s version of events and that she was abused.

Once again, the prosecution cannot meet the heavy burden of proving this constitutional error harmless. To meet that burden, the state must show that the untainted evidence of guilt is so overwhelming that every single reasonable juror faced with that evidence would still have convicted, even absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986). The only evidence of a crime was E.B.’s very non-detailed description of incredibly fleeting touches mostly over clothes under circumstances which do not otherwise show any intent for sexual gratification. That is far from “overwhelming” evidence sufficient to meet the constitutional harmless error standard. See, e.g., State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002). This error, standing alone, would compel a new trial even if reversal and dismissal were not required.

iii. The prosecutor’s flagrant misconduct and counsel’s ineffectiveness

Reversal for a new trial would also be required because of the prosecutor’s repeated acts of serious, prejudicial, flagrant and ill-intentioned misconduct which permeated the entire trial. A prosecutor is more than just another attorney; she is a “quasi-judicial officer” and thus has higher duties than most. See Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935). As a result, it is a duty of the prosecutor to seek convictions based solely on “probative evidence and sound reason.” In re

the Personal Restraint of Glassmann, 175 Wn.2d 696, 704, 286 P.3d 673 (2012), cert, denied, \_\_\_ U.S. \_\_\_, 136 S. Ct. 357 (2015).

Here, the prosecutor repeatedly failed in these duties. First, the prosecutor committed misconduct in shifting the burden to Mr. Svaleson, Jr., to disprove the state's case. In initial closing argument, the prosecutor told jurors, "you have to ask yourself why would she make up all of that?" RP 651. The prosecutor also told jurors that E.B.'s version of events and Richard's were "mutually exclusive things[.]" RP 651. The prosecutor then told jurors that "what E[B.] described is sexual contact, and if you believe her, if you believe what she's described, ladies and gentlemen, you are satisfied beyond a reasonable doubt." RP 652.

A few moments later, the prosecutor talked about what E.B. had to go through as a result of making the allegations, saying being in trial was "[o]bviously" not "a comfortable place for her to be," and that it was "an intimidating setting" for her not only because it was in public but because Svaleson was there, "watching her and listening to her testimony." RP 659 Counsel's objection that this was argument "for undue sympathy" was overruled. RP 659.

A moment later, the prosecutor urged the jury to compare the "reasonableness" each side's version of events, then again said E.B. "has no reason, again, to make up those other things," and "[n]o reason for her to fabricate this." RP 661. The prosecutor then told the jury that if it happened as E.B. said, "there's **also no reason and no reasonable explanation as to why the defendant's hands would have found themselves in those areas.**" RP 661 (emphasis added). The prosecutor then declared the lack of

bias and “motive to lie” for each of the state’s witnesses in turn. RP 661-64. Then in arguing reasonable doubt, the prosecutor said jurors did not have to find guilt “[b]eyond any doubt that you can think of” and instead the question was just “do you know enough to know beyond a reasonable doubt.” RP 664-65. The prosecutor said it was sexual contact because he wasn’t just tickling her” in where he touched her, and told the jurors not to “make this” the child’s “fault” because she did not call for help after it happened. RP 664-65.

Counsel’s argument in closing was that E.B. likely misunderstood the brief touches, said something to adults and then things got serious. RP 675-78. He pointed out the lack of evidence that the touching was done for sexual gratification “for anybody.” RP 678.

In rebuttal closing argument, the prosecutor again returned to the argument that there was “no reason” for E.B. to have said that she was improperly touched unless it had actually occurred, telling the jury, “[w]hen she said it to her mom initially, why would she have said this? **There’s no reason to unless it happened.**” RP 682-83 (emphasis added).

A moment later, the prosecutor declared that, “[f]or every explanation that defense counsel has provided, like why would he” do it in such a public place if he was doing it for sexual desire, “there’s also the counter argument” that there is no one way a “child molester” acts. RP 686. The prosecutor said that the “explanation of just the tickling, it doesn’t make sense” in this context and there need not be anything other than the touch “for that inference to be there” that it was for the required intent. RP 686-87. Because “offenders and victims” “all behave differently,” the prosecutor

said, “that’s not something that you need to decide.” RP 687. Instead, the prosecutor told the jury, their role was “[y]ou need to decide do you believe E[.]B. that her private parts were touched?” RP 688.

The prosecutor ended disputing whether there were “reasonable doubts,” reminding the jurors there was “no need for corroboration,” then again declaring, “[t]here’s no reason E.[B.] would have made these things up about him touching her.” RP 688-89. In addition to saying how the girl had decided the touching of her “breast area” was “not consistent” with tickling, the prosecutor then said, “[i]f you believe her, you’re convinced beyond a reasonable doubt, and that’s all that’s necessary.” RP 689.

All of these arguments were flagrant, prejudicial and ill-intentioned misconduct. Allegedly improper comments are viewed in the context of the total argument, issues in the case, the evidence the improper argument goes to and the instructions given. State v. Stith, 71 Wn. App. 14, 18, 856 P.2d 415 (1993). There is no question that counsel are permitted “latitude to argue the facts in evidence and reasonable inferences” flowing therefrom. See State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). But a defendant has no duty to present evidence to rebut the state’s case; it is the prosecution which must bear the full weight of the burden of *proving* that case in the first instance. See State v. Jackson, 150 Wn. App. 877, 209 P.3d 553, review denied, 167 Wn.2d 1007 (2009). A prosecutor commits misconduct in arguing that the jury should find the defendant guilty because there was no evidence showing he was not. See State v. Fleming, 83 Wn. App. 209, 215, 921 P.3d 1076 (1996), review denied, 131 Wn.2d 1018 (1997).

Further, it is “misleading and unfair to make it appear that an acquittal requires the conclusion” that the state’s witnesses - including the victim - are lying. State v. Castaneda-Perez, 61 Wn. App. 354, 362-63, 810 P.2d 74, review denied, 118 Wn.2d 1007 (1991). Such argument misstates the law, the prosecution’s burden of proof and the jury’s role. State v. Wright, 76 Wn. App. 811, 824-25, 888 P.2d 1214, review denied, 127 Wn.2d 1010 (1995). The jury is not required to decide a witness is lying in order to decide a case; instead, jurors are required to determine only if the prosecution proved its case beyond a reasonable doubt. Id.

As our Courts have made clear, the “testimony of a witness can be unconvincing or wholly or partially incorrect” for reasons which have nothing to do with the witness lying. Wright, 76 Wn. App. at 824-25; see Fleming, 83 Wn. App. at 213. For example, jurors could be unsure a witness accurately perceived what occurred, or recalled the event correctly - it need not find that a victim or other state witnesses were *lying*. Fleming, 83 Wn. App. at 213-14.

In general, prosecutors avoid making improper “false choice” arguments by couching their language in “belief.” Under Wright, where there is a direct conflict in witness testimony which must be resolved in order to decide a case, the prosecutor may argue that, in order to *believe* a defendant, the jury must find the state’s witnesses were *mistaken*. Id. But here, the prosecutor was not arguing about believing the defense; the argument was that, if they believed the witness, jurors were convinced beyond a reasonable doubt. And the prosecutor specifically framed the issue as an issue of *motive to make up the allegations or lie* - not only for E.B. but

for all of the witnesses. It is so well-settled that such arguments are misconduct that years ago, in Fleming, the Court held them “a flagrant and ill-intentioned violation of the rules governing a prosecutor’s conduct at trial.” Fleming, 83 Wn.App. at 213-14.

The prosecutor clearly conveyed to the jurors that a failure to convict would be to make this E.B.’s fault and further depend on finding that she was lying - even though the defense was not claiming lie but misunderstanding. Based on these fundamental misstatements of the law and the jurors’ role and the effective shifting of the burden of proof, reversal would also be required for a new trial even if reversal and dismissal was not. Further, to the extent that counsel’s failure to object below is seen as any impediment to relief, the Court should find counsel ineffective. Both the state and federal rights to effective assistance of counsel require that counsel must not be prejudicially deficient in his performance, applying a strong presumption of effectiveness. See State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990), overruled in part and on other grounds, State v. Condon, 182 Wn.2d 307, 343 P.3d 357 (2015). While the decision whether to object is consider “trial tactics,” where, as here, the circumstances are egregious and there is no legitimate tactical reason to fail to object, ineffectiveness may also compel reversal. See State v. Saunders, 91 Wn. App. 575. 578. 958 P.2d 364 (1998).

Further, even if this misconduct or counsel’s ineffectiveness did not compel reversal standing alone, the cumulative effect of all of the misconduct, improper instruction and improper opinion testimony, taken together with ineffectiveness, would support such a result. See State v.

Jones, 144 Wn. App. 283, 291, 183 P.3d 307 (2008). The only issue in this case was whether the state had provided sufficient evidence to prove child molestation based solely on the testimony of E.B. and her statements to others repeated at trial. All of the trial errors went directly to the jury's ability to fairly and impartially decide these issues. The cumulative corrosive effect of all of the trial errors precluded even the possibility of a fair trial. That effect is also an independent ground upon which reversal would be required, if reversal and dismissal were not.

2. SEVERAL UNCONSTITUTIONAL AND UNSUPPORTED  
CONDITIONS OF COMMUNITY CUSTODY SHOULD  
BE STRICKEN

A sentencing court's authority to impose conditions of a sentence is limited to that granted by statute. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.2d 121 (2008), review denied, 165 Wn.2d 1035 (2009). In this case, many of the conditions of sentencing exceeded not only that limit but also the bounds of the state and federal constitutions. Even if reversal and dismissal of the conviction were not required, Mr. Svaleson would be entitled to relief from the improper, unlawful and constitutionally infirm conditions the trial court imposed. SRP 7-8.

Under our state's system, the Legislature alone has the authority to establish the scope of legal punishment. Zimmer, 146 Wn. App. at 414. As a result, a sentencing court has only the authority contained in statute. State v. Hale, 94 Wn. App. 46, 53, 971 P.3d 88 (1988). Further, when a trial court exceeds its authority, it imposes an unauthorized condition of community custody and that condition must be stricken. See State v. O'Cain, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

As a threshold matter, these issues are properly before the Court. Where the lower court imposes an illegal or erroneous condition of community custody, 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); State v. Jones, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). In addition, a challenge to a condition may be made “preenforcement” - before the condition is actually enforced - where, as here, the challenge is to the legal authority of the court in imposing it and no further factual development is required. Bahl, 164 Wn.2d at 751-52.

RCW 9.94A.703 provides mandatory conditions of community custody (section (1)), as well as some which are “waiveable” (section (2)) and some which are “discretionary” (section (3)). As applicable to this case, under former RCW 9.94A.703 (2014), a “discretionary” condition is one which the court “may” order, and those conditions include “participate in crime-related treatment or counseling services,” “refrain from consuming alcohol,” participating in “rehabilitative programs” or perform other “affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community,” and a catch-all allowing the court to order that the defendant “[c]omply with any crime-related prohibitions.” Former RCW 9.94A.703 (2014).<sup>3</sup> Further, former RCW 9.94A.505(7) (2014) allows the court to impose “crime-related

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<sup>3</sup>The 2015 Legislature further amended the statute, so that the courts may now order a person to refrain from possessing or consuming alcohol, and to amend RCW 9.94A.505(7) to add the statement that a “crime-related prohibition” may only include a prohibition on the use or possession of alcohol or controlled substances “if the court finds that any chemical dependency or substance abuse contributed to the offense.” See Laws of 2015, ch. 81.

prohibitions.”

In this case, the conditions range from the unauthorized to the unconstitutional. Starting with the former, conditions 14 and 15, mandating that he not “purchase, possess or consume alcohol” and providing that he must not “enter into any location where alcohol is the primary product, such as taverns, barns, and/or liquor stores,” those conditions were not authorized by statute. In the past, imposing such a condition for a child molestation conviction when there is no evidence of alcohol involved was found improper. See State v. Julian, 102 Wn. App. 296, 304-305, 9 P.3d 851 (2000). But former RCW 9.94A.703 (2014) allows a sentencing court to order an offender not to consume alcohol even if there is no evidence alcohol contributed to the offense. See Jones, 118 Wn. App. at 206-207. At the time of the crime, however, it did not authorize a prohibition against possession, and it still does not prohibit the purchase. See Laws of 2015, ch. 81.

In addition, without evidence that alcohol was involved in the crime, there was no authority to impose the prohibition against entering “taverns, barns and/or liquor stores” - which now include regular grocery stores. Where there is no specific authority for a particular condition, the “catch-all” provision may apply but only if it is “crime -related.” See In re the Personal Restraint of Rainey, 168 Wn.2d 367, 375, 229 P.3d 686 (2010). A condition only meets that standard if it is an “order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10).

A condition is not crime-related unless it is supported by evidence

showing the factual relationship between the crime punished and the condition imposed. State v. Parramore, 53 Wn. App. 527, 531, 768 P.2d 530 (1989). There was no evidence or even allegations here that alcohol played any part in the crime, let alone linking going to places where alcohol is available as “crime related.”

The other conditions are not only not authorized as “crime-related” but unconstitutional as well. Unlike with statutes, there is no presumption in favor of the constitutionality of a condition of community custody. See State v. Sanchez Valencia, 169 Wn.2d 782, 792-93, 239 P.3d 1059 (2010). This is in contrast to the standard previously applied, which included such a presumption. See, e.g., State v. Riles, 135 Wn.2d 326, 349, 957 P.2d 655 (1998), abrogated by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010). The due process clauses of the state and federal constitutions require the state to provide a citizen fair warning of what conduct is proscribed. Bahl, 164 Wn.2d at 752. Condition 23 is an outright ban on going to “places where children congregate,” which includes an incredibly open-ended list: “Fast-food outlets,” libraries, theaters, shopping malls, playgrounds and parks, “etc.”). There is no evidence this condition is “crime-related.” The crime here allegedly occurred inside a home - not in public. Further, the condition is unconstitutionally vague. See State v. Irwin, 191 Wn. App. 644, 364 P.3d 830 (2015). A condition is unconstitutional and violates due process if it fails to provide constitutional notice and sufficient standards to protect against arbitrary enforcement. Bahl, 164 Wn.2d at 754-55; see State v. Sansone, 127 Wn. App. 630, 638, 111 P.3d 1251 (2005). While a condition is not vague merely because a

person “cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct,” it must nevertheless give ordinary people sufficient notice to “understand what conduct is proscribed.” Sanchez Valencia, 169 Wn.2d at 785; Bahl, 164 Wn.2d at 753.

A similar condition was recently struck down as unconstitutionally vague by Division One of this Court. See Irwin, 191 Wn. App. at 647. Similar to the condition in this case, in Irwin the condition provided, “[d]o not frequent areas where minor children are known to congregate,” but it further allowed the supervising CCO to define those areas. 191 Wn. App. at 649. The Irwin Court condemned the delegation of defining what conduct would amount to a violation to a CCO, noting that such delegation “underscored the inherent vagueness” of the condition. 191 Wn. App. at 654. It then pointed out that the defendant might ultimately have sufficient notice of prohibited conduct once the CCO set those locations. 191 Wn. App. at 655. But the Court was also concerned that the condition was still unconstitutional because it remained “vulnerable to arbitrary enforcement.” Id. Condition 23 is unconstitutional.

Conditions 27 and 29 are equally infirm. Condition 27 provides, “[y]ou are also prohibited from joining or perusing any public social websites (Face[sic]book, Myspace, Craigslist, etc.), Skyping, or telephoning any sexually-oriented 900 numbers.” CP 239. Condition 29 provides, “[d]o not patronize prostitutes or any businesses that promote the commercialization of sex. CP 239. There is nothing in the record indicating that this case involved, in any way, prostitution, adult “toy” shops, or any of the frankly thousands of places which might fall under the rubric

of this condition. The case involved an incident which occurred inside a private apartment, not in a sex shop, not with a prostitute, nor anything similar.

Further, that the prohibition is unconstitutionally vague, as it fails to provide ascertainable standards for enforcement and fails to provide sufficient notice of what is prohibited. Bahl, supra, is instructive. In that case, the Court addressed, *inter alia*, a condition prohibiting the defendant from frequenting “establishments whose primary business pertains to sexually explicit or erotic material.” 164 Wn.2d at 752. The condition was not unconstitutionally vague, the Court held, because definitions of what was sexually explicit or erotic were relatively clear and thus identified the prohibition sufficiently. Id.

In contrast, here, there is no definition of what places exactly, promote the “commercialization of sex” and thus are prohibited for Hesselgrave to go. And definitions vary. For example, some define the “commercialization of sex” as “offering or receiving any form of sexual conduct in exchange for money” - thus prohibiting Hesselgrave from going to any place where there is prostitution. See, e.g., Christopher R. Murray, “Grappling with ‘Solicitation’: The Need for Statutory Reform in North Carolina after *Lawrence v. Texas*,” 14 DUKE J. GENDER L. & POLICY 681, 682 (2007). Another may define “[t]he commercialization of sex” as including “all forms of media, including movies, television shows, songs, advertising, and magazines,” used “to sell products and attract consumer interest” - thus potentially prohibiting Hesselgrave from a much wider range of places. See Takiyah Rayshawn McClain, “An Ounce of Prevention:

Improving the Preventative Measures of the Trafficking Victims Protection Act, 40 VAND. J. TRANSN'L L. 597, 603 (2007).

In addition, the First Amendment protects much which is sexually explicit, as well as covering communications, speech, etc. and even the forum aspect of the Internet. See, e.g., Bahl, 164 Wn.2d at 757; see also, Reno v. ACLU, 521 U.S. 844, 117 S. Ct. 2329, 138 L. Ed 2d 874 (1997). Where a condition of community custody affects materials or conduct protected by the First Amendment, a “stricter standard” applies, requiring the government to show that the restriction in question is “reasonably necessary to accomplish the essential needs of the state and public order.” Bahl, 164 Wn.2d at 757. The state failed to meet those standards and this Court should strike this condition, as well as all of the other unsupported conditions imposed below.

3. THE SENTENCING COURT ERRED IN IMPOSING  
LEGAL FINANCIAL OBLIGATIONS

This Court should also reverse and remand for resentencing under Blazina, supra, and its progeny. The sentencing court failed to follow the requirements of RCW 10.01.160 and Blazina and subsequent cases control. The trial court imposed “standard” LFOs excluding DAC recoupment after counsel raised his client’s indigence below. SRP 7-8. The written judgment and sentence included a “boilerplate” finding of “ability to pay.” This Court should reverse the orders imposing the legal financial obligations under Blazina and its progeny, because the trial court failed to “take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose” before ordering him defendant to pay legal

financial obligations (LFOs), including those not considered “discretionary.” Blazina, 182 Wn.2d at 836; see State v. Duncan, 185 Wn. 2d 430, 374 P.3d 83 (2016).

E. CONCLUSION

The prosecution failed to present constitutionally sufficient evidence to prove the essential “intent” element of child molestation, even in light of the forgiving standard of review. In addition, the prosecution effectively relied on an improper presumption and shifted a burden of proof to appellant to disprove required intent. The conviction should be reversed and dismissed.

In the alternative, reversal and remand for a new, fair trial is required. Improper instruction, improper opinion testimony on guilt and credibility and misconduct pervaded the entire proceeding below. If new proceedings were to occur, the Court would also need to address the sentencing issues, to ensure they would not risk repeat.

DATED this 13th day of December, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

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 Opening Brief to opposing counsel VIA this Court's upload service, at [pepatecef@a-o.pierce.wa.us](mailto:pepatecef@a-o.pierce.wa.us), and to appellant Richard Svaleson, Jr., at DOC 389546, WSP, 1313 N. 13<sup>th</sup> Avenue, Walla Walla, WA. 99362.

DATED this 13th day of December, 2016

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