

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

No. 96034-8

FILED
COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON)

Respondent,)

v.)

Richard Svalson Jr.)

(your name))

Appellant.)

2017 JAN 18 AM 11:19

No. 48855-8-II

STATE OF WASHINGTON

BY [Signature]
DEPUTY

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, Richard Svalson Jr, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

Prosecutorial misconduct pursuant to Lindsay 171 W.W. App. 808
as detailed herein.

Additional Ground 2

Innsufficient Evidence pursuant to Washington 125 W.W. 2d 212
as detailed herein.

#3 Inneffective ass. of counsel pursuant to Hamilton 179 W.W. App 870

#4 Cumulative error pursuant to Coe 175 W.W. 2d 482

If there are additional grounds, a brief summary is attached to this statement.

Date: 1/18/17

Signature: Richard Svalson Jr.

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Procedural History

Appellant Richard Ivey Svaleson Jr. was convicted of 1st Degree Child Molestation on March 3, 2016 in the Superior Court of Pierce County, Case No. 15-1-00660-8, with the Honorable Judge Kathryn J. Nelson presiding. With an offender score of zero, (no prior criminal history) Appellant Svaleson's standard sentencing range was 51-68 months, the State asked for a sentence of 68 months yet Judge Nelson sentenced then-defendant Svaleson to the low-end of 51 months on April 15, 2016. Appellant Svaleson hereby moves to have your distinguished panel reverse his conviction and remand this case pursuant to the controlling dictates of our State and U.S.C. Supreme Court precedents cited to and relied upon herein.

Stare Decisis/Equal Protection

The Doctrine of Stare Decisis commands a reviewing Court to abide by or adhere to decided cases. "The Doctrine of Stare Decisis is of fundamental importance to the the rule of Law." "It is indisputable that Stare Decisis is a basic self-governing principle

within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurispru-

dential system that is not based upon an arbitrary discretion."

The Federalist, No. 78, p. 490 (H. Lodge Ed. 1888) (A. Hamilton).

"Patterson v. McClean Credit Union 109 S.Ct. 2363, 2370. "Stare Decisis ensures that "the law will not merely change erratic-

ally" and "permits society to presume that bedrock principles

are founded in the law rather than in the proclivities of individuals." Vazquez v. Hillery 474 U.S. 254, 265. The Lindsay 171

WN.App 808 (2011), Weatherspoon 410 F.3d 1142 (9th Cir. 2005),

State v. W.R. 181 WN.2d 757 (2014), Jackson v. Virginia 443 U.S. 307, Hendrickson 129 WN.2d 61, Strickland v. Washington 466 U.S.

668, Coe 175 WN.2d 482 (2012) and U.S. v. Frederick 78 F.3d 1370 (9th Cir. 1996) cases are in fact well-settled and controll-

ing precedents from which a reviewing Court may not depart pursuant to the Doctrine of Stare Decisis. Accordingly, the same result must obtain here in Appellant Svaleson's case as prevailed

for Appellant Lindsay within the afore-cited authority. "The Equal Protection clause of the 14th Amendment commands that no State shall deny to any person within its jurisdiction the Equal Protection (protection) of the laws, which is essentially a direction that all persons similiarly situated be treated alike." Lee v. City of Los Angeles 250 F.3d 668 at 686 (9th Cir. 2001) (citing to City of Clebournce v. Clebourne Living Ctr. 473 U.S. 432, 439) "The Equal Protection clauses of both The 14th Amenedment of The State and Federal Consitutions require that persons "similiarly situated" with respect to the legitimate purpose of the law recieve like treatment." In Re Runyan 121 WN.2d 432, 438. Appellant Svalesen is "similiarly situated" Runyan 121 WN.2d at 448 to Appellant Lindsay (at State v. Lindsay 171 WN.App 808) and Hamilton (at State v. Hamilton 179 WN.App 870) by way of the fact that they each had trials afflicted by the egregious prosecutorial misconduct and ineffective assistance of counsel detailed within the afore-quoted precedents. As a result, this case must be remanded for further proceedings consistent with these opinions.

Prosecutorial Misconduct

"Statements made to misstate or trivialize the burden of proof" State v. Lindsay 171 WN.App 808, 824 are improper. State trial Prosecutor Kara Sanchez formally conceded within her opening statement/argument as well as her closing argument that the evidence which she had already established was the Crux of the States case,, "the testimony of E.B." V.R.P., p.660, lines 3 & 4, was riddled with alot of "I dont remembers" and "I dont knows". (See also V.R.P., p. 652, lines 19-22) Each "I dont remember" and "I dont Know" consitutte another "missing Piece of the puzzle" Lindsay 171 WN.App 808, 829 (2001), especially so when given in response to "THE STATES OWN QUESTION" as these questions by design

are meant to establish the Prosecutors case. The record here in the instant case is thoroughly riddled with over 35 of these "I dont remembers", including but not limited to; "I dont remember "what time her (E.B.) mom dropped her off" p.349, lines 20-21, "what specific time of morning it was", p.349, line 25, p.350, line 1, "who was at home at her Grandmothers house," p.350, line 5, "if Appellant Svaleson was even at home", p.350, lines 8-9, "which room was watching T.V. in", p.351, line 14, "if she brought her lunch that day", p.352, line 3 and 5, "if got there before or after lunch" p.352, line 17, "why she sat on his lap", p.353, line 8, "what she was wearing at the time of the incident", p.357, line 25, "if she was wearing anything under her shirt (over her shirt) at the time of the incident", p.358, line 3, "how quickly she pushed his hands down after the incident," p.358, line 21, "if she was wearing anything under her shirt at the time of the incident" p.3 line 3, "if anything else happened after she pushed his hands down," p.358, line 25, "if he "ever" touched her where she goes #1 p.359, line 11, "what he did after the incident ceased" p.360 line 14, "if she and Appellant Svaleson were alone or not at the time of the incident", p.362, line 6, "if told sister Amanda or o Grandmother what the Appellant did after the incident", p.363, line 5, "if was ever alone with Appellant Svaleson for the rest of the day in question," p.363, line 17, "if Appellant Svaleson Stayed home that whole day," p.363, line 20, "what she told her Mom in the car when she picked her up," p.364, line 21, 25, "where her dad was when went home", p.365, line 19, 21, "what happened after full talked to Nana," p.367, line 6, "what she did after she talked to Nana" p.367, line 11, "If she talked about what happened in kitchen

with Doctor a few days later," p.368, line 10, "if Appellant Svalson said anything to her during the incident,": p.370, line 3, "why she wrote the letter about the incident in question," p.370 line 9, "who she was writing this letter to," p.370, line 11, "if she recognized the letter she wrote itself," p.377, line 16, "if she even wrote the letter which had her name on the bottom of it" p.377, line 20, "why she wanted MOM do do something about what happened", p.378, line 23, "why she didnt call one of her parents from Amandas house when this happened," p.384 line 12 and even "if she was scared," p.384, line 22. Moreover, E.B. was even asked for clarification purposes if she "really didnt remember or if she just didnt want to talk about it and she (E.B.) re-stated that "I dont remember", p.359, line 15 (see also p.378, line 7). "A prosecuting attorney commits misconduct by misstating the law. State v. Warren 165 WN.2d 17, 28 (2008). "A prosecutor should not misstate the law in his closing argument." U.S. v. Flores 802 F.3d 1028, 1034 (9th Cir. 2014). At State v. Lindsay "The Prosecutor"described to the jury: you put in about 10 more pieces and see this picture...you can be halfway done with this puzzle.. you could have 50% (compare "many" over 35 here in the instant case) of these puzzle pieces missing and you know its Seattle." State v. Lindsay 171 WN.App 808, 829 (2010). Analogously, here in Appellant Svalsons case, the Prosecutor told the jury of the "many" "missing pices" Lindsay 171 WN.App at 829 from the onset during her "opening argument" and within her "closing argument" as well. (See V.R.P. p.652, lines 19-22). Because Pros. Sanchez "Prepped" the jury to "Bypass" the many "missing pieces" from the onset, this misconduct was arguably even more egregious than that which was reversed at Lindsay 171 WN.App 808 (2011). "We Fear given the importance of a witnesses testimony (Pros. Sanchez formally conceded that the crux of the States case was E.B.s testimony, p.652, lines 19-22, p.660, lines 3-4) to the case, the

prosecutor may have "CONSCIOUSLY" avoided recognizing the obvious that he was not telling the truth." *Brown v. Borg* 951 F.2d 1011 at 1015 (9th Cir. 1991)(reversed where Prosecutor knowingly introduced and argued from false evidence). That Prosecutor Sanchez' Misconduct was (was) "Conscious" is evidenced by the fact that she "Prepped" the jury within her "Opening argument" to by pass the many "missing pieces" *Lindsay* 171 WN.App 808 at 829 of the evidentiary puzzle, thereby "trivializing" *Lindsay* 171 WN.App at 824 the burden of proof. "The evidence concerning the temporal aspect of Decks intent WAS NOT overwhelming." *Deck v. Jenkins* 768 F.3d 1015, 1029 (9th Cir. 2014)(reversed)(see essential element , jury instruction no.8, p.649, lines 23-25). "Evidence of intent is to be gathered from all the CIRCUMSTANCES (history, locale, etc) of the case, including not only the manner and act of inflicting the wound, but also the nature of the prior relationship and any previous threats." *Washington v. Wilson* 125 WN.2d 212, 217 (1994).

The relevant "Circumstances" here in Appellant Svaesons' case are that this was an "isolated incident" in an area where both her (E.B.) sister and her Grandmother were "Close-by", p.361, line 12-14, there was "no D.N.A. evidence", videotape or forensic evidence and "no medical findings", p.656, lines 2-9, no criminal history from the Appellant/purported Assailant Svaeson, with whom E.B. "got along with" p.379, lines 10-12 fine prior to the incident in question, along with the fact that the States "only" evidence was the flimsily porous testimony of E.B. which was thoroughly riddled with "blank recollection." These "Circumstances" *Washington* 125 WN.2d at 217 provided supple ground for the ensuing prosecutorial misconduct of Pros. Sanchez who unequivocally

"trivialized" Lindsay 171 WN.App at 824 the burden of proof. "the analogies quantified the the multitude of puzzle pieces ("I dont remembers" and "I dont knows", V.R.P., p.660, lines 3-4)(and the percentage of missing pieces) with a degree of ceratinty pur-
porting to be the equivalent of the beyond a reasonable doubt standard. See Anderson, 153 WN.App at 432, we conclude that the Prosecutotrs analogies ("statements regarding the multitude of "I dont remembers") minimized and trivialized the gravity of the standard and the juries role." State v. Lindssay 171 WN.App 808 at 829 (2011). "It is most egregious degree of error when the prosecutors misconduct is so flagrant and ill-intentioned that an instruction couldn't have cured the resulting prejudice." State v. Emery 174 WN.2d 741, 760-61 (2012). Moreover, Prosecutor Sanchez' statement that it would be "reasonable" to infer then-defendant Svalesons' intent (p.7, p.647, lines 11-12) was certainly not supported by the evidence as it would be everything but "reasonable" to infer a "necessary elelemnet" U.S. v. Gaudin 515 U.S. 506, 522-23 from a quantum of evidence as porous as the testimony of E.B. "Improper prosecutorial statements cannot be nuetralized by instructions that do not in any way address "the specific statements of the prosecutor." U.S. v. Weatherspoon 410 F.3d 1142, 1151 (9th Cir. 2005). "The Prosecuting Attorney committed prejudicial misconduct by misstating the standard upon which the jury could find Allen Guilty." State v. Allen 182 WN.2d 364, 373 (2014), "The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. Its function is to vindicate the rights of people as expressed in the laws and give the accused of crime a fair trial." U.S. v. Kojoyan 8 F.3d 1315, 1319 (9th Cir. 1992). "The Prosecuting Attorney mistating the law of the case is a serious irregularity having the grave potential t

to mislead the jury. This because "the jury knows that the prosecutor is an officer of the state." State v. Allen 182 WN.2d 364, 380 (2014). "In sum, the prosecuting attorneys statements were improper. Because there was a substantial likelihood that the improper statements affected the jurys verdict, we hold that the prosecuting attorney committed prejudicial misconduct. We Reverse The Court of Appeals and remand for a new trial." State v. Allen 182 WN.2d 363, 382 (2014). The same result must obtain for Appellenat Svaleson and he respectfully urges your distinguished court to find likewise.

Ineffective Assistance of Counsel

"Effective assistance of counsel is guranteed by the United States Constitution Amendmenbt 6 and the Washington Constitution Art.1sec.22." State v. Hendrickson 129 WN.2d 61, 77 (citing to Strickland v. Washington 466 U.S. 668, 686). "To establish ineffective assistance of counsel, an appellant must show that (1) defense counsels performance was defecient and (2) this performance prejudiced him." State v. Yarborough 151 WN.App 66, 89 (2008). "Deficient performance occurs when counsels performance falls below an objective standard of reasonableness." Yarborough 151 WN.App at 89 Appellant Svalesons' trial attorney., David Shaw failed to conduct a cross-examination of officer Jahner at the 3.5 hearing, see V.R.P. vol.1, p.42, lines 12-13 and also failed to question officer Robison at trial, see V.R.P. p.519, line 6. In a case where the State themselves formally conceded that there was "no physical evidence" (see V.R.P., p.656, lines 2-9), questioning the officers tasked with gathering "physical evidence as well as the chain of custody through which the evidence is processed is sound strategy which wouldve compelled the states own witnesses to essentially testify for the defense. This would also

neutralize/mitigate evidence proffered by the state. Atty. Shaw also called "no witnesses" for the 3.5 hearing notwithstanding their availability and willingness to testify on behalf of the defendant. (See V.R.P. vol.1, p.42, line 21)(see also p.44 lines 11-13). Atty. Shaw also "failed to object" to the ridiculous and inflammatory question posed by Prosecutor Sanchez at p386, lines 14-17 where she asked E.B. "if E.B. and Appellant Svaeson were legally married." (E.B. is/was only 11 years old). "A criminal defendant's claim of prosecutorial misconduct is properly preserved for review by an immediate objection to the prosecutor's conduct." State v. Allen 182 WN.2d 364 #16 (2014). Accordingly, this "failure to object" could potentially procedurally default a measureable quantum of prejudice here in this case. Trial atty. Shaw also "failed to request" a "lesser included" instruction (jury) notwithstanding the fact that prior to trial the state formally offered then-defendant Svaeson a plea bargain to an inferior offense. Controlling Supreme and Appellate Court law "require" that there be a sound evidentiary foundation for every legal plea. This evidentiary foundation mirrors the criteria for a "lesser included" jury instruction so it necessarily follows that the evidence quotient was legally appropriate for a "lesser-included" jury instruction. "None" of these failure by trial atty. Shaw can be "characterized as legitimate trial strategy or tactics". State v. McNeal 145 WN.2d 352, 362 (2002). "Hamilton argues that her counsel's performance was deficient because there was no conceivable strategic reason for her counsel to have failed (to move to suppress) based on an unlawful warrantless search of the purse. We agree." State v. Hamilton 179 WN.App 870, 880 (2014)(see also Hamilton and Hinton v. Alabama 134 S.Ct. 1081, 188 L.ED.2d 1, 8 (2014). "WE hold that Hamilton prevails on her ineffectice assistance

of counsel claim, we reverse the conviction and remand for proceeding consistent with this opinion." Hamilton 179 WN.App. 870, 888 (2014).

Insufficient Evidence to Support Conviction

"A sufficiency challenge shall be assessed against the elements of the charged crime." Musachio v. U.S. 136 S.Ct. 709, 712 (2015). Here in Appellant Svalesons case, there was Constitutionally Insufficient Evidence to Support his conviction. The trial record was/is "completely devoid" of any evidence to satisfy the "necessary element" Sullivan v. Louisiana 508 U.S. 275 of intent set forth within jury instruction no.8, see p.649, lines 23-25; that "the touching of the sexual or intimate parts of a person" was "for the purpose of gratifying the sexual desires of the other party." Appellant Svaleson had no prior criminal history of any sort, "got along" well (V.R.P. p.379, lines 10-12) w/E.B. all of her life, was within the visual sightline of both E.B.'s sister and Grandmother the entire time and certainly did not testify in any inculpatory way which would satisfy this "Necessary" "intent" element. "In a criminal prosecution the state must prove "beyond a reasonable (emphasis added) doubt..every fact necessary to constitute the crime with which a defendant is charged." State v. W.R. 181 WN.2d 757, 762 (2014). A reviewing Court must at minimum, "read into a statute the mens rea which is necessary to separate wrongful conduct from otherwise innocent conduct." Carter v. U.S. 147 L.ED.2d 203, 216 (2000). Our Supreme Court has unequivocally held that "evidence of intent is to be gathered from ALL OF THE CIRCUMSTANCES of the case, including not only the manner and act of inflicting the wound,

but also THE NATURE OF THE PRIOR RELATIONSHIP and any previous threats." Washington v. Wilson 125 WN.2d 2121, 217 (1994). "the prior relationship" evinced "no irregularities" whatsoever, see testimony of E.B. at p.379, lines 10-12. "Although specific intent cannot be presumed, it can be inferred as a LOGICAL possibility from all the facts and circumstances." Washington v. Wilson 125 WN.2d 212, 217. In sum, the relevant "facts and circumstances" are as follows; 1.) there was no D.N.A., no videotape, no blood spatter, analysis or fibers and no eyewitnesses....(notwithstanding the fact that E.B.'s sister and Grandmother were "close-by", p.361, line 1-14) and no "medical findings", Pros. Sanchez, lines 2-9 of p.656 2.) Abuse therapist Skinner testified that E.B. was "inconsistent with her version of events through her own professional reports" p.549, line 25, p.551, line 9. 3.) There was no "physical evidence", p.616, line 6-14, testimony of Dr. Duralde, medical director of Mary Bridge Hospital and "no positive findings" from physical examination, p.618, lines 2-11. (see also p.618, lines 15 and 25). 4.) The state themselves formally conceded in open court that "The primary evidence...are Elyshias own words", p. 657, lines 20-21. see also p.652, lines 19-22, "The most base part of the evidence is what Elyshia said." The State then went on to formally concede that the crux of their own case was evidence which was thoroughly riddled with "A lot of I dont remember" and "I dont know", V.R.P. p.660, lines 3-4, over 35 "missing pieces" Lindsay 171 WN.App at 829 of the states "own puzzle", affirmative proof that E.B.'s own recollection of the day in question was fundamentally flawed. 5.) these facts in unison with the fact that Appellant Svaeson had "no prior criminal history whatsoever" (see sentencing transcript p.4, line 13 and 14) and "got along" well with E.B. throughout her life (see testimony of E.B.), VR.R.P, p379, lines 10-12) are the relevant "circumstances of the case" Washington 125 WN.2d at 217

from which a juror would have had to "infer" the existence of an otherwise non-existent element. It would "certainly not" be "logical" Washington 125 WN.2d at 217 to "infer" the "necessary element" Sullivan 508 U.S. 275 of "intent" from this evidentiary fact-pattern. "It is beyond argument that the Government bears the burden of proving the defendants guilt beyond a reasonable doubt at trial." U.S. v. Evanston 651 F.3d 1080, 1091-92 (9th Cir. 2011). "A criminal defendant is constitutionally entitled to a jury verdict that he is guilty of the crime, and absent such a verdict the conviction must be REVERSED, "no matter how inescapable the findings to support that verdict might be...A jury verdict that he is guilty of the crime means of course, a verdict that he is guilty of each necessary element of the crime." California v. Roy 136 L.Ed.2d 266, 519 U.S. 2 at 7. Accordingly, Appellant Svalesons conviction "MUST" be reversed.

Cumulative Error

The cumulative effect of the afore-announced errors deprived Appellant Svaleson of his Constitutionally guaranteed right to a fair trial. These errors were/are reversible independent of the other errors so they are certainly reversible collectively. "The cumulative error doctrine applies where a combination of trial errors denies the accused of a fair trial even where any one of the errors taken individually would be harmless." In Re det. of Coe 175 WN.2d 482, 515 (2012). Appellant Svaleson has met his burden of showing multiple trial errors "and that the accumulated prejudice affected the outcome of his trial." U.S. v. Salona 669 F.3d 943, 956 (9th Cir. 2012). In lieu of the constellation of errors present here in the instant case, this Court should not conduct a "balkanized, issued by issue harmless error review." U.S. v. Frederick 78 F.3d 1370, 1381 (9th Cir. 1996).

"The superior court imposed a judgement and sentence that included discretionary Legal Financial Obligations." State v. Marks 185 WN.2d 143, 144 (2016). "With respect to discretionary legal financial obligations, the superior court imposed discretionary obligations pursuant to RCW 10.01.160. This Court held in State v. Blazina, 182 WN.2d 827, 837-39 (2015), that the record must reflect that the superior court conducted an individualized inquiry into the defendants present and future ability to pay such obligations, as required by RCE 10.01.160(3). THE RECORD IN THIS CASE REFLECTS NO SUCH INQUIRY at the sentencing hearing, and the judgement and sentence form contains only boilerplate findings of ability to pay, which we held in Blazina to be inadequate." "As we did before/there, we remand this case to the superior court to re-consider discretionary legal financial obligations." Marks 185 WN.2d 143, 145-46 (2016) The Blazina Court relied upon sound and accurate briefings in reaching its findings, including but not limited to: the fact that, "The Legislature did not intend L.F.O. orders to be uniform among cases of similar crimes. Rather, it intended each judge to conduct a case by case analysis and arrive at an L.F.O. order appropriate to the individual defendants circumstances," State v. Blazina 182 WN. 2d 827, 834 (2015). Appellant Svaesons Judgement and Sentence contains no references to then-defendant Svaesons' "individual circumstances", most notably his advanced age/health issues ...a "circumstance" which virtually nullifies his "ability to pay" the L.F.O.'s at issue.

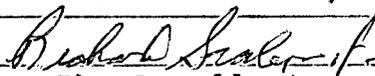
The afore-stated findings of the Blazina Court unequivocally establish the error from which Appellant Svaleson seeks relief/redress. It is self-evident that Appellant Svaleson did not have the requisite "ability to pay" which necessarily makes the courts error in imposing the L.F.O.'s manifest and completely devoid of statutory authority. "By statute, the court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." "RCW 10.01.160(3)." State v. Blazina 182 WN.2d 827 at 838 (2015). Accordingly, Appellant Svaleson respectfully urges your Honorable Court to vacate his current L.F.O.'s catalogued within the record.

Conclusion

The facts detailed herein clearly establish by and through controlling U.S. and State Supreme Court precedent that Appellant Svaleson is Constitutionally entitled to a reversal of his conviction and he respectfully urges your Honorable Court to find likewise.

Respectfully Submitted,

Mr. Richard Svaleson,


The Appellant.

* PLEASE be advised of and take judicial notice of the fact that my appeal attorney, Kathryn RUSSELL SEIK, through formal legal and written correspondence dated 12/22/10, informed me 1.) that it "appears that my (your) SAG and the opening brief might have crossed each other in the mail and 2.) that I (you) dont have to change my (your) SAG (statement of additional grounds) after reading the brief I (she) filed on your behalf." For these reasons I am filing my SAG as it was originally prepared/drafted. Thank you.