

No. 74143-8-I

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

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Court of Appeals
Division I
State of Washington

JESSE THOMAS FULLER, Appellant

v.

STATE OF WASHINGTON, Respondent

OPENING BRIEF OF APPELLANT

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I. INTRODUCTION

Jesse Thomas Fuller is a thirty-two year old man with no prior criminal history currently serving an indeterminate sentence of 120 months to life imprisonment following his convictions on two counts of Rape of a Child in the First Degree.

In this direct appeal, Mr. Fuller submits three errors warranting reversal of his convictions: (A) the trial court erred allowing a complete read-back of the trial testimony of the alleged victim without considering the danger of allowing this crucial witness to essentially testify a second time via a clear and articulate surrogate; (B) the prosecutor committed misconduct by appealing to the passions of the jury and encouraging a verdict based on emotion rather than evidence, mischaracterizing the burden of proof and the role of the jury, as well as vouching for the credibility of the alleged victim and this misconduct was so flagrant and ill-intentioned an instruction could not have cured the resulting prejudice; and (C) the cumulative effect of these errors denied Jesse Fuller a fair trial.

II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING THERETO

Assignment of Error A. The trial court erred in allowing a reading of a transcript of the alleged victim's entire trial testimony during deliberations;

Issue A. Whether the trial court errs in providing the jury with a reading of a transcript of the alleged victim's entire trial testimony by a clear and articulate bailiff where there was no specific factual inquiry concerning some relevant portion of this testimony, the trial court did not consider the danger of allowing this crucial witness to testify a second time, the trial court did not instruct the jury that the transcript was not evidence, and the transcript was necessarily stripped of the nonverbal cues of the alleged victim and clad instead with the nonverbal cues of the transcript reader.

Assignment of Error B. The prosecutor committed misconduct by appealing to the passions of the jury and encouraging a verdict based on emotion rather than evidence, mischaracterizing the burden of proof and role of the jury, as well as vouching for the alleged victim's credibility and this misconduct was so flagrant and ill-intentioned an instruction could not have cured the resulting prejudice.

Issue B.1. Whether it is misconduct for the state to ask the jury to put themselves in the place of the alleged victim by directing that jurors “[t]hink for a moment about the powerlessness of that little girl” as her mother is leaving the house and her father is about to rape her, then offering up a lengthy analogy contrasting this 'powerless little girl' with a safe child whose sexually abusive father no longer had power over her because he had been sent far, far away.

Issue B.2. Whether the prosecutor misstated the role of the jury and the burden of proof by arguing repeatedly that if the jury listened to the alleged victim and believed her that was enough to find the defendant guilty regardless of any other evidence in the case.

Issue B.3. Whether the prosecutor improperly vouched for the credibility of the alleged victim by arguing, “I think you knew that she was telling you what happened.”

Issue B.4. Whether the prejudice resulting from all this misconduct could have been cured considering that these themes permeated the state's total argument and went to the heart of the legal issues in the case and the state's most crucial witness and evidence herein.

Assignment of Error C. The combined effects of these errors denied Jesse Fuller a fair trial.

Issue C.1. Whether a defendant is denied a fair trial where the court allows all of the alleged victim's statements to be repeated to the jury during deliberations including all of the alleged victim's trial testimony and then the state argues for the jury to put themselves in the place of the alleged victim, vouches for the credibility of the alleged victim, then argues that if the jury listened to the alleged victim and believed her that was enough to find the defendant guilty regardless of any other evidence in the case.

III. STATEMENT OF THE CASE

Jesse Fuller was charged by Second Amended Information with two counts of Rape of a Child in the First Degree both allegedly occurring between January 1 and June 10, 2014. CP 120-21. The alleged victim was Jesse Fuller's oldest daughter, AMF. CP 4-5.

Jesse Fuller and AMF's mother, Olga Fuller, met and quickly married when they were both in their early twenties. 07/29/15 VRP 5 line 21-22, 7 line 5-7. Two years later, they had their first child, AMF. *Id.* at 7 line 20-22.

Olga Fuller became a stay-at-home mom and embraced parenthood. *Id.* at 8 line 19-20; 07/30/15 VRP 127 line 17. According to the state and Olga Fuller, Jesse did not embrace parenthood and really

never stepped up as a dad. 07/29/15 VRP 8 line 20, 9 line 2 and line 20. He resisted changing diapers and did not express much interest in spending time with or giving affection to AMF. *Id.* at 8 line 12 – 9 line 3; 07/30/15 VRP 146 line 11-12. This wore on Olga and Jesse Fuller's marriage. 07/29/15 VRP 10 line 5-6. Most of the time, Olga Fuller was very frustrated and upset about Jesse's lack of involvement. 07/30/15 VRP 148 line 6 – 149 line 8; 08/04/15 VRP 233 line 1.

After Olga Fuller repeatedly discussed the issue with Jesse, he started to take a more active role. 07/29/15 VRP 10 line 6 –11 line 7. Jesse Fuller was the disciplinarian. *Id.* at 13 line 11-13. He was really authoritative and could be really tough on AMF. 08/04/15 VRP 200 line 8-10. According to Olga Fuller, Jesse would threaten to spank AMF “all day long every day” and when she was home Olga “wouldn't let him.” *Id.* at 235 line 21 – 236 line 9.

By contrast, Olga Fuller and AMF were “very close.” 07/30/15 VRP 139 line 25. Not surprisingly under these circumstances, AMF did not respond well to Jesse Fuller's more active parenting role. 07/29/15 VRP 12 line 23-25. When Jesse Fuller would watch AMF, she would scream and cry. 07/30/15 VRP 179 line 21. AMF told her mother that when she was gone, “daddy does bad things to me.” 07/30/15 VRP 185

line 23. When AMF initially said this, Olga was clearly satisfied AMF was talking about Jesse spanking spanking her when her mother was away. 07/21/15 VRP 35 line 4-6.

But Olga Fuller testified AMF eventually told her, “daddy does the same things to me as he does to you.” 08/04/15 VRP 206 line 23-24. Per her testimony, Olga Fuller's “instinct” when she heard this was to produce two videos on which she questioned AMF and AMF made allegations of sexual abuse by Jesse Fuller. *Id.* at 208 line 13-14.

The State relied on child hearsay including these oral and videotaped statements heard and created by Olga Fuller, as well as testimony and videotaped statements heard and created by Carolyn Webster, an interviewer with the prosecutor's office. CP 14, 23-28. The videotaped statements were admitted as substantive evidence and played during the state's case in chief. CP 180; 07/30/15 VRP 118 line 24; 08/04/15 VRP 211 line 7, 215 line 24.

The first of these videotaped statements begins with Olga Fuller directing AMF, “tell me again what you just told me.” CP 74 line 14. In this statement, then four-year-old AMF indicated Jesse Fuller made her “suck his pee pee” which he taught her to do “five years ago.” CP 74 line 15, CP 75 line 5.

In her videotaped interview with Carolyn Webster, AMF did not initially accuse her father of touching her inappropriately. CP 81-101. Webster then brought Olga Fuller into the room who begged AMF to accuse her father, offering to buy her “an ice cream cone dipped in chocolate” and take her “to the big playground in McDonalds,” then threatening to give the ice cream cone to AMF's little sister instead. CP 104 line 4 – 106 line 5-7; 08/04/15 VRP 227 line 1-5. AMF still refused to accuse her father of touching her inappropriately. CP 106-19.

As the trial court recognized, the videos spoke for themselves. 07/21/15 VRP 160 line 2-3. Nonetheless, the state both admitted the videos *and* repeatedly elicited testimony from witnesses, some who had merely seen the videos and not been present when they were made, regarding what was depicted thereon. For example, the state's first witness was social worker Gioia Gonzalez. 07/29/15 VRP 34 line 24 – 35 line 5. She testified Olga Fuller showed her the videos of AMF. *Id.* at 45 line 21-23, 47 line 6. Without objection, Gioia Gonzalez testified regarding AMF's “childlike” demeanor on the video, opined that Olga Fuller sounded “pretty horrified by what her daughter was saying on the video,” and commented “[i]t was pretty difficult to listen to.” *Id.* at 47 line 21, 48 line 10.

The state elicited similar testimony from their detective, who similarly watched the videos created by Olga Fuller and observed the videotaped interview with Carolyn Webster. *Id.* at 61 line 20 – 62 line 10. The detective contrasted her characterizations of AMF's demeanor in these videos, testifying that during the Webster interview wherein AMF did not claim she had been molested or raped by her father, AMF was “shut down. She didn't want to talk. She was afraid to talk.” *Id.* at 62 line 11-16. To this testimony at least, defense counsel did object and the trial court struck this portion of the detective's testimony. *Id.* at 62 line 18-23.

AMF testified at trial that Jesse Fuller made her “suck his butt.” 08/04/15 VRP 266 line 9. AMF was reportedly difficult to understand. 08/04/15 VRP 253 line 15-16; 07/27/15 VRP 182 line 14-18 (the state noted both Olga Fuller and AMF “can be a little bit difficult to understand”) *see also*, 07/30/15 VRP line 9.

Perhaps as a result, the state relied heavily on the simple power of repetition. After admitting and publishing the videos of AMF's out of court statements as well as offering ample witness testimony regarding the same, the state played the first of these videotapes again in closing argument. 08/05/15 VRP 294 line 8. Then, four times, the state urged the jury during closing argument to watch all the videos again: “you can

watch it [the interview with Carolyn Webster] again.” “[y]ou should watch it again,” “the State asks you . . . to watch the videos that have been admitted, because they are powerful,” and “[w]atch everything again.” *Id.* at 302 line 22, 308 line 2-3, 312 line 19-20, 332 line 25.

In the closing argument, the state also directed the jury to put themselves in AMF's place:

Think for a moment about the powerlessness of that little girl in that environment when she saw her mom getting her purse, grabbing her shopping list, getting her keys, and getting ready to go.

08/05/15 VRP 292 line 22-25. The state then offered up a lengthy analogy contrasting this 'powerless little girl' with a safe child whose abusive father no longer had power over her because he had been sent far, far away.

08/05/15 VRP 304 line 1 – 306 line 1. The state invited the jury to “think of it this way:”

she's looking at the water and wondering, how deep is that water? How swift is the current? How cold is the water? What does a little girl like [AMF] do? Does she just jump in off the rope swing? Or does she test the waters by putting her toe in? A little girl like [AMF] tests, the waters, which is exactly what she did when she started to tell her mom, Mommy, daddy does bad things to me. . . .

She finds a time that's safe and goes in a little bit deeper. Mommy, daddy makes me do the same things that you do. He makes me suck his pee-pee, and we rub butts together. A little bit further in.

And then the forensic interview where all of a

sudden all of her fears – all of the fears the defendant instilled in her start to come true. I can't do this. She backs out. It's too deep. It's too cold. I don't know if I can do this. . .

And then yesterday, yesterday, 14 months after her initial disclosure, [AMF] was swimming. She was safe. She knew that she was not going to be taken away. She knew that man. He had no power over her anymore because her mommy had sent him away, far, far away, that she was safe, and that she could come here, a very adult place, and tell you what she could about what her father, a man that she misses, did to her when they lived in the same house.

Id.

The prosecutor also repeatedly misstated the burden of proof arguing that a belief in AMF's testimony was sufficient to support guilty verdicts regardless of any other evidence in the case: “if you listened to [AMF] and you believed her, that is enough in this case for you to find the defendant guilty,” “if you believe [AMF] when she tells you what her father did, you are satisfied beyond a reasonable doubt,” and “you will know that this case was proven to you beyond a reasonable doubt because you'll look back and know what [AMF] said is what happened to her.” 08/05/15 VRP 301 line 1-3, 311 line 24 – 312 line 1, 312 line 14-16. The state bolstered this line of argument by vouching that AMF was in fact telling the truth: “[w]hen you heard her testify to these things, I think you knew that she was telling you what happened.” *Id.* at 312 line 5-6.

Just an hour after they retired to deliberate, the jury accepted the State's multiple invitations and asked to rehear all of AMF's statements: all three videotaped out of court statements *and* a full transcript of her trial testimony. CP 61-62, 184, 186.

The trial court allowed the jury to review the videos as a matter of course. 08/04/15 VRP 280 line 25 – 281 line 7. Prior to the jury's requests, the trial court notified the parties, “my normal practice is this, if they ask to see the videos, to bring them into court and show it to them without comment, and then send them back.” 08/04/15 VRP 280 line 25 – 281 line 7. The defense did not object to replaying the three videos. *Id.* at 281 line 15-16; 08/05/15 VRP 334 line 12.

The defense did object to providing the jury a transcript of AMF's testimony arguing this would unduly emphasize that testimony to the exclusion of the other evidence. 08/05/15 VRP 334 line 23-25. The Court granted the request over the defense objection, reasoning that AMF was the crucial witness in this case and some difficulty with hearing her testimony justified repeating it in its entirety:

THE COURT: Okay. Well, I have reviewed the WPIC instruction and the commentary to the instruction. And for a number of reasons, I am going to grant the request to read.

The reasons are, first of all, we did have some

difficulty with hearing the witness, who is the crucial witness in this case. We had at one time to move the chairs up so that we could bring her closer to the microphones. We also had partway through a microphone on a stand that was placed close to her mouth. At one time, the court reporter said that she could not hear an answer or a question and an answer. And I, a couple of times during the beginning portions, saw Juror – I believe it was Juror 1, hold up his ear like he couldn't hear.

So I am satisfied for all of those reasons that, and the jury has requested because they indicated, and I'll read it into the record, can we get a transcript of Anna's testimony because we had a hard time hearing her.

And that will be filed. That's signed by the presiding juror.

Now, after reviewing – so I am going to grant the request.

08/05/15 VRP 338 line 13-15.

Prior to repeating AMF's trial testimony, the Court instructed the jury pursuant to WPIC 4.74. *Id.* at 341 line 5-18. The court then had a bailiff from another court come in and read the transcript to the jury.

08/05/15 VRP 339 line 11-13, 341 line 19 – 369 line 8. Ten minutes later, the jury returned guilty verdicts on both counts. *Id.* at 369 line 19-23; CP 63, 172-74.

IV. ARGUMENT

A. The Trial Court Erred in Providing the Jury with a Reading of a Transcript of the Alleged Victim's Entire Trial Testimony During Deliberations.

The only direct evidence against Jesse Fuller at trial was AMF's statements. Under RCW § 9A.44.120, the state was able to admit and rely on AMF's videotaped out-of-court statements as substantive proof of the matters asserted therein. CP 14, 23-28. 180; 07/30/15 VRP 118 line 24; 08/04/15 VRP 211 line 7, 215 line 24. The state also offered the testimony of four witnesses characterizing AMF's admitted videotaped statements, despite the fact that the videos really did speak for themselves. 07/29/15 VRP 34 line 24 – 48 line 10, 60 line 12 – 62 line 17; 07/30/15 VRP 120 line 9 – 122 line 23; 08/04/15 VRP 208 line 19 – 215 line 13. The state played one of AMF's videotaped statements a second time during closing argument. 08/05/15 VRP 294 line 8. The court then played all of AMF's videotaped statements again during the jury's deliberations. CP 62. And finally the court took the disfavored and dangerous step of granting the jury's request to rehear all of AMF's in-court statements. CP 63; 08/05/15 VRP 341 line 20.

Though AMF's out-of-court videotaped statements were arguably properly admitted, neither the trial court nor the defense demonstrated any

awareness of the potential for overemphasizing the importance of these statements through their multiple replaying and characterizing by witnesses who had merely seen the videos. The trial judge at least should have been aware of this potential and should have carefully considered the possibility of prejudice in permitting all this. *State v. Frazier*, 99 Wn.2d 180, 190-91, 661 P.2d 126 (1983). This lack of awareness was likewise evident in the trial court's consideration of whether to allow repetition of AMF's entire trial testimony and especially in this respect and the above-referenced context, this error warrants reversal.

The right to a fair and impartial jury, guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and article I, section 22 of the Washington Constitution, requires that the trial court balance any need to provide the jury with relevant portions of testimony to answer a specific inquiry against the danger of allowing a witness to testify a second time. *State v. Morgensen*, 148 Wn.App. 81, 88, 197 P.3d 715 (2008), *rev. denied*, 166 Wn.2d 1007 (2009). In conducting this balancing the trial court should start with the proposition that review of witness testimony during deliberations is disfavored because of the possibility the jury will thereby place undue emphasis on such testimony at the expense of the other evidence produced at trial. *State v. Koontz*, 145

Wn.2d 650, 654, 658, 41 P.3d 475 (2002); *citing, United States v. Portac, Inc.*, 869 F.2d 1288, 1295 (9th Cir. 1989); *United States v. Montgomery*, 150 F.3d 983, 999 (9th Cir.), *cert. denied*, 525 U.S. 917 (1998). Given this starting point and possibility, it “is seldom proper to replay the entire testimony of a witness.” *Koontz*, 145 Wn.2d at 657.

The issue in *Koontz* was with replay of videotaped trial testimony. *Id.* But this Court applied the rules announced therein to transcribed trial testimony in *State v. Monroe*, 107 Wn.App. 637, 643, 27 P.3d 1249 (2001), *rev. denied*, 146 Wn.2d 1002 (2002). Citing common law authorities, this Court noted the danger of allowing a transcript to overwhelm the jury's memory of the oral testimony and to overemphasize the transcribed testimony to the detriment of other evidence. *Id.* at 641. These concerns are echoed in the federal decisions cited in *Koontz* including *United States v. Binder*, 769 F.2d 595 (9th Cir. 1985). In *Binder*, the defendant was on trial for child molestation and the jury asked to rehear the testimony of the complaining witnesses. *Id.* at 600. The trial court allowed a replay of their videotaped testimony and the court of appeals reversed holding the replay unduly emphasized this testimony reasoning:

Since there was no physical evidence the only evidence of acts of molestation was presented through the children's videotaped testimony. The defendant denied any criminal

conduct, asserting that the children were displeased with him and their charges against him were vindictive. Credibility became a crucial issue. Under these circumstances the videotaped testimony may have taken on great significance. Allowing the jury to see and hear the children's videotaped testimony a second time in the jury room during deliberations unduly emphasized their testimony.

Id. at 600-01.

In *Montgomery*, a Ninth Circuit case also cited with approval by the *Koontz* Court, the court noted with approval a contemporaneous instruction emphasizing:

the testimony at trial is the evidence, not the transcripts. The transcript is not authoritative. If you remember something different from what appears in the transcripts, your collective recollection is controlling. In other words, the transcripts may not serve as a substitute for the collective memories of the jury or take the place of the assessment of the credibility of witnesses subject to the usual rules.

150 F.3d at 999-1000. Likewise in *Morgensen*, Division II approved an instruction to the jury prior to playing an audiotape of trial testimony that one of the factors for consideration was the witness' manner while testifying calling appropriate attention to the fact that this information would not be available during the playing of the audiotape. 148 Wn.App. at 85.

Part of the problem identified in *Koontz* was the fact that a

videotape of a witness' trial testimony cannot duplicate the perspective or view of jurors during trial. 145 Wn.2d at 654. A transcript can be an even poorer substitute for the perspective of jurors evaluating a witness' live testimony at trial since a transcript is necessarily stripped of important nonverbal cues and thus emphasizes the words transcribed over the manner in which they were communicated. *See, id.* at 655 n.2.

AMF's live trial testimony was reportedly difficult to understand. 08/04/15 VRP 253 line 15-16; 07/27/15 VRP 182 line 14-18. AMF's live testimony may have been hesitant, uncertain, or otherwise unconvincing considering this difficulty as well as the apparent quality of her memory while testifying and her manner while testifying. By contrast, the transcribed testimony, read back clearly by an articulate and intelligent court bailiff, would have been completely divorced of all these important qualities that the jury is supposed to be able to consider in making a determination about the credibility of a given witness' testimony. *See, CP* 154-55; WPIC 1.02.

Insofar as there was some inability to hear some part of AMF's testimony, the danger presented by the reading of the entire transcript is heightened. Jurors are allowed to take notes but not to substitute their own notes for their memory or the memories of other jurors. WPIC 151.00.

Why? Because the trial testimony is the evidence, not the jurors' notes recording the same. If the jurors never heard AMF's words in the first instance, they were encouraged by the court's reading of the transcript to wholly substitute the words in the transcript for their memory of AMF's testimony. If there were errors in the transcription, resulting quite possibly from the difficulty in understanding and/or hearing AMF, the jurors would have no way of knowing of or disregarding the same.

There was no physical evidence implicating Jesse Fuller. The only direct evidence presented by the state was the testimony and statements of AMF *all* of which the court allowed to be repeated. Repetition can be powerful. *See, e.g., The Influence of Amicus Curiae Briefs on U.S. Supreme Court Opinion Content*, 49 *Law & Soc'y Rev.* 917, 936 (2015) (observing that even the Supreme Court appears to be significantly influenced by repetition of language from the litigant's brief in an amicus brief and collecting studies demonstrating that repetition can increase the extent to which message recipients view a message as credible and valid). Certainly the state was counting on repetition having some effect when they urged the jury to "watch everything again." 08/05/15 VRP 332 line 25.

Jesse Fuller denied any criminal conduct and his attorney argued

that there was reason to doubt the state's case given the inconsistencies in AMF's statements and both her and her mother's dissatisfaction with Jesse as a father and husband. *Id.* at 313 line 10 – 328 line 8. The state argued that if the jury believed AMF when she testified, that was independently sufficient for a guilty verdict. 08/05/15 VRP 301 line 1-3, 311 line 24 – 312 line 16. No effort was made to limit AMF's read back testimony to any discrete issue or specific factual dispute. The jury was not instructed that AMF's testimony at trial was the evidence rather than the reciting of the transcript; WPIC 4.74 does not address this issue. The reading of a transcript of AMF's testimony was of great significance not only repeating and thereby overemphasizing this crucial evidence but also allowing the clear and certain reading of the words in the transcript by a bailiff to be substituted for jurors' memories of the actual evidence of AMF's live testimony. Under these circumstances, the reading of the transcript of AMF's trial testimony warrants reversal of Jesse Fuller's convictions.

B. The Prosecutor Committed Misconduct that was So Flagrant and Ill-Intentioned an Instruction Could not have Cured the Resulting Prejudice.

The Sixth and Fourteenth Amendments to the United States Constitution, as well as article I, section 22 of the Washington Constitution guarantee defendants the right to a fair trial. It is the courts' duty to encourage prosecutors to respect the Constitution over and above the ever-present and always powerful interest in obtaining a conviction in a particular case. *See, Rose v. Clark*, 478 U.S. 570, 588-89 (1986) (Stephens, J., concurring). If the courts of appeals allow someone like Jesse Fuller to be convicted by improper and unfair means, then we are essentially at a point when prosecutors will be able to convict anyone by unfair means. "Courts must not permit this to happen, for when it does the freedom of each citizen is subject to peril and chance." *State v. Torres*, 16 Wn.App. 254, 263, 554 P.2d 1069 (1976).

A defendant alleging prosecutorial misconduct must first show the conduct was improper. *State v. Emery*, 174 Wn.2d 741, 759, 278 P.3d 653 (2012); *State v. Berube*, 171 Wn.App. 103, 110, 286 P.3d 402 (2012), *rev. denied*, 178 Wn.2d 1002 (2013). If a prosecutor's conduct was improper and the defendant did not object at trial, the defendant must then show the prosecutor's misconduct was so flagrant and ill-intentioned that an

instruction could not have cured the resulting prejudice. *Emery*, 174 Wn.2d at 761. In making this determination, the focus is less on whether the prosecutor's misconduct was subjectively flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured considering the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury. *Id.* at 762-63, 764 n.14.

“A prosecutor may not appeal to the passions of a jury so as to encourage a verdict based on emotion rather than evidence.” *Berube*, 171 Wn.App. at 118-19; *In re Glassman*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012); *quoting*, 1 Am. Bar Ass'n, *Standards for Criminal Justice* std. 3-5.8(c) (2d ed. 1980).

There can be no explanation for the prosecutor calling on the jury to “[t]hink for a moment about the powerlessness of that little girl” except that the state meant to flagrantly appeal to the jurors' passions and thereby encourage them to decide this case on the basis thereof. *See*, 08/05/15 VRP 292 line 22-25. Make no mistake, this is a powerful appeal whereby the state invites each juror to think about being a little girl left alone with someone who has raped her before and who will rape her again. The insidious and pervasive effect of such an appeal is apparent.

The state elaborated on this improper appeal with their swimming

analogy, next inviting the jury to contrast that feeling of powerlessness with the feeling of a confident young girl whose abuser “had no power over her anymore because her mommy had sent him away, far, far away.” *Id.* at 304 line 1 – 306 line 1. The state coupled these overt emotional pleas with not-so-veiled references to how an abused child may carefully assess to whom and whether they will disclose (like a small child testing the water before swimming) and how the judicial system (a very adult place) can be frightening to a child which are also improper. *See, id.*; *State v. Jones*, 71 Wn.App. 798, 808, 863 P.2d 85 (1993); *State v. Warren*, 134 Wn.App. 44, 68-69, 138 P.3d 1081 (2006), *aff’d*, 165 Wn.2d 17 (2008).

These arguments focusing first on AMF's alleged powerlessness and subsequent struggles analogized to swimming have nothing whatsoever to do with whether the state's evidence amounted to proof of each of the elements of each of the offenses beyond a reasonable doubt. They were made contrary to the prosecutor's duty to ensure a verdict free of prejudice and based on reason.

The prosecutor compounded these improper arguments by then attempting to denigrate the burden of proof. *See*, 08/05/15 VRP 301 line

1-3, 311 line 24 – 312 line 16. It is improper for a prosecutor to mischaracterize the burden of proof or the role of the jury. *Berube*, 171 Wn.App. at 120. Put simply:

The question for any jury is whether the burden of proof has been carried by the party who bears it. In a criminal case, the State must prove its case beyond a reasonable doubt. The jury cannot discern whether that has occurred without examining the evidence for reasonable doubt.

Id. at 121. The state also miscasts the jury's role when it argues the jurors should determine what happened and not whether the state has met its burden of proof. *State v. Evans*, 163 Wn.App. 635, 645, 260 P.3d 934 (2011).

The court explained these principles in *State v. Fleming*, where the prosecutor argued the jury would have to find that an alleged rape victim, D.S., lied, was confused, or fantasized when she testified in order to find the defendants not guilty:

The prosecutor's argument misstated the law and misrepresented both the role of the jury and the burden of proof. The jury would not have had to find that D.S. was mistaken or lying in order to acquit; instead it was *required* to acquit unless it had an abiding conviction in the truth of her testimony. Thus, if the jury were unsure whether D.S. was telling the truth, or unsure of her ability to accurately recall and recount what happened in light of her level of intoxication on the night in question, it was required to acquit. In neither of these instances would the jury also have to find that D.S. was lying or mistaken, in order to

acquit.

83 Wn.App. 209, 213, 921 P.2d 1076 (1996), *rev. denied*, 131 Wn.2d 1018 (1997).

In this case, the state repeatedly misstated the law and misrepresented the role of the jury and the burden of proof by arguing that if the jury listened to AMF's trial testimony and "believed her, that is enough in this case for you to find the defendant guilty." 08/05/15 VRP 301 line 1-3, 311 line 24 – 312 line 1, 312 line 14-16. The state compounded this error by vouching for AMF's credibility, arguing "I think you knew that she was telling you what happened." *Id.* at 312 line 5-6. *See, Warren*, 134 Wn.App. at 68; *citing, State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995). *See also, State v. Horton*, 116 Wn.App. 909, 921, 68 P.3d 1145 (2003).

Contrary to the state's multiple assertions, the question for the jury was not simply whether they believed AMF. It was not simply to determine based on AMF's testimony what happened or what did not happen. It was whether, considering all of the evidence, the state had proved each of the elements of both of the charged offenses beyond a reasonable doubt. A simple belief in AMF's testimony was not necessarily enough to find Jesse Fuller guilty unless for example, AMF's testimony

that Jesse Fuller made her “suck his butt” amounted to proof beyond a reasonable doubt that on two separate and distinct occasions on which they all unanimously agreed between January 1 and June 10, 2014, there was an act of sexual contact between the sex organs of one person and the mouth or anus of another.

Conversely, disbelief in AMF's testimony was not required to find Jesse Fuller not guilty. Jurors could have basically believed AMF's testimony, but thought that this testimony standing alone did not preclude all reason to doubt. Jurors could have believed some but not all of AMF's testimony. Jurors could have believed AMF's testimony but found it insufficiently specific or clear to satisfy each of the elements of both offenses. Under any one of these scenarios, the jury may have had reason to find Jesse Fuller not guilty. By repeatedly arguing that all that was required to find Jesse Fuller guilty was some belief in AMF's testimony, the state presented the jury with a falsity and essentially encouraged a false choice: either believe AMF and find Jesse Fuller guilty or disbelieve her and acquit. This was not simply an argument that to accept one version of the facts the jury might reject another; the state went further by arguing that if the jury believed AMF's testimony it would have to convict regardless of whether any portion of the testimony or any of the other

evidence left a reasonable doubt as to any one of the elements of either of both charged offenses.

These arguments were both misleading and unfair. They denigrated the state's burden of proof inviting the jury to convict on less than proof beyond a reasonable doubt. Especially coupled with the state's appeal to the passions of the jurors, and vouching for AMF's credibility, these errors were both incurable and substantially likely to affect the jury verdict because they permeated the state's entire closing argument, mischaracterized the role of the jury, and denigrated the standard of proof.

C. The Combined Effects of These Errors Denied Jesse Fuller a Fair Trial.

The cumulative error doctrine applies when several trial errors occur which, standing alone, may not be sufficient to justify reversal but, when combined, deny a defendant the fair trial guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, and article I, section 22 of the Washington Constitution. *Warren*, 134 Wn.App. at 69; *citing, State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

In this case, the errors discussed above had a kind of synergistic effect on the trial as a whole. The state asked the jury to put themselves in the alleged victim's place by thinking for a moment about the

powerlessness of a four-year-old child about to be raped by her father. 08/05/15 VRP 292 line 20-25. The state then argued that this case presented just one simple question, whether the jury listened to AMF when she testified and believed her. *Id.* at 310 line 1-3, 311 line 24 – 312 line 1, 312 line 14-16. According to the state, no additional consideration was required to find Jesse Fuller guilty of both counts. *Id.*

And the state then repeated all AMF's statements to the jury over and over again by not only playing her videotaped out-of-court statements but also by offering the testimony of several witnesses to reiterate such statements and offer commentary regarding the same, by replaying one of the videos during closing argument, and by imploring the jury repeatedly to “watch everything again.” *Id.* at 302 line 22, 308 line 2-3, 312 line 19-20, 332 line 25. The jury was not only allowed to revisit all these videotaped statements again during deliberations, they were also allowed to hear a transcript of AMF's entire trial testimony, this time completely devoid of her manner while testifying and instead presented in the clear and concise manner of the bailiff who was tasked with reading the same.

The unrelenting repetition of AMF's statements including the read-back of a transcript of all her trial testimony was error because it allowed the jury to place undue emphasis on this testimony at the expense of the

other evidence produced at trial. This error is especially harmful in light of the state's arguments the jury needed only to ask whether they believed these statements to convict Jesse Fuller. Standing alone and cumulatively, these errors deprived Jesse Fuller of a fair trial and warrant reversal of his convictions.

V. CONCLUSION

For all these reasons and in the interests of justice, Mr. Fuller respectfully asks that this Court reverse his convictions for Rape of a Child in the First Degree and remand these charges for a new trial in accordance with the authorities cited herein.

RESPECTFULLY SUBMITTED this 24th day of March, 2016.

Law Offices of Cassandra Stamm, PLLC

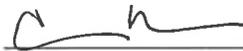


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CERTIFICATE OF SERVICE

I certify that I emailed and mailed a copy of the foregoing Brief of Appellant to poaappellateunitmail@kingcounty.gov and to 516 Third Avenue W-554, Seattle, Washington 98104 and to appellant Jesse Fuller, at the Washington State Penitentiary at Walla Walla, Washington, postage prepaid, on March 24, 2016.

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