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NO. 92909-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JEREMY THOMAS STEVENS,

Petitioner.

ON DISCRETIONARY REVIEW FROM
THE COURT OF APPEALS, DIVISION II
Court of Appeals No. 46905-7-II
Kitsap County Superior Court No. 13-1-01058-3

ANSWER TO PETITION FOR REVIEW

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SERVICE		
	Wayne C. Fricke 1008 S. Yakima Avenue, Suite 302 Tacoma, Wa 98405-4850 Email: wayne@hesterlawgroup.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED April 18, 2016, Port Orchard, WA **Original e-filed at the Supreme Court; Copy to counsel listed at left.** **Office ID #91103 kcpa@co.kitsap.wa.us**

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I. IDENTITY OF RESPONDENT

The respondent is the State of Washington. The answer is filed by Kitsap County Deputy Prosecuting Attorney RANDALL A. SUTTON.

II. COURT OF APPEALS DECISION

The State respectfully requests that this Court deny review of the Court of Appeals unpublished decision in *State v. Stevens*, No. 46905-7-II (Mar. 1, 2016), a copy of which is attached to the petition for review.

III. COUNTERSTATEMENT OF THE ISSUES

The Court of Appeals, in conformity with well-established principles held that:

> (1) sufficient evidence support[ed] two of Stevens's second degree child rape convictions based on charges that Stevens raped SN when she was 12 years old, even though SN testified that she was 11 years old when the rapes occurred; (2) sufficient evidence support[ed] the third second degree child rape conviction despite an absence of penetration because there was evidence of oral to genital contact between Stevens and SN; (3) sufficient evidence support[ed] the sexual exploitation of a minor conviction despite conflicting trial testimony; (4) the trial court did not err in giving the to-convict instructions that included a date range for when the rapes occurred even though the State elected to prove each charge with specific conduct; and (5) the special verdict forms for exceptional sentences based on an ongoing pattern of sexual abuse were proper even though they omitted reference to the requirement that multiple incidents [have] occurred over a prolonged period of time.

Stevens, Op. at 1-2. The court accordingly affirmed Stevens's conviction. *Id.*, at 2.

Stevens challenges each of the holdings below, as well as an additional issue, which he raised for the first time in his reply brief, that the court did not address. The question presented is thus whether this Court should decline to accept review because none of the criteria set forth in RAP 13.4(b) are met, because:

1. The Court of Appeals decision does not conflict with any decision of this Court or the Court of Appeals; and

2. The decision fails to present a significant question of law under the Constitution of the State of Washington and of the United States; and

3. The petition fails to present any issue of substantial public interest that should be determined by this Court?

IV. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Jeremy Thomas Stevens was convicted of three counts of rape of a child in the second degree and one count of sexual exploitation of a minor. The jury also found as an aggravating circumstance that each of counts of rape of a child involved an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time. CP 200-08.

The trial court imposed an exceptional minimum term of 320

months on the child rape offenses and a maximum term of life. The basis for the exceptional upward sentence was the jury's finding of the aggravating circumstance of an ongoing pattern of sexual abuse. CP 245-56, 259-60. It imposed a standard range sentence of 120 months on the sexual exploitation charge, with all sentences running concurrently. CP 247.

On appeal, he raised the issues previously noted. As noted, the Court of Appeals affirmed his convictions and sentence.

B. FACTS

The facts are summarized in the opinion below:[1]

> Stevens and SN's mother have been close friends since they were in junior high school. Stevens has known SN since SN's birth on April 28, 1999. Stevens regularly socialized with SN's mother and stepfather. Stevens's father and stepmother, Kerry and Sue Stevens, also were good friends with SN's mother and stepfather and socialized with them.
>
> *Birthday and Babysitting Incidents*
>
> At some point, SN began babysitting Stevens's young daughter, occasionally spending the night at Stevens's home when he worked late at night. On the night of SN's birthday, Stevens engaged in sexual intercourse with her. The State refers to this incident as the "birthday incident." A few weeks later, SN babysat Stevens's daughter and spent the night. Stevens again had sexual intercourse with SN. The State refers to this incident as the "babysitting incident."
>
> There was conflicting testimony at trial when these incidents occurred. SN explained that the first time they

[1] A more thorough treatment, with record citations, is found in the brief of respondent.

had sexual intercourse was on her 11th birthday, which would have been April 29, 2010. However, she also testified that the incidents occurred when she was in the 6th grade. SN's counselor's testified that SN turned 12 in the 6th grade on April 29, 2011. In addition, SN's stepfather testified that SN was 12 years old when she started babysitting for Stevens.

Fair Incident

On August 24, 2012, the evening before the Kitsap County Fair began, SN and her friend SS (who was a year older than SN) stayed at Kerry and Sue's home. Stevens came to the house after getting off work and the three of them stayed up after Kerry and Sue went to bed. Stevens and the girls went outside and Stevens performed oral sex on SN in the presence of SS.

Stevens later went upstairs to bed but came down three times, each time explaining that he could not sleep because he was sexually aroused. The third time, he told the girls they should "do stuff." Report of Proceedings (RP) at 316. SS and SN then lay down in the family room and Stevens watched from the stairway as SN touched SS's vagina. After they stopped, Stevens commented, "So you guys did it." RP at 316. SN responded, "Yeah." RP at 316. According to SS, Stevens then wanted SS to have sex with him and SN, but SS refused. The State refers to this incident as the "fair incident."

Disclosure and Charges

The allegations against Stevens came to light in December 2012 when SS told her mother that SN was having sex with Stevens.[1] SS's mother told [] SN's mother and stepfather, who initially decided not to report the situation to the police. In April 2013, SN disclosed what had happened to a school counselor, who contacted law enforcement.

[1] According to SN, the last time she had sexual intercourse with Stevens was before Thanksgiving 2012 and stopped because Stevens went out of state to a trucking school.

Stevens, Op. at 2-3.

V. ARGUMENT

THIS COURT SHOULD DENY REVIEW OF THE COURT OF APPEALS DECISION BECAUSE STEVENS FAILS TO ESTABLISH THAT THE OPINION BELOW CONFLICTS WITH ANY ESTABLISHED PRECEDENT OR PRESENTS ANY SIGNIFICANT QUESTION IN NEED OF RESOLUTION BY THIS COURT.

1. None of the considerations governing acceptance of review set forth in RAP 13.4(b) support acceptance of review.

RAP 13.4(b) sets forth the considerations governing this Court's acceptance of review:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision by the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

This Court should decline to accept review because none of these considerations supports acceptance of review. Contrary to Stevens's claim none of the holdings below conflicted with any established precedent. Nor is any significant unresolved question of law presented.

The opinion below was correct for the reasons stated in that opinion, and in the State's brief of respondent. The State will therefore primarily rely on those documents, with supplemental argument as appropriate. Because the aggravating factor instructional claim was not

raised until Stevens's reply brief, and the State therefore has not had an opportunity to respond to it, it will address that claim in more detail.

2. *The Court of Appeals correctly determined that issues of conflicting testimony are for the jury to resolve.*

Stevens firsts asserts that the evidence was insufficient to support his convictions on the birthday incident charges (Counts III and IV) because SN testified that the incident occurred on her 11th birthday. However, as the Court of Appeals noted, that was not the only evidence before the jury:

> Here, Stevens relies on SN's testimony that the birthday and babysitting incidents occurred when she was 11 years old. However, there also was evidence that those incidents occurred when SN was 12. SN testified that she was in 6th grade when Stevens first raped her. Based on her birthdate and enrollment information, the evidence showed that SN turned 12, not 11, when she was in the 6th grade. Further, while Shannon thought that SN started babysitting for Stevens when she was 11 years old, SN's stepfather testified that SN was 12 years old when she started babysitting for Stevens. The jury could have found that SN was mistaken when she stated that the first rape occurred on her 11th birthday.
>
> There also was evidence that the first rape occurred even later than SN's 12th birthday. SN was adamant that the first rape occurred when Stevens was living in what the witnesses referred to as the Bielmeier residence. Stevens testified that he did not move into that residence until October 2011, six months after SN's 12th birthday. SN also admitted at trial that she had stated in an interview with defense counsel that the first rape actually occurred when she was in the 7th grade.[2] And SN testified that the first rape occurred when Stevens worked for Waste Management, and Stevens testified that he worked there only in July and August of 2012. SN was 13 years old at

that time.

> [2] SN explained at trial that after the interview she figured out that the first rape occurred when she was in the 6th grade.
>
> Stevens also points out that SN's testimony that the first rapes occurred when Stevens was working for Waste Management was inconsistent with her testimony that the first rape occurred on her birthday because Stevens testified that he worked for Waste Management in July and August of 2012. However, the jury could have found that SN was mistaken about the first rape occurring on her birthday or about where Stevens was working when the rapes occurred.

Stevens, Op. at 5-7.

Stevens's reliance on *State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988), *abrogated on other grounds*, *In re Stockwell*, 179 Wn.2d 588, 316 P.3d 1007 (2014), is misplaced. That case stands for the now-unremarkable proposition that when "the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act." *Kitchen*, 110 Wn.2d at 409.

First, both measures were taken here. The Court instructed the jury that to "convict the defendant on any count of Rape of a Child in the First Degree and/or Rape of a Child in the Second Degree you must unanimously agree that this specific act was proved." CP 174. Additionally the State elected in closing argument which acts it was

asserting satisfied each charge. 5RP 725-26.

More fundamentally, however, Stevens's contention is not at heart a "multiple acts" claim at all. He does not argue that different acts were alleged and the jurors might not have been unanimous as to which act occurred. Instead, the argument is over *when* the acts occurred. Given the conflicting evidence as to the dates (but not the acts), the Court of Appeals correctly determined that there was sufficient evidence for the jury to conclude that Stevens molested and raped SN when she was between 12 and 14 years old. Stevens fails to demonstrate any issue warranting review.

3. Testimony that Stevens "started to eat [SN] out" and "rub[bed] his tongue on the outside of [her] vagina" was sufficient to prove intercourse by oral sexual contact.

Stevens next asserts that there was insufficient evidence of intercourse with regard to the fair incident. However, SN testified that Stevens "started to eat [her] out," which she clarified meant that he "rub[bed] his tongue on the outside of [her] vagina." 3RP 393-94. As the Court of Appeals noted,

> RCW 9A.44.010(1)(c) also defines sexual intercourse as oral to genital contact: "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another."

Stevens, Op. at 7. Stevens fails to cite any authority suggesting the resolution below was incorrect. He thus fails to show that this Court

should accept review.

4. The Court of Appeals properly declined to reweigh the jury's determination of the evidence with regard to the sexual exploitation of a minor charge.

Stevens argues that the evidence did not meet the standard set forth in *State v. Chester*, 133 Wn.2d 15, 940 P.2d 1374 (1997), with regard to the sexual exploitation of a minor charge. However, as the Court of Appeals properly found, Stevens's argument misunderstands the standard of review:

> SS testified that after Stevens engaged in oral sex with SN, he came down from his bedroom and explained that he could not sleep because he was sexually aroused. He then told SN and SS that they should "do stuff," and then watched as SN touched SS's vagina. RP at 316. He also acknowledged their behavior. This was sufficient evidence to support a finding that he invited the girls to engage in sexually explicit conduct while he watched. ...
>
> SS's testimony provides sufficient evidence that Stevens invited SS and SN to engage in sexually explicit conduct and then watched as they did so. The jury was free to disregard SN's contrary testimony, and once again we defer to the jury's resolution of conflicting testimony. *Homan*, 181 Wn.2d at 106. Accordingly, we hold that sufficient evidence supports Stevens's conviction for sexual exploitation of a minor.

Stevens, Op. at 8-9.

Finally, Stevens's reliance on *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1990), is misplaced, as the Court of Appeals properly held. *Stevens*, Op. at 9. *Alexander* was not a sufficiency of the evidence case. Rather, the issue there was harmless error. There was improper

bolstering and improper closing argument. The Court concluded that it was unable to find that error harmless in light of the conflicting testimony. Notably it did not remand for dismissal, which would be the appropriate remedy for insufficient evidence. Instead it remanded for new trial. *Alexander*, 64 Wn. App. at 158. Stevens again fails to show any issue warranting review.

5. The State both elected specific acts and the trial court specifically instructed the jury, twice, that it needed to be unanimous as to the act of conviction.

Stevens next complains that the although the State elected the acts to which each charge related, the trial court failed to adequately instruct the jury on unanimity, allowing "the jury to convict based on anything that occurred over an extended period of time without coming to a unanimous verdict." Petition, at 17. This claim is contrary to the record.

As noted above the court specifically instructed the jury on its duty to be unanimous as to the act charged before deliberations began:

> In alleging the defendant committed the crimes of Rape of a Child in the First Degree and/or Rape of a Child in the Second Degree, the State relies upon evidence regarding a single act constituting each count of Rape of a Child in the First Degree and/or Rape of a Child in the Second Degree. To convict the defendant on any count of Rape of a Child in the First Degree and/or Rape of a Child in the Second Degree you must unanimously agree that this specific act was proved.

CP 174. Then again during deliberations, the jury asked if the counts corresponded to a specific incident or an/or date, and the court answered

yes. CP 163.

Ultimately the jury delivered verdicts acquitting on counts I and II, convicting on counts III, IV, and V, acquitting on count VI and VII, and convicting on count VIII. CP 200-02. This mixed verdict suggests that the jury was able to correctly follow the court's instructions regarding the prosecution's decision to elect specific incidents. Had the jury convicted on counts I, II, III, and IV, then it would appear rather obvious the jurors misunderstood the idea that counts I and II were alternatives to III and IV. That did not happen here. The jury also acquitted the defendant of the specific rape of a child pre-Thanksgiving incident allegation and one of three of the charges associated with the fair incident. It cannot be said on this record that the jury was improperly instructed or hopelessly confused.

The State properly elected four specific incidents and the jury was properly instructed it had to be unanimous as to each incident, fully complying with *Kitchen*, 110 Wn.2d at 411. Clearly the opinion below does not conflict with that case.[2]

[2] Stevens also alleges in his argument heading that the decision below conflicts with *State v. Rhinehart*, 92 Wn.2d 923, 602 P. 2d 1188 (1979). He does not elaborate on that contention. *Rhinehart* involved a State appeal from a trial court dismissal for insufficiency of the evidence. The State had charged the defendant with possession of a stolen vehicle, but the evidence showed only possession of stolen car parts. The relevance to the Stevens's case is not readily apparent.

6. *Stevens invited any error relating to the definition of an ongoing pattern of sexual abuse.*

Stevens argues that the trial court's instruction defining the aggravating circumstance of an ongoing pattern of sexual abuse, which was taken verbatim from WPIC 300.16, violated this Court's holding in *State v. Brush*, 183 Wn.2d 550, 353 P.3d 213 (2015).

He first faults the Court of Appeals for not addressing the issue. However, he did not raise the issue until his reply brief. The Court of Appeals was thus under no obligation to address it. *State v. Chen*, 178 Wn.2d 350, 358 n.11, 309 P.3d 410 (2013).

More importantly, Stevens requested the very instruction of which he currently complains. CP 145; 4RP 699. It is well settled that a defendant may not request an instruction at trial and then complain that it was erroneous on appeal, even if the instruction is incorrect. *State v. Studd*, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999).[3]

Finally, even if Stevens were permitted to complain of this clearly invited error, unlike the situation in *Brush*, any error would be harmless. *See Brush*, 183 Wn.2d at 559. Here the jury's guilty verdicts are instructive as to whether this was harmless error beyond a reasonable

[3] Moreover, trial counsel cannot be deemed ineffective for proposing a WPIC instruction that at the time of trial had never been held erroneous in any published opinion. *Studd*, 137 Wn.2d at 551 ("counsel can hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC").

doubt. The jury convicted Stevens of raping SN on or about her 12th birthday on April 28, 2011, and then again approximately two weeks later and then again approximately 15 months later in August 2012. In addition to the verdicts, the jury heard testimony that the defendant had sex with her approximately 12 times per month during that time period as well as sent her sexually explicit electronic messages. RP 382, 453-55. The verdicts, in and of themselves, reflect multiple incidents over a 16-month period of time. It is difficult to see how any error here is not harmless beyond a reasonable doubt based on the particular facts of this case as determined by the jury in its verdict. This Court should decline to review an issue of invited error that was raised for the first time in a reply brief, and which would unquestionably be harmless.

VI. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court deny Stevens's petition for review.

DATED April 18, 2016.

Respectfully submitted,

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Thank you.

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