96337-1

Supreme Court
of the
State of Washington

State of Washington
Respondent,
V.
Stephen Jabs,
petitioner

PETITION FOR REVIEW

Stephen Jabs
Prose
SCCC
H4 B 043L
191 Constantine Way
Aberdeen, Wa 98520

Table of Contents

Appendix A

Table of Contents

Table of Authorities

page

State cases

Table of Authorities

page

Table of Authorities

page

Constitutional Provisions (cont'd)

Statutes

Rules

Introduction

I am innocent, I believe each issue brought forth is meritorious, and I ask this courts patience if it finds that I have incorrectly stated the record; it is not my intent to mislead the court nor waste it's time.

I have multiple sclerosis and an extremely muddled thought process and I ask the court to please keep this in mind when evaluating this petition.

Stephen Jabs

A. Stephen Jabs ask this court to accept review of the Cof A decision designated in part B.

B. All issues brought forth in the courts analysis of 49466-3-II and identified in part C.

C. Issues presented for review

1. Whether the court's finding of competency re CG, KH, and KK is in conflict with a prior decision of this court or involves a significant question of law under the state and federal constitutions?

2. Whether counsel's failure to request a lack-of-volition instruction presents a significant question of law under the state and federal constitutions?

3. Whether the jury instructions violated my right against being placed in double jeopardy guaranteed by the state and federal constitutions?

4. Whether the statutory definition of "communiction with a minor for an immoral purpose" was unconstitutionally as applied to my conduct?

5. Whether I was denied my right to a unanimous jury verdict guaranteed by the state and federal constitutions?

6. Whether prosecutorial misconduct deprived me of a fair trial guaranteed by the state and federal constitutions.

7. Whether the court abused it's discretion in admitting highly prejudicial evidence with scant probative value violating my right to a fair trial guaran-

teed by the state and federal constitutions?

8. Whether cumulative error denied me a fair trial guaranteed by the state and federal constitutions?

9. Whether the court erred in admitting unreliable and uncorroborated hearsay statements in opposition to a prior decision of this court and violated my rights to a fair trial guaranteed by the state and federal Const?

D. Statement of the case

The facts are set forth in part B of my BofA and are in each argument in my sag.

E. Argument

1. The courts finding of competency re: CG, ICH, and KK is in conflict with a prior decision of this court and involves a significant question of law under the US Const. Amends 5 and Wa Const. Art 1 sec 3

In Jabs (A1-A30) the court holds that State v. SJW 170 wn.2d 92 applies to my case and not In re: A.E.P 135 wn.2d 208. I argue: (A) The facts of my

case are nothing like SJW's and (B) By failing to conduct a competency hearing the court did not preform a reasonable exploration of all the facts and circumstances surrounding the girls statements, thus denying me due process.

A.(i) WM made a spontaneous outcry to his dad, arguably the same day as the event SJW at 94. KH and KK made no such outcry and CG's outcry alleged by her mother was unsupported by her SANE exam. RP 2513-14

(ii) WM's competency hearing/SJW's trial were approx. 7 months after the event. My trial was 2½-6½ years after the alleged events.

(iii) WM was 14 at the time the event was alleged, KK and KH alleged they were 5, 6, 7, or 8 and 3, 4, or 5 respectively and CG never stated any timeframe.

(iv) SJW admitted abusing WM SJW at 94-95. I am innocent. This is supported by HH's and JJ's testimony (RP 501-11, 2755-62) and (RP 304-10, 2793-96) respectively.

(V) The court in SJW found that WM demostrated

an independent recollection of events SJW at 95, no such independent recollection was had by CG, KH, or KK (SAG at 4-16).

(iv) In SJW this court stated that A.E.P. and Jenkins offer no guidance on the issue before us here. SJW at 98 Given that my case is similar to AEP, how can it be governed by SJW? This defies logic.

B.(i) The court failed to conduct a competency hearing even though I raised a colorable challenge in my "Defendent's motion challenging hearsay and competency" A41 to A71. "Courts have established that after a colorable objection to the competency of a witness, the trial court must perform 'a reasonable exploration of all the facts and circumstances' concerning competency" Walters v. McCormick, 122 F.3d 1172, 1176 (9th cir.)

(ii) The judge simply asking the parties if the girls were competent RP 849, is not a reasonable exploration nor can it ascertain if the girls were competent at the time of the alleged events.

(iii) In SJW at 100 this court affirmed RCW 5.60.050's[1] application to competency determinations, that one must be capable of receiving just impressions of the facts and of relating them truly.

"A child's competency is now determined by the trial judge within the framework of RCW 5.60.050, while the Allen factors[2] serve to inform the judges determination."

The judge could not have determined if the girls were capable of "just impressions" when no dependable timeframe was give by KH or KK and none was given by CG. "If the trial court has no idea when the alleged event occurred, the trial court cannot begin to determine whether the child had the mental ability at the time of the alleged event to receive an accurate impression of it" AEP at 225.

(iv) In AEP this court applied the Allen factors and despite the relatively close timeframe (approx 8 mo) between the accusations and Peteu's hearing, found AEP incompetent to testify. In my case literal years went by between the alleged events and

1. A 72 2. A 73

my trial. And, the Allen factors were not applied.

As stated in the dissent in State v Brousseau, 172 wn. 2d 331, 361, discussing SJW:

"We did not however, nor should we, disturb the expectation that a witness be able to perceive, remember, and truly relate the relevant details about which he or she is called to testify.... Nor did we disturb the rule that the trial court must fully scrutinize competency when a colorable challenge is raised."

By applying SJW, the appellate court erred in finding the girls competent to testify; by failing to follow RCW 5.60.050 and use the Allen factors as a guide, the trial court denied me a fair trial especially since the only evidence was CG, KH, and KK's testimony. In Sinclair v Wainwright, 814 F. 2d 1516, 1522-23 the USSC held, "if the challenged testimony is crucial, critical, or highly significant, failure to conduct an appropriate competency hearing implicates due process concerns of fundamental fairness."

Under RAP 13.4(b)(1)(3) I respectfully ask this court to review this issue.

2. Counsel's failure to request a lack-of-volition instruction violated my U.S. const. 6th amend. and my wa const. Art. 1 Sec. 22 rights to effective assistance of counsel. A 76 and A77

Every accused person enjoys the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86 (1984). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defense. Strickland at 687

(i) I was entitled to a lack-of-volition instruction. In State v. Deer, 175 wn.2d 725 (2012) this court held the judges instruction 11 to acquit if Deer proved by a prepoderance of the evidence that sex had occurred without her knowledge or consent was a correct statement of law. Deer at 733

KH was adamant in her statement to Sinclair (cp 160-61) and in her testimony (RP 242, 252-55, 2409-10) that I was asleep during the event alleged.

(ii) Counsel's choice was not a legitiment trialstratagy. I testified during direct and cross that this did not happen, but if it did, then I was asleep. RP 3332-33, 3430-31

(iii) The court states, "By raising the affirmative defense, Jabs would have taken on the burden of proving that he was asleep when the children sucked on his penis, but that the other incidents did not occur." A20

Both of these statements fail to prove counsel's choice was legitimet trial stratagy.

An affirmative defense would have required me to prove that I was sleeping by a "preponderance of the evidence" a task easily accomplished because is the only child who alleged the event with HH and JJ occurred.

The court errs by lumping all my charges togegther when it states, "but that the other incidents did not occure" A20 In jury inst. 1 A74 the court states, "the law is contained in my instructions to you." I jury inst. 7 A75 the court states, "A seperate crime is charged in each count. You must decide each count seperately. Your verdict on one count should not control your verdict on any other count." If the court's instructions are indeed the law, then the other alleged incidents have no bearing on a lack-of-volition instruction.

(iv) Counsel's deficiency prejudiced the out come of my trial. Prejudice occurs when there is a reasonable

probability that but for counsel's deficiency the result would have been different. Strickland at 685-86
Even if the sleep issue was before the jury, without the instruction the jurors would not have known that if they believed it 50 plus percent possible I was asleep they cald acquit.

I respectfully request the court to review this issue under RAP 13.4(b)(3) and because KH's testimony was not properly weighed - undermining faith in the judicial process (b)(4)

3. The jury instructions violated my right against being placed in double jeopardy guaranteed by the U.S. const. 5th amend and wa. const. Art. 1 sec 9 A76 and A77

The appellate court states, "To determine whether a double jeopardy violation occurred, we consider whether 'the evidence, arguments, and instructions' made it 'manifestly apparent to the jury'.... Mutch 171 wn.2d 646, 664" A15 (underline added)
Though the state conceded that the jury instructions given did not clearly distinguish the acts jurors could

consider for each count against me A16, the court still held that it was manifestly apparent which acts supported each count. A17 The court further stated, "The state argued the child rape and child molestation involving HH were based on HH's oral-genital contact with [me] on the couch, and [me] putting [my] penis on HH in [my] bedroom respectively." A17

But, the to convict~~ion~~ instructions 18 and 19A for counts 5 and 6 are both for molestation. A78 A79 And, the state argued a rape charge for count 6 (RP 3521-22)

It was not "manifestly apparent" which act supported which charge. If learned judges mixup instructions and charges, how can laymen jurors be expected to get it right? This undermines faith in the judicial process.

I respectfully ask this court to review this issue under RAP 13.4 (b)(3)(4)

4. The statutory definition of "communication with a minor for an immoral purpose" RCW 9.68A.090 A80 was unconstitutionally vague as applied to my conduct.

The court construed this issue as a clam the jury instruction defining "immoral porposes" was unconstitutionally vague because it failed to provide an ~~as~~ ascertainable standard by which the jury could evaluate the alleged misconduct. A25 This construction side-steps my stated claim that the statute was unconstitutionally vaague. SAG 17-24

Of course "immoral porposes" means "immoral porposes of a sexual nature", but clarifying this obvious definition does nothing to clarify which purposes of a sexual nature are prohibited nor does it address the issue in my SAG. The court takes 3 words from McNallie (ante) out of context by putting emphsis on "promoting their exposure" and fails to consider the courts complete holding of "[Prohibiting] communication with children for the 'predatory purpose' of promoting their exposure to and involvment in sexual misconduct." McNallie, 120 wn.2d 925, 933.

If this holding is allowed to stand then every parent, relative, care giver, and educator is at risk of arrest simply for communicating with children topics of a sexual nature regardless of motive.

I respectfully ask this court to review this issue because it's ramifications are of substantial public intrest. RAP 13.4(b)(4) and because statutes that are unconstitionally vague as applied affect a persons due process rights under the u.s. const. 5th amend. and wa. const. Art.I sec.3 RAP 13.4(b)(3).

5. I was deprived of my right to a unanimous jury verdict guaranteed by the u.s. const. 6th amend. and wa. const. art. 1 sec 22 A76 A77

The court's reliance on State v. Rodriguez, 187 wn. app. 922, 937 to support denial of my unanimity instruction request is misplaced.

In Rodriguez the events were carried out over a short period of time "within seconds of one another", "within the same house", and Rodriguez repeatedly stated what he was going to do to the alleged victim. Rodriguez at 937.

The facts of my case differ significantly. KK finding the vibrator and me telling her that it did the same thing as the back massager were the same one time act and seperate from the one time "educational" sex

talk in the hot tub, and further seperate from the alleged showing of pornographic videos, denied by me and HH. And none of these events were given a time frame in any witness' testimony from which a "continuing course of conduct" could be drawn

I respect fully ask this court to review this issue under RAP 13.4(b)(3).

6. Prosecutorial misconduct deprived me of my right to a fair trial guaranteed by the us const. 5th amend. and wa. const. Art. 1. Sec 3.

The court cited Thorgerson, 172 wn.2d 438, 443 when it stated, "[i]mproper vouching occers when the prosecutor expresses a personal belief in the veracity of a witness." A29
The prosecutor did express a personal belief when she stated, "not based on what else we know" RP 3521 (emphsis added). Here counsel implies that she knows HH is not credible.
The prosecutor flat-out lied to the jury regarding J.J. (SAG at 34).

The prosecutor expressed a personal belief that I woke up during the alleged "sucking incident" and allowed it to continue; even though there was no evidence what-so-ever introduced or admitted to support her statement (SAG 35)

"... But, a prosecutor may not make any statements that are unsupported by the evidence and unfairly prejudical to the defendant. State v. Boehning, 127 wn. app. 511, 519" SAG at 38

The prosecutors' lies, misstatements, and misleading arguments when taken together could not have been cured by an instruction. And, given the conflicting testimony and the state's weak case, I was prejudiced.

I respectfully ask this court to review this issue under 13.4(b)(3).

7. The court abused it's discretion in admitting highly prejudicial evidence with little probative value and thus violated my right to a fair trial guaranteed by the us const. amend 5 and wa. const. art. 1 sec 3.

The court is correct, I never specified which pics were unduly prejudicial. I considered it a given that I was referring to the "nakey-butt" pics taken ~~of~~ out of context.

The trial court suggested that the photos could be used to show opportunity (RP 930) (SAG 31). If this was the intent, then any of the 4000+ pics of fully clothed children at my home could have been shown.

If impeachment was the intent, the court could have admitted the photos of only JJ or HH who were the targets of the prosecutor's attacks.

"Careful consideration and weighing of both relevance and prejudice is particularly important in sex cases, where the potential for prejudice is at its highest" State v. Coe, 684 P.2d 668, 673-74.

"The court may exclude relevant evidence if its probative value is substantially out weighed a danger of unfair prejudice." ER 403 A 81

"The rules of evidence and due process limit the admissibility of irrelevant or prejudicial evidence." ER 404 (b). A 81

I respectfully ask this court to review this issue

under 13.4(b)(3)

8. Comulative error denied me my right to a fair trial under the us const. amend 5 and wa. const. art 1 sec 3.

Had the appellate court properly ruled on my SAG issues 3 and 4 (6 and 7 in this Petition) then the combined effect of these issues would indeed be cummulative error.

Under the cumulative error doctrine, even where one error viewed in isolation may not warrent reversal, the court must consider the effect of multiple error[s] and the resulting prejudice on a accused person. United States v. Federick, 78 F.3d 1370, 1381 (9th cir 1996)

I respectfully ask this court to review this issue under RAP 13.4(b)(3)

9. The court erred in admitting unreliable and uncorroborated hearsay statements violating my right to a fair trial guaranteed by ~~by~~ the us constitution 5th amend and wa. Const. Art 1 Sec. 3.

Because the children's ability to receive just impressions of the facts and of relating them truly was not properly established under RCW 5.60.050 nor a competency hearing held and because their statements were uncorroborated, the court erred in their admittance.

"Because AEP was incompetent to testify, she was unavailable as a witness. Her hearsay statements regarding sexual abuse lack corroboration and cannot be admitted under RCW 9A.44.120 A 82" AEP 135 wn.2d 208, 234 (# 1998)

I respectfully request this court to review this issue under RAP 13.4 (b)(1)(3)

F. Conclusion - This court should accept review for all of the reasons indicated in part E and grant the relief requested in the conclusions to my B of A and my SAG.

Respectfully Submitted,
12/3/18
Stephen R. Jaeb

Gribble concur by Forrest
60 Wn.App 374

Brown 5 SW 11 23

Filed
Washington State
Court of Appeals
Division Two

July 10, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEPHEN ROBERT JABS, Appellant.	No. 49466-3-II UNPUBLISHED OPINION

MELNICK, J. — A jury convicted Stephen Robert Jabs of six counts of rape of a child in the first degree, four counts of child molestation in the first degree, and one count of communicating with a minor for an immoral purpose. It also found special allegations and aggravating factors.

Jabs argues the trial court abused its discretion by admitting child hearsay statements. He also argues double jeopardy violations, ineffective assistance of counsel, and a lack of jury unanimity. Jabs further argues, and the State concedes, the trial court violated his First Amendment to the United States Constitution rights by restricting his access to public social websites. Jabs also filed a statement of additional grounds (SAG) asserting a number of errors.[1] We affirm the convictions but remand to the trial court to strike the challenged sentencing condition.

[1] Jabs also asks us to deny costs if he does not prevail on appeal because the trial court deemed him indigent. Pursuant to RAP 14.2, we defer to the commissioner if the State files a cost bill and Jabs objects.

FACTS

Jabs babysat a number of children whose parents were friends with his daughters. Starting in 2006, he babysat KH and EH almost every weekend. The next year he began babysitting his granddaughter, JJ, and KH's sister, HH. Jabs also babysat KK.

In 2009, another friend of Jabs's daughters, Mandala took her children, CG and C, to parties and barbecues at Jabs's house. CG started spending the night at Jabs's house when she was six months old.

In February 2014, when CG was four, Mandala and her children began temporarily living with Jabs. During this time, Jabs told Mandala he bought KK a vibrator after he caught her using his back massager to masturbate. Two or three days after this discussion, CG told Mandala that Jabs touched her vagina. When Mandala asked CG what happened, CG said it happened at night when Jabs thought she was sleeping; Jabs moved her underwear, touched her with his fingers, and "tried to put his finger in, but it hurt really bad, and it felt like a rip, and it stung." 1 Report of Proceedings (RP) at 175. CG added it happened a second time when Jabs and CG were in Jabs's hot tub and that "it didn't hurt as bad because it was wet and warm in the water." 1 RP at 175. Mandala reported the abuse to the police the next day.

I. FORENSIC INTERVIEW OF CG

On March 18, Karen Sinclair, a child forensic interviewer, conducted a forensic interview of then four-year-old CG. After ascertaining that CG knew the difference between telling the truth and telling a lie, CG initially denied or avoided questions about abuse by Jabs and her disclosure to her mother. Sinclair asked CG if she really did not know what she told her mother about Jabs or just did not want to tell Sinclair, and CG said "I just don't want to tell you." Suppl. Clerk's Papers (CP) at 389.

However, shortly thereafter, in response to a question from Sinclair about whether CG knew places on the body that are okay to touch, CG said Jabs sometimes touched her vagina. CG said Jabs touched her vagina more than once, including at night when she slept with him on the couch. CG first said Jabs only touched the outside of her vagina, but later said he touched her on the inside of her vagina. CG also said Jabs inserted his finger in her vagina while they were in Jabs's hot tub.

After CG's interview with Sinclair, Detective Aaron Baker investigated the allegations against Jabs.

The mothers of other children Jabs babysat heard about CG's disclosure, but did not believe CG, and their children continued going to Jabs's home.

II. SEARCH OF JABS'S HOME

In September, Baker obtained a search warrant for Jabs's home. Upon executing the warrant, the police found a vibrator and lubricant. They also found pictures of the children Jabs babysat. Some photos showed the children partially or fully naked.

During the search, Baker and another detective interviewed Jabs. Jabs admitted he bought a vibrator for KK. Jabs also admitted to telling KK she could use the lubricant if the vibrator hurt. Jabs told Baker he talked to the children he babysat about sex, telling them they could get pregnant the first time they had sex. However, Jabs denied ever touching CG. The police arrested Jabs.

III. FORENSIC INTERVIEW OF KH, KK, HH, AND JJ

On September 26, Sinclair conducted forensic interviews of KK, then nine-years-old, and KH, then eight-years-old.

get affidavit from Karsetter stating that no pornograph was found on my computers of any kind

KK initially denied or avoided questions about Jabs; however, she eventually said Jabs gave her a purple vibrator and told her it was for her vagina. KK made this disclosure in response to Sinclair telling KK she heard Jabs's white back massager "was used somewhere [other than KK's back, stomach, and legs,] on at least someone else." CP at 427. Sinclair then asked if "there [was] ever a time when [Jabs] was around" when KK used the vibrator, and KK said Jabs used the vibrator on, but not inside, her vagina. CP at 437. KK also said Jabs would put lubricant on the vibrator so it wouldn't hurt.

, 444

never said that

KK also said she and HH did "inappropriate stuff" with Jabs in his bedroom. CP at 440. When asked what she meant, KK started crying and said if her moms found out, she would never go to Jabs's house again. KK said she, HH, and Jabs watched videos of naked adults making out or having sex and did what they saw. The first time she saw a video like that, EH showed it to her on the computer in the girls' room in Jabs's home. KK indicated she watched similar videos on the computer in Jabs's dining room on other occasions.

PGP – No Pornography found at all on my computers -

Sinclair told KK she needed to hear about what happened in Jabs's bedroom. KK said she and HH would "sort of do the making out thing," that "[KK] and [HH] would always be on top of [Jabs,]" and that Jabs's penis would go between their legs, but "not in" their vaginas. CP at 444. KK also said HH would be in the room with her when these acts occurred, but Jabs never had her and HH do these things at the same time. She said white stuff came out of Jabs's penis and he would always put it on either HH's or her stomach; he did not put it other places, because Jabs said it "would make you have a baby." CP at 446. KK also said she and HH put their mouths on

Jabs's penis, and that Jabs said it felt good. KK and HH would suck on Jabs's penis while he licked the outside of their vaginas, and Jabs would sometimes lick their vaginas while they were in the hot tub. KK said these acts happened more than once, and she was eight-years-old the last time it happened.

During the interview, KK said she had been in the interview room before. Sinclair did not know it at the time, but KK was referring a prior false accusation of sexual abuse she had made against her mom's ~~ex-boyfriend.~~

On the way home from her interview with Sinclair, KK told her mother for the first time about Jabs abusing her.

KH also initially denied or avoided questions about abuse by Jabs. CP at 460-536. However, after Sinclair asked if Jabs used his white back massager, KH eventually disclosed he used it on the outside of her vagina; she said he did the same thing to KK, HH, and JJ. KH said Jabs used the back massager on the children's vaginas when they told him their vaginas were sore.

KH also said she saw Jabs's penis when she, HH, and JJ sucked on it while Jabs slept on the couch. KH knew Jabs was sleeping because "if [her] teeth were rubbing on him, he would have w[oken] up, but he didn't." CP at 558. When asked if anything came out of Jabs's penis when they sucked on it, KH said no. Sinclair asked how they knew when to stop sucking, and KH said they stopped when they were "tired of shaking [their] heads up and down." KH said the girls sucked on Jabs's penis more than once. KH thought she was four-years-old when these incidents happened.

KH told Sinclair that Jabs was awake when HH and JJ sucked on his penis while they were in the hot tub. She added that Jabs kept on telling HH to stop.

Sinclair also interviewed HH and JJ, but they did not accuse Jabs of sexually abusing them.

IV. CHARGING

The State charged Jabs with six counts of rape of a child in the first degree, four counts of child molestation in the first degree, and two counts of communicating with a minor for an immoral purpose.[2] The named victims were CG, KH, HH, JJ, and KK. The State also charged Jabs with special allegations and aggravating factors.

V. CHILD HEARSAY HEARING[3]

Pretrial, the trial court held a hearing to determine the admissibility of statements made by CG and KK to their mothers, and made by CG, KH, and KK to Sinclair.

CG, KH, and KK testified regarding a variety of topics to demonstrate their competence, including their names, birth dates, mothers' names, the difference between the truth and a lie, and details about Jabs's home and the incidents of abuse. CG, KH, and KK gave substantially the same testimony as provided in their disclosures to Sinclair.

Sinclair testified and opined that her forensic interview methods did not result in any false disclosures.

Jabs's expert witness, Mark Whitehill, a licensed psychologist, opined that Sinclair's questioning likely tainted CG's, KH's, and KK's statements, making them unreliable. Whitehill said Sinclair engaged in repeated questioning, and displayed dogged persistence that came close to badgering. Whitehill opined that Sinclair's technique interjected facts into the interview, RP at 596, and that CG, KH, and KK denied any abuse until after Sinclair introduced outside

[2] The trial court dismissed one of the communicating charges.

[3] The court held the hearing pursuant to pursuant to RCW 9A.44.120 and *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

information. However, Whitehill also opined that Sinclair's interview technique of using narrow, leading questions at the end of the interviews was appropriate.

At the conclusion of the child hearsay hearing, the trial court addressed the children's competency on the record. The parties agreed the children were competent and available to testify at trial. The court did not enter specific findings on the *Allen*[4] factors.

The trial court analyzed each *Ryan* factor, as discussed later in this opinion, and concluded that the hearsay statements were reliable and admissible. The trial court's written findings of fact stated that CG's, KH's, and KK's statements either satisfied each *Ryan* factor or, when not satisfied, that the factors did not weigh against the reliability of the statements. The court found there was no evidence of a motive for the children to lie or of any untruthful character. It found that CG disclosed to multiple people and the disclosure to her mother was spontaneous. Further, the lack of spontaneity in KH's and KK's interviews with Sinclair did not weigh against reliability nor did the timing of the disclosures or past assertions of fact. When cross-examined, the children did not show a lack of knowledge. Finally, the court found that the chance of faulty recollection was remote, and that imprecise recollection at times did not detract from reliability.

The trial court was not convinced by Whitehill's opinion that the children's statements were tainted by unduly suggestive or leading questioning or by badgering. Additionally, the court found inconsistencies in the children's statements did not detract from reliability, because without some inconsistency "the statements might seem contrived [ ] or premeditated." CP at 302.

[4] *State v. Allen*, 70 Wn.2d 690, 424 P.2d 1021 (1967).

VI. PRETRIAL ORDER ON PHOTOGRAPHS

The trial court denied Jabs's pretrial motion to preclude photos seized by the police from Jabs's home. Jabs argued the photos depicting nude or partially nude children were irrelevant when viewed in context of other normal family photos and, in the alternative, that the photos were unduly prejudicial if admitted out of context of the thousands of other photos seized. The court concluded the photos were admissible to show opportunity because they showed Jabs at home with the children. They also could impeach the child victims' hearsay denial that they were nude in Jabs's home. The court said Jabs could offer other photos seized to provide context for the nude or partially nude photos of children.

VII. TRIAL TESTIMONY AND EXHIBITS

At trial, Baker, CG, KK, KH, HH, JJ, and Jabs provided relevant testimony as follows.

Baker testified that Jabs said he bought KK a vibrator, and offered lubricant to KK if the vibrator felt uncomfortable. Baker told the jury about the photos recovered from Jabs's home, depicting nude or partially nude children. He also told the jury that the police seized thousands of photos and reviewed all of them. The majority of the photos depicted normal family activity, and none of the photos was sexually explicit.

The trial court granted Jabs's motion to admit two full photo albums. The trial court set aside an hour for the jury to review the photo albums to gain a clearer understanding of the context from which the police selected photos of nude or partially nude children. The judge also permitted Randall Karstetter, Jabs's witness, to give testimony on the quantity of photos seized, and allowed him to opine on the nature of a sample of the photos.

KK and KH testified substantially similar to their disclosures to Sinclair. HH and JJ again denied that Jabs abused them or any of the other children.

Jabs testified that he never observed any of the children sucking on his penis. When asked if the children sucked on his penis, Jabs responded "'not to [his] knowledge.'" 19 RP at 3333. Jabs also testified that, if the children sucked on his penis multiple times, he slept through it 3431 multiple times. He sleeps soundly.

Jabs admitted he bought KK a vibrator. He said KK asked him what the vibrator was, and he told her it "[did] the same thing as the back massager." 19 RP at 3352, 3354, 3395. Jabs further testified he saw KK looking at pornography on his computer, and talked to her about sex. Jabs also testified that he told KK and the other children about "the facts of sex" in response to one of the children saying that a woman could not get pregnant until she was a certain age. 19 RP at 3340. Jabs admitted to talking to the girls about sex when they were between the ages of seven and nine. He felt discussing topics of a sexual nature with a seven year old was acceptable.

VII. JURY INSTRUCTIONS

Jabs proceeded to trial. The court instructed the jury:

> In alleging that the defendant committed rape of a child in the first degree as charged in Counts I and II, the State relies upon evidence regarding a single act constituting each count of the alleged crime. To convict the defendant on any count, you must unanimously agree that this specific act was proved.
>
> The State alleges that the defendant committed acts of rape of a child in the first degree, and child molestation in the first degree, in Counts III, IV, V, VI, VII, VIII, IX, and X on multiple occasions. To convict the defendant of rape of a child in the first degree or child molestation in the first degree, one particular act of rape of a child in the first degree or child molestation in the first degree must be proved beyond a reasonable doubt as to each respective count, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the alleged acts of rape of a child in the first degree or child molestation in the first degree.

CP at 256 (Instr. 8).

The court also instructed the jury that: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP at 255 (Instr. 7).

The first paragraph is a modification of WPIC 4.26,[5] and the second paragraph is a modified *Petrich*[6] instruction (WPIC 4.25). Defense counsel argued the communicating charge should be included in the instruction. The trial court disagreed because the State elected an ongoing course of conduct in support of that charge. The court instructed the jury that, to convict, the State had to prove beyond a reasonable doubt that Jabs communicated with KK, a minor, for immoral purposes between November 30, 2008, and September 29, 2014, and the act occurred in Washington. The trial court also instructed the jury that the communication could be by words or conduct, and that the immoral purposes had to be of a sexual nature.

IX. CLOSING ARGUMENT

During closing argument, the State elected separate and distinct acts for each count. As we explain in more detail below, the State gave a detailed description of the underlying act that supported each count and to which victim each count pertained. The prosecutor grouped the counts by victim.

The State also invited the jury to consider different acts that constituted "an overall behavior" of communicating, including giving KK a vibrator, talking to KK about masturbation, showing KK pornographic videos, and talking to KK about sex. 20 RP at 3526. Specifically the prosecutor said:

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[5] 11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTION: CRIMINAL 4.26, at 115 (3r ed. 2008).

[6] *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

> Count XI, this is the Communicating With a Minor For Immoral Purposes, and this is more of a span of time. This is more of an overall behavior. This is the talking to the seven or eight or nine year old about sex, about using condoms, about keeping your legs together, about the myth that you won't get pregnant the first time you have sex, that conversation he had with [KK] in the hot tub. It also includes the videos that she describes him showing her. It also includes the vibrator. All of this behavior is Communicating With a Minor For Immoral Purposes.
>
> And you don't have to . . . find that, yes, he had the sex talk; yes, he showed her videos; yes, he gave her a vibrator. The point is, this is all an overarching behavior, and he is communicating to her about things like masturbation, which, obviously, are sexual in nature. And when we're talking about a man who's over 40 years older than this seven, eight, nine year old, I think we can all agree that that's an immoral purpose. misquoting the Law

20 RP at 3525-26.

During closing argument, the prosecutor made a number of statements Jabs now challenges. Jabs did not object during the prosecutor's closing argument.

X. VERDICT AND SENTENCE

The jury convicted Jabs on all counts. The jury also convicted Jabs on all aggravating factors. The court sentenced Jabs to an exceptional sentence above the standard range. The court also ordered that Jabs could not join or peruse any public social websites.

Jabs appeals.

ANALYSIS

I. CHILD HEARSAY STATEMENTS

A. Legal Principles

Jabs argues the trial court abused its discretion in admitting child hearsay statements of CG, KH, and KK to Sinclair because their hearsay statements were not reliable. We disagree.

"RCW 9A.44.120 governs the admissibility of out-of-court statements made by putative child victims of sexual abuse." *State v. Brousseau*, 172 Wn.2d 331, 351 259 P.3d 209 (2011). RCW 9A.44.120 provides that statements of a child under the age of ten describing acts of, or

attempts at, "sexual conduct performed with or on the child" are admissible in criminal proceedings, if the trial court concludes, after a hearing, "that the time, content, and circumstances of the statement provide sufficient indicia of reliability[,]" and the child "[t]estifies at the proceedings."

We review a trial court's determination that child hearsay statements were reliable for abuse of discretion. *State v. Borboa*, 157 Wn.2d 108, 121, 135 P.3d 469 (2006). "A trial court abuses its discretion 'only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.'" *Borboa*, 157 Wn.2d at 121 (quoting *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003)). Trial courts are "necessarily vested with considerable discretion in evaluating the indicia of reliability" in a child victim's hearsay statements. *C.J.*, 148 Wn.2d at 686.

In determining the reliability of child hearsay statements, the trial court considers nine factors. *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). They are

> (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; [] (5) the timing of the declaration and the relationship between the declarant and the witness[; . . . (6)] the statement contains no express assertion about past fact[; (7)] cross-examination could not show the declarant's lack of knowledge[; (8)] the possibility of the declarant's faulty recollection is remote[;] and [(9)] the circumstances surrounding the statement . . . are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

Ryan, 103 Wn.2d at 175-76. "No single *Ryan* factor is decisive and the reliability assessment is based on an overall evaluation of the factors." *State v. Kennealy*, 151 Wn. App. 861, 881, 214 P.3d 200 (2009).

A trial court does not abuse its discretion where it follows the requirements of RCW 9A.44.120 and the *Ryan* factors in concluding that a child's hearsay statements are reliable. *C.J.*, 148 Wn.2d at 686. "The abuse of discretion standard, as applied in child hearsay cases, . . . acknowledges the obvious, that the trial court is the only court that sees the children and listens to them and to the other witnesses in such a case." *State v. Swan*, 114 Wn.2d 613, 667, 790 P.2d 610 (1990).

B. Finding of Facts

Jabs assigned error to the conclusion that CG's, KH's, and KK's statements to Sinclair were reliable. Jabs did not assign error to any of the trial court's findings on the *Ryan* factors in his opening brief. However, in the body of his brief, Jabs argued the court erred in its findings on *Ryan* factors two, four, five, and nine. Although the State argues Jabs has not preserved the issue on appeal, we address this issue on the merits.

1. Undisputed Findings

Jabs does not challenge the trial court's findings that the first, third, sixth, seventh, and eighth *Ryan* factors were met. We accept these findings as verities. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). The court concluded that the factors favored reliability and admission, except factor six, which was neutral.

2. Challenged Findings

Jabs argues the court erred in making findings on the general character of the children (factor two), on the spontaneity of the statements to Sinclair (factor four), on the timing of the statements to Sinclair and the relationship between the children and Sinclair (factor five), and that the circumstances surrounding the statements to Sinclair do not show the children misrepresented Jabs's involvement (factor nine).

We review whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. *State v. Homan*, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014). We review challenges to conclusions of law de novo. *Homan*, 181 Wn.2d at 106.

Our review of the record on these contested findings of fact demonstrate that substantial evidence supports the court's findings of fact. Further, the conclusions of law flow from the supported findings of fact. The trial court examined all nine *Ryan* factors. It correctly applied the law and, because no one factor is determinative, determined that the factors favored reliability. The trial court did not abuse its discretion. We uphold the admission of the child hearsay statements.

II. DOUBLE JEOPARDY

Jabs argues the jury instructions violated his double jeopardy rights because they did not require the jury to convict him of separate and distinct acts, and the jury could have convicted him multiple times for the same act. We disagree.

"We review double jeopardy claims de novo." *State v. Wilkins*, 200 Wn. App. 794, 805, 403 P.3d 890 (2017), *review denied,* 190 Wn.2d 1004 (2018). "'The constitutional guaranty against double jeopardy protects a defendant . . . against multiple punishments for the same offense.'" *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011) (quoting *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991)); U.S. CONST. amend. V; WASH. CONST. art. I, § 9. However, if each of a defendant's convictions "arises from a separate and distinct act," the offenses are factually different, and there is no double jeopardy violation. *State v. Fuentes*, 179 Wn.2d 808, 824, 318 P.3d 257 (2014).

Jury instructions may result in a double jeopardy violation if they allow a jury to convict a defendant on multiple counts based on a single act. *Fuentes*, 179 Wn.2d at 824. Such instructions create the potential for multiple punishments for the same offense. *Mutch*, 171 Wn.2d at 663.

To determine whether a double jeopardy violation actually occurred, we consider whether "the evidence, arguments, and instructions" made it "'*manifestly apparent* to the jury'" that the State sought a single punishment for each offense, "and that each count was based on a separate act." *Mutch*, 171 Wn.2d at 664 (quoting *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)).

In *Mutch*, a "separate crime instruction . . . fail[ed] to 'inform[] the jury that each 'crime' required proof of a different act.'" 171 Wn.2d at 663 (quoting *State v. Borsheim*, 140 Wn. App. 357, 367, 165 P.3d 417 (2007)). The jury instruction stated:

> [A] separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Mutch, 171 Wn.2d at 662. In *Mutch*, none of the instructions "expressly stated that the jury must find that each charged count represents an act distinct from all other charged counts." 171 Wn.2d at 662. However, the court concluded no double jeopardy violation occurred because "despite deficient jury instructions, it [wa]s nevertheless manifestly apparent that the jury found [the defendant] guilty of five separate acts of rape to support five separate convictions." *Mutch*, 171 Wn.2d at 665. The victim testified to five separate rapes. These incidents corresponded to the "to convict" instructions. The State discussed all five episodes in its closing arguments and elected those incidents upon which it relied for each count. The defendant did not argue insufficient evidence as to the number of events but argued the victim lacked credibility on the issue of consent. *Mutch*, 171 Wn.2d at 665.

In *Fuentes*, the challenged jury instructions for two counts of child molestation specified each conviction required a separate and distinct act; however, they did not specify that the child rape count must be based on a separate and distinct act from the counts of child molestation. 179 Wn.2d at 823. The court concluded it was "manifestly apparent that the convictions were based on separate acts because [in closing argument] the prosecution made a point to clearly distinguish between the acts that would constitute rape of a child and those that would constitute child molestation." *Fuentes*, 179 Wn.2d at 825. "[T]he prosecutor clearly used 'rape' and 'child molestation' to describe separate and distinct acts." *Fuentes*, 179 Wn.2d at 825. The prosecutor also divided the elected acts "into two categories—the acts involving penetration, which constituted rape, and the other inappropriate acts, which constituted molestation." *Fuentes*, 179 Wn.2d at 825.

Here, the State concedes that the jury instructions given did not clearly distinguish the acts jurors could consider for each count against Jabs. We accept the State's concession.

However, as Jabs conceded at oral argument, in closing argument, the State elected an underlying act for each count of child rape and child molestation. This election made it manifestly apparent to the jury that it must unanimously find one act per count. But Jabs argues that we should conclude that the election was insufficient to protect his double jeopardy rights based on *State v. Kier*, 164 Wn.2d 798, 808, 811, 814, 194 P.3d 212 (2008).

In *Kier*, the court held that assault and robbery in the first degree merge when assault is the charge that elevated the robbery charge to robbery in the first degree. 164 Wn.2d at 801-02. There, a single carjacking gave rise to the charges of assault and robbery in the first degree. *Kier*, 164 Wn.2d at 805. Both charges involved two victims and, during closing argument, the prosecutor elected "the driver [of the carjacked vehicle] as the victim of the robbery and the passenger as the

victim of the assault." *Kier*, 164 Wn.2d at 805. The court rejected the State's argument "that the assault and robbery convictions [did] not merge because these crimes were committed against separate victims." *Kier*, 164 Wn.2d at 814. The court concluded that the prosecutor's election of a victim was unclear because "evidence presented to the jury identified [both the victims] as victims of the robbery," and that an ambiguous verdict resulted. *Kier*, 164 Wn.2d at 812-13.

The facts in *Kier* are distinguishable from the facts presently before us. In *Kier*, the court considered whether two offenses that arose from the same act merge. Here, Jabs conceded at oral argument that the child rape and child molestation charges do not merge, and that *Kier* was "not directly analogous." Wash. Court of Appeals oral argument, *State v. Jabs*, No. 46466-3-II (April 3, 2018), at 9 min., 38 sec. through 9 min., 40 sec. (on file with court). In this case, the charges arise from separate acts with separate victims. The State elected a separate and distinct criminal act for each count. Unlike in *Kier*, where the assault and robbery arose from one occurrence, each of the acts of sexual assault for each victim occurred at different points in time. There is nothing that stated a point in time no testimony

It was manifestly apparent in this case what acts supported each count. The State provided a detailed description of each act that supported each count. The State argued the counts by victim. The State argued the two counts of child rape involving CG were based on Jabs penetrating CG's vagina on the couch, and Jabs penetrating CG's vagina in the hot tub, respectively. The State argued the child rape and child molestation involving KH were based KH's oral-genital contact with Jabs on the couch, and Jabs using the back massager on KH, respectively. The State argued the child rape and child molestation involving HH were based on HH's oral-genital contact with Jabs on the couch, and Jabs putting his penis on HH in his bedroom, respectively. The State argued the child rape and child molestation involving JJ were based on JJ's oral-genital contact with Jabs on the couch, and on Jabs using the back massager on JJ, respectively. The State argued the child

rape and child molestation involving KK were based on KK's oral-genital contact with Jabs in the bedroom, and on Jabs putting his penis on KK in the bedroom, respectively.

The State's election during closing argument, along with the jury instructions, made it manifestly apparent that each count was based on a separate and distinct act. No double jeopardy violation occurred.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Jabs argues his defense counsel at trial was ineffective for failing to request a lack of volition jury instruction. He asserts substantial evidence supported Jabs's claim that he was asleep when KH, HH, and JJ sucked on his penis while he was on the couch.[7] We disagree.

We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on an ineffective assistance of counsel claim, the defendant must show both that defense counsel's representation was deficient and that the deficient representation prejudiced the defendant. *State v. Grier*, 171 Wn.2d 17, 32–33, 246 P.3d 1260 (2011). If a defendant fails to prove either prong, the claim fails. *State v. Lord*, 117 Wn.2d 829, 884, 822 P.2d 177 (1991).

Representation is deficient if after considering all the circumstances, it "falls 'below an objective standard of reasonableness.'" *Grier*, 171 Wn.2d at 33(quoting *Strickland v. Washington*, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have differed. *Grier*, 171 Wn.2d at 34.

[7] Jabs argues his conviction for rape of KK was also based on oral-genital contact on the couch, but the prosecution elected the act of oral-genital contact in Jabs's bedroom to support that conviction. No evidence supports a claim that Jabs was asleep during the incidents in the bedroom.

We begin with a strong presumption that counsel's representation was effective. *Grier*, 171 Wn.2d at 33. To demonstrate deficient performance the defendant must show that, based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). Trial counsel has wide latitude in the choice of tactics. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 736, 16 P.3d 1 (2001). Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kyllo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

Defense counsel's failure to request a jury instruction on an affirmative defense can be strategic. *State v. Coristine*, 177 Wn.2d 370, 379, 300 P.3d 400 (2013); *State v. Frost*, 160 Wn.2d 765, 775, 161 P.3d 361 (2007). In raising an affirmative defense, the defendant admits the charged "act, but pleads an excuse." *State v. Riker*, 123 Wn.2d 351, 367-68, 869 P.2d 43 (1994). If a decision to forgo an affirmative defense could be based on a reasonable determination that the defense is inconsistent with the defense's theory that the act did not occur, counsel's decision is strategic. *See Frost*, 160 Wn.2d at 775. Lack of volition is an "affirmative defense" to child rape, which a defendant must prove by "a preponderance of the evidence." *State v. Deer*, 175 Wn.2d 725, 740-41, 287 P.3d 539 (2012). RP 333?

Here, the decision to forego a lack of volition instruction was purely tactical. Jabs's counsel did not perform deficiently. In this context, a jury instruction on the affirmative defense of lack of volition was inconsistent with the defense theory denying that any of the alleged acts occurred.

In raising the affirmative defense of lack of volition, Jabs would have admitted the sexual assault on the couch occurred. *Riker*, 123 Wn.2d at 367-68. However, Jabs was able to elicit evidence that those acts never occurred. Defense counsel explicitly referred to the children's only 1 child's account

accounts of Jabs sleeping during the couch incident as inconsistent and contradictory to the defense theory that it never happened.

By raising the affirmative defense, Jabs also would have taken on the burden of proving that he was asleep when the children sucked on his penis, but that the other incidents did not occur. This strategy would have weakened Jabs's denial on the other counts. Jabs's counsel made a reasonable tactical decision and was not deficient.

IV. UNANIMITY INSTRUCTION

Jabs argues the trial court violated his constitutional right to juror unanimity on the charge of communicating with a minor for an immoral purpose by denying his request for a *Petrich* instruction on that count. He argues that the State elected several distinct acts to support the count, and the jury was not unanimous as to any one act. We disagree.

"Criminal defendants have a right to a unanimous jury verdict in Washington." *State v. Armstrong*, 188 Wn.2d 333, 340, 394 P.3d 373 (2017); WASH. CONST. art. I, § 21. We review such constitutional issues de novo. *State v. Jorgenson*, 179 Wn.2d 145, 150, 312 P.3d 960 (2013).

The *Petrich* rule ensures juror unanimity when the prosecution alleges several acts in support of a single count charged against a defendant. *State v. Craven*, 69 Wn. App. 581, 587, 849 P.2d 681 (1993). The prosecution must elect the underlying act, or the court must instruct the jury that it must unanimously agree on a single criminal act underlying the conviction. *Petrich*, 101 Wn.2d at 572. "Where there is neither an election nor a unanimity instruction in a multiple acts case, omission of the unanimity instruction is presumed to result in prejudice." *State v. Coleman*, 159 Wn.2d 509, 512, 150 P.3d 1126 (2007). "The presumption of error is overcome only if no rational juror could have a reasonable doubt as to any of the incidents alleged." *Coleman*, 159 Wn.2d at 512.

Where a prosecutor elects a continuing course of conduct for a particular count, the *Petrich* rule is inapplicable. *Craven*, 69 Wn. App. at 587-88. "Evidence that multiple acts were intended to secure the same objective supports a finding that the defendant's conduct was a continuing course of conduct." *State v. Rodriquez*, 187 Wn. App. 922, 937, 352 P.3d 200 (2015). "Courts also consider whether the conduct occurred at different times and places or against different victims." *Rodriquez*, 187 Wn. App. at 937.

However, "'one continuing offense' must be distinguished from 'several distinct acts,' each of which could be the basis for a criminal charge." *State v. Barrington*, 52 Wn. App. 478, 480, 761 P.2d 632 (1988) (quoting *Petrich*, 101 Wn.2d at 571). "'To determine whether one continuing offense may be charged, the facts must be evaluated in a commonsense manner.'" *Barrington*, 52 Wn. App. at 480 (quoting *Petrich*, 101 Wn.2d at 571).

RCW 9.68A.090(1) prohibits communication with a minor for an immoral purpose. Communication under RCW 9.68A.090 may involve either a course of conduct or spoken words. *State v. Falco*, 59 Wn. App. 354, 358, 796 P.2d 796 (1990)); *State v. Schimmelpfennig*, 92 Wn.2d 95, 100-01, 594 P.2d 442 (1979). As such, a continuing course of conduct can support one count of communication with a minor for immoral purposes. *Barrington*, 52 Wn. App. at 482 (communicating conviction where a defendant promoted prostitution of one minor during a 3-month period); *State v. Gooden*, 51 Wn. App. 615, 620, 754 P.2d 1000 (1988) (communicating conviction where a defendant promoted prostitution of two minors during a 10-day period)). The trial court does not violate the defendant's rights to a unanimous jury verdict by omitting a *Petrich* instruction if the prosecutor elects a continuing course of conduct underlying a count of communication with a minor for immoral purposes. *Petrich*, 101 Wn.2d at 571.

Here, Jabs objected to the exclusion of the communicating with a minor count from the modified *Petrich* instruction given. The trial court ruled it did not need to be included because the State elected "an ongoing course of conduct" to support that count. 20 RP at 3453.[8]

In closing argument, the State invited the jury to consider different acts that constituted "an overall behavior" of communicating, including giving KK a vibrator, talking to KK about masturbation, showing KK pornographic videos, and talking to KK about sex. 20 RP at 3526.

We conclude that a series of acts by Jabs were intended to serve a single objective. In evaluating them in a commonsense manner, the communication charge involved one continuing course of conduct.

V. RESTRICTED ACCESS TO SOCIAL WEBSITES AS A SENTENCING CONDITION

Jabs argues the court violated his First Amendment rights by restricting his access to public social websites as a sentencing condition. Jabs relies on *Packingham v. North Carolina*, ___ U.S. ___, 137 S. Ct. 1730, 198 L. Ed. 2d 273 (2017), where a statute making it a felony for registered sex offenders to access certain websites was held to facially violate the First Amendment. The State concedes the trial court erred in prohibiting Jabs from accessing social websites as a sentencing condition, and concedes the sentencing condition should be stricken.

We accept the State's concession, and remand with instructions to strike the challenged sentencing condition.

[8] Instead, the court instructed the jury that, to convict, the State must prove, beyond a reasonable doubt, Jabs communicated with KK, a minor, for immoral purposes between November 30, 2008, and September 29, 2014, and the act occurred in Washington.

VI. SAG CLAIMS

A. Competency of Child Witnesses

Jabs asserts the trial court abused its discretion in ruling that CG, KK, and KH were competent. Jabs asserts CG was incompetent because she did not understand the obligation to speak the truth when Sinclair interviewed her. He next asserts the court abused its discretion because CG, KH, and KK gave too broad of a timespan for the alleged abuse for the court to determine the second *Allen* factor. Last, Jabs contends the court abused its discretion because Sinclair's allegedly suggestive and leading questions, corrupted CG's, KH's, and KK's memories. We disagree.

Witness competency hinges on whether the witness, at the time of testifying had the capacity to accurately perceive, had the capacity to accurately recall, and had the capacity to accurately relate. *State v. S.J.W.*, 170 Wn.2d 92, 99-100, 239 P.3d 568 (2010). A competency determination is "relevant only to [a child witness's] ability to testify *at trial* and not the admissibility of [the child's] out of court statements." *Borboa*, 157 Wn.2d at 120 (emphasis added). Even "where the court is reviewing a pretrial competency determination, the inquiry is always whether the child is competent to testify *at trial*." *Brousseau*, 172 Wn.2d at 341 n.5.

Every person is presumed competent to testify, including children. *Brousseau*, 172 Wn.2d at 341. "A child's competency is now determined by the trial judge within the framework of RCW 5.60.050, while the *Allen* factors serve to inform the judge's determination." *S.J.W.*, 170 Wn.2d at 100. The challenging party has the burden of proving incompetence of a witness "by a preponderance of evidence," usually with evidence indicating the child is incapable of receiving just impressions of the facts, or incapable of relating facts truly. *Brousseau*, 172 Wn.2d at 341;

RCW 5.60.050. "[R]ecitation of the *Allen* factors, without more, [will] not constitute a sufficient offer of proof of incompetency." *Brousseau*, 172 Wn.2d at 345

The "bar for competency is low." *Brousseau*, 172 Wn.2d at 347. Inconsistencies in a child's testimony do not necessarily call into question witness competency. *State v. Carlson*, 61 Wn. App. 865, 874, 812 P.2d 536 (1991). Inconsistencies generally relate to the witness's credibility and the weight to give his or her testimony, not competence. *Carlson*, 61 Wn. App. at 874.

While criminal defendants have a constitutional due process right to be convicted on competent evidence, we give "significant deference to the trial judge's competency determination," and "disturb such a ruling only upon a finding of manifest abuse of discretion." *Brousseau*, 172 Wn.2d at 340. This standard of review is especially applicable to child witnesses because "[t]he competency of a youthful witness is not easily reflected in a written record, and [an appellate court] must rely on the trial judge who sees the witness, notices the witness's manner, and considers his or her capacity and intelligence." *State v. Woods*, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005). "There is probably no area of law where it is more necessary to place great reliance on the trial court's judgment than in assessing the competency of a child witness.'" *Woods*, 154 Wn.2d at 617.

Here, the trial court found CG, KH, and KK were competent to testify at trial after conducting a child hearsay hearing under RCW 9A.44.120. Jabs concurred with the court's assessment that CG, KH, and KK were competent. Additionally, at the child hearsay hearing, CG,

KH, and KK testified regarding a variety of topics illustrating competence, including the children's names, birth dates, mothers' names, the difference between the truth and a lie, and details about Jabs's house and the incidents of abuse.

The court did not abuse its discretion in finding these child witnesses were competent.

B. Communicating with a Minor for Immoral Purposes

Jabs asserts the statute prohibiting communication with a minor for immoral purposes, RCW 9.68A.090, is unconstitutionally vague as applied to his conduct. Jabs seems to also assert that insufficient evidence supports his conviction under RCW 9.68A.090. We disagree.

Jabs contends his discussions with KK about sex were "informative," that he only bought KK a vibrator so she would stop masturbating with his back massager, and denies that he ever showed KK pornography.

We construe Jabs's assertion on this point as a claim that the jury instruction defining "immoral purposes" was unconstitutionally vague because it failed to provide an ascertainable standard by which the jury could evaluate the alleged misconduct.

"The vagueness standard . . . [asks] whether persons of common intelligence and understanding have fair notice of the conduct prohibited, and ascertainable standards by which to guide their conduct." *Schimmelpfennig*, 92 Wn.2d at 102. "[W]hen ["immoral purposes"] is read in context with RCW 9.68A, it clearly provides persons of common intelligence and understanding with fair notice of and ascertainable standards of the conduct sought to be prohibited." *State v. Danforth*, 56 Wn. App. 133, 136, 782 P.2d 1091 (1989), *overruled on other grounds in State v. McNallie*, 120 Wn.2d 925, 846 P.2d 1358 (1993).

To the extent Jabs asserts the jury based his conviction on conduct that was not carried out with immoral purpose, his argument is without merit. *State v. Gladden*, 116 Wn. App. 561, 566, 66 P.3d 1095 (2003).

Here, the court instructed the jury that "immoral purposes" means "immoral purposes of a sexual nature." CP at 273 (Instr. 24). *McNallie*, 120 Wn.2d at 933, upheld an identically worded instruction. There, the court held that the communication statute "prohibits communication with children for the predatory purpose of *promoting their exposure* to and involvement in sexual misconduct." *McNallie*, 120 Wn.2d at 933 (emphasis added). *McNallie* "expressly rejected a detailed delineation of the requisite misconduct and led to a holding that 'sexual misconduct' was a sufficient context for the 'immoral purposes' contemplated by the communications with a minor statute." 120 Wn.2d at 932–33. Thus, the jury instruction defining "immoral purposes" was not unconstitutional vague.

Additionally, to the extent Jabs argues that there is insufficient evidence to support the communication conviction, the record shows sufficient evidence exists.

Evidence is sufficient when, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220–22, 616 P.2d 628 (1980). "[W]hen the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the state and interpreted most strongly against the defendant." *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977), *overruled on other grounds by State v. Lyons*, 174 Wn.2d 354, 365, 275 P.3d 314 (2012). A claim of insufficiency "admits the truth of the State's evidence and all

inferences that can reasonably be drawn therefrom." *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980). We do not review credibility determinations, and we defer to the trier of fact on issues of conflicting testimony and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004).

Sufficient evidence supported Jabs conviction for communicating with KK, a minor for immoral purposes. The jury had to find that there was communication constituting an ongoing course of conduct by Jabs with KK of a sexual nature. Viewing the evidence in the light most favorable to the State, a rational trier of fact could have found Jabs was guilty beyond a reasonable doubt.

C. Admission of Photos

Jabs challenges the trial court's evidentiary rulings admitting photos of the children and of Jabs's home.[9] He claims the photos were irrelevant to the charged crimes, had negligible probative value, and were unduly prejudicial. Jabs also asserts he was tried on matters extraneous to the charged offenses when the photos were admitted. We disagree.

We review a trial court's admissibility of evidence determinations for an abuse of discretion. *State v. Cayetano–Jaimes*, 190 Wn. App. 286, 295, 359 P.3d 919 (2015). A trial court abuses its discretion when its evidentiary ruling is manifestly unreasonable or based on untenable grounds. *Cayetano–Jaimes*, 190 Wn. App. at 295. "Allegations that a ruling violated the defendant's right to a fair trial does not change the standard of review." *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192, 1196 (2013).

[9] Jabs never specifies which photos he is basing this assertion on.

Here, Jabs moved to exclude all photos seized in the search of his house as irrelevant when viewed in context and, in the alternative, as unduly prejudicial if admitted out of context. The court denied the motion and concluded the State offered the photos either to show opportunity, or to impeach the child victim's hearsay statements about nudity in Jabs's home. The court also concluded "the photos [we]re relevant for a variety of purposes[,]" and that Jabs could offer photos other than those proffered by the State for context. 6 RP at 932.

At trial, Baker testified about the photos depicting rooms in the home and children who were partially clothed or naked. Baker testified that there were thousands of photos taken from Jabs's home, that the police reviewed all the photos, that the majority depicted normal family activity, and that none were sexually explicit.

Additionally, the trial court granted Jabs's motion to admit two full photo albums. The trial court set aside an hour for the jury to review the photo albums so it could gain a clearer understanding of the context from which the police selected photos of nude or partially nude young girls. The judge also permitted Randall Karstetter, Jabs's witness, to give testimony on the quantity of photos reviewed by the police, and allowed him to opine on the nature of a sample of the photos.

Because the trial court did not abuse its discretion, Jabs's argument fails.

D. Prosecutorial Misconduct

Jabs argues the prosecutor improperly offered personal opinions on the veracity of witnesses and misled the jury by misstating the evidence during cross-examination and closing argument. We disagree.

Prosecutorial misconduct is grounds for reversal if the defendant shows the prosecuting attorney's conduct was both "improper and prejudicial in the context of the entire record and the circumstances at trial." *State v. Thorgerson*, 172 Wn.2d 438, 442, 258 P.3d 43 (2011). Generally,

a prosecutor's improper comments are prejudicial only where "'there is a substantial likelihood [that] the instances of misconduct affected the jury's verdict.'" *Thorgerson*, 172 Wn.2d at 442–43 (quoting *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008)).

When the defendant fails to object to the challenged portions of the prosecutor's argument, he "is deemed to have waived any error, unless 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 760–61. The defendant must show that no curative instruction would have eliminated the prejudicial effect, and "the misconduct resulted in prejudice that 'had a substantial likelihood of affecting the verdict.'" *Emery*, 174 Wn.2d at 761 (quoting *Thorgerson*, 172 Wn.2d at 455).

A prosecutor has wide latitude to comment on a witness's credibility in closing argument. *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). The prosecutor also may argue reasonable inferences from the evidence regarding the credibility of a witness. *Thorgerson*, 172 Wn.2d at 448. For example, a prosecutor may argue the jury should believe one witness over another because one witness's version of the events is more credible based on the evidence presented. *Thorgerson*, 172 Wn.2d at 448. However, "[i]mproper vouching occurs when the prosecutor expresses a personal belief in the veracity of a witness or indicates that evidence not presented at trial supports the testimony of a witness." *Thorgerson*, 172 Wn.2d at 443.

Here, Jabs did not object during the prosecutor's closing argument. None of the challenged statements during closing argument were flagrant or ill-intentioned, and the defendant fails to make any showing that a curative instruction would not have eliminated any prejudicial effect. Jabs's prosecutorial misconduct challenge fails.

E. Cumulative Error

Jabs argues that, cumulatively, effects of the errors at trial were so prejudicial that they denied him his right to a fair trial. We disagree.

"Under the cumulative error doctrine, we may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant [his] right to a fair trial, even if each error standing alone would be harmless." *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010). Cumulative error does not apply where the errors are few and have little or no effect on the outcome of the trial. *Venegas*, 155 Wn. App. at 520.

Because the trial court did not err, we conclude that Jabs is not entitled to relief under the cumulative error doctrine.

We affirm the convictions but remand to the trial court to strike the challenged sentencing condition.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Maxa, C.J.

Lee, J.

my original copy
1 copy each sent to the CoA Div II
& Kitsap county PO on 8/16/16

Court of Appeals Div II
State of Washington

State of Washington Re: 49466-3-II
Respondent

v. Motion to Reconsider

Stephen Jabs
Appellant

1. Stephen Jabs, the moving party, seeks the relief designated in Part 2.
2. Reconsideration of all assignments of error brought forth in the BoA and my SAG and Dismissal of my Case.
3. The facts relevant to this motion are as follows:

A. Because of the voluminous material submitted regarding my case, errors and oversights occurred in the courts determination of the facts.
Opinion Pg 2 If Mandala is being taken at her word, that CG allegedly said, "It felt like a rip and a sting", why was CG's SANE exam negative for abuse or signs of abuse? (RP) 2511. The SANE nurse goes on to say, "that "touching" doesn't leave marks, generally." " But I'm not being charged with "touching"; I'm being charged with rape, with putting my finger in a 4 year olds

vagina and her allegedly feeling a rip and sting. The alleged last contact is said to have been 3/15/14. (C.G. left my home on 3/14/14 and I've not spent time with her since.) CG's SAME exam was on 3/20/14 (RP) 2516. I submit to this court, that if the alleged abuse happened, the SAME nurse would have found evidence of abuse. No abuse was noted or found.

also on Pg 2 "and CG said, "I just don't want to tell you" (CP) at 389 CG immediately corrected herself and said, "Actually I don't know". This correction was confirmed by Sinclair (CP) at 389

also on Pg 3 CG did not say Jabs thought she was sleeping; she said she thought I was sleeping①.

also on Pg 2 Mandala did not report the alleged abuse the next day. She left on 3/14/14 to take the kids, CG and Caleb, to their grandmas for the weekend for one last visit before moving to Flordia. This alleged allegation happend during the car ride to grandmas. The kids stayed with grandma until monday 3/17/14. It was only after having "her" weekend and getting the kids that she went to the police - On Monday 3/17/14. This is backed up by the date on the report filed by the KCSO. Then on 3/18/14 CG saw Sinclair, and saw the SAME

① CG's interview pg 28

nurse on 3/20/14.
also on pg 2 CG did not "avoid" questions of abuse. She had no clue what Sinclair was getting at. C.G. is 4½ years old at the time of this interview, had not been abused by me, and to my knowledge had not been abused by anyone else. She is a sweet, confused, innocent, tired, and open little girl, while Sinclair is a skilled police interrogator only looking to hear what she wants to hear. Starting on Pg 11 of CG's interview with Sinclair is the 1st of at least 25 times where C.G says I don't know or I don't remember - she is not trying to avoid anything she's 4 and she does not have an imbeded independent memory of any abuse because none occurred. Sinclair's one track mind is evidenced by Sinclair calling the dog "mollie" "Aunt mollie" (Pg 12 of CG's interview) This is further evidenced on pg 16 of the interview when chloe says "Duck the who" and Sinclair responds What? Doctor what? You do not need to be an expert to know what was said, bct because Sinclair is so hyperfaused on finding confirmation of abuse she then finds abuse in every statement. And, on pg 18 CG tells sinclair "she said, um, come in the office, and, um, and, um, and talk to her."

Sindair's response, " OK, and then what happened? When you went in the office to talk" Sindair is oblivious to the fact that CG is describing what her mom said to her to get her into Sinclair's office. (CG's interview pg 18) And then on pg 19 of CG's interview Sindair is under the impression that CG was brought to Grandmas <u>because</u> she made an accusation not that the alleged accusation was made on the ride to grandmas. Sinclair is not aware or does not remember any of the info told to her concerning CG, mandala, or the timing of any events as they happened or were alleged to have happend. This is due to Sinclair's sole focus of finding abuse where there is none.

CG had no independent recollection of any alleged abuse, neither KK's nor KH's interview or testimony corroborates any abuse involving CG, and both HH and JJ stated and testified that they never observed me abusing any child, And CG's sane exam was negative for abuse. ~~Also on pg 2 of the opinion~~ On pg 3 of the courts opinion it is stated that detective Baker investigated the alleged CG Allegations but this court fails to state that no action was taken against me as a result of this investigation. No

police contact, No charges filed, no arrest. This was due to there being no evidence of mandala's allegation, no evidence of abuse on or in Chloe, and no corroborative evidence. CG rembered only what her mom implanted in her head that was triggered by sinclair's improper and leading interrogation —

On pg 7 of the opinion the court states that C.G disclosed to multiple people. How can info garnered in an interrogation concerning an alleged disclosure be construed as a second seperate disclosure? I ask this because on pg 5 of this opinion KK telling her mother about alleged abuse after KK's sinclair interview was not considered a second seperate disclosure, therefore it stands to reason that CG's disclosure to Sinclair was not a second disclosure but rather a regurgiation of the ~~the~~ origional alleged disclosure alleged by Mandalla and extracted by Sinclair under dubious conditions.

On pg 5 of the opinion "she said he did the same thing to KK, HH, and JJ." KH never said I ~~did~~ used the back massager on KK. In the (RP) @ 2295 KH talks about how KK and others maybe used it on themselves on their backs. I've reread KH's forensic interview 3 times in

preperation of this motion and there is nowhere that she says I used the massager on KK.

And, Concerning KH's statements about HH and JJ - both HH and JJ stated and testified that I have never touched them in an inappropriate way nor had they ever observed any inappropriate touching between me and any other child. Each stated this atleast 3 times over a 21 month period beginning with their forensic interviews in sept/oct 2014, through the child hearsay hearings in April 2016, and again during trial in July 2016. There is no corroborative evidence of any kind that supports KH's assertion that I touched the girls with the backmassager in a sexual way and no corroborative evidence that the "lollipop" incident ever took place. H.H and JJ have never wavered in their consistent denial of KH's statements; they have never wavered because these incidents never occurred.

Combine this with KK stating that she never observed any inappropriate behavior involving JJ or KH and combine this with KK admitting she previously made a false accusation (opinion pg 5) of sexual abuse involving

her stepdad (this was not an ex boyfriend as the court states rather this was her moms ex husband)
All of the above corrected facts and noted oversights leads to questioning the "evidence" against me and to questioning the reliability of the statements made by CG, KH, and KK.

B. In a nutshell,
There were no charges regarding CG until the charges regarding KK, KH, HH, and JJ were brought, yet nothing from these 4 girls adds evidence to the charges regarding CG - Nothing corroborates CG and there is no change in the facts of her alleged allegations from 3/14 to 9/14.
KH at 8 1/2 years old had a 1hr 40 min interogation full of leading and suggestive questions. KH made fanciful statements re: HH, JJ, & herself yet there is no corroboration or accusation from HH & JJ nor is there any evidence other than KH's unreliable statements. To have a crime doesn't there have to be a victim?
KK is an admitted false accuser re: similar allegations. She only inculpates HH, me, and

herself. HH denies all of KK's accosations as do I. I also deny CG's and Mandala's accusations and KH's accusations.

There is no corroboration between the ~~falling~~ following:

CG and Any other child

CG and her Sane Exam

KH and HH & JJ

KH and KK

KK and HH

KK, KH, CG & me

I've never abused anyone, at any time, of any age for any reason.

C. In addition to A & B above, I ask this court to reexamine the trial courts application of the Ryan factors based on the fact that there is no continuity between any childs statements and no corroboration of abuse of any kind.

To reexamine the ineffective assistance of Counsel claim. Regardless of ~~child~~ trial stratagy - I testified that if KH, HH, & JJ sucked on my penis, I was asleep. Heck, KH stated I was asleep, sound asleep, snoring. How can I be guilty of a crime

if I'm asleep and the other parties allegedly involved in said crime say that the crime never occurred?

D. In my SAG I challenged competency with respect to Rcw 5.60.050 (2) "Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truely shall not be competent to testify" CG testified to facts that she could not remember 5½ days after the alleged event yet she was considered competent to ~~remember~~ remember them 28 months later? KH testified to events that allegedly took place when she was 3, 4, or 5 yet the court made no effort to ascertain her competency as it was at those ages even though counsel put in a motion challenging competency and Hearsay the trial court never applied the allen factors or entered written findings. The same goes for KK, the court should have tried to ascertain her competency at the time of the alleged event, specially after counsel challenged competency and hearsay. The St. supreme court states the trial Judge is to determine competency within the framework of

RCW 5.60.050(2) while the Allen factors are to inform the judges determination. But, my Judge never inquired about or applied the Allen Factors to his determination. How could he have? If he had applied the Allen Factors, the only logical conclusion to their application would have been CG did not meet factors 1, 2, & 3 and KH and KK did not meet factors 2 & 3, and my charges would therefore been dismissed.

5. I ask this court to reconsider all Brief of Appellate and SAG arguements taking into consideration the corrected facts and oversights addressed in this motion.

4. The grounds for relief are intertwined with the facts that are ~~fewel~~ relevant to this motion. I'm Innocent, please reconsider my case, find me innocent and release me from my restraint.

Signed this 15th day of Aug 2018
Respectfully Submitted
Stephen Jobe

Filed
Washington State
Court of Appeals
Division Two

September 6, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. STEPHEN ROBERT JABS, Appellant.	No. 49466-3-II ORDER GRANTING MOTION FOR EXTENSION OF TIME TO FILE MOTION FOR RECONSIDERATION; DENYING RECONSDIERATION; AND DENYING MOTION TO PUBLISH

Appellant, Stephen Robert Jabs, moved this court in three separate motions for an extension of time to file a motion for reconsideration, for reconsideration of the court's opinion, and for publication of the court's unpublished opinion.

After consideration, we grant Jabs's motion for extension of time to file his motion for reconsideration and accept his motion for reconsideration as filed, we deny his motion for reconsideration, and deny his motion to publish the court's opinion.

IT IS SO ORDERED.

PANEL: Jj. Maxa, Lee, Melnick.

FOR THE COURT:

Melnick J.

Melnick, J.

FILED
KITSAP COUNTY CLERK
2015 OCT -9 AM 10:08
DAVID W. PETERSON

SUPERIOR COURT OF WASHINGTON
COUNTY OF KITSAP

STATE OF WASHINGTON, Plaintiff, v. STEPHEN ROBERT JABS, Defendant.	No. 14-1-01041-7 DEFENDANT'S MOTION TO CHALLENGE COMPETENCY AND CHILD HEARSAY

MOTION

The Defendant, by and through his attorney, moves the court to conduct a competency hearing concerning the complainants, and further moves to exclude child hearsay evidence.

DATED this 7th day of October, 2015.

LAW OFFICES OF
BENJAMIN & HEALY, PLLC
Attorneys for Defendant

By: _____
Timothy L. Healy
WSB #25220

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DECLARATION

Discovery reveals the following:

The State has charged Mr. Jabs with multiple counts of rape of a child and child molestation. The complainants were under the age of 10 when the allegations were made and were interviewed forensically in 2014. Reverse these statements

The State is seeking to utilize child hearsay at trial.

The defense reserves the right to supplement this motion abiding conclusion of expert review and Defense interview(s).

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Tacoma, Washington this 7th day of October, 2015.

Timothy L. Healy
WSB #25220
Attorney for Defendant

APPLICABLE LAW

I. COMPETENCY

a. Competency as it relates to the reliability child hearsay is treated differently by the courts than the

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issue of whether a child is competent to testify at court proceedings.

The Washington Supreme Court has provided ample guidance on each competency situation. State v. C.J, 148 Wn.2d 672, 63 P.2d 765 (2003). The court in In Re A.E.P., 135 Wn.2d 208, 956 P.2d 297 (1998) reaffirmed the five step inquiry required to determine whether a child is competent to testify at a court proceeding. A,E.P., supra at 223.

> By statute, persons "who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly: are not competent to testify. [HN1] RCW 5.60.050(2). [HN2] Five factors must be found before a child can be declared competent: The true test of the competency of a young child as a witness consists of the following: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

State v. Allen, 70 Wash.2d 690,692,424 P.2d 1021 (1967). The court in A.E.P. found that the second Allen factor was not met in this case because the five (5) year old did not have the mental capacity at the time of the occurrence to receive an accurate impression of it. A.E.P. at 225.

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> The court cannot possibly rule on a child's "mental capacity at the time of the occurrence . . ., to receive an accurate impression of it" when the court has never determined when in the past the alleged events occurred. Allen, 70 Wash.7d at 692. At oral argument, counsel for the State conceded the trial judge, at the time of the competency hearing, had not been told by anybody when the events were supposed to have occurred. The sole fact that A.E.P. supplied particular details about the alleged touching when questioned by the court does not in itself guarantee A.E.P.'s ability to accurately recall the events. Without any concrete reference, there is no way to guarantee the child's recall of details is based on fact, as opposed to fantasy. See Przybvlski, 48 Wash. App. at 665 (Witness' memory and perception are "better tested against objective facts known to the court, rather than disputed facts and events in the case itself.").

Competency concerning the admissibility and/or reliability of child hearsay statements is handled in a different manner. The court in C.J, distinguished the two competency inquiries. C.J. at 770:

> A determination under RCW 5.60.050 that a child witness is incompetent to testify at the time of trial does not, however, resolve the question whether an out of court statement by a child is admissible if the statement is reliable. Determining the admissibility of a child victim's hearsay statement requires a separate and different analysis under RCW 9A.44.120. The statute's prerequisites to the admissibility of a child victim's hearsay statements do not include any requirement that a declarant must be shown to have possessed testimonial competency at the time of the out of court statement, specifically the ability to distinguish the difference between

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truthful and false statements and an understanding of an obligation to tell the truth.

The court held that just because a child is incompetent to testify at trial, that fact alone does not automatically render the hearsay statements inadmissible. The court further held that whether the child had the ability to distinguish truth and reality from lies or fantasy is to be taken into account in applying the factors from State v. Ryan, 103 Wn.2d 165,691 P.2d 197 (1984), C.J., at 770:

> We also note that a finding that the child victim is incompetent to testify at trial does not make the hearsay statements unreliable, State v. Doe, 105 Wn.2d 889, 896, 719 P.2d 554 (1986), though it does make the child unavailable as contemplated by RCW 9A.44.120(2)(b). The trial court must determine whether extrinsic evidence or the nature of the comments themselves, renders the child's statements sufficiently reliable. Admissibility under the statute does not depend on whether the child is competent to take the witness stand, but on whether the comments and circumstances surrounding the statement indicate it is reliable. State v. Swan, 114 Wn.2d 613, 648, 790 P.2d 610 (1990). Finally, in some cases, like this one, there will be some evidence of whether the child had the ability to discern between truth and lies at the time the hearsay statement is made. Although not identified as a Ryan factor, if such evidence exists, it may be considered as part of the totality of the circumstances indicating reliability. This does not mean that a determination of competency must be made as of the time of the statement, nor does it mean that

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the inability to distinguish between truth and lies alone ends the inquiry.

More recently, the Washington Supreme Court discussed the issue of child competency in State v. S.J.W., 170 Wn.2d 92, 239 P.3d 568 (2010). The Court in that case held that all witnesses, regardless of their age are presumed competent unless proven otherwise by a preponderance of the evidence and that the burden of proof is on the challenging party. S.J.W. at 100-102.

The court extended its holding in S.J.W. in State v. Brousseau, 172 Wn.2d 131,259 P.3d 209 (2011). In Brousseau, the court adopted the federal rule requirement that a court may only conduct a competency hearing upon submission of a written motion by the challenging party and the court is satisfied that at least a threshold showing has been made that there is a reason to doubt competency.

II. CHILD HEARSAY

a. The admissibility of child hearsay is balanced against the defendant's Right of Confrontation under the Sixth Amendment to the United States Constitution.

Admissibility of child hearsay relating to alleged sexual abuse is governed by statute(RCW 9A.44.120):

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the

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child by another . . . not otherwise admissible by statute or court rule, is admissible in evidence . . . in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and (2) The child either:

(a) Testifies at the proceedings; or (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

The confrontation clause of the Sixth Amendment, made applicable to the states by the Fourteenth Amendment, provides: "In all criminal prosecutions, the accused shall enjoy the right . . to be confronted with the witnesses against him . . ." U.S. Const. Amend. VI; Idaho v. Wright, 197 U.S. 805, 8-13, 110 S. Ct. 3139, 111 L.Ed.2d 638 (1990). Similarly, the Confrontation Clause of the Washington Constitution guarantees the accused the right "to meet the witnesses against him. ... " Const. Art. 1. sec. 22 (amend. 10). The protection afforded by both clauses is identical. State v. Florczak, 76 Wash, App. 55, 71, 882 P.2d 199 (1994), review denied, 126 Wash.2d 1010, 892 P.2d 1089 (1995).

pick up mom + 3yo in wallet - guilty

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8 Coffee act

The United States Supreme Court decision in Crawford v. Washington 541 U.S. 36, 124 S.Ct 1354 (2004) held that the admission of testimonial hearsay statements from a witness who does not appear at a criminal trial, violates the Confrontation clause of the Sixth Amendment. Crawford v. Washington, 541 U.S. 36, 53-54, 124 S.Ct. 1354 (2004).

The issue then became and still remains what is "testimonial". The Washington Supreme Court adopted Crawford and applied it to child hearsay statements in State v Beadle, 173 Wn.2d 97,261 P.3d 863 (2011). In doing so, the court reversed its 2006 decision in State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006) which essentially held that statements of sexual abuse made by a child were not testimonial under Crawford and admissible even if the child did not testify. However, since Crawford, the Supreme Court of the United States further clarified what it meant by testimonial and required the Washington Supreme Court to reverse Shafer.

The issue in Beadle was whether statements of a child made to CPS workers and police investigators were testimonial and in violation of the Confrontation Clause, the court held that they were testimonial. The court relied on cases from other states holding that such forensic interviews like the ones done

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in the present case were in fact testimonial because the purpose of the interview was to prove past facts that could be used in a criminal prosecution. Beadle at 110-11.

The Court began its analysis by summarizing what is meant by testimonial. Beadle at 108.

> Months after this court issued the Shafer opinion, the United States Supreme Court again discussed testimonial hearsay, explaining that, within the context of police interrogations, whether statements are "testimonial" is determined by the primary purpose of the interrogation.
>
> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.
>
> Davis v. Washington, 547 U.S. 813, 822, I26 S.Ct. 2266, 165 L.Ed.2d 224(2006). The Court noted that the primary purpose test was specific to the police interrogation context. Id. At 823 n. 2.
>
> In State v. Ohlson, 162 Wash.2d 1,168 P.3d 1273 (2007). We adopted the "primary purpose" test announced in Davis and identified four factors to determine whether an out-of-court statement is testimonial under Davis: "(1) the timing relative to the events discussed, (2)the threat of harm posed by the situation, (3)the need for information to resolve a present emergency, and

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(4) the formality of the interrogation." Id. At 12, 168 P.3d 1273.

In so holding, we declined to import the declarant-centric standard announced in Shafer to the police interrogation context, noting that "the Davis primary purpose test is not focused on the reasonable belief of an objective declarant, as was one definition of 'testimonial' endorsed in Crawford," Id. At 11, 168 P.3d 1273; see Shafer, 156 Wash.2d at 390 n.8, 128 P.3d 87; see also State v. Kosiowski, 166 Wash.2d 409,430n. 13,209 P.3d 479 (2009) ("the four-factor inquiry as well as the rest of the analysis in Davis does not turn on the purpose and understanding of the victim/witness whose statements are at issue, and whatever else might be said of Crawford, the formulations of possible approaches to what constitute 'testimonial statements' spearing in it do not take precedence over Davis.").

In Michigan v. Bryant, ----U.S.----, 131 S.Ct. 1143, 1156, 179 L.Ed.2d 93 (2011), decided shortly after oral argument in this case, the United States Supreme Court further clarified that in deciding whether the primary purpose of the interrogation is to meet an ongoing emergency, the court objectively evaluates the circumstances of the encounter and the statements and actions of the parties to the encounter. As part of this inquiry, the court also considers the level of formality surrounding the statement. Id, at 1160. Beadle

The court then applied to the case the modified definition of "testimonial" that had developed since Crawford. Beadle at 109-110.

In this case B. A.'s out-of-court statements to Jensen and Detective Buster were made in the course of a police interrogation. Although Jensen

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was not a law enforcement officer, she was present only to assist the police department--- not to protect B.A.'s welfare in her capacity as a CPS employee. Accordingly, we consider the primary purpose of the interrogation to determine whether B. A.'s statements were testimonial. Davis, 547 W.S. at 822,126 S.Ct. 2766.

At the time of these disclosures, the immediate danger to B.A. had passed: B.A.'s interview with Jensen and Detective Buster took place in February 2007, whereas beadle had no access to B.A. after January 2006. See Ohlson, 162 Wash.2d at 12, 168 P.3d 1273. Although the interview was tailored to a child, it had a degree of formality and was unlike a conversation with a casual acquaintance. Id. Unlike the interrogation in Bryant, the interview in this case took place in a neutral location---not in the field at the scene of a potential crime. See Bryant 131 S.Ct. at 1150.

On these facts, we conclude that the primary purpose of this interview was to "establish or prove past events potentially relevant to later criminal prosecution," rather than to respond to an "ongoing emergency." Davis, 547 U.S, at 822,126 S.Ct. 2266; see Bryant, 131 S.Ct. at 1156. Thus, we hold the trial court erred in concluding that B.A.'s disclosures to Jensen and Detective Buster were nontestimonial. Cf. State v.Justus. 205 S. W.3d 872 (Miss.2006) (holding that child victim's statements during forensic interview were testimonial under primary purpose test); State v. Arnold, 126 Ohio St.3d 290,933 N.E.2d 775 (2010) (same).

The statements made to the forensic interviewers in this case are clearly testimonial for confrontation clause purposes. However, this does not end the inquiry. Complainants

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in the present case, as in Beadle, were under ten years old and that brought the Court to the child hearsay statute just discussed. The Court then discussed the correlation between Crawford and the child hearsay statute. Beadle at 112-113.

> Prior to the Supreme Court's decision in Crawford, determining whether a child witness was unavailable did not require courts to distinguish between testimonial and nontestimonial hearsay. Instead, under the test outlined in Ohio v. Roberts, 448 U.S. 56,74, 100 S.Ct. 253 1,65 L.Ed.2d 597 (1 980), overruled by Crawford, 541 U.S. 36, 124 S.Ct. 1354, all hearsay statements admitted under RCW 9A.44.120 were evaluated under the confrontation clause to determine whether the statements were reliable. After Crawford, however, only testimonial statements implicate the constitutional protections of the confrontation clause.

After Crawford, the key to admissibility is not unavailability. The key is just the opposite - it is availability. If the out of court statement is testimonial in nature, the declarant must be available for cross-examination, or else the declarant's statement is inadmissible. Put another way, if the declarant's statement is testimonial hearsay, and if the declarant is not available for cross-examination, the declarant's statement is inadmissible, period, even if it falls within an exception to the hearsay rule. Crawford v. Washington 541 U.S. 36, 124 S.Ct 1354, 158 L.Ed.2d 177 (2004).

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There is a critical distinction that must be made between unavailability for Confrontation Clause purposes and unavailability for evidentiary purposes under ER 804. Basically, only testimonial statements are subject to the constitutional standard whereas non testimonial statements are subject to ER 804. Beadle at 115.

The statements that the alleged victim in Beadle made to her family and therapist were non testimonial and only subject to ER 804's unavailability standard. The court found that the child was unavailable for ER 804 purposes when alleged victim repeatedly refused to testify and admitted the non testimonial hearsay. Beadle at 116.

> Under ER 804(a), a witness is unavailable if she/he:
>
> (1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
>
> (2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) Testifies to a lack of memory of the subject matter of the declarant's statement; or
>
> (4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

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> (5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b(2),(3), or (4), the declarant's attendance or testimony) by process or other reasonable means.
>
> In addition, under ER 804(a)(6), declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

The present state of the law following Beadle is that testimonial hearsay is controlled by the Constitutional standard under Crawford, Davis, and its progeny. Non testimonial hearsay is still subject to the ER 804 analysis.

b. Reliability and Trustworthiness.

There exists a nine-part test that Washington courts use to determine reliability and trustworthiness. State v. Ryan, 103, Wn.2d 165, 691 P.2d 197. The so called Ryan factors are applied to child hearsay statements to determine reliability and trustworthiness.

The first guideline is whether the declarant had an apparent motive to lie. The second guideline is whether the general character of the declarant suggests trustworthiness. The third guideline is whether more than one person heard the

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statements. The fourth guideline is whether the statements were made spontaneously. The fifth reliability guideline concerns whether the timing of the statements and the relationship between declarant and witness suggest trustworthiness. The sixth guideline is whether the statements contained express assertions of past fact. Guideline seven is whether cross-examination could not help to show the declarant's lack of knowledge. The eighth guideline is whether the possibility of the declarant's recollection being faulty is remote. The ninth and final guideline to consider in assessing reliability is declarant misrepresented the defendant's involvement.

The court in C.J. supra, also requires either as an added Ryan factor or part of the totality of the circumstances, a consideration of whether the declarant child had the ability to discern truth and reality from lies at the time the hearsay statement was made.

The nine Ryan factors are applied where the declarant child testifies at the proceeding or is determined to be unavailable. The court in State v. Rorich, 132 Wn.2d 472, 481, 939 P.2d 697 (1997) defined what is meant by the word "testifies" in RCW 9A.44.120:

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> We conclude "testifies," as used in RCW 9A.44.120(2)(a), means the child takes the stand and describes the acts of sexual contact alleged in the hearsay. This definition is consistent with the Confrontation Clause and comports with legislative intent that the child hearsay statute condition the admission of hearsay as previously described.

The court found that calling the child to the stand and asking only general questions to show memory and recall ability does not meet the definition of testifies, and the court excluded the hearsay statements. Rorich at 481-82.

A child who is found to be not competent to testify is unavailable as a witness and not only must the hearsay statements be reliable under the Ryan factors, they must also be corroborated by other evidence of abuse. A.E.P. at 227.

> Since the trial court erred in allowing A.E.P. to testify, we must reevaluate the application of RCW 9A.44.120 to A.E.P.'s hearsay statements. Being incompetent to testify, A.E.P. should have been found unavailable as a witness. Being unavailable as a witness, A.E.P.'s hearsay statements not only must be reliable, but they must be corroborated by other evidence of abuse. RCW 9A.44.120(2)(b).

Evidence of corroboration, whether direct or indirect must support a "logical and reasonable inference" that the alleged act(s) of abuse described in the hearsay statement occurred. See State v. Swan, 114 Wn.2d 613,622, 790 P.2d 610

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(1990). The court in A.E.P. found that the surrounding facts did not show corroboration, and the hearsay was excluded. A.E.P. at 232-234.

c. Well accepted studies and evidence in the psychological community have been allowed in the courts of this and many other states to show that children's memory and recall can easily be tainted and influenced by interviewers applying improper and/or suggestive interview procedures.

The Washington courts have recognized that children's memories and recall can easily be tainted and improperly influenced by suggestive and other improper interview procedures. In A.E.P, supra, the court held that issues concerning improper and/or suggestive interview procedures are to be raised during the reliability portion of the child hearsay hearing because they do effect several of the Ryan and Allen factors. The court relied heavily on the landmark, New Jersey cases, State v. Michaels, 625 A.2d 489 (1993)(Michaels I) and State v. Michaels, 642 A.2d 1372 (1994) (Michaels II). A.E.P. at 227-28:

> On the issue of the reliability of a child's hearsay statements, Petitioner claims the existing state of the law inadequately addresses the possibility of a child's statements having been tainted by improper, suggestive interview techniques. Citing State v. Michaels,264 N.J. Super, 579,625 A.2d 489 (Ct. App. Div. 1993) (Michaels I), aff'd, 136 N.J. 299,642 A.2d 1372

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(1994)(Michaels II), and Idaho v. Wright, 497 U.S. 805, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990), Petitioner claims the trial court should have held a separate, pretrial "taint" hearing to determine if A.E.P.'s hearsay statements, and her in-court testimony, were so tainted by improper interview techniques that her hearsay statements and testimony were rendered unreliable, thus inadmissible. Michaels II held when alleged child sexual abuse victims were improperly interrogated, causing a substantial likelihood the evidence derived from those children was unreliable, it was proper to require a trial court to hold a pretrial taint hearing at which the state must prove by clear and convincing evidence that statements and testimony retained sufficient indicia of reliability. Michaels II, 642 A.2d at 1383.

Petitioner claims A.E.P, was improperly interviewed, resulting in taint, and rendering her statements unreliable. His arguments heavily rely on Michaels I, Michaels II and Idaho v. Wright, all of which discuss various improper interview techniques. Michaels II, citing American Prosecutors Research Institute, National Center for Prosecution of Child Abuse, Investigation and Prosecution of Child Abuse (1987), states an interviewer should remain open, neutral, and objective; should avoid asking leading questions; should never threaten a child or try to force a reluctant child to talk; and should refrain from telling a child what others have reported. Michaels II, 642 A.2d at 1378. Michaels II also cites the New Jersey Governor's Task Force on Child Abuse & Neglect, Child Abuse and Neglect: A Professional's Guide to Identification, Reporting, Investigation and Treatment (1988) for the rule that multiple interviews with various interviewers should be avoided. Michaels II, 642 A.2d at 1378. Idaho v. Wright, affirmed the Idaho Supreme Court's holding that a child's hearsay statements were

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unreliable because "blatantly leading questions were used in the interrogation . . .[,and] this interrogation was performed by someone with a preconceived idea of what the child should be disclosing." Wright, 497 U.S. at 813 (internal quotation marks omitted).

The court then addressed what procedures need to be taken by the trial court. A.E.P. at 230-31:

> As to the reliability of a child's testimony, a defendant can argue memory taint at the time of the child's competency hearing. If a defendant can establish a child's memory of events has been corrupted by improper interviews, it is possible the third Allen factor, "a memory sufficient to retain an independent recollection of the occurrence[,]" may not be satisfied. Allen, 70 Wash. 2d at 692.
>
> As to the reliability of a child's hearsay statements, a defendant can argue memory taint at the pretrial hearing held pursuant to RCW 9A.44.120(1). In determining the reliability of hearsay, we have previously set out nine nonexclusive factors a trial court should consider. State v. Ryan, 103 Wash.2d 165, 175-76, 691 P.2d 197 (1984) (adopting the first five factors from State v. Parris. 98 Wash.2d 140, 146,654 P.2d 77 (1982), and the next four factors from Dutton v. Evans, 400 U.S. 74, 88-89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970)). Petitioner and amicus Washington Association of Criminal Defense Lawyers urge us to reject the Ryan factors as being inadequate. We recognize some of the Ryan factors have subsequently been criticized as being unhelpful in determining reliability, see. e.g., State v. Swan, 114 Wash.2d 613, 650-51, 790 P.2d 610 (1990); State v. Leavitt, 111 Wash.2d 66,75,758 P.2d 982(1988); In Sampson v. Department of Social & Health Services, 61 Wash.App. 488, 499, 814 P.2d 204 (1991), but we

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> decline to reevaluate the Ryan factors at this time because the issues presented here are easily resolved within the Ryan framework.

The court finally discussed the impact of suggestive / improper interviews as it relates to the Ryan factors. A.E.P. at 231.

> The possibility a child's memory or testimony may have been tainted by improper interviews is easily addressed by the fifth, eighth and ninth Ryan factors. "The timing of the declaration and the relationship between the declarant and the witness[.]" Ryan, 103 Wash.2d at 176 (fifth factor), allow the court to consider the exact nature of the exchange through which the witness obtained the child's statements. Suggestive interviewing can also affect the eighth Ryan factor, "the possibility of the declarant's faulty recollection is remote[.]" "The circumstances surrounding the statement . . .," Ryan, 103 Wash.2d at 176 (ninth factor), also make room for argument concerning the methodology of the interview. The possibility of suggestive interviews leading to tainted child hearsay statements should definitely be considered by a trial court; and Petitioner did present the issue in the dependency hearing.

The Michaels cases set the standard for courts throughout the country to follow when improper child interviews may have tainted a child's memory and subsequent testimony.

In September 1984, Margaret Kelly Michaels began working as a teacher's aide at Wee Care, a nursery school enrolling approximately sixty children ages three to five. In

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October of that year, Michaels was promoted to teacher and continued in that capacity for almost seven months. During this time Wee Care received no complaints about Michaels's performance from staff, children or parents.

As Michaels's employment was drawing to an end, however, a four-year old Wee Care child, M.P., was brought to his pediatrician to treat a rash. During the examination, a nurse took M.P.'s temperature rectally at which time M.P. stated that his teacher, Michaels, had also done this to him at nap time. The child provided additional instances and details of sexual abuse prompting his mother to notify the New Jersey Division of Youth and Family Services (DYFS). DYFS notified the prosecutor's office of the allegations and an investigation ensued, beginning with interviews of only a small number of children and eventually expanding to all children who had contact with Michaels.

These interviews revealed accounts of sexual abuse ranging from minor instances to bizarre and heinous sexual acts. The prosecutor proceeded to trial with a 163 -count indictment involving aggravated sexual assault, sexual assault, endangering the welfare of children and making terroristic threats. At the trial, a large portion of the state's evidence consisted of the

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testimony of the Wee Care children who at the time of trial ranged from ages five to seven. After a nine month trial and twelve days of deliberation, the jury returned a guilty verdict of 115 counts, sentencing Michaels to forty-seven years imprisonment.

The Court of Appeals reversed the convictions, finding that the overwhelming psychological evidence supported the idea that improper interview techniques do in fact effect children's memory and testimony. Michaels I at 514-15.

> Experiments conducted on children who varied in age from three to twelve years suggested that younger children, after receiving misleading information, provided less accurate details about the original event than did older children. Stephen J. Ceci et al., Age Differences in Suggestibility. in Children's Eyewitness Memory 82 (Stephen J. Ceci et al. Eds., 1987). Ceci and his colleagues observed that younger children may be more likely to conform their answers in the hope of pleasing an adult interviewer. "Clearly, the youngest children demonstrated a sensitivity to the age of the manipulator and a desire to conform to their perceptions of an adult authority figure's expectations." Ibid. Ceci and his colleagues concluded that if erroneous information is suggested to the young child, this erroneous information may resurface in the form of the child's reconstruction of the events" if the child is given a choice between the original information and the misleading information. Id. At 90.
>
> In a recent article specifically examining children's suggestibility, the author extensively

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> examined current social science literature and came to the following conclusions:
>
> Careful review of the social science literature indicates that children are susceptible to suggestive interviewing techniques and that such techniques can render children's accounts of abuse unreliable. A number of studies have shown that children will lie when they have a motivation to lie, that they are susceptible to accommodating their reports of events to fit what they perceive the adult questioner to believe, and that inappropriate post-event questioning can actually change a child's cognitive memory of an event. Even the studies that concluded that children are resistant to suggestion found a small percentage of children who were not. [Youngs, supra, 41 Duke L.J. at 692 (footnotes omitted).]

The court then went on to discuss what the scientific literature suggests are important factors to consider regarding interviewers influence and misleading information. Michaels I at 515-16.

> Several factors can influence children to provide misleading information: (1) adults may misinterpret what a child states; (2) the possibility of abuse may lead to hysteria; or (3) an adult may have malicious motives. Id. At 697. In addition,
>
> As there is more media coverage of sexual abuse, parents and the professional community are more likely to suspect sexual abuse as a cause for symptom formation, even when sexual abuse has not occurred. [Id. (quoting Elissa P. Benedek & Diana H. Schctky, Problems in Validating Allegations of Sexual Abuse, Part 2: Clinical Evaluation, 36 J.Am.Acad. Child & Adolescent Psychiatry 916,917 (1 987)).]

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Younts believes that Stephen Ceci's 1990 study provides the most impartial results of the nine studies Younts examined. Ceci found that "even small material and psychological rewards" prompted children to lie about events. Id. At 722. According to Younts, when a study provides motivational actors for lying, children will often lie. Ibid.

Younts reviewed a study conducted in 1989 by Clarke-Stewart in which children interpreted an event which could either be sexually abusive or innocent.

The researchers found that when the adult interviewers contradicted what actually happened to the children, two-thirds of the children changed their stories to conform to the suggestions of the interviewer. Most of the remaining children merged their account of the factual events with the interviewer's suggestions. At the end of the interrogation, only one child answered all the questions accurately. When the second interviewer contradicted the first interviewer, the children again changed their stories. The children's reports to their parents were consistent with the interviewers' suggestions. [Id. At 723 (footnotes omitted).]

Another study by Ceci revealed similar results. Ceci found that children are very susceptible to modifying their story based upon an adult's post-event suggestions. However, children are even susceptible to suggestions by older children. Id. At 724. The suggestiveness can be incorporated even when the child retains memories of the original event. Based upon these two studies, Younts suggests that "courts should pay particular attention to whether the abuse investigator had a preconceived notion of what

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> happened to the child and then sought the child's confirmation." Id.At 725.
>
> Younts expresses the opinion that post-event suggestion poses a significant problem especially with children six-years old or younger. Id. At 726. When interviews include suggestive and leading questions, children may eventually incorporate the suggested responses into memory. Vitally important is the fact that *the children's credibility will not be disturbed because the children actually believe what they are saying.* Id. At 727.

The New Jersey Supreme Court affirmed Michaels I. The court found that the psychological literature lead to the conclusion that children can be influenced by improper or suggestive interview techniques. Michaels II at 1379.

> We therefore determine that a sufficient consensus exists within the academic, professional, and law enforcement communities, confirmed in varying degrees by courts, to warrant the conclusion that the use of coercive or highly suggestive interrogation techniques can create a significant risk that the interrogation itself will distort the child's recollection of events, thereby undermining the reliability of the statements and subsequent testimony concerning such events.

The court then criticized the interview procedures in the case. Michaels II at 1379-80.

> The record is replete with instances in which children were asked blatantly leading questions that furnished information the children themselves had not mentioned. All but five of the thirty-four children interviewed were asked

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> questions that indicated or strongly suggested that perverse sexual acts had in fact occurred. Seventeen of the children, fully one-half of the thirty-four, were asked questions that involved references to urination, defecation, consumption of human wastes, and oral sexual contacts. Twenty-three of the thirty-four children were asked questions that suggested the occurrence of nudity. In addition, many of the children, some over the course of nearly two years leading up to trial, were subjected to repeated, almost incessant, interrogation. Some children were re-interviewed at the urgings of their parents.
>
> Almost all of the interrogations conducted in the course of the investigation revealed an obvious lack of impartiality on the part of the interviewer. One investigator, who conducted the majority of the interviews with the children, stated that his interview techniques had been based on the premise that the "interview process is in essence the beginning of the healing process." He considered it his "professional and ethical responsibility to alleviate whatever anxiety has arisen as a result of what happened to them." A lack of objectivity also was indicated by the interviewer's failure to pursue any alternative hypothesis that might contradict an assumption of defendant's guilt, and a failure to challenge or probe seemingly outlandish statements made by the children.

The court then announced the "taint" procedure that our Supreme Court adopted in A.E.P. Michaels II at 1383-84.

> Once defendant establishes that sufficient evidence of unreliability exists, the burden shall shift to the State to prove the reliability of the proffered statements and testimony by clear and convincing evidence. Hurd, supra, 86 N.J. at 546, 432 A.2d 86. Hence, the ultimate determination to be made is whether, despite the

3/21/18

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> presence of some suggestive or coercive interview techniques, when considering the totality of the circumstances surrounding the interviews, the statements or testimony retain a degree of reliability sufficient to outweigh the effects of the improper interview techniques. The State may attempt to demonstrate that the investigatory procedures employed in a case did not have the effect of tainting an individual child's recollection of an event. To make that showing, the State is entitled to call experts to offer testimony with regard to the suggestive capacity of the suspect investigative procedures. The defendant, in countering the State's evidence, may also offer experts on the issue of the suggestiveness of the interrogations. However, the relevance of expert opinion focusing essentially on the propriety of the interrogation should not extend to or encompass the ultimate issue of the credibility of an individual child as a witness.

The court placed the burden on the State to show by clear and convincing evidence that the hearsay and other statements by the child are reliable. Michaels I at 1384.

> In choosing the burden of proof to be imposed on the State, we are satisfied that the clear-and-convincing-evidence standard serves to safeguard the fairness of a defendant's trial without making legitimate prosecution of child sexual abuse impossible. We have applied the clear and convincing evidence standard to other areas in which the issue of illegal or unreliable evidence was in question. See, e.g., State v. Sugar, 100 N.J. 214,239,495 A.2d 90 (1985) (applying "clear and convincing evidence" standard as burden of proof with respect to "inevitable discovery" discovery claim), Hurd, supra, 86 N.J. at 546, 432 A.2d 86 (imposing

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"clear and convincing" standard on party who proffers hypnotically refreshed testimony).

The Washington Courts of Appeals have also adopted the taint hearing analysis of A.E.P., and Michaels II. In Re Carol M.D., 89 Wn.App. 77,948 P.2d 837 91997), in Carol M.D., the court reversed child rape convictions due to possible improper interview techniques, the court remanded the case to have a "taint" hearing in accordance with the Michaels procedure. Carol M.D. at 92.

> The records of the interviews show that these methods caused certain children to use their imagination and stray from reality, even to the dismay of the investigator at times. In several instances, the children were tired and/or resistant to participating in the interviews, but the investigators continued to press for cooperation.
>
> Michaels 625 A.2d at 511.
>
> We agree the facts cited by Mr. And Mrs. D. indicate possible misconduct by the State that may have infringed on their right to compulsory process. On retrial, the superior court shall conduct a hearing and enter findings on the issue of whether the State improperly influenced statements and testimony by M.D.

In State v. Willis, 151 Wn.2d 255, 87 P.3d 1164 (2004), the Court refused to allow a world renowned child interview expert to testify at trial concerning the interview technique used and its suggestibility because there was no recording of the interview

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done and he could not recreate the interview. The court did however hold that such testimony is relevant and helpful to a jury where the expert has sufficient information about the exact nature of the interview such as audio or video recordings like we have in the case at bar, and the testimony is directed to how the interview techniques impacted the particular children in the interviews, and tainted the interviews. Willis at 261.

> We hew to our conclusion in Swan that the general principle that younger children are more susceptible to suggestion is "well within the understanding of the jury." Swan, 114 Wash.2d at 656.790 P.2d 610. But we also agree with the Court of Appeals that specialized knowledge regarding the effects of specific interview techniques and protocols "is not likely within the common experience of the jury." Willis, 113 Wash.App. at 394, 54 P.3d 184. For example, that wet pavement is more slippery than dry pavement is within the general knowledge of the jury. That does not prevent the admissibility of expert testimony regarding specific stopping distances under specific friction coefficients created when specific driving surfaces are wet. Similarly, merely because it is a matter of general knowledge that children's memories are changeable does not preclude testimony that specific interview techniques might compromise specific memories.

CONCLUSION

The Defense reserves the right to supplement this motion abiding conclusion of expert review and Defense interview(s).

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Respectfully submitted this 7th day of October, 2015.

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DECLARATION OF MAILING

I, Heather Devyak, declare that on the 9th day of October, 2015, I mailed a true and correct copy of the foregoing document, via first class mail, postage prepaid, in an envelope addressed to the following:

Cami Lewis
Kitsap County Prosecutor's Office
MS 35
614 Division St.
Port Orchard, WA 98366-4681

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Signed at Tacoma, WA on: 10.8.15

Heather Devyak

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"witness suggestibility" — Stipendized 6031 PCS

RCW 5.60.020

Who may testify.

Every person of sound mind and discretion, except as hereinafter provided, may be a witness in any action, or proceeding.
[1986 c 195 § 1; Code 1881 § 388; 1877 p 85 § 390; 1869 p 103 § 383; 1854 p 186 § 289; RRS § 1210.]

RCW 5.60.030

Not excluded on grounds of interest—Exception—Transaction with person since deceased.

No person offered as a witness shall be excluded from giving evidence by reason of his or her interest in the event of the action, as a party thereto or otherwise, but such interest may be shown to affect his or her credibility: PROVIDED, HOWEVER, That in an action or proceeding where the adverse party sues or defends as executor, administrator or legal representative of any deceased person, or as deriving right or title by, through or from any deceased person, or as the guardian or limited guardian of the estate or person of any incompetent or disabled person, or of any minor under the age of fourteen years, then a party in interest or to the record, shall not be admitted to testify in his or her own behalf as to any transaction had by him or her with, or any statement made to him or her, or in his or her presence, by any such deceased, incompetent or disabled person, or by any such minor under the age of fourteen years: PROVIDED FURTHER, That this exclusion shall not apply to parties of record who sue or defend in a representative or fiduciary capacity, and have no other or further interest in the action.
[1977 ex.s. c 80 § 3; 1927 c 84 § 1; Code 1881 § 389; 1877 p 85 § 391; 1873 p 106 § 382; 1869 p 183 § 384; 1867 p 88 § 1; 1854 p 186 § 290; RRS § 1211.]
NOTES:
Purpose—Intent—Severability—1977 ex.s. c 80: See notes following RCW 4.16.190.

RCW 5.60.050

Who are incompetent.

The following persons shall not be competent to testify:
(1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
(2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.
[1986 c 195 § 2; Code 1881 § 391; 1877 p 86 § 393; 1869 p 103 § 386; 1863 p 154 § 33; 1854 p 186 § 293; RRS § 1213.]

The Allen Factors

The true test of the competency of a young child as a witness consists of the following: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independen recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

State v. Allen, 70 wn.2d 690, 692, 424 p.2d 1021 (1967)

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party

11

introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

Comment Error?

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 7

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

US Constitutional Amendments
(in pertinent part)

5th - ...nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law;....

6th - ...and to have the Assistance of Counsel for his defence.

14th - ... nor shall any state deprive any person of life, liberty, or ~~pro~~ property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wa. Constitution
(in pertinent part)

Art. I Sec 3 - Personal rights. No person shall be deprived of life, liberty, or property with out due process of law.

Art. I Sec. 22 - Rights of the accused. ... to meet the witnesses against him face to face.

INSTRUCTION NO. 18

To convict the defendant of the crime of child molestation in the first degree as charged in Count V each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about or between November 30, 2008 and September 29, 2014, the defendant had sexual contact with H.H.;

(2) That H.H. was less than twelve years old at the time of the sexual contact and was not married to the defendant;

(3) That H.H. was at least thirty-six months younger than the defendant; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 19 CORRECTED to 19A

To convict the defendant of the crime of rape of a child in the first degree as charged in Count VI, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about or between November 20, 2008 and September 19, 2014, the defendant had sexual intercourse with H.H.;

(2) That H.H. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That H.H. was at least twenty-four months younger than the defendant; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 19A

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

(1) That on or about or between November 30, 2008 and September 29, 2014, the defendant had sexual contact with H.H.;

(2) That H.H. was less than twelve years old at the time of the sexual contact and was not married to the defendant;

(3) That H.H. was at least thirty-six months younger than the defendant; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

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Ad E #2

of viewing depictions of a minor engaged in sexually explicit conduct in the second degree, a class C felony punishable under chapter 9A.20 RCW.

(3) For the purposes of determining whether a person intentionally viewed over the internet a visual or printed matter depicting a minor engaged in sexually explicit conduct in subsection (1) or (2) of this section, the trier of fact shall consider the title, text, and content of the visual or printed matter, as well as the internet history, search terms, thumbnail images, downloading activity, expert computer forensic testimony, number of visual or printed matter depicting minors engaged in sexually explicit conduct, defendant's access to and control over the electronic device and its contents upon which the visual or printed matter was found, or any other relevant evidence. The state must prove beyond a reasonable doubt that the viewing was initiated by the user of the computer where the viewing occurred.

(4) For the purposes of this section, each separate internet session of intentionally viewing over the internet visual or printed matter depicting a minor engaged in sexually explicit conduct constitutes a separate offense.

[2010 c 227 § 7.]

RCW 9.68A.080

Reporting of depictions of minor engaged in sexually explicit conduct—Civil immunity.

(1) A person who, in the course of processing or producing visual or printed matter either privately or commercially, has reasonable cause to believe that the visual or printed matter submitted for processing or producing depicts a minor engaged in sexually explicit conduct shall immediately report such incident, or cause a report to be made, to the proper law enforcement agency. Persons failing to do so are guilty of a gross misdemeanor.

(2) If, in the course of repairing, modifying, or maintaining a computer that has been submitted either privately or commercially for repair, modification, or maintenance, a person has reasonable cause to believe that the computer stores visual or printed matter that depicts a minor engaged in sexually explicit conduct, the person performing the repair, modification, or maintenance may report such incident, or cause a report to be made, to the proper law enforcement agency.

(3) A person who makes a report in good faith under this section is immune from civil liability resulting from the report.

[2002 c 70 § 2; 1989 c 32 § 6; 1984 c 262 § 7.]

RCW 9.68A.090

Communication with minor for immoral purposes—Penalties.

(1) Except as provided in subsection (2) of this section, a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.

(2) A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if the person has previously been convicted

Evid. Rule 403

Excluding relevant evidence for prejudice, confusion, waste of time, or other reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

Evid. Rule 404(b)(1)

crimes, wrongs, or other acts.

prohibited uses. Evidence of a crime, wrong or other act is not admissible to prove a persons character in order to show that on a particular occasion the person acted in accordance with the character

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(e) "Views" means the intentional looking upon of another person for more than a brief period of time, in other than a casual or cursory manner, with the unaided eye or with a device designed or intended to improve visual acuity.

(2) A person commits the crime of voyeurism if, for the purpose of arousing or gratifying the sexual desire of any person, he or she knowingly views, photographs, or films:

(a) Another person without that person's knowledge and consent while the person being viewed, photographed, or filmed is in a place where he or she would have a reasonable expectation of privacy; or

(b) The intimate areas of another person without that person's knowledge and consent and under circumstances where the person has a reasonable expectation of privacy, whether in a public or private place.

(3) Voyeurism is a class C felony.

(4) This section does not apply to viewing, photographing, or filming by personnel of the department of corrections or of a local jail or correctional facility for security purposes or during investigation of alleged misconduct by a person in the custody of the department of corrections or the local jail or correctional facility.

(5) If a person is convicted of a violation of this section, the court may order the destruction of any photograph, motion picture film, digital image, videotape, or any other recording of an image that was made by the person in violation of this section.

[2003 c 213 § 1; 1998 c 221 § 1.]

NOTES:

Effective date—2003 c 213: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 12, 2003]." **[2003 c 213 § 2.]**

RCW 9A.44.120

Admissibility of child's statement—Conditions.

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

please confirm receipt.

DECLARATION OF SERVICE BY MAIL
GR 3.1

I, Stephen R Jabs, declare and say:

That on the 3rd day of December, 2018, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. 96337-1 - State v. Jabs

Request to waive filing fee and to serve copies on a parties; with attached orders of indigency;
Petition for Discretionary Review;
_____.

addressed to the following:

The Supreme Court
Temple of Justice
PO Box 40929
Olympia, Wa. 98504-0929

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 3rd day of December, 2018, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Stephen R Jabs
Signature

Stephen R Jabs
Print Name

DOC 392581 UNIT H4-B 043L (cell)
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520

Stephen R Jabs # 392581
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