89974-6

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

COA. #43199-8-II

STATE OF WASHINGTON,

Respondent,

Vs.

RONALD SORENSON,

Petitioner.

On Appeal Form The Superior Court Of
The County of Clark, In The State of Washington

The Honorable Judge Melnick

MOTION FOR DISCRETIONARY REVIEW

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3/25/14

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STATUTES, RULES, AND CONSTITUTIONAL PROVISIONS

A. IDENTITY OF PETITIONER

Mr. Ronald Sorenson asks this Court to accept review of the court of appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), Mr. Sorenson seeks review of the unpublished opinion, in STATE V. SORENSON, COA. #43199-8-II (January 28, 2014). A copy of the decision is in Appendix at Pages A-1 to A-5.

C. ISSUES PRESENTED FOR REVIEW

1. The Due Process Clause of the federal and state constitutions require that the prosecution prove every essential element of the crime charged beyond a reasonable doubt. The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the State, did the prosecution prove the essential elements of the crimes beyond a reasonable doubt?

2. The Sixth and Fourteenth Amendments to the U.S. Constitution includes the right to counsel to "make a full investigation of the facts and law applicable to the case." When a trial court denies defenses request for a continuance when it states-

that it is completely unprepared for trial, result in a manifest abuse of discretion?

3. Defense counsel requested a limiting instruction on Evidence Rule ("ER") 404(b) evidence. The trial court failed to give this instruction to the jury. Did the absence of the cautionary instruction affect the outcome of the trial, in deprivation of the right to a fair trial under the Sixth and Fourteenth Amendments to the U.S. Constitution?

D. STATEMENT OF THE CASE

1. Prior Proceedings

After 20-years of marriage, the petitioner and Sabrina, his ex-wife, had begun discussing separation. RP 2 at 132. Petitioner was employed as a truck driver, working 70-hours per week, and handed every work check to his wife. One year prior to separation, Sabrina had begun secretly planning for the divorce by neglecting to pay the mortgage, bills, as well as the car payments.

In the month of July, 2010, the petitioner informed Sabrina that he had "had enough," and the couple eventually stopped communicating with each other.

The unavailable impeachment evidence had shown that Sorenson received text-messages from Sabrina, stating, inter alia, "[t]his is the last time I'm going to ask you" [to work things out for the benefit of the family]. [emphasis added]. When petitioner phoned Sabrina informing her that he was not in love with her anymore, the truth sparked a series of events deliberately calculated to ensure Sabrina's financial gain to the pending divorce.

Specifically, "separation meetings" were conducted without the petitioner's presence, whereas, Sabrina spoke with their daughters on a plan to implicate the petitioner in molestation charges. RP 2 at 133-34. [Interview of Sabrina, June 1, 2011, at 4-6].

Thereafter, the stage was set for Sabrina to phone Children Protective Services after the two-day weekend, and to dial 9-1-1 emergency.

To the contrary, the couple had always spoken with their children together, especially on the issues of "bad touching." [Interview at 13]. Further, no allegations of 'bad touching' occurred until the 'separation meeting". RP 173.

Interviews were conducted with the children as follows:

> BROOKE described the family as happy, and denied to police for six months that she was touched inappropriately by her father, the petitioner. [Interview, at 2].
> She guessed that this bad touching happened when she was 13-years old. Id. at 3. She alleged that she awoke in her parents bedroom with her hand in her dad's pants, and that she did not know how her hand had gotten there. 3RP[January 24, 2012], at 403-05.

Brooke's testimony that she had never slept with her father again after the alleged incident, was contrary to A.H.'s she made in her interview:

> "Brooke was a daddy's girl who slept with her dad all the time." 3RP 410;429.

> BRIDGET also revealed that Brooke and her dad were 'really close." [Interview, at 3]. Like Brooke, Bridget stated that she awoke with her hand in her dad's pants. Id. at 3-4, 8. During the separation meeting, Bridget had "kind of started getting into" what Sabrina's scheme, and eventually, Bridget "didn't say names or what happened or anything" in regards to any alleged bad touching. Id. at 10.

> BRITNEY and her dad, the petitioner, were at odds with each other, which ultimately worked to the petitioner's disadvantage when allegations were fabricated against him. Britney alleged that bad touching occurred over a ten-year period. [Interview, at 8]. The hand in the pants claim advanced to "up my shirt, or my hand would be in his pants, or his hand near my pants." 3RP 237.

To the contrary, Britney conceded that both the petitioner and Sabrina confided in her to tell someone if anyone touched her inappropriately. 3RP 243-44. None of Britney's testimony revealed that the petitioner was awake during these alleged incidents.

> ASHLEY HOWARD alleged that her step-dad, the petitioner, had begun bad touching her on the living room couch. [Interview, at 5].

Fortunately, Ashley was caught in a series of falsehoods, which ultimately resulted in a not guilty verdict. 3RP 311;334.

> ALEXUS accused several other individuals of bad touching other than the petitioner, whereas, testimony of this fact would have been introduced to the jury had the trial court granted a continuance to secure Alexus's psychiatrist. The psychiatrist also labeled Alexus as a "perpetual liar."
>
> During trial, Alexus testified that her uncle, bad touched her on her breasts and crotch areas. 3RP[January 24, 2012], at 371.
>
> Alexus's mother knew of her daughter's perpetual liar status, and when Alexus informed her mother of this allegation against the petitioner, the police were not notified, nor did Alexus's mother notify the Sorenson family. Id. at 375.

Ironically, Britney spoke with Alexus, and informed her of Sabrina's scheme to implicate the petitioner in wrongdoing, and that is how Alexus was interviewed by the detective. Id. at 378-79.

During cross-examination, Alexus testified that she, her mother, and two sisters lived with the -

Sorenson family at one point, and that no bad touching had ever occurred at that time. Id. at 384-86.

Alexus conceded that any touching that occurred had to have happened after she came back from Texas, and prior to 6:30 p.m. before Alexus's mother arrived at the residence from work. Id. at 387. Interestingly, Alexus's mother did not have to knock on the door before ever entering the Sorenson residence. Id. at 388.

During the alleged touching claims herein, none of the children claimed that the petitioner told them not to tell anyone, never went into their bedroom during the incidents, which raised some "mixed confusions" with the detectives. Id. at 389-91.

Alexus had never mentioned any touching until after Britney had visited her at Alexus's residence. Id. at 393-94.

Before trial, petitioner moved for a continuance so that counsel could obtain impeachment evidence. He sought text-messages, Facebook pages, documents pertaining to Ashley's pending civil suit filed against the petitioner, and to interview approximately 72 witnesses. Counsel also had to secure a psychiatrist testimony for trial. [Unpublished Opinion, at A-1.]

On January 23, 2012, the defense stated to the trial court "I'm not prepared," and that the State-

needed more time to retrieve discovery that was more favorable to the accused. RP[January 19, 2012], at 30; RP[January 23, 2012], at 60:

JUDGE: Defense prepared?

DEFENSE: No. I asked for a continuance. It was denied.

JUDGE: Oh, I don't know anything about that.

DEFENSE: So, I'm not prepared.

Defense counsel reasoned that the previous Judge, the Honorable Collier, denied defense's motion for a continuance, in order to interview several witnesses that saw the defendant and his daughters interacting with each other. In this regard, multiple witnesses would have testified that they saw the defendant and his daughters "hugging" and that he had a good reputation for truth and veractiy, which amounted to impeachment evidence. RP[January-19, 2012], at 29.

Further, counsel need more time to transcribe the interviews of the defendant's daughters, interview Alexus's psychiatrist, and consequently, the trial court denied defense counsel's opportunity to secure impeachment evidence. Id.

On January 23, 2012, the parties filed motions in limine, consistent with the previous trial court's

ruling on the motion for severance. The FaceBook-Pages of the petitioner's daughter, Brooke, were excluded in evidence over defense counsel's objection, which showed the Brooke gave false statements in regards to the alleged offenses against the petitioner. EXHIBIT -A.

This limiting instruction would have clearly advised the jury that the testimony of the other alleged victims could only be used to show "common scheme or plan."

The State agreed to this instruction, and the trial court, in the Honorable Collier's absence, ruled that a limiting instruction was warranted, but that defense counsel's curative instruction was an "improper statement of the law." The trial court refused to suggest an alternative instruction, and failed to suggest any specific points of improvements. 4RP[-January 25, 2012], at 535; 539.

As a consequence, in denying the defense's motion for a continuance, petitioner was forced to go to trial with ill-prepared counsel. Further, the trial court's requirement to give a limiting instruction, once requested, worked to prejudice the petitioner.

Finally, the petitioner testified that, during the course of his marriage to Sabrina, he spent the -

majority of his time as a truck driver, working to provide for his family. He slept through the day, and worked at night. 4RP[January 25, 2012], at 477-78. Contrary to Ashley's testimony, petitioner had never had an injury that required a cast on his foot of knee.

Prior to the ex-wife informing petitioner not to come home anymore, his daughter's continued sleeping with them in their bedroom. 4RP 485. To make the offenses against the petitioner bogus, Sabrina was a regular sleeper, who did not possess a hearing aid, and did not have an alcohol or drug problem. Id. Petitioner had taken naps with his daughters up until such time as the separation was complete, with the exception of Alexus. 4RP 487.

Another point of evidence of the petitioner's innocence, court-appointed defense counsel retrieved a "gift-in-a-box," i.e., "Cologne" from Ashley, after she had moved out of the house, thanking the petitioner for everything he had done for her. Id.

Evidence showed that petitioner had made a trip to Sunnydale California, with his daughter Britney, for her showcase tournament. 4RP 490-93.

As for the "separation meeting," Sabrina would not allow the petitioner to attend, and set the stage-

to claim that their daughters were touched inappropriately by the petitioner. Specifically, Sabrina first claimed that she was molested as a child. 4RP 516-17. This prompted their daughters to rehearse this claim during the meeting.

Finally, none of the petitioner's daughters could provide specific details about how old they were when these incidents occurred. The jury acquitted the petitioner of the charges related to Bridget, and Ashley. CP 84-105 [counts 5 and 6]. The jury returned a guilty verdict on the remaining counts, with special verdicts on each count, finding that the petitioner abused a position of trust. Id.

The sentencing court imposed an exceptional minimum term of 240-months, and maximum term of life on counts I, II, X, and XI. CP 126. He received a standard range on the remaining counts. CP 126.

In summary, had the trial court granted the court-appointed defense counsel a continuance, it is more likely than not that the counsel would have been able to secure impeachment evidence, which would have resulted in a different verdict.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. PETITIONER'S CONVICTION WAS A RESULT OF INSUFFICIENT EVIDENCE, IN VIOLATION OF THE DUE PROCESS CLAUSE, AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION. Jackson v. Virgina, 443 U.S. 307 (1979).

a. The state is required to prove each essential element of the crimes charged beyond a reasonable doubt. Due process requires that the prosecution prove every element of the offenses charged beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends VI, and XIV; Washington Const. art. I, §§3, 22.

Petitioner argues that, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the offenses charged beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

First, to convict the petitioner of child molestation in the first degree, the prosecution must prove "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party. RCW 9A.44.010(2).

b. There was insufficient evidence of "sexual gratification" under the statute. Petitioner argues that his daughters claimed that their hand was in his pants when they awoke. This is insufficient itself that he touched his girls for the purpose of gratifying sexual desire when he was asleep during these alleged incidents.

On direct, petitioner relied on the court of appeals decision Powell, 62 Wn. App. 914, 816 P.2d 86 (1991), in support of this argument. Powell was convicted of first degree child molestation based on two incidents. The first incident occurred while Windy was seated in Powells' lap. He hugged her around her chest, and when he helped her off his lap, he placed his hand on her "front" and bottom of her underpants, and under her shirt. Id. at 916. The other occasion occurred while Windy was alone with Powell in his truck. He touched both her thighs outside of her clothing. Id.

Powell appealed his conviction, alleging that the evidence was insufficient to support his conviction. The court of appeals reversed, holding that both touching was equivocal. State v. Powell, 62 Wn.App. at 917-18.

The court further noted that Windy did not remember how Powell touched her, and both incidents were susceptible to an innocent explanation. the circumstances in Powell's case was that the touching-

was outside the clothing and she was clothed on each occasion; no threats, bribes, or requests not to tell anyone were made to Windy. Id.

In the instant case, petitioner was asleep in his bedroom, next to his wife during the times the alleged touching occurred. There was no evidence that he touched his daughters. Rather, their hand was allegedly in his pants when they awoke. There was no touching even outside of their clothing, and the children were fully clothed on each occasion; no threats, bribes, or requests not to tell were made.

In this regard, the evidence, in the light most favorable to the prosecution, at the least, merely show innocent contact. The overwhelming evidence in the Interviews of the petitioner's daughters show that petitioner was asleep during the alleged incidents.

Sexual gratification is not an essential element of the offenses charged, but rather, defines the term "sexual contact." State v. Lorenz, 152 Wn.2d 22, 34-35, 93 P.3d 133 (2004).

Washington appellate courts require additional evidence of sexual gratification when the defendant had served as a caregiver, in order to ensure that the touching, if any, was not accidental or open to innocent explanation. See State v. Whisenhunt, 96 Wn.App. 18,-

24, 980 P.2d 232 (1999); Powell, 62 Wn.App., supra at 917.

In the instant case, petitioner submitted that the prosecution was required to produce additional evidence, beyond the facts that established that the daughters crawled into their parents' bed to sleep with them, albeit, while he was asleep. Otherwise, the "touching" was inadvertent or subject to innocent explanation. State v. T.E.H., 91 Wn.App. 908, 916, 960 P.2d 441 (1998).

c. The court of appeals erred in its unpublished opinion that petitioner claimed that he touched inadvertently. [Unpublished Opinion, at A-3]. This statement was not claimed by the petitioner. Rather, he claimed that their "touching" was inadvertent, or was susceptible to innocent explanation. [Statement of Additional Grounds, at 18]. BROOKE denied to police for nearly 7-months, that the petitioner touched her inappropriately. [Interview, at 2]. She guessed that the one time she was bad touched was when she was 13-years old. According to the statute, a person is guilty of the offense when sexual contact with another who is less thn 12-years old. RCW 9A.44.083(1) See 3RP[January 24, 2012], at 403-05 (BROOKE awoke in her parents bedroom with her hand in her dad's pants,

and that she did not know how her hand had gotten there).

Petitioner was acquitted of the charges against him prompted by BRIDGET. Accordingly, his conviction in regards to BROOKE should be reversed, and dismissed with prejudice.

Second, in challenging BRITNEY'S allegations, with counsel for the accused, and the prosecution present, and Interview of BRITNEY was conducted on June 1, 2011. There, she claimed that she awoke with her hand in the petitioner's pants. [Interview, at 6].

BRITNEY claimed that the petitioner was asleep during the the alleged touching. Like BROOKE, the petitioner's conviction in regards to BRITNEY should be reversed, and dismissed with prejudice.

Petitioner concedes that he is unable to challenge ALEXUS'S offense against him due to the unavailability of impeachment evidence that his court appointed counsel attempted to retrieve when moving for a continuance which was denied. However, the court of appeals relied on ASHLEY and BRIDGET to conclude that, in looking in the light most favorable to the prosecution, "any rational trier of fact could have concluded from this evidence that Sorenson touched the girls' sexual or intimate parts for sexual gratification ..." [Appendix A-3].

Accordingly, petitioner respectfully request that this Court grant review, reverse 2 counts of his convictions, and remand to dismiss with prejudice.

2. THE STATE TRIAL COURT ABUSED ITS DISCRETION IN DENYING THE COURT-APPOINTED COUNSEL'S MOTION FOR CONTINUANCE, WHICH DEPRIVED HIM OF THE RIGHT TO A FAIR TRIAL, AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

a. The constitutional right to due process and to counsel, includes the right to adequately prepared attorney. This right to counsel includes "the right to make a full investigation of the facts and law applicable to the case. State v. Hartwig, 36 Wn.2d 598, 601, 219 P.2d 564 (1950); State v. Burri, 87 Wn.2d 175, 180, 550 P.2d 507 (1976).

A grant or denial of a court-appointed counsel's motion for continuance may not be disturbed absent a showing of a manifest abuse of discretion. State v. Campbell, 103 Wn.2d 1, 14, 691 P.2d 929 (1984). See also State v. Woods, 143 Wn.2d 561, 579, 23 P.3d 1046, cert. denied, 534 U.S. 964 (2001).

Here, on direct, petitioner argued that he was prejudiced by the trial court's denial of his court-appointed counsel's motion for continuance because, had the court granted the motion, "the result of the trial would likely have been different. [Statement-

of Additional Grounds, at 19].

The trial court's abuse of discretion occurs when exercised on untenable grounds for untenable reasons. See State v. Hughes , 154 Wn.2d 118, 154, 110 P.3d 192 (2005).

Under CrR 3.3 (h)(2), a trial court may continue the case when required "in the administration of justice."

Here, court-appointed defense counsel moved the trial court for continuance of the trial date, in order to allow (1) the prosecution time for its discovery of evidence more favorable to the accused, (2) to gather impeachment evidence by interviewing potential defense witnesses, and to transcribe the Interviews of the defendant's daughter witnesses. 2RP[January 23, 2012] at 60-70. Counsel stated that it was unprepared for trial, and the prosecution made its objection. Consequently, the trial court denied defense counsel's continuance to prepare, despite the fact that newly-appointed counsel's case-load was congested, and counsel had only been representing the defendant for 6-months.

Generally, a defendant is not required to explain why it is impossible to defend the case within the time remaining on the speedy trial calendar. See State v. Earl, 97 Wn. App. 408, 412, 984 P.2d 427 (1999).

Here, petitioner's appointed counsel made several attempts to explain the discovery issues to the trial-court. Id. Petitioner contends that, had counsel received the continuance, counsel would have retrieved FaceBook pages alleging the conspiracy to convict him of the crimes charged, the transcription of the - interviews with his daughters, clearly showing that he was asleep during the allegations made against him, interviews of several witnesses, ex., Alexus's mother, and psychiatrist, who would have testified that Alexus -was a "perpetual liar," inter alia. More likely than not, petitioner argues that his convictions against Alexus and Britney would have amounted to an acquittal.

With the impeachment evidence against the prosecution's witnesses, it would have successfully cast doubt on the alleged victim's credibility during cross-examination.

The right to counsel is clearly established in our State, which includes a reasonable time for consultation and preparation of the defense. State v. Hartzog, 96 Wn.2d 383, 402, 635 P.2d 694 (1981).

Here, it is undisputed that Sorenson was forced to go to trial with ill-prepared court appointed - counsel -- no defense interviews were called to testify on petitioner's behalf due to the lack of a continuance.

Simply put, it was unreasonable for the trial court to assume that defense counsel was prepared to go to trial. State v. Guloy, 104 Wn.2d 412, 428, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

Further, the evidence was circumstantial and the alleged victims' interviewed statements contradicted some of their testimony at trial; those statements also clearly show that the petitioner was asleep during the alleged incidents as to which he was convicted.

In this regard, this impeachment evidence would have materially decreased the credibility of the alleged victim's testimony at trial, as to the events that supposedly occurred during the crucial juncture. Counsel simply did not have equal opportunity to discover the impeachment evidence.

The court of appeals opined that the petitioner "cannot show that his desired impeachment evidence" was crucial to his defense is error. [Unpublished-Opinion, at A-2,3]. Accordingly, petitioner asks this Court to grant review of his continuance claim.

3. THE TRIAL COURT MANIFESTLY ABUSED ITS DISCRETION IN FAILING TO GIVE A LIMITING INSTRUCTION, WHICH DEPRIVED PETITIONER OF A RIGHT TO A FAIR TRIAL, GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION

Defense counsel moved the trial court for a limiting instruction on ER 404(b) evidence, consistent-

with the previous trial judge's memorandum of opinions.

Defense's limiting instruction read as follows:

> Certain evidence had been admitted in this case for only a limited purpose. This evidence consists of the evidence produced in the other alleged victims counts when deciding the guilt or innocence of the accused on each count.
>
> Evidence in the other alleged victims counts can only be used for the limited purpose of showing common scheme or plan by defendant. You may not consider evidence in other victim's counts for any other purpose. Any discussion of the evidence during your deliberation must be consistent with this limitation.

11 WASHINGTON PATTERN JURY INSTRUCTION: Criminal 5.30, at 132 (1994) (WPIC), (citing, State v. Russell, 154 Wn.2d 118 (2010)).

The point of this instruction was to advise the jury that evidence from the other victims' case [the other four victims] could only be used to show "common scheme or plan" in finding guilt or innocence on any count involving the victim. 4RP [January 25, 2012], at 535; 539.

Further, the State conceded to this instruction, and the trial court ruled that it was warranted, but that the proposed instruction was not a "proper statement of the law." Id. The trial court would not suggest any specific points of improvements, or any alternative limiting instruction.

Here, the trial court was required to give a limiting instruction once it was requested. See State v. Brown,

111 Wn.2d 124, 761 P.2d 588 (1988), rehearing, 113 Wn.2d 520, 782 P.2d 1013 (1989), 787 P.2d 906 (1990).

The cited WPIC 5.30 was approved by this Court in Brown. Id. In this regard, petitioner assigns error to the trial court's denial of a limiting instruction, arguing that it was reversible error for the trial court's failure to give a curative instruction to the jury.

Petitioner reasons that a trial court is not required to provide an ER 404(b) limiting instruction unless one of the parties requests such an instruction. See State v. Russell, 171 Wn.2d 118, 124, 249 P.3d 604 (2011); State v. Gresham, 173 Wn.2d 405, 423-24, 269 P.3d 207 (2012).

In the instant case, Judge Collier's memorandum of opinion reflects that defense counsel requested a limiting instruction. In this regard, counsel's instruction clearly stated, inter alia, that "evidence in the other alleged victim's counts can only be used for the limited purpose of showing common scheme or plan ..." WPIC 5.30, [Statement of Additional Grounds, at 25], (citing, EXHIBIT-B)).

This Court has held that, if the evidence is admitted under ER 404(b), a limiting instruction must be given. State v. Foxhoven, 161 Wn.2d 168, 175, 163 P.3d 786 (2007) (citing, State v. Lough, 125 Wn.2d 847, 864,

889 P.2d 487 (1995). Here, the trial court gave no instruction. See Gresham, 173 Wn.2d at 423-25.

The Foxhoven requirements were not met, and in this regard, the admission of the evidence was unduly prejudicial. State v. Foxhoven, 161 Wn.2d supra at 175. Cf. Lough, 125 Wn.2d supra at 864. In this regard, the trial court is obligated to explain the purpose of the 404(b) evidence and give a cautionary instruction to "consider it for no other purpose." Brown, 113 Wn.2d supra at 529.

It is undisputed that this limiting instruction has a substantial impact in the admission of 404(b) evidence. Accordingly, the lack of a cautionary instruction affected the outcome of the trial. Under the facts of this case, the trial court manifestly abused its discretion, which was not harmless. See Gresham, 173 Wn.2d at 425; In re Detention of Pouncy, 168 Wn.2d 382, 391, 229 P.3d 678 (2010).

Finally, the petitioner argues that if a reasonable probability exists that in the absence of the error, the verdict might be more favorable to the accused, it cannot be harmless under this test. State v. Young, 48 Wn.App. 406, 410, 739 P.2d 1170 (1987).

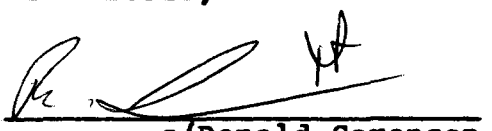
F. CONCLUSION

Mr. Ronald Sorenson, pro-se, respectfully request

that this Court the petition, reverse his convictions and remand to the trial court with instructions consistent with its opinion.

DATED: February 25 2014

RESPECTFULLY SUBMITTED,



s/Ronald Sorenson
Petitioner

Stafford Creek Corr. Ctr.,
191 Constantine Way,
Aberdeen, WA., 98520

CERTIFICATE OF SERVICE [GR 3.1]

STATE OF WASHINGTON)
COUNTY OF GRAYS HARBOR) ss.

I, Ronald Sorenson, certify that on February 25, 2014, I deposited in the U.S. MAIL, as "legal mail," through prison authorities, the document MOTION FOR DISCRETIONARY REVIEW, to the following addresses:

SUPREME COURT OF WASHINGTON
ATTN: Commissioner
P.O. BOX 40929
OLYMPIA, WA., 98504-0929

PROSECUTING ATTY.
CLARK CTY. PROS. ATTY.
1013 FRANKLIN ST.,
VANCOUVER, WA.,
98666-3039
ATTN: ANNA KLEIN

CASE #89974-6

I, certify that the foregoing is true, correct, and complete. 28 U.S.C. §1746
MAILED ON THIS 25 . Day of February, 2014

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. RONALD LEE SORENSON, Appellant.	No. 43199-8-II UNPUBLISHED OPINION

JOHANSON, A.C.J. — Ronald Lee Sorenson appeals his jury convictions and sentences for multiple sex crimes. Sorenson claims that (1) the trial court manifestly abused its discretion by denying a continuance, (2) the State offered insufficient evidence for his first degree child molestation convictions, (3) the trial court erred by failing to provide a limiting instruction, (4) the prosecutor's misconduct denied him a fair trial, and (5) scrivener's errors plague his judgment and sentence. Because the trial court did not abuse its discretion by denying the continuance, the State offered sufficient evidence to support the convictions, the trial court provided a limiting instruction, and Sorenson did not demonstrate that prosecutorial misconduct resulted in reversible error, we affirm. But we accept the State's concession and remand to correct the scrivener's errors in Sorenson's judgment and sentence.

FACTS

The State charged Sorenson with two counts of first degree child molestation[1] and two counts of second degree child molestation[2] against BES, two counts of second degree child molestation and one count of third degree child molestation[3] against BLS, and two counts of first degree child molestation against AKB.[4] BES, BLS, and AKB are all related to Sorenson.

Before trial, Sorenson moved for a continuance so that he could obtain impeachment evidence. He sought information about a subsequently added victim, evidence from Facebook, and he wanted to interview 72 additional potential witnesses. The State contested the continuance motion, arguing that (1) the case was over a year old; (2) Sorenson's new attorney had been working the case for six months; (3) the State added its latest victim a month and a half earlier; and (4) Sorenson's desired evidence was irrelevant and cumulative, so his need for it did not outweigh the detriment of delay to the victims. The trial court denied Sorenson's continuance motion after considering the State's arguments and judicial economy interests.

At trial, BES testified that when she was 11, she woke up roughly 10 times with Sorenson's hand touching her sexual or intimate parts. AKB testified that when she was 8 or 9, Sorenson would lie with her on the couch "spooning style" 15 to 20 times, touching her sexual or intimate parts. 3B Report of Proceedings (RP) at 371. BLS testified that when she was between

[1] RCW 9A.44.083.

[2] RCW 9A.44.086.

[3] RCW 9A.44.089.

[4] We use initials to protect the minor victims' privacy. The State also charged Sorenson with sex crimes against two other victims. The jury acquitted Sorenson of those charges and they are not relevant to this appeal.

the evidence Sorenson wanted to obtain was irrelevant, cumulative, and did not outweigh the detriment of delay to the victims. The trial court also articulated that it intended to deny the continuance in the interest of judicial economy. Sorenson cannot show that his desired impeachment evidence, which had been available throughout the case, was crucial to his defense or that his attorney was diligent in securing it. Thus, he cannot demonstrate that the trial court denied the continuance based on clearly untenable grounds or reasons; accordingly, he does not show that the trial court manifestly abused its discretion.

II. SUFFICIENT EVIDENCE

Sorenson next argues that the State failed to prove his first degree child molestation charges beyond a reasonable doubt because it could not show he acted for sexual gratification. We disagree because the record demonstrates that the State sufficiently proved the crimes.

We review claims of insufficient evidence to determine whether, "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. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We draw all reasonable inferences from the evidence in favor of the State and against the defendant. *Salinas*, 119 Wn.2d at 201. A sufficiency challenge admits the truth of the State's evidence and all reasonable inferences from it. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). We leave credibility determinations to the fact finder and do not review them on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To prove first degree child molestation, the State needed to prove beyond a reasonable doubt that Sorenson had sexual contact with a victim who is less than 12 years old, that the victim and Sorenson are not married, and that Sorenson is at least 36 months older than the victim. *See* RCW 9A.44.083(1). "Sexual contact" means any touching of the sexual or other

intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party. RCW 9A.44.010(2). Sorenson specifically argues there is insufficient evidence that he had contact with BES and AKB for purposes of sexual gratification. The record does not support his claim.

Sorenson analogizes to *State v. Powell*, 62 Wn. App. 914, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013 (1992), to argue that he only touched the girls inadvertently, and that any touching "was susceptible to innocent explanation." Statement of Additional Grounds at 18. In *Powell*, the sexual contact was "fleeting" and "susceptible of innocent explanation," so the court held that no rational trier of fact could have found sexual contact beyond a reasonable doubt and reversed Powell's conviction. 62 Wn. App. at 918.

Here, unlike *Powell*, Sorenson touched BES and AKB neither fleetingly nor inadvertently. BES testified that Sorenson touched her roughly 10 times; she woke up numerous times with Sorenson's hand touching her sexual or intimate parts. AKB testified that Sorenson would lie with her on the couch "spooning style" 15 to 20 times, touching her sexual or intimate parts. 3B RP at 371. Taken in the light most favorable to the State, any rational trier of fact could have concluded from this evidence that Sorenson touched the girls' sexual or intimate parts for sexual gratification; thus, the State sufficiently proved the sexual contact element of Sorenson's first degree child molestation convictions and his claim fails.

III. LIMITING INSTRUCTION

Sorenson next argues that the trial court violated his right to a fair trial by failing to give a limiting instruction. We disagree.

Generally, when a trial court admits evidence for a limited purpose and the party against whom it was admitted requests a limiting instruction, trial courts must give an instruction. ER

APPENDIX A5

misstatement of the law could not have been cured by a remedial instruction that clarified the reasonable doubt standard. *See Emery*, 174 Wn.2d at 758-59 (explaining that a misstatement of the "esoteric" reasonable doubt standard that shifts the burden of proof may be "certainly and seriously wrong" but does not demonstrate bad faith or an attempt to inject bias). Accordingly, he failed to show flagrant and ill-intentioned conduct incurable by a remedial instruction; so he did not preserve these challenges for appeal. *See Emery*, 174 Wn.2d at 760-61.

Next, regarding Sorenson's preserved prosecutorial misconduct claim, we review the prosecutor's argument for improper conduct and resulting prejudice. *Emery*, 174 Wn.2d at 756. Sorenson argues that the prosecutor's statement, "[I]f you have an abiding belief that equals a reasonable -- beyond a reasonable doubt," misstated the basis on which the jury could acquit. 4B RP at 649. Even assuming, without deciding, that Sorenson may show that this statement constitutes misconduct, he cannot demonstrate resulting prejudice—he cannot show that the statement likely affected the jury's verdict.

Here, Sorenson denied that any inappropriate touching ever happened, and he contended that even had it happened, the touching occurred accidentally in the course of cuddling with the victims. But the jury heard testimony from BES, BLS, and AKB, who each testified that on multiple occasions, they each woke up to Sorenson touching their sexual or intimate parts. And the trial court instructed the jury that it must decide each count against each victim separately, such that the verdict on one count should not control other verdicts. Sorenson does not demonstrate that absent the prosecutor's allegedly improper argument, the jury would not have believed the victims' testimony beyond a reasonable doubt. Thus, Sorenson does not show prejudice and his prosecutorial misconduct claim fails.

V. SCRIVENER'S ERRORS

Sorenson argues, and the State concedes, that his judgment and sentence contains scrivener's errors. We accept the State's concession and remand to correct those errors.

A defendant may challenge an erroneous sentence for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). The remedy for a scrivener's error in a judgment and sentence is remand to the trial court for correction. *See State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.3d 1280 (2010); CrR 7.8(a).

Sorenson's judgment and sentence incorrectly states the dates that Sorenson committed the offenses in counts 2, 3, and 9. Sorenson committed count 2 between March 9, 2002 and March 8, 2004; count 3 between March 9, 2003 and March 8, 2006; and count 9 between August 23, 2006 and August 22, 2009. We accept the State's concession and remand to the trial court for it to correct Sorenson's judgment and sentence on counts 2, 3, and 9 to accurately reflect when Sorenson committed those crimes.

We affirm, but remand to correct scrivener's errors in Sorenson's judgment and sentence.

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.

Johanson, A.C.J.
JOHANSON, A.C.J.

We concur:

Bjorgen, J.
BJORGEN, J.

Maxa, J.
MAXA, J.

CERTIFICATE OF SERVICE BY MAIL [GR 3.1]

I, Ronald Sorenson, certify under penalty of perjury, under the laws of the State of Washington, that on February 25, 2014, and on March 25, 2014, I deposited in the U.S. Mail through prison officials, the following documents as "legal-mail," under CASE # 89974-6:

MOTION FOR DISCRETIONARY REVIEW

TO:

SUPREME COURT OF WASHINGTON
415 12th. Ave., SW,
P.O. BOX 40929,
OLYMPIA, WA., 98504-0929
ATTN: RONAL CARPENTER, COURT CLERK

AND:

PROSECUTING ATTORNEY'S OFFICE
CLARK COUNTY - 1013 Franklin St.,
Vancouver, WA., 98666-3039

I certify that the foregoing is true, correct, and complete and based upon my personal knowledge. 28 U.S.C. §1746.

MARCH 25, 2014

3/25/14
s/Ronald Sorenson
Petitioner

Stafford Creek Corr. Ctr.,
191 Constantine Way,
Aberdeen, WA., 98520

Department of Corrections
WASHINGTON STATE

POSTAGE TRANSFER
Transferencia de fondos para el franqueo

POSTAGE DUE
Franqueo pagadero
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Haga el favor de retirar los fondos suficientes de mi cuenta para cubrir el costo de enviar esta carta/paquete. Si no he marcado ninguna casilla, se hará el retiro de mi cuenta gastable.

☐ FUNDS ON HOLD *Fondos suspendidos*	☐ POSTAGE ACCOUNT *Cuenta de correo*	☐ INDIGENT *Indigente*	☑ LEGAL MAIL *Correo legal*	☐ PROPERTY *Propiedad*	☐ POSTAGE DUE *Franqueo pagadero*

OFFENDER NAME (PLEASE PRINT) *Nombre del interno/interna (letra de molde, por favor)*: Ronald Solewson

DOC NUMBER *Número del DOC*: 355432

HALL/UNIT *Pasillo/Unidad*: H3-07

OFFENDER SIGNATURE *Firma del interno/interna*: [signature]

DATE *Fecha*: 2/25/14

CLASS MAIL OPTIONS *OPCIONES DE CORREO CLASE*

☐ INSURED *Asegurado* $

☐ CERTIFIED ONLY *Certificado solamente*

☐ CERTIFIED & RETURN RECEIPT *Certificado y acuse de recibo*

PROPERTY OPTIONS *OPCIONES DE PROPIEDAD*

US POSTAL SERVICE *Administración de Correo Nacional* ☐ 1ST CLASS *1ª clase* ☐ PARCEL POST *Servicio de paquetes postales*

☐ INSURANCE *Seguro* $

☐ GROUND COURIER *Servicio de entrega local* (NO P.O. BOXES ACCEPTED) *(No se aceptan apartados postales)*

ITEM WEIGHT *PESO DEL ARTÍCULO*

☒ PARCEL *Paquete* ☐ FLAT *Bulto plano*

MAILROOM STAFF *PERSONAL DE CORREO*

SIGNATURE FOR INDIGENT LEGAL MAIL *FIRMA PARA CORREO LEGAL DE INDIGENTE*

DATE/TIME *FECHA/HORA*

NAME / *Nombre*: Supreme Court of Washington

STREET / *Dirección de domicilio*: P.O. Box 40929

CITY / *Ciudad*: Olympia

STATE / *Estado*: WA

ZIP / *Código Postal*: 98504-0929

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COUNTRY / *País*

COMMENTS *Comentarios*: Motion For Discretionary R.O.R.W

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DOC 02-003 ES (Revised 6/10/10) **White** – Inmate Banking **Canary** – Mail Staff **Pink** – Offender

RECEIPT from Stafford Creek Corrections Center MAILROOM, verifying POSTAGE PAID for legal mail in regards to the MOTION FOR DISCRETIONARY REVIEW, sent to the WASHINGTON SUPREME COURT, on February 25, 2014

Department of Corrections
WASHINGTON STATE

POSTAGE TRANSFER
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Haga el favor de retirar los fondos suficientes de mi cuenta para cubrir el costo de enviar esta carta/paquete. Si no he marcado ninguna casilla, se hará el retiro de mi cuenta gastable.

☐ FUNDS ON HOLD *Fondos suspendidos*	☐ POSTAGE ACCOUNT *Cuenta de correo*	☐ INDIGENT *Indigente*	☑ LEGAL MAIL *Correo legal*	☐ PROPERTY *Propiedad*	☐ POSTAGE DUE *Franqueo pagadero*

OFFENDER NAME (PLEASE PRINT) *Nombre del interno/interna (letra de molde, por favor)*: Ronald Sorenson
DOC NUMBER *Número del DOC*: 355432
HALL/UNIT *Pasillo/Unidad*: H3-07
OFFENDER SIGNATURE *Firma del interno/interna*: Ron
DATE *Fecha*: 2/25/14

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☐ CERTIFIED ONLY *Certificado solamente*		☐ INSURANCE *Seguro* $		
☐ CERTIFIED & RETURN RECEIPT *Certificado y acuse de recibo*	☐ GROUND COURIER *Servicio de entrega local*	(NO P.O. BOXES ACCEPTED) *(No se aceptan apartados postales)*		

RECIPIENT'S NAME AND ADDRESS

NAME / *Nombre*: Prosecut~ Atty. CLARK CTY. MOS. Atty
STREET / *Dirección de domicilio*: 1013 Franklin St.
CITY / *Ciudad*: Vancouver
STATE / *Estado*: WA
ZIP / *Código Postal*: 98666-3039
☐ OUTSIDE USA / *Fuera de los EE.UU.*
COUNTRY / *País*:

COMMENTS *Comentarios*: Motion For D. Sec Twenty [illegible]

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DOC 02-003 ES (Revised 6/10/10) White – Inmate Banking Canary – Mail Staff Pink – Offender

RECEIPT FROM: Stafford Creek Corrections Center, MAILROOM,

This verifies that postage was paid for delivery of legal mail

to: Prosecuting Atty. Clark County:
1013 Franklin St., Vancouver, WA., 98666-3039

MOTION FOR DISCRETIONARY REVIEW was filed on February 25, 2014, and sent on February 26, 2014.

Department of Corrections
WASHINGTON STATE

OFFENDER REQUEST TO TRANSFER FUNDS
PEDIDO DEL INTERNO PARA TRANSFERIR

Please Print/LETRA DE MOLDE

OFFENDER COMPLETES THIS SECTION – EL INTERNO LLENA ESTA SECCION

Offender Name/NOMBRE DEL INTERNO: Ronald Sorenson	DOC Number/NUMERO DOC: 355432
Please deduct sufficient funds from my account to cover the cost of: / Favor de retirar los fondos suficientes de mi cuenta para cubrir el costo de: Legal Copies 32 x .20 x 2 + 2 envelopes	
Facility/INSTITUCION	Date/FECHA
Pay To/PAGA A: S.C.C.C	Pay Amount/PAGA CANTIDAD: ~~$15.36~~ $13.64
Address/DIRECCION Street/CALLE: 191 Constantine Way	City/CIUDAD: Aberdeen — State/ESTADO: WA — Zip/CODIGO POSTAL: 98520
Purpose/PROPOSITO: Legal Mail	Housing Unit/UNIDAD DE VIVIENDA: H3-07
Offender's Signature/FIRMA DEL INTERNO	Counselor/CONSEJERO/A: WEIGMAN
Counselor's Signature/FIRMA DEL CONSEJERO/A	Date/FECHA: 2/25/14

ACCOUNTING DEPARTMENT / DEPARTAMENTO DE CONTABILIDAD

Comments: 20809033	
Check Number/NUMERO DE CHEQUE	Date Processed: 2.26.14 VD

PLEASE ATTACH A SELF-ADDRESSED ENVELOPE. **FAVOR DE ADJUNTAR UN SOBRE CON SU NOMBRE Y DIRECCION**

Distribution: **WHITE** – Accounting/CONTABILIDAD **YELLOW** - Counselor/CONSEJERO/A **PINK** - Offender/INTERNO

DOC 06-075 (Rev. 02/06/12) DOC 200.000, DOC 210.060, DOC 440.000, DOC 540.250 DOC 590.500

RECEIPT for making legal copies for the MOTION FOR DISCRETIONARY-
REVIEW, mailed on February 25, 2014

TRANSACTION #20809033