

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 90639-4

Court of Appeals Case No. 71666-2-1

Clark County Superior Court No. 11-1-01948-9

STATE OF WASHINGTON, Respondent

v.

RYAN DEE WHITAKER, Petitioner

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COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
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PETITION FOR DISCRETIONARY REVIEW

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STATE OF WASHINGTON
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I. IDENTITY OF PETITIONER

Petitioner is Ryan Dee Whitaker, formerly defendant in Clark County Superior Court, and appellant in the Court of Appeals.

II. CITATION TO COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division One, affirming the defendant's convictions in Superior court. A copy is attached as Appendix A to this petition.

III. ISSUES PRESENTED FOR REVIEW

1. In a prosecution for Child Molestation in the First Degree, did the defendant receive ineffective assistance of counsel at trial, when his attorney failed to call at least three, and as many as six exculpatory witnesses who were physically present at the scene, and within a few feet of the defendant and alleged victim, during molestations which allegedly occurred for twenty-six hours over an eight month period?
2. Did the Court of Appeals, Division One, commit error when it imposed a heightened standard of prejudice on a claim of ineffective assistance of counsel?
3. Did the Court of Appeals, Division One, commit error when it assessed the credibility of witnesses on appellate review, to determine whether the ineffective assistance of counsel caused prejudice?

IV. STATEMENT OF THE CASE

A. Superior Court Procedural History.

On January 31, 2013, following a bench trial, Appellant Ryan Dee Whitaker was convicted of two counts of Child Molestation in the First

Degree. These charges were contained in a Second Amended Information, filed during trial. CP 166, Appendix item B, attached.

B. Court of Appeals Decision.

The Court of Appeals, Division Two, granted consolidation of the direct appeal and appellant's Personal Restraint Petition, for purposes of the appeal. The Personal Restraint Petition was filed in order to supplement the record of ineffective assistance of counsel.

The appeal and PRP were transferred to Division One of the Court of Appeals for oral argument and decision. In an unpublished opinion filed on July 7, 2014, Division One of the Court of Appeals affirmed the convictions.

C. Facts presented at trial.

In 2011, Petitioner Ryan Dee Whitaker was a member and teacher at the St. John's Ward of the Church of Latter Day Saints in Vancouver, Washington. M*** S****, the eight year old alleged victim, was in his class of approximately eight students. RP 468, l. 21-24; p. 469, l. 1-14 p. 475, l. 18-24, p. 476, l. 1.

Every Sunday, the students at the church would gather for instruction in the "Sharing Time Room," which is large meeting room with rows of folding chairs. As many as 60 people would be present during these sessions, including a dozen or more adults, including parents

and teachers. People were moving around in the room, engaged in various activities. RP p. 888 l. 6-23.

Appellant, known as “Brother Whitaker” to the students, would sit with his class of eight and nine year olds in their assigned two rows of chairs, in the back of the room on the far right side, as viewed from the front of the room. RP p. 1103, l. 19-24.

1. Testimony of alleged victim.

M*** S**** testified at trial that during the period of January through August, 2011, Appellant would touch her in the Sharing Time Room on her vagina. Her testimony covers several pages, and relates that he would invariably reach behind her chair, come up from behind with his hand, go under her skirt, and touch her vagina. RP P. 482, l. 1-24; p. 483, l. 1-23. She testified that this touching occurred every Sunday during the classes when other children were in the classroom. RP p. 483, l. 24; p. 484, l. 1- 10, continuously for the entire 45 minutes of the classes. RP p. 534, l. 1-8, while the classmates sat near each other. RP p. 478, l. 23-24; p. 479, l.1-2.

M*** S**** testified that every time, Appellant’s finger would go into the hole in her private parts. RP p. 487, l. 1-14. She subsequently changed her testimony and said that touching had occurred over her clothes, at a time when the class was singing Christmas songs. RP p. 40, l.

6-12, however, M*** was never in a class with Appellant during the Christmas season. RP p. 962, l. 7-8.

M*** also testified that Appellant had touched her one time outside of her clothes, in a different classroom, when just the two of them were present, RP p. 492-494. This alleged incident is apparently the basis for the charge in Count

1: Child Molestation in the First Degree. M*** had told her mother, however, that the touching never occurred anywhere except in the Sharing Time Room. RP p. 615, l. 9-14. For at least a month, in late July and in August, 2011, another teacher, “Brother Gonsalves,” would sit with the class as well. RP p. 846, l. 4-24.

For at least a month, in late July and in August, 2011, another teacher, “Brother Gonsalves,” would sit with the class as well. RP p. 846, l.4-24.

2. Hearsay Witnesses.

To bolster the uncorroborated testimony of M*** S****, the State sought to admit the testimony of the usual parade of RCW 9A.44.120 and other hearsay witnesses.

1. The State offered the testimony of Arica S**** and Jason S****, relating to the first disclosure made to them by M*** on August 30, 2011. RP p. 18- 23. The State sought to admit the testimony of a Bishop

Mansius, who questioned M**** about the claims. RP p. 75, l. 13-19; p. 76, l. 5-12. The State offered the testimony of Cynthia Bull, a detective with the “Children’s Justice Center” as to statements made during her interview with M*** S****. RP p. 165-170. The State offered the testimony of Dr. Kim Copeland, a physician who works with the “Children’s Justice Center” as to statements made by M***, RP p.107-117. Additionally, the State sought to admit the testimony of Danielle Wilcox, an unlicensed counselor, who was not eligible to be licensed for lack of sufficient education, RP p. 721, l. 12-17.

After a lengthy pretrial hearing, the court issued rulings concerning the hearsay witnesses listed above. The Court ruled admitted M****’s hearsay statements to her parents, RP p. 429 l. 23-25; 430 l. 1-8 and to Detective Cynthia Bull to Cynthia Bull, RP p. 432, l. 9-12.

The statements to the Bishop were unreliable and not admissible. RP p. 430, l. 24-25; p. 431, l. 1-15. The statements to Dr. Copeland and to Danielle Wilcox were elicited in a manner which rendered them unreliable and not admissible under RCW 9A.44.120. RP p. 432, l. 17-25; p. 433, l. 1-14. Further, they were not made for purposes of medical diagnosis, and not admissible under ER 803(a)(4). RP p. 453, l. 10-20, RP. p. 737, l. 10-25; p. 738, l. 1-20.

3. Other Witnesses.

During trial, both sides called dueling witnesses as to what could be seen, by whom, and from what vantage point in the courtroom. These included State's witnesses, who testified that people in the Sharing Time Room could not necessarily see what was happening in the last row of chairs: Ashley Denton RP p. 692-693; p. 704-707; Tammy Copes, RP p. 1083-1087; Arianna Pierce, RP 1106-1110.

The defense called "site view" witnesses who in general testified that Appellant's location and activities could be seen by others in the room: Steven Gonsalves RP p. 853-854; Laurie Ogden RP p. 895-899; Pamela Wise RP p. 923-931; Paul Pecora RP p. 1042-1045; Michelle Pecora RP p. 1061-1063.

Brother Gonsalves' ability to observe, however was limited to late July and August of 2011.

The sessions in the Sharing Time Room lasted 45 minutes each Sunday, and involved around sixty persons, including ten to twelve adults, teachers, and parents in the room, engaged in various activities. RP p. 634, l. 5-9, coming and going through the room at various times. RP p. 913, 914.

Appellant's eight students and Brother Gonsalves all sat together in the same two rows. RP p. 921 18-20; p. 847 l. 23-24. The other students sitting near to Appellant and to M*** S**** included K*****

C****, K***** O'*****, and J***** K*****. RP p. 843, l. 7-11.

These three children were witnesses who were in a position to accurately see what was going on in the last two rows of the classroom, throughout the entire period of January through August, 2011. None of these three children were subpoenaed by the defense to testify. See Declaration of Josephine Townsend, attached to Personal Restraint Petition.

The police interviews of these three child witnesses is attached as Appendix item C.

D. Verdicts and Sentence.

The Court found Appellant not guilty on Count I, Rape of a Child in the First Degree. Further, the court found Appellant not guilty on Count II, Child Molestation in the First Degree, which apparently was charged as some sort of a lesser included offense under count I.

The Court found Petitioner guilty on Count III, Child Molestation in the First Degree, apparently based upon the testimony of sexual touching in the Sharing Time Room, and guilty on count IV, apparently based upon the alleged touching in the other classroom, although the court did not specify which incident related to which count.

On March 5, 2013, the court sentenced Petitioner to a minimum of 89 months in prison, the high end of the standard range, and a maximum

sentence of life imprisonment. CP 208, Judgment and Sentence,
Appendix item F.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The Supreme Court should accept discretionary review of the case
under the following rules:

RAP 13.4(b)

(1) The decision of the Court of Appeals is in conflict with a
decision of the Supreme Court; and

(2) A significant question of law under the Constitution of the
State of Washington or of the United States is involved.

A. Issue # 1: Ineffective Assistance due to Deficient Representation

Appellant received ineffective assistance of counsel at trial. The
representation was deficient.

The right to counsel in a criminal case is guaranteed by the Sixth
Amendment to the United States Constitution, incorporated into State
prosecutions by the Fourteenth Amendment Due Process Clause, and is
contained in the Washington State Constitution, Article I, Section 22:

“RIGHTS OF THE ACCUSED. In criminal prosecutions the
accused shall have the right to appear and defend in person, or by
counsel...”

This right is violated when a defendant is convicted of a crime, as a
result of receiving ineffective assistance of counsel. Strickland v.

Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

To establish a claim of ineffective assistance of counsel, a defendant must prove both that his trial attorney's representation was deficient and that the deficiency prejudiced his defense. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In determining whether a defendant has met the first prong of this test, "scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." *Id.* at 226. Therefore, trial conduct that can be characterized as legitimate trial strategy or tactics cannot form the basis for a claim of ineffective assistance of counsel. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). If the defendant meets the first burden, the second prong requires the defendant to show only a "reasonable probability" that the outcome of the trial would have been different absent the attorney's deficient performance. *State v. Thomas*, *supra*.

The failure of defense counsel to present exculpatory evidence to the court was an egregious error. Bearing in mind that this was a case hinging entirely upon the uncorroborated testimony of a ten year old girl, concerning events that were almost, by any objective standard of review, very puzzling and unlikely, presentation of all exculpatory evidence was essential.

Appellant, a 57 year old attorney and teacher, was accused of putting his hand down the clothing of the child while she was sitting in a chair next to him, in a room full of approximately 60 people, including 10 to 15 adults, while other children and even one adult were sitting next to him and the alleged victim in the row of chairs, mere feet away. The victim claimed that this occurred every Sunday for an eight month period, for 45 minutes per session, when several other witnesses were present within a few feet of the participants. In other words, the victim claimed that, within touching distance of several other children, the petitioner sexually molested her in some acrobatic fashion, for a total of twenty-six hours, with no-one noticing anything unusual.

The evidence of who could see what, and from where in the room was contested by the diametrically opposed testimony of defense witnesses and prosecution witnesses. What is uncontested, however, is that despite the ability of adults throughout the room to see or not see what was transpiring, there were three witnesses who sat in the same rows as the crimes were alleged to occur.

These child witnesses were K***** C*****, J***** K*****, and K***** O'*****. These witnesses each gave interviews to Cynthia Bull, the investigating officer, who, either despite of, or because of the fact that they were exculpatory, excluded them from her police report. RP p.

792-825. The interviews were, however, made available to defense counsel in the form of CD recordings, (exhibits 41, 42, and 43.) Transcripts of these interviews, demonstrating the exculpatory value of the testimony available from these witnesses, have been included in Mr. Whitaker Personal Restraint Petition filed contemporaneously with the appeal, Appendix item C.

Also, a review of the record of the trial itself clearly demonstrates that defense counsel at trial desired to have the contents of the three witnesses interviews presented to the court. This was not a case of a tactical decision to refrain from interviewing or calling a witness at trial.

Trial counsel's method of attempting to enter the testimony was deficient and doomed to failure, as a matter of law. It is elementary that counsel cannot enter substantive testimony from a non-appearing witness under the guise of impeachment of a different witness. State v. Stewart, 2 Wn. App. 637, 468 P.2d 1006 (1970).

The alternate theory argued by counsel, to the effect that exculpatory hearsay can be admitted despite the strictures of the Rules of Evidence was novel and foreseeably unsuccessful, but more importantly, no substitute for the live testimony of the witnesses. Again, this was not a tactical decision. Counsel has clearly, in the trial record, RP p. 953-958, and in the Personal Restraint Petition materials, indicated that the failure

to call the three witnesses, or any of them, was a failure on her part, rather than a tactical decision.

Trial Counsel states that the decision not to call witness K***** C***** was because he had moved out of state, and the Appellant lacked funds to bring him or his family to court to testify. (Yet counsel did, in fact, call K*****'s mother and stepfather, Michelle and Paul Pecora, as witnesses.) Even if finances were a problem, there was no request to the court for a material witness subpoena, under RCW 10.55.060, whereunder costs to transport, and lodging would be paid by the state. Every defendant has available compulsory process, at no expense to the defendant to secure the attendance of a material witness. State v. Edwards, 68 Wn.2d 246, 255, 412 P.2d 747 (1966), State v. Eller, 8 Wn. App. 697, 508 P.2d 1045 (1973). Having available the right to compulsory process to secure the missing witnesses, and having failed to utilize the available procedures, defense counsel at trial failed to prevent potentially exculpatory and dispositive evidence.

. There can be no tactical basis for failing to raise a potentially dispositive defense. State v. C.D.W., 76 Wn. App. 761, 887 P.2d 911.(1995).

As a matter of law, the court should conclude that trial counsel's failure to secure material, probative, and exculpatory evidence fell below

the standard of effective assistance of counsel.

"We have clearly held that defense counsel's failure to interview witnesses that the prosecution intends to call during trial may constitute ineffective assistance of counsel." Baumann v. United States, 692 F.2d 565, 580 (9th Cir. 1982).

That being said, failure to interview exculpatory eyewitnesses that the prosecution does not intend to call at trial is even worse. Defense counsel, in possession of the exculpatory evidence from the three witnesses, failed to have the interviews transcribed. Instead, trial counsel attempted to get them before the court under the guise of playing the recordings to refresh the memory of Detective Bull, who revealed a startling failure of memory when asked about exculpatory evidence in her investigation. Defense counsel then sought to have the recordings admitted under a "due process" theory of admissibility of exculpatory evidence, a theory which the trial court rejected. RP p. 947, 17-16.

What is clear in this case is that defense counsel recognized the value of the evidence, and wanted it presented to the court. Rather than being a tactical ploy to avoid bringing the witnesses before the court, the decision was an extremely unfortunate and prejudicial mistake.

The declaration of trial attorney Josephine Townsend appended to the concurrent Personal Restraint Petition (attached hereto as Appendix item D) refutes the presumption that the failure to call these witnesses was

a tactical decision. There is no need to speculate that she may have had a tactical reason; she unequivocally states that she did not. She had hoped to put the witnesses' testimony before the court on two implausible theories: as impeachment of Cindy Bull, and as an unrecognized due process exception to the hearsay rule. Neither was a tactical, competent decision. Both theories were doomed to failure, and her selection of doomed strategies fell below the standard of performance expected of an effective attorney in a case of such dire consequences. See Personal Restraint Petition of Ryan Whitaker, and Declaration of Mark Muenster, attached hereto as Appendix item E.

The trial court refused to allow the playing of the CDs of the witnesses' interviews. Even if the court had allowed it, the testimony would not have been substantive evidence. The true value of the information provided by the three witnesses was not to impeach Detective Bull, but rather to refute and disprove the victim's testimony. This purpose was essential to the defense. The tale presented by the State, that Appellant fondled the child under all her clothes, by reaching behind her and coming up with his hand from behind, for 45 minutes at a time, every Sunday for eight months, without her ever making a peep, and without anyone in the packed room noticing was highly improbable. It is reasonably likely that this theory would have been irreparably damaged by

the three witness's testimony, that they sat in very close proximity to the parties on all those occasions, and never saw a thing. They were in the best position of anyone to see what did or did not happen, and their highly relevant and probative testimony was lost by counsel's failure to diligently interview and subpoena those three essential witnesses.

These were not merely witnesses across the room, who may or may not have been in a position to notice the improbable crimes. They were sitting next to Appellant and his claimed victim. The value of their testimony, given the offer of proof made in their police interviews, is overwhelming.

The failure to interview material witnesses constitutes ineffective assistance of counsel. Likewise, failure to subpoena third party, objective, material and essential witnesses left the Appellant in the position of having to defend himself solely his testimony, and the testimony of friends with limited ability to observe what allegedly happened over an eight month period.

The decision whether to call a witness is generally presumed to be a matter of trial strategy or tactics. But this presumption may be overcome by showing that the witness was not presented because counsel failed to conduct appropriate investigations. See State v. Thomas, 109 Wn.2d 222 , 230, 743 P.2d 816 (1987). Moreover, the failure to conduct a reasonable

investigation is considered especially egregious when the evidence that would have been uncovered is exculpatory. In re Pers. Restraint of Davis, 152 Wn.2d 647 , 721, 101 P.3d 1 (2004).

B. Issues # 2 and 3: Showing of Prejudice.

From the record, it is clear that the evidence of guilt was not overwhelming, as the court acquitted the Appellant on counts I and II. Therefore, defense counsel's ineffective assistance and the deprivation of the constitutional right to effective counsel cannot be classified as harmless beyond a reasonable doubt. The exculpatory testimony of the three children from the class, who sat in close proximity to the Appellant and M*** S**** during the Sharing Time Room sessions, could easily have tipped the reasonable doubt scales in Appellant's behalf on the other two counts, one of which was indistinguishable from the two counts resulting in acquittal.

It appears that the Court of Appeals felt that, in order to show prejudice Petitioner is required to present some affirmative evidence that a witness saw something which could change the verdict in this case. The opinion states:

“Testimony elicited from the three classmates of M.S. would not have provided any new significant facts or evidence that would have led the trial court to a different conclusion.”

That comment misses the entire thrust of the claim; there was

nothing to be seen. Reasonable doubt can arise from evidence or lack of evidence. The only way to prove a negative is through testimony of persons who were in a position to see if something happened, and their testimony that they saw nothing.

The Court of Appeals' observation that the defense called other witnesses who testified that they saw nothing and that it would be impossible for the crimes to have occurred without anyone seeing something, again entirely misses the point that the missing witnesses were sitting in the same rows as the Petitioner and alleged victim; not across a crowded room, with dozens of people interposed between, and blocking any view, as argued by the prosecutor, in attacking the testimony of the witnesses who were actually called by the defense.

The Court of Appeals quoted from In re Pers. Restraint of Cook, 114 Wn.2d 802,810, 792 P.2d 506 (1990): "Unless a petitioner can make a prima facie showing of such prejudice, his petition will be dismissed." 114 Wn.2d at 810.

Apparently, the Court of Appeals interpreted the term "*prima facie* case" in Cook as requiring some heightened level of affirmative proof of innocence, beyond the level of proof required by the Supreme Court.

Petitioner submits that the showing made here of the lack of any evidence of wrongdoing from potential witnesses who were in the absolute

best position to observe, far exceeds a *prima facie* case.

Further, the Court of Appeals erred in assessing the “*prima facie* case,” by engaging in an analysis of credibility and weight (as opposed to sufficiency) of the evidence from the absent witnesses. In evaluating a *prima facie* case, the court should have drawn all reasonable inferences in favor of the proponent of the evidence, instead of searching the record for inconsistencies. This appeal and PRP did not challenge the sufficiency of the evidence, wherein all reasonable inferences are drawn in favor of the State. It is the function the trial court or jury to decide credibility of evidence, yet in this appeal, the appellate court usurped that function.

The Court of Appeals addresses the contradiction of the alleged victim, through the potential testimony of the three missing witnesses by commenting on the children’s statements: “the contents of the interviews indicate that the children were not particularly observant of their surroundings.” While one could draw that conclusion by cherry-picking through the statements, that conclusion is not applicable to the circumstances of this case. If the alleged molestation had lasted a few seconds, or minutes, then momentary inattention by the children present would be a possible excuse for their seeing and noticing nothing incriminating.

Here, however, the Court of Appeals concluded that all three

children were “not particularly observant” for twenty-six hours of molestation, occurring over an eight month period, every Sunday, for the entire forty-five minute class period.

Cook, if it does impose some sort of stricter standard for PRP-based claims of ineffective assistance of counsel, should not be applied to this case. Cook involved a post-conviction, post-appeal, second collateral attack on a judgment of guilty of Robbery, filed eight years after the judgment of guilty. The PRP did not allege a constitutional error, but was based upon a statutory provision relating to concurrent State and federal prosecutions. The opinion of the court is focused upon relieving petitioners from procedural bars previously imposed upon multiple recurrent collateral attacks.

By utilizing a supposedly stricter standard for PRP relief, applicable to a delayed, post-appeal collateral attack on a judgment, Division One failed to recognize that the PRP presented here was for the purpose of supplementing the record on direct appeal. This is not a subsequent collateral attack on a judgment which has already withstood appellate review. For this reason, the assessment of the showing by Petitioner as to prejudice should be that set out in State v. Thomas, supra. The defendant must:

“...only show a “reasonable probability” that the outcome of the

trial would have been different absent the attorney's deficient performance."

It appears that the Sharing Time Room incident is the subject of Count III. That conviction and the failure to present testimony of the three children also taints Count IV, the "small classroom" incident allegation. Although the three child witnesses would have nothing to say about that charge, it is obvious that the trial court's finding of guilty on count III must have been taken into consideration when deliberating on count IV. One would act as a similar act to show common scheme or plan. ER 404(b). It is highly likely that if the trial court acquitted on Count III based upon the testimony of the three children, an acquittal on Count IV would probably have followed. The Appellate court cannot conclude otherwise upon this record.

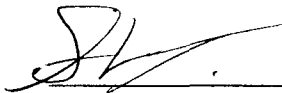
In failing to address the "reasonable probability" test for prejudice caused by ineffective assistance of counsel, and instead applying a standard for prejudice designed to address the problem of repetitive collateral attacks, the decision of the Court of Appeals is in conflict with State v. Thomas, *supra*. Further, Petitioner has raised a significant question of law under both the federal and State constitutional rights to counsel, and the purpose and rationale of Strickland v. Washington, *supra*.

VI. CONCLUSION

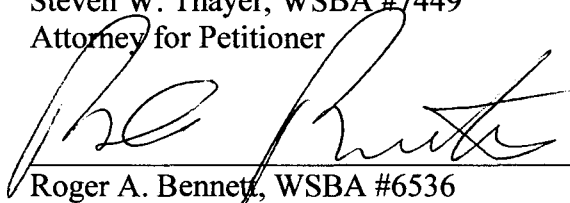
Appellant is entitled to a new trial, with effective counsel presenting the exculpatory testimony of K*****, J***** and K*****, which was lacking from the first trial, for no justifiable reason.

In the alternative, if the Court is not convinced from the available record, (scarce as it is due to counsel's failure to interview and call the witnesses at trial) as to the true value of the three witnesses' testimony, a reference hearing should be ordered, pursuant to the Personal Restraint Petition, to allow development of the record that was foregone due to ineffective assistance of counsel.

DATED this 1st day of August, 2014.



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APPENDIX ITEM A

UNPUBLISHED OPINION

OF COURT OF APPEALS

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)	
)	DIVISION ONE
)	
Respondent,)	No. 71666-2-1
)	
v.)	UNPUBLISHED OPINION
)	
RYAN DEE WHITAKER)	
)	
Appellant.)	FILED: July 7, 2014
_____)	

DWYER, J. — After a trial to the court, sitting without a jury, Ryan Whitaker was found guilty of two counts of child molestation in the first degree. Whitaker appeals, raising the following issues: (1) whether the trial court erred by allowing the child victim's counselor to give expert testimony; (2) whether he was denied the effective assistance of counsel by virtue of his trial attorney's failure to properly object to the counselor's testimony; (3) whether the trial court erred by declining to personally visit the scene of the crime; (4) whether the trial court erred by entering a no-contact order effective for 100 years; (5) whether he was denied effective assistance of counsel because his trial attorney did not interview or summon to court several potential witnesses; (6) whether the functions of the Indeterminate Sentence Review Board were unlawfully included in the pertinent

bill passed by the legislature; (7) whether the trial court erred by imposing as a condition of his sentence that he submit to plethysmograph testing at the direction of his community corrections officer; (8) whether the information charging Whitaker was deficient because it did not allege that he acted for his sexual gratification as an element of the offense of child molestation in the first degree; and (9) whether the trial court erred by overruling his challenge to the sufficiency of the evidence brought at the conclusion of the State's case in chief. We hold that the plethysmograph testing condition was improper and, accordingly, reverse that part of his sentence with instructions to the trial court to modify that condition on remand. In all other respects, we affirm the judgment and sentence.

Whitaker also filed a personal restraint petition, which was consolidated with his direct appeal. In his petition, Whitaker argues that his counsel's failure to interview or to call as witnesses three classmates of the child victim constituted ineffective assistance of counsel.¹ Even had Whitaker's counsel rendered deficient performance, however, Whitaker fails to establish that he suffered any resulting prejudice. Accordingly, we dismiss the petition.

I

In 2011, Whitaker was a member of the St. John's Ward of the Church of Latter Day Saints, located in Vancouver, Washington. Whitaker was also a

¹ Whitaker also raises this issue in his direct appeal. We resolve the issue in the context of the personal restraint petition because it contains additional factual averments. However, whether we analyze the issue pursuant to the standard of review applicable to direct appeals or pursuant to the personal restraint petition standard of review, our result is the same in this case.

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teacher of primary school students. Between January 2011 and August 2011, his class of approximately eight students included the nine year old victim, M.S.

Every Sunday, the students at the church would gather for instruction in a large meeting room—the “sharing time” room. M.S.’s class would sit in the very back of the room. M.S. would frequently sit next to Whitaker, either because he asked her to sit next to him or because he took the seat next to her. During the time the students were in the “sharing time” room, they would be facing forward, toward the front of the room, where someone would lead them in song or would preach to them.

M.S. testified at trial that Whitaker would reach under her skirt and touch her vagina with his hand while they were in the “sharing time” room. She stated that he touched her in this manner every Sunday and that the other children did not see what he was doing.

M.S. also testified that, on another occasion, Whitaker asked her to stay behind and help him in a small classroom. Once they were alone, Whitaker kneeled down and touched her vagina with his hand over her dress for 10 seconds. Whitaker asked M.S. if it made her uncomfortable when he touched her. Although she did not respond to his question, she testified that it made her feel “weird” and she decided to tell her mother what had happened. That night, in August 2011, she told her mother what had been happening to her.

Subsequently, the State charged Whitaker with one count of rape of a child in the first degree and three counts of child molestation in the first degree. Whitaker waived his right to a jury trial and the case was tried before the

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Honorable Robert Lewis.

At trial, Whitaker denied that he ever touched M.S. inappropriately. He called numerous witnesses to testify that it would have been impossible for him to do what M.S. had described. Steven Gonsalves,² Laurie Ogden, and Pamela Wise—three fellow teachers—all testified that Whitaker could not have touched M.S. in the “sharing time” room without being noticed. Paul and Michelle Pecora—the parents of a child in Whitaker’s class—provided similar testimony.

Other students in Whitaker’s class, including K.C., K.O., and J.K., were not subpoenaed by the defense to testify. These three children were each interviewed by Cynthia Bull, the investigating officer. Although the interviews were not included in her police report, they were made available to defense counsel in the form of CD recordings. While defense counsel did not call these children as witnesses, she did try to enter the contents of the interviews into evidence in an attempt both to impeach Detective Bull and to present exculpatory evidence. The trial court, however, did not admit the contents of the interviews.

Danielle Wilcox testified as an expert witness for the State. She is a family and child therapist with the Children’s Center and she was M.S.’s counselor following her disclosure of sexual abuse. Although Whitaker’s defense counsel objected, the trial court permitted Wilcox to offer an opinion as to whether M.S. expressed feelings that were consistent with someone who had experienced a traumatic event such as sexual abuse. She was not, however,

² Gonsalves served as a co-teacher with Whitaker on four Sundays and, on those days, sat with Whitaker’s class in the back two rows.

permitted to testify as to any statements M.S. made or offer an opinion as to whether M.S. had, in fact, been sexually abused.

Whitaker requested that the trial judge view the site of the alleged crimes, but the judge declined to do so.

Judge Lewis entered findings of fact and conclusions of law, in which he ruled that the defendant was guilty of two counts of child molestation in the first degree. His findings and conclusions, in their entirety, are as follows:

I. FINDINGS OF FACTS

1. Between January 1, 2011 and August 31, 2011, the defendant was a Sunday school teacher in the Church of Latter Day Saints, St. John's Ward. M.L.S. was a female child in the defendant's class during that time. On or between those dates, the defendant massaged the vagina of M.L.S. with his hand on at least two occasions.

2. On at least one occasion, the defendant touched M.L.S. in the larger "sharing time" room. The defendant would often have M.L.S. sit with him in the back row of the classroom. When he would touch her he would use his jacket to hide his actions, either putting it across their laps, or behind her. He then massaged her vagina and buttocks with his hand. He massaged her vagina and buttocks both over her tights, and under her clothing, on her skin.

3. Another incident occurred in the smaller classroom. The defendant had asked M.L.S. to stay behind to run an errand for him. When they were alone, he knelt in front of her. He asked her why she wasn't wearing her tights that day. He proceeded to massage her vagina with his hand over her dress. He asked M.L.S. if it made her feel uncomfortable when he would touch her. This incident prompted M.L.S. to tell her mother.

4. M.L.S. eventually disclosed the touching to her mother in August 2011. She approached her mother, Arica Smith, and told her that she needed to talk to her.

5. The defendant had no legitimate reason to touch M.L.S.'s vagina or buttocks.

6. M.L.S.'s date of birth is August 13, 2002. She was eight or nine years old at the time of the offense.

7. The defendant's date of birth is November 7, 1953. He was fifty-seven at the time of the offenses.

II. CONCLUSIONS OF LAW

1. The court has jurisdiction over the parties hereto and the subject matter of the action.

2. All of the above facts have been proven by the State beyond a reasonable doubt.

3. On two separate and distinct occasions, on or between January 1, 2011 and August 31, 2011, the defendant had sexual contact with M.L.S. M.L.S. was less than twelve years old at the time of the sexual contact and was not married to, or in a state-registered domestic partnership with, the defendant. The defendant was at least thirty-six months older than M.L.S.

4. The touching was of a sexual or intimate part of M.L.S., done for the purpose of gratifying sexual desires of either party.

5. The defendant is guilty of Child Molestation in the First Degree as alleged in count three of the information.^[3]

6. The defendant is guilty of Child Molestation in the First Degree as alleged in count four of the information.^[4]

7. At least one separate act of sexual contact between the defendant and M.L.S., pertaining to each count, has been proved beyond a reasonable doubt.

8. A defendant used a position of trust to facilitate a crime. The defendant gained access to the victim of the offense, M.L.S., because of the trust relationship. The defendant also gained access to the location of the offense, the Sunday school classrooms at the St. John's Ward of the Church of Latter Day Saints, because of the trust relationship.

9. The defendant is not guilty of Rape of a Child in the First Degree, as alleged in count one, and Child Molestation in the First Degree, as alleged in count two.

On March 5, 2013, Whitaker was sentenced to a minimum of 89 months in prison and a maximum sentence of life imprisonment. He was also sentenced to lifetime community custody. Additionally, the trial court imposed a sexual assault

³ "That he, RYAN DEE WHITAKER, in the County of Clark, State of Washington, between January 1, 2011 and August 31, 2011, on an occasion separate and distinct from that charged in Counts 2 and 4"

⁴ "That he, RYAN DEE WHITAKER, in the County of Clark, State of Washington, between January 1, 2011 and August 31, 2011, on an occasion separate and distinct from that charged in Counts 2 and 3"

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protection order effective for 100 years.

Whitaker appealed and filed a personal restraint petition that was consolidated with his direct appeal. We address both herein.

II

Whitaker first contends that the trial court erred by permitting Wilcox to testify as an expert witness and that Wilcox offered improper testimony. This is so, he avers, because her testimony was based upon principles not generally accepted in the scientific community as required by Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). However, because Whitaker has failed to overcome the presumption that—in a bench trial—the trial court disregards inadmissible or incompetent evidence when ruling, no appellate relief is warranted.

“A trial court’s decision to admit expert testimony is reviewed for abuse of discretion.” State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007).

“An expert’s scientific or technical testimony must be based upon a scientific principle or explanatory theory that has gained general acceptance in the scientific community.” State v. Jones, 71 Wn. App. 798, 814, 863 P.2d 85 (1993). “Under Frye, generalized testimony regarding a profile of behaviors of victims of sexual abuse must be sufficiently established to have gained general acceptance by the scientific community.” Jones, 71 Wn. App. at 818. “[T]he use of generalized profile testimony, whether from clinical experience or reliance on studies in the field, to prove the existence of abuse is insufficient under Frye.” Jones, 71 Wn. App. at 820. Such evidence may be presented, however, “to

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rebut an inference that certain behaviors of the victim, such as sexual acting out, are inconsistent with abuse.” Jones, 71 Wn. App. at 820.

It is significant that, in this case, no jury was empanelled. “In bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions.” State v. Read, 147 Wn.2d 238, 245, 53 P.3d 26 (2002) (quoting Harris v. Rivera, 454 U.S. 339, 346, 102 S. Ct. 460, 70 L. Ed. 2d 530 (1981)). As our Supreme Court has explained:

“In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is sufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made.”

Read, 147 Wn.2d at 245 (quoting Builders Steel Co. v. Comm'r of Internal Revenue, 179 F.2d 377, 379 (8th Cir. 1950)).

When the State called Wilcox as an expert witness, Whitaker’s defense counsel objected on the basis that Wilcox had not been disclosed as an expert witness. The trial court, however, allowed Wilcox to testify as an expert witness, subject to certain restrictions on the scope of her testimony.

I will allow—if she believes she can make—express such opinions Ms. Wilcox to indicate in general the sorts of feelings since she’s indicated—she’s already indicated in her previous Offer of Proof that she’s not a forensic person, that she believes that—or assumes that if a child says they’ve been sexually abused, then they were—she accepts that assumption.

So she at least has indicated she can’t—and makes no attempt to determine whether the person, in fact has been sexually abused based on what they’re expressing.

If she is in a position to testify that there are certain feelings

or emotions that sexual abuse victims express and that [M.S.] expressed—without going into the details of her statements—expressed similar statements, then she's permitted to testify as to that.

Absent some other showing that in fact I'm not being told and I don't think I would allow her to testify that based on what [M.S. is] saying, she's concluding that she was, in fact sexually abused. Only that those expressions of feelings are consistent with a person that—in her expert opinion has experienced some traumatic event like sexual abuse.

Whitaker's defense counsel objected again, directing the trial court's attention to this court's decision in Jones and arguing that Jones precluded the testimony that the trial court was allowing.⁵ Specifically, defense counsel stated:

In a prosecution for molestation and rape of a child the court allowed a case worker to testify about the child's nightmares and the child's propensity to act out as they were common behaviors of essentially abused children, behaviors collectively called sometimes the sexual abuse syndrome.

The Defendant was convicted and appealed and argued the testimony should have been excluded based upon the Frye rule. Division 1 terms the issue difficult and reached something of a compromise holding that evidence of sexual abuse syndrome is objectionable under Frye when offered to prove the fact of abuse.

And it would appear that they're trying to enter this information to indicate that this is a child of abuse which is not relevant when the therapist has already testified that she wouldn't know the difference between someone alleging abuse that happens and alleging abuse that didn't happen.

The judge then asked the prosecutor whether he was offering testimony as to sexual abuse syndrome. The prosecutor responded that he was not offering testimony as to sexual abuse syndrome.

⁵ On appeal, the State argues that Whitaker failed to preserve this issue for review. This is so, it claims, because Whitaker did not object after the trial court clarified that Wilcox could only testify as to whether M.S. had feelings that were consistent with someone who had experienced trauma, such as sexual abuse. The State's position is untenable. It was not incumbent upon Whitaker to interpose duplicative objections to the admission of Wilcox's testimony. The issue was properly preserved for review.

No I am not. I believe that that particular syndrome does not meet the criteria so I'm not offering the name of the syndrome or that these—these—in fact these characteristics make up that syndrome as I'm familiar with it, and they do not.

So they are some of the characteristics but they are not the full syndrome and the syndrome we're not asking for here.

The trial court did not change its ruling. However, the judge told defense counsel that if “after the testimony you think there's some additional piece of evidence that came in that you wish me to move me to strike, I will listen to your argument at that time.”

On direct examination, the prosecutor asked Wilcox whether she had “an opportunity to make any observations with regard to something called traumagenic dynamics.” Wilcox said that she had and she defined “traumagenic dynamics” as follows:

Traumagenic dynamics are—well there's four specific traumagenic dynamics outlined by David Finklehore (ph), PhD and Angela Brown, PhD.

And it's stigma, powerlessness, traumatic sexualization and betrayal. And these are four symptoms or dynamics that come up for children who have experienced sexual abuse.

And what they—what they do is an altering cognitive and emotional orientation to the world and creating trauma by distorting self-concept world view and effective capacities.

Wilcox then testified that she had observed all four of these dynamics in her treatment of M.S.

In light of our decision in Jones, the trial court's decision to admit Wilcox's testimony is troubling. Although the State asserted to the trial judge that it was not attempting to elicit testimony regarding sexual abuse syndrome, on appeal the State failed to articulate a distinction between sexual abuse syndrome and

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“traumagenic dynamics.” The testimony elicited from Wilcox appears to be generalized profile testimony being offered to prove the existence of abuse, which is the type of testimony foreclosed by Jones.

However, even if the trial court did abuse its discretion in making its evidentiary ruling, Whitaker has not overcome the presumption that the trial court did not rely on the inadmissible evidence in rendering its decisions on guilt. In order to do so, he must establish either that all of the competent evidence received was insufficient to support the convictions or that the incompetent evidence induced the trial court to make an essential finding that it otherwise would not have made. Although the trial court did not credit the entirety of M.S.’s testimony—as evidenced by the acquittal on two counts charged in the second amended information—the testimony that was credited was sufficient to support Whitaker’s conviction on two counts. Furthermore, contrary to Whitaker’s position, the trial court’s decision to acquit Whitaker on two counts does not show that Wilcox’s testimony induced the court to make an essential finding that otherwise would not have been made. Had Wilcox’s testimony had the effect claimed by Whitaker, presumably the trial court would have convicted Whitaker on all four counts. Yet, Whitaker provides no explanation as to why Wilcox’s testimony induced the trial court to convict on two counts and to acquit on two others. Indeed, Wilcox’s testimony is not referenced at all in the trial court’s findings of fact.

The record supports the conclusion that the trial court was well-versed as to the evidentiary dangers addressed in our Jones decision, and the trial judge

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was careful not to allow Wilcox to testify as to what had actually happened between M.S. and Whitaker or what M.S. had said to her about that. The trial court was well aware of its obligation to not allow Wilcox to “vouch” for M.S. as a witness. Given the care taken by the trial court in ruling on the various questions raised by Wilcox’s proffered testimony, there is no reason for us to believe that the trial court put Wilcox’s testimony to an improper use. Because Whitaker has failed to rebut the presumption that the trial court did not rely on inadmissible or incompetent evidence in reaching its findings as to guilt, no appellate relief is warranted.^{6, 7}

III

Whitaker next contends that the trial court abused its discretion by not viewing the scene of the crime. This is so, he asserts, because a view “could only serve to clarify and dispel” the contradictory and confusing testimony offered regarding the “sharing time” room. We disagree.

“Under CrR 6.9, the trial court is given the discretion to allow the jury to view the crime scene.” State v. Land, 121 Wn.2d 494, 501, 851 P.2d 678 (1993). Accordingly, “[a] trial court’s refusal to permit a jury view is reviewed under an abuse of discretion standard.” Land, 121 Wn.2d at 502. “The purpose of permitting a jury to view the crime scene is to enable it to better understand the

⁶ Whitaker also argues that Wilcox improperly testified that she believed that M.S. was telling the truth about being molested and that it was her personal opinion that Whitaker molested M.S. This argument is based on testimony Wilcox gave during an offer of proof. There is no danger that the trial court improperly relied on such testimony in reaching its final decisions.

⁷ Whitaker also argues that, in the event that we conclude that his counsel failed to properly interpose an objection to the admission of Wilcox’s testimony, his counsel’s assistance was ineffective. Given our conclusion that defense counsel properly preserved this issue for review, we need not consider this argument.

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evidence produced in court.” Land, 121 Wn.2d at 501-02. The same concern applies to the trial court’s decision as to whether a view of the scene would be beneficial to the judge in a bench trial.

In denying Whitaker’s request, the trial court observed that viewing the site would not reveal anything that would constitute evidence and that viewing the site would be necessary only if there was confusion about the testimony or evidence presented. Although Whitaker asserts that the trial court received directly contradictory evidence “as to who could see what, and from where,” Whitaker cites to nothing in the record to support this contention or to demonstrate why the trial court was disabled from correctly determining which evidence was credible. This decision fell squarely within the trial court’s discretion. There was no error.⁸

IV

Whitaker next contends that the sexual assault protection order issued by the trial court is void on its face. This is so, he argues, because although the pertinent statute sets forth an indeterminate duration for such orders, the trial court issued an order that would expire on a specific date. We disagree.

We review a trial court’s imposition of sentencing conditions for abuse of discretion. State v. Deskins, 180 Wn.2d 68, 77, 322 P.3d 780 (2014). A trial court abuses its discretion when its decision is manifestly unreasonable or based

⁸ Whitaker’s duplicative argument contained within his statement of additional grounds is also of no avail.

on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Sentencing conditions are generally upheld if they are reasonably crime related. State v. Riley, 121 Wn.2d 22, 36, 846 P.2d 1365 (1993). An order prohibiting contact with the victim of a crime is a crime-related prohibition. In re Pers. Restraint of Rainey, 168 Wn.2d 367, 376, 229 P.3d 686 (2010).

In conjunction with the trial court's authority under RCW 9.94A.505(8),⁹ a statute specifically authorizes issuance of a separate sexual assault protection order if no contact with the victim is imposed as a condition of a defendant's sentence. See RCW 7.90.150(6)(a). This statute allows the trial court to impose an order prohibiting the defendant from having contact with the victim for a period of time to include two years following expiration of a sentence or period of community supervision. The statute provides:

(6)(a) When a defendant is found guilty of a sex offense as defined in RCW 9.94A.030 . . . , and a condition of the sentence restricts the defendant's ability to have contact with the victim, the condition shall be recorded as a sexual assault protection order.

. . . .
(c) A final sexual assault protection order entered in conjunction with a criminal prosecution shall remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole.

RCW 7.90.150.

Whitaker was sentenced to an indeterminate sentence that, among other things, included lifetime community custody. Issuing an order with an expiration

⁹ This provision empowers a sentencing court, as a part of any sentence, to impose and enforce crime-related prohibitions and affirmative conditions.

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date set 100 years in the future guarantees that the victim will be protected for as long as Whitaker remains alive, whether he remains in prison or is released on community custody. This achieves the statute's goal. The trial court did not abuse its discretion.

V

In his personal restraint petition, Whitaker contends that he received ineffective assistance of counsel. This occurred, he avers, because his counsel failed to interview and subpoena as witnesses three classmates of M.S. We disagree.

As part of her investigation, Detective Bull interviewed K.C., K.O., and J.K.—three classmates of M.S. The interviews were recorded and transcribed.

During K.C.'s interview, he told Detective Bull that in the sharing time room, M.S. would sit on one side of Whitaker and he would sit on the other. He said that Whitaker usually kept his jacket on but that he would give it to someone else to wear if that person was cold. K.C. said that Whitaker never gave his jacket to M.S. When asked why not, K.C. said that it was because "she'd (sic) mostly not at church because she was gone for three months." When told to focus on the relevant time period, he said that M.S. never wore Whitaker's jacket. He immediately changed his mind and said that M.S. did wear Whitaker's jacket. Ultimately, K.C. opined that he did not really know if Whitaker's jacket was ever on M.S.'s lap. K.C. never saw Whitaker touch M.S. or any other child inappropriately.

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K.O. said she never saw Whitaker take his jacket off because it did not get hot in class. She said Whitaker never did anything to make her feel uncomfortable. She said that Whitaker sat in the last row, whereas she sometimes sat in the first of their two rows. When asked if there was anyone in particular who usually sat next to Whitaker, she said, "just girls—he wanted the girls." She said M.S. usually sat by herself, by K.O., or by another girl. Contrary to her earlier statement, she said that Whitaker did, in fact, take his jacket off in class sometimes. He would put the jacket on the back of a chair. She said that he would do that in the smaller classroom and she would not notice what he did in the sharing room.

J.K. told Detective Bull that Whitaker sat in the back row during the sharing hour. She said that everybody sat next to Whitaker and that M.S. sat next to Whitaker a lot. She said that Whitaker would sometimes take his jacket off and put it on the back of a chair. She said that he never put his jacket on someone's lap, but then said she would not have seen what he did with his jacket because she would not have been looking. She said that sometimes Whitaker would tickle a student on the middle of the student's back. M.S. was one of the students he tickled. J.K. thought that Whitaker only tickled her and M.S. When he tickled J.K., he would do it from behind her in the big primary class. When asked if Whitaker ever asked her to do something that she did not think was okay, J.K. said she did not remember.

Detective Bull asked J.K. whether she ever saw Whitaker touch M.S.'s leg and she said, "I don't know." Bull asked J.K. if there was anything about

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Whitaker that made her uncomfortable, about how he acted or what he did, to which she replied: "In primary if I was sitting next to him he would sort of do this over the chair (moves arm as though putting it on the back of a chair)." Bull asked J.K. if there was anything she did not like about Whitaker and she shook her head "no." She was then asked if there was anything she did like about Whitaker and she again shook her head "no." Bull asked, "Is there—have you ever told anybody about having any problems with him?" J.K. shook her head "no." Bull then asked, "Okay. Is that something you could tell somebody?" J.K. shook her head "no." Bull then told J.K. that she could tell her anything and she would not get in trouble, to which J.K. nodded her head. Bull then asked, "So—is there anything that we should talk about?" J.K. replied, "I don't know" and shrugged her shoulders. Bull then asked J.K. if she was ever touched on her private parts and she replied, "no." She also said that she never saw Whitaker touch M.S. on her private parts. Bull asked how it made J.K. feel when Whitaker tickled her and she said it made her feel funny.

Whitaker's trial counsel did not call as a trial witness any of the three children who were interviewed by Detective Bull. In fact, Whitaker's trial attorney did not interview them. At trial, she did attempt to have the recordings of the interviews with Detective Bull admitted into evidence, but the trial court denied her proffer. Defense counsel, in a declaration included in Whitaker's personal restraint petition, stated, "I wanted to call these witnesses, however, I was informed prior to trial that none of them were attending the church any longer." She went on to state, "I did not ask my investigator to locate the children. It was

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not a tactical choice to not call these exculpatory witnesses. I simply did not obtain their presence, nor issue subpoenas to them. I wish I had."

"To obtain state judicial review of a decision through a personal restraint proceeding, an inmate is required to demonstrate both that he or she is being restrained and that the restraint is unlawful." In re Pers. Restraint of Costello, 131 Wn. App. 828, 832, 129 P.3d 827 (2006). Relief may be obtained "by demonstrating either a constitutional violation or a violation of state law." Costello, 131 Wn. App. at 832. "[I]n the context of constitutional error, a petitioner must satisfy his threshold burden of demonstrating actual and substantial prejudice." In re Pers. Restraint of Cook, 114 Wn.2d 802, 810, 792 P.2d 506 (1990). "Unless a petitioner can make a prima facie showing of such prejudice, his petition will be dismissed." Cook, 114 Wn.2d at 810.

"In order to prevail on a claim of ineffective assistance of counsel," Whitaker "must demonstrate (1) deficient performance, that his attorney's representation fell below the standard of reasonableness, and (2) resulting prejudice that, but for the deficient performance, the result would have been different." State v. Hassan, 151 Wn. App. 209, 216-17, 211 P.3d 441 (2009). However, even deficient performance by counsel "does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding" and so "any deficiencies in counsel's performance must be

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prejudicial to the defense in order to constitute ineffective assistance under the Constitution.” Strickland, 466 U.S. at 691-92.

“Where counsel’s actions involve trial tactics, the courts have declined to find constitutional violations.” State v. Jones, 33 Wn. App. 865, 872, 658 P.2d 1262 (1983). “Generally, the decision to call a witness will not support a claim of ineffective assistance of counsel. However, the presumption of counsel’s competence can be overcome by a showing, among other things, that counsel failed to conduct appropriate investigations.” State v. Thomas, 109 Wn.2d 222, 230, 743 P.2d 816 (1987) (citations omitted).

When an ineffective assistance claim is based on counsel’s failure to call a witness, our Supreme Court has held that the defendant’s showing with respect to prejudice is insufficient when that witness’s testimony does not provide any significant new facts or evidence that could have led the jury to a different conclusion. See, e.g., In re Pers. Restraint of Davis, 152 Wn.2d 647, 742-43, 101 P.3d 1 (2004) (where defense expert could not “provide any significant new facts or evidence that might have led the jury to a different conclusion,” defense counsel’s failure to call the expert as a witness did not constitute ineffective assistance).

Without deciding whether Whitaker’s counsel’s performance was, in fact, deficient, it is clear that Whitaker cannot establish the requisite prejudice to make a prima facie showing of ineffective assistance of counsel. The central issues in this case were (1) whether M.S. was credible, (2) whether Whitaker was credible, and (3) whether it was physically possible for Whitaker to have committed the

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acts in the manner described by M.S. At trial, Whitaker offered testimony from a number of adults who testified that what Whitaker had been accused of doing would have been impossible for him to do without being noticed. Additionally, the trial court heard extensive testimony regarding the configuration of the "sharing time" room, the configuration of the chairs, the design of the chairs, and the vantage point of the witnesses. Ultimately, the trial court determined that at least part of M.S.'s testimony was credible and that it was physically possible for Whitaker to have committed the acts he was accused of committing in the manner described by M.S.

Testimony elicited from the three classmates of M.S. would not have provided any new significant facts or evidence that would have led the trial court to a different conclusion. Although none of the children saw Whitaker touch M.S. inappropriately, the contents of the interviews indicate that the children were not particularly observant of their surroundings. Their accounts alternate between confusion and uncertainty, whereas several adult witnesses testified that it would have been impossible for Whitaker to have done that which he stood accused of doing. The adult witnesses spoke in no uncertain terms, saying that Whitaker would have to have been "invisible" or a "contortionist." The children's testimony would not have added to the strength of this position.

On the other hand, the children also provided potentially damaging information, particularly J.K., who stated that Whitaker always sat next to girls and that he tickled his students, which made J.K. uncomfortable. Ultimately, testimony from these students was unlikely to make any difference in the

outcome. Accordingly, Whitaker does not establish prejudice and his petition is dismissed.¹⁰

VI

Whitaker raises a number of arguments in a statement of additional grounds. Only one warrants appellate relief.

Whitaker contends that he was denied effective assistance of counsel. This occurred, he argues, when his counsel failed to interview or subpoena as witnesses other classmates of M.S. and other teachers who co-taught with Whitaker. However, because he provides no indication that any of these witnesses would have offered exculpatory testimony, his claim fails.

Whitaker argues that his counsel should have interviewed and subpoenaed four students in M.S.'s class not mentioned in his appellate briefing. He asserts that these children were interviewed by Detective Bull and rebutted M.S.'s version of the events. The record does not support this assertion. Detective Bull testified that, "[n]one of them could corroborate or discount [M.S.'s version of the events]." (Emphasis added.) Even if Whitaker's counsel should have at least interviewed these children, Whitaker cannot establish that he was prejudiced by counsel's failure to call them as witnesses. This is so because Whitaker provided no indication that these children would have offered exculpatory testimony.

¹⁰ We reiterate that Whitaker also raised this issue on direct appeal. That claim of error also fails because of the absence of prejudice, as required by Strickland.

Whitaker argues that his counsel should have interviewed and subpoenaed Whitaker's co-teachers because failing to call them left many weeks unaccounted for in the defense theory of the case. However, Whitaker does not demonstrate any likelihood that the outcome would have been different had they been interviewed or called as witnesses. He provides no indication that these co-teachers would have offered exculpatory testimony. Thus, he cannot establish that he was prejudiced.

VII

Whitaker next contends that the court abused its discretion by issuing a judgment and sentence that contained provisions made without authority of law. This is so, he argues, because they were based upon the functions of a lapsed Indeterminate Sentence Review Board (ISRB).

Washington State Constitution article II, section 19 provides: “[no] bill shall embrace more than one subject, and that shall be expressed in the title.” Although the title does not need to act as an index to its contents, “the larger body of case law finds this court requiring proposed legislation carry a title that ‘would lead to an inquiry into the body of the act, or indicate to an inquiring mind the scope and purpose of the law.’” Patrice v. Murphy, 136 Wn.2d 845, 853, 966 P.2d 1271 (1998) (quoting Young Men's Christian Ass'n v. State, 62 Wn.2d 504, 506, 383 P.2d 497 (1963)).

“A legislative title can be either general or restrictive.” State v. Thomas, 103 Wn. App. 800, 807, 14 P.3d 854 (2000). “Where the title of the act is general and comprehensive, we liberally construe its subject to determine whether it

No. 71666-2-1/23

embraces the subject of all the provisions expressed within the act.”¹¹ Thomas, 103 Wn. App. at 807-08. “A restrictive title, on the other hand, ‘is one where a particular part or branch of a subject is carved out and selected as the subject of the legislation.’”¹² Thomas, 103 Wn. App. at 808 (quoting State v. Broadway, 133 Wn.2d 118, 127, 942 P.2d 363 (1997)). “A restrictive title will not be liberally regarded and provisions not within its subject are not given force.” Thomas, 103 Wn. App. at 808

The relevant title to this inquiry is the word, phrase, or phrases following “AN ACT Relating to . . .” and preceding the first semi-colon.” Thomas, 103 Wn. App. at 808.

In 2001, a bill was passed which repealed the termination clause in former RCW 9.95.0011 (2001), thereby preserving the existence of the ISRB. ENGROSSED THIRD SUBSTITUTE S.B. 6151, 57th Leg., 2d Spec. Sess. (Wash. 2001). This bill was given the title: “AN ACT Relating to the management of sex offenders in the civil commitment and criminal justice systems.”

Whitaker alleges that this title was restrictive and the inclusion of the language repealing the ISRB termination provision of former RCW 9.95.0011 violated our state constitution. We disagree. The title of the bill was a general title. It did not carve out and select a particular part of a subject; rather, it

¹¹ Examples include: “AN ACT Relating to violence prevention”; “An Act Relating to Community Colleges”; and “AN ACT Relating to industrial insurance.” Thomas, 103 Wn. App. at 808 n.15.

¹² Examples include: “An Act Relating to the acquisition of property by public agencies”; “AN ACT Relating to local improvements in cities and towns”; and “AN ACT Relating to the rights and disabilities of aliens with respect to land.” Thomas, 103 Wn. App. at 808 n.16.

No. 71666-2-1/24

focused on sex offenders generally. Construed liberally, the bill did embrace the subject of all the provisions contained within it, as the ISRB deals with the management of sex offenders. Accordingly, Whitaker's contention provides no basis for appellate relief.

VIII

Whitaker next contends that the trial court erred by including an impermissible condition in his felony judgment and sentence. The offending condition, he alleges, is: "You shall submit to plethysmography exams, at your own expense, at the direction of the community corrections officer." We agree.

In State v. Riles, 135 Wn.2d 326, 957 P.2d 655 (1998), abrogated on other grounds by State v. Valencia, 169 Wn.2d 782, 239 P.3d 1059 (2010), our Supreme Court upheld conditions requiring plethymograph testing as part of the defendant's sexual deviancy treatment. Riles, 135 Wn.2d at 343-45, 352 ("[A] sentencing court may not order plethysmograph testing unless it also requires crime-related treatment for sexual deviancy. . . . Plethysmograph testing does not serve a general monitoring purpose."). Recently, we held that a trial court errs by requiring that a defendant, as a condition of community custody, submit to plethysmograph testing at the discretion of a community corrections officer. State v. Land, 172 Wn. App. 593, 605-06, 295 P.3d 782 (2013). In concluding that this violates a defendant's constitutional right to be free from bodily intrusions, we held that "testing can properly be ordered incident to crime-related treatment by a qualified provider" but "it may not be viewed as a routine

No. 71666-2-1/25

monitoring tool subject only to the discretion of a community corrections officer.”
Land, 172 Wn. App. at 605-06.

Although Whitaker was required to engage in sexual deviancy treatment as a condition of his sentence, the condition imposed regarding plethysmograph testing was made subject to the discretion of a community corrections officer. In order for plethysmograph testing to be properly imposed as a condition of sentencing, it must be “incident to crime-related treatment *by a qualified provider.*” Land, 172 Wn. App. at 605 (emphasis added). A community corrections officer is not a qualified provider. Therefore, on remand, this condition must be stricken from Whitaker’s sentence or modified to comply with the authorities discussed herein.¹³

IX

Whitaker next contends that the trial court erred by permitting the trial to proceed on an inadequate information. The information was inadequate, he argues, because it failed to allege all of the essential elements of each crime—specifically, that it failed to allege and state particular facts supporting the essential element of “purpose or intent to gratify sexual desires of either party.” We disagree. Because sexual gratification is not an element of child molestation, Whitaker’s claim fails. See State v. Lorenz, 152 Wn.2d 22, 34, 93 P.3d 133 (2004) (“Had the legislature intended a term to serve as an element of the crime,

¹³ In Whitaker’s reply brief, his attorney raises, for the first time, an argument with respect to another condition in Whitaker’s judgment and sentence—specifically, the requirement that he consent to DOC home visits to monitor compliance with supervision. Given that this claim of error was raised for the first time in the reply brief, we do not consider it. See, e.g., State v. Chen, 178 Wn.2d 350, 358 n.11, 309 P.3d 410 (2013).

No. 71666-2-I/26

it would have placed 'for the purposes of sexual gratification' in RCW 9A.44.083. Rather, the definition of 'sexual contact' clarifies the meaning such that it excludes inadvertent touching or contact from being a crime."). Definitions need not be alleged in an information. State v. Johnson, ___ Wn.2d ___, 325 P.3d 135, 138 (2014).

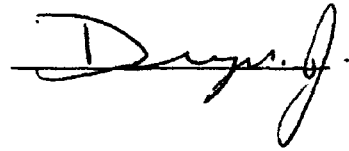
X

Whitaker finally contends that the trial court erred by denying the defense motion for a directed verdict made at the conclusion of the State's case in chief. However, because Whitaker presented evidence following the trial court's denial of his motion, he waived his right to challenge the sufficiency of the evidence presented by the State in its case in chief. See State v. Chavez, 65 Wn. App. 602, 605, 829 P.2d 1118 (1992) ("When a defendant presents evidence in his or her behalf after the trial court has denied the defendant's motion to dismiss a charge because of insufficient evidence, the defendant waives his or her right to challenge the sufficiency of the evidence presented by the State"). No appellate relief is warranted.

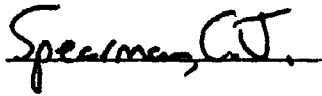
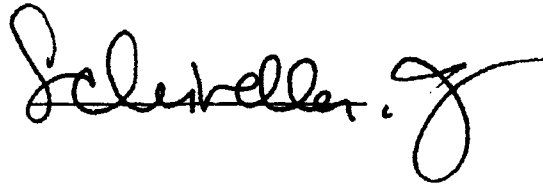
The judgment is affirmed. However, we remand to the trial court with instructions to strike or modify the condition of sentence requiring Whitaker to submit to plethysmograph testing at the discretion of a community corrections officer.

No. 71666-2-1/27

Whitaker's personal restraint petition is dismissed.

A handwritten signature in cursive script, appearing to read "Dwyer, J." with a horizontal line through the middle.

We concur:

A handwritten signature in cursive script, appearing to read "Specimen, C.T." with a horizontal line through the middle.A handwritten signature in cursive script, appearing to read "Schellinger, J." with a horizontal line through the middle.

APPENDIX ITEM B

**SECOND AMENDED
INFORMATION**

3

FILED

JAN 30 2013

1:26
Scott G. Weber, Clerk, Clark Co.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,

Plaintiff,

v.

RYAN DEE WHITAKER

Defendant.

SECOND AMENDED INFORMATION

No. 11-1-01948-9
(CCSO 11-11951)

COMES NOW the Prosecuting Attorney for Clark County, Washington, and does by this inform the Court that the above-named defendant is guilty of the crime(s) committed as follows, to wit:

COUNT 01 - RAPE OF A CHILD IN THE FIRST DEGREE - 9A.44.073

That he, RYAN DEE WHITAKER, in the County of Clark, State of Washington, between January 1, 2011 and August 31, 2011 did have sexual intercourse with M.L.S., who was less than twelve years old and not married to the defendant and not in a state registered domestic partnership with the defendant, and the defendant was at least twenty-four months older than the victim; contrary to Revised Code of Washington 9A.44.073.

This crime is a 'most serious offense' pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(32), RCW 9.94A.030(37), RCW 9.94A.505(2)(a)(iii) and RCW 9.94A.570).

Further, the State of Washington notifies the Defendant that it is seeking a sentence above the standard sentencing range based upon the following aggravating circumstance(s):

The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time RCW 9.94A.535(3)(g).

The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense. RCW 9.94A.535(3)(n).

COUNT 02 - CHILD MOLESTATION IN THE FIRST DEGREE - 9A.44.083

That he, RYAN DEE WHITAKER, in the County of Clark, State of Washington, between January 1, 2011 and August 31, 2011, on an occasion separate and distinct from that charged in Counts 1, 2011 and August 31, 2011, did have sexual contact with M.L.S., who was less than twelve years old, not married to the defendant and not in a state registered domestic partnership with the defendant, and the defendant was at least thirty-six months older than the victim; contrary to Revised Code of Washington 9A.44.083.

AMENDED INFORMATION - 1
ND

Arthur D. Curtis Children's Justice Center
P.O. Box 61992
Vancouver Washington 98666
(360) 397-6002

100
↓

1 This crime is a 'most serious offense' pursuant to the Persistent Offender Accountability Act
2 (RCW 9.94A.030(32), RCW 9.94A.030(37), RCW 9.94A.505(2)(a)(iii) and RCW 9.94A.570).

3 Further, the State of Washington notifies the Defendant that it is seeking a sentence above the
4 standard sentencing range based upon the following aggravating circumstance(s):

5 The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of
6 eighteen years manifested by multiple incidents over a prolonged period of time RCW
9.94A.535(3)(g).

7 The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate
8 the commission of the current offense. RCW 9.94A.535(3)(n).

9 **COUNT 03 - CHILD MOLESTATION IN THE FIRST DEGREE - 9A.44.083**

10 That he, RYAN DEE WHITAKER, in the County of Clark, State of Washington, between January
11 1, 2011 and August 31, 2011, on an occasion separate and distinct from that charged in Counts
12 2 and 4, did have sexual contact with M.L.S., who was less than twelve years old, not married to
the defendant and not in a state registered domestic partnership with the defendant, and the
defendant was at least thirty-six months older than the victim; contrary to Revised Code of
Washington 9A.44.083.

13 This crime is a 'most serious offense' pursuant to the Persistent Offender Accountability Act
14 (RCW 9.94A.030(32), RCW 9.94A.030(37), RCW 9.94A.505(2)(a)(iii) and RCW 9.94A.570).

15 Further, the State of Washington notifies the Defendant that it is seeking a sentence above the
16 standard sentencing range based upon the following aggravating circumstance(s):

17 The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of
18 eighteen years manifested by multiple incidents over a prolonged period of time RCW
9.94A.535(3)(g).

19 The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate
20 the commission of the current offense. RCW 9.94A.535(3)(n).

21 **COUNT 04 - CHILD MOLESTATION IN THE FIRST DEGREE - 9A.44.083**

22 That he, RYAN DEE WHITAKER, in the County of Clark, State of Washington, between January
23 1, 2011 and August 31, 2011, on an occasion separate and distinct from that charged in Counts
24 2 and 3, did have sexual contact with M.L.S., who was less than twelve years old, not married to
the defendant and not in a state registered domestic partnership with the defendant, and the
defendant was at least thirty-six months older than the victim; contrary to Revised Code of
Washington 9A.44.083.

25 This crime is a 'most serious offense' pursuant to the Persistent Offender Accountability Act
26 (RCW 9.94A.030(32), RCW 9.94A.030(37), RCW 9.94A.505(2)(a)(iii) and RCW 9.94A.570).

27 Further, the State of Washington notifies the Defendant that it is seeking a sentence above the
28 standard sentencing range based upon the following aggravating circumstance(s):


29 The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of
eighteen years manifested by multiple incidents over a prolonged period of time RCW
9.94A.535(3)(g).

1
2 The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate
3 the commission of the current offense. RCW 9.94A.535(3)(n).

4 ANTHONY F. GOLIK
5 Prosecuting Attorney in and for
6 Clark County, Washington

7 Date: January 30, 2013

8 BY:


9 Jessica E. Smith, WSBA #38001

10 Deputy Prosecuting Attorney

11 *Dustin Richardson, WSBA #34094*

12 DEFENDANT: RYAN DEE WHITAKER			
13 RACE: W	14 SEX: M	15 DOB: 11/07/1953	
16 DOL: WHITARD472QG WA		17 SID:	
18 HGT: 600	19 WGT: 170	20 EYES: BRO	21 HAIR: GRY
22 WA DOC:		23 FBI:	
24 LAST KNOWN ADDRESS(ES):			
25 HOME - 5306 NE 102ND ST, VANCOUVER WA 98686			

APPENDIX ITEM C

POLICE INTERVIEWS WITH CHILDREN

Exhibit 1, K.C.

Exhibit 2. K. O'C.

Exhibit 3. J.K.

Exhibit /

Transcript of police
interview with
exculpatory witness
K***** C*****

1 Recorded statement of 1 K C
2 In re: State v. Whitaker
3 Case Number 11-1-01948-9

4 (Note: This interview is strictly audio.)

5 Q: So you see that that little light's on?

6 A: (No oral response heard.)

7
8 Q: Okay. So K before we came in here I didn't
9 ask you any questions or anything, right?

10 A: (No oral response heard.)

11 Q: You've got to speak up for me cause remember we're
12 making - we're not making a movie today. We're
13 making a recording so you've got to use the word.
14 Can you do that?

15 A: Okay.

16 Q: Okay. So anyway - today is November 30th, 2011 and
17 it's about 8:25 in the morning. We're at the
18 Children's Justice Center and I'm Cindy. What's
19 your whole name?

20 A: K.J.C

21 Q: KJ - and how do you spell your last
22 name?

23 A: C

24 Q: Ah-hah.

25 A:

26

1 Q: Oh thank you. And you said it was okay that we
2 recorded you - that was okay?

3 A: Yeah.

4 Q: Okay. All right. Good. Do you know your birth
5 date?

6 A: Birthday?

7 Q: Ah-hah.

8 A: Umm - June 2nd.

9 Q: June 2nd. Do you remember what year you were born?
10

11 A: 2002.

12 Q: 2002? Very good. Do you know your address?
13

14 A: Address? No.

15 Q: You don't know your address?
16

17 A: Huh-uh.

18 Q: Do you live in a house or an apartment or something
19 different?

20 A: In a house.

21 Q: Okay. Do you guys have a home phone?
22

23 A: Yes.

24 Q: Do you know it?
25

26 A: No.

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Q: No?

A: They didn't tell me it.

Q: Oh my gosh! Does mom or - is that mommy and dad or mom and stepdad or -

A: Mom and stepdad.

Q: - okay. So do you call him dad or do you call - what do you call him?

A: Paul.

Q: You call him Paul? So do they have cell phones?

A: Yes.

Q: Do you know their numbers?

A: Yes.

Q: Okay.

A: Mom's - my mom's is 635-1144.

Q: Okay. Do you know Paul's?

A: Yes. 635 -

Q: Ah-hah.

A: - 6 - wait - 76 - oh wait - 7860.

Q: Very good. 7860. All right. Now what's mom's name?

1 A: Umm - her whole name?
2 Q: Her whole name - yeah.
3
4 A: Michelle Elaine Pekora (ph).
5 Q: All right. Very good. Pekora. And it - Paul's
6 last name is Pekora, right?
7 A: Yes.
8 Q: Okay.
9
10 A: But I don't know his middle name.
11 Q: Okay. That's okay. And thanks for telling me
12 that. If you don't know something that's okay to
13 just say I don't know. That's very good. Okay.
14 So what did they say about coming to see me?
15 A: They just said we're doing an interview.
16 Q: Oh. Do you know what that means?
17 A: Huh-uh.
18 Q: Oh. Did they tell you what I do for a living? Do
19 you know what my job is?
20 A: (No oral response heard.)
21 Q: Well do I look like a police officer?
22
23 A: No.
24 Q: I don't, huh. Well I don't wear a uniform cause I
25 talk to kids all the time. So it's just a job that
26 I have where I talk with kids about things that may

1 have been - maybe that upset you or concerns you or
2 bothered you or maybe you just knew something about
3 it or maybe find you knew something about it. So -
4 and let's see - all right. And if you notice, I
5 take notes because the older I get the less I
6 remember. And it's really important that I write
7 stuff down so that it's easier for me then - so I
8 don't have to listen to the whole tape. Okay?

9 A: Um-hum.

10 Q: So let's see - do you know what it means to tell
11 the truth?

12 A: Yes.

13 Q: What's that mean?

14 A: To not lie.

15 Q: Okay.

16 A: And to not tell stories.

17 Q: Very good. So while we talk today it is really
18 important that we talk about the things that are
19 the truth and that really happened, okay? And it's
20 okay to tell me if you forgot something or - I mean
21 don't make it up or guess - or if you're not sure
22 it's okay to tell me you're not sure.

23 A: Um-hum.

24 Q: Also another thing is is that if I make a mistake -
25 like if I called you by the wrong name or - or if I
26 write something down wrong or I misstate something,
it's okay to tell me if I goofed. Not a big deal.
I just want to make sure I get it right. Okay?

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A: Um-hum.

Q: All right. Do you have any idea what we might be talking about today?

A: No.

Q: No? Okay. Well you're not in any trouble or anything. It's just that I was gonna talk with you about your Sunday school class.

A: Sunday school?

Q: Ah-hah. Yup. At church.

A: Oh.

Q: Okay. Sorry. My throat's dry today. Okay. So - now let's see. Do you remember when Brother Whitaker was there as one of your teachers?

A: Yeah.

Q: Okay. So do you remember him?

A: Yeah.

Q: Okay. So I was wondering - so it was him and Brother Gonzales, right - that would teach class?

A: Um-hum.

Q: Okay. So - and just - just - I talk to a lot of people so I - this is what I know about it and then maybe you can help me kind'a figure things out. So you guys go to that first class where there's like eight or nine kids and then after that you guys go

1 to the big class room, is that what you call
2 primary?

3 A: Yeah.

4 Q: Okay. So do you remember the girls that were in
5 your class when Brother Whitaker was there?

6 A: I know there was M

7

8 Q: Okay.

9 A: And K . And that's what I can remember.

10 Q: Okay.

11

12 A: And this other girl.

13 Q: Okay. So we got M K - was there a J ?

14 A: J.

15 Q: J . Okay. Okay. So when you guys were in the
16 smaller class - before you went to primary - where
17 would everybody sit?

18 A: You would have to grab a chair from the back and
19 bring them there so you could sit on them.

20 Q: Okay. Would anybody sit close to the teachers?

21

22 A: Umm - sometimes.

23 Q: Who would -

24 A: Sometimes we don't - sometimes we do.

25 Q: - oh okay. Who would normally sit close to the
26

1 teachers?

2 A: People who don't listen.

3

4 Q: Oh. Who doesn't listen. Did you ever have to sit

5 close to the teacher?

6 A: (No oral response heard.)

7 Q: No? Okay. Good. Was it - was it the boys that

8 didn't listen sometimes or the girls or both?

9 A: Both.

10 Q: Oh okay. So do you remember *K* sitting by

11 Brother Whitaker or Brother Gonzales?

12 A: No.

13 Q: How about -

14 A: She hasn't.

15 Q: - what?

16 A: She hasn't.

17 Q: Okay. What about *M*

18 A: No.

19 Q: No? Okay. So -

20 A: *J* has.

21 Q: - did she? How come she'd sit by the teachers?

22 A: I forgot. But - wait - let me see - oh yeah. She

23

24

25

26

1 was talking when it wasn't her turn.

2 Q: Oh. Okay. Okay. So now when you guys would go
3 into the primary class - in that big class room
4 where all the kids come together - where would you
5 guys sit as a class?

6 A: They have a certain spot they have to go sit in -

7 Q: Um-hum.

8 A: - there's some chairs and you get to pick what
9 chair over there -

10 Q: Um-hum.

11 A: - but you would get like two rows to pick from.

12 Q: Okay. So where would Brother Whitaker sit
13 normally?

14 A: He's on the chairs by someone.

15 Q: Okay. Is there somebody that would sit by him more
16 often than other kids?

17 A: Yes.

18 Q: Who?

19 A: Me.

20 Q: You? Did any of the girls ever sit by him?

21 A: *M* likes to.

22 Q: Oh really? So do you sit - so how about - would
23 you be sitting on one side of him and *M* on the
24
25
26

1 other?

2 A: Yeah.

3

4 Q: Oh. Okay. Well all right. So how about - I heard
5 there was like a lot of people in that class room.
6 Would it get hot in there sometimes because there
7 was a lot of people or -

8 A: Yeah - that's why I'd be at this window that we
9 could open.

10 Q: Oh. Okay. Now would Brother Whitaker wear like a
11 jacket?

12 A: He would wear like a black vest -

13 Q: Okay.

14 A: - actually yeah - actually a gray jacket -

15 Q: Like a suit jacket type thing or -

16 A: - yeah -

17 Q: - a coat or something -

18 A: - right.

19 Q: - okay. So in that room where would he put his
20 jacket?

21 A: He would usually keep it on.

22 Q: He would? Did he ever take it off? Did he put it
23 on anybody's lap or anything that you remember?

24 A: Mostly he keeps it on or if anyone's cold he gives
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it to them.

Q: Oh. Who would he give it to that was cold?

A: All kinds of people that were in the class that got cold.

Q: Did he ever give it to M ?

A: No.

Q: No?

A: Cause she - she'd mostly not at church because she was gone for three months.

Q: Yeah. But how about when she was there with Brother Whitaker?

A: No.

Q: If you can remember back to that?

A: She didn't get a great - usually J got it because she was cold.

Q: Ah-hah.

A: Actually she did. M .

Q: Did she?

A: Yeah.

Q: Where would he put her jac - put his jacket on her? Did she ever - did he ever put it over -

A: She -

1
2 Q: - her lap or anything?
3 A: - no she put it in the sleeves -
4 Q: Um-hum.
5
6 A: - but it was way too big for her.
7 Q: It was? Yeah. Well he's kind of a tall guy huh?
8 Okay. So - now when you were sitting in class did
9 you ever see - well I guess - when M was sitting
10 next to Brother Whitaker, tell me about all the
11 stuff you saw happen when they were sitting
12 together?
13 A: Mara?
14 Q: Ah-hah.
15 A: They mostly didn't do anything - they were just
16 paying attention. And sometimes they played with
17 like these things - like they make with -
18 Q: Um-hum.
19 A: - and that's mostly all. Cause they don't usually
20 do stuff together when we're in primary.
21 Q: Ah-hah. Did you ever - did you ever see a time
22 where his jacket would be on her lap or anything?
23 A: Umm - no I never seen - well I wasn't here -
24 sometimes I'm not there at church -
25 Q: Um-hum.
26 A: - so I don't really know.

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Q: Oh. Okay. Well did you - did he ever - did you ever see like Brother - Brother Whitaker put his arm around her or anything like that or -

A: Yeah.

Q: - rub her knee or - did you ever see anything like that?

A: No. Never seen anything like that.

Q: Okay.

A: Cause I told my mom does when he teaches that.

Q: Oh. What - tell me about that.

A: I don't -

Q: Was that - you mom was doing that to who?

A: - no. Paul was doing that to my mom. Like -

Q: Oh. Oh. So like Paul would put his arm around your mom's shoulders? Did that ever happen with Brother Whitaker and M ?

A: - no.

Q: How about any of the other girls?

A: Nope.

Q: How about - did he ever put his arm around you?

A: No.

1 Q: No? Well you know sometimes guys give a squeeze or
2 something - and say good job. Okay. I've got to
3 think for a second. Is there anybody else that sat
4 by Brother Whitaker a lot?
5
6 A: A guy - was [inaudible].
7
8 Q: Ah-hah. What's his last name?
9
10 A: [Inaudible] Nobles (ph).
11
12 Q: Okay. And was that when |M| was there - or was
13 that another time?
14
15 A: That was another time.
16
17 Q: Okay. Now Brother Whitaker hasn't been -
18
19 A: Here for a long time because he's not our teacher
20 anymore.
21
22 Q: - oh. Okay. So - now did you ever see him have -
23 like spend more time with one of the girls than any
24 of the others?
25
26 A: No I never seen that.
27
28 Q: Would you have noticed it?
29
30 A: Just so he doesn't - class.
31
32 Q: Oh okay. So - let's see. Are you friends with
33 |M| ?
34
35 A: Yes.
36
37 Q: Are you? Has she ever told you any secrets or
38 anything?
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A: No.

Q: Okay. Has she ever talked to you about having any touching problems?

A: No.

Q: Like where somebody did something that she didn't like?

A: No.

Q: Okay. Would - would - is that - would that be something that she would tell you?

A: No.

Q: No? You don't think so? You're not that good a friends, huh? Okay. So let's see - have you ever seen Brother Whitaker touch her in any way you didn't think was okay?

A: No.

Q: No? Hum. How about any of the other kids? Has he ever done anything that made anybody feel uncomfortable?

A: No.

Q: No? Hum. Did he ever ask you to keep any secrets?

A: No.

Q: Okay. How about Brother Gonzales?

A: (No oral response heard.)

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Q: No?

A: Huh-uh.

Q: Okay. Well that's good. How do you feel - how do you feel when you're around Brother Gonzales?

A: I don't know.

Q: I mean do you feel safe?

A: Yeah.

Q: Okay. How do you feel when you're around Brother Whitaker - when you were around Brother Whitaker?

A: I feel safe.

Q: Okay. Same thing? Okay. Well - let's see - have you ever had a problem with somebody touching you in a way you didn't like?

A: No.

Q: No? Do boys and girls have private parts?

A: Yes.

Q: They do? Is your nose private?

A: Huh-uh.

Q: No? How about you - is your butt private?

A: Yes.

Q: Yeah. So basically those private parts - girls

1 have the top part and boys have - and they have the
2 bottom part front and the back and the boys have
3 the front and the back, right?

4 A: Um-hum.

5 Q: Okay. Have you ever had a problem with somebody
6 trying to touch you on one of those private parts?

7 A: My little brother.

8 Q: He did?! How old is he?

9 A: Five.

10 Q: And what did you tell him?

11 A: I didn't tell him - I told my mom.

12 Q: Did you? What did she do?

13 A: He pulled down my pants and stated poking his
14 finger into my butt.

15 Q: Oh nice! Nice! How old were you?

16 A: How old was I?

17 Q: Ah-hah.

18 A: Nine.

19 Q: Oh so this just happened not too long ago?

20 A: Yeah - not too long ago.

21 Q: Okay. What did mom do?

22
23
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1 A: I don't know. I don't really know.
2 Q: Did she get upset -
3
4 A: Yeah -
5 Q: - with him? And was that not okay?
6 A: - I heard that.
7
8 Q: Okay. All right. Well that's good. So now when
9 you guys were sitting in the primary class, tell
10 me, what would you - when - okay. So you've got
11 Brother Whitaker and M - would she sit - which
12 side would she normally sit on?
13 A: Well I usually liked to sit on the right.
14 Q: Okay. And where would she sit?
15 A: On the left.
16 Q: Okay. So when you guys were sitting there, tell me
17 - think back and tell me all that you remember was
18 going on when you were sitting there.
19 A: Sometimes I was talking to him
20 Q: Um-hum.
21 A: And then he - he sometimes gives me those things
22 that - to make stuff.
23 Q: Um-hum.
24 A: And then mostly we just listened.
25 Q: Okay. Did you ever look over to see what he was
26

1 doing with M ?

2 A: No. Not mostly. I saw him once when he was playing

3 with her - spelling her name with those things.

4 Q: Um-hum.

5 A: And then the rest of the time they were just

6 watching while M was playing.

7 Q: Okay. Now would you watch what they were doing or

8 were you paying attention to the -

9 A: Mostly paying attention.

10 Q: - to the speaker? Okay. All right. Hum. All

11 right. So now - do you remember him taking his

12 jacket off in primary or -

13 A: Yes -

14 Q: - what do you remember -

15 A: - it was a while ago - a long time ago.

16 Q: - okay. You haven't seen him in a while, huh?

17 A: Yeah.

18 Q: Okay. So now when he would take that jacket off in

19 primary, what would he do with it? Do you - do you

20 remember? It's okay if you don't remember -

21 A: I don't remember -

22 Q: - I'm just - that's okay. That's a hard thing to

23 remember, huh cause would you - you weren't

24 thinking about it huh? All right. So do you have

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any questions for me?

A: No.

Q: Okay. Have you had any other problems - any other touching problems or anything like that?

A: Nope.

Q: So you know it's okay to tell mom and mom would - would help you be safe?

A: Yup.

Q: Okay. All right. Do you have any questions for me?

A: No.

Q: No? All right. Now you remember that we're being taped. Is that okay?

A: Yup.

Q: All right. So it's about 8:40 hours - we're still in the same place - it's the same people. And I'm gonna go ahead and turn it off. Is that okay?

A: Um-hum.


Q: All right.

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C E R T I F I C A T E

I, Evelyn M. Pierce, certify that the interview of
K C : occurred at the time and place set forth
and that at said time and place the recorded interview
was recorded. That I subsequently transcribed the
entire recorded interview to the best of my ability as
accurately as possible.

August 13, 2013.



Evelyn M. Pierce
Court Certified transcriptionist

Exhibit 2

Transcript of police
interview with
exculpatory witness
K***** O'C*****

1 Recorded statement of K O'C
2 In re: State v. Whitaker
3 Case Number 11-1-01948-9

4 (Note: For the first 6 minutes of this recording, the
5 room is empty and there is only background noise coming
6 from another room. The child and investigator enter the
7 room at 6:00.)

8 Q: Come on in here. We've got a chair right there for
9 you.

10 A: Okay.

11 Q: All right. This room is kind'a special because - you
12 see these things right here?

13 A: Um-hum.

14 Q: That's a microphone and those are some cameras. So
15 we're gonna make a movie while we talk. Is that okay?

16 A: Yeah.

17 Q: Okay. All right. So before we came in here I told you
18 what my job was and that I was a police officer, huh?

19 A: Um-hum.

20 Q: And you said I didn't look like a police officer.

21 A: Um-hum.

22 Q: Huh? So let's see. How old are you Katie?

23 A: Nine.

24 Q: Nine huh? So what's your real name?
25
26

1
2 A: K: [inaudible] O'C
3 Q: Wow! You have a long one.
4 A: It's -
5
6 Q: So K: - how do you spell K
7 A: - K -
8 Q: All right. And do you go by K
9
10 A: Um-hum.
11 Q: Or by K:
12 A: I go by K.
13
14 Q: Okay. And what was your middle name?
15 A: K: [inaudible] O'C
16 Q: Do you know how to spell your middle name?
17
18 A: Umm - I know how to spell [inaudible] M. (ph) -
19 Q: Okay.
20 A: - O'C
21
22 Q: Okay.
23 A: Okay. E. is E.
24 Q: E I That's pretty.
25
26 A: - and the M1 is M. - I mean -

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Q: "C"?

A: - ' -

Q: Okay. Just one "L"?

A: I'm pretty sure.

Q: Okay. And what's your last name?

A: O'C

Q: Like an "O" -

A: O C

Q: - does it have that apostrophe in there?

A: Yes.

Q: Very good. So what's your birth date?

A: Umm - it's 2002 and March 27th.

Q: 3/27/02. Very good. Do you know your address?

A: Umm - not really.

Q: Oh! Oh! So how does Santa come visit you?

A: Huh!

Q: Does he just know?

A: Well - I know that there's a couple parts - I know I live in Orchard Dell Court, St. John's Road -

1 Q: Oh okay.

2 A: - and -

3

4 Q: So you live at Orchard Dell Court?

5 A: - yes.

6 Q: Okay. What number do you live in?

7

8 A: Like the house?

9 Q: Ah-hah.

10 A: Umm -

11

12 Q: Do you know?

13 A: - 5004.

14 Q: Oh very good. Is there a Northeast in there - do you

15 know what street you live on?

16 A: On St. John's.

17

18 Q: Oh okay. Very good. Now is that a house or an

19 apartment?

20 A: House.

21 Q: Okay. Now do you guys have a house phone or does mommy

22 have a cell phone or what do you guys do?

23 A: We have house phones in -

24 Q: What's your house phone?

25 A: - like it - like what do you mean?

26

1

Q: What's the number?

2

3 A: Oh - from 597-3727.

4

Q: I have the 3727 - what was the first part?

5

6 A: 597.

6

7 Q: 597. Do you know mom's cell number?

8

8 A: 980-5202.

9

9 Q: 980 -

10

10 A: 5202.

11

12 Q: - 5202. Very good. Now you said you're nine. So are
13 you in fourth grade?

13

14 A: Um-hum.

14

15 Q: Very good. What school do you go to?

15

16

16 A: Minnehaha Elementary School.

17

18 Q: What's your teacher's name?

18

19

19 A: Ms. Hickey (ph).

20

21 Q: All right. Do you like her?

21

22 A: Um-hum. I actually wanted to go to there and talk to
23 her (ph).

23

24 Q: Oh really?

24

25

25 A: Yeah.

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Q: Very good. So did you have a good Thanksgiving?

A: Yeah. I had it with my dad and it was really good.

Q: Ah - do you know why?

A: Yeah. I'm like I ate too much.

Q: I think we all did. We all did. So let's see - now what did mom say about coming to see me?

A: She said that she has no idea why - but she doesn't know - but again she just said she just wants to talk to you and all that.

Q: Did - did she say what we were going to talk about?

A: No.

Q: No? She didn't? Okay. All right. Well I have kind of a special job cause I talk to kids all the time. And I talk to kids about different kinds of things. Like sometimes where there's maybe something that's happened where they feel uncomfortable or something like that.

A: Um-hum.

Q: So I'm just kind'a hoping maybe you can help me out with some stuff and just kind'a - I'm trying to figure out - like how things kind'a went in a class room that you had at Sunday school. So let's see - so what's it mean to tell the truth?

A: It means that you're not lying and it means that you tell them what happened or you tell them what's happened to a kid or -

1 Q: So you tell about what really happened?
2 A: - yeah.
3 Q: Okay. Can we do that today while we talk?
4 A: Um-hum.
5 Q: Okay. So like if I goof up and I say something like -
6 I misunderstand what you say, it's okay to tell me if I
7 was wrong. Just say hey you didn't get that Cindy. Just
8 fix me if you need to, okay?
9 A: Okay.
10 Q: And so that - that's just the thing. If I
11 misunderstand you, you correct me. Okay?
12 A: Um-hum.
13 Q: Okay. So now let's see - I was hoping I could talk
14 with you - do you know who Brother Whitaker is?
15 A: Um-hum. He is my teacher and then - when he's not my
16 teacher then it's Brother Gonzales.
17 Q: So you have Brother Gonzales now?
18 A: Um-hum.
19 Q: Now were they - did they teach together?
20 A: They teach together and then Brother Gonzales is the
21 one teacher now.
22 Q: Oh okay. Well tell me about Brother Whitaker. What
23 can you tell about him?
24
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1 A: He was fun and he teached us cool things -
2 Q: Um-hum.
3 A: - and sometimes for nothing we were just like being
4 real good he said the next day he'll bring us treats or
5 something.
6 Q: Um-hum.
7 A: And - yeah that's what Brother Gonzales does too.
8 Q: Oh okay. All right. Did anybody ever - like sit by
9 Brother Whitaker more than anybody else - did any of the
10 kids in the class?
11 A: No. She was like - he was like right here and all the
12 kids like - like - they were here and he was right here.
13 Q: Like kind of a half circle?
14 A: Yeah.
15 Q: Yeah. What about when you guys went into that next
16 class - I think it's called primary?
17 A: Oh yeah. Primary.
18 Q: So how did everybody sit when you'd go to primary?
19 A: Umm - well there's like there's these - there's like
20 these rows of seats - this class is not that class - it's
21 not - where we would be like sitting in the back but - I
22 was sitting up front kind of.
23 Q: Um-hum.
24 A: Still in our row - I don't really like sitting way in
25
26

1 the back - but I just go up one more -

2 Q: Oh.

3
4 A: - so I can see a little bit better.

5 Q: Okay. Did you ever sit by Brother Whitaker in that
6 part?

7 A: Yeah.

8 Q: Okay. Did he ever wear a jacket like a - like a suit
9 jacket?

10 A: Um-hum.

11 Q: What would he do with his jacket in that class -
12

13 A: Umm -

14 Q: - did he ever take it off?

15 A: - no he just kepted it on and just pay attention and -
16 yeah.

17 Q: Did it ever get hot in there?
18

19 A: Not really.

20 Q: No? Oh. Did you ever see him take his jacket off?

21 A: Nope.
22

23 Q: No? Would you have noticed?

24 A: Yes.

25 Q: Oh. So where would M. sit?
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A: Umm - M would probably sit like - probably next - next to me or about three seats - or a few seats from me she would.

Q: Did she sit by Brother Whitaker?

A: Umm - a couple times.

Q: Did she? Would she do it very often?

A: Umm - not really.

Q: Oh.

A: She just like - she's just like a person who like sits by people sometimes and sometimes doesn't. Then - yeah.

Q: Would you always sit by her or would you just sometimes sit by her?

A: Sometimes.

Q: Oh.

A: Because you don't really - cause we're not technically friends. But we - we talk - but -

Q: Oh.

A: - not really.

Q: Hum. So did you ever spend much time with Brother - Brother Whitaker by himself?

A: Umm -

Q: Just you and him - did you ever help him out after

1 class or anything?
2 A: - umm - no.
3
4 Q: No?
5 A: He like never asked me and I didn't.
6
7 Q: Oh okay.
8 A: But I'd see him around the neighborhood because - umm -
9 umm - we live by the - the river kind'a and he comes and
10 visits her so I - well I'd say hi and -
11 Q: Does she have kids?
12 A: Umm - no. She's ninety something.
13 Q: Oh. So she's like an older lady?
14 A: Yeah.
15 Q: Oh okay. All right. So do you - has Brother Whitaker
16 ever asking you to keep any secrets?
17 A: Umm - nope.
18 Q: No? Did you ever get any presents from him?
19 A: Only the treats for the whole class.
20 Q: Oh. Cause I thought you mom had said something about
21 him coming by your house one time to drop off a present -
22 something - do you remember something like that?
23 A: No. Well he did give me a - like on my birthday or if
24 - and then some day when I was done with church and he
25 gave me a birthday card.
26

1
2 Q: Oh. Okay. Was that in class though?
3 A: No.
4 Q: Or was that -
5 A: It was in - it was in Sacrament meeting.
6
7 Q: - oh. Okay. But it was at church that he gave you the
8 card?
9 A: Yeah.
10 Q: It wasn't when he came to your house or anything?
11 A: No.
12
13 Q: Okay. Do you remember him coming to your house?
14 A: No. But if he was in the neighborhood -
15
16 Q: Oh okay. All right. Maybe you weren't there when that
17 happened, I don't know.
18
19 Q: Okay. Has anybody ever told you anything about Brother
20 Whitaker that kind'a concerned you? Has anybody ever told
21 you about anything in his life or -
22 A: No.
23
24 Q: - that made you feel uncomfortable?
25 A: Huh-uh.
26
27 Q: Okay. How about Brother Gonzales?

1
2 A: Umm - he doesn't - he doesn't really say anything
3 because he really wasn't teaching our lessons and -
4
5 Q: Yeah. Oh. Okay. So I guess - how did - how would we
6 describe Brother Whitaker? Is - does he hug you guys?
7 Does he rub your back? Does he do anything like that?
8
9 A: Umm -
10
11 Q: Different than other teachers?
12
13 A: - umm - well he doesn't really do anything like that
14 but he does compliment us - like the girls and boys - he's
15 like you have a pretty dress or you have pretty -
16
17 Q: Oh okay.
18
19 A: - like that.
20
21 Q: Well that's nice. Okay. Has he ever done anything
22 that made you feel uncomfortable?
23
24 A: Umm - no.
25
26 Q: No? Okay. And do you know what private parts are?
27
28 A: Um-hum.
29
30 Q: Do girls have private parts?
31
32 A: Um-hum.
33
34 Q: Is this a private part? Is your nose a private part?
35
36 A: I don't know.
37
38 Q: You don't know?! Well maybe you can help me with my

1 drawing then. Then we can figure out what private parts
2 are. So what does that look like to you?

3 A: Umm - a body.

4 Q: Yeah. But does it look like a girl body or a boy body
5 or kind'a in the middle?

6 A: Umm - boy body.

7
8 Q: Hum. What's your favorite color?

9 A: Umm - my favorite color is probably aquamarine.

10 Q: Very good. So kind of a blue with some green in it or
11 something?

12 A: Yeah.

13
14 Q: Is that aquamarine? I don't know if I have an aqua - I
15 have a blue. Can I use blue?

16 A: Um-hum.

17 Q: Okay. So what we're gonna do is we're gonna make this
18 a drawing that I could use for a girl. Does that work?

19 A: Um-hum.

20 Q: Okay. And that's gonna be our girl. Come on crayons.
21 All right. So what's this part right here on a girl?

22 A: Belly button.

23 Q: Belly button? Very good. How about this right here?

24
25 A: a foot.

26

1 Q: Foot? Very good. How about that right there?
2 A: Hand.
3 Q: Hand? Very good. So what is this part you sit on -
4 what do you guys call that at your house?
5 A: A butt.
6 Q: Um-hum. So if I draw these on the front of a girl,
7 what do you and your mom call this?
8 A: Umm - boobs.
9 Q: Um-hum. What do you call this front part on a girl?
10 A: A vagina.
11 Q: Um-hum. Whoops - I skipped a letter. So what do you
12 call the front part of a boy?
13 A: Umm - like when - like what do you mean?
14 Q: What do you call that front part on a boy? Does it
15 have a name?
16 A: Umm - oh a lot of people call it other things and - I
17 don't really know the real name -
18 Q: That's okay.
19 A: - but yeah -
20 Q: So what - what name would you give it if we were gonna
21 give it a name?
22 A: - umm - I think a [inaudible] cause -
23
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1 Q: Okay.

2 A: - I heard my brother say and - yeah.

3

4 Q: So that's on a boy. Now are the private parts on girls
and boys?

5

6 A: Um-hum.

7 Q: Okay. So do you think a foot's private?

8

9 A: No.

10

11 Q: How about a hand?

12

13 A: Not really.

14

15 Q: Not really? How about the boobs?

16

17 A: Um-hum.

18

19 Q: Front part on a girl?

20

21 A: Umm - yeah.

22

23 Q: Yeah. Front part on a boy?

24

25 A: Kind'a.

26

Q: Well they're not supposed to be running around with it
hanging out are they?

A: Yeah. But - well - the only part where I might see the
front part of a boy is when he swims next to me sometimes.

Q: Oh. But shouldn't they have a swim suit on?

A: Well they have little trunks and sometimes boys have

1 different suits but trunks so - yeah.

2 Q: Oh. So do they go swimming with a suit on or do they
3 not wear a suit?

4 A: They wear trunks. So - yeah.

5 Q: All right. So is the butt private?

6 A: Yup.

7 Q: So it's pretty much whatever your swim suit covers?

8 A: Um-hum.

9 Q: So like a girl can wear a one-piece or a two piece -
10 they know what's okay at your house?

11 A: I wear a one-piece.

12 Q: And then boys can wear the swim trunks, right?

13 A: Um-hum.

14 Q: Okay.

15 A: Well they can wear like a top with it but -

16 Q: Um-hum.

17 A: - but a shirt - [inaudible] or take it off.

18 Q: Well very good. This is the 28th, huh? All right. So
19 then let's see - all right. So that's why it was kind of
20 helping me - knowing what you called stuff. Now have you
21 ever had a problem with somebody touching you on one of
22 your private parts?

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1 A: Umm - one time in second grade.

2 Q: You did? Who was that?

3

4 A: His name is Ethan - he was in my class - we lived in
the same group and all that.

5

6 Q: Oh. Do you still see him?

7 A: Yeah. He was in my class for third grade but now he's
8 not. Yeah.

9 Q: What did he do?

10 A: Umm - well like we were like going around [inaudible]
11 and he started talking to somebody like - saying like can
12 I borrow a pencil or -

13 Q: Um-hum.

14 A: - and like - kind'a hard to explain - well - okay so -
15 like he was like - started like - okay - so I was sitting
16 on my chair and there was his hand and he kind of like
17 went like that a little bit (putting one hand slightly
under the other).

18 Q: On what part?

19

20 A: Umm - the bottom.

21 Q: Oh so like on your butt?

22 A: Yeah. Kind of and I was getting nervous and - it
23 happened for a couple days so - so I went to the bathroom
24 and so I told the principal but I couldn't - but I told
the teacher and ever since he never did it.

25

26 Q: Oh good. Good. So you did the right thing - you told

1 about that. Very, very good. Have you had a problem with
2 anybody else - where they tried to touch you or asked you
3 to touch or anything?

4 A: Nope.

5 Q: Nope? That's good. So would you tell somebody if they
6 did?

7 A: Yeah.

8 Q: Okay. Cause you did when it was a kid, huh?

9 A: Um-hum.

10 Q: So if it was an adult would you tell somebody?

11 A: Um-hum.

12 Q: Very good. That's excellent. So is there anybody
13 that's ever told you about having a touching problem -
14 where they've had a problem?

15 A: Umm - no.

16 Q: Okay.

17 A: Not any of my brothers or anything.

18 Q: Okay. Have you ever seen anybody have a touching
19 problem?

20 A: Nope.

21 Q: No? So when you guys were sitting in - in the primary
22 part of the class - that second class?

23 A: Um-hum.

1
2 Q: What would you guys do - looking at - what would be
going on in that class room?
3
4 A: Umm - well she probably be teaching us songs or some -
like - like - she might be like - like asking people to
5 hold up signs -like the song - we're singing the song - or
6 singing a [inaudible] or singing out loud -
7 Q: Oh. So she makes it kind's fun?
8 A: - yeah.
9
10 Q: Okay. So who is the teacher on that?
11 A: Umm - I don't really know her but she's new to all the
12 kids.
13 Q: Um-hum.
14 A: We used to have Sister Mary but I don't know what
15 happened to her so - yeah.
16 Q: So there's a lot of people in that class at that time?
17 A: Um-hum. But like before that class we're in our own
18 each individual -
19 Q: Um-hum.
20 A: - we're in our own class so -
21 Q: Where there's like eight or nine of you?
22 A: - yeah.
23
24 Q: Okay. So - when you guys were in that big class - umm
25 - where would Brother Whitaker sit?
26

1
2 A: Well - umm - like he would sit where we were - where we
3 sit - he would just like sit in any chair and - yeah - and
4 like last Sunday or when I wanted to sit up front like I
5 usually do - and then he's oh you get to go in front of -
6 okay.

7 Q: Was Brother Whitaker there last Sunday?

8 A: Umm - no I don't really see him anymore.

9 Q: Oh okay. So when he was there, did he generally sit in
10 a specific spot?

11 A: Kind'a - he kind'a sits in the middle of us.

12 Q: Oh okay. Was it in the last row or was it in the - how
13 far - how far from the back would he -

14 A: It was in the last row cause I was sitting in front
15 sometimes.

16 Q: Oh.

17 A: And sometimes I was sitting in the back row.

18 Q: Oh. So is there anybody that usually sat by him?

19 A: Umm - probably the boys cause they - they - oh no just
20 girls - he wanted the girls so -

21 Q: Oh - girls - huh?

22 A: - yeah.

23 Q: So where did M sit?

24 A: Umm - well M would probably sit where the other
25
26

1 girls are at.

2 Q: Um-hum. Do you remember or are you kind'a guessing?
3 It's okay if you don't really remember.

4 A: Well by the - when I was looking she's usually sitting
5 by R (ph) or - that other girl - she's - sorry.
6 She's either sitting with R or sitting by herself or
7 sitting be me.

8 Q: Oh okay. Okay.

9 A: She's just like switching off - so -

10 Q: Oh. Okay. Did you ever see anything - I can't think
11 what I was gonna say. Have you ever - has she ever told
12 you about having any problems with anything or any
13 concerns or anything that made her uncomfortable with
14 anybody?

15 A: Umm - no.

16 Q: No? But you said you guys weren't that kind of friends
17 though?

18 A: No.

19 Q: Not really? Okay. So has - do you have any secrets
20 with anybody?

21 A: Umm - yeah.

22 Q: Like friends from school or do you have secrets -

23 A: Just from school -

24 Q: - oh.

25

26

1 A: - that would be it.

2 Q: Oh. Do you have any secrets with any adults?

3

4 A: Umm -

5 Q: Have any adults ever asked you to keep secrets?

6

7 A: - no.

8 Q: No? Okay. Is there anything that - that somebody's

9 asked you to do or tried to do that made you feel

10 uncomfortable?

11 A: Umm - well not really because I didn't really see

12 anyone or don't ever ask me -

13 Q: That's good. Okay. Well do you have any questions for

14 me?

15 A: Umm - nope.

16 Q: No? Have you told me the whole truth?

17 A: Um-hum.

18 Q: All right. Very good. All right. Have you ever seen

19 - that's what I was going to ask you - have you ever seen

20 - now we talked about how - like - I think Brother

21 Gonzales and Brother Whitaker would wear kind of like suit

22 jackets or some kind of jacket. Do you ever remember them

23 putting it - you know - like Brother Whitaker putting his

24 jacket over somebody's lap?

25 A: Umm - no. But only in class he takes off his jacket

26 sometimes. But - like he didn't do anything or any -

Q: Oh he doesn't ever take his jacket off?

1
2 A: - he takes it off like in the class sometimes because
3 it's really hot in there.
4
5 Q: Yeah.
6
7 A: And - yeah.
8
9 Q: So does he take it off in the primary class? Would you
10 now or - I mean cause you're sitting in front of him so
11 maybe - would you notice?
12
13 A: Not really.
14
15 Q: Okay. All right. So you have never looked over and
16 see his jacket laying on somebody's lap or anything?
17
18 A: No. He just like puts it on the back of the chair and
19 all that.
20
21 Q: Oh. But that's what he does in the smaller class room?
22
23 A: Um-hum.
24
25 Q: Okay. So we don't - do you know what he does in the
26 bigger class room? Or would you notice?
27
28 A: I wouldn't notice.
29
30 Q: Okay. All right. Well I'm sure glad you talked to me.
31 So what I'm gonna do is - cause remember I told you we
32 were making a movie. I'm gonna go turn that off - so I'll
33 let you go back out to the lobby and then in a couple
34 minutes I'll come out and get mom. Okay?
35
36 A: Okay.
37
38 Q: All right. You did a nice job talking to me. I sure

1 appreciate it. There you go. Now do you have to go back
2 to school today?

3 A: Umm - yeah.

4 Q: Do you?
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C E R T I F I C A T E

I, Evelyn M. Pierce, certify that the interview of K
O'Co occurred at the time and place set forth and that
at said time and place the recorded interview was
recorded. That I subsequently transcribed the entire
recorded interview to the best of my ability as accurately
as possible.

August 12, 2013.

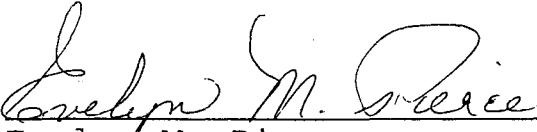

Evelyn M. Pierce
Court Certified transcriptionist

Exhibit 3

Transcript of police
interview with
exculpatory witness
J***** K*****

1 Recorded statement of J. K.
2 In re: State v. Whitaker
3 Case Number 11-1-01948-9
4

5 **(Note: For the first almost 33 minutes of this**
6 **recording, the room is empty and there is only**
7 **background noise coming from another room. The child**
8 **and investigator enter the room at 32:32.)**

9 Q: Oh my gosh. You know Tabitha is just the right
10 size - so it's very cool. I have a chair for you. All
11 right. Well let me tell you before we even get
12 started, this is kind of a special room. And this is a
13 microphone and these are come camera. So while we talk
14 we're going to make a movie so that it's easier for me
15 to remember what we talked about. Is that okay?

16 A: (No oral sound heard - nods head.)

17 Q: All right. So let's see - what did mom say about
18 coming to see me?

19 A: She said that like somebody got hurt or something.

20 Q: Well there was something that I - I heard about
21 some things that might'a happened. And so - nothing
22 that I know about you, but I figured I'd just talk -
23 maybe you can kind'a help me with some stuff to figure
24 out where some people are in the room and stuff. But
25 I'll tell you about that. So you're not in trouble or
26 anything.

Did she tell you what my job is?

27 A: (No oral response heard - shakes head no.)

28 Q: Do I look like a police officer?

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A: No.

Q: I'm a police officer. I just don't wear a uniform because I talk to kids all the time - cause uniforms are kind'a scary -

A: Yeah.

Q: - a little bit huh? Yeah.

A: Not too good.

Q: Yeah. And that - that's why we work here so we don't wear those here and we just talk to kids all the time. So now let's see - now you are how old?

A: Nine.

Q: You're nine. Okay. Can you tell me your whole name?

A: Jo W: K.

Q: J

A: J and then W

Q: That's pretty.

A: - K

Q: K, right?

A: (No oral response heard - nods head yes.)

Q: Do you know your birthday?

1 A: June 12th, 2002.

2 Q: Very good. Now you said you're nine so you're in
3 fourth grade or what's your grade?

4 A: Fourth.

5 Q: Very good. What school do you go to?
6

7 A: Minnehaha.

8 Q: How's that going?

9 A: Good. I'm in fourth split.
10

11 Q: Oh you're in one of those split classes?

12 A: At [inaudible]

13 Q: Oh wow! Very good. What's your teacher's name?
14

15 A: Mrs. Andrejeski (ph).

16 Q: Wow! Do you like her?

17 A: (No oral response heard - nods head yes.)
18

19 Q: Is she a nice lady?

20 A: (No oral response heard - nods head yes.)
21

22 Q: Good. Do you know your address?

23 A: 6616 N.E. 58th Avenue.

24 Q: 58th Avenue. What's mom's name?

25 A: Amy Margaret K.
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Q: Oh very good. Well you know the whole thing, huh?

A: (No oral response heard - nods head yes.)

Q: All right. So now what does it mean to tell the truth? If mom says hey J - you go by J, right?

A: (No oral response heard - may have slightly shaken her head yes.)

Q: So J you need to tell the truth. What does it mean to tell the truth?

A: It's something that is true.

Q: And it really happened?

A: (No oral response heard - nods her head yes.)

Q: So if I said it was raining in here, is that a truth or a lie?

A: Lie.

Q: Yeah. Cause it's not raining in here huh?

A: Only if you had water coming out from the sink.

Q: That's true. But we don't. So while we talk today it's really important that we talk about the things that are the truth and that you actually remember or that you saw or you heard or something like that. Can we do that?

A: (No oral response heard - nods head yes.)

1 Q: Okay. So - now let's see - I was kind'a hoping you
2 maybe - oh the other thing is - you know - if - if I
3 goof - like I called you the wrong name or I get
4 something wrong, it's okay to tell me I got it wrong.
That's no problem.

5 A: Okay.

6 Q: That way we'd - you just straighten me out and then
7 I'll make sure I get it right, okay? And if you don't
8 understand something, you just tell me you don't
9 understand. That's not a problem. Okay? Because
10 sometimes I goof - I don't hear you right or something.
All right.

11 So now let's see - let me talk to you about a few
12 things. Now you go to church at the LDS Church, right?

13 A: (No oral response heard - nods head yes.)

14 Q: Is that on Sundays?

15 A: (No oral response heard - nods head yes.)

16 Q: Okay. Do you remember

17 Q: That's not a problem. Do you remember Brother
18 Whitaker?

19 A: (No oral response heard - nods head yes.)

20 Q: Tell me about Brother Whitaker?

21 A: Ahh -

22 Q: What do you remember?

23 A: - I don't really remember any -
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Q: Do you remember him?

A: - (No oral response heard - nods head yes.)

Q: Do you remember what he looks like and -

A: He - he sort of like an old grandpa type.

Q: - ah-hah.

A: Umm - I don't know how I could like explain him.

Q: Oh. Well how did you feel when you were around Bro - Brother Whitaker?

A: Fine.

Q: Did you? What would you guys do?

A: Sometimes we'd - games - like you'd have some stuff.

Q: Um-hum.

A: And - we'd learn stuff - that's [inaudible] -

Q: Oh. So who would be in your class when you were with Brother Whitaker?

A: Ahh -

Q: Do you remember what the kids' names were?

A: - there was J; and Jc - M. - she disappeared - she went - she still at school - and she don't do that - and then there's sometimes K C, and then there's - I forgot - ahh -

1
2 Q: That's okay. Do you remember somebody named K ?
3 A: (No oral response heard - nods head yes.)
4 Q: Was she in your class?
5
6 A: Sometimes.
7 Q: Sometimes? How about - who can I think of?
8 K ? Do you remember K ?
9 A: He came sometimes cause he had a stepmom and
10 stepdad.
11 Q: Oh okay. So sometimes he'd stay with one and then
12 the other - he'd stay back and forth. Is that why?
13 A: (No oral response heard - no head shake.)
14 Q: Okay. Well who else can we think of? Is there -
15 were there people there that were always there - that
16 always came back then?
17 A: Normally the boys - normally Ar , J , and - I
18 can't remember. Oh Joey (ph).
19 Q: Okay.
20 A: And then we had some teachers like switched that -
21 I know that's in our Ward - but - and then - now it's
22 Brother Gonzales and a new teacher.
23 Q: Oh okay.
24 A: [inaudible - whispering]
25 Q: Okay. So - now back when it was Brother Whitaker
26

1 and Brother Gonzales - do you remember that?
2 A: (No oral response heard - nods head yes.)
3
4 Q: Did M come all the time?
5 A: She came until she disappeared.
6
7 Q: Oh okay. But before that was she there all the
8 time?
9 A: (No oral response heard - nods head yes.)
10
11 Q: How about K
12 A: K - she - sometimes comes cause I think she has
13 a stepdad or something - she does and - and so she
14 barely comes.
15 Q: Oh okay.
16 A: She comes every - like not -
17
18 Q: Oh okay. So now you guys would go to the first
19 class, right?
20 A: (No oral response heard - nods head yes.)
21
22 Q: In that small class room?
23 A: Yeah.
24
25 Q: And then after -
26 A: Primary -
Q: - you guys would switch - you'd go to primary. So
do you remember going to primary with Brother Whitaker?

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A: (No oral response heard - nods head yes.)

Q: Where would everybody sit?

A: There's like three groups that - groups that were - there - the eight and seven year olds and then there's - they were behind that and then it's like the ten and eleven year olds -

Q: Um-hum.

A: - behind them and then there was like - there was groups and then the second group there was the twelve year olds and they had to - there's only three rows in that one -

Q: Um-hum.

A: - and then it was the - I think - twelve year olds - umm - no not twelve - the kids like eleven and - I don't know - I think it's just the eleven year olds or something -

Q: um-hum.

A: - and then in the other group it's our - our class is in the back and same - same age which is a different class cause there's so many kids in the front.

Q: Oh okay. So where would Brother Whitaker sit with your group?

A: He would normally sit in the back row cause we had two.

Q: Okay. So who would normally sit by him?

1 A: Everybody?

2 Q: Was there anybody who would sit by him more often?

3

4 A: (No oral response heard - shakes head no.)

5 Q: Did you sit by him very often?

6 A: Sometimes.

7

8 Q: Did you? How about M

9 A: I don't - I think she sits - sat by him a lot - I

10 don't know.

11 Q: Okay. How about K

12 A: She would normally sit in the row up above.

13

14 Q: Oh okay. Do you remember Brother Whitaker wearing

15 a jacket? Would he wear like a suit coat or anything

16 like that?

17 A: (No oral response heard - no movement of her head.)

18 Q: Would he ever take it off when you guys were in

19 primary?

20 A: Sometimes.

21 Q: Where would he put it?

22 A: In the back of a chair.

23

24 Q: Did he ever put it on anybody's lap?

25 A: (No oral response heard - shakes head no.)

26

1 Q: To keep them warmer or something?
2 A: (No oral response heard - no movement of head.)
3
4 Q: Would - did - is it that he didn't or you wouldn't
5 know or you wouldn't remember? Cause that's okay too.
6 A: I remember like - he never did.
7 Q: Oh okay. Would you notice that?
8 A: (No oral response heard - shakes head no.)
9
10 Q: I mean would you have seen what he did with his
11 jacket? I mean would you really have been looking?
12 A: I probably wouldn't be looking.
13 Q: Okay. Hum. So how did you get along with Brother
14 Whitaker?
15 A: Fine.
16 Q: Did you? You guys ever have any special secrets or
17 anything?
18 A: (No oral response heard - shakes head no.)
19
20 Q: Has he ever done anything that made you feel
21 uncomfortable? Do you know what that means?
22 A: (No oral response heard - nods head yes.)
23 Q: That it kind'a makes you feel kind'a - ugh - like
24 that?
25 A: (No oral response heard - no movement of head.)
26

1 Q: So you don't - nothing ever happened that made you
2 feel uncomfortable?

3 A: (No oral response heard - shakes head no.)

4 Q: Would you tell me if it did?

5

6 A: Probably.

7 Q: You think probably?

8 A: Well sometimes at primary he would like do
9 something so someone was sort'a tickled.

10 Q: So tell me about that.

11

12 A: Ahh - he would sometimes - I don't know.

13 Q: Well what would he do? Describe it for me.

14 A: He like this (moves hand to table top and moves
15 fingers slightly).

16 Q: Where would he do it? On what part of the body?

17

18 A: Like there (on mid/upper back)

19 Q: On your back?

20 A: (No oral response heard - nods head yes.)

21 Q: Did he ever do it anywhere else?

22

23 A: (No oral response heard - shakes head no.)

24 Q: Or any other parts of your body?

25 A: (No oral response heard - shakes head no.)

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Q: Would you tell me if he did?

A: (No oral response heard - nods head yes.)

Q: Okay. So do girls have private parts?

A: (No oral response heard - nods head yes.)

Q: Where are some of those private parts - do you know?

A: Up here and here (pointing to groin area).

Q: And backside too?

A: Right on the butt.

Q: The butt? Oh so that front part - on the front part and on the back part. So did you ever have any troubles with any tickling or anything on the private parts?

A: (No oral response heard - shakes head no.)

Q: Would you tell me?

A: (No oral response heard - nods head yes.)

Q: Okay. Is there anything that happened that made you feel uncomfortable?

A: (No oral response heard - shakes head no.)

Q: Would you tell me?

A: (No oral response heard - nods head yes.)

1 Q: Okay. Cause this - nobody's in any trouble or
2 anything. Not - no kids are in trouble. I'm just
3 trying to make sure everybody's safe. Did you ever see
4 him do that to anybody else? Did you ever see him
touching kind'a like that - or different or -

5 A: Umm -

6 Q: - no?

7
8 A: - I think he would sometimes do it to M

9 Q: What would he do?

10 A: Tickle her.

11 Q: Where would he tickle her?

12
13 A: (No oral response heard - points to her mid/upper
14 back).

15 Q: Was it on the clothes or under the clothes?

16 A: On.

17 Q: Would it ever - would it be on her back or would it
18 get on her butt?

19 A: Back.

20
21 Q: Okay. Did you ever see anything else that you
22 thought was kind'a - you know - kind'a different? Did
he ever touch her in any other way you thought was -

23 A: (No oral response heard - shakes head no.)

24
25 Q: - did you ever see him touch her anywhere else?
26

1 A: (No oral response heard - shakes head no.)

2 Q: So when this tickling was going on - what would
3 happen? What would - tell me about that. I mean was he
4 tickling everybody or just you guys?

5 A: I think just us.

6 Q: Okay. Well what do you remember about that? Tell
7 me about that.

8 A: I don't know.

9 Q: You don't know? Well just tell me - tell me what
10 you remember - what you - what was going on and what
11 you felt and what was said and - that kind of stuff.
12 Cause I wasn't there so it helps if you give me a -
13 kind'a picture in my head of what was going on.

14 A: I don't really know - I think it was - it seemed
15 kind -

16 Q: Was it in primary or the smaller class room?

17 A: - we had ___ time and also like this other sort of
18 lesson thing.

19 Q: The what?

20 A: Sort of like a lessony (ph) thing but not a lesson.
21 The - at times.

22 Q: Okay. And that's not in primary - it's in the
23 smaller class room?

24 A: We had - it's sort of like an activity time - right
25 after the singing and we go - that's basically all .

26

1 Q: Okay. So when he was tickling you, was it during
2 the big class room in primary or was it before that?

3 A: The big class in primary.

4 Q: So it was when?

5 A: In primary.

6
7 Q: Okay. So where would you be when this was
8 happening?

9 A: I would really be sitting sort of in front him.

10 Q: So like would your - if - if he's sitting here,
11 would your chair be in front of him in a different row
12 or beside him somehow?

13 A: Well - so there's - there's like two chairs here -
14 he would sit there and I was like three other chairs -

15 Q: Um-hum.

16 A: - and then there's two right here and then I would
17 probably sit right there.

18 Q: Okay.

19 A: Right here.

20
21 Q: So would he ever tickle you anywhere else?

22 A: (No oral response heard - shakes head no.)

23 Q: Because you're not in any trouble if you tell me
24 that something else happened.

25 A: (Shakes head no.)
26

1
2 Q: No? Did he ever ask you to do anything that you
3 didn't think was okay?

4 A: (Shakes head no.) Not that I remember.

5 Q: Okay. So tell me all that you remember about that
6 tickling stuff. Tell me all about it.

7 A: Umm -

8 Q: Well did he ever tickle up on that front part we
9 were talking about?

10 A: - (no oral response heard - shakes head no.)

11 Q: Huh? No? So is - I'm just - I'm just really - I
12 want to make sure we're telling the truth because it's
13 really important. So if there's anything - is there
14 anything that's hard to talk about or it just didn't
15 happen cause that - that's - that's - it's okay to tell
16 me if it's hard to talk about. So is there anything
17 that's hard to talk about?

18 A: (No oral response heard - shakes head no.)

19 Q: Of it just didn't happen?

20 A: Umm -

21 Q: What?

22 A: - (no oral response heard - no head movement.)

23 Q: Okay. So did you ever see him tickle M. anywhere
24 else?

25 A: (No oral response heard - shakes head no.)
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Q: Did you ever - did you ever see him like touching her leg or anything like that or - like what did you see?

A: I don't know.

Q: What do you think would happen if you told me about something happening - do you think you'd get in trouble?

A: (No oral response heard - shakes head no.)

Q: No? That's good cause you wouldn't get in trouble. So - did he ever ask you to stay after class and help him out with anything?

A: (No oral response heard - shakes head no.)

Q: No? Did he ever give you any gifts?

A: Some of the birthdays - and sometimes he would give a gift to everyone basically.

Q: Oh that's good. Okay. Was there anything that made you feel uncomfortable about him? About how he acted or what he did?

A: In primary if I was sitting next to him he would sort of do this over the chair (moves arm as though putting it on the back of a chair).

Q: With his - so his arm - would it be over your shoulders or would it be on the chair?

A: On the chair.

Q: Oh. What else would he do?

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A: Not really anything.

Q: Okay. So what - what - is there anything you didn't like about him?

A: (No oral response - shakes head no.)

Q: Was there anything you liked about him?

A: (No oral response heard - shakes head no.)

Q: You didn't like him or dislike him?

A: (No oral response heard - shakes head no.)

Q: Okay. Hum. Is there - have you ever told anybody about having any problems with him?

A: (No oral response heard - shakes head no.)

Q: Okay. Is that something you could tell somebody?

A: (No oral response heard - shakes head no.)

Q: No? See that's why I'm kind'a wondering is that - and I talk to lots and lots and lots of kids and sometimes it's just really hard to talk about things that happened. Just because they're kind'a scared or they're embarrassed or whatever. And so I want to make sure that if any of that's going on, it's okay to tell me. You're not in any trouble. Mom's not gonna be mad. I've already talked to mom and she knows what we're gonna talk about. So I just want to give you a chance if something's going on that maybe you could talk with me. If there's anything that you felt bad about cause I don't want any of that stuff in your belly. Because it's upsetting.

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A: (No oral response heard - nods head yes.)

Q: You know? And that - the secrets are what makes you feel bad. So - is there anything that we should talk about?

A: I don't know - (shrugs shoulder).

Q: You don't know? Would it help if Tabitha was in here and maybe you could just sit with Tabitha?

A: That's basically all that happened.

Q: Is it? Did he ever do anything else that - that you've having a hard time telling me about?

A: (No oral response heard - shakes head no.)

Q: Did he ever touch you on any of your privates?

A: (No oral response heard - shakes head no.)

Q: Would you tell me if he did?

A: (No oral response heard - nods head yes.)

Q: For real?

A: (No oral response heard - nods head yes.)

Q: For real?

A: (No oral response heard - nods head yes.)

Q: I don't know - I want to make sure you're telling me the truth.

1 A: No, that's it.

2 Q: That's good. Did - did you ever see him do
3 anything like that to M ^

4 A: (No oral response heard - shakes head no.)

5 Q: Did she ever tell you about anything - are you guys
6 friends that she would tell you something like that?

7 A: (No oral response heard - waves hand sideways.)

8 Q: Sort'a? Did she ever tell you anything about being
9 touched in a way she didn't like?

10 A: (No oral response heard - shakes head no.)

11 Q: Hum. How about Brother Gonzales, how did that go?
12 Did you have any problems with him?

13 A: (No oral response heard - shakes head no.)

14 Q: No? Never have any touching on the arms or -

15 A: He never did anything.

16 Q: - well that's good. What do you - what do you
17 think of him?

18 A: He's okay.

19 Q: Is he? What is it that just makes him okay?

20 A: Gives candy - like.

21 Q: So that's okay - if you like the candy. Very good.
22 So you feel okay with him? Do you feel safe?

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1 A: Sort'a.

2 Q: Okay. What would make you not feel safe with
3 Brother Gonzales?

4 A: That he's been drinking before.

5 Q: He did? Well tell me about that.

6 A: Talking to church.

7 Q: So tell me about that.

8 A: I don't know -

9 Q: Well what did he say?

10 A: - he said that now he's after that he's not
11 drinking.

12 Q: Oh so that helped - by going to church it helped
13 him stop doing stuff he shouldn't have. So that's
14 good. Has he ever been scary when you've been in
15 school?

16 A: (No oral response heard - shakes head no.)

17 Q: With him? Okay. Well that's good. Well did - did
18 you ever feel - well how did you feel with Brother
19 Whitaker being safe - how did you feel?

20 A: The same.

21 Q: Did he ever say anything that made you kind'a not
22 feel safe?

23 A: (No oral response heard - shakes head no.)

24

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1 Q: Did he ever talk about drinking or something like
2 that -

3 A: (No oral response heard - shakes head no.)

4 Q: - like Brother Gonzales?

5 A: (No oral response heard - shakes head no.)

6 Q: Did he ever say anything that made you feel kind'a
7 -

8 A: (No oral response heard - shakes head no.)

9 Q: - nervous?

10 A: No - it's not like he was - like he chewed
11 something funny -

12 Q: Oh was he -

13 A: He never was [inaudible]

14 Q: - what did it sound like?

15 A: I think tobacco but I don't know - it was like -

16 Q: Oh just something funny, huh? Did - he didn't act
17 odd or anything?

18 A: (No oral response heard - shakes head no.)

19 Q: He's okay?

20 A: (No oral response heard - nods head yes.)

21 Q: Okay. All right. Well how did it make you feel
22 when he tickled you like that?

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A: Funny.

Q: Did it? Okay. Is there anything more you can tell me about that?

A: (No oral response heard - shakes head no.)

Q: Did anything else happen that kind'a made you feel funny?

A: (No oral response heard - shakes head no.)

Q: No? You know what though? I - I want to - I'm not gonna sit here and keep asking you and asking you - cause that's not very nice. But you know what? Sometimes kids have a hard time talking about stuff and sometimes - you know - after they kind'a have a break and have time to think - you know - it's more comfortable so it's - you know - kind'a used to be in here they - you know - they're like you know what? I - I think I do remember something. So if you remember something - you know - after I talk with mom - and you say hey Cindy I want to tell you something, that's okay too. If there's something else to tell me, okay?

A: Well we always had like these picture things.

Q: What were they?

A: It was like - he would have like a joke every - like - maybe like every couple of months.

Q: Um-hum.

A: Like one of them it said the real cowboy - the two letters and that was - umm - [inaudible - whispering to herself] - umm -

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Q: Not pyramids?

A: - no.

Q: No?

A: Umm - pioneers.

Q: Ah-hah.

A: And it had like a cowboy.

Q: Oh okay. I see.

A: And then - [inaudible]

Q: Um-hum. Anything else you can think of?

A: (No oral response heard - shakes head no.)

Q: Anything I haven't asked you that you're like - oh you should ask me that?

A: (No oral response heard - shakes head no.)

Q: No? Okay. Well if you think of something and - you know - after you're sitting there - cause I think Tabitha is out there - so if you sit there and you're like oh - I forgot to tell Cindy this or it was hard to tell me - and after I talk with mom - it's okay to tell me if you need to talk some more, okay? Or if you think of it later - on another day - that's okay too. But I just want to make sure you're safe. And that you don't have any secrets.

A: How come you asked me these questions?

1 Q: Well - because there are some things that - that
2 somebody said - not about you - but that they had -
3 there was some things that happened that made them feel
4 uncomfortable and so that's why I'm just checking to
5 make sure everybody's safe and that nothing happened
6 and - and if it did, that that way we know and so that
7 everybody's okay. And I want to make sure there's no
8 secrets and that everybody's healthy and - have you
9 ever had a problem with somebody touching you in your
10 privates?

11 A: One time a male tells this girl - but I don't know
12 - to touch a -

13 Q: Well how old was she?

14 A: - I think - maybe ten.

15 Q: Oh. Well how old were you?

16 A: I was kindergarten so probably five.

17 Q: Oh okay. So what did she do?

18 A: [Inaudible]

19 Q: She lived - (segment ends here and segment starts
20 as follows:)

21 Q: Were they on your body?

22 A: (No oral response heard - nods head yes.)

23 Q: Oh. Did she touch you in any way?

24 A: (No oral response heard - shakes head no.)

25 Q: No? Did you tell mom?
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A: (No oral response heard - nods head yes.)

Q: What did mom say?

A: (No oral response heard - shrugs shoulders.)

Q: Did she say that's okay - or don't do that - or did she tell the girl not to do that or -

A: Well I never told her but then like I told her like maybe a couple months ago and she's like oh do you know what to do if anybody does that or tries to and I said scream.

Q: Um-hum.

A: She said -

Q: You know sometimes when stuff happens, it's hard to scream just cause you're kind of in shock. And you don't know what to do. And sometimes that happens and we wish we could scream. So if anything like that ever happened and it - you kind'a feel bad now, you don't have to feel bad. You just want to be honest about it.

So if there's no secrets in your belly and you don't feel bad and that - you know - you think something's gonna happen, okay? Cause that's - you know - I talk about this stuff all the time with kids. That's just what I do - to help make kids safe. And there isn't anything that anybody could say that would upset me or embarrass me or shock me. Cause I've heard pretty much everything.

So - and that - that's really the thing is - is that we just want to make sure kids are safe. So I'm really glad you told me about that. Okay? So - you know -

1 like now - now that we've talked do you think maybe you
2 could tell somebody not to do something bad?

3 A: (No oral response heard - nods head yes.)

4 Q: You - was there a time when you wouldn't have been
5 able to tell them no?

6 A: Probably before.

7 Q: Um-hum. It would be kind'a hard to tell an adult
8 no, huh?

9 A: (No oral response - nods head yes.)

10 Q: Yeah. Have you ever had a problem like that with
11 an adult doing something to you you didn't like?

12 A: (No oral response heard - shakes head no.)

13 Q: No? Okay. Has anybody ever told you not to tell
14 stuff like that?

15 A: (No oral response heard - shakes head no.)

16 Q: No? Okay. Do you have questions for me?

17 A: (No oral response heard - shakes head no.)

18 Q: No? I've asked you a bunch of questions - you have
19 no more questions?

20 A: (No oral response heard - shakes head no.)

21 Q: Oh my gosh! So is everything you've told me - has
22 it been the truth?

23 A: (No oral response heard - nods head yes.)

24

1 Q: Is there anything you haven't told me that you
2 should tell me about?

3 A: That's all I remember.

4 Q: Okay. All right. So how about if you go out and
5 visit with Tabitha and I'll talk to mom? Will that
6 work? All right. Nice job. And if you think of
7 something else you just say Cindy I've got to tell you
something else. Okay?

8 A: (No oral response heard - nods head yes.)

9 Q: All right. That sound good? All right. Come on
10 out.

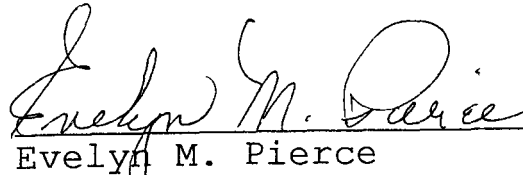
11 (Child and investigator leave the room - camera and
12 sound stay on. Segment runs out at 4:13 minutes.)
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C E R T I F I C A T E

I, Evelyn M. Pierce, certify that the interview of
J. K. occurred at the time and place set forth
and that at said time and place the recorded interview
was recorded. That I subsequently transcribed the
entire recorded interview to the best of my ability as
accurately as possible.

August 12, 2013.



Evelyn M. Pierce
Court Certified transcriptionist

APPENDIX ITEM D

DECLARATION OF JOSEPHINE TOWNSEND

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

IN RE: THE PERSONAL RESTRAINT OF
RYAN HOWARD WHITAKER

Trial Court No.: 11-1-01948-9
Court of Appeals Appeal No.:

DECLARATION OF
JOSEPHINE TOWNSEND

Clerk's Action Required

I Josephine Townsend, declare under penalty of perjury, and RCW 9A.72.085:

I am an attorney at law, licensed to practice in the State of Washington.
I represented Ryan Howard Whitaker in pre-trial preparation and investigation,
and at trial in this matter. I was assisted by co-counsel, Vernon McCray, attorney
at Law.

Prior to trial, I received recordings of Detective Cindy bull's interviews with three
children who attended the St. John's Church of Latter Day Saints, along with
Mara Smith and while the Defendant was a teacher there, during the time of the
alleged crimes. The children are Caitlyn O'Connor, Kayden Carter, and Jordana
Kaneen.

At trial, I had these recordings marked as exhibits 41, 42, and 43. The court did
not admit them into evidence. I did not have them transcribed for trial, however, I

1 have now provided the recordings to attorney Roger A. Bennett, to be transcribed
2 by Evie Pierce, court reporter, for a Personal Restraint Petition.

3
4 It was apparent to me that the testimony of the three children was potentially
5 exculpatory. They described that they always sat in the back two rows (in close
6 proximity to Mr. Whitaker and to Mara Smith) during the relevant time period and
7 events, and never saw any instances of improper touching or molestation.

8 A major focus of our defense case was that there were numerous other people,
9 including adults, present in the sharing room used by the church, wherein the
10 majority of the alleged touching occurred, none of whom saw anything unusual or
11 inappropriate. The prosecution rebutted these witnesses by showing that the
12 witnesses were not necessarily close enough, or in the right place to see
13 anything occurring.

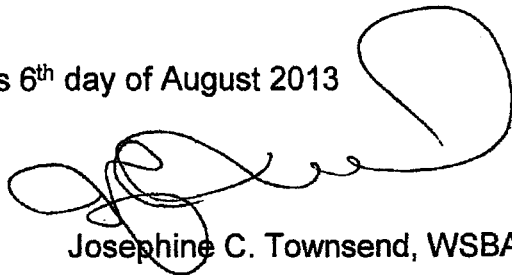
14 The three witnesses named above, however, were in the same class as Mara
15 Smith, and were required to sit in the same rows as she used throughout the
16 year, within a few feet or even inches of Defendant and Mara Smith. A finder of
17 fact could conclude that they were in a perfect position to see any abuse as
18 described by Mara, if it occurred.

19 I wanted to call these witnesses, however, I was informed prior to trial that none
20 of them were attending the church any longer. Kayden Carter resided out of state
21 and we did not have the funds to transport him and his parents to the trial. I did
22 not seek to ascertain the whereabouts, through interviews with friends,
23 subpoenas to their schools, nor requests to the LDS church for their parents'
24 addresses and phone numbers for Caitlyn O'Connor or Jordana Kaneen.

25 I did not ask my investigator to locate the children.
26

1 It was not a tactical choice to not call these exculpatory witnesses. I simply did
2 not obtain their presence, nor issue subpoenas to them. I wish I had.

3 Signed at Vancouver Washington, this 6th day of August 2013
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A handwritten signature in black ink, appearing to read 'Josephine C. Townsend', is written over the printed name below it.

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6 Josephine C. Townsend, WSBA 31965
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APPENDIX ITEM E

**DECLARATION OF
MARK MUENSTER**

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

IN RE: THE PERSONAL RESTRAINT OF

RYAN DEE WHITAKER

Trial Court No.: 11-1-01948-9

DECLARATION OF
MARK MUENSTER

Clerk's Action Required

I, MARK MUENSTER, Attorney at Law, declare pursuant to RCW 9A. 72.085:

I am an attorney at law, licensed to practice in the State of Washington.

I have practiced criminal law as a defense lawyer at the trial and appellate level for about 30 years.

I am the former president of the Washington Association of Criminal Defense Lawyers. I have appeared as counsel of record or as counsel for amicus curiae in about 60 reported decisions in the Court of Appeals or Supreme Court of Washington and probably an equal number of unreported cases in Division One of the Court of Appeals. I have been the presenter in a number of CLE programs.

I am familiar with the prevailing professional standards applicable to attorneys practicing criminal law in the State of Washington.

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4 I have not read the entire transcript of the trial of Ryan Whitaker in Clark County
5 Superior Court cause # 11-1-01948-9, however, I have read the entire testimony
6 of Mara Smith, the complaining witness, and the entire testimony of the
7 Appellant, Ryan Dee Whitaker, and I have reviewed the following exhibits to the
8 Personal Restraint Petition of Ryan Dee Whitaker:

- 9 a. Second Amended Information
10 b. Partial Report of Proceedings of Trial relating to
11 three exculpatory witnesses, Kayden Carter, Kaitlyn
12 O'Connor, and Jordana Kaneen
13 c. Transcript of police interview with exculpatory
14 witness Kayden Carter
15 d. Transcript of police interview with exculpatory
16 witness Kaitlyn O'Connor,
17 e. Transcript of police interview with exculpatory
18 witness Jordana Kaneen,
19 f. Declaration of trial counsel, Josephine
20 Townsend,
21 h. Judgment and Sentence
22 i. Motion and Affidavit for Order of Partial Indigency, and Partial
23 Order of Indigency on Appeal
24 j. Findings of Fact and Conclusions of Law
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I am informed that there were no eyewitnesses to any acts of abuse against the
alleged victim, other than the alleged victim herself, and that there was no
physical evidence of abuse to corroborate her testimony.

1 I am informed that there was conflicting testimony given at trial concerning
2 whether the numerous persons present in the "Sharing Time Room" at the LDS
3 church during Sunday meetings from January 1 through August 31, 2011 would
4 or would not be in a position to view the alleged conduct.

5 It is my opinion that the testimony of the three witnesses named above would be
6 highly relevant and potentially exculpatory in a case of this type. It appears that
7 they would have been in a uniquely pertinent vantage point to address the
8 issues.

9 These witnesses would not be merely impeachment witnesses, but would
10 actually contradict the testimony of Mara Smith on material issues.

11 The police interviews support this conclusion, although further development of
12 the testimony through defense interviews would be necessary for trial counsel to
13 discharge their duty of effective representation.

14 The standard of care of a reasonably effective criminal defense attorney in this
15 case would require that these three witnesses be interviewed before trial, and be
16 subpoenaed to testify at trial. There would be no reasonably effective alternative
17 to presenting their live testimony, with the possible exception of a videotaped
18 deposition. There is no hearsay exception which I am aware of which would
19 allow the police interviews into evidence as substantive proof.

20 In my opinion, defense counsel at trial was ineffective in representing Mr.
21 Whitaker by failing to interview the three child witnesses before trial, and by
22 failing to secure their appearance for testimony at trial.

23 If defense counsel was unaware of the locations of said witnesses, an
24 investigator should have been dispatched to locate them. Subpoenas to their
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1 church for the addresses and phone numbers of the parents could have been
2 employed, or subpoenas to the schools attended by the children, to see if
3 records had been forwarded to any other schools. Moreover, since each of the
4 three child witnesses were interviewed by the police, it is likely that their address
5 and whereabouts were known in the time period leading up to the trial.

6 I am informed that one of the witnesses, Kayden Carter, is the son and stepson
7 of the Pecoras, who actually testified in the trial. The Declaration of Ms.
8 Townsend states that the defense lacked funds to bring Kayden to court to testify.

9 Failure to make efforts to obtain a material witness summons, and public funding
10 to secure the presence at trial of Kayden Carter, due to cost concerns, was also
11 a failure to effectively represent Mr. Whitaker. Every criminal lawyer should
12 know, simply from preparing and reading the standard "Statement of Defendant
13 on Plea of Guilty" that a criminal defendant has the right to subpoena witnesses
14 and have them appear at no cost to the defendant. Mr. Whitaker had previously
15 qualified for indigent defense funds from Clark County. As part of an application
16 for an out of state subpoena, defense counsel could have made an application
17 for public funds for the travel and lodging of this witness.

18 Signed this 19th day of AUGUST, 2013 at Vancouver, Washington.

19
20
21 Mark W. Muenster
22 Mark Muenster WSBA # 11228
23 Attorney at Law
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APPENDIX ITEM F

JUDGMENT AND SENTENCE

17 C-Townsend
C-jail

S9
11-1-01948-9

FILED
APR 05 2013
4:30
Scott G. Weber, Clerk, Clark Co

**Superior Court of Washington
County of Clark**

State of Washington, Plaintiff,

vs.

RYAN DEE WHITAKER,
Defendant.

SID: _____
If no SID, use DOB: 11/7/1953

No. 11-1-01948-9

**Felony Judgment and Sentence -
Prison**

**RCW 9.94A.507 Prison Confinement
(Sex Offense and Kidnapping of a Minor)**

(FJS) 13-9-01534-9

**Clerk's Action Required, para 2,1, 4.1, 4.3a,
4.3b, 5.2, 5.3, 5.5 and 5.7**

Defendant Used Motor Vehicle

Juvenile Decline **Mandatory** **Discretionary**

I. Hearing

1.1 The court conducted a sentencing hearing this date; the defendant, the defendant's lawyer, and the (deputy) prosecuting attorney were present.

II. Findings

There being no reason why judgment should not be pronounced, in accordance with the proceedings in this case, the court **Finds:**

2.1 **Current Offenses:** The defendant is guilty of the following offenses, based upon
 guilty plea jury-verdict bench trial 1/31/2013:

Count	Crime	RCW (w/subsection)	Class	Date of Crime
03	CHILD MOLESTATION IN THE FIRST DEGREE	9A.44.083	FA	1/1/2011 to 8/31/2011
04	CHILD MOLESTATION IN THE FIRST DEGREE	9A.44.083	FA	1/1/2011 to 8/31/2011

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)
(If the crime is a drug offense, include the type of drug in the second column.)

Additional current offenses are attached in Appendix 2.1a.

The defendant is a sex offender subject to indeterminate sentencing under RCW 9.94A.507.

The jury returned a special verdict or the court made a special finding with regard to the following:

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- The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count _____. RCW 9.94A.839.
- The offense was predatory as to Count _____. RCW 9.94A.836.
- The victim was under 15 years of age at the time of the offense in Count _____ RCW 9.94A.837.
- The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count _____. RCW 9.94A.838, 9A.44.010.
- The defendant acted with **sexual motivation** in committing the offense in Count _____. RCW 9.94A.835.
- This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.825, 9.94A.533.
- The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____ RCW 9.94A.825, 9.94A.533.
- Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____ RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- Count _____ is a **criminal street gang-related felony** offense in which the defendant compensated, threatened, or solicited a minor in order to involve that **minor** in the commission of the offense. RCW 9.94A.833.
- Count _____ is the crime of **unlawful possession of a firearm** and the defendant was a **criminal street gang member** or associate when the defendant committed the crime. RCW 9.94A.702, 9.94A._____.
- The defendant committed **vehicular homicide** **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. RCW 9.94A.834.
- Count _____ is a felony in the commission of which the defendant used a **motor vehicle**. RCW 46.20.285.
- The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- The crime(s) charged in Count _____ involve(s) **domestic violence**. RCW 10.99.020.
- Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score (RCW 9.94A.589).
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):**

	<i>Crime</i>	<i>Cause Number</i>	<i>Court (county & state)</i>
1.			

- Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

Crime	Date of Crime	Date of Sentence	Sentencing Court (County & State)	A or J Adult, Juv.	DV?*	Type
1 See attached criminal history						

*DV: Domestic Violence was pled and proved

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- The prior convictions for _____ are one offense for purposes of determining the offender score (RCW 9.94A.525).
- The prior convictions for _____ are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term	Maximum Fine
03	3	X	67 MONTHS to 89 MONTHS		67 MONTHS to 89 MONTHS	LIFE	\$50,000.00
04	3	X	67 MONTHS to 89 MONTHS		67 MONTHS to 89 MONTHS	LIFE	\$50,000.00

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9), (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude.

- Additional current offense sentencing data is attached in Appendix 2.3.

For violent offenses, most serious offenses, or armed offenders, recommended sentencing agreements or plea agreements are attached as follows: _____

2.4 Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

- below the standard range for Count(s) _____.
- above the standard range for Count(s) _____.
- The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.
- Aggravating factors were stipulated by the defendant, found by the court after the defendant waived jury trial, found by jury, by special interrogatory.
- within the standard range for Count(s) _____ but served consecutively to Count(s) _____.
- Jury's special interrogatory is attached. The Prosecuting Attorney did did not recommend a similar sentence.

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds:

- That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

- The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

- The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

- 3.1 The defendant is **guilty** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.
- 3.2 The court **dismisses** Counts 1, 2 in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

- (a) **Confinement.** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

_____ months on Count 03 _____ months on Count 04

- The confinement time on Count(s) _____ contain(s) a mandatory minimum term of _____.
- The confinement time on Count _____ includes _____ months as enhancement for firearm deadly weapon sexual motivation VUCSA in a protected zone manufacture of methamphetamine with juvenile present sexual conduct with a child for a fee.

Actual number of months of total confinement ordered is: _____

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: _____

The sentence herein shall run consecutively with any other sentence previously imposed in any other case, including other cases in District Court or Superior Court, unless otherwise specified herein:

Confinement shall commence immediately unless otherwise set forth here: _____

The total time of incarceration and community supervision shall not exceed the statutory maximum for the crime.

- (b) **Confinement.** RCW 9.94A.507 (Sex Offenses only): The court orders the following term of confinement in the custody of the DOC:

Count	03	minimum term	<u>89 months</u>	maximum term	Statutory Maximum
Count	04	minimum term	<u>89 months</u>	maximum term	Statutory Maximum

- (c) **Credit for Time Served:** The defendant shall receive 70 days credit for time served prior to sentencing for confinement that was solely under this cause number. RCW 9.94A.505. The jail shall compute earned early release credits (good time) pursuant to its policies and procedures.
- (d) **Work Ethic Program.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released

on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. Violation of the conditions of community custody may result in a return to total confinement for remaining time of confinement.

4.2 Community Custody. (To determine which offenses are eligible for or required for community placement or community custody see RCW 9.94A.701)

(A) The defendant shall be on community placement or community custody for the longer of:

- (1) the period of early release. RCW 9.94A.728(1)(2); or
- (2) the period imposed by the court, as follows:

Count(s) _____ 36 months Sex Offenses
Count(s) _____ 36 months for Serious Violent Offenses
Count(s) _____ 18 months for Violent Offenses
Count(s) _____ 12 months (for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate)

(Sex offenses, only) For count(s) 03, 04, sentenced under RCW 9.94A.507, for any period of time the defendant is released from total confinement before the expiration of the statutory maximum.

The total time of incarceration and community supervision/custody shall not exceed the statutory maximum for the crime.

(B) While on community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while on community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) for sex offenses, submit to electronic monitoring if imposed by DOC; and (10) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody. For sex offenders sentenced under RCW 9.94A.709, the court may extend community custody up to the statutory maximum term of the sentence.

The court orders that during the period of supervision the defendant shall:

- consume no alcohol.
- have no contact with: _____
- remain within outside of a specified geographical boundary, to wit: _____
as directed by DOC officer _____
- not reside within 880 feet of the facilities or grounds of a public or private school (community protection zone). RCW 9.94A.030(8).
- participate in the following crime-related treatment or counseling services: _____
- undergo an evaluation for treatment for domestic violence substance abuse mental health anger management, and fully comply with all recommended treatment. _____
- comply with the following crime-related prohibitions: _____

Additional conditions are imposed in Appendix ~~B~~ A, if attached or are as follows:

(C) For sentences imposed under RCW 9.94A.507, the Indeterminate Sentence Review Board may impose other conditions (including electronic monitoring if DOC so recommends). In an emergency, DOC may impose other conditions for a period not to exceed seven working days.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3a Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE

RTN/RJN	\$211.73	Restitution to: <u>CVCP (\$211.73)</u> (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)	
PCV	\$ 500.00	Victim assessment	RCW 7.68.035
PDV	\$ _____	Domestic Violence assessment	RCW 10.99.080
CRC	\$ _____	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee \$ <u>200.00</u> FRC	
		Witness costs \$ _____ WFR	
		Sheriff service fees \$ _____ SFR/SFS/SFW/WRF	
		Jury demand fee \$ _____ JFR	
		Extradition costs \$ _____ EXT	
		Other \$ _____	
PUB	\$ <u>200.00</u>	Fees for court appointed attorney and trial per diem, if applicable	RCW 9.94A.760
WFR	\$ <u>\$7,442.00</u>	Court appointed defense expert and other defense costs	RCW 9.94A.760
	\$ _____	DUI fines, fees and assessments	
FCM/MTH	\$ 500.00	Fine RCW 9A.20.021; <input type="checkbox"/> VUCSA chapter 69.50 RCW, <input type="checkbox"/> VUCSA additional fine deferred due to indigency RCW 69.50.430	
CDF/LDI/FCD NTF/SAD/SDI	\$ _____	Drug enforcement Fund # <input type="checkbox"/> 1015 <input type="checkbox"/> 1017 (TF)	RCW 9.94A.760
	\$ 100.00	DNA collection fee	RCW 43.43.7541
CLF	\$ _____	Crime lab fee <input type="checkbox"/> suspended due to indigency	RCW 43.43.690
FPV	\$ _____	Specialized forest products	RCW 76.48.140
RTN/RJN	\$ _____	Emergency response costs (Vehicular Assault, Vehicular Homicide, Felony DUI only, \$1000 maximum) Agency: _____	RCW 38.52.430
	\$ _____	Other fines or costs for: _____	
	\$ <u>8,953.75</u>	Total	RCW 9.94A.760

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.

is scheduled for _____ (date).

The defendant waives any right to be present at any restitution hearing (sign initials): _____.

Restitution Schedule attached.

Restitution ordered above shall be paid jointly and severally with:

RJN	Name of other defendant	Cause Number	Victim's name	Amount

The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ _____ per month commencing _____. RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b).

The court orders the defendant to pay costs of incarceration at the rate of \$ _____ per day, (actual costs not to exceed \$100 per day). (JLR) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.3b **Electronic Monitoring Reimbursement.** The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____, for the cost of pretrial electronic monitoring in the amount of \$ _____.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

HIV Testing. The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact:

The defendant shall not have contact with MLS (female, 8/13/2002) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for 100 years (which does not exceed the maximum statutory sentence).

The defendant is excluded or prohibited from coming within:

500 feet 880 feet 1000 feet of:

MLS (female, 8/13/2002) (name of protected person(s))'s

home/ residence work place school

(other location(s)) person

other location _____,
for 100 years (which does not exceed the maximum statutory sentence).

A separate Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed concurrent with this Judgment and Sentence.

4.6 Other: see attached "Appendix A"

4.7 **Off-Limits Order.** (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

4.8 For Offenders on Community Custody, when there is reasonable cause to believe that the defendant has violated a condition or requirement of this sentence, the defendant shall allow, and the Department of Corrections is authorized to conduct, searches of the defendant's person, residence, automobile or other personal property. Residence searches shall include access, for the purpose of visual inspection, all areas of the residence in which the defendant lives or has exclusive/joint control/access and automobiles owned or possessed by the defendant.

4.9 If the defendant is removed/deported by the U.S. Immigration and Customs Enforcement, the Community Custody time is tolled during the time that the defendant is not reporting for supervision in the United States. The defendant shall not enter the United States without the knowledge and permission of the U.S. Immigration and Customs Enforcement. If the defendant re-enters the United States, he/she shall immediately report to the Department of Corrections if on community custody or the Clerk's Collections Unit, if not on Community Custody for supervision.

V. Notices and Signatures

5.1 **Collateral Attack on Judgment.** If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 **Length of Supervision.** If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 **Notice of Income-Withholding Action.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 **Community Custody Violation.**
(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.633.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.714.

5.5 Firearms. You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040 and RCW 9.41.047.

5.6 Sex and Kidnapping Offender Registration. Laws of 2010, ch. 367 § 1, 10.01.200.

1. General Applicability and Requirements: Because this crime involves unlawful imprisonment involving a minor as defined in Laws of 2010, ch. 367 § 1, you are required to register.

If you are a resident of Washington you must register with the sheriff of the county of the state of Washington where you reside. You must register within three business days of being sentenced unless you are in custody, in which case you must register at the time of your release with the person designated by the agency that has jurisdiction over you. You must also register within three business days of your release with the sheriff of the county of the state of Washington where you will be residing.

If you are not a resident of Washington but you are a student in Washington, or you are employed in Washington, or you carry on vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register within three business days of being sentenced unless you are in custody, in which case you must register at the time of your release with the person designated by the agency that has jurisdiction over you. You must also register within three business days of your release with the sheriff of the county of your school, where you are employed, or where you carry on a vocation.

2. Offenders Who are New Residents or Returning Washington Residents: If you move to Washington or if you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three business days after moving to this state. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state.

3. Change of Residence Within State: If you change your residence within a county, you must provide, by certified mail, with return receipt requested or in person, signed written notice of your change of residence to the sheriff within three business days of moving. If you change your residence to a new county within this state, you must register with the sheriff of the new county within three business days of moving. Also within three business days, you must provide, by certified mail, with return receipt requested or in person, signed written notice of your change of address to the sheriff of the county where you registered.

4. Leaving the State or Moving to Another State: If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within three business days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. If you move out of the state, you must also send written notice within three business days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12): If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within three business days prior to arriving at the institution. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within three business days prior to beginning to work at the institution. If your enrollment or employment at a public or private

institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within three business days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within three business days prior to arriving at the school to attend classes. The sheriff shall promptly notify the principal of the school.

6. Registration by a Person Who Does Not Have a Fixed Residence: Even if you do not have a fixed residence, you are required to register. Registration must occur within three business days of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within three business days after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register with the sheriff of the new county not more than three business days after entering the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You must keep an accurate accounting of where you stay during the week and provide it to the county sheriff upon request. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

7. Application for a Name Change: If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within three business days of the entry of the order. RCW 9A.44.130(7).

8. Length of Registration:

Class A felony – Life; Class B Felony – 15 years; Class C felony – 10 years

5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

5.8 Other: _____

5.9 Persistent Offense Notice

The crime(s) in count(s) 03, 04 is/are "most serious offense(s)." Upon a third conviction of a "most serious offense", the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody. RCW 9.94A.030, 9.94A.570

The crime(s) in count(s) 03, 04 is/are one of the listed offenses in RCW 9.94A.030.(31)(b). Upon a second conviction of one of these listed offenses, the court will be required to sentence the defendant as a persistent offender to life imprisonment without the possibility of early release of any kind, such as parole or community custody.

Done in Open Court and in the presence of the defendant this date: April 5, 2013

[Signature]
Judge/Print Name LEWIS

[Signature]
Deputy Prosecuting Attorney
WSBA No. 38001
Print Name: Jessica E. Smith

[Signature]
Attorney for Defendant
WSBA No. ~~20407~~ 31965
Print Name: Josephine Townsend

[Signature]
Defendant
Print Name:
RYAN DEE WHITAKER

Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW 9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

Defendant's signature: _____

I am a certified or registered interpreter, or the court has found me otherwise qualified to interpret, in the _____ language, which the defendant understands. I interpreted this Judgment and Sentence for the defendant into that language.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Signed at Vancouver, Washington on (date): _____

Interpreter

Print Name

I, Scott G. Weber, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

Witness my hand and seal of the said Superior Court affixed this date: _____

Clerk of the Court of said county and state, by: _____, Deputy Clerk

Identification of the Defendant

RYAN DEE WHITAKER

11-1-01948-9

SID No: _____
(If no SID take fingerprint card for State Patrol)

Date of Birth: 11/7/1953

FBI No.

Local ID No. 208814

PCN No. _____

Other _____

Alias name, DOB:

Race: W

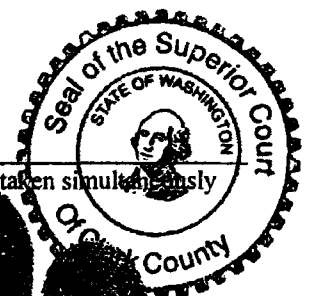
Ethnicity:

Sex: M

Fingerprints: I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court, Deputy Clerk, *Jessie Li* Dated: 4-5-2013

The defendant's signature: *Ryan Deetaker*

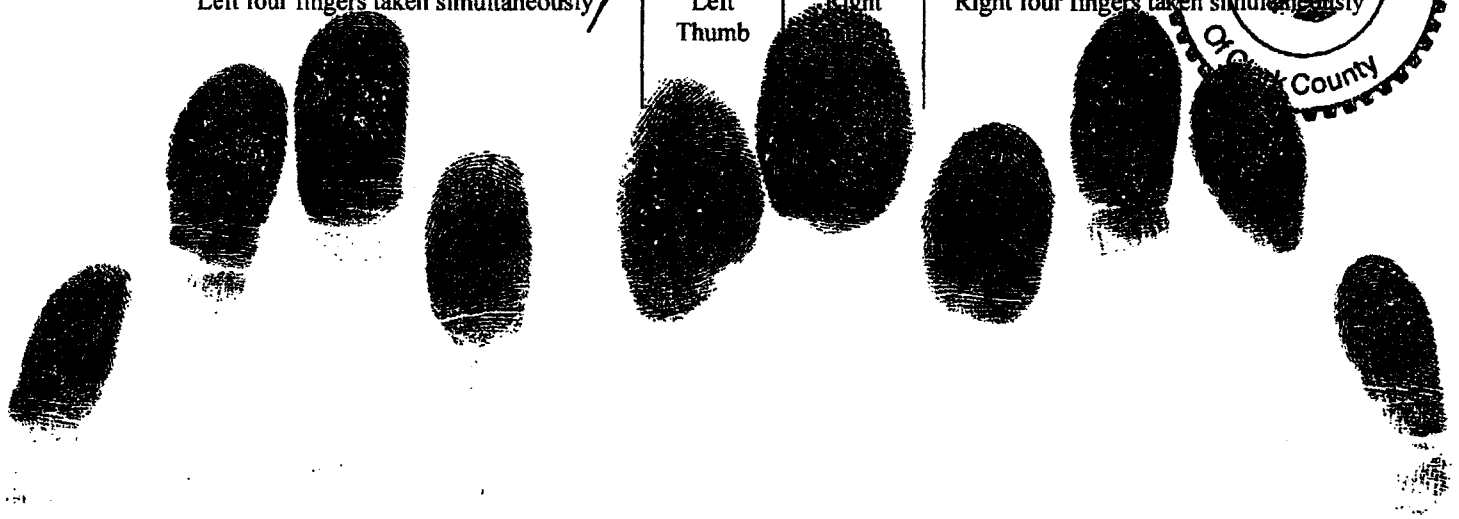


Left four fingers taken simultaneously

Left Thumb

Right

Right four fingers taken simultaneously



SUPERIOR COURT OF WASHINGTON - COUNTY OF CLARK

STATE OF WASHINGTON, Plaintiff,

v.

RYAN DEE WHITAKER,

Defendant.

SID: _____

DOB: 11/7/1953

NO. 11-1-01948-9

**WARRANT OF COMMITMENT TO STATE
OF WASHINGTON DEPARTMENT OF
CORRECTIONS**

THE STATE OF WASHINGTON, to the Sheriff of Clark County, Washington, and the State of Washington, Department of Corrections, Officers in charge of correctional facilities of the State of Washington:

GREETING:

WHEREAS, the above-named defendant has been duly convicted in the Superior Court of the State of Washington of the County of Clark of the crime(s) of:

COUNT	CRIME	RCW	DATE OF CRIME
03	CHILD MOLESTATION IN THE FIRST DEGREE	9A.44.083	1/1/2011 to 8/31/2011
04	CHILD MOLESTATION IN THE FIRST DEGREE	9A.44.083	1/1/2011 to 8/31/2011

and Judgment has been pronounced and the defendant has been sentenced to a term of imprisonment in such correctional institution under the supervision of the State of Washington, Department of Corrections, as shall be designated by the State of Washington, Department of Corrections pursuant to RCW 72.13, all of which appears of record; a certified copy of said judgment being endorsed hereon and made a part hereof,

NOW, THIS IS TO COMMAND YOU, said Sheriff, to detain the defendant until called for by the transportation officers of the State of Washington, Department of Corrections, authorized to conduct defendant to the appropriate facility, and this is to command you, said Superintendent of the appropriate facility to receive defendant from said officers for confinement, classification and placement in such correctional facilities under the supervision of the State of Washington, Department of Corrections, for a term of confinement of :

COUNT	CRIME	TERM
03	CHILD MOLESTATION IN THE FIRST DEGREE	89 Days /Months
04	CHILD MOLESTATION IN THE FIRST DEGREE	89 Days /Months

These terms shall be served concurrently to each other unless specified herein:

The defendant has credit for 70 days served.

The term(s) of confinement (sentence) imposed herein shall be served consecutively to any other term of confinement (sentence) which the defendant may be sentenced to under any other cause in either District Court or Superior Court unless otherwise specified herein:

And these presents shall be authority for the same.

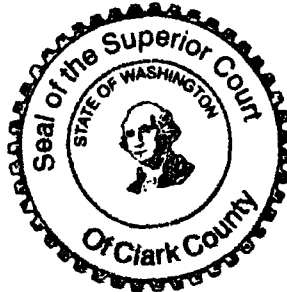
HEREIN FAIL NOT.

WITNESS, Honorable

R. Lewis

JUDGE OF THE SUPERIOR COURT AND THE SEAL THEREOF THIS DATE:

4/5/13



SCOTT G. WEBER, Clerk of the
Clark County Superior Court

By:

Scott G. Weber

Deputy

"APPENDIX A"
9.94A.507

STIPULATED CONDITIONS OF SENTENCE/COMMUNITY CUSTODY

1. You shall commit no law violations.
2. You shall report to and be available for contact with the assigned community corrections officer as directed.
3. You shall work at a Department of Corrections approved education program, employment program, and/or community service program as directed.
4. You shall pay a community placement/supervision fee as determined by the Department of Corrections.
5. You shall not have any direct or indirect contact with the victim, including but not limited to personal, verbal, telephonic, written, or through a third person without prior written permission from his community corrections officer, his therapist, the prosecuting attorney, and the court only after an appropriate hearing. This condition is for the statutory maximum sentence of 100 years, and shall also apply during any incarceration.

VIOLATION OF THIS ORDER IS A CRIMINAL OFFENSE UNDER CHAPTER 10.99 RCW AND WILL SUBJECT THE VIOLATOR TO ARREST; ANY ASSAULT OR RECKLESS ENDANGERMENT THAT IS A VIOLATION OF THIS ORDER IS A FELONY.


6. You shall not enter into or frequent business establishments or areas that cater to minor children without being accompanied by a responsible adult. Such establishments may include but are not limited to video game parlors, parks, pools, skating rinks, school grounds, malls or any areas routinely used by minors as areas of play/recreation.
7. You shall not have any contact with minors. This provision begins at time of sentencing. This provision shall not be changed without prior written approval by the community corrections officer, the therapist, the prosecuting attorney, and the court after an appropriate hearing.
8. You shall remain within, or outside of, a specified geographical boundary as ordered by your community corrections officer.
9. Your residence location and living arrangements shall be subject to the prior approval of your community corrections officer and shall not be changed without the prior knowledge and permission of the officer.
10. You must consent to allow home visits by Department of Corrections to monitor compliance with supervision. This includes search of the defendant's person, residence,

automobile, or other personal property, and home visits include access for the purposes of inspection of all areas the defendant lives or has exclusive/joint control or access. RCW 9.94A.631

11. Your employment locations and arrangements shall be subject to prior approval of your community corrections officer and shall not be changed without the prior knowledge and permission of the officer.
12. You shall not possess, use, or own any firearms or ammunition.
13. You shall enter into, cooperate with, fully attend and successfully complete all inpatient and outpatient phases of a Washington State certified sexual deviancy treatment program as established by the community corrections officer and/or the treatment facility. You shall not change sex offender treatment providers or treatment conditions without first notifying the prosecutor, community corrections officer and shall not change providers without court approval after a hearing if the prosecutor and/or community corrections officer object to the change. "Cooperate with" means you shall follow all treatment directives, accurately report all sexual thoughts, feelings and behaviors in a timely manner and cease all deviant sexual activity.
14. The sex offender therapist shall submit quarterly reports on your progress in treatment to the court, Department of Corrections, and prosecutor and you shall execute a release of information to the community corrections officer, prosecutor and the court so that the treatment provider can discuss the case with them. The quarterly report shall reference the treatment plan and include the following, at a minimum: dates of attendance, your compliance with requirements, treatment activities, and your relative progress in treatment.
15. During the time you are under order of the court, you shall, at your own expense, submit to polygraph examinations at the request of the Community Corrections Order and/or the Prosecuting Attorney's office (but in no event less than twice yearly). Copies shall be provided to the Prosecuting Attorney's office upon request. Such exams will be used to ensure compliance with the conditions of community supervision/placement, and the results of the polygraph examination can be used by the State in revocation hearings.
16. You shall submit to plethysmography exams, at your own expense, at the direction of the community corrections officer and copies shall be provided to the Prosecutor's Office upon request.
17. You shall register as a sex offender with the County Sheriff's Office in the county of residence as defined by RCW 9.94A.030.
18. You shall not use/possess sexually explicit material as defined in RCW 9.68.130(2).
19. If the offense was committed on or after July 24, 2005, you may not reside within eight hundred eighty (880) feet of the facilities and grounds of a public or private school. RCW 9.94A.030

The undersigned defendant agrees that he has read this Appendix A, or it has been read and explained to him; that he understands it, and has no questions about it.

Dated: 4/5/13

Signed: X 

Print name: <<DEFENDANT>>

Defendant