No. 46905-7-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JEREMY THOMAS STEVENS

Appellant.

APPEAL FROM THE SUPERIOR COURT

OF KITSAP COUNTY

Cause No. 13-1-01058-3

OPENING BRIEF OF APPELLANT

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III. STATEMENT OF THE CASE

A. Procedural History

Mr. Stevens was charged with six counts of rape of a child in the first and second degree, all involving SMN. Additionally, he was charged with a single count of child molestation in the third degree and sexual exploitation involving SMS. CP 44-52. After the presentation of the evidence and while preparing instructions outside the presence of the jury, the prosecutor indicated he intended to rely on a single act for each count involving the individuals and the court instructed the jury accordingly. RP 689:18–690:19; CP 174 (Instruction Number 6). It reads as follows:

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

This instruction was given after the state initially offered a "Petrich" instruction, changed its mind, and stated that it would be relying on specific acts for specific counts. RP 711:21–715:3. While the defense conceded the prosecutor could choose to elect, it objected to the "to-convict" instructions covering an expansive time period, as opposed to a single event. RP 715:9–717:4; CP 181-183. (See attachments 1-3; Instructions 13, 14 & 15). As a result, the defense

took exception to the giving of the instruction, as well as objecting to the court's failure to give a *Petrich* instruction[1]. RP 718:12-15.

Almost immediately, the state then began an argument that was virtually at odds with the very election instruction that it had proposed and received. RP 725-735. Rather, than electing conduct for a particular charge, it argued that counts III and IV were alternatives to counts I and II. RP 734:19–735:18. The defense objected. RP 735:19-21. After hearing argument, the court then allowed the state to argue these as alternatives, describing counts I and III as the "birthday incident" and counts II and IV as the "babysitting incident". RP 747:1-13. Count V was designated as the "fair incident" and count VI as the "pre-Thanksgiving incident". RP 747:18-25. Counts VII and VIII, which involve SMS, correspond to the "fair incident".

During deliberations, the jury sent five separate notes to the court for clarification involving the counts. CP 163-165; 209-10. One of the questions involved the very issue noted above, wherein the jury asked if counts 3, 4, 5, and 6 corresponded to specific incidents, to which the court responded in the affirmative that the jury had to address specific conduct in counts III-VI. CP 163. A subsequent note again demonstrated confusion as to what the state was required to prove as it related to count III (the "birthday incident"). CP 210.

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[1] *State v. Petrich*, 101 Wn.2d 566, 693 P.2d 173 (1984). WPIC 4.25. The *[State] [County] [City]* alleges that the defendant committed acts of (identify crime) on multiple occasions. To convict the defendant *[on any count]* of (identify crime), one particular act of (identify crime) must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of (identify crime). WPIC 4.25.

The jury ultimately found Mr. Stevens not guilty of two counts of rape of a child in the first degree (counts I and II), rape of a child in the second degree as charged in count VI (pre-Thanksgiving incident), as well as child molestation in the third degree as charged in count VII. He was found guilty of rape of a child in the second degree as charged in counts III, IV and V and sexual exploitation as charged in count VIII. The jury also answered "yes" to the special verdict form alleging aggravating factors for counts III-V. CP 205-07. The aggravating factor in this case was that there were multiple instances over a prolonged period of time. CP 259-260. The actual special verdict forms read, "Did the defendant, Jeremy Thomas Stevens, engage in an ongoing pattern of sexual abuse with the victim SMN?" CP 205-07.

Based on the aggravating factor, Mr. Stevens was sentenced above the guideline range to a minimum term of 320 months in prison based on the jury's finding that an ongoing pattern of sexual abuse occurred. CP 245-260. The actual sentencing range was 210-280 months. CP 259.

B. Facts

Jeremy Stevens met SMN when she was a young child. He was a friend of her mother, Shannon Chapman. The friendship evolved into an affair which ended in animosity. It was after the end of this relationship that Mr. Stevens was stung by these allegations, which included allegations that he was having a sexual relationship over an extended period of time with SMN.

Specifically, SMN testified that she began having sex with Mr. Stevens on the day of her 11th birthday in April 2012. RP 361:5-6. She was born on

April 28, 1999. RP 173:21-23. The accusations were made to the investigating agency in the spring of 2013 when she was in the eighth grade, just prior to turning 14 years of age, as acknowledged by her step father, Sean Chapman. RP 175:1-25. Prior to this time, beginning in 2012, when she was beginning junior high school, she began to grow apart from her parents, she confided in Mr. Stevens, who then informed the Chapmans. RP 186:1-187:8. No other problems were apparent. RP 187:8-10. The first time Mr. Chapman had any indication that there was anything unusual going on between his step-daughter and Mr. Stevens was around Thanksgiving in 2012, when his wife, Shannon Chapman, mentioned it. RP 187:14-23. It was just after Mr. Stevens became a long haul trucker beginning in the fall of 2012. RP 188:913. This was immediately after the Kitsap Fair, when she had stayed at the Stevens' family residence. RP 190:9-12. As Mr. Chapman testified, the last time his step-daughter stayed at Mr. Stevens' residence to babysit was prior to him becoming a trucker. RP 189:19-29.

SMN's statements differed dramatically as to the when and how long the alleged abuse started, saying it lasted over a period of three years, starting on her birthday and the next time happening a couple of weeks later. RP 382:20-24; RP 369:1-6. She referenced her 11th birthday as to when it happened. RP 361:5-6. She remained consistent that the birthday she was referring to was when she turned 11 years of age and she never deviated from that date. RP 411:14-25.

She was, however, consistent that any abuse occurred when Mr. Stevens worked at Waste Management and rented a particular residence known as the Bielmeier residence. RP 414:11-23. Her mother, Shannon Chapman, confirmed this period of time. RP 265:19-24. Mr. Stevens rented the residence from October 2011 thru May 2013. RP 634:13-15. His belongings were moved out after his then girlfriend, Brandi Jo McKenzie, was found staying in the residence and was kicked out by the Chapmans after an argument including severe name calling. RP 617:16-622:10.

While she testified that there were multiple instances of sexual contact/intercourse, she indicated a few instances that corresponded with specific events. As mentioned above, one was on her birthday and then two weeks later. A subsequent incident corresponded with the Kitsap County Fair, occurring in August of 2012. RP 384-394. Finally she testified as to an incident that occurred around Thanksgiving in 2012, but stated it happened too many times to count when she was visiting him after the fair incident. RP 435:1-10. As noted above, her step-father testified she never stayed with him after the weekend fair.

As it relates to the sexual exploitation charge involving SMS, there was conflicting testimony as to what, if anything happened. SMS was born on June 12, 1998. RP 287:23. Thus, she would have been 14 at the time of the 2012 fair. She met Mr. Stevens thru SMN. RP 292:24. At trial SMS testified that she and SMN stayed at Mr. Stevens' parents' house the night before the fair. RP 303: 12-16. She also testified that Mr. Stevens arrived at approximately 8:00 p.m.

that evening and made himself a drink. RP 304:6-24. In actuality, he was working that day and did not arrive until approximately 11:30-12:00. RP 580:19-22. His father met him and he picked up his daughter and left immediately. RP 580:23-581:10. RP 660:10-24. His testimony that he did not stay at the residence was consistent with Sean Chapman's testimony that he was at the house in the morning when Mr. Stevens arrived and they had a cigarette together. RP 196:3-23.

SMS, however, testified that after Stevens' parents went to bed, she and SMN were alone with Mr. Stevens in the living room of the residence. RP 305:3-24. Mr. Stevens went outside to smoke, followed by SMN, then SMS. RP 309:1-24. She then indicated that Mr. Stevens performed oral sex on SMN while she, at his request, kissed her. RP 310:1-25. After they returned inside she testified that he asked them to "do stuff" and SMN penetrated her with her finger while Mr. Stevens watched. RP 316:1-14. She acknowledged previously stating that he never observed anything. RP 330:15-18. It was also inconsistent with SMN's testimony wherein she stated nothing at all happened inside the residence and the only thing that happened outside with SMS was that she kissed her. RP 396:10-397:9. She further testified that Mr. Stevens never penetrated her in the backyard, but that he rubbed "his tongue on the outside of [her] vagina". RP 394:9-21. The next day (Saturday) they all went to the Kitsap County Fair. RP 398.

SMN testified that the last time there was any sexual contact was prior to Thanksgiving of 2012. RP 399:22-24. However, this was inconsistent with her

step-father's testimony that she had no contact with Mr. Stevens after August. RP 189:19-29. It also diverged with Mr. Stevens' testimony that he was at a trucking school during this time period. RP 590:19-22. RP 648:16-652:9. She was consistent that whenever there was sexual contact of any kind Mr. Stevens was working at for Waste Management. RP 415:7-19. Mr. Stevens, however, only worked at Waste Management from July 7 to August 28, 2012. RP 635:3-4. This was verified by reviewing his employment records. RP 647:15-19.

Mr. Stevens denied all of the allegations. He indicated, with support from his father, that he merely stopped by the house to pick up his daughter on the night prior to the fair as it relates to this allegation. RP 657:17-660:9. He testified that the accusations occurred after having an affair with SMN's mother, which started in July 2012 and ended in August 2012. RP 629:20-633:11. As mentioned above, he testified that he only worked at Waste Management from July to August of 2012 and that he was at the trucking school from October to December of 2012.

Ultimately, he was found guilty of three counts of rape of a child in the second degree, two of which correspond with the birthday incident, but at a different time than what SMN testified. The third conviction is referenced as the fair incident. Additionally, he was found guilty of sexual exploitation of a minor, with SMS as the victim. This was based on the testimony involving the fair incident in August of 2012. Mr. Stevens appeals.

IV. ARGUMENT

A. THE COURT SHOULD REVERSE THE CONVICTIONS BECAUSE THERE WAS INSUFFICIENT EVIDENCE INTRODUCED TO SUPPORT A CONCLUSION THAT MR. STEVENS COMMITTED THE ACTS FOR WHICH HE WAS CONVICTED.

As this court is aware, due process requires the state to prove its case beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). When challenging the sufficiency of evidence, this court must determine:

> Whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

State v. Weisberg, 65 Wn.App. 721, 724, 829 P.2d 252 (1992). See also *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980); *State v. Gallagher*, 112 Wn.App. 601, 612, 51 P.3d 100 (2002) (citations omitted). "A defendant's claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from the evidence." 112 Wn.App. at 613 (citations omitted).

Substantial evidence must exist to support the State's case. *Id.* Substantial evidence is evidence that "'would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.'" *Id.* Thus, to convict Mr. Stevens of the three counts of child rape as alleged in counts III, IV and V, the state was required to prove that Mr. Stevens had sexual intercourse with SMN on the respective instances based on the prosecutor's decision to elect. CP 181-183. And, because the state opted to instruct the jury

as to specific instances, it was incumbent on the state to present substantial evidence as to each.

(i) The State Failed to Prove Beyond a Reasonable Doubt That Mr. Stevens Engaged in Sexual Intercourse with SMN on Her 12th Birthday and Two Weeks Later as was Required in Relation to Counts III and IV.

In addressing the evidence related to counts III and IV, the court must consider the evidence in relation to the State's decision to elect specific acts to specific charges. As the court is aware, this instruction was given over defendant's objection and further discussion resulted after the State attempted to deviate from the instruction at the beginning of its argument. Once the prosecutor chose to elect in this situation, which involved multiple acts, it was required that he prove that specific act beyond a reasonable doubt. *State v. Kitchen,* 110 Wn.2d 403, 411, 756 P.2d 105 (1988)(see also *State v. Kier,* 164 Wn.2d 798, 194 P.3d 212 (2008)).

SMN was adamant that any sexual intercourse related to her birthday as referenced in counts III and IV occurred when she was 11 years old, which would have formed the basis for a conviction on counts I and II. At no time did she testify that he had intercourse with her on her 12th birthday, which forms the basis for the convictions on counts III and IV. And, while she testified that all of the conduct occurred while Mr. Stevens was employed at Waste Management, the undisputed evidence was that he only worked there between July and August 2012, which was several months after SMN's birthday, which is in April. As such, the state failed to prove the elements of counts III and IV beyond a reasonable doubt and the court should reverse the convictions.

(ii) The State Failed To Prove Beyond A Reasonable Doubt That Mr. Stevens Engaged in Sexual Intercourse with SMN During the Fair Incident (Count V).

Count V was characterized as the "fair incident". Mr. Stevens was charged with rape of a child in the second degree under this count. However, SMN consistently testified that there was no penetration during this time frame: thus, there was no evidence to support a conviction of child rape. Specifically, she testified in response to the prosecution that he never went inside her vagina, only rubbing his tongue on the outside. RP 394:9-15. She confirmed this on cross examination and further indicated that nothing else of a sexual nature occurred. RP 427: 9-19.

Intercourse was defined as:

> ...the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight or any penetration of the vagina or anus however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex, or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

CP 176 (Instruction Number 8).

As there was no evidence as to penetration and the alleged contact is vague as to specifically where the contact occurred, the court should reverse count V, which charged Mr. Stevens of the crime of rape of a child in the second degree related to the "fair".

(iii) The State Failed To Prove Beyond A Reasonable Doubt That Mr. Stevens Aided, Invited, Employed, Authorized or Caused SMS to Engage In Sexually Explicit Conduct (Count VIII).

In order to convict Mr. Stevens of the crime of Sexual Exploitation of a Minor, the state was required to prove that Mr. Stevens aided, invited, employed, authorized or caused a minor [SMS] to engage in sexually explicit conduct, knowing that such conduct would be part of a live performance. RCW 9.68A.040(1)(b); CP 196 (Instruction #28).

The testimony as it relates is entirely inconsistent between SMS and SMN. SMS testified that Mr. Stevens told the two "to do something" and she then engaged in digital penetration with SMN. Despite acknowledging that she had previously stated that Mr. Stevens was not present, she testified at trial that he was on the stairs and able to observe. Perhaps more importantly, SMN denies that there was any request "to do something" and they all simply went to bed. Under this situation, there was not enough evidence to prove the charge beyond a reasonable doubt.

Specifically, in *State v. Chester*, 133 Wn.2d 15, 940 P.2d 1374 (1997), the Washington Supreme Court held that there must be some affirmative act by the defendant to cause the minor to engage in sexually explicit conduct. As in *Chester*, none is present here. While there is some indication that Mr. Stevens requested that the two do something, there is no request that they engage in sexually explicit conduct. As such, the court should reverse this conviction. *Cf State v. Stribling*, 164 Wn.App. 867, 267 P.3d 403 (Div. 2, 2011)(reversing

conviction where there is no evidence that defendant caused the sexually explicit behavior).

Finally, while SMS changed her testimony as to Mr. Stevens' presence, there is nothing to suggest that he actually witnessed any alleged sexually explicit conduct. In fact, taking her testimony at face value, Mr. Stevens actually questioned them as to whether it happened, stating, "He came down from the stairs. He was, like—he was, like, 'So you guys did it.' And Shania answered 'Yeah.' And that's all I remember at the time." RP 316:17-19. Moreover, SMN completely denies that any sexual conduct occurred or that there was a request. The inconsistencies between her own statement, as well as the complete contradiction with SMN's testimony, compels a reversal of this count. See *State v. Alexander*, 64 Wn.App. 147, 822 P.2d 1250 (1990).

In *Alexander*, the Court of Appeals reversed the defendant's conviction because the alleged victim's testimony was so filled with extreme inconsistencies that the jury could not possibly have found the elements of the charge beyond a reasonable doubt. In that case, the alleged victim directly contradicted herself about whether an incident ever occurred. 64 Wn.App at 589. Her testimony also was contradicted by her mother's as it related to the time frames she was even in contact with the alleged abuser. *Id.*

Similarly, in this case there is an extreme inconsistency between the testimony of SMN and SMS as to whether any sexual contact occurred between the two that is used as the basis for the conviction. SMN says there was not. SMS says there was. Additionally, SMS has changed her testimony as to

whether Mr. Stevens was even present at the time, which would be the basis of a "live performance". Under this scenario, the court should hold that the evidence was insufficient and reverse the conviction.

C. THE COURT SHOULD REVERSE THE CONVICITONS FOR RAPE BECAUSE THE TO CONVICT INSTRUCTIONS ERRONEOUSLY ALLOWED THE STATE TO SEEK A CONVICTION OUTSIDE OF THE ACTS CHARGED, THUS THE INSTRUCTIONS FAILED TO ENSURE JURY UNANIMITY.

In a multiple acts case, the State must either clearly elect the conduct forming the basis of each charge or the court must instruct the jury to agree on a specific criminal act. *Kier, supra,* at 811. When there is a failure to make a proper election and the trial court fails to instruct the jury on unanimity, there is constitutional error, resulting from the possibility that some of the jurors may have relied on one act or incident and some on another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. *Kitchen, supra,* at 411.

Here, the state never made a proper election. Instead, while stating it was relying on specific acts for each count, the to-convict instruction for each charge (CP 181-184) allowed for convictions for each count over a two year time period. While the parties argued that each count corresponded with specific events during closing argument, the jury was nevertheless confused as to whether it had to find a specific act constituted the particular count. Indeed, on the very first day of deliberation, the jury sent out a question as to whether it had to find a specific act related to each count. CP 163. Notwithstanding the

court's answer in the affirmative, it followed with a second question on the following day, asking the same question as to count III. CP 210.

Because of the jury's confusion, the possibility remains that they were not unanimous as to the act forming the conviction for each count. Thus, Mr. Stevens was denied his constitutional right to a unanimous verdict on each of the counts. The court should reverse.

D. THE COURT SHOULD REVERSE THE EXCEPTIONAL SENTENCE BECAUSE THE STATE WAS RELIEVED OF PROVING THE AGGRAVATING FACTOR BEYOND A REASONABLE DOUBT WHEN THE TRIAL COURT ERRONEOULSY OMITTED STATUTORY LANGUAGE THAT ANY ABUSE NEEDED TO EXTEND OVER A "PROLONGED PERIOD OF TIME".

Jury instructions "must make the relevant legal standard manifestly apparent to the average juror." *State v. Borsheim*, 140 Wn.App. 357, 366, 165 P.3d 417 (2007)(citations omitted).

As previously stated, due process places the burden on the State to prove every element of a crime beyond a reasonable doubt. *Victor v. Nebraska*, 511 U.S. 1, 5, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994). "A corollary of the due process requirement that a jury find proof beyond a reasonable doubt in order to return a verdict of guilty is that it must return a verdict of not guilty if the State does not carry its burden. This same due process requirement is applicable when the State seeks to enhance a sentence beyond statutory guidelines by use of an aggravating factor." *Blakely v. Washington,* 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

"It is reversible error to instruct the jury in a manner relieving the State of its burden." *Smith*, 174 Wn.App. at 366. The court reviews *de novo* a challenged jury instruction. *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). In considering the instruction at issue all of the "instructions, read as a whole, 'must make the relevant legal standard manifestly apparent to the average juror'." *State v. Kyllo*, 166 Wn.2d 856, 865, 215 P.3d 177 (2009) (*quoting State v. Walden*, 131 Wn.2d 469, 473, 932 P.2d 1237 (1997)). The court is also to consider statutory interpretation in its de novo review. *State v. Hacheney,* 160 Wn.2d 503, 512, 158 P.3d 1152 (2007)(*cert. denied* 128 S.Ct. 1079 (2008).

RCW 9.94A.535 sets forth the aggravating factors that the jury may consider in determining a whether an exceptional sentence is appropriate. It provides in relevant part:

> (3) The trial court may impose an aggravated exceptional sentence under the following circumstances:
>
> (g) 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).

Here, the challenged special verdict form failed to take into consideration the requisite statutory language. Specifically, it only required the jury to make a finding that Mr. Stevens engaged in an ongoing pattern of sexual abuse with SMN. CP 205-07. As a result, the jury only had to find that there was an ongoing pattern of sexual abuse. Without any reference to a "prolonged

period of time" the special verdict form allowed the finding to be made without any regard to the time period required by the statute[2]. As a result, the special finding was made without requiring the state to prove it beyond a reasonable doubt, thus relieving the State of its burden. The sentence should be reversed.

V. CONCLUSION

Based on the above points and authorities, Mr. Stevens requests that this court reverse his conviction in whole or in part and remand to the trial court for further proceedings consistent with this opinion.

DATED this 27 day of May, 2015.

HESTER LAW GROUP, INC., P.S.
Attorneys for Appellant

By: _____
WAYNE C. FRICKE
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[2] The defense had proposed the appropriate language in its instructions, but did not give those forms to the jury. CP 147-155.

CERTIFICATE OF SERVICE

Lee Ann Mathews, hereby certifies under penalty of perjury under the laws of the State of Washington, that on the day set out below, I delivered true and correct copies of the opening brief of appellant to which this certificate is attached, by United States Mail or ABC-Legal Messengers, Inc., to the following:

Randall Avery Sutton
Kitsap County Prosecutor's Office
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Jeremy T. Stevens
DOC #376553
Airway Heights Corrections Center
P.O. Box 1899
Airway Heights, WA 99001-1899

Signed at Tacoma, Washington this 27th day of May, 2015.

Lee Ann Mathews

INSTRUCTION NO. 13

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

(1) That on or between April 28, 2011 an April 27, 2013, the defendant had sexual intercourse with SMN;

(2) That SMN was at least twelve years old but was less than fourteen years old at the time of the sexual intercourse and was not married to the defendant;

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

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

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

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

INSTRUCTION NO. 14

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

(1) That on or between April 28, 2011 an April 27, 2013, the defendant had sexual intercourse with SMN;

(2) That SMN was at least twelve years old but was less than fourteen years old at the time of the sexual intercourse and was not married to the defendant;

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

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

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

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

INSTRUCTION NO. 15

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

(1) That on or between April 28, 2011 an April 27, 2013, the defendant had sexual intercourse with SMN;

(2) That SMN was at least twelve years old but was less than fourteen years old at the time of the sexual intercourse and was not married to the defendant;

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

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

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

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

EXHIBIT
3

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