

66766-1

66766-1

NO. 66766-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

BRIAN STARK,

Appellant.

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2012 AUG 23 PM 3:41  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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**REPLY TO STATE'S RESPONSE TO APPELLANT'S  
ADDITIONAL GROUNDS ON APPEAL**

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BRIAN STARK  
PRO SE  
Washington Correctional Center  
P.O. Box 900  
Shelton, WA 98584

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**A. STATEMENT OF CASE**

**1. PROCEDURAL FACTS**

On April 24, 2012, Appellant BRIAN STARK filed a pro se *Supplemental Grounds on Appeal* in this matter. On June 4, 2012, the State was asked to respond by Commissioner MARY NEEL. The State responded to the appellant's fourteen issues and Mr. STARK replies.

**2. SUBSTANTIVE FACTS**

Mr. STARK relies on the facts presented in *Appellant's Opening Brief* and his *Supplemental Grounds on Appeal*. Any additional facts will be stated in the arguments below if needed.

**B. ARGUMENT AND POINTS OF AUTHORITY.**

**1. MR. STARK'S RIGHT TO AN OPEN TRIAL WAS VIOLATED WHEN THE COURT REMOVED DEFENDANT WHILE THE ATTORNEYS INTERVIEWED THE STATE'S FIRST WITNESSES IN COURT FOR SUBSEQUENT MOTIONS.**

Mr. STARK has objected to the State's surprise witness testimony on the first day of trial when the State was about to call its first witnesses (i.e., "trauma narrative" in counseling sessions attended by ROBIN and KAILEI JORDAN). The jury was left in the jury room and Mr. STARK was taken away while the attorneys interviewed the witnesses in a courtroom with a court reporter. Issues of admissibility of the testimony and discovery of the counseling records were deferred. The State argues that

Mr. STARK "appears to argue that he was denied an open and public trial because the parties conducted a mid-trial witness interview outside the presence of the appellant, the jury, and the public." (*St. Resp.*, p. 3).

The State further argues that a criminal defendant who is represented by counsel does not have the right "to attend a pretrial preparatory/investigative interview of a witness." (*St. Resp.*, p.4). However, these interviews were not pretrial - these interviews were at trial.

Article I, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution guarantee a criminal defendant the right to a public trial. Article I, section 10 of the Washington Constitution provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." This provision guarantees the public and the press the right to open and accessible judicial proceedings. *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). After the court weighs the *Bone-Club* factors, it must enter specific findings justifying its closure order. *Easterling*, 157 Wn.2d at 175. As noted by the Washington Supreme Court:

Just as we would not consider a proceeding normally conducted in a courtroom and subject to the open courts provision to be free of the requirements of article I, section 10 merely because it

was held in a different location, we do not conclude that use of a courtroom controls the issue of application of the constitutional provision in the case of a deposition taken in an empty courtroom for convenience of staff. The place, in and of itself, does not dictate whether the right of access under article I, section 10 exists.

*Tacoma News, Inc. v. Cayce*, 172 Wn.2d 58, 69, 256 P.3d 1179 (2011) (the *Cayce* court held that a deposition conducted in court was not subject to Sec. 10 because "It was not submitted in connection with any motion." *Cayce*, 172 Wn.2d at 70.).

In this case, the interviews of the JORDANS was conducted in a different courtroom with trial court's reporter during trial. The court recessed to allow the interviews for purposes of continuance and further discovery. In *State v. Sadler*, 147 Wn.App. 97, 114, 193 P.3d 1108 (2008), Division 2 recognized the public trial right applies to evidentiary phases of the trial as well as other "adversary proceedings," including suppression hearings during voir dire and during the jury selection process. See also *Ayala v. Speckard*, 131 F.3d 62, 69 (2d Cir.1997); *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (Thus, a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, and during voir dire).

The interviews of the JORDANS occurred immediately before the State put on its first witnesses at trial (i.e., the JORDANS). The "trauma narrative" testimony was a surprise. The need for defense

investigation and preparation, the admissibility of counseling records, whether any privilege was waived in using counseling records, the scope of any waiver, discovery of related counseling records and defense review of counseling records by a defense expert as left opened. It was the prosecutor who raised these issues which were never re-raised by the defense attorney:

CARLSTROM: Given that this occurred in the context of counseling, there is obviously some question about whether I am entitled to those records, whether Caitlin would be willing to allow me to see them, knowing that they would have to be turned over to the defense, or whether she just is plain adamantly opposed to anyone looking at them, and, therefore, has some statutory rights that she needs to be able to exercise. . . .

10/14/10 RP 54.<sup>1</sup>

The trial court took a recess for interviews and discovery of facts and argument on those issues. The "trauma narrative" was ultimately admitted without addressing the issues set out by court and counsel. The interviews were adversarial in nature and a fact-finding mission, not an exercise addressing "purely ministerial or legal issues." See *State v. Rivera*, 108 Wn.App. 645, 653, 32 P.3d 292 (2001).

In light of the circumstances of this case, the court should have not closed the courtroom or, minimally, the trial court should have gone

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<sup>1</sup> Two transcripts for 10/07/10 and 10/14/10 proceedings were combined by the court reporter. The 10/07/10 transcript ends on page 46 where the 10/14/10 transcript begins.

through the *Boneclub*<sup>2</sup> factors in closing the courtroom.

2.. **DEFENSE PREPARATION FOR CROSS-EXAMINATION COULD NOT HAVE BEEN ADEQUATE WITHOUT REVIEW OF THE COUNSELING RECORDS.**

Mr. STARK questions the admissibility of the victim's "trauma narrative" after trial had begun. Mr. STARK correctly argues he was denied the opportunity to adequately prepare for trial and the cross-examination of State's witnesses testifying about "trauma narrative." On the first day of presenting witnesses at trial, the prosecutor informed the court and the defense that the victim, C.W., had completed a "trauma narrative" which she read to witnesses ROBIN and KALEI JORDAN prior to trial - something that was supposedly not recalled by either witness in the defense interview prior to trial. 10/14/10 RP 47-48. Counsel expressed various concerns about proceeding with the witnesses' testimony without further addressing this with them, and perhaps obtaining a copy of the trauma narrative itself. 10/14/10 RP 47-48, 52-53.

After the JORDANS' interviews, defense counsel informed the trial court that he could be ready to cross-examine both witnesses around 2:30 or 3:00 p.m. the same day (something that was ineffective in itself since he had not seen the counseling records or done any other

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<sup>2</sup> *State v. Bone-Club*, 128 Wn.2d 254, 906 P.2d 325 (1995).

investigation). 10/14/10 RP 56. No counseling records were forthcoming other than the "trauma narrative" the State wanted to introduce into evidence. *Supp.'l Grounds, List of Exhibits*, No. 13, p. 3). The State argues that "Appellant has failed to identify any specific prejudice that resulted from the unintentional late disclosure of this material, nor has he identified any claim of prejudice or inadequate preparation by defense counsel after the parties had time to investigate this new information." *St. Resp.*, p. 6. Here is the prejudice.

Defense counsel failed to obtain critical counseling records or do any investigation regarding the "trauma narrative". C.S. made a "trauma narrative" for friends. This became a central piece of the State's case.<sup>3</sup>

Defense counsel was obligated to investigate and raise any challenge to "trauma narrative" that existed. Since the theory is a treatment model and not a diagnostic tool to show sexual assault it was highly prejudicial. If defense counsel had done minimal research he would have found that "trauma narrative" is a treatment model, not a

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<sup>3</sup> This case came down to the credibility of C.S. versus Mr. STARK who steadfastly denied the charges. It was established that C.S. voiced hostility against BRIAN STARK, her step-father, who she resented for setting rules. 10/20/10 RP 94. C.S. also gave inconsistent reports and had vague recall. 10/14/10 RP 48 ("... there was a lot of emotions and processing what she had told us, like I said before, where she was so vague . . ."). The trauma narrative became important although no expert explained its function in counseling, limits, and possibility of abuse.

diagnostic tool:

According to Mr. Kromidas, the TFCBT model (*Trauma Focused Cognitive Behavioral Therapy*) works on alleviating or decreasing trauma-related symptoms by helping the child change the way he thinks about past trauma. . . . Another component of this treatment includes teaching the child relaxation skills. . . . Eventually, the child gets to the point of developing a trauma narrative, which is the child's subjective recollection of his experience of trauma. In developing a trauma narrative, the child is empowered to identify his past traumas and then, with the support of his therapist and caregiver, correct what Mr. Kromidas called "cognitive distortions" in which the child feels guilt, shame, self-blame. . . .

*In re Aiden S.*, \_\_ A.3d \_\_, WL 1367031, \*8 (Conn.Super., 2011).

To what extent "cognitive distortions" were found with C.S. in counseling is unknown. However, there is certainly the ability to mislead with such a tool.

In one case, *State v. Velez*, WL 338286 (Ohio App. 9 Dist., 2010), a therapist learned "during the development of this 'trauma narrative' " that the alleged victim, A.W., indicated she had lied about Velez molesting her and that she "kept calling herself a liar." A.W.'s mother testified that she believed A.W.'s recantation to be truthful and that she had been working with A.W. to develop a "trauma narrative" in which she described the specific things that happened to her. Neither the trial court or appellate court accepted the trauma narrative for post-conviction relief.

Defense counsel must, " 'at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how

best to represent [the] client.' " Records were not obtained or requested by defense counsel, he did not interview the counselor at whose behest the "trauma narrative" was developed, he did not find out the scope and design of the method, he did not see how many drafts/corrections were made to the trauma narrative (was it a work in progress? over what period of time?) and he failed to research or consult with his own expert. Minimally, STARK was deprived of effective assistance of trial.

**3. " TRAUMA NARRATIVE" TESTIMONY WAS IMPROPERLY ADMITTED.**

The State argues that C.W.'s "trauma narrative" was properly admitted. The Government attempts to distinguish *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) claiming that "rape trauma syndrome" was inadmissible because such evidence "constitute(d) an opinion as to the guilt of the defendant, thereby invading the exclusive province of the finder of fact." *St. Resp.*, p.7. While this is true as far as it goes, *Black* further elucidated the prejudice inherent in the presentation of the treatment model of "rape syndrome" - i.e., that the prejudice from theories like "rape trauma syndrome" is especially acute where an expert, who carries "an aura of special reliability and trustworthiness," uses the term "rape trauma syndrome" because it " 'connotes rape.' " *Black*, 109 Wn.2d at 349, 745 P.2d 12 (*quoting State v. Saldana*, 324 N.W.2d 227, 230 (Minn.1982), and *State v. Taylor*, 663 S.W.2d 235,

241 (Mo.1984)). It is the connotation of rape from "trauma narrative" testimony that garners prejudice.

The State misses another point. The prosecutor is not allowed to buttress C.W.'s testimony with evidence of counseling and participation in counseling thereby implying that C.W. suffered from molestation by STARK. At least this was the result in *State v. Roderiques*, 656 A.2d 192 (R.I., 1995). In that case the defendant was convicted of two counts of second-degree child molestation of Donna G. and he appealed. The defense called a witness named Ms. Mueller concerning the child victim's drawing and Mueller's diagnosis as it related to that drawing on direct examination. The State, in effect, made Mueller its own witness and then elicited from her the equivalent of expert testimony that the victim's behavior was consistent with that of a sexually abused child and that defendant was most likely the one responsible for the alleged abuse.

This testimony was not essential to Mueller's diagnosis or treatment of Donna G. but rather served to corroborate Donna's testimony. The Rhode Island Supreme Court concluded that Mueller's testimony amounted to impermissible bolstering of the complainant's testimony and that such testimony was highly prejudicial to defendant. The court reversed. The same is true in STARK'S case. The State offered testimony through its first two lay witnesses regarding "trauma narrative" and statements made within

that counseling. Aside from the fact that defense counsel failed to investigate and/or research "trauma narrative" testimony, the defense attorney failed to object to the "trauma narrative" testimony. The appellate court should reverse and remand for new a trial to correct the prejudice.

**4. THE TRIAL COURT SHOULD HAVE CONDUCTED AN  
IN CAMERA REVIEW OF COUNSELING RECORDS.**

The Government next argues that an *in camera* review of counseling records was unnecessary because "no other counseling records were requested by either party" although "there was some limited discussion about C.W.'s counseling records beyond the trauma narrative." *St. Resp.*, p.8. In other words, the Government highlights the ineffectiveness of defense counsel by implication.

In *State v. Kalakosky*, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993), the court evaluated whether the trial court should have conducted an *in camera* review of a sexual assault victim's counseling file, which is subject to a qualified privilege by statute. (RCW 70.125.065 requires a written motion and affidavits setting forth specifically the reasons why the defendant is requesting discovery.) The *Kalakosky* court concluded, based upon the statutory language, that "before a rape victim's privacy should be invaded by a review of crisis center counseling notes ... the defendant must make a particularized

showing that such records are likely to contain material relevant to the defense." *Kalakosky*, 121 Wn.2d at 550. The *Kalakosky* court concluded that the motion in that case, which stated only that the counseling notes " 'may contain details which may exculpate the accused or otherwise be helpful to the defense,' " did not make the required particularized showing. *Id.* at 544, 550. See also *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n. 15, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). There must be a " 'plausible showing' " that the information will be both material and favorable to the defense.

In *Ritchie, supra*, the defendant was prosecuted for sexually abusing his daughter. He argued that his daughter's Children and Youth Services (CYS) file might contain the names of favorable witnesses or other exculpatory evidence, and thus, that the trial court erred in refusing to conduct an *in camera* review of the CYS file. *Ritchie*, 480 U.S. at 44. Even though it was impossible to say whether any information in the CYS records would actually support Ritchie's arguments, the Court held that the defendant was entitled to have the file reviewed by the trial court to determine whether it contained information that probably would have changed the outcome of Ritchie's trial. *Id.* at 57-58.

In Mr. STARK'S case the prosecutor established "materiality" for review of the records:

CARLSTROM. . . You know, it (the trauma narrative) **also potentially raises some additional questions about the extent to which other counseling records may or may not be in play, et cetera.** So, with apologies to the Court, obviously, with apologies to the jurors, I don't see any way to proceed other than going forward in that fashion. I mean, I'm in a position, frankly, that is not of my doing but that nevertheless leaves me in a spot where I don't know how to conduct witness examinations of some of the critical characters in this case until I've had an opportunity to do some additional investigation based on what we started to learn as of 8:30 this morning.

10/14/10 RP 55.

The materiality of the records was shown by the State and the court allowed time to the State to review the records. In discussions on recessing and returning to trial the defense mentioned the importance of the counseling records for cross examination:

MERYHEW. . . But I could not effectively cross-examine those witnesses today before probably about 2:30 or 3:00. "And even then, that might be a little guarded unless we had a better understanding of the counseling records. And that assumes that the Court told Mr. Carlstrom that he wasn't going to get those records and to forget about it. . .

10/14/10 RP 56.

In light of defense counsel's admitted ignorance of any counseling records, part of which were offered into the evidence by the State, it was incumbent upon him to investigate and review the records,

interview the counselor as to the purpose and instructions regarding the records, figure out what the "trauma narrative" was all about, and consider his own expert.

**5. RCW 9A.44.120 REQUIRED A HEARING ON CHILD HEARSAY.**

Mr. STARK also assigns error to the admission of C.W.'s statements under the age of ten. The Government argues that STARK called his wife (DANNELLE STARK) and asked her about her C.W.'s statements at an estimated age of eleven or twelve. *St. Resp.* p.9. Thus, the Government argues, no hearing under RCW 9A.44.120 was needed because it only applies to statements made by a child under the age of ten and the mother did not remember her being under ten..

The problem with the Government's argument is that they were offering statements supposedly made by C.W. when she was under the age of ten according to her testimony. 10/20/10 RP 370.<sup>4</sup> RCW 9A.44.120 governs the admissibility of child hearsay. In order to admit a hearsay statement made by a child under the age of 10 related to sexual contact, the court must find that the statement is reliable. If so, the statement may be admitted if the child testifies at trial or the child is

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<sup>4</sup> MERYHEW: Q. When you and I talked about this/ you told me that you were actually in the seventh or eighth grade when you had the conversation with your mother. C.S. A. When you asked that I thought -- I meant seven or eight years old."

"unavailable as a witness," and there is "corroborative evidence of the act." RCW 9A.44.120(1)(b).

Thus, in *Blanton v. State*, 880 So.2d 798 (Fla. 5th DCA 2004) the statutory hearsay exception applied where child victim was age 11 or less at the time she gave statement to police, but over age 11 at the time of hearing on motion to admit the statement.

In this case, C.W. testified to reports she made to her mother under the age of ten. The mother denied the reports. C.W.'s statements were hearsay and the court should excluded such statements or at least had a hearing on their admissibility under 9A.44.120 - i.e., find that find that the reports were reliable.

Nor can the admission of the statements be made as to "hue and cry".

The "hue and cry" doctrine requires that the victim complain to someone within a reasonable time after the abuse. *State v. Ferguson*, 100 Wn.2d 131, 144, 667 P.2d 68 (1983). As conceded by the Government, C.W.'s mother, DANELLE STARK, denied that statements were made to her by C.W. at 7 or 8 years old. Indeed, she testified as a defense witness and that C.W. made a report of a "dream" where she thought Defendant was coming into her room and touching her. 10/25/10 RP 93. <sup>5</sup> The whole

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<sup>5</sup> (CARLSTROM) Q. Because when Caitlin was younger she had told you that she thought Brian was coming in her room and touching her, right?

point of the hearing requirement under RCW 9A.44.120 is to establish reliability - something that was not done in this case.

6. CONVICTION ON OFFENSE IN PIERCE COUNTY.

Mr. STARK has raised an objection to his conviction for Attempted Child Molestation 1° (Count 1) since the acts complained of occurred in Pierce County. C.W. testified to many incidents of abuse. The charging period for Count I (Attempted Child Molestation 1°) was from August 17, 1999 through December 31, 2000 in King County. C.W. indicated that misconduct happened "a lot more" in Spanaway (i.e., Pierce County). 10/19/10 RP 153.

Mr. STARK resided in Pierce County from August, 1999 until March, 2000 and again from July, 2000 until August, 2003. 10/25/10 RP 755-56, 758-59; 645-646 (DANELLE STARK testified that she and defendant moved into together February, 2000, not before).

The alleged victim C.W. did not reside with Mr. STARK until February of 2000. 10/25/10 RP 645-646. Mr. STARK'S convictions could not be based on those periods of time when C.W. did not live with Mr. STARK or where the alleged misconduct occurred in a different county. No instruction advised the jury that they could not convict Mr. STARK if they

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A. She told me that one time and she thought it was a dream. She couldn't tell me for sure if it was something that actually happened or not.

found molestation in Spanaway - i.e., before February, 2000 when C.W. moved into the house in Spanaway (Count 1, the Attempted Molestation 1<sup>o</sup> charge, was alleged to have occurred 08/17/99 - 12/31/00 which would place the misconduct in Spanaway, Pierce County from 08/17/99 to Feb., 2000). Accordingly, the appellate court should remand the case for a new trial and proper instruction.

**7. THE PARTIAL INSTRUCTION ON JURY UNANIMITY AS TO SOME OFFENSES BUT NOT OTHERS PREVENTED A FAIR TRIAL.**

Mr. STARK also assigned error to the trial court's failure to give a unanimity instruction (a *Petrich* instruction) for some counts but not others. The Government contends that "given the evidence presented, the charging periods alleged, and the specific election by the prosecutor, the jury was properly instructed." *St. Resp.*, p.13. However, the Government acknowledges that two of the four counts charged in this matter had overlapping charging periods - Counts II and III. *St. Resp.*, p.14.

The Government further concedes that C.W. testified in terms of ongoing abuse at the hands of STARK. *St. Resp.* 13 ("... C.W. talked in general terms about ongoing abuse. . ."). The charges and periods of occurrence were charged as follows:

- Ct. 1 - Att.CM1<sup>o</sup> -Instr.17 - (08/17/99 - 12/31/00)
- Ct. 2 - CM1<sup>o</sup> -Instr.11 - "on occasion separate and distinct from Ct. III"  
(01/01/04 - 08/16/05)
- Ct. 3 - Incest 1<sup>o</sup> -Instr.21 - "on occasion separate and distinct from Ct. II"

(08/17/03 - 08/17/06)  
Ct. 4 - CM3° -Instr.13 - (08/17/07 - 09/30/07)

Although the Government claims that no unanimity instruction was needed, it fails to explain why the "separate and distinct" language in the "to convict" instructions for Counts 2 and 3 was added but not to the "to convict" instructions for Counts 1 and 3 (counts with overlapping periods.) The Government agrees that "... such a (*Petrich*) instruction was given with respect to Counts II and III because there was a slight period of overlap with respect to the charging periods for those two charges." The prosecutor then abandons that standard of "separate and distinct" language for overlapping periods when other counts with overlapping periods are involved - i.e., Cts. 2 & 3. The same caution should have been observed with the other counts in this case.

In *Borsheim*, 140 Wn.App. 357, 165 P.3d 417 (2007), the defendant was charged with four counts of first-degree rape of a child. All four counts of sexual abuse were alleged to have occurred within the same charging period. The "to convict" instruction encompassed all four counts and listed elements of the offense once. Other instructions given by the trial court in *Borsheim* (140 Wn.App. at 364) included the following:

There are allegations that the Defendant committed acts of rape of child on multiple occasions. To convict the Defendant,

one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt. (Instruction 3).

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count. (Instruction 4)

The instructions did not specifically state that a conviction on each count had to be based on a separate and distinct underlying incident and that proof of any one incident could not support a finding of guilt on more than one count.

In finding the instructions deficient Division I explained the double jeopardy implications:

A defendant's right to a unanimous jury verdict is the guarantee that a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. <sup>(cite omitted)</sup> Pursuant to this right, a jury must be unanimous as to which act or incident constitutes a particular charged count of criminal conduct. <sup>(cites omitted)</sup> Thus, in cases where several acts could form the basis of one charged count, in order to convict the defendant on that count either the State must elect the specific act on which it relies for conviction or the court must instruct the jury that it must unanimously agree that a specific criminal act has been proved beyond a reasonable doubt. <sup>(cite omitted)</sup>

*State v. Borsheim*, 140 Wn.App. 357, 365, 165 P.3d 417 (2007).

In Mr STARK'S case, the same instruction on a "separate crime" was given like in *Borsheim*. (STARK'S Instuction #4). However, the

instruction in *Borsheim* on "unanimously agree(ing) as to which act" was not given. None of the instructions in *Borsheim* specifically stated that a conviction on each charged count must be based on a separate and distinct underlying incident and that proof of any one incident cannot support a finding of guilt on more than one count. That was error. Only two of the four counts in Mr. STARK'S case used the "separate and distinct" language - Counts 2 and 3. Counts 1 and 4 did not. The omission of the "separate and distinct" language in the "to convict" instructions for Counts 1 and 4, like *Borsheim*, was critical. The case should be remanded for a new trial.

**8. THERE WAS "SAME CRIMINAL CONDUCT" ON AT LEAST TWO CHARGES.**

Mr. STARK has also appealed his sentence for "same criminal conduct" on the two charging periods for Counts II and III.

RCW 9.94A.525 sets forth the calculation of offender scores. The statute directs the trial courts to count all convictions separately, except acts encompassing the "same criminal conduct." RCW 9.94A.525(5)(a)(i). Two or more crimes constitute the "same criminal conduct" for purposes of sentencing when each is committed (1) with the same criminal intent, (2) at the same time and place, and (3) against the same victim. RCW 9.94A.589(1)(a).

In *State v. Walden*, 69 Wn.App. 183, 188, 847 P.2d 956 (1993), the court held that child rape and attempted child rape committed by forced masturbation and fellatio followed by attempted anal intercourse, in quick succession, involved the same criminal intent—sexual intercourse.

In *State v. Dolen*, 83 Wn.App. 361, 921 P.2d 590 (1996), the State charged defendant with one count of second degree child rape and one count of second degree child molestation of his stepdaughter. The State alleged the incidents occurred between June 1, 1992, and June 1, 1993, while the child was 12 and 13 years old. At trial, the child testified to six different incidents in which defendant engaged in inappropriate conduct such as rubbing her breasts and vagina. The jury convicted defendant of both child rape and child molestation. The trial court determined that the two convictions did not encompass the same criminal conduct.

In doing so, the court stated:

It follows that if the jury convicted Dolen of both offenses for the same incident, the crimes encompassed the same criminal conduct. But the record does not tell us whether the jury convicted Dolen of committing the two offenses in a single incident or in separate incidents. At sentencing, the State has the burden of proving the defendant's criminal history by a preponderance of the evidence. <sup>(cites omitted)</sup> If the time an offense was committed affects the seriousness of the sentence, the State must prove the relevant time. <sup>(cites omitted)</sup>

Here, the State failed to prove that Dolen committed the crimes in separate incidents. Consequently, the trial court's finding that the two convictions did not constitute the same criminal conduct is unsupported. The trial court erred in treating each conviction as a

prior offense in determining Dolen's offender scores and criminal sentences. We vacate the sentences and remand for resentencing.

*Dolen*, 83 Wn.App. 363.

In this case it is unclear which acts constituted the convictions in counts 2 and 3. In any event, the jury was told that "separate and distinct" acts had to be involved in 2 and 3 but not other charges. The charges of Child Molestation (Count 1) and Incest (Count 3) involved the same victim, place and time although the specific date is uncertain. The two offenses have overlapping periods - the Incest 1<sup>o</sup> occurring over a 3-year period from 08/17/03 to 08/17/06 (Incest/Ct.3) and the other offense (Child Molestation/Ct.2) occurring within that time period - i.e., from 01/01/04 to 08/16/05. The two offenses involved the same victim, criminal intent, time, and place and were the same "criminal conduct." The appellate court should so find and remand for resentencing.

**9. THE TRIAL COURT HAD A DUTY TO INVESTIGATE ONCE HE WAS ALERTED TO REPORTS OF IMPROPER WITNESS COMMUNICATION.**

Mr. STARK believes the trial court had a duty to investigate evidence of misconduct (or, minimally, his defense counsel had a duty to investigate). The Government characterizes it as a motion to continue sentence in light of a letter to the court alleging witness misconduct.

The letter sent to the court by C.W.'s maternal grandmother made

allegations that C.W. had had inappropriate contact with witnesses during the course of the trial. The Government argues that " the allegations were vague and unsubstantiated at best and even defense counsel represented to the court that he had no reason to believe that misconduct had occurred."

(*St. Resp. p.* ). The Government further argues that ER 615 is permissive in separating witnesses and RCW 7.69.030 allows victims to be physically present in court during trial after they have testified. However, PAT THOMAS was specifically excluded from trial because of his relationship to various witnesses. 10/07/10 RP 33-34.

This argument totally ignores the purpose of ER 615 and the court's duty to prevent misconduct in the conduct of trial. ER 615 is concerned with witnesses not being improperly influenced by others. RCW 7.69.030 may allow a victim to sit in court after testimony but not to influence witnesses.

In STARK'S case the Government acknowledges that "C.W. could have been there during her mother's testimony, there was no harm in someone else sharing with her its content." *St. Resp.*, p.21.

However, there is no greater duty of the court than to insure a fair trial:

A fair trial is a legal trial; one conducted according to the rules of common law except in so far as it has been changed by statute; one where the accused's legal rights are safeguarded and

respected. A fair trial is a proceeding which hears before it condemns, which proceeds on inquiry, and renders judgment only after trial. A fair trial is that which is such in contemplation of law, namely, that which the law secures to the party, and a fair trial before an impartial jury means one where the jurors are entirely indifferent between the parties. The necessary factors in a fair trial are an adequate hearing and an impartial tribunal, free from any interest, bias, or prejudice. A fair trial is only likely to accomplish full justice within human limitations.

*State v. Rodriguez*, 146 Wn.2d 260, 278, 45 P.3d 541 (2002) (quoting *Box v. State*, 74 Ark.App. 82, 88-89, 45 S.W.3d 415 (2001) (quoting 88 C.J.S. *Trial* § 1 (1955))).

The fact that the trial court may consider the accused to be guilty in no way lessens the court's duty to see that he has a fair trial. *Rodriguez*, 146 Wn.2d at 279. In STARK'S case the court had a letter indicating there was improper communication between witnesses.

Mr. PAT THOMAS, CAITLIN WEISS'S great uncle and the spouse of LORI NELSON (another State witness), sat through trial because he was not a witness and not subject to the witness separation order. Mr. THOMAS is also a step-father to ASHLEY HUGHES (another State witness). The trial court was advised by letter from NANCY WEISS (another State witness and sister-in-law to PAT THOMAS) "That there was communication between spectators and courtroom and witnesses during the trial." The letter also stated that "Phone records show phone calls between LORI NELSON (State Witness) and CAITLIN WEISS (alleged victim) during trial." There is no question the letter was directed to the court about the integrity of the trial

and coordination of witness testimony. 12/17/10 RP 3-4.

This is another example of how the defense attorney sat on his hands as he did with the surprise, last-minute testimony regarding "trauma narrative." (he did not interview the counselor or obtain counseling records to see what the "trauma narrative" was all about, etc.) He failed to investigate the improper communication between witnesses. The court should have investigated the matter further regardless of the defense attorney's inaction.

**10. BLACKBOARD BLOCKING VIEW OF WITNESSES.**

Mr. STARK believes that his right to confrontation was violated because a large board was placed between him and the complaining witness. Reference to the board is made during cross-examination of CAITLIN WEISS when the defense attorney asks the court "Okay. There's a board here, and, with the Court's permission, I would ask you to step down, although there's not a pen." 10/20/10 RP 347. The board was blocking the court's view of jurors at the end of trial ("Can I ask you, Mr. Carlstrom, to move the board, because it's blocking several people for me. 10/25/10 RP 936.) as well as Mr. STARK'S view of the complaining witness.

The Government agrees that if a blackboard was blocking Mr. STARK'S view of the complaining witness then it would be a confrontation violation (although it argues there is no evidence of

blockage of view). E.g., *People v. Lofton*, 194 Ill.2d 40, 251 Ill.Dec. 496, 740 N.E.2d 782, 794 (2000) (defendant's confrontation clause rights violated by barricade erected by trial court that blocked child witness from defendant's view); *State v. Lipka*, 174 Vt. 377, 817 A.2d 27, 33 (Vt., 2002) ("We agree with defendant that his right to confrontation . . . was violated by the seating arrangement that prevented defendant from seeing R.L. while she testified . . .").

In this case, Mr. STARK claims his view of the complaining witness was blocked from the placement of a large board in court. Accordingly, so were his right to confrontation.

**11. THE PROSECUTOR'S CLOSING REMARKS MINIMIZED THE BURDEN OF PROOF.**

In *State v. Evans*, the Court of Appeals admonished the prosecutors on minimizing the burden of proof with "subtle twists" on the jury's role and the burden of proof:

The prosecutor's arguments in closing cleverly mixed requests for the jury to "[h]old me to the burden of proof exactly" with subtle twists of the jury's role and the State's burden of proof, seemingly intended to make it easier for the jury to convict in two difficult cases.<sup>(cite omitted)</sup> Yet a prosecutor is a quasi-judicial officer of the court, with an obligation to ensure that every defendant is fairly tried. Measured against this standard, the prosecutor's comments overstepped the bounds of ethical advocacy.

*State v. Evans*, 163 Wn.App. 635, 646, 260 P.3d 934 (2011)

The Government correctly notes that the prosecutor, in his closing, reiterated the standard in WPIC 4.01. However, the prosecutor

expanded upon WPIC 4.01 by asking the jury to "notice what that instruction doesn't say. It doesn't say beyond all doubt. It doesn't say beyond a shadow of a doubt. It doesn't say with 100 percent certainty." 10/26/10 RP 892-893. He further cautions the jury that "we need to recognize the reasonable doubt standard for what it actually is, an abiding belief in the truth of the charge. . ." Id.

Although the prosecutor claimed in closing he was not minimizing the reasonable doubt standard, and, by extension, the State's burden, he did undermine the reasonable doubt instruction by misstating WPIC 4.01. A jury's "abiding belief in the truth of the charge" does not meet the State's burden if it is not reached after "full, fair and careful consideration of the evidence and lack of evidence." To the contrary, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence" and a "reasonable doubt" is such "a doubt that would exist in the mind of a reasonable person after fully, fairly and carefully consideration of all of the evidence or lack of evidence."

In essence, the prosecutor undermined the reasonable doubt instruction by interpreting what WPIC 4.01 did not say and what he believed "reasonable doubt" meant. As noted in *Evans*, "this cleverly mixed requests for the jury to '[h]old me to the burden of proof exactly' with subtle twists of the jury's role and the State's burden of proof,

seemingly intended to make it easier for the jury to convict in difficult cases."

Child sex cases are difficult enough without the prosecutor lowering the standard of proof. Mr. STARK adamantly denied the charges before, during and after the trial - i.e., attributing the reports to a disgruntled step-daughter who wanted her biological father to accept and love her. The prosecutor's de-emphasized of the jury's duty to "fully, fairly and carefully consider the evidence and lack of evidence." The appellate court should remand for a new trial.

**12. THE PROSECUTOR SHIFTED THE BURDEN OF PROOF WHEN HE ARGUED THE DEFENSE SHOULD HAVE PRODUCED MISSING WITNESSES.**

Mr. STARK asserts that the prosecutor committed misconduct by shifting the burden of proof in his closing argument when he commented on defendant's failure to call two witnesses. His assertion fails in the analysis.

A prosecutor may not comment "on the lack of defense evidence because the defendant has no duty to present evidence." *State v. Cleveland*, 58 Wn.App. 634, 647, 794 P.2d 546 (1990). Under the missing witness doctrine, the prosecutor may comment on the defense's failure to call a witness. *State v. Montgomery*, 163 Wn.2d 577, 597-598, 183 P.3d 267 (2008)). The doctrine applies if a party

fails to call a witness to provide testimony that would properly be part of the case, the testimony would naturally be in the party's interest to produce and the witness is within the control of the party, the jury may be allowed to draw an inference that the testimony would be unfavorable to that party. *State v. Blair*, 117 Wn.2d 479, 485-86, 816 P.2d 718 (1991).

The defense attorney spoke about the failure of witnesses to appear in relation to the State's burden:

Now, who you never heard from, the State didn't call them -- remember, it's their duty to call witnesses, not mine. So, don't let them stand up here and say, "Oh, Mr. Meryhew could have called them."

But you didn't hear from Jacob Wagener, you didn't hear from Matthew Purvine, the two first people that she made disclosures to, whenever she made disclosures to them, talked to by the police. The State elected not to call them as witnesses in this case. But you didn't hear from Jacob Wagener, you didn't hear from Matthew Purvine, the two first people that she made disclosures to, whenever she made disclosures to them, talked to by the police.

10/25/10 RP 910.

The State's response in its rebuttal closing was that "... they did put on a case, and these are two young men that if the defense thought they had anything helpful to say, I'm sure they would have put them on."

10/25/10 RP 929.

The Government argues that it was a fair tactic to talk about the

defense failure to call witnesses. That is not what the case law says. In *Commonwealth v. Miranda*, 458 Mass. 100, 934 N.E.2d 222 (2010), the Massachusetts Supreme Court held that a prosecutor shifts the burden of proof when he or she calls the jury's attention to the defendant's failure to call a witness or witnesses, or when the prosecutor offers "direct comment on a defendant's failure to contradict testimony." *Id.* at 117, 934 N.E.2d 222, citing *Commonwealth v. Amirault*, 404 Mass. at 240, 535 N.E.2d 193. In such cases the prosecution is signaling to the jury that the defendant has an affirmative duty to bring forth evidence of his innocence, thereby lessening the State's burden to prove every element of a crime. See also *Whitney v. State*, 112 Nev. 499, 915 P.2d 881 (1996); *Wise v. State*, 132 Md.App. 127, 148, 751 A.2d 24, 34 (2000) ("Maryland prosecutors, in closing argument, may not routinely draw the jury's attention to the failure of the defendant to call witnesses, because the argument shifts the burden of proof." )

In sum, the State may not comment on a defendant's failure to call a witness; such a comment improperly shifts the burden of proof from the State to the defendant. Accordingly, the appellate court should remand for new trial to correct the error.

**13. THE INCEST 1 CHARGE BETWEEN 2003 - 2006 REQUIRED SEXUAL PENETRATION WHICH WAS NOT PROVED..**

Mr. STARK has raised an issue with respect to the Incest 1<sup>o</sup> charge - that he was convicted of incest without sexual penetration. The State failed to prove penetration in establishing "sexual intercourse" between STARK and C.W. The Government points out that the applicable definition of sexual intercourse encompasses "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." RCW 9A.44.010(1)(c).

However, the charging period for the Incest 1<sup>o</sup> charge is 08/17/03 - 08/17/06. In 2003 the definition of "sexual intercourse" for child sex offenses included penetration. For example, in *State v. Holland*, 119 Wn.App. 1024, \_\_P.3d \_\_, WL 22753618 (2003) the court noted that the elements of child rape (first degree) required "sexual intercourse:" "(i) sexual intercourse with another who is (ii) less than 12 years old, and (iii) not married to the perpetrator, and (iv) the perpetrator is at least 24 months older than the victim. RCW 9A.44.073." It further stated that "sexual intercourse 'has its ordinary meaning and occurs upon any penetration, however slight.'" *State v. Holland*, WL 22753618 (2003) (citing former RCW 9A.44.010(1)(a) (1997).

The definition of "sexual intercourse" in child rape and incest cases in 2003 involved penetration. Thus, in *State v. D.R.*, 84 Wn.App.

832, 930 P.2d 350 (1997), a 14-year-old student was questioned by police officer regarding allegations of incest involving the student's younger sister. Aside from the un-*Mirandized* statements of defendant, the only other evidence of incest was the testimony of J.K., who was not able to verify that he witnessed penetration. Accordingly, the appellate court reversed and remanded the case. The appellate should do the same in Mr. STARK'S case.

D. CONCLUSION

For the many reasons stated above, Mr. STARK respectfully requests remand of this case for a fair trial on offenses he did not commit.

DATED this 23 day of August, 2012.

Respectfully submitted,

Brian Stark  
BRIAN STARK  
Pro Se

IN THE APPELLATE COURT FOR THE STATE OF WASHINGTON  
DIVISION I

STATE OF WASHINGTON , )  
 )  
 ) NO. 66766-1-I  
 ) Plaintiff, )  
 ) CERTIFICATE OF SERVICE  
 vs. )  
 )  
 )  
 BRIAN STARK , )  
 )  
 )  
 ) Respondent. )

On this day the undersigned for Defendant, delivered, served, sent and otherwise transmitted a copy of the *Reply To State's Response to Appellant's Statement of Additional Grounds and Motion to File Overlength Brief*, in *State v. Brian Stark*, Cause No. 66766-1-I (Court of Appeals, Division I, for the State of Washington), by depositing in the mail of the United States of America, postage prepaid, these documents, and/or by e-mail, personal delivery, attorneys' messenger services, addressed to the following:

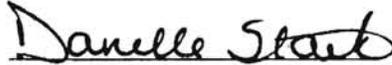
King County Prosecutor  
Appellate Unit Supervisor W554 King  
County Courthouse  
516 Third Avenue  
Seattle, WA, 98104  
paoappellateunitmail@kingcounty.gov

Christine Wilson Keating  
King County Prosecutors Office  
516 3rd Ave , Rm 554  
Seattle, WA, 98104-2312  
christine.keating@kingcounty.gov

Greg Link, Attorney  
Washington Appellate Project  
1511 3rd Ave Ste 701 Seattle  
WA 98101-3635  
[greg@washapp.org](mailto:greg@washapp.org)

I certify under penalty of perjury under the laws of the State of Washington that the above statements are true and correct and that I am eighteen years of age and a resident of the State of Washington.

DATED this 23rd day of August, 2012.

  
DANELLE STARK