

FILED  
COURT OF APPEALS

No. 34046-1-II

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STATE OF WASHINGTON

BY



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

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**STATE OF WASHINGTON,  
Respondent,**

v.

**C.T.C.,  
Appellant.**

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**APPELLANT'S BRIEF**

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PM 8/12/06

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## A. ASSIGNMENTS OF ERROR

### Assignments of Error

1. The court erred in admitting the hearsay statements of N.S. and in making the following findings: that N.S. had no motive apparent to lie, that her statements were generally consistent, that her statements were spontaneous, that nothing about the timing of the statements suggests an improper motive, that the possibility of faulty recollection is remote, and that there is no reason to believe she misrepresented the juvenile's involvement. CP at Order Finding N.S.'s Child Victim Hearsay Admissible.<sup>1</sup>

2. The court erred in admitting the hearsay statements of D.S. and in making the following findings: that D.S. had no apparent motive to lie, that her statements were generally consistent, that her statements were spontaneous, that nothing about the timing of the statements suggests an improper motive, that the possibility of faulty recollection is remote, and that there is no reason to believe she misrepresented the juvenile's involvement. CP at Order Finding D.S.'s Child Victim Hearsay Admissible.

3. The court erred in admitting the hearsay statements of Z.S. and in

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<sup>1</sup> Because a Supplemental Designation of Clerk's Papers has been filed with this brief, the page numbers in the Clerks' Papers for documents designated in that supplement are currently unknown. To avoid confusion in this Brief, Appellant refers to these documents as CP - [Name of Document].

making the following findings: that Z.S.'s statements were generally consistent, that her statements were spontaneous, that nothing about the timing of the statements suggests an improper motive, that the possibility of faulty recollection is remote, and that there is no reason to believe she misrepresented the juvenile's involvement. CP at Order Finding N.S.'s Child Victim Hearsay Admissible.

4. The court erred in finding that the juvenile touched D.S.'s buttocks with his hand and that she pushed his hands away but he did not stop touching her. CP at Findings of Fact and Conclusions of Law after Trial - 3.

5. The court erred in finding that the juvenile tried to rub S.K.H.'s buttocks and actually touched her buttocks with his hand. *Id.* at 8.

6. The superior court erred in permitting the juvenile to be tried in violation of his right to counsel.

7. The court erred in finding that the acts alleged in paragraph XVII of the Findings of Fact and Conclusions of Law after Trial occurred "between 10/11/03 and 2/27/05, when S.L.H. was approximately eleven years old." *Id.* at 6.

8. The court erred in finding that the juvenile touched S.L.H. under her clothing with his hand. *Id.* at 6.

9. The court erred in finding that a sexual encounter between S.L.H. and the juvenile occurred in September 2004. *Id.* at 6.

10. The court erred in finding that S.L.H. was incapable of consenting to the sexual encounter with the juvenile. *Id.* at 7.

11. The superior court erred in finding that the juvenile had capacity to commit the crime charged in Count VI of the information. CP at 18.

12. The superior court erred in finding the juvenile understood the nature of the crime charged in Count VI given his maturity level, experience, age and intelligence in that he was “bright, mindful, respectful of others and of normal maturity.” CP at 19.

13. With regard to Count VI, the court erred in finding that the juvenile admonished the alleged victim not to tell. CP at 19.

14. With regard to Count VI, the court erred in finding that the juvenile engaged in prior similar conduct and there were consequences attached to the conduct. CP at 19.

15. The superior court erred in finding that the juvenile understood that the sexual act that occurred prior to his twelfth birthday was wrong and inappropriate. CP at 19.

16. The trial court erred in holding that the juvenile exposed his penis knowing that such conduct was likely to cause reasonable affront and alarm. CP at Findings of Fact and Conclusions of Law after Trial - 7.

**Issues Pertaining to Assignments of Error**

1. Did the trial court err in admitting the alleged child victims' hearsay testimony? This issue pertains to Assignments of Error Nos. 1-3.

2. Whether the State failed to prove sexual contact as required in Counts I and V under the following circumstances:

a. (Count I) D.S. testified at trial that the juvenile tried to pull her pants down while she was sleeping and he did not touch her anywhere, except to the extent he tried to unbutton her pants, but that he "was trying to feel [her] butt;"

b. (Count V) S.K.H. testified at trial that the juvenile tried but did not succeed in pulling down her and his pants, and that she did not know if he touched her buttocks for a moment before she moved away; and

c. (Counts I & V) If this Court finds that the State did prove a touching of the buttocks with regard to either count, the touching was through the clothing and the buttocks is not a sexual or intimate part of a person.

This issue pertains to Assignments of Error Nos. 4 & 5.

3. Alternatively, were the crimes of child molestation and indecent liberties as charged in Counts I and V void for vagueness when a required element of the crimes, sexual contact, is defined as "any touching of the sexual or other

intimate parts of a person” and the term “intimate parts” is not defined?

4. Was trial counsel ineffective in failing to challenge the competency of S.L.H., a twelve-year-old witness with an I.Q. of 47, when the witness gave nonsensical information to an interviewer prior to trial, was mistaken as to events that happened the day of her testimony and gave self-contradictory testimony? This issue pertains to Assignment of Error No. 6.

5. When the State failed to prove that the juvenile was twelve or older at the time of the acts alleged in Count IV and the Court did not make any findings as to his capacity to commit the crime, should his conviction on this count be vacated? This issue pertains to Assignments of Error Nos. 7 & 9.

6. When S.L.H.’s family had spoken to her about sex and the risks of sex, she functioned fairly normally socially, and she apparently understood the basics of sexual intercourse, did the State fail to prove she was incapable of consenting to sexual activity with the juvenile? This issue pertains to Assignment of Error No. 10.

7. Did the trial court err in finding that the juvenile, who could have been eleven at the time, had sufficient capacity to understand the wrongfulness of showing his penis to his nine- or ten-year-old cousin and asking to see “hers”? This issue pertains to Assignments of Error Nos. 11-15.

8. Alternatively, did the State fail to prove that the juvenile revealed his penis to his cousin knowing that such conduct was likely to cause reasonable affront or alarm? This issue pertains to Assignment of Error No. 16.

### **Standards of Review**

Issues 1: This Court reviews a trial court's determination of the reliability of child hearsay statements for abuse of discretion. *State v. Borboa*, 157 Wn.2d 108, 121, 135 P.3d 469 (2006).

Issue 2, 5, 6 & 9: The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted).

Issue 3: This Court reviews a vagueness challenge to a statute on a *de novo* basis. *See generally State v. Williams*, 144 Wn.2d 197, 26 P.3d 890 (2001) (reviewing vagueness claim *de novo*).

Issue 4: Appellate courts review a claim of ineffective assistance of counsel *de novo*. *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000).

Issue 5: This issue raises a legal question and a sufficiency of the evidence question. The standard for sufficiency of the evidence is given above. This Court

reviews legal questions *de novo*.

Issue 8: This Court reviews a capacity finding by determining if there was evidence from which a rational trier of fact could have found capacity by clear and convincing evidence. *State v. J.P.S.*, 135 Wn.2d 34, 37, 954 P.2d 894 (1998).

## **B. STATEMENT OF THE CASE**

### **1. Procedural History**

By amended information filed September 6, 2005, the State charged the juvenile in this case, Charles T.C., born February 11, 1992, with three counts of Child Molestation in the First Degree (Counts I-III), one count of Rape in the Second Degree (Count IV), two counts of Indecent Liberties (Counts V & VII) and one count of Indecent Exposure – Victim under the Age of Fourteen (count VI). CP at 9-14.

The Honorable Roseanne Buckner presided over all relevant proceedings. After a hearing, the court determined that Charles had sufficient capacity to commit the crimes charged in Counts III and VI. CP at 18-20. Following additional hearings, the court held that one alleged victim, D.S., was competent to testify at trial, but that other alleged victims, N.S. and Z.S. were not. CP at Order Finding Child Victim Competent to Testify at Trial. In addition, it held that the hearsay statements of D.S., N.S. and Z.S. were all admissible at trial. CP at Order

Finding N.S.'s Child Victim Hearsay Admissible at Trial; CP at Order Finding D.S.'s Child Victim Hearsay Admissible at Trial; CP at Order Finding Z.S.'s Child Victim Hearsay Admissible at Trial. Following a CrR 3.5 hearing, the court held Charles's statements admissible at trial. CP at 15-17.

After a bench trial, Charles was convicted of Counts I-VI, and acquitted of Count VII. CP at Findings of Fact and Conclusions of Law After Trial. The court sentenced him to 45 to 108 weeks in custody. CP at 21-22.

This appeal followed. CP at 30-46.

## **2. Substantive Facts**

### **a. Background**

Harriet S. is grandmother or stepgrandmother to the victims and Charles. Harriet has four grown children: 1) Onnewa, mother of N.S., D.S. and J.S. (not an alleged victim in the case); Harold, father or stepfather to S.K.H., S.L.H. and Z.S.; Sukari, who lives with Harriet, and Emmitt, stepfather to Charles. At the relevant times, Emmitt lived with Charles and Charles's mother, Valencia Catching. Harold's wife and the mother of S.K.H., S.L.H. and Z.S. is Shantia H. Sukari and Onnewa are not married. CP at Findings of Fact and Conclusions of Law after Trial - 2.

D.S. was born February 27, 1996; N.S. was born December 11, 1999;

S.K.H. was born March 14, 1994; S.L.H. was born October 11, 1992; and Z.S. was born October 27, 2001. Charles was born February 11, 1992. Throughout the proceedings, he was generally referred to as “Squeak.” CP at Findings of Fact and Conclusions of Law after Trial - 2.

Harold, Emmitt, Onnewa and their families all lived near Harriet. Harold and his family lived next door to her; Emmitt and his family were around the corner. The families all spent large amounts of time with each other. In particular, Harriet and Valencia Catching would often watch the children, N.S., D.S., S.K.H., S.L.H., and J.S. *See* RP at 736-42; 834-35.

Until the night of the allegations were disclosed, relations between the family of the victims and the Catching family were generally close and friendly. RP at 444; 458; 498; 526-27; 534. However hard feelings may have existed between the family of the victims and the Catching family over Valencia Catching sleeping with Charles’s step-dad’s cousin. RP at 407. In general, Emmitt and Valencia were having problems around the night of the disclosure. RP at 917. Further, at trial Harriet stated that she and Valencia “got along sometime.” RP at 796. However, she also revealed that from a year to three years before the night of the disclosure, she had an incident with Valencia that resulted in Harriet going to jail. RP at 795-96.

**b. The Night of Disclosure**

The allegations charged in the information were first brought to light on February 27, 2005. Various witnesses recounted the events of that night. At a pretrial hearing, S.K.H. reported that that night, N.S. was at her house, which is next door to their grandmother. “Out of the blue,” N.S. told S.K.H. that Charles touched her “private.” She said “He closed the door and turned off the light and said don’t tell anybody or else I’m going to do it to you again.” RP at 563-64; 1208-09.

S.K.H. went into the next room, where her sister, Z.S., and cousin, J.S., were. She asked Z.S. if Charles had ever touched her. Z.S. said “Yeah, he touched my private, and he told me not to tell, and it hurt.” RP at 564. J.S. repeated the allegation, saying “almost the exact same thing, but in different words.” RP at 565. S.K.H. then went to her grandmother’s with the younger children and relayed the information to her. RP at 565.

Harriet S. had taken her medication and was taking a nap when S.K.H. and N.S. knocked on her door. Her medication can make her sleepy. Before hearing what the problem was, Harriet did not want to talk, she wanted to get back to bed. When she learned what the problem was, she called Onnewa, N.S.’s mother, as well as her other children. RP at 511-15; 792-93. The family gathered together in

Harriet's bedroom to hear about and discuss the allegations.

When the family gathered in Harriet's bedroom, everyone was crying and seemed upset. See RP at 813. S.K.H. began talking, and then all the girls began talking a little. RP at 814. After everyone started talking, "it was like so many people talking at one time." RP at 816.

**c. The Allegations Regarding N.S.**

As Harriet remembered it, S.K.H. came over with N.S. and told Harriet in front of N.S. that Charles had "been doing something nasty to" N.S. N.S. said "he was humping me." When asked what humping meant, S.K.H. explained that Charles was getting on top of N.S. RP at 756. The first time Harriet was asked about these events at the pretrial hearing, she remembered the hearsay differently. Then she remembered that all that N.S. said initially was in response to the question, "did [Charles] do anything to you"? N.S. answered "Yes, Granny." RP at 512. She later remembered N.S. had said "he was doing nasty stuff to us." RP at 518.

Harriet stated that that night, all the children were saying Charles humped them. Harriet asked them "Did Squeak put his hands on you all? And they said yes. I said, What, in a nasty way? He was trying to hump us. That's what the kids said." RP at 519.

In response to Harriet's call, Onnewa S. went to her mother's house. Harriet; her sister, Sukari S.; and niece, S.K.H. were there. RP at 452. First S.K.H. told the group what N.S. had told her about Charles. R.P. at 901. Then Onnewa asked N.S., "What happened with Squeak?" "What did he do?" N.S. told her "every time I go over to [Valencia Catching's] house, Squeak be humping on me." RP at 453; 893. N.S. demonstrated what "humping" meant on her mother, by lying on top of her and pressing her vaginal area against her mother's. RP at 453-54; 481-82; 849-50; 894-95. N.S. was five at the time.

Sukari S. reported that N.S. stated that Charles humped her for five minutes. When questioned about the length of time, she answered, "Well, he just humped me; Squeak was humping me." RP at 480; 848. She said she did not tell about it because she was afraid of Charles. RP at 480-81; 850. She also reported that N.S. said Charles would let the children watch "little porno movies or the nasty movies that they got" when his mother was not home. RP at 483. Sukari observed that N.S. would say "Squeak humped me" all the time, out of the blue, to anybody. RP at 489. At trial, however, she only remembered N.S. saying that twice. RP at 854.

N.S. repeated the allegation when questioned later that evening by her uncle, Harold S., saying "Squeak was humping me." RP at 548; 1387. She told

him Charles humped her twice. RP at 548-50. Harold had previously questioned D.S. in front of N.S. RP at 1388.

On March 7, 2005, a nurse practitioner who evaluates children for sexual abuse examined N.S. RP at 1088-1103. The nurse asked N.S. if she understood what telling the truth meant, but could not understand her response. RP at 634. The first words the nurse could understand her say were “hump me.” RP at 601. “She started the conversation by saying something about “hump me.” She said Charles “humped and the door was locked at my Auntie Wincy’s house.” RP at 1113. She reported that this happened one time, in her cousins’s room, in the bed. N.S. also said, “He pulled down my pants while I was sleeping” and told her not to tell. RP at 1114. Her physical exam was “normal.” RP at 1116.

N.S. was known to lie to avoid punishment, but she was not known as a liar. RP at 449-51; 485-86. She had no ill feelings toward Charles. RP at 448.

**d. The Allegations Regarding D.S.**

D.S. was with her “Auntie” Yolanda (Yolanda Hull), a friend of the family, the evening of the disclosures. Her mother and grandmother called and told Ms. Hull to bring D.S. home immediately. In the car on the way home, Ms. Hull explained that there was a problem at home. She related that D.S.’s cousin had told their grandmother that Charles had been doing things to her. D.S.’s eyes

got big. Ms. Hull asked: “when you are over there, has Squeak tried to mess with you, because [S.L.H.] just told your grandma that he was been messing with her.”

RP at 410. D.S. began to cry and said:

[H]e touched me. And that’s when she started saying about he pulled the pants down and he made [S.L.H.] put her mouth on the penis. He said, If you guys –  
It was when she was in the closet, and she said something that Bidy and Max [Charles’s twin step brothers] was in the closet too with [J.S.] and [N.S.], and then she just kept on crying.

RP at 405; *see also* RP at 411 & 811-12. Ms. Hull asked, “And if something happened, why didn’t you come and tell? You are old enough to know right from wrong.” D.S. reported that Charles said he would beat them up if they told. RP at 406 & 812. D.S. also said she did not tell because she did not want her mother to whup her: “I don’t want my mom to get mad at me; I don’t want my mom to whup me.” RP at 420 & 410, *see* RP at 812-13.

At trial, Ms. Hull did not have as specific a memory of the hearsay. She remembered D.S. saying that “they were in a closet, that he had her in the closet before, and about watching some [pornographic] movies.” RP at 811; *see* RP at 811–12. Ms. Hull related that D.S. said that Charles’s twin stepbrothers had the little ones, N.S. and J.S. in the closet with them and she explained what the boys were doing to the girls. RP at 812.

Ms. Hull drove to Harriet’s house. D.S.’s father, mother, grandmother,

aunt, sister, N.S., and cousins, S.K.H., S.L.H. and Z.S., were there in the grandmother's bedroom all talking about Charles. RP at 411-13, *but see*, RP at 461 (relating that some of the girls were out of the room at the time). At trial, Ms. Hull remembered D.S. saying in Harriet's bedroom "that they were in the closet, and then he pulled her pants down and got on top of her and did it," referring to Charles. RP at 815. Ms. Hull said that "did it to her" was the language the children always used. RP at 816.

Onnewa remembered that when she asked D.S. if Charles had "messed with her," D.S. said that one day, when she was at the Catching's residence with her two sisters watching TV with two of Charles's brothers, she was lying down and Charles tried to pull her pants down. D.S. left the room to be near Valencia. RP at 462-63; 895-96.

Sukari and Harriet remembered a different allegation. Sukari remembered D.S. telling a story similar to N.S.'s, that Charles humped her, that she watched "nasty movies" with him and that he told her not to tell or he would beat her up. RP at 492-94; 851-52. Harriet mistakenly remembered that D.S. came to her house with the other children, when Yolanda had brought her. RP at 517. She remembered that D.S. said Charles "was doing nasty stuff to her and trying to hump them." At trial she remembered D.S. also saying that Charles put on "nasty

tapes” of people “doing nasty things.” RP at 763-64. After relaying what D.S. said about Charles, she could not remember more because at that point in the evening of February 27, she was exhausted. RP at 519.

Harold spoke to his nieces when they were all together with the adults in his mother’s room. RP at 1385. At a pretrial hearing, Harold remembered that D.S. told him Charles had touched her “private parts,” and she pointed to her vaginal area. RP at 551. She also relayed that Charles had offered “you show me your stuff, I’ll show you my stuff.” RP at 552. She told Harold that Charles threatened her not to tell. RP at 552. At trial, he said she told him that when she was asleep at Valencia’s Charles came in and tried to pull her pants down and hump her. RP at 1386-87.

At trial, D.S. initially remembered one evening she was at Charles’s house in a chair and Charles had a hold of her hand, trying to pull her off the chair so he could get on top of her. He did not pull her off the chair, she got loose and ran into the bathroom. Nothing else happened that night. There was not another time that Charles did something to her. RP at 1250-53.

However, when reminded about talking to a forensic interviewer with a tape recorder, D.S. remembered telling her that something else had happened at Charles’s house while she was sleeping. She was lying on the bed at Charles’s

house when he came in and tried to pull her pants down while she was sleeping. She woke up because she felt him trying to unbutton her pants. She moved his hand, got off the bed, and ran into the living room. He did not try to do anything else, and did not really touch her anywhere, except that he tried to unbutton her pants. RP at 1253-58. Later, when reminded about what she had said in an earlier interview, D.S. recalled that Charles “was trying to feel [her] butt.” She woke up and moved his hand. RP at 1429-30. Charles said he would hurt her if she told anyone. RP at 1265. When asked why she did not tell, she said it was because she was scared, but she did not know why she was scared. RP at 1431. She denied ever watching a pornographic movie, with or without Charles. RP at 1259.

The earlier interview, with a representative from the prosecutor’s office, was put into evidence. Pl. Ex. 8 (transcript) & 9 (tape). In that interview, D.S. said that, through her clothes, Charles touched her bottom with his hand. However, she did not repeat that allegation at trial or, apparently, to anyone else.

On March 7, 2005, a nurse practitioner who evaluates children for sexual abuse examined D.S. RP at 1088-1103. D.S. told the nurse that one time Charles “tried to get on top of me. . . . He tried to pull my clothes down, but I pulled them back up and went to the living room with my Aunt Valencia. . . . Because I was sleeping and he went to my room and pulled my pants down. I ran to the room

where my aunt was and went to sleep.” RP at 1107-08. He told her not to tell anyone. She was scared. RP at 1108.

A physical exam of D.S. resulted in a “nonspecific” diagnosis, meaning that the hymen was “a little unusual,” but the variation from normal could be either “a congenital variant of normal” or the result of sexual abuse. In order of increasing seriousness, the diagnostic categories used by the nurse were normal, nonspecific, worrisome and definitive. RP at 1109-10. In this case, the hymen “looked normal enough to not cause us to be alarmed specifically because of her findings.” RP at 1111.

D.S. did not seem to have any particular anger directed at Charles or his mother prior to disclosing her story. RP at 414-15; 447-48 465. She was known to have told “stories” or lies on occasion to prevent herself from getting into trouble. She was not known to lie about important things or lie a lot. RP at 408-09; 449-51.

**e. The Allegations Regarding Z.S.**

Onnewa remembered that with everyone all together, Harriet asked, “Has Squeak been messing with you guys too?” RP at 460. Z.S. said “Squeak was humping on me.” RP at 459; see RP at 496. Z.S. later reported to her father that Charles had touched her, pointing to her vagina. RP at 545. Harriet remembered

that when she asked if Charles touched her, she answered “He touched me, he touched me, Granny, he touched me right here, and it hurt,” indicating her vagina. RP at 520-22.

Sukari remembered Z.S. saying the same thing she remembered D.S. and N.S. say, that Charles “humped her.” RP at 852.

Harold spoke with Z.S. alone in the bathroom at his mother’s house. She told him “Squeak touched me,” pointing to her vaginal area. She said it happened in her room and it hurt. RP at 545; 1382-85.

At a pretrial hearing, S.K.H. testified that on some night before Christmas in 2004, when she was ten and Z.S. was two, the extended family was at S.K.H.’s house for “family night” to watch football and have dinner. S.K.H. saw Charles and Z.S. go into S.K.H.’s bedroom. The door was closed. S.K.H. saw Z.S. come out of the room pulling up her pants. She asked Z.S. why her pants were down. RP at 566-71. Z.S. answered “I don’t know.” Then S.K.H. asked, “Did Squeak just hump you or anything? And she said, Yeah, and it hurt.” RP at 569. S.K.H. later repeated that Z.S., who was two at the time, said “he humped me on my private and it hurt.” RP at 570-72.

At trial, S.K.H. said that the question she asked Z.S. was “Did Squeak just touch you?” She reported that Z.S. answered “Yeah, and it hurt.” RP at 1080. At

trial she specifically said that Z.S. had not used the word “private.” This time she said that she asked Z.S. if Charles had touched her private and Z.S. had answered yes, and pointed to her vagina. RP at 1180-82.

On March 23, 2005, the nurse-practitioner examined Z.S. RP at 614. Z.S. gave nonsensical answers to questions. RP at 618-24. A physical exam of Z.S. disclosed no abnormalities in her hymen or surrounding tissues. RP at 1141-42.

Z.S. was not known to have lied before. RP at 539.

**f. S.L.H.**

**i. S.L.H.’s Mental Capacity**

S.L.H., twelve at the time of trial, was described as slow, mentally challenged, learning disabled, or mentally retarded. She also had a speech problem. RP at 742-44; 1000; 1005; 1342. Her I.Q. is 47. RP at 1444-45; 1465. The mean I.Q. is 100; S.L.H.’s IQ is three standard deviations below the mean. Entry into the special education program begins with an IQ of 70. Cognitively, she functions at or below the second grade level. RP at 1445-50.

S.L.H. can dress herself, feed herself, talk and write, although her reading, writing are at a second grade level. She has been in school since kindergarten, but was not identified for special education until first grade. Since her needs were identified, she has been steadily improving. RP at 783-86; see 835-37; 1002. She

began reading fluently at the age of nine, but writing and spelling took longer. RP at 1344-49. However, she cannot be left alone: she goes nowhere alone, she cannot cook alone and should not babysit, although she sometimes does. RP at 798-99; 835-37; 1010; 1351-52.

She presents closer to “normal” socially. A former teacher testified that if you saw S.L.H. with a group of girls her own age, it would be hard to pick her out as disabled. If you started questioning her at length, you would then think “something is not quite right.” RP at 1444. However, “Socially . . . you wouldn’t pick her out of a group of girls.” RP at 1449. She shows appropriate social skills and is very well-mannered, in fact, one of her strong points is her social ability. RP at 1466-68. At the same time, however, she is not “street-wise.” RP at 1451.

S.L.H.’s mother, Shantia, testified that she treats her daughter just like the other kids, as a normal child. She gets an allowance and the responsibility of spending it. S.L.H. likes to cook and swim and skate. When interviewed regarding the instant allegations, Shantia reported that S.L.H. functions fairly well in a family social context, but that she has academic difficulties. RP at 1040-45. Shantia also said that her developmental delay made it difficult to make friends out of the family, although she had neighborhood friends. Although S.L.H. was able to understand that certain behaviors were inappropriate and unacceptable and

the consequences of such behaviors, Shantia believed that her disability prevented her from agreeing to have sex. RP at 1047-53.

Her stepfather, Harold, also treats S.L.H. like any other child. When she was eleven or twelve, he would leave a list of tasks for her to do that day while he was at work, but the tasks would be simple, such as to clean her room. RP at 1352. He said S.L.H. had a few neighborhood friends, and mentioned one thirteen-year-old girl who is in the mainstream classes at school and another, younger girl. His mother is her best friend. RP at 1364-65.

S.L.H. testified that she can read and write. She explained that she learned math and reading at school, could add, subtract, and do multiplication. She answered basic questions. However, she stated she had three sisters, including an older sister, but she did not know who the older sister was. In addition, she believed that her parents had picked her up from Lynnwood the prior night, when, in fact, they had picked her up that morning. RP at 962-73; RP at 1008. She specifically remembered spending the prior night on the couch at her house, when she had slept at her grandmother's in Lynwood. S.L.H. acknowledged that the calculation of time was difficult for her. RP at 982-87; 1008.

Shantia had discussed menstruation, hygiene, and the risk of pregnancy with S.L.H. when she got her period, at age eleven. She warned her about kissing

and playing around with boys at that time. Shantia knew that S.L.H. had also had sex education during her previous year in school. The school education program sent home a book that explicitly discussed sexuality. RP at 1011-17.

Harold had not talked to S.L.H. about menstruation, but he has always had conversations with his daughters about boys and the risks they pose. He also discusses with them why certain clothes are inappropriate, because “you will end up a mother before your time.” RP at 1368-69. Shortly after S.L.H. got her period, he warned S.L.H. about being with boys, hinting at what they might want to do that she might want to do too. He ended the conversation when she looked confused and said she did not like boys. RP at 1370-72. However, he stated that Shantia had always been adamant about “that stuff” with S.L.H. RP at 1372.

**ii. S.L.H.’s Testimony**

S.L.H. stated that she did not like Charles but also that he had never done anything to make her feel uncomfortable. She stated that he had touched her breasts through her clothes, but initially denied that he had touched her anywhere else:

Q: Has Charles touched you on your boobs?

A: Yes.

Q: On top of your clothes or under your clothes.

A: On top.

Q: Has he ever stuck his hand down your shirt and touched your boobs?

A: No.  
Q: No. Has Charles ever touched you anywhere else?  
A: No.  
Q: No. Has Charles ever touched you with any part of him?  
A: No.  
Q: No. Has Charles ever touched your private vagina area?  
A: Nope.

RP at 976-77. The State emphasized the importance of telling the truth and tried again.

Q: Has Charles ever touched you in a way you don't like?  
A: My boobs.

...

Q: Has Charles ever done something else to you that you don't really want to talk about?  
A: No.  
Q: Do you know what sex is?  
A: No.

RP at 977-78. S.L.H. said she had seen Charles's "private part" without clothes on in her Aunt Valencia's room. RP at 979. The State promised only five more questions and told her to count them down. However, it took numerous more questions to elicit the facts that at her house, when she was eleven, Charles put his penis on her "private part." RP at 979-81.

On redirect examination, over Charles's objection as outside the scope of cross examination, the State elicited additional information. S.L.H. could not remember how long ago her mother hurt her ankle, but when asked if it was last

year, agreed. When asked if she was eleven or twelve at the time, she chose twelve.

Q: 12. Did you ever go over to Charles' house during the time period your mom had hurt her ankle.

A: No.

Q: Do you ever remember being at Charles' house when your dad came over?

A: Yeah.

Q: Yeah. And that was around the time your mom hurt her ankle.

A: Yeah.

RP at 988-89.

That day, Charles touched her vagina through her clothes and she saw his penis through his clothes. Charles made her watch a pornographic movie. While she agreed that the people in the movie were having sex, she also denied knowing what sex is. In addition, she denied ever having done what the people in the movie did. However, she said that Charles put his penis inside her vagina and it hurt. He had never done this before and also had not done other things to her. RP at 989-94. At the end of this questioning, S.L.H. was certain she was eleven at the time the alleged incident with Charles occurred. RP at 994-95.

Later, on recross, she first stated that when that incident happened no one else was in the house; next she said there was a girl in the closet, Charles's friend. RP at 995-96.

S.L.H.'s mother, Shantia, said that she broke her leg on February 9, 2005.

See RP at 1031-32; 1360-63.

**iii. S.K.H.'s Allegations**

S.K.H. testified that she once saw S.L.H. and Charles “humping” in Charles’s room at his current house. To S.K.H., humping meant that Charles was on top of S.L.H. It was nighttime and she could not see if they were wearing clothes because the lights were off. She could tell that they were facing each other. Upon seeing this, S.K.H. ran into the livingroom. RP at 1065-70.

S.K.H. said she saw Charles and S.L.H. “humping” in her mother’s room on the bed sometime after this, in September 2004. RP at 1070-72. The light was on, S.L.H. was undressed from the waist down, face down on the bed and Charles was on top of her. S.K.H. did not see Charles’s “privates.” However, she also said that his private was touching S.L.H. on her leg. When the State asked if Charles’s penis was touching S.L.H.’s butt, S.K.H. agreed. She said that his penis was inside S.L.H.’s butt. She said the penis was staying still, but when asked about “humping,” she answered that Charles was moving up and down on S.L.H. Charles saw her and told her to leave and not to tell anyone or he would do it again. S.L.H. was just smiling. RP at 1075-79.

However, S.K.H. also remembered that the first time she saw Charles and S.L.H. together was that time in September 2004. She remembered because her

parents were getting ready to go to Las Vegas. RP at 1218-19. Her parents went to Las Vegas in September 2004 and for New Years in 2003/04. RP at 1028-29; 1035. At trial she believed she saw the incident in September 2004, but she agreed that she did not always know when she saw it. RP at 1219.

When S.K.H. was interviewed April 4, 2005, by a representative from the prosecutor's office, she described seeing Charles and S.L.H. together only one time. RP at 1324; 1326; 1328.

#### **iv. The Medical Interview and Examination**

On March 27, 2005, a nurse practitioner who evaluates children for sexual abuse examined S.L.H. These hearsay statements were apparently admitted without objection. S.L.H. told the nurse that Charles wanted her to suck his penis and she did. RP at 1122-25. When asked if this happened once or other times, she answered "other times." The nurse asked her "What happened with his private part?" and S.L.H. replied "It came out the inside the cot." RP at 1125-26. The nurse was unable to determine what that meant. RP at 1126.

When asked if anything else happened, S.L.H. shook her head no. But she seemed concerned about pregnancy. The nurse explained that she could not get pregnant unless the penis went into her vagina which made S.L.H. appear anxious. RP at 1126-27. She said, "I went in the bathroom. I used it. I checked it. And

that stuff – and then I went pee. And then I wiped it.” RP at 1127. The nurse asked, “That part of his body, was it in your vagina?” S.L.H. indicated yes, and that it had happened one time. RP at 1127.

A physical exam of S.L.H. resulted in a “nonspecific” diagnosis, meaning the hymen could have been healing from trauma or it could have been a variation of normal. RP at 1128.

g. **S.K.H.**

i. **S.K.H.’s Testimony**

S.K.H. testified to an incident involving herself and Charles. She said that she was once at Charles’s house when her Aunt Valencia was at work and no other adult was around. Charles invited her into his room. In his room he tried to pull down her pants, tried to pull down his pants, pushed her on the bed and tried to touch her butt through her clothes. She could remember the belt she was wearing in detail. RP at 1182-86. When asked if he rubbed her buttocks, she answered, “He kind of touched it, but I had moved back.” RP at 1186. However, when asked if he touched her butt for a moment before she moved back, she said she did not know. He did not succeed in pulling down his or her pants. She told him to stop and he did. When she said she was going to tell, he said she would not tell anybody. She got off the bed, left the room, and did not tell anyone

because she was scared. She could not name what she feared. RP at 1186-89.

When S.K.H. was nine or ten, she and Charles were alone in the backseat of a car for a few minutes waiting. Charles pulled out his penis and said, “Look, [S.K.H.] . . . And then he said, Let me see yours, and I said no.” She said it was “gross,” hopped out of the car and ran into the house. RP at 1198-1201; 1227.

#### **ii. The Medical Interview and Examination**

On March 27, 2005, a nurse practitioner who evaluates children for sexual abuse examined S.K.H. These hearsay statements were apparently admitted without objection. S.K.H. was very animated, exhibited a feeling of pressure to get things out and was a little anxious. RP at 1132-34. When asked what happened to her, S.K.H. answered Charles “pulled me into the room, and then he closed the door. . . . And then he pulled down his pants. And I said, What are you doing? and he is like, Don’t tell nobody. And right when he said that, he started touching me. . . . on my private.” RP at 1134-35. The nurse understood “private” to mean genitals. S.K.H. said that her clothes were on, but Charles “touched me with his private. . . . He held it with his hands, and then he started holding my butt with his hand.” RP at 1136. She said she would tell, he said if she did there would be trouble, and she left the room. RP at 1136.

S.K.H. also told the nurse about the incident in the car, which occurred

after the first incident described. RP at 1137; 1157. She also described an incident where Charles “touched me over my clothes and then he tried to pull off my pants. And I asked, And did he pull off your pants? And she replied, quote, ‘No, because of my belt,’ unquote. And then she told me she could pick out the belt she wore that time if I needed to see it.” RP at 1137-38.

S.K.H. also related to the nurse, “‘There is another time when he did it,’ unquote. And then she went on to tell me about a time when she was getting her hair braided. She said, quote, ‘He held me, pushed me against the wall, got behind me, and humped me,’ unquote.” RP at 1138. The nurse did not ask for any more information because she “felt like there would be a whole lot more for this child to get into” and she was concerned about time constraints.

The physical exam of S.K.H. resulted in an “abnormal” diagnosis. The nurse saw a “transection,” which is caused by penetrating trauma. It appeared that the hymen had had a significant tear, but had healed. It was not possible to determine how long ago the transection had happened. RP at 1139-41.

#### **h. Charles’s Statements**

On March 30, 2005, A police officer questioned Charles about the allegations in this case. Charles told him he had had sexual intercourse with S.L.H. once or twice a year or two prior to the questioning. RP at 281-85; 943-45.

Charles told him "I put my penis in her vagina once for about a minute or less. It didn't feel right so I stopped." RP at 946. When asked about Z.S., Charles answered, "I tried to take her clothes off because she wet them." RP at 946. Charles denied touching S.K.H. or N.S. RP at 947-48. He admitted an incident with D.S. that happened three or four years ago, saying "I had sexual intercourse with her for less than 30 seconds." RP at 947. He denied ever ejaculating or "humping" or pretending to hump the others. RP at 949.

At trial, Charles testified that he was friendly with S.L.H. She would talk to him about her boyfriends and people who messed with her at school. He knew that there was something wrong with her speech, but had not realized she was slow until the proceedings started. RP at 1566-67. He explained, "Nobody treats her different." RP at 1567. However, he knew that she rode the kind of bus to school that children who are retarded sometimes ride. RP at 1603-04.

He said that when he lived in a previous location, S.L.H. was lying down, he took his clothes down a little and he lied down on top of her. He could not remember if his penis was either exposed or erect at the time. That is what he meant when he told the police officer he had sexual intercourse with her. RP at 1568-69; 1612-13.



**i. Charles's Capacity Regarding Count VI**

The witnesses all described Charles as a “normal” boy. He was described as a “good kid” with normal, polite, age-appropriate behavioral issues. RP at 28-29; 85-88; 118-20; 172-73; 258-60. He has had some behavioral problems in school, facing suspension or in-school suspension for a fight and a uniform violation. In so far as learning right from wrong at home, he learned some things quickly and others took longer. His biggest area of difficulty lies in paying attention. RP at 176-80.

His mother and step-father described some learning difficulties Charles experienced. His mother explained that he learns slower than most children and has been on a modified learning plan and in special education since elementary school. She believed that he was reading at a level two grades below others in his age group. RP at 85; 173-75. Charles testified that all his classes but one are regular classes. He takes one class called compensatory skills, where the teacher helps with homework and areas he finds difficult. RP at 1541; 1577-78.

His aunt Kisha (Ms. Catching-Stuckey) described Charles as “exceptional” for the progress he had made in school despite his dyslexia. He even won an award one year for being the most improved student. RP at 254-58.

Family members testified that when Charles was anywhere from between

eight and nine and his step-cousin D.S. was somewhere between four and six, his step-father discovered the two of them lying on top of each other. Witnesses had heard that Charles had “humped” against his cousin through their clothes. Both children were punished for this incident and told their actions were inappropriate. RP at 19-27; 77-82; 100; 111-112. However, the incident caused no concern for family members, as it was seen as the typical behavior of children. RP at 26-27; 117; 132-33.

A similar incident may or may not have happened in the summer of 2003. *Cf.* RP at 237-53 (testimony of mother of other child involved); RP at 116 (witness heard story from “people talking” or Charles’s step-father who had heard story from Charles’s mother who had heard story from Charles’s aunt) and RP at 154-55 (story similarly heard second- or third- hand).

### **C. ARGUMENT**

#### **I: The Trial Court Erred in Admitting the Hearsay Statements of D.S., N.S., and Z.S.**

The trial court abused its discretion in admitting the unreliable hearsay statements of three alleged child victims when it did not base its findings on the full reliability test and the statements in this case do not pass the test. RCW 9A.44.120 authorizes the admission of hearsay statements made by a child under certain circumstances:

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

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

(2) The child either:

(a) Testifies at the proceedings; or

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

RCW 9A.44.120. Charles does not challenge the court's findings with regard to RCW 9A.44.120(2), only the reliability of the statements. The test for reliability is distinct from the question of whether a witness is competent to testify. *State v. Borboa*, 157 Wn.2d 108, 120, 135 P.3d 469 (2006).

In *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984), the Supreme Court set out nine factors to determine the reliability of hearsay statements:

(1) [W]hether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the

relationship between the declarant and the witness[;] . . . [(6)] the statement contains no express assertion about past fact[;] [(7)] cross examination could not show the declarant's lack of knowledge[; [(8)] the possibility of the declarant's faulty recollection is remote[;] and [(9)]the circumstances surrounding the statement (in that case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

*Borboa*, 157 Wn.2d at 121-22 (internal quotations omitted), *quoting Ryan*, 103

Wn.2d at 175-76. In this case, the court did not consider factors 6 or 7 at all. All of the assertions in this case involved past fact and all could be challenged on cross examination, thus the court erred in ignoring these factors. In addition, it abused its discretion regarding its findings as to the remaining seven factors.

A. Hearsay Regarding N.S.

N.S. was five at the time of her disclosures. While N.S. was not known as a liar, she was known to lie to avoid punishment. RP at 449-51; 485-86. Charles does not challenge the trial court's findings with regard to N.S.'s statements to S.K.H. However, the statements the adults remembered were unreliable because they were inconsistent, made under suggestive circumstances, made to avoid punishment, and not spontaneous.

### 1. N.S.'s Statements to Harriet S.

Harriet's recollection of what N.S. told her is completely unreliable. First, Harriet had taken medication that makes her sleepy and was, in fact, just awakened at the time she was told of the allegations. RP at 511-15; 792-93. Next, before N.S. told Harriet what happened, S.K.H. relayed the information in front of N.S. When asked what humping meant, S.K.H. was the one who explained. RP at 756. In addition, Harriet remembered two different versions of what N.S. told her, one involved "humping," the other "nasty stuff." Cf. RP at 756 and RP at 512 & 518. Finally, Harriet remembered that all the children said Charles was humping them, a statement at variance with the details of the statements remembered by the adults. Thus, under the circumstances surrounding the statements, Harriet's recollection of what N.S. told her cannot be deemed reliable.

### 2. N.S.'s Statements to Onnewa and Harold

N.S.'s statements as remembered by Onnewa are similarly unreliable. Onnewa remembered N.S. talking to her in front of the family gathered in Harriet's bedroom. Again N.S. spoke after S.K.H. told the group what N.S. had told her about Charles. RP at 901. Then Onnewa asked N.S., "What happened with Squeak?" "What did he do?" N.S. told her "every time I go over to

[Valencia Catching's] house, Squeak be humping on me." RP at 453; 893.

Harold also questioned N.S. under suggestive circumstances. After asking D.S. what happened to her in front of N.S., he then asked N.S. what happened. Thus, the circumstances of the telling to Onnewa and Harold were so suggestive as to make the statements unreliable.

In addition, the variation in the frequency makes the remembered statements suspect. N.S. told Onnewa it happened "every time" she saw Charles, she told Harold it happened twice, Sukari remembers her saying that it happened for five minutes. Thus the inconsistency of the statements remembered also makes them unreliable.

### 3. N.S.'s Statements to Sukari

N.S.'s Statements to Sukari show that all of her statements after those made to S.K.H. were the words of a five-year-old mimicking her older sibling and cousins. Sukari observed that N.S. would say "Squeak humped me" all the time, out of the blue, to anybody. RP at 489. In this regard, the statements were meaningless. In addition, Sukari was the only witness who reported that N.S. said Charles would let the children watch "little porno movies or the nasty movies that they got" when his mother was not home. RP at 483. When no one else heard this statement, Sukari's memory was unreliable the statements she remembered

should not have been admitted.

#### 4. N.S.'s Statements to the Nurse-Practitioner

Like the statements to Sukari, these statements also show a young girl repeating the words of her older relatives. N.S. started the conversation by saying something about "hump me." RP at 1113. But she also repeated her sister, D.S.'s, allegations as though they were her own. Having told everyone else about "humping," she told the nurse that Charles pulled her pants down when she was sleeping. RP at 1114. When, at this point, whatever memory she had was so mingled with the statements she had heard from her sister and cousins, any statement made to the nurse was unreliable and should not have been admitted.

#### B. Hearsay Regarding D.S.

D.S. turned nine on the day of the disclosure. She testified at trial, so the court was able to get her first-hand account of what happened. It was when she was under oath, in the courtroom, that she was most likely to tell the truth. Thus, as an initial matter, any hearsay statement that was inconsistent with her trial testimony was unreliable and should not have been admitted.

In addition, her motives are open to question. Although she was not known to lie about important things or lie a lot, she was known to have told "stories" or lies on occasion to prevent herself from getting into trouble. RP at

408-09; 449-51. She was also openly fearful of her mother's punishment: "I don't want my mom to get mad at me; I don't want my mom to whup me." RP at 420 & 410, see RP at 812-13. She had been punished for inappropriate behavior involving Charles once before and thus had incentive to put the onus on Charles this time so that she would not be punished.

Further, her statements to Onnewa, Sukari, Harriet and Harold were all made under suggestive circumstances. She made those statements when she was with her whole family in her grandmother's bedroom, where S.K.H. and the other children were relating stories about Charles humping them, in response to her family's questions about whether Charles had "messed" with her. *See, e.g.*, RP at 462-63; 895-96. In addition, the adults' memories of what D.S. said are all over the map, even though they heard them at the same time (while Harold was not present the entire time, the others were present when he questioned D.S.). For these reasons as well as the reasons given below, the hearsay statements were not reliable.

#### 1. D.S.'s Statements to Yolanda Hull

D.S. made her statements to Ms. Hull under circumstances likely to make D.S. wish to avoid trouble. They were on their way to D.S.'s grandmother's to discuss a problem that had arisen. Ms. Hull expressly asked if Charles had ever

tried to mess with D.S. D.S. broke down and related a fragmented story. Under these circumstances, the statements were unreliable.

The statements were also unreliable because of their content. Ms. Hull remembered that D.S. stated Charles tried to pull down her pants while they were both in the closet with Bidy and Max (Charles's twin step brothers), J.S. and N.S. RP at 405; *see also* RP at 411 & 811-12. She also remembered D.S. saying that Charles pulled her pants down, got on top of her and "did it to her," implying that they actually had sexual intercourse. RP at 816. When D.S. herself related neither of these scenarios at trial and apparently told these stories to no one else, the statements Ms. Hull recalled were unreliable and should not have been admitted.

## 2. D.S.'s Statements to Sukari and Harriet

When Harriet was on medication at the time she heard D.S.'s statements, and because of her general difficulty with memory, D.S.'s statements as recalled by Harriet were not reliable. *See, e.g.*, RP at 517 & 519 (Harriet mistakenly remembered that D.S. came to her house with the other children, when Yolanda had brought her; she was "so pooped" that evening she could not remember more).

In addition, the statements recalled by both Sukari and Harriet seem closer

to the “humping” recited by N.S. than to D.S.’s trial testimony. Sukari remembered D.S. saying that Charles humped her and she watched “nasty movies” with him. RP at 492-94; 851-52. Harriet remembered that D.S. said Charles “was doing nasty stuff to her and trying to hump them” and that Charles put on “nasty tapes” of people “doing nasty things.” RP at 763-64. No one else heard D.S. say she watched pornographic movies with Charles and D.S. herself denied it at trial. RP at 1259. Thus, these statements were unreliable and should not have been admitted.

### 3. D.S.’s Statements to Harold

At the pretrial hearing, Harold remembered hearing a completely different story from D.S., making his recollection utterly unreliable and inadmissible. Harold remembered that D.S. told him Charles had touched her “private parts,” and she pointed to her vaginal area. RP at 551. He said she also relayed that Charles had offered “you show me your stuff, I’ll show you my stuff.” RP at 552. When this testimony seems merely like a merger of his daughters, Z.S.’s and S.K.H.’s, allegations, his recollection is unreliable and should not have been admitted. Although his testimony changed at trial, his memory of the specific events of the night of disclosure was too poor to consider any hearsay statements he remembered to be reliable.

#### 4. D.S.'s Statements to the Nurse Practitioner and the Prosecution's Interviewer

D.S.'s statement to the nurse practitioner and the prosecution's representative were not spontaneous, but produced as a result of specific questioning. In addition, they were given after she had already committed herself to a position. Moreover, the statements to the prosecution about Charles touching her buttocks were not repeated either at trial or to any other witness. Under these circumstances, the statements were not reliable and should not have been admitted.

#### C. Hearsay Regarding Z.S.

Z.S. was three on the night of the disclosure. She was not known to have lied before. RP at 539. Her first statement regarding sexual activity was made when she was two. All of her statements should be particularly scrutinized, given her age at the time of the first disclosure, the highly suggestive manner of eliciting that disclosure, and S.K.H.'s changing memory of that disclosure.

According to S.K.H., when Z.S. was two, she and Charles went into a bedroom alone together. S.K.H. saw Z.S. come out of the room pulling up her pants. She asked Z.S. why her pants were down. RP at 566-71. Z.S. answered "I don't know." Then S.K.H. asked, "Did Squeak just hump you or anything? And she said, Yeah, and it hurt." RP at 569. S.K.H. later repeated that Z.S. said "he

humped me on my private and it hurt.” She maintained that Z.S. used the word “private.” RP at 570-72.

However, at trial, S.K.H. said that the question she asked Z.S. was “Did Squeak just touch you?” She reported that Z.S. answered “Yeah, and it hurt.” RP at 1080. At trial she specifically said that Z.S. had not used the word “private.” This time she said that she asked Z.S. if Charles had touched her private and Z.S. had answered yes, and pointed to her vagina. RP at 1180-82.

These hearsay statements are not reliable given the suggestive nature in which they were elicited, the improbability of a two-year-old knowing how to use words such as “hump” and “private,” and S.K.H.’s changing story. Moreover, S.K.H.’s memory seems even less credible when she did not report her concerns immediately. She gave N.S.’s tender age as the reason she decided to bring the allegations to Harriet on the night of February 27. However, she allegedly heard Z.S.’s story well before that, when Z.S. was only two. Yet she did not act to protect Z.S. For these reasons, Z.S.’s statements to S.K.H. were not reliable and should not have been admitted at trial.

When the next time Z.S. talked about “humping” was the night of the disclosure, in the suggestive atmosphere of her grandmother’s bedroom, after hearing her mother, grandmother, aunts, sisters and cousins all talking about

humping, her statements were not reliable and should not have been admitted.

None of Z.S.'s statements were spontaneous; they were all given in response to specific suggestive questions. Under these circumstances, the nonsense Z.S. speaks in response to direct questions is relevant to this inquiry. She gave nonsensical answers to questions asked by the nurse practitioner. RP at 618-24. In addition, the frequently nonsensical answers she gave to the court when it was determining whether she was competent to testify should make it clear that whatever statements she made could not be relied upon. RP at 334-352 (*e.g.*, the courtroom was the park, her sister was a boy, "Q: What month is it? A: Because she has a baby in their stomach.").

For all of these reasons, Z.S.'s hearsay statements should not have been admitted at trial.

In sum, when only Z.S.'s unreliable hearsay supported the conviction on Count II, that conviction should be vacated. When the convictions relating to D.S. and N.S. were based in part on unreliable hearsay evidence, and the admission of the unreliable evidence so tainted the trial as to result in the convictions, the convictions for Counts I and III should also be vacated.

**II. The State Failed to Prove the Crime of Child Molestation as Charged in Count I and Indecent Liberties as Charged in Count V When D.S. Testified That Charles Did Not Touch Her Anywhere but Attempted to Feel Her Buttocks and S.K.H. Testified That She Did Not Know if Charles Touched Her Buttocks Before She Moved Away**

The evidence at trial was insufficient as a matter of law to prove Charles committed the acts alleged in Counts I and V. Evidence supports a conviction if, when viewed in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted).

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *Id.* Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

To be guilty of child molestation or indecent liberties as charged, Charles would have had to have completed, *inter alia*, a “touching of the sexual or other intimate parts of a person.” RCW 9A.44.010(2) (definition of “sexual contact”); see RCW 9A.44.083 & RCW 9A.44.100 (crimes requires “sexual contact”). The testimony in this case, however, does not support the convictions, supporting, at the most, attempted child molestation or attempted indecent liberties.

A. Count I: D.S. Testified to an Attempt

The court based the finding of guilt on Count I on “D.S.’s credible testimony” that Charles “touched her buttocks with his hand.” CP at Findings of Fact and Conclusions of Law after Trial - 3. This finding was erroneous as D.S. did not testify in that manner.

At trial, D.S. testified that she was lying on the bed at Charles’s house when he came in and tried to pull her pants down while she was sleeping. She woke up because she felt him trying to unbutton her pants. She moved his hand, got off the bed, and ran into the living room. He did not try to do anything else, and did not really touch her anywhere, except that he tried to unbutton her pants. RP at 1253-58. Later, when reminded about what she had said in an earlier interview, D.S. recalled that Charles “was trying to feel [her] butt.” She woke up and moved his hand. RP at 1429-30.

Thus, D.S. testified at trial that Charles attempted to feel her buttocks, not that he was successful. In all of the variety of statements remembered by her family members, not one includes Charles touching her buttocks. The only time she told someone Charles touched her buttocks was during the interview with the representative from the prosecutor’s office. However, she did not repeat that allegation at trial. Under these circumstances, the State failed to prove Charles

touched D.S.'s buttocks and Charles's conviction on Count I should be vacated.

**B. Count V: S.K.H. Did Not Know if a Touching Occurred**

The court based the finding of guilt on Count V on S.K.H.'s credible testimony that Charles "touched her buttocks with his hand." CP at Findings of Fact and Conclusions of Law after Trial - 7-8. This finding was erroneous, however, as S.K.H. did not testify in that manner.

S.K.H. said that once when she was at Charles's house, he tried to pull down her pants, tried to pull down his pants, pushed her on the bed and tried to touch her butt through her clothes. RP at 1182-86. When asked if he rubbed her buttocks, she answered, "He kind of touched it, but I had moved back." RP at 1186. However, when asked if he touched her buttocks for a moment before she moved back, she said she did not know. RP at 1186. He did not succeed in pulling down his or her pants. RP at 1186-88.

Accordingly, the State failed to prove Charles touched S.K.H.'s buttocks and this Court should vacate Charles's conviction as to Count V.

**C. Even if this Court Finds that Either D.S. or S.K.H. was Touched, the Touch Did Not Amount to Sexual Contact**

Alternatively, even if this Court finds that Charles actually touched D.S.'s or S.K.H.'s buttocks, the State failed to prove sexual contact. Touching buttocks through clothing is not touching a "sexual or other intimate part[] of a person" as

required under RCW 9A.44.010(2). Although the sexual and other intimate parts of a person are left undefined by statute, to construe them to mean the touching of the buttocks through clothing results in a broad construction of a criminal statute when such statutes are to be strictly and narrowly construed. *See, e.g., State v. Washington Ed. Ass'n*, 140 Wn.2d 615, 653, 999 P.2d 602 (1999) (noting rule as basic tenet).

The buttocks cannot be seen as protected by this statute when present day mores treat the buttocks as an extension of the thighs. Thong bathing suits, which expose the entire buttocks, have long been popular. At various times in recent memory, low-cut pants, tending sometimes to expose the top of the buttocks and ultra short shorts and skirts, tending sometimes to expose the bottom of the buttocks, have been fashionable. Under these circumstances, the buttocks cannot be considered a sexual or intimate part of the body. *See also State v. R.P.*, 122 Wn.2d 735, 862 P.2d 127 (1993) (holding hugging and kissing girl and putting “hickey” on neck provided insufficient evidence of sexual contact). Moreover, when the touching, if it occurred in this case at all, was through the clothes, a finding that it was sexual contact clearly cannot be supported.

This Court has held that touching a girl’s hips, after the pants had been pulled down, was a touching of a “sexual or other intimate part[]” so as to amount

to “sexual contact.” *In re Welfare of Adams*, 24 Wn. App. 517, 519-20, 601 P.2d 995 (1979). In affirming the trial court’s decision, the court noted that the trial court had also apparently relied on the additional body contact in that case, in which a boy was lying prone on top of a girl lying underneath him. *Id.* at 521 (a witness observed that the boy “was trying to rock and work his way into her”).

In reaching its decision, the Court relied on two trial court cases from New York and one court of appeals case from Oregon to conclude, in *dicta*, that “it has been held that the buttocks are an intimate part.” However, counsel found no controlling authority in which touching the buttocks through clothing has been held to constitute sexual contact. Moreover, *Adams* notes that what constitutes sexual contact may be determined by the “commonly accepted community sense of decency, propriety and morality.” *Id.* at 520. When changing styles of dress reflect a changing sense of what is decent or appropriate, *dicta* in a case over twenty-five years old should not control this Court’s conclusion on the matter.

Although the attempted or actual touching in this case might have supported convictions for attempted child molestation or attempted indecent liberties, touching of the buttocks through the clothes cannot support a finding of actual sexual contact. For all of these reasons, even if this Court finds that Charles touched either girl’s buttocks through their clothing, the State did not

prove that he committed the crimes charged in Counts I and V and this Court should vacate his convictions.

**III. Alternatively, This Court Should Hold the Crimes of Child Molestation and Indecent Liberties as Charged in Counts I and V Void for Vagueness When a Required Element of the Crimes, Sexual Contact, Is Not Meaningfully Defined**

Charles's convictions as to Counts I and V should be vacated when the statutes under which he was convicted are too vague. Both the crime of Child Molestation in the First Degree and Indecent Liberties require "sexual contact." RCW 9A.44.083 & RCW 9A.44.100. RCW 9A.44.010(2) defines "sexual contact" to mean "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party."

A statute is void for vagueness if either: "(1) the statute 'does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed'; or (2) the statute 'does not provide ascertainable standards of guilt to protect against arbitrary enforcement.'" *State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 890 (2001), quoting *City of Bellevue v. Lorang*, 140 Wn.2d 19, 30, 992 P.2d 496 (2000); U.S. Const. amend. 14, § 1; Wash. Const. art. 1, § 3. When a challenged statute does not involve First Amendment rights, the statute must be evaluated in light of the particular facts of each case. *State v. Halstien*, 122 Wn.2d 109, 117, 857 P.2d 270 (1993) (citation

omitted).

Two purposes underpin the vagueness doctrine, providing “citizens with fair warning of what conduct they must avoid” and protecting them from “arbitrary, ad hoc, or discriminatory law enforcement.” *Williams*, 144 Wn.2d at 203 (citations omitted). However, the vagueness doctrine has limitations. “A statute is presumed to be constitutional unless it appears unconstitutional beyond a reasonable doubt.” *Halstien*, 122 Wn.2d at 118 (citations omitted). In addition, “The party challenging a statute carries the burden of proving its unconstitutionality.” *Id.* Further, “‘impossible standards of specificity’ or ‘mathematical certainty’ are not required because some degree of vagueness is inherent in the use of language.” *Id.* (citations omitted).

In this case, the statutes violate both prongs of the vagueness test. An element of both statutes, “sexual contact” is circularly defined to mean “any touching of the sexual or other intimate parts of a person.” While “sexual” parts clearly mean those related to sexual intercourse, “other intimate parts of a person” is so vague a concept that the statutes fail both to give fair warning of what conduct is prohibited and fail to protect against arbitrary enforcement. Virtually the whole body could be subsumed under that definition.

To one person an intimate part might be the neck or the feet. To another

the face, arms or belly. In this case, Charles was convicted for touching the buttocks, a part not inherently more intimate than the thighs or belly. The definition simply has no end point at all. For these reasons, RCW 9A.44.083 and RCW 9A.44.100 are void for vagueness as applied to the facts alleged in Counts I and V and this Court should vacate Charles's convictions on those counts.

**IV. Trial Counsel was Ineffective When She Failed to Request a Competency Hearing for S.L.H., a Twelve-year-old Witness with an I.Q. of 47, When the Witness Gave Nonsensical Information to an Interviewer Prior to Trial, Was Mistaken as to Events That Happened the Day of Her Testimony and Gave Self-Contradictory Testimony**

Trial counsel was ineffective in failing to request a competency hearing regarding the ability of S.L.H. to receive just impressions of the facts or of relating them truly. The right to counsel includes the right to effective counsel. See U.S. Const. amend. VI; Wash. Const. art. 1 § 22. To demonstrate ineffective assistance of counsel, the defendant must show both that defense counsel's representation fell below an objective standard of reasonableness and that, but for this deficient representation, there is a reasonable probability that the result of the proceeding would have been different. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citations omitted). If defense counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984). In this case, counsel's performance was both deficient and prejudicial and can in no way be viewed as tactical.

Counsel's performance was deficient when she failed to request a competency hearing for an obviously incompetent witness. "Competency is a matter to be determined by the trial court within the framework of RCW 5.60.050 and CrR 6.12(c)." *State v. Froehlich*, 96 Wn.2d 301, 304, 635 P.2d 127 (1981). RCW 5.60.050 provides that people incapable of receiving just impressions of facts and relating them truly are incompetent to testify:

The following persons shall not be competent to testify: (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

RCW 5.60.050. CrR 6.12(c) provides a similar stricture. In this case, S.L.H. was manifestly unable to receive just impressions of facts or relate them truly.

S.L.H. is mentally retarded. Her I.Q. is 47. RP at 1444-45; 1465. The mean I.Q. is 100; S.L.H.'s IQ is three standard deviations below the mean. Entry into special education programs in public school begin with an IQ of 70. A low I.Q. alone does not make a person incompetent. However, additional evidence of S.L.H.'s incompetence was fully before the court.

S.L.H. sometimes gave nonsensical responses when interviewed prior to

trial. When the examining nurse asked her “What happened with [Charles’s] private part?”, S.L.H. replied “It came out the inside the cot.” RP at 1125-26. Apparently with regard to a concern about pregnancy, S.L.H. said, “I went in the bathroom. I used it. I checked it. And that stuff – and then I went pee. And then I wiped it.” RP at 1127.

At trial, she was confused as to events that happened that day, when her parents picked her up at her grandmother’s house in Lynnwood. She believed that to have happened the night before. RP at 962-73; RP at 1008. In addition, she stated she had three sisters, including an older sister, but she did not know who the older sister was. RP at 962-73; RP at 1008. Further, she gave numerous contradictory answers, first saying nothing had happened with Charles, then saying it had. RP at 976-995. She gave both contradictory and an apparently false answers to another question, first stating that when the incident happened with Charles, no one else was in the house; next stating there was a girl in the closet, Charles’s friend. RP at 995-96.

Under these circumstances, defense counsel was deficient in failing to raise the question of S.L.H.’s competency as a witness. Moreover, her deficient performance was prejudicial when had a hearing been held, S.L.H. would likely have been found incompetent to testify. As her testimony resulted in Charles’s

conviction on Count IV, CP at Findings of Fact and Conclusions of Law After Trial - 6, the attorney's deficient performance prejudiced Charles and his conviction as to count IV should be reversed.

**V. When Charles Could Have Been Eleven at the Time of the Acts Alleged in Count IV and the Court Did Not Make Any Findings as to His Capacity to Commit the Crime, His Conviction on this Count Should Be Vacated**

An eleven-year-old is presumed to lack capacity to commit a crime:

Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong.

RCW 9A.04.050. This statute applies to juvenile adjudications, and the State has the burden to rebut the presumption of incapacity by clear and convincing evidence. *State v. J.P.S.*, 135 Wn.2d 34, 37, 954 P.2d 894 (1998).

Here, the court convicted Charles of a crime that could have occurred when he was eleven without requiring the State to rebut the presumption codified in RCW 9A.04.050. The court based Charles's conviction for Count IV on conduct occurring "between the 14th day of March, 2003, and the 27th day of February, 2005." CP at Findings of Fact and Conclusions of Law - 10. Charles did not turn twelve until February 11, 2004. Accordingly, his conviction on

Count IV should be vacated.

Moreover, the State failed to prove that Charles was twelve when the acts were committed. To the extent S.L.H. was competent to testify, she unequivocally testified that she was eleven when the sexual incident with Charles occurred. RP at 994-95. S.L.H. was eleven from October 11, 2003 to October 10, 2003. Charles was eleven on October 11, 2003 and through February 11, 2004.

S.K.H. testified that she saw a sexual incident occur between Charles and S.L.H. in September 2004. But her memory of the timing was confused. At trial she testified to seeing two encounters. In an earlier interview she remembered she had seen only one. At trial, she remembered seeing them once in the dark when she could not see clearly, another time in the light and she could see well. At first she said that the time she saw them in the dark was before the time she could see them clearly. RP at 1065-72. Later she said the time she could see them clearly was the first time she saw them. RP at 1218-19.

The timing of when she saw them was tied into a trip her parents took to Las Vegas. But her parents went to Las Vegas twice, nine months apart; in September 2004 and for New Years in 2003/04. RP at 1028-29; 1035. At trial S.K.H. believed it happened in September 2004, but she agreed that she did not always know when it happened. RP at 1219. Had she confused the trips to Las

Vegas, as was not unlikely, she would have seen Charles and S.L.H. together in 2003, which would have been consistent with S.L.H.'s testimony that it happened when she was eleven. Of course, Charles would have been eleven then too.

When S.L.H. was clear that she was eleven when Charles had sexual intercourse with her and S.K.H.'s memory of the timing was confused, the State failed to prove that a sexual incident between S.L.H. and Charles occurred in September 2004. Thus, it failed to prove he was twelve when the acts alleged in Count IV were committed. When the court did not find he had the capacity to commit the crime when he was eleven, this Court should vacate his conviction on Count IV.

**VI. When S.L.H.'s Family Had Spoken to Her about Sex and the Risks of Sex and She Functioned Fairly Normally Socially, the State Failed to Prove She Was Incapable of Consenting to Sexual Activity with Charles**

The State failed to prove S.L.H. lacked the capacity to consent to sexual activity with Charles. In order to prove this crime, the State had to prove that S.L.H. "is incapable of consent by reason of being physically helpless or mentally incapacitated." RCW 9A.44.050(1)(b). Factors relevant to prove this element are "that person's testimony regarding his or her understanding, [and] other relevant evidence such as the victim's demeanor, behavior, and clarity on the stand." A fact-finder may also take into consideration "a victim's IQ, mental age, ability to

understand fundamental, nonsexual concepts, and mental faculties generally, as well as a victim's ability to translate information acquired in one situation to a new situation.” *State v. Ortega-Martinez*, 124 Wn.2d 702, 714, 881 P.2d 231 (1994)

The standards for challenging the sufficiency of the evidence are set forth in Part II, above.

The State did not meet its burden. S.L.H.’s parents discussed sex with her. Her mother had discussed menstruation, hygiene, and the risk of pregnancy with S.L.H. when she got her period, at age eleven. She warned her about kissing and playing around with boys at that time. RP at 1011-17. Her father had not talked to S.L.H. about menstruation, but he has always had conversations with his daughters about boys and the risks they pose. He also discusses with them why certain clothes are inappropriate, because “you will end up a mother before your time.” RP at 1368-69. Shortly after S.L.H. got her period, he warned S.L.H. about being with boys, hinting at what they might want to do that she might want to do too. RP at 1370-72. In addition, he stated that Shantia had always been adamant about “that stuff” with S.L.H. RP at 1372.

In addition, S.L.H. functions fairly normally socially. A former teacher testified that if you saw S.L.H. with a group of girls her own age, it would be hard to pick her out as disabled. RP at 1444. In fact, one of her strong points is her

social ability. RP at 1466-68.

The State asked S.L.H. few questions which would have established her inability to consent to sex. *Cf. State v. Summers*, 70 Wn. App. 424, 853 P.2d 953 (1993) (describing questions and answers demonstrating incapacity to consent).

While S.L.H. said she did not know what “sex” or “pornography” meant, she also said that she knew people in a “dirty” movie were having sex. In addition, S.L.H. knew what a penis, vagina and “boobs” are, apparently understood the mechanics of sex, and feared pregnancy. RP at 976-994; RP at 1126-27.

Under these circumstances, the State failed to prove that S.L.H. was “incapable of consent by reason of being physically helpless or mentally incapacitated” as required under RCW 9A.44.050(1)(b). Accordingly, this Court should vacate Charles’s conviction as to Count IV.

**VII: The Trial Court Erred in Finding That Charles, Who Could Have Been Eleven at the Time, Had Sufficient Capacity to Be Criminally Tried for Showing His Penis to His Nine- or Ten-year-old Cousin and Asking to See “Hers”**

The trial court erred in holding Charles criminally responsible for the childish act of showing his cousin his penis and asking for a reciprocal peek. Children between the ages of 7 and 12 are presumed incapable of committing a crime. The statute governing capacity, RCW 9A.04.050, is set forth in Part V.

The test for capacity is whether the child “had knowledge of the

wrongfulness of the act at the time he committed the offense.” *State v. J.P.S.*, 135 Wn.2d at 37-38. Capacity is particularly difficult to determine of young children in sexual misconduct cases. “When a child is accused of a crime which involves sexual misconduct, it is more difficult for the State to prove the child understood the conduct was wrong. It is very difficult to tell if a young child, particularly one who is developmentally disabled, understands the prohibitions on sexual behavior with other children.” *Id.* at 38.

The question here is whether Charles understood that showing his penis to his nine- or ten-year-old cousin and asking to see hers was wrong. The following factors are relevant to this determination: “(1) the nature of the crime; (2) the child’s age and maturity; (3) whether the child showed a desire for secrecy; (4) whether the child admonished the victim not to tell; (5) prior conduct similar to that charged; (6) any consequences that attached to the conduct; and (7) acknowledgment that the behavior was wrong and could lead to detention.” *Id.* at 38-39 (citations omitted).

Here, the nature of the crime makes it almost impossible for a child to understand its wrongfulness. All Charles did was show his cousin his penis and ask to see “hers.” Standing alone, that behavior is a basic part of growing up and it is absurd to criminalize it.

Next, although Charles was a “normal” boy, he also exhibited a learning disability and age-appropriate behavioral issues. RP at 28-29; 85-88; 118-20; 172-73; 176-80; 258-60. In addition, there was no evidence that he had ever been taught that exposing his penis was wrong. For these reasons, Charles’s personal attributes did not set him above other eleven year olds in understanding the wrongfulness of this particular conduct. Accordingly, the trial court’s finding in this regard was erroneous.

Third, to the extent Charles showed a desire for secrecy, it was only the natural secrecy children exhibit when they engage in exploratory sexual play. Charles was in the backseat of the car when he showed his penis to his cousin, at a time when the adults could have returned at any moment. Thus, any desire for secrecy he exhibited was not sufficient to show that he knew his behavior was wrongful. In addition, the trial court failed to make a finding on this point.

Fourth, Charles never told S.K.H. not to tell about the incident. The court’s finding to the contrary is not supported by the facts.

Fifth and Sixth, there was no evidence that Charles engaged in prior conduct similar to this or that he was admonished for such conduct (the prior conduct discussed was of a different nature than that charged in Count VI).

Finally, Charles did not acknowledge that this behavior was wrong to the

extent that it could lead to detention.

For all of these reasons, the finding that Charles had capacity to be charged with the crime of showing his cousin his penis was erroneous and this Court should reverse his conviction as to Count VI.

**VIII: Alternatively, When All the Evidence Showed was That Charles, at the Age of Eleven or Twelve, While Sitting in the Backseat of a Car Alone with His Cousin, Showed Her His Penis and Asked to See “Hers,” the State Failed to Prove That He Revealed His Penis Knowing That Such Conduct Was Likely to Cause Reasonable Affront or Alarm**

The State failed to prove that Charles revealed his penis to his cousin knowing that it would cause reasonable affront or alarm. “A person is guilty of indecent exposure if he or she intentionally makes any open and obscene exposure of his or her person or the person of another knowing that such conduct is likely to cause reasonable affront or alarm.” RCW 9A.88.010. The standards for challenging the sufficiency of the evidence are set forth in Part II.

The trial court concluded that Charles acted with the requisite knowingness because of “the nature, location, and time of the exposure and because the respondent waited until the adults left the car and he was alone with S.K.H.” CP at Findings of Fact and Conclusions of Law - 9. It is unclear what the court meant when it referred to “the nature, location, and time of the exposure.” Charles exposed his penis to his cousin in the backseat of a car, when

it was dark, and after the adults had temporarily left the car. None of these factors tends to show a knowledge that the act would cause reasonable affront or alarm except, perhaps, the darkness and the fact that the adults were gone.

But the nature of the act itself makes it the kind of thing children do when adults are not around. Charles may have desired privacy, but not because he planned to affront or alarm his cousin. Children typically realize “I’ll-show-you-mine-if-you-show-me-yours”-type behavior is something to do with close friends or relatives when the grown-ups are gone.

Moreover, S.K.H.’s reaction did not show affront or alarm. True, she did not want to see his penis; she thought it was gross. She left the car. But that does not mean she was affronted or alarmed in the manner a child would be if an adult or a child who was a stranger pulled out his penis and showed her.

For these reasons, the State failed to prove that Charles exposed himself “knowing that such conduct is likely to cause reasonable affront or alarm” and this Court should reverse his conviction.

**D. CONCLUSION**

For all of these reasons, Charles T.C. respectfully requests this Court to vacate all of his convictions.

Dated this 12th day of August, 2006.

Respectfully submitted,



Carol Elewski, WSBA # 33647  
Attorney for Appellant

**CERTIFICATE OF SERVICE** ✓

I certify that on this 12th day of August, 2006, I mailed one copy of the attached brief, postage prepaid, to the attorney for the Respondent, Kathleen Proctor, Deputy Prosecuting Attorney, 930 Tacoma Avenue S, Tacoma, Washington, 98402-2102, and one copy of the brief, postage prepaid, to Mr. Charles T. Catching, 4545 South Cedar, Apartment 23, Tacoma, WA 98409 WA 98531-9699.



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