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Nº. 34312-6-II

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

STATE OF WASHINGTON
Respondent,

v.

ARTHUR LEON JOHNSON,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 04-1-01178-5
The Honorable Annie M. Laurie, Presiding Judge

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I. ASSIGNMENTS OF ERROR

1. Trial irregularities deprived Mr. Johnson of his right to a fair trial.
2. The trial court committed reversible error by (1) failing to determine whether the “near verbatim” report was admissible under any rule of evidence; (2) by permitting the prosecutor and a witness to read the “near verbatim” report to the jury in its entirety; and (3) permitting the prosecutor to read from the “near verbatim report” a second time during closing argument.
3. There was no properly admitted evidence whatsoever to support Mr. Johnson’s conviction for first degree rape of a child, more than one count of first degree child molestation, or third degree assault of a child.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is a defendant denied a fair trial where the trial court admits a “near verbatim” report of a child interview based on a misinterpretation of another judge’s ruling on the issue of child hearsay, permits the prosecutor and the witness who wrote the report to read it to the jury in its entirety, and permits the prosecutor to read excerpts from the “near-verbatim” report to the jury a second time during closing argument? (Assignments of Error Nos. 1 and 2)
2. Should convictions for first degree rape of a child, a second count of first degree child molestation, and third degree assault of a child be reversed and charges dismissed where the only evidence supporting the charges were statements ascribed by a child interviewer to the alleged victim, which statements were never determined to be admissible under any rule of evidence? (Assignment of Error No. 3)

III. STATEMENT OF THE CASE

Mr. Johnson was originally charged with one count of child molestation in the first degree on July 29, 2004. CP 1-8. Mr. Johnson entered an *Alford* plea of guilty to the charge, based in part upon belief of defense counsel and the prosecutor that Mr. Lindsay's offender score was zero. *See* 4/28/05 RP 1-7. Based upon a presumed offender score of zero, his sentencing range was 51 to 68 months. 8/23/05 RP 3.

On February 11, 2005, the court entered an Order for evaluation of Mr. Johnson's competency to stand trial (CP 17-23), and on April 5, 2005, a "Forensic Mental Health Report" was filed with the court, stating that "Mr. Johnson does have the capacity to understand the charges against him and does have the capacity to assist his attorney in his own defense." CP 30. On April 12, 2005, the court found Mr. Johnson competent to stand trial. 4/12/05 RP 3-4.

Following entry of the *Alford* plea, the State was contacted by the Department of Corrections and informed that Mr. Johnson had a 1978 indecent liberties conviction for which he had successfully completed a deferred sentence. 8/23/05 RP 3.

Based on *State v. Moore*, 75 Wn. App. 166, 171, 876 P.2d 959 (1994), in which this Court wrote that a pre-SRA sex offense counts as part of the defendant's offender score in a subsequent SRA prosecution,

Mr. Johnson moved to withdraw his *Alford* plea because his offender score was actually three, and his standard sentencing range would be 67-79 months. CP 48-65.

The State agreed that Mr. Johnson was entitled to specific performance, which would have resulted in a sentence of 60 months, or alternatively, to withdraw his plea, but stated on the record that if he did withdraw his plea, “he will be looking at further arraignment charges of rape of a child in the first degree, additional counts of child molestation first degree, two counts of bail jump,” and that the State would seek an “exceptional” 20-year sentence. 8/23/05 RP 5.

The trial court engaged in extensive colloquy with Mr. Johnson, and his counsel was directed to meet with him again to discuss withdrawal of the plea. 8/23/05 RP 6-9. On return to court, Mr. Johnson’s counsel requested permission to withdraw, stating:

The jail records would reflect that I have met with Mr. Johnson no less than eight times on this matter. Mr. Cross from my office has met with him one additional time. We have advised him repeatedly of the options that Mr. Johnson has before him. But I just cannot stand here and tell this court that I honestly believe that he understands those options.

8/23/05 RP 11.

The prosecutor added:

Ms. Muth and I have had numerous discussions about this, as well as even talking with our own appellate unit about certain legal issues. I know she's met with them. I don't know what else she can do. She's filed motions. We've talked about the motions, legal options, et cetera.

The choice comes down to today, I guess, for Mr. Johnson, basically. The state looks at it as binary. Either he withdraws his plea and faces potentially – and I misspoke this morning, and I figured out 26.5 years, or asks for specific performance of the original plea. Speedy sentencing is up today.

8/23/05 RP 11-12.

Mr. Johnson signed a speedy sentencing waiver, and the court permitted his counsel to withdraw and appointed a new attorney to represent him. 8/23/05 RP 13-15. On September 7, 2005, Hon. Sally F. Olsen signed an Order permitting Mr. Johnson to withdraw his guilty plea.

On October 19, 2005, a child hearsay hearing was held during which Hon. Leonard Costello (10/19/05 RP 1-2) heard testimony of the alleged victim, KLM (10/19/05 RP 14-36); Ellen Jane Schaupy, a SANE nurse practitioner (10/19/05 RP 38-57); Kevin Marsh, the alleged victim's father (10/19/05 RP 58-67); and Sasha Mangahas, a child interviewer employed by the prosecutor's office. 10/19/05 RP 68-78. Judge Costello admitted Ms. Mangahas's transcription of her "near verbatim" notes of the interview she conducted with KLM on June 7, 2004 as an exhibit "for the purpose of the child hearsay hearing." 10/19/05 RP 74.

On October 28, 2005, Judge Costello issued his ruling:

The trustworthiness of these statements to all three, suggested by the timing of the statements, is there is nothing to suggest that the relationship between the declarant and the witness would affect the general trustworthiness of these statements. For these reasons, **the court finds that each of the statements that was testified to has sufficient indicia of reliability to allow admissibility at the time of trial.**

Any issues relating to relevance, to cumulativeness or other potential issues can abide trial.

10/28/05 RP 5 (emphasis added).

In the written findings of fact and conclusions of law (prepared by the State) is found the following conclusion: “the statements by K.L.M. to Sasha Mangahas are admissible at trial **subject to relevant rules of evidence.**” CP 102. (Emphasis added.)

On November 7, 2005, a First Amended Information was filed, in which Mr. Johnson was charged with one count of rape of a child in the first degree, two counts of child molestation in the first degree, one count of assault of a child in the third degree, and two counts of bail jumping. CP 104-109. A Second Amended Information was filed on November 7, 2005, maintaining the same charges but adjusting the dates of the alleged crimes. CP 110-115.

Trial to the jury began on November 8, 2005, on which date the alleged victim testified. KLM stated that Arthur “touched” her (11/8/05

RP 58) on her skin (11/8/05 RP 62), “rubbing” his hand “back and forth” on “the place where [she went] to the bathroom.” 11/8/05 RP 63. KLM testified that the touching happened one time only (11/8/64), that Mr. Johnson did not “put his finger in [her]” (11/8/05 RP 64-65), that Mr. Johnson did not “put his foot on [her] where he shouldn’t have,” and that Mr. Johnson did not “ever kick[] [her] down there in the private place.” 11/8/05 RP 65.

Prior to calling Sasha Mangahas to the stand, the prosecutor told the court (Hon. Anna M. Laurie) that “Judge Costello made a child hearsay ruling” and that he wanted to pass out copies of Ms. Mangahas’s “near verbatim” notes of her interview of KLM to the jury to read along as Ms. Mangahas and the prosecutor read the transcript into the record. 11/9/05 RP 114-115. Defense counsel objected on the basis of ER 403 (“very prejudicial material”), because “it’s presented in a format that looks like a transcript of a tape recording, which it is not,” and “just because it is near verbatim in the opinion of Ms. Mangahas, doesn’t mean it is so.” 11/8/05 RP 116.

During argument on whether the notes could be admitted, both the court and the prosecutor stated that Judge Costello “said it was admissible.” 11/8/05 RP 118. At one point, the court stated “this is

admissibility [sic.] evidence,” and that “[t]he question is how to present it to the jury.” 11/9/05 RP 119.

The prosecutor suggested that he “could lay the foundation under past recollection recorded. If she doesn’t remember, in which case under – I believe it’s 804(a)(5), I could proffer it that way.” *Id.* When defense counsel was asked by the court if any of the prosecutor’s suggested methods of presenting Ms. Mangahas’s notes was acceptable, defense counsel responded:

if . . . Mr. Mitchell goes through the procedure at a point where the witness gets stuck and asks her the proper questions for recollection recorded so she can refresh her memory; and then he could instruct her that she should let us now at subsequent questioning that she is referring to her report. She could just simply say, “I will refer to my report, and we don’t need to go through the – the standard questioning for that. And that – that seems to be a fair solution to this; where she could testify if she has – remembers these things or refer to this report she created.

11/8/05 RP 119-120.

The court ruled that the prosecutor could lay the foundation for the report with Ms. Mangahas, and “then I will give you permission to play the part of “SKM” with her playing the part of “KLM,” and that the report could be read to the jury. 11/8/05 RP 120-121.

The prosecutor “laid the foundation” as follows:

Q. Ms. Mangahas, do you remember doing an interview with a Kathryn Marsh?

A. Yes.

Q. Do you recall when?

A. I would have to refer to my interview.

* * *

MR. MITCHELL: Your Honor, for the record, I'm showing counsel what's been marked for identification purposes only as Plaintiff's Exhibit 10.

* * *

Q. Ms. Mangahas, I'm showing you a document that's been marked as Plaintiff's Exhibit 10 for identification; do you recognize that?

A. Yes.

Q. What is Plaintiff's Exhibit 10?

A. It is a child interview report.

Q. Who's the subject of the interview?

A. Kathryn Marsh.

Q. Who was the interviewer?

A. I was.

Q. If you would flip through that, please. Is that, as far as you remember, your near-verbatim notes of an interview with Kathryn Marsh?

A. Yes.

Q. And when was that interview conducted?

A. On June 7th, '04.

Q. Okay.

MR. MITCHELL: Your Honor, at this point I would like to read the Plaintiff's Exhibit 10 into the record.

THE COURT: All right. Go ahead.

11/8/05 RP 133-134.

Defense counsel stated, "At this point, your Honor, for the record, object to hearsay, confrontation, and ER 403." 11/8/05 RP 134. Judge Laurie responded: "The record is noted that the objection has been made. Go ahead, Mr. Mitchell." 11/8/05 RP 134-135.

The prosecutor and Ms. Mangahas then read the "near-verbatim" report into the record in its entirety. *See* 11/8/05 RP 135-154. According to the "near-verbatim" report, KLM told Ms. Mangahas that Arthur "rubbed [her] tummy and he touched" her "where she "go[es] to the bathroom." 11/9/05 RP 143. The transcript also includes statements ascribed to KLM that Mr. Johnson "licked his thumb and put it on the part I go to the bathroom with" (11/9/05 RP 148) and that he put his thumb "inside the place" she "go[es] to the bathroom with" (11/9/05 RP 149); that Arthur had touched her "a hundred times" (11/9/05 RP 150); that Arthur touched "the part [she] go[es] pee with . . . really hard" with "his foot," "point[ing] to her heel" (11/9/05 RP 152); that Arthur was "kicking

. . . the part [she] go[es] pee with” (RP 153); and that “it started to hurt” when Arthur kicked her, although there was never any bleeding. 11/9/05 RP 154.

During closing argument, and over the objection of defense counsel, the court permitted the prosecutor to re-read parts of the “near-verbatim” report to the jury. *See* 11/10/05 RP 320-327. The basis for the court’s ruling was that “it is proper demonstrative evidence.” 11/10/05 RP 320.

The jury returned verdicts of guilty on the charges of first degree rape of a child, two counts of child molestation in the first degree, and two counts of bail jumping (11/14/05 RP 364-365), and not guilty on the charge of third degree assault of a child. *Id.*

Mr. Johnson was sentenced to 300 months on the rape charge; 149 months on each count of child molestation; and 29 months on each of the bail-jumping charges, all to run concurrently. 12/16/05 RP 416-417.

Notice of Appeal was timely filed on January 10, 2006. CP 285. A motion for relief of judgment and/or a new trial was filed pursuant to CrR 7.8(b)(1), (2), (5), and CrR 7.5(a)(1)(5) on January 26, 2006 based on the affidavits of Mr. Johnson’s daughter (CP 283-284) and Mr. Johnson’s brother (CP 286-287) that they saw KLM’s mother prompting her to give

certain answers during trial. CP 288-292. The motion was denied on February 3, 2006. CP 302.

IV. ARGUMENT

Trial irregularities deprived Mr. Johnson of his right to a fair trial. “An irregularity in trial proceedings is grounds for reversal when it is so prejudicial that it deprives the defendant of a fair trial.” *State v. Condon*, 72 Wn. App. 638, 647, 865 P.2d 521 (1993), *review denied*, 123 Wn.2d 1031, 877 P.2d 694 (1994).

In determining whether a trial irregularity deprived a defendant of a fair trial, the reviewing court should examine the following factors:

- (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow.

Id. (quoting *State v. Escalona*, 49 Wn. App. 251, 254, 742 P.2d 190 (1987) (citing *State v. Weber*, 99 Wn.2d 158, 164-165, 659 P.2d 1102 (1983))).

Several “irregularities” took place during Mr. Johnson’s trial, the result of which was the denial of Mr. Johnson’s right to a fair trial. First, the court treated the “near verbatim” report prepared by Ms. Mangahas as if it had already been determined by Judge Costello that the report itself

was admissible at trial. Second, the trial court permitted the prosecutor and Ms. Mangahas to read the “near verbatim” report in its entirety to the jury. Third, although the trial court did not admit the “near verbatim” report as an exhibit, the prosecutor was permitted to read from it a second time during closing argument.

A. The trial court abused its discretion by admitting the “near verbatim” report into evidence at trial and permitting the prosecutor and Ms. Mangahas to read the report to the jury in its entirety.

This court reviews a trial court’s admission of evidence for abuse of discretion. *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306, review denied, 108 Wn.2d 1033 (1987). “Abuse occurs when the trial court’s discretion is ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *State v. Sanford*, 128 Wn. App. 280, 284, 115 P.3d 368 (2005) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

1. Judge Laurie erroneously interpreted Judge Costello’s child hearsay ruling as a determination that the “near verbatim” report was admissible at trial.

At the child hearsay hearing, Judge Costello ruled orally that the hearsay statements made to Ms. Mangahas had “sufficient indicia of reliability to allow admissibility at the time of trial. Any issues relating to relevance, to cumulativeness or other potential issues can abide trial.”

10/28/05 RP 5. Judge Costello's written findings of fact and conclusions of law state "the statements by K.L.M. to Sasha Mangahas are admissible at trial subject to relevant rules of evidence." CP 102.

Referring to the "near-verbatim" report, Judge Laurie stated that Judge Costello "said it was admissible." 11/9/05 RP 118. What Judge Costello actually said was that the statements made by KLM to Ms. Mangahas "had sufficient indicia of reliability to allow admissibility at the time of trial," and that "any issues relating to relevance, to cumulativeness, or other potential issues can abide trial." 10/28/05 RP 5.

Judge Costello did not state that the "near-verbatim" report itself was admissible, and certainly did not state that the report was admissible as "substantive evidence," as the prosecutor stated to Judge Laurie. 11/9/05 RP 119. In fact, Judge Costello specifically stated that the "near-verbatim" report could be admitted as an exhibit "for the purpose of" the child hearsay hearing. 10/28/04 RP 74. There were only two very brief references to the contents of the "near-verbatim" report during Ms. Mangahas's testimony at the child hearsay hearing. *See* 10/28/05 RP 73-74; RP 76-77.

Judge Laurie herself made no determination of whether the "near-verbatim" report was admissible under the rules of evidence. She erroneously stated that Judge Costello "said it was admissible (11/9/05 RP

118), and that “[t]he question is how to present it to the jury.” 11/9/05 RP 119.

Judge Laurie admitted the “near-verbatim” report into evidence based upon a misinterpretation of Judge Costello’s earlier ruling and without any consideration of the defense objection or of the Rules of Evidence. Judge Laurie’s decision to admit the “near-verbatim” report was an abuse of discretion because it was based on untenable grounds, i.e., on her misinterpretation of Judge Costello’s earlier ruling. This was the first trial irregularity.

2. It was error to permit the prosecutor and Ms. Mangahas to read the “near verbatim” report to the jury in its entirety.

Although the prosecutor identified ER 804(a)(5) as the past recollection recorded exception to hearsay, that rule is, in fact, found in ER 803(a)(5). “Evidence admitted under ER 803(a)(5) may be read into evidence in pertinent part, **not** admitted into evidence as a whole.” *State v. Mathes*, 47 Wn. App. 863, 868 fn1, 737 P.2d 700 (1987) (citing *Wilson v. Key Tronic Corp.*, 40 Wn. App. 802, 814, 701 P.2d 518 (1985)). It was error to permit the entire “near verbatim” report to be read to the jury, and this without any determination that any part of the report was admissible under ER 803(a)(5). This was the second trial irregularity.

3. Judge Costello's child hearsay ruling on KLM's statements to Ms. Mangahas implicates ER 612, not ER 803(a)(5).

Under ER 803(a)(5), the memorandum or record itself may be admissible into evidence and pertinent parts may be read to the jury; however, there was never a determination by either Judge Costello or by Judge Laurie that any portion of the "near verbatim" report itself was, in fact, admissible under that rule of evidence.

Judge Costello's ruling that the statements of KLM to Ms. Mangahas were sufficiently reliable to be admissible under the child hearsay statute suggests that the appropriate rule of evidence for use of the "near verbatim" report was not ER 803(a)(5), but was, rather, ER 612, i.e., a writing used to refresh the memory of a witness.

Under ER 612, a witness may use a writing to "refresh memory for the purpose of testifying, or before testifying, if the court in its discretion determines it is necessary in the interests of justice," but "the writing itself is not evidence." Karl B. Tegland, *5D WASHINGTON PRACTICE, Courtroom Handbook on Washington Evidence* (2006), page 320.

In fact, the prosecutor laid a foundation for use of a writing by Ms. Mongahas to refresh her memory pursuant to ER 612 when (1) he asked if she recalled when she did the interview with KLM, (2) was told that Ms. Mongahas "would have to refer to my interview," (3) handed Ms.

Mongahas a copy of the “near verbatim” report, (4) asked Ms. Mongahas again when the interview was conducted, and (5) received Ms. Mongahas’s answer based on her review of the report. *See* 11/9/05 RP 133-134.

Just as no determination was ever made that any portion of the “near verbatim” report itself was admissible under ER 803(a)(5), there was no determination ever made that use of the report by Ms. Mangahas to refresh her memory for the purpose of testifying was “necessary in the interests of justice,” as required by ER 612.

The decision to admit the “near verbatim” report into evidence and to permit its reading to the jury in its entirety was based solely on Judge Laurie’s misinterpretation of Judge Costello’s ruling at the child hearsay hearing. Judge Costello had merely ruled that KLM’s statements made to Ms. Mongahas had “sufficient indicia of reliability” to be considered at the time of trial pursuant to the rules of evidence. No such “consideration” took place. The decision to admit the report was thus an abuse of discretion because it was based on untenable grounds. Further, it was error under either ER 612 or ER 803(a)(5) to permit the prosecutor and Ms. Mongahas to read the report to the jury in its entirety.

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B. The court's error in admitting and permitting the reading of the entire "near verbatim" report was highly prejudicial to Mr. Johnson.

At trial, KLM testified that Mr. Johnson touched her one time only, without any penetration. This testimony would have supported a single charge of child molestation.

The additional charges were based solely on the "near verbatim" report written by Ms. Mangahas. *See* 11/9/05 RP 216; RP 221-222. It was solely on the basis of the "near-verbatim" report that the court denied the defense half-time motion to dismiss the rape charge, the second count of molestation, and the assault charge. *See Id.* The "near verbatim" report was the only evidence to support the charge of rape, a second count of molestation, and assault, and was quoted extensively during the State's closing argument to support conviction on those charges. *See* 11/10/05 RP 320-327.

"Erroneous admission of evidence is not grounds for reversal 'unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" *Sanford*, 128 Wn. App. at 285, 115 P.3d 368 (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). Without question, the outcome of the trial would have been "materially affected" if the "near verbatim" report had not been admitted into evidence and read to the jury. Absent the "near

verbatim” report, the evidence against Mr. Johnson supported only a single charge of child molestation, the maximum sentence for which would have been 79 months (CP 48-65) if he had been convicted. The trial court’s error in admitting the report into evidence and permitting the prosecutor to read the report in its entirety to the jury was reversible error.

C. Absent the “near verbatim” report, there was no evidence either to send to the jury or to convict Mr. Johnson on the charges of rape, a second count molestation, and assault.

As discussed above, absent the “near verbatim” report, there was absolutely no evidence whatsoever to support the charges of rape or assault or a second molestation. In fact, KLM testified at trial that there was never a penetration of her body by Mr. Johnson, that he touched her only one time, and that he never kicked her. Mr. Johnson’s convictions for first degree rape of a child, a second count of child molestation, and third degree assault of a child should be reversed and the charges dismissed.

D. It was error to permit the prosecutor to read portions of the “near verbatim” report to the jury during closing argument.

CrR 6.15(e) requires that “all” exhibits received in evidence go to the jury room, without exception. The court below did not admit the “near verbatim” report as an Exhibit, but instead, stated “the jury will not be

provided a copy of this report, either now or in the future as they go into the jury room. They will rely on this as with any other testimony.”
11/9/05 RP 121.

During closing argument, the prosecutor stated he was “going to take some excerpts” from the “near verbatim” report, and defense counsel objected, stating “this has not been admitted.” 11/10/05 RP 319. The court permitted the prosecutor to read a second time from the report on the basis that it was “proper demonstrative evidence.” 11/10/05 RP 320. This was the third trial irregularity.

“Demonstrative evidence refers to tangible evidence, as opposed to oral testimony describing something tangible. It is evidence that shows rather than tells. Individual items of demonstrative evidence are called *exhibits*.” Karl B. Tegland, 5D WASHINGTON PRACTICE, *Courtroom Handbook on Washington Evidence* (2006), page 201 (emphasis by Tegland). The “near verbatim” report was **not** admitted as an exhibit: it was **not** “proper demonstrative evidence.”

As previously discussed, the “near-verbatim” report was extremely prejudicial to Mr. Johnson: the jury heard it not just once, but twice under the court’s ruling during closing argument.

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E. Mr. Johnson’s right to a fair trial was denied by the occurrence of trial irregularities.

The factors set out in *Condon, supra*, to determine whether a trial irregularity deprived a defendant of a fair trial are (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction which a jury is presumed to follow. *Condon*, 72 Wn. App. at 647, 865 P.2d 521.

- Factor One: Seriousness of the Irregularity

In this case, the irregularity of admitting the “near-verbatim” report without any determination that it or any portion of it was, in fact, admissible under any rule of evidence was extremely serious: irrelevant evidence is inadmissible (ER 402); relevant evidence which is more prejudicial than probative is inadmissible. ER 403. Under ER 803(a)(5), the report “as a whole” should not have been read to the jury; under ER 612, the report should only have been used to refresh Ms. Mongahas’s memory to enable her to testify. Further, the statements ascribed to KLM by Ms. Mongahas in her “near verbatim” report contradicted KLM’s trial testimony and constituted the only evidence supporting charges of first degree rape of KLM, a second charge of molestation of KLM, and third degree assault of KLM.

- Factor Two: Whether the Statement in Question was Cumulative of Properly Admitted Evidence

As previously discussed, the “near verbatim” report was “cumulative” of KLM’s trial testimony on only one charge of molestation: the remainder of the statements ascribed to KLM in the “near verbatim” report constituted the only evidence related to rape, a second charge of molestation, and third degree assault. The “near verbatim” report was not cumulative or repetitive of any other properly admitted evidence on these issues.

- Factor Three: Whether the Irregularity Could be Cured by an Instruction to Disregard the “Near-Verbatim” Report

No curative instruction was given: in fact, the court permitted excerpts from the “near verbatim” report to be read to the jury a second time during closing arguments.

Application of the *Condon* factors to the irregularities that occurred during Mr. Johnson’s trial results in the clear conclusion that Mr. Johnson was denied a fair trial.

VI. CONCLUSION

The trial court committed reversible error by admitting the highly prejudicial “near verbatim” report into evidence on untenable grounds and in permitting it to be read to the jury in its entirety one time and excerpts

to be read to the jury a second time during the State's closing argument. These trial irregularities violated Mr. Johnson's right to a fair trial.

The Court should reverse Mr. Johnson's convictions for first degree rape of a child, the second count of child molestation, and third degree assault of a child and dismiss those charges for insufficiency of evidence.

The Court should reverse Mr. Johnson's convictions for the remaining count of child molestation and bail jumping and remand for a new trial on those charges. *State v. Perrett*, 86 Wn. App. 312, 314, 936 P.2d 426 (1997) (reversing and remanding for new trial where accumulated trial errors denied the defendant a fair trial).

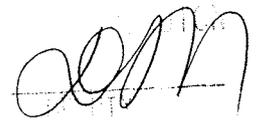
DATED this 14 day of July, 2006.

Respectfully submitted,


Eric Fong, WSBA No. 26030
Attorney for Appellant

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IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	Appeal No. 34312-6-II
Respondent,)	Superior Court No. 04-1-01178-5
)	
vs.)	
)	AFFIDAVIT OF MAILING
ARTHUR LEON JOHNSON,)	
)	
Appellant.)	

The undersigned, being first duly sworn, under oath, states: That on the 14th day of July, 2006, affiant deposited in the United States mails, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway Street, Suite 300
Tacoma, WA 98402

the original and one copy of the Brief of Appellant, and to

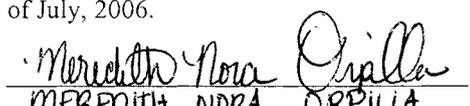
Mr. Randall Sutton
Attorney at Law
614 Division Street, MS-35
Port Orchard, WA 98366

Mr. Arthur Leon Johnson
DOC #255903
Washington State Penitentiary
1313 N. 13th Avenue
Walla Walla, WA 98362

a true copy of the Brief of Appellant.


ANN BLANKENSHIP

SUBSCRIBED AND SWORN to before me this 14th day of July, 2006.


MEREDITH NDRA ORPILA
NOTARY PUBLIC in and for the State of
Washington, residing at Port Orchard
My commission expires 9-11-06

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