

NO. 34629-0-II

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

STATE OF WASHINGTON,

Respondent,

v.

FRANK C. EARL,

Appellant.

STATE OF WASHINGTON
COUNTY OF PIERCE
CLERK OF COURT
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BY [Signature]

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frederick W. Fleming, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENTS OF ERROR</u>	1
<u>Issues Pertaining to Assignments of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
1. <u>Procedural Facts</u>	3
2. <u>Substantive Facts</u>	5
C. <u>ARGUMENTS</u>	6
1. JUROR MISCONDUCT DEPRIVED EARL OF HIS RIGHT TO A FAIR TRIAL BY JURY.	6
a. <u>A Juror Disregarded The Court's Instructions By Talking About The Case With Another Juror During A Break In Deliberations.</u>	7
b. <u>It Is Misconduct For A Juror To Discuss The Case During A Break In Deliberations Without The Full Jury Present.</u>	12
c. <u>The Trial Court Erred In Not Conducting An Appropriate Inquiry Into The Misconduct, Thereby Failing To Ensure The Rogue Juror Was Willing And Able To Follow The Court's Instructions To Properly Deliberate.</u>	15
d. <u>Earl Was Prejudiced By The Court's Refusal To Conduct Appropriate Inquiry Into The Juror's Misconduct.</u>	19

TABLE OF CONTENTS (CONT'D)

	Page
e.	<u>The Court Erred When It Denied Earl's Motion For Mistrial Based On Juror Misconduct.</u> 21
2.	THERE WAS INSUFFICIENT EVIDENCE TO CONVICT EARL ON EITHER COUNT OF FIRST DEGREE RAPE. 23
3.	DEFENSE COUNSEL'S AGREEMENT TO A DEFECTIVE UNANIMITY INSTRUCTION DEPRIVED EARL OF EFFECTIVE ASSISTANCE OF COUNSEL. 27
a.	<u>The Unanimity Instruction Did Not Clearly Specify The Need To Agree On A Separate And Distinct Act For Each Separate Count.</u> 28
b.	<u>Counsel's Agreement To The Defective Unanimity Instruction Prejudiced Earl.</u> 34
4.	THE COURT VIOLATED EARL'S RIGHT TO A JURY TRIAL BY ALLOWING THE STATE'S EXPERT WITNESS TO GIVE IMPROPER OPINIONS REGARDING THE ALLEGED VICTIM'S VERACITY AND EARL'S GUILT. . . . 36
a.	<u>The Forensic Interviewer Gave Improper Opinions Regarding the Victim's Veracity And Earl's Guilt.</u> 37
b.	<u>The Errors Are Preserved For Review.</u> 42

TABLE OF CONTENTS (CONT'D)

	Page
c. <u>The Improper Opinion Testimony Was Prejudicial.</u>	42
5. THE COURT ERRONEOUSLY SENTENCED EARL ON COUNTS 3 AND 5.	45
D. <u>CONCLUSION</u>	46

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>Hanson v. City of Snohomish</u> , 121 Wn.2d 552, 852 P.2d 295 (1993)	15
<u>In re Det. of Gaff</u> , 90 Wn. App. 834, 954 P.2d 943 (1998)	28
<u>State ex rel. Carroll v. Junker</u> , 79 Wn.2d 12, 482 P.2d 775 (1971)	15
<u>State v. Black</u> , 109 Wn.2d 336, 745 P.2d 12 (1987)	37, 41
<u>State v. Boling</u> , 131 Wn. App. 329, 127 P.3d 740 (2006)	19
<u>State v. Bradford</u> , 60 Wn. App. 857, 808 P.2d 174 (1991)	32
<u>State v. Bradley</u> , 141 Wn.2d 731, 10 P.3d 358 (2000)	28
<u>State v. Briggs</u> , 55 Wn. App. 44, 776 P.2d 1347 (1989)	20
<u>State v. Byrd</u> , 72 Wn. App. 774, 868 P.2d 158 (1994)	34
<u>State v. Chapin</u> , 118 Wn.2d 681, 826 P.2d 194 (1992)	23

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>WASHINGTON CASES (CONT'D)</u>	
<u>State v. Crediford,</u> 130 Wn.2d 747, 927 P.2d 1129 (1996)	23
<u>State v. Cummings,</u> 31 Wn. App. 427, 642 P.2d 415 (1982)	20, 22, 23
<u>State v. Davenport,</u> 100 Wn.2d 757, 675 P.2d 1213 (1984)	18
<u>State v. Demery,</u> 144 Wn.2d 753, 30 P.3d 1278 (2001)	37
<u>State v. Dunn,</u> 125 Wn. App. 582, 105 P.3d 1022 (2005)	43
<u>State v. Easter,</u> 130 Wn.2d 228, 922 P.2d 1285 (1996)	42
<u>State v. Ellis,</u> 71 Wn. App. 400, 859 P.2d 632 (1993)	32, 33
<u>State v. Elmore,</u> 155 Wn.2d 758, 123 P.3d 72 (2005)	15, 16
<u>State v. Gobin,</u> 73 Wn.2d 206, 437 P.2d 389 (1968)	22
<u>State v. Guloy,</u> 104 Wn.2d 412, 705 P.2d 1182 (1985)	42

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

<u>State v. Hardesty</u> , 129 Wn.2d 303, 915 P.2d 1080 (1996)	27
<u>State v. Hayes</u> , 81 Wn. App. 425, 914 P.2d 788 (1996)	23-26, 32
<u>State v. Holland</u> , 77 Wn. App. 420, 891 P.2d 49 (1995)	30
<u>State v. Hughes</u> , 106 Wn.2d 176, 721 P.2d 902 (1986)	13
<u>State v. Jackson</u> , 75 Wn. App. 537, 879 P.2d 307 (1994)	7
<u>State v. Jensen</u> , 125 Wn. App. 319, 104 P.3d 717 (2005)	23, 24, 26
<u>State v. Kell</u> , 101 Wn. App. 619, 5 P.3d 47 (2000)	13, 19
<u>State v. Kirkman</u> , 126 Wn. App. 97, 107 P.3d 133, <u>rev. granted</u> , 155 Wn.2d 1014, 124 P.3d 304 (2005)	37, 40, 42-44
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988)	28, 35

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>WASHINGTON CASES (CONT'D)</u>	
<u>State v. LeFaber,</u> 128 Wn.2d 896, 913 P.2d 369 (1996)	30, 34
<u>State v. Lemieux,</u> 75 Wn.2d 89, 448 P.2d 943 (1968)	19
<u>State v. Lord,</u> 117 Wn.2d 829, 822 P.2d 177 (1991)	35
<u>State v. McFarland,</u> 127 Wn.2d 322, 899 P.2d 1251 (1995)	35
<u>State v. McNeal,</u> 145 Wn.2d 352, 37 P.3d 280 (2002)	35
<u>State v. Murray,</u> 118 Wn. App. 518, 77 P.3d 1188 (2003)	46
<u>State v. Neal,</u> 144 Wn.2d 600, 30 P.3d 1255 (2001)	15
<u>State v. Noltie,</u> 116 Wn.2d 831, 809 P.2d 190 (1991)	30
<u>State v. Petrich,</u> 101 Wn.2d 566, 683 P.2d 173 (1984)	27, 28, 30, 35, 36
<u>State v. Stevens,</u> 127 Wn. App. 269, 110 P.3d 1179 (2005)	37

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

State v. Thomas,
109 Wn.2d 222, 743 P.2d 816 (1987) 34

State v. Tigano,
63 Wn. App. 336, 818 P.2d 1369 (1991) 7

State v. Watkins,
136 Wn. App. 240, 148 P.3d 1112 (2006) 30

State v. Williamson,
100 Wn. App. 248, 996 P.2d 1097 (2000) 15

State v. Willis,
153 Wn.2d 366, 103 P.3d 1213 (2005) 28

State v. Workman,
66 Wash. 292, 119 P. 751 (1911) 36

State v. WWJ Corp.,
138 Wn.2d 595, 980 P.2d 1257 (1999) 42

FEDERAL CASES

Blakely v. Washington,
542 U.S. 296, 124 S. Ct. 2531,
159 L. Ed. 2d 403 (2004) 45

Brady v. Maryland,
373 U.S. 83, 83 S. Ct. 1194,
10 L. Ed. 2d 215 (1963) 3

TABLE OF AUTHORITIES (CONT'D)

	Page
 <u>FEDERAL CASES (CONT'D)</u>	
<u>Stockton v. Virginia</u> , 852 F.2d 740 (4th Cir. 1988)	13, 20
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	34, 35
<u>United States v. Amaral</u> , 488 F.2d 1148 (9th Cir. 1973)	44
<u>United States v. Gaskin</u> , 364 F.3d 438 (2nd Cir. 2004)	13, 20
<u>United States v. Resko</u> , 3 F.3d 684 (3rd Cir. 1993)	13
 <u>OTHER JURISDICTIONS</u>	
<u>People v. Daniels</u> , 52 Cal.3d 815, 802 P.2d 906 (Cal. 1991)	18, 21
<u>People v. Ledesma</u> , 39 Cal.4th. 641, 140 P.3d 657 (Cal. 2006)	19
 <u>RULES, STATUTES AND OTHERS</u>	
CrR 6.5	15
Former RCW 9.94A.030(32)(b)(i)	4

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHERS (CONT'D)</u>	
Laws of 2002 c. 175 § 5	4
Persistent Offender Accountability Act	4
RAP 2.5(a)	42
RCW 2.36.110	15
RCW 9.94A.510	45
RCW 9.94A.535	45
RCW 9.94A.570	4, 46
RCW 9A.28.020	3
RCW 9A.44.073	3, 24
RCW 9A.44.076	3
RCW 9A.44.086	3
Sentencing Reform Act	46
U.S. Const. amend. V	7
U.S. Const., amend. VI	7, 27
Wash. Const. art. 1, § 3	7
Wash. Const. art. 1, § 22	7, 27

A. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to adequately inquire into juror misconduct.

2. The trial court erred when it denied appellant's motion for a mistrial based on juror misconduct.

3. There was insufficient evidence to convict appellant on either count of first degree rape of a child.

4. Appellant was denied effective assistance of counsel when his attorney agreed to a defective unanimity instruction.

5. The trial court erroneously allowed the state's expert witness to give improper opinion testimony regarding the alleged victim's veracity and appellant's guilt.

6. The court erroneously imposed an exceptional sentence for Count 3, attempted first degree rape of a child.

7. The court erroneously imposed a term of community custody under Count 5, second degree rape of a child.

Issues Pertaining to Assignments of Error

1. A juror notified the court that another juror with whom she disagreed had discussed the case with her during a break in deliberations in an attempt to influence the verdict. This discussion took place without

all 12 jurors present. The court replaced the notifying juror with an alternate, retained the offending juror without questioning her, and ordered the reconstituted jury to begin deliberations anew without further instruction. Did the trial court deny appellant a fair trial in not conducting an appropriate inquiry into the misconduct, thereby failing to ensure the offending juror was willing and able to follow the court's instructions to deliberate properly? Did the trial court further violate appellant's right to a fair trial by denying appellant's motion for a mistrial?

2. The state charged appellant with two counts of first degree rape of a child. Where the evidence, which consisted largely of the child's generic testimony about what happened, failed to provide enough detail to satisfy all the elements of each count, must appellant's convictions on both counts be reversed and dismissed with prejudice?

3. The state charged appellant with multiple counts involving sexual abuse. The unanimity instruction did not clearly require the jury to unanimously agree as to which distinct acts were proven beyond a reasonable doubt for each separate count. Was appellant denied effective assistance of counsel when his attorney agreed to this defective instruction?

4. Did the trial court violate appellant's right to a jury trial when it allowed the state's expert witness to express an opinion that the

alleged victim displayed behavior typical of abused children and that her report of abuse was the truth?

5. Appellant was sentenced as a persistent offender under Count

5. Did the trial court lack statutory authority to impose a term of community custody under this count?

6. Did the trial court err in imposing an exceptional sentence under Count 3 where no aggravating factors were found to justify departure from the standard range?

B. STATEMENT OF THE CASE

1. Procedural Facts

The state charged appellant Frank Chester Earl by amended information with two counts of rape of a child in the first degree, one count of attempted rape of a child in the first degree, one count of rape of a child in the second degree, and one count of child molestation in the second degree. CP 131-33; RCW 9A.44.073; RCW 9A.28.020; RCW 9A.44.076; RCW 9A.44.086. On August 31, 2005, the first jury trial held before the Honorable D. Gary Steiner ended in a mistrial due to the state's failure to disclose Brady¹ material. 2RP²412-58. On October 24, 2005, a second

¹ Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

jury trial before the same judge ended in a mistrial due to juror misconduct. 3RP 196-258. Following a third trial held before the Honorable Frederick W. Fleming in December 2005, a jury found Earl guilty on all five counts. CP 162-66; 5RP 1-705.

On March 17, 2006, the court determined Earl's conviction for second degree rape of a child was a "second strike" under the Persistent Offender Accountability Act and imposed a sentence of life without the possibility of parole. CP 488-505; 6RP; RCW 9.94A.570; former RCW 9.94A.030(32)(b)(i).³ Earl also received 318 months of confinement on each count of first degree rape, 318 months for attempted first degree rape, and 116 months on the child molestation count. CP 488-505. This appeal timely follows. CP 508-27.

²(...continued)

² The verbatim report of proceedings is contained in 30 volumes referenced as follows: 1RP - 4/15/04; 2RP - 10 consecutively paginated volumes from 7/5/05, 7/18/05, 7/19/05, 8/22/05, 8/23/05, 8/24/05, 8/25/05, 8/29/05, 8/30/05, 8/31/05; 3RP - five consecutively paginated volumes from 10/17/05, 10/18/05, 10/19/05, 10/20/05, 10/24/05; 4RP - 11/23/05; 5RP - 12 consecutively paginated volumes from 12/1/05, 12/5/05 (two volumes), 12/6/05, 12/7/05, 12/8/05, 12/12/05, 12/13/05, 12/14/05, 12/15/05, 12/16/05, 12/19/05; 6RP - 3/17/06.

³ Laws of 2002 c. 175 § 5. In effect during the charging period for the second degree rape count.

2. Substantive Facts

A.K. (d.o.b. 7/14/91) lived with her mother, Florenda Kassabaum. 5RP 244, 248. Kassabaum and Earl maintained a sexual relationship from 1990 to December 2003. 5RP 344-45, 416-17. Kassabaum brought A.K. over to Earl's house on a weekly basis from 1999 through December 2003. 5RP 258-59, 284-85, 320-21, 416. In December 2003, A.K. told her stepmother, Benita Ochoa, that Earl had inappropriately touched her. 5RP 174, 182, 184-85, 276-77. Earl was arrested. 5RP 158. When Earl failed to appear for a subsequent court date, a bench warrant issued and he was re-arrested. 5RP 164-67.

At trial, A.K. claimed Earl had sexual contact with her many times from 1999 through 2003 while at Earl's house. 5RP 284-85, 320-21, 328-29. She said Earl penetrated her vagina with his finger on a number of unspecified occasions. 5RP 260-62, 267-68, 332-33. A.K. also claimed Earl fondled her breasts more than once, and had tried to do so at other times. 5RP 263-66. A.K. further described one instance where Earl allegedly exposed his penis to her and told her to kiss it. 5RP 268-73.

The defense theory of the case was that A.K. was a manipulative liar who falsely accused Earl of doing these things. 5RP 126, 131, 620-21, 623-24. At the time of the accusation, A.K.'s mother and biological father,

Earl Youell, were locked in a bitter custody battle. 5RP 178, 181, 192, 207, 235, 350-52, 369-70, 399-400. The defense argued A.K. had motive to lie about Earl's abuse because she wanted to escape the physical abuse handed out by her mother and her mother's live-in boyfriend. 5RP 129, 202-03, 220-21, 618, 622. Ochoa testified A.K. told her she did not want to return to her mother when she made the initial accusation about Earl. 5RP 198. A.K.'s accusations hurt her mother's custody battle, and she was put in her father's custody after the accusations came to light. 5RP 303, 369-70, 400, 407. The defense argued A.K.'s credibility was undermined because she had repeatedly recanted her original allegations of sexual abuse prior to trial. 5RP 130, 282-84, 287-92, 622. In a letter dated March 8, 2004, A.K. stated she was afraid Ochoa, who was living with her father, would beat her if she told the truth to the state that Earl had not touched her. 5RP 130, 215-16, 287, 290-91, 292-95, 303. A genital examination of A.K. was normal and revealed no sign of sexual abuse. 5RP 524-25.

C. ARGUMENTS

1. JUROR MISCONDUCT DEPRIVED EARL OF HIS RIGHT TO A FAIR TRIAL BY JURY.

A juror instigated a discussion on the merits of the case with another juror during a break in deliberations in an attempt to sway the verdict. This discussion took place without all 12 jurors present. The court erred in

failing to discover the identity of the offending juror, which resulted in the court failing to ensure this juror was willing and able to follow the court's instructions to properly deliberate. In addition, the court erred when it refused to grant a mistrial based on this misconduct. Reversal is required.

Both the Washington and United States constitutions guarantee the right to a fair and impartial jury trial. U.S. Const. amend. V, VI; Wash. Const. art. 1, §§ 3, 22; State v. Jackson, 75 Wn. App. 537, 543, 879 P.2d 307 (1994) (failure to provide defendant with fair trial violates minimal standards of due process). A constitutionally valid jury trial must be free of disqualifying jury misconduct. State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991).

a. A Juror Disregarded The Court's Instructions By Talking About The Case With Another Juror During A Break In Deliberations.

On December 16, two days after the jury retired for deliberations, juror No. 7 presented a doctor's letter to the court indicating an incident with another juror had occurred. 5RP 658, 664. The court proposed the whole jury be brought back out and reinstructed on proper deliberations. 5RP 659-61. The state and defense counsel wanted to question juror No. 7 to find out what happened, and both parties initially wanted to learn the identity of the offending juror. 5RP 661-64. Defense counsel specifically

pointed to the reference in the letter indicating the offending juror insisted on bringing up issues regarding the case during break time. 5RP 664. The court agreed such action was improper and said "I'm not pleased about what apparently is some other juror exercising outside the presence of everybody else some undue pressure" and "if somebody is deliberately violating the instructions of the Court, then that is an issue." 5RP 664-65.

When juror No. 7 was brought in for questioning, the court immediately informed her everyone had agreed she should be excused. 5RP 666. The state had earlier said juror No. 7 should be discharged because "she's been tainted" or unable to serve due to her psychological condition. 5RP 662. Defense counsel claimed juror No. 7 should be removed because it appeared she had discussed the case with her psychiatrist. 5RP 662-65.

The court asked juror No. 7 to describe what happened, but cautioned her not to talk about "the deliberations themselves or where you might be." 5RP 666-67. Juror No. 7 told the court "things were said by another juror in reference to deliberations, in reference to some of the jurors, me included in that some of the jurors. And it was a disrespectful term, and I can't say what the term was because it would imply something about what was going on or whatever." 5RP 667. In response to the

state's question about the "name calling," juror No. 7 said it was more a "situation calling. It was naming the situation that occurred." 5RP 674.

This event occurred inside the jury room during a break in deliberations. 5RP 667-68, 669. Juror No. 7 said "we just had a tense series of conversations right before the break, but it just for some reason kind of continued into the break and it shouldn't have." 5RP 675. Some jurors were in the room, but one or more were not present. 5RP 668, 674. One impugned juror was not present in the room when the offending juror discussed the case with juror No. 7. 5RP 676. Juror No. 7, defending herself, said something in response. 5RP 668, 675. She believed a few other jurors overheard what was said, but she did not know how focused the other jurors were on the conversation she had with the offending juror. 5RP 668, 674. Juror No. 7 contacted her psychiatrist later that night "to help me out with this and figure out what was going on." 5RP 669. Juror No. 7 brought this matter to the court's attention because proper procedure was not followed: "I know it said not to discuss anything about the case during breaks." 5RP 669. She said this was "the straw that broke the camel's back" because there had been sighing, gasping, and eye-rolling directed at her throughout deliberations. 5RP 673. Her sense was that the

offending juror was "trying to sway the decision . . . by bringing these things up." 5RP 674.

The court asked her if she was being overly sensitive. 5RP 670. Juror No. 7 said she did not think she was, but could not be more specific because "that alludes to what was going on." 5RP 670. After learning juror No. 7 had seen her psychiatrist since 1996 due to a bad car accident, the court asked her if the accident had made her more sensitive to issues. 5RP 671. Juror No. 7 said she was not sure, but possibly. 5RP 671.

Defense counsel joined the state in asking for the identity of the offending juror. 5RP 678. The court responded:

[W]hat is the purpose of identifying -- I haven't heard her say what occurred, she can't disclose specifically, but it did occur in the jury room -- what juror was done this [sic]. And she felt it was a personal attack, if I understood it right, and I have to assume that the jury is going to, in their deliberations, is going to follow the instructions that I have read to them. And particularly I'm going to assume that includes the entirety, all of the instructions, and that includes the ones I emphasized in the beginning of this thing. So what good, I want you to tell me, gentlemen, does it do for this proceeding to identify this person who has offended this No. 7, No. 7 with a thirteen-year history of health care, who may be sensitive, overly sensitive. Give me a good reason why I should have this person identified. I want to go on with this thing and the deliberations will begin anew with an alternate.

5RP 679.

The state then said there was no longer a reason to identify the offending juror. 5RP 679-80. Defense counsel stated he would "like to start off" with the presiding juror to see if there were any problems. 5RP 680. Defense counsel opined "I think we all are aware of what went on in there. The No. 7 was on our side and the offending juror is on their side." 5RP 680. Counsel said he was guessing. 5RP 681.

The trial judge stated he was going to bring the presiding juror out and tell him that juror No. 7 had been excused, an alternate would replace her, and deliberations would begin anew. 5RP 682. The court would also ask if there were any problems that needed to be identified. 5RP 682. After juror No. 7 was excused, Earl himself protested that the court did not find out the name of the offending juror. 5RP 683. The court responded in no uncertain terms: "Mr. Earl, I'm not going to. I'm going to let it just stay as it is. And I'm going to now tell you what I just said. I will repeat myself. I will bring the presiding juror out and tell him what I have done. I've excused, I'm going to bring an alternate back in, they'll begin anew, are there any problems that we should know about. And that's it." 5RP 683.

The court accordingly informed the presiding juror that an alternate would be brought in and deliberations would begin anew. 5RP 684. The

court then said "But before I do that, I've brought you out to tell you what we are going to do, and then to ask one question, and that question is: Are you aware of any problems that I should know about that have occurred in your deliberations?" 5RP 684-85. The presiding juror started to respond "Yes, sir it's --" when the court interrupted him, cautioning him not to say anything that would reveal the status of deliberations. 5RP 685. The juror then said there were no problems. 5RP 685. The court allowed the juror to leave without further questioning. Defense counsel reiterated they should have investigated further and found out the name of the offending juror. 5RP 686.

The alternate juror was given a copy of the court's instructions. 5RP 688. The jury was informed juror No. 7 had been excused and replaced with an alternate, and that deliberations were to start over again. 5RP 688-89. The court did not reinstruct the jury in any other manner before excusing them for deliberations.

b. It Is Misconduct For A Juror To Discuss The Case During A Break In Deliberations Without The Full Jury Present.

There appear to be no cases from Washington that address the form of juror misconduct at issue here. Two federal circuits, however, recognize it is misconduct for a subset of jurors to discuss the merits of the case, or

a defendant's guilt or innocence, during a break in deliberations. Stockton v. Virginia, 852 F.2d 740, 747 (4th Cir. 1988); United States v. Gaskin, 364 F.3d 438, 463-64 (2nd Cir. 2004). The jury system is meant to involve decision-making as a collective, deliberative process. United States v. Resko, 3 F.3d 684, 689 (3rd Cir. 1993). Discussions among a subset of individual jurors about the merits of the case, without the full jury present and outside the bounds of the proper deliberative process, thwart the goal of collective decision-making and affect a defendant's right to a fair and impartial jury trial. See id. (premature deliberations among individual jurors undermines process of collective deliberation).

Earl bears the burden of showing that the alleged misconduct occurred. State v. Kell, 101 Wn. App. 619, 621, 5 P.3d 47 (2000). The trial court, prior to deliberations, instructed the jury not to discuss the case separately because deliberation is a group process. 5RP 643. A juror's ability to follow the court's instructions is a fundamental requirement of service as a juror. See, e.g., State v. Hughes, 106 Wn.2d 176, 181, 721 P.2d 902 (1986) (juror will be excused for cause if views would prevent or substantially impair performance of duties as juror in accordance with instructions and oath).

The record shows a juror continued to talk about the case with another juror during a break in deliberations without the full jury present, and that the offending juror who insisted on talking about the case disagreed with juror No. 7 about what the verdict should be. 5RP 667, 669, 672-75. The presiding juror's one word answer of "no" to the question of whether he was "aware" of any problems that the court "should know about" does not show juror No. 7's description of the event was untrue. 5RP 685. The court's single, open-ended question was an empty formality. The court had no interest in further inquiry, having already made it clear it would not seek the identity of the offending juror or remove her from deliberations before questioning the presiding juror. 5RP 683. Furthermore, it is unclear what the presiding juror knew about the incident. He may have been in the room, but it is unknown whether he heard the discussion while it took place, or what he was told after the fact about what happened. Even if the presiding juror witnessed the incident, he may not have viewed it as a problem because he did not know the legal significance of this form of misconduct.⁴ Alternatively, after having been informed juror No. 7 had been discharged, he may have no longer viewed the incident as a problem because the perceived cause of the disruption no longer sat on the jury.

⁴ According to No. 7, the presiding juror "said it was probably out of line, but he wasn't sure it was out of line." 5RP 667.

- c. The Trial Court Erred In Not Conducting An Appropriate Inquiry Into The Misconduct, Thereby Failing To Ensure The Rogue Juror Was Willing And Able To Follow The Court's Instructions To Properly Deliberate.

Trial courts have a "continuous obligation" to investigate allegations of juror unfitness and to excuse jurors who are found to be unfit, even if they are already deliberating. State v. Elmore, 155 Wn.2d 758, 773, 123 P.3d 72 (2005) (citing RCW 2.36.110 and CrR 6.5). The trial judge is afforded discretion in its investigation of jury problems. 155 Wn.2d at 773-74. Abuse occurs when the trial court's discretion is "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). At some point, the judge makes a decision outside the range of acceptable discretionary choices and thereby abuses discretion. State v. Williamson, 100 Wn. App. 248, 257, 996 P.2d 1097 (2000). "The range of discretionary choices is a question of law and the judge abuses his or her discretion if the discretionary decision is contrary to law." State v. Neal, 144 Wn.2d 600, 609, 30 P.3d 1255 (2001). Questions of law are reviewed de novo. Hanson v. City of Snohomish, 121 Wn.2d 552, 556, 852 P.2d 295 (1993).

There appears to be no Washington case law addressing the precise issue of what inquiry the trial court should make once it learns that a

deliberating juror has violated instruction by discussing the merits of the case during a break in deliberations. Elmore addressed the extent to which a trial court should investigate allegations that a juror is not following the court's instructions by engaging in nullification. The Court stated "inquiry should focus on the conduct of the jurors and the process of deliberations, rather than the content of discussions. The court's inquiry should cease if the trial judge becomes satisfied that the juror in question is participating in deliberations and does not intend to ignore the law or the court's instructions." Elmore, 155 Wn.2d at 774. As Elmore involved inquiry into misconduct stemming from disregard of the court's instructions, a similar rule should apply here: inquiry into alleged juror misconduct involving failure to follow the court's instructions on proper deliberation should not cease until the trial court is reasonably satisfied that the offending juror does not intend to further ignore the court's instruction.

Here, the trial court heard evidence that a juror had disregarded the court's instructions on proper deliberation. The court thus had a reasonable basis for doubting the offending juror's ability or willingness to follow its instructions. This doubt was never dispelled because the court, by prematurely cutting off further inquiry into the matter, never confirmed the offending juror could change her behavior and properly deliberate after the

reconstituted jury started deliberations anew. To safeguard Earl's right to a fair jury trial, the court should have learned the identity of the rogue juror and questioned her to determine whether she could refrain from singling out and attempting to sway other jurors with whom she had a disagreement about the case during breaks in deliberations. "Although courts must take care not to delve into the substance of deliberations, it is possible to focus . . . on whether the juror has openly expressed an intent to defy the law or the court's instructions." Id. at 775.

The court gave two reasons why it would not inquire further, both of which are untenable. First, the court indicated there was no reason to identify the offending juror because juror No. 7 may have been overly sensitive to what she felt was a personal attack. 5RP 678-79. The court's reasoning is spurious. Whether a juror discussed the case during a break in deliberations did not depend on the validity of juror No. 7's subjective reaction to that misconduct. Either it happened or it did not happen. The trial court's characterization of the situation as one in which juror No. 7 felt offended by the rogue juror's conduct similarly misses the point. 5RP 679. Regardless of whether juror No. 7's personal discomfort was justified, the rogue juror's misconduct offended the integrity of the trial.

In further defense of its decision not to inquire further, the court stated "I have to assume that the jury is going to, in their deliberations, is going to follow the instructions that I have read them." 5RP 679. There is a rebuttable presumption that jurors follow the trial court's instructions. State v. Davenport, 100 Wn.2d 757, 763-64, 675 P.2d 1213 (1984). That presumption was rebutted in this case by evidence that a juror disregarded the court's instructions in talking about the case during a break in deliberations without the full jury present. The court's second reason for declining to identify the offending juror is therefore untenable. Because the court did not reinstruct the reconstituted jury on proper deliberations prior to sending them out to deliberate anew, the presumption was in no sense revived.

Given a juror is presumed to follow the court's instructions unless evidence shows otherwise, the reverse should also be true: once evidence shows a juror initially disregarded a court's instructions, there should be a presumption that the juror continued to violate the court's instructions unless rebutted by the record. Thus, once a juror is shown to have disregarded an instruction concerning proper deliberations, the presumption at trial, and on appeal, should be that the juror continued to disregard the court's instruction throughout deliberations. See People v. Daniels, 52

Cal.3d 815, 864-65, 802 P.2d 906 (Cal. 1991) (juror who has violated instructions to refrain from discussing the case or reading newspaper accounts of trial cannot be counted on to follow instructions in future); People v. Ledesma, 39 Cal.4th. 641, 738, 140 P.3d 657 (Cal. 2006) ("in appropriate circumstances a trial judge may conclude, based on a juror's willful failure to follow an instruction, that the juror will not follow other instructions and is therefore unable to perform his or her duty as a juror."). This should at least hold true where, as here, the trial court did not verify the offending juror was willing and able to follow instruction after initial discovery of the misconduct and did not correct the juror by means of additional admonition.

d. Earl Was Prejudiced By The Court's Refusal To Conduct Appropriate Inquiry Into The Juror's Misconduct.

Only instances of juror misconduct that cause prejudice warrant a new trial. State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). Prejudice is presumed once juror misconduct is established, and the state bears the burden of overcoming this presumption beyond a reasonable doubt. State v. Boling, 131 Wn. App. 329, 333, 127 P.3d 740 (2006); Kell, 101 Wn. App. at 621. Any reasonable doubt that the misconduct affected the verdict must be resolved against the verdict. Boling, 131 Wn.

App. at 333; State v. Cummings, 31 Wn. App. 427, 430, 642 P.2d 415 (1982). The inquiry is objective rather than subjective. The question is whether the misconduct could have affected the jury's determinations, not whether it actually did. State v. Briggs, 55 Wn. App. 44, 55, 776 P.2d 1347 (1989).

Stockton and Gaskin recognize prejudice results and a new trial is warranted when a subset of jurors discuss the merits of the case during a break in deliberations. Stockton, 852 F.2d at 747 (no prejudice to warrant new trial because subset of jurors did not deliberate on merits of case); Gaskin, 364 F.3d at 463-64 (holding no cause for mistrial because judge ascertained there had never been any consideration of evidence or culpability except with all jurors present). Here, prejudice goes beyond the simple fact that the case was discussed without the full jury present. Nor is prejudice derived solely from the trial court's failure to verify the rogue juror was willing and able to deliberate properly. By removing juror No. 7, keeping the rogue juror on the jury without confirming her willingness to follow court instruction, and ordering the reconstituted jury to deliberate anew without reinstructing the jury on how to deliberate properly, the trial court implicitly ratified the rogue juror's misconduct from the perspective of both the rogue juror and the remaining jurors. See

Daniels, 52 Cal.3d at 864 (likelihood of rebutting presumption of prejudice is far less when the offending juror remains on the jury and participates in the verdict than when the juror is promptly removed). By removing juror No. 7 without any admonition regarding the misconduct that instigated the removal, the court, in effect, rewarded the rogue juror for her misconduct and encouraged her to continue the same type of misbehavior within the reconstituted jury. Juror No. 7, meanwhile, indicated she was not the only juror who disagreed with the offending juror about the merits of the case. The offending juror's remarks impugned at least one or more other jurors who remained on the jury after juror No. 7 was excused. 5RP 667, 668, 676. In acting as he did, Judge Fleming sent a message to remaining hold-out jurors that they too would face abuse without protection from the court if they disagreed with the rogue juror, and that they would be removed as well if they complained about any misconduct. The appropriate remedy is reversal and remand for a new trial on all counts to which double jeopardy has not attached.

e. The Court Erred When It Denied Earl's Motion For Mistrial Based On Juror Misconduct.

After the court instructed the jury to deliberate anew, defense counsel notified the court that Earl wanted on the record that he believed there was still cause for mistrial. 5RP 689. Earl spoke on his own behalf,

saying the offending juror could still contaminate the whole jury and may have already done so. 5RP 690. The court read a letter composed by Earl⁵ into the record: "Judge Fleming, you did not resolve the problem. The problem is still in the jury room. In Judge Steiner's courtroom, each jury member was questioned.⁶ I am concerned that there is still cause for a mistrial." CP 134-35; 5RP 690. Judge Fleming said he understood Earl's concerns, but he was not going to do anything more. 5RP 690-91.

It is often stated a court's decision to deny a motion for new trial based upon alleged juror misconduct is reviewed for abuse of discretion. See, e.g., Cummings, 31 Wn. App. 430. This standard of review applies only where controverted questions of fact are involved in the trial court's determination. State v. Gobin, 73 Wn.2d 206, 208, 437 P.2d 389 (1968). The appellate court is not restricted in its review insofar as questions of law are involved. Id.

For a new trial to be granted on ground of juror misconduct, more than the possibility of prejudice must be shown, but once misconduct has been shown and there is reasonable doubt as to its effect, doubt must be

⁵ Earl is illiterate. He dictated the letter to a friend, who wrote his words down. RP 690.

⁶ Referring to the previous trial wherein Judge Steiner declared a mistrial after questioning jurors about misconduct. 2RP 412-58.

resolved against the verdict. Cummings, 31 Wn. App. at 430. As set forth above, it cannot be said beyond a reasonable doubt that the rogue juror's actions did not affect the outcome of the case. Earl's request for a mistrial should have been granted.

2. THERE WAS INSUFFICIENT EVIDENCE TO CONVICT EARL ON EITHER COUNT OF FIRST DEGREE RAPE.

There was insufficient evidence to convict Earl of first degree rape because the evidence failed to establish an act of intercourse occurred before A.K. was 12 years old. Dismissal of both counts with prejudice is required.

In every criminal prosecution, constitutional due process requires the state to prove all elements of the charged crime beyond a reasonable doubt. State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the state, a rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Chapin, 118 Wn.2d 681, 691, 826 P.2d 194 (1992).

In cases involving an alleged resident child molester, the victim's generic testimony can be used to support multiple counts of abuse. State v. Hayes, 81 Wn. App. 425, 438, 914 P.2d 788 (1996); State v. Jensen, 125 Wn. App. 319, 327, 104 P.3d 717 (2005). If the state relies upon

generic testimony rather than electing particular acts associated with each count, the court must "fairly balance the due process rights of the accused against the inability of the young accuser to give extensive details regarding multiple alleged assaults." Hayes, 81 Wn. App. at 438. In such a situation, sufficient evidence for conviction requires, at minimum, the victim to describe (1) the kind of act or acts with sufficient specificity to allow the trier of fact to determine what offense, if any, has been committed; (2) the number of acts committed with sufficient certainty to support each of the counts alleged by the prosecution; and (3) the general time period in which the acts occurred. Hayes, at 438; Jensen, 125 Wn. App. at 327.

The state charged Earl with two counts of rape of a child in the first degree. CP 131-33; RCW 9A.44.073. Identical "to convict" instructions for each count required the state to prove A.K. was less than 12 years old at the time of the sexual intercourse. CP 149-50 (Instructions 10 and 11). Earl's convictions on both counts of first degree rape cannot stand, even assuming the lenient test for sufficiency as set forth in Hayes applies here.

According to A.K., she was eight years old the first time Earl "touched" her in the "wrong place" and 12 years old the last time he "touched" her. 5RP 255, 274. The "touchings" happened at Earl's house.

5RP 256. She went over to Earl's house "a lot of times" on a weekly basis for about four years. 5RP 258-59, 267, 284, 321. During that period, she claims, Earl touched her "a lot" of times but she could not remember each time specifically. 5RP 284-85, 320-21, 328-29.

At one point, the prosecutor stated "You said that you were eight years old when he started touching you. I need you to get some of the early times in your mind and just answer a couple questions about that." 5RP 260. After A.K. said Earl touched her in almost every room except the spare room, the prosecutor asked "Did any of the touchings *ever* happen in the living room?" 5RP 260 (emphasis added). By phrasing the question this way, the relevant time frame for the "touchings" became open-ended. In response, A.K. indicated Earl touched her on the couch in the living room. 5RP 260. A.K. further testified Earl "sometimes" put his fingers on top of her clothing and other times put his fingers inside her vagina. 5RP 261-62. She did not, however, specifically connect an act of digital penetration occurring on the couch in the living room to a time before she turned 12 years old. The third prong of the Hayes test is not met. Cf. Hayes, 81 Wn. App. at 439 (victim testimony that acts occurred during charging period sufficient to establish third prong).

A.K. further claimed Earl touched her "down there" in the bedroom when she was eight. 5RP 266. The prosecutor asked her "So the first time that he touched you in the bedroom in your private spot down low was when you were eight years old?" 5RP 266. She responded "yeah." 5RP 266. After A.K. gave the same answer to the same question shortly after, the prosecutor then asked if the touching occurred under or on top of her clothes. 5RP 267. A.K. answered "sometimes it was under and sometimes it was over." 5RP 267. She then confirmed that on some occasions he was "inside" of her. 5RP 267-68. But she did not specifically connect an act of penetration, which "sometimes" occurred, to a time before she turned twelve years old, and so the third prong of the Hayes test remains unsatisfied.

A.K. also said Earl touched her once in the bedroom while her brother was present watching television. 5RP 263. Specifically, she testified he touched her over her clothes on either her chest or "down there." 5RP 263. Sexual intercourse, as defined by Instruction 8, means penetration of the vagina or anus or any act of sexual contact involving the sex organs of one person and the mouth or anus of another. CP 147. Touching A.K. over her clothes does not qualify as intercourse, and so the first prong of the Hayes test is not met. See Jensen, 125 Wn. App. at 328

(reversing child molestation conviction where victim's testimony did not specify sexual contact occurred).

Viewing the facts in the light most favorable to the state, no rational trier of fact could find Earl raped A.K. before she turned 12 years old. The convictions on each count must be reversed and the charges dismissed with prejudice. State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996) (retrial barred by double jeopardy).

3. DEFENSE COUNSEL'S AGREEMENT TO A DEFECTIVE UNANIMITY INSTRUCTION DEPRIVED EARL OF EFFECTIVE ASSISTANCE OF COUNSEL.

The unanimity instruction was defective because it did not clearly require the jury to unanimously agree as to which five separate acts were proven beyond a reasonable doubt for each of the five separate counts. Earl was denied effective assistance of counsel because his attorney agreed to the defective instruction. Reversal is required.

In criminal prosecutions, the accused has a constitutional right to a unanimous jury verdict. U.S. Const., amend. VI; Wash. Const. art. 1, § 22. "[A] defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed." State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). In multiple acts cases where several acts are alleged, any one of which

could constitute the crime charged, the jury must be unanimous as to which act constitutes the crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). To ensure jury unanimity, either the state must elect the act upon which it will rely for conviction or the trial court must instruct the jury that all jurors must agree that the same underlying criminal act has been proven beyond a reasonable doubt. Id.; Petrich, 101 Wn.2d at 572. Alleged errors in a trial court's jury instructions are reviewed de novo. State v. Willis, 153 Wn.2d 366, 370, 103 P.3d 1213 (2005).

The doctrine of invited error applies because defense counsel ultimately agreed to the unanimity instruction. 5RP 573; In re Det. of Gaff, 90 Wn. App. 834, 845, 954 P.2d 943 (1998). But the invited error doctrine does not preclude review where, as here, defense counsel was ineffective in agreeing to the defective instruction. State v. Bradley, 141 Wn.2d 731, 736, 10 P.3d 358 (2000).

a. The Unanimity Instruction Did Not Clearly Specify The Need To Agree On A Separate And Distinct Act For Each Separate Count.

The state, in its third and final amended information, charged Earl with two counts of first degree rape and one count of attempted rape against A.K. during a period between July 14, 1999 and July 13, 2003. CP 131-33. The state also charged Earl with one count of second degree child

molestation during a period of July 14, 2003 to December 25, 2003 and one count of second degree rape of a child during a period of November 27, 2003 to December 25, 2003. CP 131-33. The "to convict" instructions for all five counts tracked the charging periods in the amended information. CP 149 (Instruction 10), 150 (Instruction 11), 153 (Instruction 14), 156 (Instruction 17), 158 (Instruction 19). The "to convict" instructions for each count of first degree rape were identical. CP 149, 150.

The evidence produced at trial showed multiple acts potentially applicable to each count charged. A.K. testified Earl touched her vagina many times on a weekly basis over the course of four years. 5RP 258, 260-62, 284-85, 320-21, 328-29, 332-33. A.K. also testified Earl had fondled her breasts on more than one occasion, and had tried to do so on other occasions. 5RP 263-66. His attempts to touch her breasts could be construed as acts of attempted rape.⁷ A.K. further described one instance where Earl exposed his penis to her and asked her to kiss it. 5RP 268-73.

Instruction 6, to which defense counsel agreed, read:

⁷ Instruction 12 stated: "A person commits the crime of attempted Rape of a Child in the First Degree when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime." CP 151. Instruction 13 stated: "A substantial step is conduct, which strongly indicates a criminal purpose and which is more than mere preparation." CP 152.

You have heard evidence alleging more than one sexual act between the defendant and the alleged victim. To convict the defendant, all twelve of you must agree that the same underlying sexual act has been proved beyond a reasonable doubt.

CP 145 (Instruction 6).

"Jury instructions must more than adequately convey the law. They must make the relevant legal standard 'manifestly apparent to the average juror.'" State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006) (quoting State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)). "Included in the constitutional requirement of jury unanimity is the requirement that the jury unanimously agree on the act underlying *each charge*." State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995) (emphasis added) (citing Petrich, 101 Wn.2d at 572). In cases with multiple counts, the unanimity instruction should include language instructing the jury that it must unanimously agree on one act for each count. See, e.g., State v. Noltie, 116 Wn.2d 831, 843, 809 P.2d 190 (1991) (approving Petrich instruction that stated in part: "to convict the defendant of Count I or Count II you must unanimously agree that at least one separate act of sexual intercourse *pertaining to each count* has been proved beyond a reasonable doubt") (emphasis added).

The instruction here is deficient because it fails to make "manifestly clear" that the jury, in order to convict Earl on each of the five counts charged, needed to agree upon five separate acts and then uniformly apply each agreed-upon act to the same given count. As written, the instruction allowed the jury to convict on all five counts so long as it unanimously agreed a single act had occurred. For example, in following the instruction, jurors could have agreed on the same act that constituted first degree rape, disagreed on the acts underlying the other four counts, but still convicted Earl on all five counts. The instruction is further deficient because it allowed jurors to agree the same underlying act was committed without necessarily agreeing that the same act should serve as the basis for conviction on any given count. For example, jurors could have all agreed a generic act of vaginal penetration occurred, but some jurors could have applied that act to the second degree rape count while others applied the act to first degree rape count.

The trial court also gave Instruction 5, which read: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." CP 144. Instruction 5 does not save the deficiency in the unanimity instruction. Instruction 5 tells the jury to deliberate on each

count separately, but it does not tell the jury what evidence it can or cannot consider on each count. State v. Bradford, 60 Wn. App. 857, 861-62, 808 P.2d 174 (1991). It particularly does not address the need to agree on a separate underlying act for each separate count.

State v. Ellis also involved the problem of how to ensure unanimity when a defendant is charged with multiple counts. In that case, the trial court gave an instruction similar to Instruction 5 in Earl's case. State v. Ellis, 71 Wn. App. 400, 402, 859 P.2d 632 (1993). The Ellis trial court also gave this unanimity instruction: "Evidence has been introduced of multiple acts of sexual contact and intercourse between the defendant and (C.R.). Although twelve of you need not agree that all the acts have been proved, you must unanimously agree that at least one particular act has been proved beyond a reasonable doubt *for each count*." Id. (emphasis added). This Court held the unanimity instruction adequately insured unanimity on each count because, as read by an ordinary juror, the instruction communicated the idea that before the defendant could be convicted on any count, each juror must agree that the same act occurred. Ellis, 71 Wn. App. 405; see also Hayes, 81 Wn. App. at 430-31, 431 n.9 (holding unanimity ensured where jury told to consider each count separately and each "to convict" instruction specified the need for unanimity as to each

count). Unlike the instruction in Ellis, Earl's unanimity instruction did not specify the jury must agree on the same act *for each count*.

While Instruction 5 may have guarded against double jeopardy,⁸ it did not direct the jury that it must agree upon five distinct acts and consistently apply each agreed-upon act to each of the five separate counts. Significantly, this Court in Ellis observed the unanimity instruction at issue there was only marginally adequate because "it unnecessarily attempts to describe in the same sentence two different ideas: the idea that all twelve jurors must agree on the act used as a factual basis for any given count, and the idea that the same act cannot be used to convict twice . . . *the two ideas are fundamentally different, and to mix them is to invite confusion.*" Ellis, 71 Wn. App. at 407 (emphasis added). If mixing the ideas of unanimity and double jeopardy invites confusion, then it follows that Instruction 5, which speaks to double jeopardy,⁹ is incapable of adequately clarifying Instruction 6, which addresses the need for unanimity.

While it may be possible to cobble together Instruction 5 and Instruction 6 to support a legal argument that the jury was adequately instructed on unanimity, the jury should not be required to engage in that

⁸ To use one act as the basis for two counts is to convict twice for the same crime and violates double jeopardy. Ellis, 71 Wn. App. at 404.

⁹ Ellis, 71 Wn. App. at 406.

interpretive exercise. The standard for clarity in a jury instruction is higher than for a statute. LeFaber, 128 Wn.2d at 902. Courts may resolve ambiguous wording in a statute by utilizing rules of construction, but jurors lack such interpretative tools. Id. Accordingly, a jury instruction must be manifestly clear to the average juror. 128 Wn.2d at 900. The unanimity instruction here fails on this ground.

The prosecutor in closing argument tried to explain what the unanimity instruction meant. 5RP 589-91. This attempt at clarification did not cure the defect: "Instructions should tell the jury in clear terms what the law is. Jurors should not have to speculate about it, nor should counsel have to engage in legalistic analysis or argument in order to persuade the jury as to what the instructions mean or what the law is." State v. Byrd, 72 Wn. App. 774, 780, 868 P.2d 158 (1994).

b. Counsel's Agreement To The Defective Unanimity Instruction Prejudiced Earl.

The standard of review for an assertion of ineffective assistance of counsel involves a two-prong test. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). First, the defendant must show that counsel's performance was deficient. Thomas, 109 Wn.2d at 225. Second, the defendant must show that the deficient performance

prejudiced the defense. Id. at 225-26. Counsel's conduct is deficient if it fell below an objective standard of reasonableness. State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). Conduct based on a legitimate strategy or tactical decision is not deficient. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Earl's counsel was deficient because no legitimate strategy justified agreeing to a jury instruction that deprived Earl of his constitutional right to a unanimous jury verdict on each count.

To demonstrate prejudice, the defendant must show there is a reasonable probability that but for counsel's deficient performance the result would have been different. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); Strickland, 466 U.S. at 694. When the trial court fails to give a proper unanimity instruction, "the error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt." Kitchen, 110 Wn.2d at 411 (citation omitted). In Petrich, the Court held the failure to give a proper unanimity instruction was not harmless because evidence showed multiple instances of conduct that could have been the basis for each charge. The victim described some incidents with detail and specificity. Others were simply acknowledged, with attendant confusion as to date and place,

and uncertainty regarding the type of sexual contact that took place. Petrich, 101 Wn.2d at 573.

Similarly, here the trial court's failure to provide a proper unanimity instruction was not harmless because A.K. testified about multiple sexual acts occurring every week over the course of four years. A.K. described some incidents in some detail, while others were merely acknowledged without articulation. In the absence of a proper unanimity instruction, there is no way to know that all the members of the jury were relying on the same incident when considering each count. See Petrich, 101 Wn.2d at 570 ("The greater the number of offenses in evidence, the greater the possibility, or even probability, that all of the jurors may never have agreed as to the proof of any single one of them") (quoting State v. Workman, 66 Wash. 292, 294-95, 119 P. 751 (1911)). Reversal is required.

4. THE COURT VIOLATED EARL'S RIGHT TO A JURY TRIAL BY ALLOWING THE STATE'S EXPERT WITNESS TO GIVE IMPROPER OPINIONS REGARDING THE ALLEGED VICTIM'S VERACITY AND EARL'S GUILT.

The state's use of improper expert opinion testimony to rehabilitate the credibility of the state's key witness violated Earl's right to a jury trial. The convictions must be reversed as a result.

A witness may not directly or indirectly give an opinion on another witness's credibility. State v. Kirkman, 126 Wn. App. 97, 105, 107 P.3d 133, rev. granted, 155 Wn.2d 1014, 124 P.3d 304 (2005); State v. Stevens, 127 Wn. App. 269, 275-76, 110 P.3d 1179 (2005). In addition, no witness, lay or expert, may opine as to the defendant's guilt by direct statement or inference. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Opinion testimony on the guilt of the defendant and the veracity of a witness violates the defendant's constitutional right to a jury trial because it invades the exclusive fact-finding province of the jury. Demery, 144 Wn.2d at 759; Kirkman, 126 Wn. App. at 106.

a. The Forensic Interviewer Gave Improper Opinions Regarding the Victim's Veracity And Earl's Guilt.

Jennifer Knight, a forensic child interviewer at Mary Bridge Child Abuse Intervention Department, testified as an expert witness for the state. 5RP 455. Knight explained forensic child interviewers are trained by linguists on how to interview children with the goal of maximizing the ability for a child to make a disclosure of abuse. 5RP 456. She had been a child interviewer for eight years and had interviewed 3,000 children during that time. 5RP 455, 460, 491.

Shortly after Knight began testifying, lengthy argument regarding the bounds of Knight's testimony ensued. 5RP 466-90. The state argued A.K.'s credibility was the crux of the case, and for this reason the jury was entitled to hear from an expert about how children who have been abused typically disclose the abuse. 5RP 474-75, 485-86. The trial court found this explanation dubious, stating "You might be dressing it up, but what it gets down to is this expert says, because of this, this, and this, [A.K.] is telling the truth." 5RP 486. After further argument, the court nevertheless expressed willingness to allow the expert to testify about the issue of child recantation in abuse cases: "I don't know what you are going to do, but I'm just -- if you do it and there's no objection that I sustain, then you're going to do whatever you are going to do." 5RP 489-50.

Knight resumed testimony, and confirmed for the jury that she followed accepted protocol in interviewing A.K., such as building rapport with the child, asking background information to determine memory and language, and asking general, non-leading questions. 5RP 491-92, 498. The admitted testimony to which error is assigned on appeal is as follows:

Q: What was [A.K.'s] demeanor during the interview?

A: [A.K.'s] demeanor was actually -- you know, *she used powerless speech, which is typical of abused children*. She seemed like certain things were harder for her to talk about than others.

5RP 498 (emphasis added).

Soon thereafter, the prosecutor asked:

Q: Now, as part of your training, do you have certain signs that you look for in terms of evaluating whether -- you talked about suggestive questions and trying to avoid those. Is there anything you can look for in interviewing a child to determine whether some sort of suggestion has taken place prior to your interview?

A: *Things that we look for in children to indicate that they are being deceptive is canned responses*, meaning that they're not -- they don't even appear to be recalling anything from their memory, they are just saying the same thing over and over again. For children, concept lies -- I mean, complicated lies are hard for them to maintain over a period of time, so *canned responses are a very big sign of indicating lying* because they don't really have anything in their memory to pull from for their reference of the abuse, so they just continually say the same thing, like daddy touched my private, but they can't indicate anything further on that.

5RP 499-500 (emphasis added).

The prosecutor, with reference to one of A.K.'s recantation letters, a short time later asked Knight:

Q: *[I]s it true that in that exhibit it is a letter from the victim that recants the allegations against Mr. Earl?*

A: *Yes.*

Q: *Does that surprise you?*

A: *No.*

Q: *Why not?*

A: *Typically, unfortunately, the children that -- typically the children that are sexually abused come from very unstable families and, once they disclose, they become even more unstable. They're not believed. They're seen as manipulative. And their families that were meant to support them continue not to support them. It is very common that*

children recant. It appears, I would say, probably about 75 percent of the time in many research projects involving many children.

SRP 501-02 (emphasis added).

In closing argument, the state repeatedly returned to Knight's testimony in asking the jury to believe A.K.'s testimony. SRP 598-600, 604, 605, 607-08. The state specifically referenced how Knight was trained to look for "canned answers," that Knight's testimony demonstrated sexually abused children often recant, and that A.K.'s recantation was understandable given the unfortunate circumstances of her life. SRP 600, 604, 605.

In State v. Kirkman, the state asked the examining physician whether the physical exam of the child victim was consistent with the victim's explanation of the event. The physician testified the victim's report of sexual touching was clear and consistent with appropriate affect, and that she used appropriate vocabulary. This Court reversed conviction, holding the physician clearly commented on the child victim's credibility in so testifying. Kirkman, 126 Wn. App. at 104, 107. This Court also held the detective's testimony that he tested the victim's competency and truthfulness was erroneously admitted because "[i]n essence, he told the jury that [the victim] told the truth when she related the incriminating events to him." Id. at 105.

Here, the state's expert witness similarly commented on A.K.'s credibility. Knight, by testifying A.K. used speech typical of abused children, indirectly but unmistakably expressed her opinion that A.K. was in fact sexually abused. 5RP 498. Knight also indicated she was adept at recognizing when children were being deceptive by means of canned answers. 5RP 499-500. The prosecutor elicited this testimony after Knight had explained how she carefully followed correct protocol in interviewing A.K. -- a protocol designed to maximize the ability of a child to make an untainted disclosure of abuse. 5RP 456. A.K. had earlier testified she told Knight the truth.¹⁰ 5RP 280-81, 336. Finally, Knight testified she was not surprised by A.K.'s recantation because victims of sexual abuse typically come from unstable families. 5RP 501-02. In this manner, Knight not only vouched for A.K.'s credibility on the issue of whether she was telling the truth when she accused Earl of abuse, but also expressed an indirect opinion on Earl's guilt. See Black, 109 Wn.2d at 348-49 (expert opinion that alleged victim suffered from rape trauma syndrome and fit profile for rape victims impermissibly implied complainant was telling truth and was indirect opinion on the accused's guilt).

¹⁰ Michelle Breland, nurse practitioner at the Child Abuse Intervention Department, later testified A.K. answered "yes" to Breland's question of whether A.K. told Knight the truth about Earl. 5RP 509, 521.

b. The Errors Are Preserved For Review.

The erroneous admission of Knight's opinion testimony is preserved for review in spite of defense counsel's failure to raise a contemporaneous objection. Improper opinion testimony regarding the veracity of a witness or guilt of the defendant is an error that may generally be raised for the first time on appeal pursuant to RAP 2.5(a) because it is a manifest error affecting a constitutional right. Kirkman, 126 Wn. App. at 106. An error is "manifest" when there is "a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). The improper opinion testimony given by Knight is manifest because, as explained in further detail below, it had the identifiable effect of bolstering A.K.'s credibility in a case where her credibility was the deciding issue.

c. The Improper Opinion Testimony Was Prejudicial.

A constitutional error is harmless only if (1) the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error; and (2) the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. State v. Easter, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996); State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985). In cases involving an opinion on witness

credibility, the risk of prejudice is acute where, as here, a successful defense hinges on whom the jury believes. Kirkman, 126 Wn. App. at 107; State v. Dunn, 125 Wn. App. 582, 594, 105 P.3d 1022 (2005).

Both the prosecutor and defense counsel argued A.K.'s credibility was the crux of the case. 5RP 474, 597-98, 599, 603-04, 606, 620-21, 623-24. By the time Knight took the stand, A.K.'s credibility was in need of repair. The jury had learned A.K., after her initial accusation, subsequently recanted the abuse allegation in three written letters and to at least seven different people. 5RP 282, 291-92.¹¹ There was also evidence that A.K. had reason to falsely accuse Earl. Her stepmother testified A.K. had told her she did not want to go back home to her mother because she and her live-in boyfriend were abusing her.¹² 5RP 202-03. This admission occurred two weeks before A.K. made the allegation against Earl. 5RP 202-03. A.K. also had motive to continue to lie about the allegations: in one of the recant letters, A.K. indicated her fear that her stepmother would beat her if she told "the State" Earl had not touched her. 5RP 294-95. As a further blow to her credibility, no one had noticed anything inappropriate over the course of four years, even though her

¹¹ A.K. testified she was lying when she recanted. 5RP 283, 290.

¹² A.K. denied this on cross-examination. 5RP 302-03.

younger brother was always in Earl's house with her, Kassabaum and her boyfriend would often be working in the yard, Earl's wife was sometimes home when A.K. was over there, and people would enter Earl's home without knocking on a regular basis. 5RP 273-74, 321-24, 331-32, 347-48, 425-26. Furthermore, A.K. never expressed fear or anger towards Earl and continually expressed a desire to go over to Earl's house. 5RP 409, 418, 426. By rehabilitating A.K.'s credibility through Knight, the jury was told they could nevertheless believe A.K.'s testimony that Earl had abused her.

In Kirkman, this Court found the doctor's comments on the victim's credibility to be prejudicial error because the case rested on the credibility of the victim, an examination revealed no physical signs of rape, and there was no other evidence of abuse apart from the victim's statements. Kirkman, 126 Wn. App. at 99, 107. Similar circumstances, including no physical sign of rape, present themselves here. 5RP 524-25. Furthermore, due to the aura of reliability that surrounds expert testimony, the jury may have been unduly swayed by Knight's comments in determining whether the state had proven its case. See United States v. Amaral, 488 F.2d 1148, 1152 (9th Cir. 1973) (recognizing expert testimony may unduly bias jury

"because of its aura of special reliability and trustworthiness"). Under such circumstances, it cannot be said the error was harmless.

5. THE COURT ERRONEOUSLY SENTENCED EARL ON COUNTS 3 AND 5.

The court imposed a sentence of 318 months for Count 3, attempted first degree rape of a child. CP 493. Using Earl's offender score of 9+, the maximum standard range sentence for first degree rape of a child is 318 months. CP 490; RCW 9.94A.510. However, "[f]or persons convicted of the anticipatory offenses of criminal attempt . . . the presumptive sentence is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the crime, and multiplying the range by 75 percent." RCW 9.94A.595. The maximum standard range for Earl's attempted first degree rape conviction is therefore 238 1/2 months. The court may impose a sentence outside the standard sentence range for an offense only if the jury, or in appropriate circumstances, the judge, finds substantial and compelling reasons to justify an exceptional sentence. RCW 9.94A.535; Blakely v. Washington, 542 U.S. 296, 301, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). No findings were made to justify the exceptional sentence. The sentence under Count 3 must therefore be vacated and remanded for redetermination.

The court imposed a term of community custody for the remainder of Earl's life under Count 5, second degree rape of a child. CP 496. Earl was sentenced as a persistent offender to life without parole under Count 5. CP 493. A persistent offender is not eligible for community custody. RCW 9.94A.570. When a trial court exceeds its sentencing authority under the Sentencing Reform Act, it commits reversible error. State v. Murray, 118 Wn. App. 518, 522, 77 P.3d 1188 (2003). The community custody condition must therefore be stricken.

D. CONCLUSION

For the reasons stated, this Court should reverse Earl's convictions on all counts, dismiss counts 1 and 2 with prejudice, and remand for a new

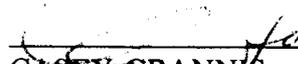
trial on counts 3, 4 and 5. If this Court declines to reverse convictions,
then the case should still be remanded for resentencing on Count 3 and 5.

DATED this 5th day of March, 2007.

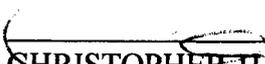
Respectfully Submitted,

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

COUNTY OF KING
FILED

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STATE OF WASHINGTON
BY DM
DEPUTY

STATE OF WASHINGTON)
)
Respondent,)
)
vs.)
)
FRANK CHESTER EARL,)
)
Appellant.)

COA NO. 34629-0-II

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 15TH DAY OF MACH 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SIGNED IN SEATTLE WASHINGTON, THIS 15TH DAY OF MACH 2007.

x Patrick Mayovsky