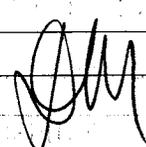


NO. 34629-0

RECEIVED
COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON
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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

FRANK EARL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming

No. 03-1-06167-2

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR..... 1

1. Has defendant failed to meet his burden of showing juror misconduct or any resulting prejudice when the alleged misconduct occurred during deliberations that were nullified when one of the jurors had to be replaced by an alternate? 1

2. Did the trial court properly exercise its discretion in limiting the scope of the inquiry into the alleged misconduct when the preliminary investigation revealed that the complaining juror was the only juror who had clearly engaged in misconduct?..... 1

3. Should this court refuse to review defendant’s claim of improper opinion evidence when it was not preserved below and concerns evidence that is insufficient to raise an issue of constitutional magnitude? 1

4. Has defendant failed to meet his burden of showing ineffective assistance of counsel when he has failed to show that his attorney proposed an erroneous instruction or that the instruction actually prejudiced his case, or that his attorney’s performance was so deficient as to leave him effectively unrepresented?..... 1

5. Was there sufficient evidence to support the jury’s findings of guilt on two counts of rape of a child in the first degree?2

6. Is defendant entitled to be resentenced on Count III when he was sentenced using an incorrect range and should the imposition of a term of community custody be stricken on Count V when defendant was sentenced as a persistent offender on that count?.....2

B. STATEMENT OF THE CASE2

 1. Procedure.....2

 2. Facts3

C. ARGUMENT.....16

 1. AS DEFENDANT DID NOT MEET HIS BURDEN OF PROVING JUROR MISCONDUCT OR RESULTING PREJUDICE, THE COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE SCOPE OF THE INQUIRY INTO THE ALLEGATIONS.....16

 2. DEFENDANT FAILED TO PRESERVE A CLAIM OF IMPROPER OPINION EVIDENCE IN THE TRIAL COURT AND DOES NOT PRESENT A CLAIM THAT MAY BE RAISED FOR THE FIRST TIME ON APPEAL.....35

 3. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING DEFICIENT PERFORMANCE OR RESULTING PREJUDICE.....38

 4. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT DEFENDANT’S TWO CONVICTIONS FOR RAPE OF A CHILD IN THE FIRST DEGREE.....48

 5. THE STATE CONCEDES THAT DEFENDANT IS ENTITLED TO BE RESENTENCED WITHIN THE PROPER RANGE ON COUNT III AND TO HAVE THE COMMUNITY CUSTODY PROVISION STRICKEN AS TO COUNT FIVE.....52

D. CONCLUSION.54

Table of Authorities

Federal Cases

<u>Blanco v. Singletary</u> , 943 F.2d 1477 (11th Cir. 1991)	34
<u>Campbell v. Knicheloe</u> , 829 F.2d 1453, 1462 (9th Cir. 1987), <u>cert. denied</u> , 488 U.S. 948 (1988).....	41
<u>Coco v. United States</u> , 569 F.2d 367 (5th Cir. 1978)	34
<u>Cuffle v. Goldsmith</u> , 906 F.2d 385, 388 (9th Cir. 1990).....	42
<u>Faretta v. California</u> , 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).....	34
<u>Florida v. Nixon</u> , 543 U.S. 175, 187, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004).....	33
<u>Galowski v. Murphy</u> , 891 F.2d 629, 639 (7th Cir. 1989).....	35
<u>Harris v. Dugger</u> , 874 F.2d 756, 761 n.4 (11th Cir. 1989)	41
<u>Hendricks v. Calderon</u> , 70 F.3d 1032, 1040 (9th Cir. 1995).....	41
<u>Hyde v. United States</u> , 225 U.S. 347, 384, 32 S. Ct. 793, 56 L. Ed. 1114 (1912).....	26
<u>Jones v. Barnes</u> , 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983).....	33, 34
<u>Kimmelman v. Morrison</u> , 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).....	39, 42, 47
<u>Mattox v. United States</u> , 146 U.S. 140, 149, 13 S. Ct. 50, 36 L. Ed. 917 (1892).....	25
<u>McDonald v. Pless</u> , 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915).....	26
<u>Murphy v. Florida</u> , 421 U.S. 794, 799, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975).....	16

<u>United States v. Webster</u> , 750 F.2d 307, 338 (5th Cir. 1984), <u>cert. denied</u> , 471 U.S. 1106, 105 S. Ct. 2340, 85 L. Ed. 2d 855 (1985).....	20
<u>Parker v. Gladden</u> , 385 U.S. 363, 365, 87 S. Ct. 468,.....	25
<u>Remmer v. United States</u> , 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954).....	17, 18, 19, 26
<u>Smith v. Phillips</u> , 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982).....	16, 17, 26
<u>Stockton v. Virginia</u> , 852 F.2d 740, 747 (4th Cir. 1988).....	31
<u>Strickland v. Washington</u> , 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	39, 40, 41, 42
<u>Tanner v. United States</u> , 483 U.S. 107, 116-34, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987).....	18, 19, 25, 26
<u>Taylor v. Illinois</u> , 484 U.S. 400, 417-418, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988).....	33
<u>Tracey v. Palmateer</u> , 341 F.3d 1037, 1044 (9th Cir. 2003).....	20
<u>United States v. Aiello</u> , 771 F.2d 621, 629 (2d Cir. 1985).....	20
<u>United States v. Barber</u> , 668 F.2d 778, 786-87 (4th Cir. 1982)	27
<u>United States v. Briggs</u> , 291 F.3d 958, 963 (7th Cir.), <u>cert. denied</u> , 537 U.S. 985, 123 S. Ct. 458, 154 L. Ed. 2d 350 (2002).....	19
<u>United States v. Brown</u> , 823 F.2d 591, 596 (D.C. Cir. 1987)	21
<u>United States v. Burke</u> , 257 F.3d 1321, 1323 (11th Cir. 2001), <u>cert. denied</u> , 537 U.S. 940, 123 S. Ct. 42, 154 L. Ed. 2d 246 (2002).....	34
<u>United States v. Casamayor</u> , 837 F.2d 1509, 1515 (11th Cir. 1988).....	27
<u>United States v. Cronin</u> , 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984).....	39, 47
<u>United States v. Gaskin</u> , 364 F.3d 438, 463-464 (2nd Cir. 2004).....	31

<u>United States v. Kelly</u> , 722 F.2d 873, 881 (1st Cir. 1983), <u>cert. denied</u> , 465 U.S. 1070, 104 S. Ct. 1425, 79 L. Ed. 2d 749 (1984).....	21
<u>United States v. Klee</u> , 494 F.2d 394, 395-96 (9th Cir. 1974).....	19
<u>United States v. Layton</u> , 855 F.2d 1388, 1419-20 (9th Cir. 1988), <u>cert. denied</u> , 489 U.S. 1046 (1989).....	41
<u>United States v. Logan</u> , 250 F.3d 350, 378 (6th Cir.), <u>cert. denied</u> , 534 U.S. 895, 122 S. Ct. 216, 151 L. Ed. 2d 154 (2001).....	18
<u>United States v. Molina</u> , 934 F.2d 1440, 1447-48 (9th Cir. 1991).....	42
<u>United States v. Olano</u> , 62 F.3d 1180, 1192 (9th Cir. 1995).....	18
<u>United States v. Prosperi</u> , 201 F.3d 1335, 1340-41 (11th Cir.), <u>cert. denied</u> , 531 U.S. 956, 121 S. Ct. 378, 148 L. Ed. 2d 292 (2000).....	19-20
<u>United States v. Rigsby</u> , 45 F.3d 120, 123 (6th Cir.), <u>cert. denied</u> , 514 U.S. 1134, 115 S. Ct. 2015, 131 L. Ed. 2d 1013 (1995).....	17, 18
<u>United States v. Romero-Avila</u> , 210 F.3d 1017, 1024 (9th Cir. 2000).....	18
<u>United States v. Symington</u> , 195 F.3d 1080, 1086 (9th Cir. 1999).....	21
<u>United States v. Washington</u> , 198 F.3d 721, 723 (8th Cir. 1999)	34
<u>United States v. Webster</u> , 750 F.2d 307, 338 (5th Cir. 1984), <u>cert. denied</u> , 471 U.S. 1106, 105 S. Ct. 2340, 85 L. Ed. 2d 855 (1985).....	20
<u>United States v. Yoakam</u> , 168 F.R.D. 41, 45-46 (D. Kan. 1996).....	20
<u>Wainwright v. Sykes</u> , 433 U.S. 72, 93, n. 1, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977).....	33
<u>Watkins v. Kassulke</u> , 90 F.3d 138, 141-43 (6th Cir. 1996).....	34
<u>Williams v. Bagley</u> , 380 F.3d 932, 945 (6th Cir. 2004)	17

State Cases

<u>City of Seattle v. Heatley</u> , 70 Wn. App. 573, 577, 854 P.2d 658 (1993)	35, 36
<u>Gardner v. Malone</u> , 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962)	27, 28
<u>Hendrickson v. Konopaski</u> , 14 Wn. App. 390, 393, 541 P.2d 1001 (1975)	27
<u>Hosner v. Olympia Shingle Co.</u> , 128 Wash. 152, 154-55, 222 P. 466 (1924)	28
<u>People v. Ferguson</u> , 67 N.Y.2d 383, 389-90, 494 N.E.2d 77, 502 N.Y.S.2d. 972, 976-77 (1986)	35
<u>Robinson v. Safeway Stores, Inc.</u> , 113 Wn.2d 154, 159, 776 P.2d 676 (1989)	16
<u>Seattle v. Gellein</u> , 112 Wn.2d 58, 61, 768 P.2d 470 (1989).....	49
<u>State v. Aker</u> , 54 Wash. 342, 345-346, 103 Pac. 420 (1909)	28
<u>State v. Barnes</u> , 85 Wn. App. 638, 668-669, 932 P.2d 669 (1997)	20
<u>State v. Barrington</u> , 52 Wn. App. 478, 484, 761 P.2d 632 (1987), <u>review denied</u> , 111 Wn.2d 1033 (1988)	49
<u>State v. Benn</u> , 120 Wn.2d 631, 633, 845 P.2d 289 (1993).....	40
<u>State v. Black</u> , 109 Wn.2d 336, 348, 745 P.2d 12 (1987)	35, 36
<u>State v. Brenner</u> , 53 Wn. App. 367, 372, 768 P.2d 509 (1989).....	17
<u>State v. Brett</u> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995), <u>cert. denied</u> , 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996).....	40
<u>State v. Camarillo</u> , 115 Wn.2d 60, 71, 794 P.2d 850 (1990).....	50
<u>State v. Carpenter</u> , 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).....	40
<u>State v. Casbeer</u> , 48 Wn. App. 539, 542, 740 P.2d 335, <u>review denied</u> , 109 Wn.2d 1008 (1987).....	50

<u>State v. Ciskie</u> , 110 Wn.2d 263, 751 P.2d 1165 (1988)	40
<u>State v. Cord</u> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	50
<u>State v. Crowell</u> , 92 Wn.2d 143, 146, 594 P.2d 905 (1979).....	28
<u>State v. Delmarter</u> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980)	49
<u>State v. Demery</u> , 144 Wn.2d 753, 759-760, 30 P.3d 1278 (2001)	35, 36
<u>State v. Ellis</u> , 71 Wn. App. 400, 404, 859 P.2d 632 (1993)	44, 45, 46
<u>State v. Hall</u> , 40 Wn. App. 162, 169, 697 P.2d 597 (1985).....	28
<u>State v. Havens</u> , 70 Wn. App. 251, 255-56, 852 P.2d 1120, <u>review denied</u> , 122 Wn.2d 1023 (1993).....	20, 28, 29
<u>State v. Hawkins</u> , 72 Wn.2d 565, 566, 434 P.2d 584 (1967)	20, 29
<u>State v. Hayes</u> , 81 Wn. App. 425, 430-31, 914 P.2d 788 (1996)	43
<u>State v. Holbrook</u> , 66 Wn.2d 278, 401 P.2d 971 (1965).....	49
<u>State v. Jackman</u> , 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989)	28
<u>State v. Jones</u> , 71 Wn. App. 798, 863 P.2d 85 (1993).....	36
<u>State v. Joy</u> , 121 Wn.2d 333, 338, 851 P.2d 654 (1993).....	49
<u>State v. Kirkman</u> , ___ Wn.2d ___, ___ P.3d ___ (2007) (2007 Wash. LEXIS 210, issued April 5, 2007).....	38
<u>State v. Kirkman</u> , 126 Wn. App. 97, 107 P.3d 133, <u>review granted</u> , 155 Wn.2d 1014, 124 P.3d 304 (2005).....	37
<u>State v. Lemieux</u> , 75 Wn.2d 89, 91, 448 P.2d 943 (1968)	17
<u>State v. Mabry</u> , 51 Wn. App. 24, 25, 751 P.2d 882 (1988).....	49
<u>State v. McCullum</u> , 98 Wn.2d 484, 488, 656 P.2d 1064 (1983)	49
<u>State v. McFarland</u> , 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).....	39, 40

<u>State v. Murphy</u> , 44 Wn. App. 290, 296, 721 P.2d 30, <u>review denied</u> , 107 Wn.2d 1002 (1986).....	17
<u>State v. Petrich</u> , 101 Wn.2d 566, 572, 683 P.2d 173 (1984).....	42, 44
<u>State v. Salinas</u> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	49
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	39, 40, 42
<u>State v. Tigano</u> , 63 Wn. App. 336, 341, 818 P.2d 1369 (1991).....	16, 20
<u>State v. Turner</u> , 29 Wn. App. 282, 290, 627 P.2d 1323 (1981).....	49

Constitutional Provisions

Fourteenth Amendment, United States Constitution.....	16
Sixth Amendment, United States Constitution.....	18, 39, 47, 48

Statutes

RCW 9.94A.570.....	53
RCW 9.94A.595.....	53
RCW 9.94A.728 (1), (2), (3), (4), (6), (8), or (9).....	54

Rules and Regulations

ER 103.....	36
Federal Rules of Evidence 606(b).....	27
RAP 2.5(a).....	37

Other Authorities

8 J. Wigmore, Evidence § 2352, pp. 696-697 (J. McNaughton rev. ed. 1961).....	25
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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to meet his burden of showing juror misconduct or any resulting prejudice when the alleged misconduct occurred during deliberations that were nullified when one of the jurors had to be replaced by an alternate?
2. Did the trial court properly exercise its discretion in limiting the scope of the inquiry into the alleged misconduct when the preliminary investigation revealed that the complaining juror was the only juror who had clearly engaged in misconduct?
3. Should this court refuse to review defendant's claim of improper opinion evidence when it was not preserved below and concerns evidence that is insufficient to raise an issue of constitutional magnitude?
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5. Was there sufficient evidence to support the jury's findings of guilt on two counts of rape of a child in the first degree?

6. Is defendant entitled to be resentenced on Count III when he was sentenced using an incorrect range and should the imposition of a term of community custody be stricken on Count V when defendant was sentenced as a persistent offender on that count?

B. STATEMENT OF THE CASE.

1. Procedure

On December 31, 2003, the Pierce County Prosecutor's Office charged FRANK CHESTER EARL ("defendant"), 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 child molestation in the second degree and one count of rape of a child in the second degree. CP 1-4. The information was amended more than once, but it did not change the number of, or nature of, the counts that were the subject of his trial. CP 48-50, 56-58, 131-133.

Defendant initially proceeded to trial before the Honorable D. Gary Steiner, but his trial ended in a mistrial due to a discovery violation. 2RP

412-458.¹ A second trial before Judge Steiner ended due to juror misconduct. 3RP 196-258. Defendant's third trial was held before the Honorable Frederick W. Fleming. 5RP 1.

After hearing the evidence the jury convicted defendant as charged. CP 162-166.

The court sentenced defendant on March 17, 2006. The court found defendant to be a persistent offender on Count V and imposed a sentence of life without the possibility of parole on that count. CP 488-505. Defendant received standard range sentences of 318 months on his two convictions for rape of a child in the first degree as well as his attempted rape of a child in the first degree. CP 488-505. He received a sentence of 116 months on the molestation conviction. Id.

Defendant filed a timely notice of appeal from entry of this judgment. CP 508-527.

2. Facts

Benita Ochoa testified that she was a step-mother to A.K. for approximately 13 years while she was in a relationship with Earl Youell, A.K.'s father. 5RP 174-176. Mr. Youell's parentage of A.K. had to be established by blood testing; A.K.'s mother, Florenda, named five possible

¹ The State will adopt the same system of identifying the 30 various volumes of the verbatim report of proceedings as used by the appellant. See, Brief of Appellant at p.3-4, n. 2

men that might be A.K.'s father including the defendant. 5RP 204. Ms. Ochoa's relationship with Mr. Youell lasted from 1992 until July of 2004 and they had three children together. 5RP 175-176. During that time, they also helped raise his biological sons, Frank and Floyd, who had been removed from the care of their mother, Florenda, because she abused them. 5RP 175-176, 179, 206. They had one visitation with A.K. in 1994 when she was about two years old. 5RP 176-177. Ms. Ochoa testified that Florenda, is extremely hostile toward her and has made several threats toward her, apparently upset that her biological sons refer to Ms. Ochoa as "mom." 5RP 177-179.

Ms. Ochoa testified that a couple of years ago Mr. Youell decided that he wanted to have more contact with A.K., as did Frank and Floyd. 5RP 179-180. They arranged visitation that started for a few hours every other weekend, but this grew to weekend-long visits, from 6:00 p.m. Friday until 6:00 p.m. Sunday. 5RP 180, 197. Every night, A.K. would scream and cry in her sleep so that they had to wake her up. 5RP 180-181. She would cry out "Don't" "Stop" and "please don't touch me." 5RP 181. Ms. Ochoa tried to talk to A.K. about her nightmares, but A.K. didn't like talking about it. Id. Ms. Ochoa reported this information to A.K.'s CPS worker. Id. At some point, Mr. Youell decided to try to fight for custody of A.K. so she could live with him, Ms. Ochoa, and her brothers. 5RP

181. Ms. Ochoa thinks that this began in December of 2003 after they heard some reports of physical abuse. 5RP 207.

Approximately six months after the overnight visitation began, on the Sunday before New Year's Eve in 2003, A.K. asked Ms. Ochoa if she could talk to her privately. 5RP 182-185, 197. A.K. then told her that defendant had touched her private spots on many occasions. 5RP 185. A.K. did not offer any specifics, but was concerned that her mom would be mad for telling. Id. Ms. Ochoa told her not to worry and that she was going to call the police. 5RP 185. That made A.K. more nervous and frightened that she would be in trouble. 5RP 186. A.K. asked Ms. Ochoa not to do that, because her mom didn't believe her when she told her. 5RP 186. Ms. Ochoa called the police; an officer arrived about 20 minutes later and she relayed what A.K. had said. 5RP 186. Ms. Ochoa knows that the officer talked to A.K. for a few minutes but she did not hear that conversation. 5RP 187. The officer placed A.K. in protective custody with her father and Ms. Ochoa over the weekend so that A.K. would not have to return to her mother's house. 5RP 187-188.

Since reporting this to Ms. Ochoa, A.K. has lived with them and in foster care. 5RP 188-190. A.K. has also had unsupervised visits with her mother, although the visits were supposed to be supervised. 5RP 190-191, 209. At one point the Tacoma Police had to be called to get A.K. back

from a visit with her mom. 5RP 209-211. A.K. told Ms. Ochoa that her mother was making her write letters. 5RP 211-213. Ms. Ochoa denied coaching or threatening A.K. to get her to say that the defendant had touched her. 5RP 193. At the time of trial, Ms. Ochoa's relationship with Mr. Youell had ended and there was no chance of reconciliation. 5RP 194.

Officer Weaver of the Tacoma Police Department testified that on December 28, 2003, he was dispatched to 835 East 49th Street in Tacoma to take a report on a complaint of a child molest. 5RP 229-232. Present at that address were Ms. Ochoa, Mr. Youell and A.K. 5RP 233. Officer Weaver received information from Ms. Ochoa that A.K. had reported a family friend had put his hand down hers pants and exposed himself to her and that the last time it happened was on December 8, 2003. 5RP 234. A.K. confirmed Ms. Ochoa's statements. 5RP 235. Officer Weaver was also informed that Mr. Youell was in a custody battle over A.K. 5RP 235. Officer Weaver contacted CPS about an appropriate placement for A.K. and was instructed to leave her with her father for the time being. 5RP 235.

A.K. testified that she was born on July 14, 1991, and was not married. 5RP 244-245. Her parents are Florenda K. and Earl Youell. 5RP 246. At the time of trial she was in the 8th grade and living with her

mother and step-dad, Reed Harris. 5RP 245-246. She had been living with her mom for about three months, prior to that she had been living in foster homes for over a year. 5RP 247-248. She testified that she lived with her mom and step-dad for the first twelve years of her life. 5RP 249. She did not have any regular contact with her father until she was 11 or 12 years old. 5RP 249-250. Then she began visiting on weekends. 5RP 251. While at her father's house she would refer to his girlfriend, Ms. Ochoa, as "mom." 5RP 251.

A.K. testified that she has known the defendant all her life and calls him "grandpa." 5RP 254. She testified that the defendant began touching her in the wrong places when she was eight. 5RP 254-255. The last time he touched her she was twelve. 5RP 255. The first time he touched her she was living in the blue house; the last time he touched her she was living in the house at 48th and J. 5RP 252-253, 255-257. The touchings would happen when she was at the defendant's house. 5RP 256. Defendant's house was just a few blocks away from the house on 48th street. 5RP 257. A.K. recalled that defendant's house was a single story with two bedrooms, a living room, bathroom and kitchen; defendant's bedroom was near the kitchen and the other bedroom was off the living room. 5RP 257-258. Defendant lived at this house with his wife, Debbie. 5RP 258. A.K. testified that she went to defendant house on many

occasions and would sometimes spend the night, usually on the weekends. 5RP 258.

When asked to talk about some of the early touchings that happened when she was eight, A.K. testified that they happened in almost every room except the spare bedroom. 5RP 260. She described one incident in the living room that happened on the couch where he touched her on her “private spot,” or vagina, with his fingers. 5RP 260-261. She described that sometimes it would be on top of her clothing but other time he would touch under her clothing. 5RP 261. She testified that he was stronger than she was and that she couldn’t stop him; but that she did tell him to stop. 5RP 261. Defendant would assure her it was okay and that he wouldn’t hurt her. Id. A.K. testified that he put his fingers inside of her vagina and moved his hands around and that it hurt. 5RP 261-262. When she would tell him that it hurt, defendant would tell her “I’ll try not to hurt you any more.” 5RP 262. She would again tell him to stop but to no avail. Id.

A.K. testified to another incident that happened in the bedroom. 5RP 262. She said that her brother was in the room, but he was watching TV and not paying attention. 5RP 262. A.K. testified that she told defendant to stop and that he told her to quiet down so her brother wouldn’t hear. 5RP 262. On this occasion he touched her over her

clothes. 5RP 263. A.K. testified that the first time he touched her vagina in the bedroom was when she was eight and the last time it happened she was twelve. Sometimes the touching that happened when she was eight was over her clothes and sometimes it was under. 5RP 267. She said that when it was under her clothes his touches would be against her skin. 5RP 267. She testified that when she tried pulling his hand out it would hurt worse because his hand was inside of her. 5RP 267-268.

A.K. described that when her breasts started to develop, when she was twelve, that defendant would rub her breasts through her clothing. 5RP 264-265. This happened in his bedroom when she was wearing shirt, pants, and a training bra. 5RP 265. A.K. said that if her parents were working on cars in the back of defendant's house that he would not try to touch as much as he would when her parents were not there. 5RP 265-266.

A.K. testified that she once saw him with his clothes off. 5RP 268. This incident happened at his workplace at the cemetery, where there was a garage and a break room with a TV and a couch. 5RP 268-269. He took her into the garage, pulled down his pants and underwear, and told her to kiss his "private," or penis. 5RP 270- 273, 326-327. She told him no and he "put it away." 5RP 271. A.K. testified that she was probably little younger than ten years old when this happened. 5RP 270.

A.K. testified that defendant told her many times not to tell anybody about the touchings or they would get in trouble. 5RP 276. A.K. testified that she didn't tell anyone for awhile because she was scared of what he would do if she told. 5RP 276. A.K. said that she tried to tell her mom a couple of times but was too scared to do it because she thought her mom would get blamed. 5RP 276. A.K. stated that the touching would happen most of the times that she went to defendant's house. 5RP 321. A.K. testified that the touchings finally stopped when she was 12 years old after she told her step-mom. 5RP 274, 277. She indicated that the last time he touched her was after Thanksgiving 2003 and just a few days before she told her step-mom. 5RP 278. She described this touching as the defendant putting his fingers inside of her. 5RP 333.

A.K. testified that if it were up to her she would live with her mom, but she wouldn't have wanted to go to her mom's the day the police were called because defendant was still out. 5RP 281-282. A.K. acknowledged that she had told at least four people² that defendant hadn't touched her; she did this because she didn't want them to hate her. 5RP 282. She also acknowledged writing some letters to her cousins³ and mom

² Two of these people were the defendant's sons. 5RP 367.

³ One of these was the defendant's granddaughter; the other was also related to defendant. 5RP 367-368.

saying that defendant hadn't touched her and that her step-mother had forced her to say that, but she testified that what she wrote in these letters wasn't true. 5RP 283, 290. She had written the letters with her cousin's help, hoping that she would get to go back home to her mom's house. 5RP 283, 293. A.K. stated that what she had testified to in court was true. 5RP 286. A.K. identified the defendant in court as the man that she knew as "grandpa" who had touched her. 5RP 284.

Florenda K. testified that she lives with her boyfriend, Reed Harris and her two kids, Robert and A.K. 5RP 338. Florenda testified that Earl Youell was A.K.'s father although this had to be shown by blood tests as she wasn't sure who the father was when she was born. 5RP 339-341. Her marriage with Mr. Youell ended while she was pregnant and the break up was bitter, leaving them no longer on speaking terms. 5RP 341-342. They were divorced in 1993. 5RP 342. Mr. Youell introduced Florenda to defendant; her ex-husband and defendant used to fish together. 5RP 342-343. She started seeing the defendant in 1990; she had just turned 18; they were sexually active. 5RP 344. The sexual relationship continued until December 2003, when A.K. reported the sexual abuse. 5RP 344-345. Defendant was good friends with her boyfriend, Mr. Harris. 5RP 346. She and Mr. Harris would be over at defendant's house frequently working on cars or other projects. 5RP 346-349. Frequently, A.K. and

Robert would be over at defendant's house with them-perhaps as much as two or three times a week for three or four years. 5RP 355, 416. Florenda denied that she ever left A.K. there alone with the defendant; there were times when the kids were there and she was not. 5RP 355. The kids did spend the night over at defendant's house. 5RP 355. There would have been times that A.K. was at defendant's house between Thanksgiving and Christmas 2003. 5RP 411-412.

In December 2003, when Florenda learned that A.K. had disclosed and would not be coming home until CPS permitted it, she was angry. 5RP 361. She called defendant on the phone and told him that A.K. had said that he had molested her. 5RP 361-362. Defendant denied that he did anything. 5RP 362. Florenda has been to defendant's job site at the cemetery; it has a garage and a break room with a TV and a couch. 5RP 356.

Detective Miller, with the Tacoma Police Department, testified that he was first assigned to defendant's case on December 30, 2003 based upon a report taken by a patrol officer on December 28, 2003. 5RP 132-134, 143. He indicated that when a patrol officer takes a report regarding a sex crime with a child victim that the officer will not interview the child as that is done by a trained interviewer at the Child Advocacy Center ("CAC") at Mary Bridge Children's Hospital. 5RP 141-142. After

getting the initial report, Detective Miller spoke with CPS and a detective with the Puyallup tribal police to see if there was any background information those agencies could provide. 5RP 144. He then arranged for an interview of the victim at the CAC. Id. Detective Miller explained the interview procedures used at the CAC. 5RP 144-149. Detective Miller indicated that the victim was brought in by her father, Earl Youell, for the interview. 5RP 146-148. The detective and a CPS worker observed the interview through a one way mirror from an adjoining room. 5RP 148-149.

Jennifer Knight, a child victim interviewer, testified as to her training to conduct forensic interviews of children and of the specific procedures used at the CAC. 5RP 455-466. She testified that abused children frequently omit details in their disclosures and in her experience children have a hard time disclosing about penetration. 5RP 476-477. Disclosure with children is a frequently a process that occurs over time. 5RP 478. Recantation is also common. 5RP 501-502. Ms. Knight testified that she interviewed A.K. on December 30, 2003. 5RP 479. A.K.'s demeanor throughout the interview was that of embarrassment and she had a difficult time talking about certain things. 5RP 479. Ms. Knight used her standard procedures in interviewing A.K. including the funnel technique of questioning. 5RP 491-494. The interview lasted approximately 45 minutes. 5RP 501. After the interview, Ms. Knight prepared a report documenting the content of the interview and other

information she gathered that day from parents or other sources. 5RP 495-497.

Michelle Breland is a pediatric nurse practitioner employed by the CAC. 5RP 507-508. She examines children suspected of being sexually or physically abused who are referred to the CAC. 5RP 510-512. Ms. Breland performed an examination on A.K. on January 8, 2004. 5RP 512-513. A.K. was brought to the clinic by her step-mom. 5RP 513-514. A.K. told Ms. Breland that there was a guy, Frank, who was touching her in places that he shouldn't. 5RP 520-521. A.K. indicated that the last time she was touched by Frank was about a month before, and that it hurt to pee after he touched her. 5RP 521. Ms. Breland testified that A.K. asked if she could go back and live with her mom because she missed her. 5RP 522. A.K. had a normal genital exam. 5RP 524-525. Ms. Breland testified that this did not surprise her as she sees normal genital exams in about 90 percent of her cases. 5RP 525. This is because the genital area is not usually injured during child abuse and because injuries can heal rapidly. 5RP 525. Ms. Breland has seen a case of a "normal exam" on a twelve year old girl who was pregnant and in cases where there is photographic evidence of abuse, so the "normal" finding does not eliminate the possibility of abuse. 5RP 526.

After observing the interview at CAC, Detective Miller believed he had probable cause to arrest defendant and notified local agencies with this information. 5RP 149-151. Detective Miller identified the defendant

in court and testified that defendant's date of birth is July 17, 1952. 5RP 142-143, 151. Defendant was arrested on the first week of January at a residence near the Roy Y. 5RP 151-152. Defendant was brought downtown to the County –City Building; Detective Miller took him to an interview room and advised him of his constitutional rights and informed him as to why he was under arrest. 5RP 152-155.

Detective Miller testified that the defendant told him that he had known A.K. and her brother Robert all their lives and that both kids had been to his house on a regular basis. 5RP 157. Defendant indicated that the kids had been at his house, on average, three times a week and that sometimes they were left there to spend the night on the couch. 5RP 157. Defendant was listed in school records as one of the emergency contacts for A.K. 5RP 161. Detective Miller confronted defendant with the allegations made against him and he denied them. 5RP 158.

Defendant failed to appear for a court date on February 4, 2004, and a warrant issued for his arrest. 5RP 164-165. Detective Miller took steps to get information about the arrest warrant to other law enforcement agencies, including the border patrol. 5RP 165-166. Detective Miller made daily efforts to try to locate defendant at his home or in one of his vehicles. 5RP 166-167. Defendant was arrested on March 4, 2004 near Port Angeles and transferred back to Pierce County. 5RP 167-168, 543-548. Defendant told the arresting deputy that he had been running from

deputies because he knew he had a warrant out for child rape. 5RP 550.

Defendant was carrying a duffle bag with clothes, toiletries and some food; he had over a thousand dollars in his wallet. 5RP 551. There are two ferries run between Port Angeles and Canada. 5RP 553.

The defendant did call any witnesses. 5RP 557.

C. ARGUMENT.

1. AS DEFENDANT DID NOT MEET HIS BURDEN OF PROVING JUROR MISCONDUCT OR RESULTING PREJUDICE, THE COURT DID NOT ABUSE ITS DISCRETION IN LIMITING THE SCOPE OF THE INQUIRY INTO THE ALLEGATIONS.

The constitutional standard of fairness set forth in the Fourteenth Amendment's Due Process Clause requires that a defendant be tried by a panel of impartial, "indifferent" jurors. Murphy v. Florida, 421 U.S. 794, 799, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975). In Washington the right of trial by jury means a trial by an unbiased and unprejudiced jury, free of disqualifying jury misconduct. Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 159, 776 P.2d 676 (1989); State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991). Due process does not require a new trial every time a juror has been placed in a potentially compromising situation, as it is "virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote." Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). Rather, "[w]hen a

trial court is presented with evidence that an extrinsic influence has reached the jury which has a reasonable potential for tainting that jury, due process requires that the trial court take steps to determine what the effect of such extraneous information actually was on that jury.” Williams v. Bagley, 380 F.3d 932, 945 (6th Cir. 2004).

If a juror communicates with a third person about an ongoing trial this constitutes misconduct; it warrants a new trial only if such communications prejudice the defendant. State v. Murphy, 44 Wn. App. 290, 296, 721 P.2d 30, review denied, 107 Wn.2d 1002 (1986); see, State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). At a minimum, a juror must discuss the pending case with a non-juror to create misconduct. State v. Brenner, 53 Wn. App. 367, 372, 768 P.2d 509 (1989).

The United States Supreme Court has stated that the remedy for allegations of juror partiality based on unauthorized juror contacts is a hearing in which the defendant has the opportunity to prove actual juror bias. Smith, 455 U.S. at 215 (citing Remmer v. United States, 347 U.S. 227, 229, 74 S. Ct. 450, 98 L. Ed. 654, 1954-1 C.B. 146 (1954)). A Remmer hearing is required “in all cases involving an unauthorized communication with a juror or the jury from an outside source that presents a likelihood of affecting the verdict.” United States v. Rigsby, 45 F.3d 120, 123 (6th Cir.), cert. denied, 514 U.S. 1134, 115 S. Ct. 2015, 131 L. Ed. 2d 1013 (1995).

A Remmer hearing is not constitutionally required in every circumstance where allegations of jury misconduct are raised. Id. at 124. The trial court enjoys wide discretion in determining the amount of inquiry, if any, that is necessary to respond to such allegations. United States v. Logan, 250 F.3d 350, 378 (6th Cir.), cert. denied, 534 U.S. 895, 122 S. Ct. 216, 151 L. Ed. 2d 154 (2001); see also, Rigsby, 45 F.3d at 124-25; United States v. Olano, 62 F.3d 1180, 1192 (9th Cir. 1995); United States v. Romero-Avila, 210 F.3d 1017, 1024 (9th Cir. 2000)(district courts are not required to hold evidentiary hearings each time there is an allegation of jury misconduct).

In Tanner v. United States, 483 U.S. 107, 116-34, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987), the Supreme Court held that the trial court's failure to hold a post-verdict hearing based on certain jurors' allegations that some jurors consumed alcohol and drugs during recesses of the trial did not violate the defendant's Sixth Amendment right to a fair and impartial jury. The Court distinguished cases involving an "extrinsic influence or relationships" from cases involving an inquiry into the "internal processes of the jury." Id. at 120. This distinction is necessary to preserve "one of the most basic and critical precepts of the American justice system: the integrity of the jury." Logan, 250 F.3d at 379; see also, Tanner, 483 U.S. at 119-20. The Court found that the defendant's Sixth Amendment interest in an impartial, "unimpaired" jury was protected by "several aspects of the trial process," including voir dire and the

opportunity for jurors and court personnel to report observable inappropriate juror behavior before a verdict is rendered. The Court stressed that the distinction made between external and internal influences on the jury is not based on whether the juror was inside or outside the jury room when the alleged misconduct occurred, but rather on the “nature of the allegation.” Tanner, 483 U.S. at 117-18.

It is generally considered less serious if the misconduct allegation does not involve outside influences or extraneous information. See, United States v. Klee, 494 F.2d 394, 395-96 (9th Cir. 1974)(district court did not err in denying a mistrial, even though eleven jurors prematurely discussed the case during recesses, and nine of the jurors expressed premature opinions about the defendant's guilt). Claims that do not involve an outside or extrinsic influence, but rather only a potential intra-jury influence, are not subject to a Remmer hearing or further inquiry by the trial court. United States v. Briggs, 291 F.3d 958, 963 (7th Cir.) (affirming district court’s denial of motion for post-verdict hearing based on a juror’s allegations that jurors and the jury foreman behaved improperly during deliberations, including exerting “extreme and excessive pressure on individuals to change votes”), cert. denied, 537 U.S. 985, 123 S. Ct. 458, 154 L. Ed. 2d 350 (2002); United States v. Prospero, 201 F.3d 1335, 1340-41 (11th Cir.)(district court’s refusal to grant mistrial or an inquiry into alleged misconduct by two jurors engaged in a “heated discussion” away from the other jurors did not amount to an abuse of

discretion and, in fact, would have “invited reversible error” if a contrary decision had been made), cert. denied, 531 U.S. 956, 121 S. Ct. 378, 148 L. Ed. 2d 292 (2000); see also, United States v. Yoakam, 168 F.R.D. 41, 45-46 (D. Kan. 1996)(denying request for investigation based on allegations of juror misconduct obtained from courthouse guard, who overheard two jurors participating in a “heated discussion” concerning their deliberations).

The party who asserts juror misconduct bears the burden of showing that the alleged misconduct occurred. State v. Hawkins, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). The determination of whether misconduct has occurred lies within the discretion of the trial court. State v. Havens, 70 Wn. App. 251, 255-56, 852 P.2d 1120, review denied, 122 Wn.2d 1023 (1993). Not all instances of juror misconduct merit a new trial; there must be prejudice. State v. Barnes, 85 Wn. App. 638, 668-669, 932 P.2d 669 (1997); State v. Tigano, 63 Wn. App. 336, 341, 818 P.2d 1369 (1991).

Substantial deference is due the trial court’s exercise of its discretion in handling situations involving potential juror bias or misconduct. See, Tracey v. Palmateer, 341 F.3d 1037, 1044 (9th Cir. 2003); United States v. Aiello, 771 F.2d 621, 629 (2d Cir. 1985); United States v. Webster, 750 F.2d 307, 338 (5th Cir. 1984), cert. denied, 471 U.S. 1106, 105 S. Ct. 2340, 85 L. Ed. 2d 855 (1985); United States v.

Kelly, 722 F.2d 873, 881 (1st Cir. 1983), cert. denied, 465 U.S. 1070, 104 S. Ct. 1425, 79 L. Ed. 2d 749 (1984).

A trial court faces a delicate situation when the allegations of potential misconduct stems from a dispute between jurors as the dispute might stem from a disagreement about the case. United States v. Symington, 195 F.3d 1080, 1086 (9th Cir. 1999); United States v. Brown, 823 F.2d 591, 596 (D.C. Cir. 1987). This is because a trial judge must not compromise the secrecy of jury deliberations. Symington, 195 F. 3d at 1086.

In this case defendant complains that the record shows there was misconduct and that trial court erred in not making an appropriate inquiry into the misconduct. The State contends the record shows that the judge properly⁴ removed a juror, Juror No. 7, who had communications with a third person regarding the deliberation process and conducted an appropriate, while limited inquiry, into whether any other misconduct had occurred. The court did not abuse its discretion in failing to identify the juror about whom Juror No. 7 had complained. The record shows the following events relevant to this issue:

On the morning of the second day of deliberations, Juror No. 7 went to the jury administration room, rather than returning to the jury deliberation room, with a letter from her psychologist indicating that she

⁴ The removal of Juror No. 7 is not challenged on appeal.

would probably not be able to continue with further deliberations as she was in a “psychological crisis.” 5RP 658-659; CP 537-539. The letter indicated that Juror No. 7 was reporting “abdominal pain, nausea, constant crying, anxiety, depression, irritability, and fear for her safety since an incident that occurred during her jury deliberations on December 15, 2005.” CP 537-539. Juror No. 7 had told her doctor that she was unhappy with how another juror had treated her, asserting that during a break the other juror had “verbally attacked her, called her insulting names, and impugned her integrity.” Id. The letter indicated that Juror No. 7 believed that the other juror was attempting to intimidate her so that she would agree to vote in accord with the other juror. Id. The doctor indicated that he had been treating Juror No. 7 for a number of years for anxiety and stress related issues. CP 537-539. The doctor indicated that if his patient were to continue in deliberations with this other juror, that he feared his patient’s mental health would deteriorate and that she would be unable to fulfill her duties as a juror. Id. Additionally, the judicial assistant had noticed that Juror No. 7 was crying when she dismissed the jury at the end day on December 15, 2005. 5RP 658, 668.

Defense counsel indicated that he wanted Juror No. 7 removed from the jury as she had violated the court’s order by discussing the case with her doctor. 5RP 663. Defense counsel had concerns that the whole jury might be tainted and joined the prosecutor’s request to have Juror No. 7 brought up to the court for some questioning. 5RP 663. The prosecutor

agreed that this juror should be removed from further jury service. 5RP 664. The court indicated that it was willing to bring Juror No 7 into court, but that it could not tell from the letter that the other juror had necessarily done anything wrong as jury deliberations could get intense. 5RP 664-665.

When Juror No. 7 was brought in to the court room, she was informed that the parties had agreed that she should be released from further service. 5RP 666-667. Juror No. 7 indicated that during a break another juror used a “disrespectful term” in reference to some of the jurors, including her. 5RP 667. On further examination she indicated that it was more “situation calling” than name calling. 5RP 674. She indicated that she thought that the comment shouldn’t have been said during a break, but that the presiding juror was not sure that it was “out of line.” 5RP 667-668. She indicated that she had made a loud retort to the comment, but that no apologies were made. 5RP 668, 675. She described this as the “straw that broke the camels back” as she felt this juror had been disrespectful throughout the whole process of deliberating. 5 RP 673. She indicated when the jury returned to deliberations, the presiding juror didn’t calm the situation down. 5RP 668. She had wanted to discuss the matter with the judicial assistant the night before, but felt that the presiding juror made sure she wasn’t left alone with the judicial assistant so that could happen. 5RP 668. Juror No. 7 indicated that she was “kind of sensitive” but wasn’t sure if she was being overly sensitive about this

situation or not. 5RP 670-671. She indicated that: she felt threatened by this other juror; this juror had tainted her view of the justice system; she was afraid of going back into deliberations with this juror; and, was afraid of encountering this juror in her workplace. 5RP 672. When questioned about the portion of the doctor's letter that indicated this "offending juror" had said she wanted the deliberations to end as soon as possible so she could be home with her family at Christmas, Juror No. 7 clarified that the other juror had never said this, but that this was the impression that she got from her. 5RP 676. Juror No. 7 had been in treatment with her psychologist for over ten years, following a bad car accident where she suffered head injuries. 5RP 670-671.

Both the prosecutor and defense counsel indicated to the court that they wanted to know the name of the juror that had offended Juror No. 7, but the court did not allow her to answer this question. 5RP 673, 678.

The court temporarily excused Juror No. 7 from the courtroom. 5RP 678.

The court then put the following question to counsel:

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 with a new alternate.

5RP 679. Neither counsel provided a reason for the court to have the other juror identified. 5RP 680. The court indicated that it was going to

call the presiding juror in, explain that Juror No. 7 has been excused and ask if there were any problems in the deliberations that needed to be identified to the court. 5RP 682-683. The court excused Juror No. 7 and called the presiding juror into court. 5RP 682-684. The court asked the presiding juror whether, without revealing the status of the deliberations, there were any problems that had occurred in the deliberations that the court should know about. 5RP 685. The presiding juror indicated that there were no problems of which the court should be advised. 5RP 685. An alternate juror was brought in and the jury was instructed that it was to begin its deliberations “anew.” 5RP 689.

a. There Was No Competent Evidence of Misconduct Other Than That Showing Juror No. 7’s Misconduct.

The “near-universal and firmly established common-law rule in the United States flatly prohibited the admission of juror testimony to impeach a jury verdict. Tanner v. United States, 483 U.S. 107, 117, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987), citing 8 J. Wigmore, Evidence § 2352, pp. 696-697 (J. McNaughton rev. ed. 1961). The only exceptions to the common-law rule were in situations in which an outside influence was alleged to have affected the jury. Mattox v. United States, 146 U.S. 140, 149, 13 S. Ct. 50, 36 L. Ed. 917 (1892)(testimony of jurors describing how they heard and read prejudicial information not admitted into evidence was admissible), Parker v. Gladden, 385 U.S. 363, 365, 87 S. Ct. 468,

17 L. Ed. 2d 420 (1966)(testimony from jurors showing non-juror or third party influence admissible), Remmer v. United States, 347 U.S. 227, 228-230, 74 S. Ct. 450, 98 L. Ed. 654 (1954)(testimony on bribe offered to juror admissible). See also, Smith v. Phillips, 455 U.S. 209 (1982)(juror in criminal trial had submitted an application for employment at the District Attorney's office). In situations that did not fall into this exception for external influence, however, the Supreme Court adhered to the common-law rule against admitting juror testimony to impeach a verdict. Tanner v. United States, 483 U.S. at 117 (court upholds lower court's refusal to consider juror affidavits or to hold evidentiary hearing on whether jurors were engaged in drinking and drug use during recesses of trial); McDonald v. Pless, 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915)(testimony of jurors as to how damages were calculated inadmissible); Hyde v. United States, 225 U.S. 347, 384, 32 S. Ct. 793, 56 L. Ed. 1114 (1912)(testimony of jurors inadmissible to show matters which essentially inhere in the verdict itself).

The common law principle was essentially codified in the Federal Rules of Evidence 606(b).⁵ See also, United States v. Casamayor, 837 F.2d 1509, 1515 (11th Cir. 1988)(“the alleged harassment or intimidation of one juror by another would not be competent evidence to impeach the verdict under Rule 606(b)”); United States v. Barber, 668 F.2d 778, 786-87 (4th Cir. 1982)(evidence that a juror had been threatened by the jury foreman held inadmissible to impeach verdict under Rule 606(b)).

Although Washington did not adopt the equivalent of the federal rule, it is well-settled in Washington that while juror affidavits or testimony may be used to establish jury misconduct involving outside influences, such evidence may not be used to contest the thought processes involved in reaching a verdict. Gardner v. Malone, 60 Wn.2d 836, 376 P.2d 651 (1962); Hendrickson v. Konopaski, 14 Wn. App. 390, 393, 541 P.2d 1001 (1975). Testimony may not be considered if “the facts alleged are linked to the juror's motive, intent, or belief, or described their effect upon him”; however, it may be considered if “that to which the juror

⁵ Which provides: (b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.

testifies can be rebutted by other testimony without probing a juror's mental processes.'" State v. Crowell, 92 Wn.2d 143, 146, 594 P.2d 905 (1979)(quoting Gardner v. Malone, 60 Wn.2d 836, 841, 376 P.2d 651, 379 P.2d 918 (1962)). Evidence concerning the mental processes of jurors, including their expressed opinions and when they made up their minds inheres in the verdict. State v. Aker, 54 Wash. 342, 345-46, 103 P. 420 (1909); Hosner v. Olympia Shingle Co., 128 Wash. 152, 154-55, 222 P. 466 (1924); see also, State v. Hall, 40 Wn. App. 162, 169, 697 P.2d 597 (1985)(third party's impression that juror had made up mind before end of trial inheres in verdict).

In State v. Aker, 54 Wash. 342, 345-346, 103 Pac. 420 (1909) the court held that juror affidavits may not be considered to show that, during a recess taken in the prosecution's case in chief, jurors went back into the jury room and commented about the defendant's guilt. The court also forbade use of a juror's affidavit to show that he assented to a guilty verdict because of intimidation by other jurors. Id.

Public policy forbids inquiries into the jury's private deliberations; the mental processes by which jurors reach their conclusion are all factors inhering in the verdict. State v. Havens, 70 Wn. App. 251, 256, 852 P.2d 1120 (1993); State v. Jackman, 113 Wn.2d 772, 777-78, 783 P.2d 580 (1989).

Under both federal and Washington law, the court could not consider Juror No. 7's testimony regarding the intimidation she felt was

occurring in the jury room. Other than her indicating that she had talked to her psychologist about the deliberations, nothing in her testimony showed any outside influences on the deliberative process. There is nothing to indicate that any juror was considering evidence that had not been admitted or was talking to non-jurors about the case or that any juror failed to disclose relevant information during voir dire. Juror No. 7's statements regarding the course of deliberations, including her perception of attempts to intimidate her, is information that inheres in the jury process. Consequently, the trial court had no properly admissible evidence of any jury misconduct to consider. For this reason alone, the court did not err in refusing to engage in further inquiry of the claim of juror misconduct.

b. Juror No.7's Testimony Did Not Establish That There Was Jury Misconduct or Resulting Prejudice so as to Warrant Further Inquiry.

As mentioned earlier, it is the defendant, as the party asserting juror misconduct, who bears the burden of showing that the alleged misconduct occurred. State v. Hawkins, 72 Wn.2d 565, 566, 434 P.2d 584 (1967). The determination of whether misconduct has occurred lies within the discretion of the trial court. State v. Havens, 70 Wn. App. 251, 255-56, 852 P.2d 1120, review denied, 122 Wn.2d 1023 (1993). Even if this court were to consider the content of Juror No. 7's testimony, it would

have to conclude that the court acted well within its discretion in finding that there was insufficient evidence of misconduct to warrant further inquiry.

What Juror No. 7's testimony indicates is that a juror made a comment about the status of the deliberations during a break, that she thought the comment was aimed at her and disrespectful, and that she was offended by it. Making a comment "in reference to the deliberations" is not the same as deliberating. See, 5RP 667. For example, the juror could have said "we are never going to get out of here unless certain idiots stop focusing on details that don't matter." Such a comment refers to other jurors, the ongoing deliberations, and shows disrespect; but it does not constitute "deliberation." It is not a discussion of the defendant's guilt or the merits of the case. Juror No. 7's testimony fails to establish that there were deliberations with less than the entire jury present. A federal court held similar types of conversations did not establish misconduct:

We likewise find no merit to Stockton's claim that his right to a fair trial was violated by improper deliberations by subgroups of jurors. The district court found, and the record reveals, that the only evidence relating to charges of improper deliberations concerned conversations between three jurors who shared a ride to and from the courthouse. These conversations consisted in part of small talk about the manner in which the trial was being conducted and the appearance of certain witnesses. The question of defendant's guilt or innocence was not discussed. It is certainly permissible for jurors to carpool to and from court without giving rise to a question of subset deliberations. It may also be unrealistic to think that jurors will never comment to each other on any matter related to a trial.

Even if these conversations violated the trial court's instructions to the jurors not to discuss matters relating to the trial, there is no evidence that the merits of the case were deliberated.

Stockton v. Virginia, 852 F.2d 740, 747 (4th Cir. 1988). In United States v. Gaskin, 364 F.3d 438, 463-464 (2nd Cir. 2004), the appellate court upheld the trial court's refusal to grant a mistrial on evidence that there was brief discussion by some of the jurors concerning their surprise that the verdict forms included some lesser-included offense alternatives. The court noted that this discussion did not involve a review of the evidence or debate the culpability of the defendant. It found that there was no prejudice and did not reach the issue of whether such a conversation constitutes misconduct. The State did not find a case, and defendant does not cite to one, holding that discussions by fewer than the full jury constitutes misconduct or that such misconduct would necessitate a new trial.

Nor do Juror No 7's comments establish improper threats or intimidation. Jury deliberations may become intense with jurors passionately arguing varying viewpoints. Such argument has the intended goal of trying to sway the other jurors to a similar viewpoint. That one juror feels offended or pressured by another juror's comments does not mean that misconduct has occurred. Defendant cites no case, and the State can find none, that holds, arguments between jurors in the jury room constitutes misconduct.

Finally, it is clear from the court's comments that it considered the personality of Juror No. 7's in assessing her claims regarding the alleged misconduct. The court noted her extensive mental health history and described her as "overly sensitive." 5RP 679. Considering that Juror No. 7 reported suffering "abdominal pain, nausea, constant crying, anxiety, depression, irritability, and fear for her safety" as well as the loss of a night's sleep as a result of a single disrespectful remark from another juror, it was not unreasonable for the court to conclude that she was "overly sensitive." See, CP 537-539. The representations that Juror 7 made to her psychologist, at least as reported by him, were more strongly worded than what she would testify to in court. Thus, there was reason to conclude that she was not the most reliable witness. After the presiding juror indicated that he had no concerns about the process of deliberations, the trial court did not abuse its discretion in ending the investigation at that point.

Finally, it is clear that in addition to showing misconduct, defendant must show he was prejudiced by any alleged jury misconduct. Here, he shows no misconduct in the deliberations that ultimately decided his guilt. After the court replaced Juror No. 7, it instructed the jury to begin its deliberations anew. 5RP 689. Any prejudice that occurred prior to this event was eliminated when the jury was instructed to start the deliberation process over from the beginning. Defendant has not alleged or shown any misconduct engaged in by the jury that found him guilty.

He has failed to demonstrate prejudice.

For all of the above reasons, defendant's claim regarding jury misconduct is without merit.

c. The Decision as to Whether to Seek or Forgo a Motion for Mistrial is a Tactical Decision That an Attorney Can Make Without the Consent of His Client.

An attorney has a duty to consult with the client regarding important decisions, including questions of overarching defense strategy, but that obligation does not require counsel to obtain the defendant's consent to "every tactical decision." Florida v. Nixon, 543 U.S. 175, 187, 125 S. Ct. 551, 160 L. Ed. 2d 565 (2004); Taylor v. Illinois, 484 U.S. 400, 417-418, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988)(an attorney has authority to manage most aspects of the defense without obtaining his client's approval). The United States Supreme Court has identified certain decisions regarding the exercise or waiver of basic trial rights as being so fundamental that they cannot be made for the defendant by a surrogate. The Court held a defendant has "the ultimate authority" to determine "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." Jones v. Barnes, 463 U.S. 745, 751, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983); Wainwright v. Sykes, 433 U.S. 72, 93, n. 1, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977)(Burger, C. J., concurring). On these decisions, an attorney must both consult with the defendant and obtain

consent to the recommended course of action. However tactical decisions of defense counsel, such as whether to pursue evidence or waive arguments, are binding on their defendants. *E.g.*, Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975); Blanco v. Singletary, 943 F.2d 1477 (11th 1991); Coco v. United States, 569 F.2d 367 (5th Cir. 1978).

The Supreme Court's list of fundamental decisions does not include the decision on whether to request a mistrial. Jones v. Barnes, 463 U.S. at 751; United States v. Burke, 257 F.3d 1321, 1323 (11th Cir. 2001), cert. denied, 537 U.S. 940, 123 S. Ct. 42, 154 L. Ed. 2d 246 (2002). Several circuits have addressed the question of whether to include a request for mistrial in the list of fundamental decisions reserved for the defendant; every circuit that has addressed this issue has declined to include this as a fundamental decision finding that the decision concerns trial strategy. *See*, Burke, 257 F.3d at 1323 (finding that decision to request a mistrial is a tactical decision and rejecting contention that is a fundamental decision that only a defendant can make); United States v. Washington, 198 F.3d 721, 723 (8th Cir. 1999)(stating that the decisions to request or not to request a mistrial are both strategic decisions for a defense attorney and do not require consultation with the defendant); Watkins v. Kassulke, 90 F.3d 138, 141-43 (6th Cir. 1996)(holding defense counsel's strategic decision to consent to mistrial binds defendant and removes bar to re-prosecution regardless of whether defendant participates

in decision); Galowski v. Murphy, 891 F.2d 629, 639 (7th Cir. 1989); see also, People v. Ferguson, 67 N.Y.2d 383, 389-90, 494 N.E.2d 77, 502 N.Y.S.2d. 972, 976-77 (1986).

Defendant assigns error to the court's denial of his motion for mistrial. While the State does not concede that defendant asked the court for a mistrial, it is clear that if a motion was brought, it was brought by the defendant and not his attorney. See, 5RP 689-691. Under the above authority, a defendant is bound by the actions of his attorney in the decision to seek or forgo a mistrial. As his attorney did not seek a mistrial, the trial court could not have erred in not granting one.

2. DEFENDANT FAILED TO PRESERVE A CLAIM OF IMPROPER OPINION EVIDENCE IN THE TRIAL COURT AND DOES NOT PRESENT A CLAIM THAT MAY BE RAISED FOR THE FIRST TIME ON APPEAL.

Generally, no witness may offer testimony in the form of a direct statement, an inference, or an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant "because it invades the exclusive province of the jury." City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). "Opinion testimony" means evidence that is given at trial while the witness is under oath and is based on one's belief or idea rather than on direct knowledge of facts at issue. State v. Demery, 144 Wn.2d 753, 759-760, 30 P.3d 1278 (2001). Washington courts have

“expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt.” State v. Demery, 144 Wn.2d at 760, quoting Heatley, 70 Wn. App. at 579. In determining whether a challenged statement constitutes impermissible opinion testimony, the court should consider the circumstances of the case, including the following factors: the type of witness involved; the specific nature of the testimony; the nature of the charges; the type of defense; and, the other evidence before the trier of fact. Demery, 144 Wn.2d at 758-59.

The following has been found not to constitute improper opinion testimony: a taped confession which included a detective’s questions that essentially accused the defendant of lying, Demery, supra; an officer’s opinion based solely on his experience and his observation of the defendant’s physical appearance and performance on the field sobriety tests that he was “obviously intoxicated and affected by the alcoholic drink . . . [and] could not drive a motor vehicle in a safe manner.” Heatley, 70 Wn. App. at 576, 579-80; a CPS worker’s statement -“I believe you”- to a child in an out of court interview said to encourage the child to disclose; State v. Jones, 71 Wn. App. 798, 863 P.2d 85 (1993).

The Supreme Court has required compliance with ER 103 before considering claims of improper admission of opinion testimony. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

In the case now before the court, defendant asserts that there were three instances of improper of opinion testimony admitted during the

direct examination of Jennifer Knight, the child interviewer who had interviewed A.K. See, Appellant's brief at pp. 38-40. The first challenged instance was when Ms. Knight, in describing A.K.'s demeanor stated "she used powerless speech, which is typical of abused children." 5RP 498. There was no objection to this testimony. Id. The next instance was to portions of Ms. Knight's testimony where she described how she is trained to look for canned responses as an indication that a child might have been coached; this testimony was discussing general techniques she employs and did not refer specifically to her interview with A.K. 5RP 499-500. There was no objection to this testimony. Id. The final challenged instance was when Ms. Knight was shown a letter in which A.K. recanted her allegations against defendant and was asked whether the recantation surprised her. Ms. Knight indicated that it did not because abused children frequently come from unstable families and the children recant because of a lack of support as well as the fact that research showed that recantation occurred about 75 percent of the time. 5RP 501-502. There was no objection to any of this testimony.

As there was no objection in the trial court to any of this testimony, defendant must show that he has a basis for raising this claim for the first time on appeal. Defendant assert that this may be raised as manifest error affecting a constitutional right under RAP 2.5(a), relying on State v. Kirkman, 126 Wn. App. 97, 107 P.3d 133, review granted, 155 Wn.2d 1014, 124 P.3d 304 (2005). After defendant filed his brief, the

Washington Supreme Court issued its opinion reversing the Court of Appeals decision. State v. Kirkman, ___ Wn.2d ____, ___ P.3d ___ (2007)(2007 Wash. LEXIS 210, issued April 5, 2007). The Supreme Court held:

Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a “manifest” constitutional error. “Manifest error” requires a nearly explicit statement by the witness that the witness believed the accusing victim. Requiring an explicit or almost explicit witness statement on an ultimate issue of fact is consistent with our precedent holding the manifest error exception is narrow.

State v. Kirkman, ___ Wn.2d ____, ___ P.3d ___ (2007)(2007 Wash. LEXIS 210, 27-28)(citations omitted). Because there was no objection to this allegedly improper evidence, defendant must show a nearly explicit statement by Ms. Knight that she believed A.K. in order for this to qualify as manifest constitutional error that may be raised for the first time on review. None of the challenged statements meet this standard. Defendant has failed to preserve a claim of improper opinion testimony for review and does not present a claim that may be raised for the first time on appeal.

3. DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING DEFICIENT PERFORMANCE OR RESULTING PREJUDICE.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial

testing.” United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also, State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney’s representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); see also, Strickland, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting

guilt.”). There is a strong presumption that a defendant received effective representation. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); Thomas, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. McFarland, 127 Wn. 2d at 336.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel’s actions “on the facts of the particular case, viewed as of the time of counsel’s conduct.” Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to

claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9th Cir. 1995).

Post-conviction admissions of ineffectiveness by trial counsel have been viewed with skepticism by the appellate courts. Ineffectiveness is a question which the courts must decide and “so admissions of deficient performance by attorneys are not decisive.” Harris v. Dugger, 874 F.2d 756, 761 n.4 (11th Cir. 1989).

In addition to proving his attorney’s deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. “that but for counsel’s unprofessional errors, the result would have been different.” Strickland, 466 U.S. at 694.

The reviewing court will defer to counsel’s strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), cert. denied, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), cert. denied, 488 U.S. 948 (1988). When the ineffectiveness allegation is premised upon counsel’s failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious, but also that the verdict would have been different if the motion or objections had been

granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). An attorney is not required to argue a meritless claim. Cuffle v. Goldsmith, 906 F.2d 385, 388 (9th Cir. 1990).

A defendant must demonstrate both prongs of the Strickland test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In this case defendant seeks to show ineffective assistance of counsel based upon a single alleged mistake, proposing a defective unanimity instruction. Defendant acknowledges that he may not challenge the instruction directly, as he is precluded from doing so by the doctrine of invited error. See, Appellant's brief at p.28.

A defendant may be convicted only when a unanimous jury concludes beyond a reasonable doubt that the criminal act charged in the information has been committed. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). To convict a criminal defendant in cases where multiple acts are alleged, any one of which could constitute the crime charged, the jury must unanimously agree on the act or incident that constitutes the crime. Id. When several criminal acts are alleged and one crime charged, a defendant's right to a unanimous verdict must be protected; the State may elect the act it relies on, or it may instruct the jury that it must unanimously agree that one act has been proven beyond a

reasonable doubt. Id.; State v. Hayes, 81 Wn. App. 425, 430-31, 914 P.2d 788 (1996).

In this case, in addition to the jury hearing a unanimity instruction, Instruction No 6, the State elected the acts that pertained to three of the counts. The jury was clearly told that the act to consider for Count III was the attempted rape that occurred at the cemetery, for Count IV it was the touching of her breasts and for Count V to consider the last time there was intercourse, which was between Thanksgiving and Christmas, 2003). CP 138-161, and 5RP 591-597, 637. As the state elected the acts pertaining to these three counts, the constitutional right to a unanimous jury has been protected regardless of whether or not the court gave a unanimity instruction. There can be no questions as to the jury's unanimity on these three counts. These counts should be affirmed.

Turning to Counts I and II, both counts were charges of rape of a child in the first degree. CP 138-161. The victim testified to numerous incidents of rape occurring in the living room and bedroom prior to her twelfth birthday, any of which could constitute the crimes charged in Counts I and II. 5RP 260-278.

Defendant argues that his attorney was ineffective for proposing a defective unanimity instruction which was ultimately given to the jury as Instruction No.6. 5RP 570-574. Defendant contends that the instruction did not sufficiently inform the jury that it had to rely on a different act for Count I than it relied upon for Count II. As noted by this court in an

earlier case, such a claim has more to do with double jeopardy than jury unanimity.

[W]e note that these arguments are fundamentally different. The one asserting that all jurors must agree on the same act underlying any given count has to do with jury unanimity and the right to jury trial. The one asserting that the jury could not use the same act as a factual basis for more than one count has to do with the right against double jeopardy; at least in the context here, to use one act as the basis for two counts is to convict twice for the same crime.

State v. Ellis, 71 Wn. App. 400, 404, 859 P.2d 632 (1993).

In this case, the court gave the following instruction, which is now challenged as insufficient:

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

CP 138-161, Instruction No. 6. The language follows that suggested by the Supreme Court in the Petrich decision. Petrich, 101 Wn.2d at 572 (one way to protect jury unanimity is to instruct “that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt . . .”) Defendant cites to no case where an instruction with wording similar to the one given here has been found to be insufficient to ensure jury unanimity.

As for his argument that the jury might have used the same act to support convictions on both Count I and Count II, the jury was also instructed:

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 138-161, Instruction No. 5. An ordinary jury reading this instruction would comprehend that each count is a separate charge that must be considered independently. This was the conclusion of this court in State v. Ellis, 71 Wn. App. at 406. Ellis contended that his jury might have used a single rape as the factual basis for two different counts because it was not told that each of those counts required a different act. His jury had been given the same instruction as Instruction No. 5 in this case and the following unanimity instruction:

Evidence has been introduced of multiple acts of sexual contact and intercourse between the defendant and [victim]. 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.

71 Wn. App. at 402. The court rejected Ellis's argument noting that in its view "the ordinary juror would understand that when two counts charge the very same type of crime, each count requires proof of a different act." Id. at 406. The Ellis court found that the instructions given were adequate.

The same result should occur in this case. Under the instructions given in this case, an ordinary jury is going to understand that in order to

convict on Count I that all twelve of them must agree that the same act of sexual intercourse occurred and that to convict on Count II all twelve of them must agree that a different act of sexual intercourse occurred. This is also the interpretation of these instructions that was argued by the prosecutor.

SRP 590-591. For the jury to think that it could use the same act for Counts I and II, would essentially render the instruction given in No. 5 meaningless. That instruction tells them that each count pertains to a separate crime. Yet defendant asks this court to assume that the jury would read this instruction and conclude that it could convict defendant of two counts of the same crime based upon a single criminal act. Such an interpretation strains the bounds of common sense. The issue in this case is not whether the instructions could have been better worded, but whether they were insufficient to convey the concepts of jury unanimity and separate crimes being charge in each count. This court should apply the rationale of Ellis and uphold these instructions as sufficient.

Obviously, if the instructions are not erroneous, then defendant's claim of ineffective assistance must fail. However, even some deficiency in the instructions does not mean that defendant succeeds on his claim of ineffective assistance of counsel. He must show that he was prejudiced by the defective instructions. Considering that the prosecutor told the jury that, under the instructions given, it had to agree on two separate acts of rape to convict on both Count I and Count II, defendant cannot credibly

argue that the jury was likely to disregard this argument and convict twice on the same act. As defendant cannot show any reasonable probability that any deficiency in the instructions affected the outcome of his case, he cannot meet his burden of proving prejudice.

Additionally, by focusing on a single alleged error, defendant has ignored the holdings of the United States Supreme court as to what is necessary to prove an ineffective assistance claim. The court noted that the trial has been “a true adversarial proceeding” the Sixth Amendment right to counsel has been satisfied even *if* defense counsel made demonstrable errors in judgment or tactics. United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). Thus it is not enough just to show that counsel made a mistake, defendant must show “that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. at 374. Defendant cannot show from the entirety of this record, that defense counsel was so unprofessional so as to essentially leave the defendant unrepresented.

The record shows that defense counsel made an opening statement articulating why the evidence would show that the jury should not believe the victim. 5RP 126-131. Counsel did so in a manner that painted the victim in an unflattering light, but also suggested to the jury that the victim was not entirely to blame that she turned out to be a liar and manipulator.

He suggested that her personality was the result of “grow[ing] up in one of the world’s biggest messes.” 5RP 126. The opening showed a clear plan of attack on the State’s evidence and set a tone that invited the jury to disbelieve the victim without having to view a young girl as being intentionally evil.

Counsel cross examined witnesses, including a lengthy cross examination of the victim. 5RP 168-173, 196-221, 286-327, 416-424, 556, 502-503, 527-528.

Counsel made timely objections that were sustained. 5RP 273, 279, 286, 334, 362. 366-367, 431, 460, 461, 466, 494, 500-501, 502.

Counsel’s closing argument showed a consistent plan of attack on the State’s evidence, as foreshadowed by the opening argument pointing out numerous reasons why the jury should not convict based on the testimony of the victim. 5RP 614-625.

In short, the record shows that defendant had a well prepared, experienced attorney who presented a vigorous defense. Defendant was not denied his Sixth Amendment right to counsel even if the unanimity instruction could have been better worded. Defendant has failed to meet his burden of showing ineffective assistance of counsel.

4. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT DEFENDANT'S TWO CONVICTIONS FOR RAPE OF A CHILD IN THE FIRST DEGREE.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); see also, Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988)(citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In

considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

great deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985)(citations omitted).

Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In this case defendant challenges the sufficiency of the evidence to support his two convictions for rape of a child in the first degree in counts I and II. The jury was instructed that they had to find the following elements on each of these counts:

(1) That during the period between the 14th day of July, 1999 and the 13th day of July, 2003, the defendant had sexual intercourse with A.K.

(2) That A.K. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least twenty-four months older than A.K.; and

(4) That the acts occurred in the State of Washington.

CP 138-161, Instructions 10 and 11. Defendant asserts that there is insufficient evidence to show that he had intercourse with A.K. prior to her twelfth birthday. See, Appellant's brief at pp 25-27. This contention is without merit.

The prosecutor asked A.K. to focus her attention on some of the early touchings that happened when she was eight and to answer questions about those incidents. 5RP 260. A.K. then described one incident in the living room that happened on the couch where he touched her on her "private spot," or vagina, with his fingers. 5RP 260-261. A.K. testified that he would put his fingers inside of her vagina and move his hands around and that it would hurt. 5RP 261-262. When she would tell him that it hurt, defendant would tell her "I'll try not to hurt you any more." 5RP 262. She would again tell him to stop but he wouldn't. Id. This testimony clearly establishes an act of rape when A.K. was eight.

A.K testified that the first time he touched her vagina in the bedroom was when she was eight. 5RP 666. The prosecutor asked A.K. to describe the type of touching the defendant had done in the bedroom

when she was eight. 5RP 267. A.K. indicated that sometimes the touching that happened when she was eight was over her clothes and sometimes it was under. 5RP 267. She said that when it was under her clothes his touches would be against her skin. 5RP 267. She testified that when she tried pulling his hand out it would hurt worse because his hand was inside of her. 5RP 267-268. A.K. also indicated that defendant did this to her numerous times over the course of years. 5RP 255, 328-329.

Two different elements in the “to convict” instruction required the jury to find that the acts occurred when A.K. was less than twelve. The first element required the jury to find that the sexual intercourse occurred “between the 14th day of July, 1999 and the 13th day of July, 2003.” CP 138-16-, Instructions No. 10 and 11. With a birthdate of July 14, 1991, A.K. would have been less than twelve this entire time frame. Additionally the second element required the jury to find that “A.K. was less than twelve years old at the time of the sexual intercourse.” Her testimony, taken in the light most favorable to the State, provides ample evidence to support the jury’s two convictions of rape in the first degree.

5. THE STATE CONCEDES THAT DEFENDANT IS ENTITLED TO BE RESENTENCED WITHIN THE PROPER RANGE ON COUNT III AND TO HAVE THE COMMUNITY CUSTODY PROVISION STRICKEN AS TO COUNT FIVE.

Defendant assigns error to the sentence imposed on two grounds; both have merit.

The first challenge is to the sentence imposed on Count III, pertaining to his conviction for attempted rape of a child in the first degree. Under the SRA, the standard range for an attempt crime is obtained by multiplying the standard range for the completed offense by 75 percent. RCW 9.94A.595. Counts I and II in defendant judgment pertain to convictions for rape of a child in the first degree. Defendant's judgment and sentence plainly shows that the court used the same range of 240-318 months on the attempted rape as it did for the two completed rapes. CP 488-536. This was error and defendant is entitled to be resentenced on Count III with the correct standard range for an attempted rape of a child in the first degree.

Defendant's second challenge is the term of community custody imposed on Count V. Defendant was sentenced as a persistent offender on Count V to "life without the possibility of early release." CP 488-536. Under RCW 9.94A.570, no persistent offender "may be eligible for community custody, earned release time, furlough, home detention, partial confinement, work crew, work release, or any other form of release as

defined under RCW 9.94A.728 (1), (2), (3), (4), (6), (8), or (9).”

Consequently, the term of community custody was improperly imposed and should be stricken.

D. CONCLUSION.

The State asks this court to affirm the convictions entered below, but to remand for resentencing on Count III and to have the community custody term imposed on Count V stricken.

DATED: June 14, 2007.

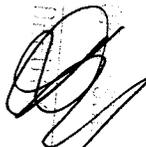
GERALD A. HORNE
Pierce County
Prosecuting Attorney


KATHLEEN PROCTOR
Deputy Prosecuting Attorney
WSB # 14811

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

6/14/07 
Date Signature


STATE OF WASHINGTON
BY
COUNT OF PIERCE COUNTY
CLERK OF COURT