

No. 35762-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Robert Todd Chesney,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II
12/11/07 11:17:27
BY [Signature]

Clallam County Superior Court

Cause No. 06-1-00260-1

The Honorable Judge Ken Williams

Appellant's Opening Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
FAX: (360) 866-7475

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

ASSIGNMENTS OF ERROR vii

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR viii

1. Did Dr. Harrington’s testimony include an improper opinion on Mr. Chesney’s guilt? Assignments of Error Nos. 1-4..... viii

2. Did Dr. Harrington’s testimony include an improper opinion on A.C.’s credibility? Assignments of Error Nos. 1-4. viii

3. Did Dr. Harrington’s opinion testimony unconstitutionally infringe Mr. Chesney’s right to a jury trial? Assignments of Error Nos. 1-4. viii

4. Did Dr. Harrington’s opinion testimony invade the province of the jury? Assignments of Error Nos. 1-4..... viii

5. Was Mr. Chesney’s conviction based on insufficient evidence? Assignments of Error Nos. 5-6. ix

6. Did the trial court err by playing the unredacted recording of Mr. Chesney’s police interview during jury deliberations? Assignments of Error Nos. 7-8..... ix

7. Should the trial court have redacted the recording of Mr. Chesney’s police interview prior to playing it during jury deliberations? Assignments of Error Nos. 7-8. ix

8. Was Mr. Chesney denied the effective assistance of counsel when his attorney forgot to object to inadmissible

material contained on the recording of Mr. Chesney's police interview? Assignments of Error Nos. 9-16..... ix

9. Was Mr. Chesney denied the effective assistance of counsel when his attorney accidentally elicited damaging and inadmissible evidence during cross-examination of Detective Ensor? Assignments of Error Nos. 9-16..... ix

10. Was Mr. Chesney denied the effective assistance of counsel when his attorney failed to object to A.C.'s testimony on competency grounds? Assignments of Error Nos. 9-16..... x

11. Was Mr. Chesney denied the effective assistance of counsel when his attorney failed to request the court to make a competency determination with regard to the three incidents that were the subject of A.C.'s testimony? Assignments of Error Nos. 9-16. x

12. Was Mr. Chesney denied the effective assistance of counsel when his attorney failed to request instructions on Attempted Rape of a Child in the First Degree? Assignments of Error Nos. 9-16. x

13. Was Mr. Chesney denied the effective assistance of counsel when his attorney failed to request instructions on Attempted Incest in the First Degree? Assignments of Error Nos. 9-16. x

STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 1

ARGUMENT..... 6

I. Mr. Chesney's constitutional right to a jury trial was infringed by Dr. Harrington's testimony, which included an opinion that he was guilty..... 6

II.	The evidence was insufficient to establish beyond a reasonable doubt that the “nightmare” incident occurred on or between December 3, 2002 and December 2, 2003.	8
III.	The trial court erred by playing the unredacted DVD to the jury during deliberations over Mr. Chesney’s objection.....	11
IV.	Mr. Chesney was denied the effective assistance of counsel.....	14
	A. Mr. Chesney was denied the effective assistance of counsel by his attorney’s failure to timely object to inadmissible portions of his recorded statement.	14
	B. Mr. Chesney was denied the effective assistance of counsel by his attorney’s failure to challenge A.C.’s competency as a witness.	17
	C. Mr. Chesney was denied the effective assistance of counsel by his attorney’s failure to request instructions on Attempted Rape of a Child in the First Degree or Attempted Incest in the First Degree.	20
	CONCLUSION	26

TABLE OF AUTHORITIES

FEDERAL CASES

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 14, 26

WASHINGTON CASES

Davis v. Microsoft Corp., 149 Wn.2d 521, 70 P.3d 126 (2003)..... 9

In re A.V.D., 62 Wn.App. 562, 815 P.2d 277 (1991)..... 9, 11

In re Dep. of A.E.P., 135 Wn.2d 208 at 223, 956 P.2d 297 (1998) 17

In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001)..... 14

Northwest Pipeline Corp. v. Adams County, 132 Wn. App. 470; 131 P.3d 958 (2006)..... 9

Rogers Potato v. Countrywide Potato, 152 Wn.2d 387, 97 P.3d 745 (2004) 9, 10

State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1987)..... 7

State v. Carlson, 130 Wn. App. 589, 123 P.3d 891 (2005) 9

State v. Chhom, 128 Wn.2d 739, 911 P.2d 1014 (1996)..... 21

State v. Demery, 144 Wn.2d 753, 30 P.3d 1278 (2001) 13

State v. DeVries, 149 Wn.2d 842, 72 P.3d 748 (2003)..... 8, 9

State v. Fernandez-Medina, 141 Wn.2d 448, 6 P.3d 1150 (2000) 20

State v. Florczak, 76 Wn. App. 55, 882 P.2d 199 (1994)..... 7

State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998)..... 11

State v. Jensen, 125 Wn. App. 319, 104 P.3d 717 (2005) 9, 11

<i>State v. Kirkman</i> , ___ Wn.2d ___, ___ P.3d ___, 2007 Wash. LEXIS 210 (2007).....	6, 7, 8
<i>State v. Luther</i> , 157 Wn.2d 63, 134 P.3d 205 (2006)	21
<i>State v. Neal</i> , 144 Wn.2d 600, 30 P.3d 1255 (2001).....	11
<i>State v. Neidigh</i> , 78 Wn. App. 71, 895 P.2d 423 (1995).....	12, 16
<i>State v. Pittman</i> , 134 Wn. App. 376, ___ P.3d ___ (2006)....	14, 21, 22, 24, 25, 26
<i>State v. Redmond</i> , 150 Wn.2d 489, 78 P.3d 1001 (2003).....	11, 13
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004)	14, 15
<i>State v. Saunders</i> , 91 Wn. App. 575, 958 P.2d 364 (1998)	15, 17
<i>State v. Stevens</i> , 127 Wn. App. 269, 110 P.3d 1179 (2005).....	7
<i>State v. Ward</i> , 125 Wn. App. 243, 104 P.3d 670 (2004) .	21, 22, 23, 24, 25, 26

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI.....	6
U.S. Const. Amend. XIV	7
Wash. Const. Article I, Section 21	6
Wash. Const. Article I, Section 22	6

STATUTES

.RCW 5.60.050	17
RCW 10.61.003	20
RCW 10.61.010	20
RCW 5.60.020	17

RCW 9.94A.533..... 21

OTHER AUTHORITIES

ER 401 16

ER 403 16

RAP 2.5..... 6

ASSIGNMENTS OF ERROR

1. Mr. Chesney's constitutional right to a jury trial was infringed.
2. Dr. Harrington invaded the province of the jury by expressing an explicit opinion on the Mr. Chesney's guilt.
3. Dr. Harrington's testimony violated Mr. Chesney's constitutional right to a jury trial.
4. The trial court erred by admitting Dr. Harrington's improper testimony over Mr. Chesney's objection.
5. Mr. Chesney's convictions of Counts II and IV were based on insufficient evidence.
6. The state presented insufficient evidence to prove beyond a reasonable doubt that the "nightmare" incident occurred "on or between December 3, 2002 and December 2, 2003."
7. The trial court erred by playing the unredacted DVD for the jury during deliberations.
8. The trial court erred by overruling Mr. Chesney's objection to inadmissible evidence contained on the DVD.
9. Mr. Chesney was denied the effective assistance of counsel.
10. Defense counsel was ineffective for failing to object to inadmissible evidence elicited during Mr. Chesney's police interview.
11. Defense counsel was ineffective for eliciting damaging and inadmissible evidence during cross-examination of Detective Ensor.
12. Defense counsel was ineffective for failing to challenge A.C.'s competence as a witness with respect to Counts I and III.
13. Defense counsel was ineffective for failing to challenge A.C.'s competence as a witness with respect to the "nightmare" incident, Counts II and IV.

14. Defense counsel was ineffective for failing to challenge A.C.'s competence as a witness with respect to the "Mexico" incident.
15. Defense counsel was ineffective for failing to offer instructions on Attempted Rape of a Child in the First Degree.
16. Defense counsel was ineffective for failing to offer instructions on Attempted Incest in the First Degree.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Robert Chesney was charged with two counts of Rape of a Child in the First Degree and two counts of Incest in the First Degree. Prior to trial, Dr. Madeline Harrington examined the complaining witness, Mr. Chesney's daughter A.C. Dr. Harrington testified that the physical exam was inconclusive, but that her diagnostic impression was sexual, physical, and emotional abuse by Mr. Chesney. An objection was overruled.

1. Did Dr. Harrington's testimony include an improper opinion on Mr. Chesney's guilt? Assignments of Error Nos. 1-4.
2. Did Dr. Harrington's testimony include an improper opinion on A.C.'s credibility? Assignments of Error Nos. 1-4.
3. Did Dr. Harrington's opinion testimony unconstitutionally infringe Mr. Chesney's right to a jury trial? Assignments of Error Nos. 1-4.
4. Did Dr. Harrington's opinion testimony invade the province of the jury? Assignments of Error Nos. 1-4.

The "to convict" instructions required the prosecution to prove beyond a reasonable doubt that the offense occurred on or between December 3, 2003 and December 2, 2003. A.C. was unable to fix the date of the incident. She first testified that it occurred when she was eight, later claimed it occurred after her mother had died (in 2004), and finally indicated that she wasn't sure if it happened before or after her mother died.

5. Was Mr. Chesney's conviction based on insufficient evidence? Assignments of Error Nos. 5-6.

During a recorded interview, Mr. Chesney was asked more than once if his daughter was lying. Although he denied her accusations, he refused to say that she was lying. The recording was admitted and played for the jury without objection. Defense counsel referred to the exchange during cross-examination. The following day, defense counsel acknowledged that he should have objected and that he may have compounded the problem on cross-examination. Mr. Chesney moved for a mistrial, which the court denied. During deliberations, the jury asked to review the recorded interview again. Defense counsel objected, arguing that the jury should not be exposed to the objectionable material. The court overruled the objection and played the unredacted recording for the jury.

6. Did the trial court err by playing the unredacted recording of Mr. Chesney's police interview during jury deliberations? Assignments of Error Nos. 7-8.

7. Should the trial court have redacted the recording of Mr. Chesney's police interview prior to playing it during jury deliberations? Assignments of Error Nos. 7-8.

8. Was Mr. Chesney denied the effective assistance of counsel when his attorney forgot to object to inadmissible material contained on the recording of Mr. Chesney's police interview? Assignments of Error Nos. 9-16.

9. Was Mr. Chesney denied the effective assistance of counsel when his attorney accidentally elicited damaging and inadmissible evidence during cross-examination of Detective Ensor? Assignments of Error Nos. 9-16.

The prosecution's case rested on the testimony of A.C., who was eleven years old at the time of trial. Although there was reason to question her competence with regard to the three incidents she testified about, defense counsel did not object to her testimony on competency

grounds, and did not ask the court to make a competency determination. A.C. never promised to tell the truth in her testimony.

10. Was Mr. Chesney denied the effective assistance of counsel when his attorney failed to object to A.C.'s testimony on competency grounds? Assignments of Error Nos. 9-16.

11. Was Mr. Chesney denied the effective assistance of counsel when his attorney failed to request the court to make a competency determination with regard to the three incidents that were the subject of A.C.'s testimony? Assignments of Error Nos. 9-16.

A.C. testified that penetration occurred during the first incident and during the "Mexico" incident, but did not explicitly testify that penetration occurred during the "nightmare" incident. Instead, she testified that Mr. Chesney touched her genitals with his soft penis. Despite this, defense counsel failed to request instructions on Attempted Rape of a Child in the First Degree and Attempted Incest in the First Degree.

12. Was Mr. Chesney denied the effective assistance of counsel when his attorney failed to request instructions on Attempted Rape of a Child in the First Degree? Assignments of Error Nos. 9-16.

13. Was Mr. Chesney denied the effective assistance of counsel when his attorney failed to request instructions on Attempted Incest in the First Degree? Assignments of Error Nos. 9-16.

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

In 2004, Robert Chesney's wife died, and he was left caring for their ten-year-old daughter A.C. RP (11/14/06) 40. In 2006, Mr. Chesney began dating his ex-wife, Christine. RP (11/14/06) 40, 58. A.C. disliked Christine, feeling that she had been displaced. RP (11/14/06) 58, 86-87. One month after Mr. Chesney resumed his relationship with Christine, A.C. reported that he had been molesting her since the age of three. RP (11/14/06) 86. Mr. Chesney was interviewed, and he denied touching A.C. inappropriately. Exhibit 34, Supp. CP. When the police asked if his daughter was lying, he refused to say that she was. RP (11/14/06) 143; Exhibit 34, Supp. CP.

Mr. Chesney was charged with two separate incidents. The Information alleged that he committed Rape of a Child in the First Degree and Incest in the First Degree "on or between September 1, 1999 and June 30, 2000" (Counts I and III) and "on or between December 3, 2002 and December 2, 2003" (Counts II and IV). CP 22-24.

A.C. was the first witness to testify at trial. Prior to her testimony, the court and the prosecutor spoke regarding A.C.'s competence as a witness:

Court: I understand that your first witness then is 11 years old...And I anticipate then that I will not be placing her under oath at that time?

Pros.: Promise--

Court: I am assuming you will establish through testimony her understanding of the requirement to tell the truth?

Pros.: Yes, I will do, Your Honor.
RP (11/14/06) 19-20.

When A.C. took the witness stand, she was asked questions regarding her understanding of the difference between truth and lies:

Q. [D]o you know the difference between truth and lie?

A. Yes.

Q. [D]o you know the difference between truth and lie?

A. Yes.

Q. Tell us what... the truth means?

A. You look someone straight in the eye, you don't fidget, and yeah.

Q. Okay, and what is a lie?

A. A lie is when you make up something that didn't actually happen, you don't make eye contact and you fidget around.

Q. Okay. Which is better, truth or lie?

A. Truth.

Q. Okay. If I were to tell you that that book laying right next to you up there is black, is that truth or lie?

A. Lie.

Q. What color is it?

A. Green.

Q. Okay.

RP (11/14/06) 37-38.

At no point did A.C. promise to tell the truth during her testimony, or express an understanding that she was required to do so. Defense

counsel did not object to A.C.'s testimony on competency grounds, and did not demand a competency determination from the trial judge.

In addition to providing generic testimony about ongoing abuse, A.C. testified to three specific incidents. The first incident formed the basis for Counts I and III, of which Mr. Chesney was ultimately acquitted. A.C. testified that her father had rubbed her on his body from chest to toe when she was three years old (although she also testified that she was in kindergarten at the time). RP (11/14/06) 41. She described his penis as hard. RP (11/14/06) 56, 57. At one point she said their privates did not touch, but later she testified that they did touch. RP (11/14/06) 90, 94. She also testified that he put his fingers inside her. RP (11/14/06) 58.

The second incident involved a trip to Mexico, and was offered by the prosecutor to show Mr. Chesney's lustful disposition. RP (11/14/06) 153. A.C. testified that when she was nine, the family traveled to Mexico, and that she slept in the same bed as her father when her mother fell ill. RP (11/14/06) 53-54. She said that her father rubbed his penis against her vagina while she slept, and penetrated her with his fingers. RP (11/14/06) 54, 58. She saw liquid come from her father's penis onto his stomach. RP (11/14/06) 54.

The third incident-- the basis for Counts II and IV-- happened when she crawled into bed with Mr. Chesney after having a nightmare.

RP (11/14/06) 43. Although she first testified that this incident occurred when she was eight years old, she later said that it happened after her mother died (when she was 10). RP (11/14/06) 43, 44. She then testified that she wasn't sure if it happened before or after her mother's death. RP (11/14/06) 45. When asked to describe what happened, A.C. testified that her father moved her underwear aside and pressed his penis against her vagina. RP (11/14/06) 43-45. She described his penis as soft. RP (11/14/06) 56. She said that while her father often smelled of alcohol, he did not on this occasion. RP (11/14/06) 52, 53. She did not explicitly testify that any penetration occurred on this occasion. Despite this, at the close of all the evidence, defense counsel did not request any instructions on Attempted Rape of a Child in the First Degree or Attempted Incest in the First Degree with regard to Counts II and IV. Defendant's Proposed Instructions, Supp. CP.

The state called Dr. Madeline Harrington, who examined A.C. in June of 2006. RP (11/15/06) 23. Dr. Harrington testified that A.C. disclosed sexual abuse from age three to age nine, but denied any sexual intercourse. RP (11/15/06) 24. Dr. Harrington's physical examination of A.C. was inconclusive. RP (11/15/06) 26, 29-31. The prosecutor asked Dr. Harrington about her "final outcome," and she testified that her diagnostic impression was "sexual, physical, emotional abuse by her

father.” RP (11/15/06) 27. Defense counsel objected, and the objection was overruled.

Mr. Chesney’s interview was videotaped, transferred to DVD, and admitted at trial, initially without objection. RP (11/14/06) 115-118; Exhibit 34, Supp. CP. The interview included three questions to Mr. Chesney about his daughter’s truthfulness, and his refusal to call her a liar. Exhibit 34, Supp. CP. When defense counsel cross-examined Detective Ensor, this exchange was repeated. RP (11/14/06) 143. The following day, defense counsel moved for a mistrial. RP (11/15/06) 11-14.

Acknowledging that he should have objected earlier, and that he may have compounded the problem by raising the issue on cross-examination, defense counsel argued that the officers’ questions and Mr. Chesney’s answers about his daughter’s truthfulness were clearly inadmissible and should have been excluded. RP (11/15/06) 12-13. The court denied the motion for a mistrial. RP (11/15/06) 15. In a later discussion, the trial judge noted on the record that he would have sustained a timely defense objection to the inadmissible questions and answers. RP (11/15/06) 61.

During deliberations, the jury asked to view the recording again. Defense counsel objected, and asked the court not to show the jury the inadmissible material. The court overruled the objection and allowed the jury to view the unredacted DVD again. RP (11/16/06) 5-7.

The jury acquitted Mr. Chesney on Counts I and III, but convicted him on Counts II and IV. CP 6. Mr. Chesney was sentenced to life in prison, with a minimum sentence of 123 months, and he appealed. CP 5, 6.

ARGUMENT

I. MR. CHESNEY'S CONSTITUTIONAL RIGHT TO A JURY TRIAL WAS INFRINGED BY DR. HARRINGTON'S TESTIMONY, WHICH INCLUDED AN OPINION THAT HE WAS GUILTY.

A claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). Under RAP 2.5(a)(3), the appellant must identify a constitutional error and show how it actually affected her or his rights at trial. *State v. Kirkman*, ___ Wn.2d ___, ___ P.3d ___, 2007 Wash. LEXIS 210, p. 9 (2007). It is this showing of actual prejudice that makes the error “manifest,” allowing appellate review. *Kirkman*, at pp. 9-10.

A criminal defendant has a constitutional right to a jury trial. Under Article I, Section 21 of the Washington Constitution, “The right of trial by jury shall remain inviolate...” Wash. Const. Article I, Section 21. Article I, Section 22 provides that “the accused shall have the right . . . to have a speedy public trial by an impartial jury.” Wash. Const. Article I, Section 22. Similarly, the Sixth Amendment to the U.S. Constitution,

applicable to the states through the Fourteenth Amendment, guarantees a federal constitutional right to a jury trial. U.S. Const. Amend VI; U.S. Const. Amend. XIV. Impermissible opinion testimony on the defendant's guilt violates an accused's constitutional right to a jury trial. *Kirkman*, p. 10; *State v. Florczak*, 76 Wn. App. 55, 882 P.2d 199 (1994); *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987).

In this case, Dr. Harrington testified, over objection,¹ that her diagnostic impression (after interviewing and examining A.C.) was "sexual, physical, emotional abuse by her father." RP (11/15/06) 27. This was explicit opinion testimony on Mr. Chesney's guilt, and inadmissible under *Kirkman, supra*. Furthermore, since her opinion was based entirely on A.C.'s statement, the testimony constituted an impermissible opinion that A.C. was telling the truth. *See, e.g., State v. Stevens*, 127 Wn. App. 269 at 275, 110 P.3d 1179 (2005). Dr. Harrington's testimony invaded the province of the jury. *Kirkman, supra*. Furthermore, since A.C.'s credibility was central to the prosecution's case, Dr. Harrington's testimony bolstering A.C.'s credibility was extremely prejudicial.

¹ The basis for the objection is not completely clear from the record. When asked, defense counsel referenced the court's ruling on an earlier motion in limine. RP (11/15/06) 27. However, since the impermissible testimony raises a manifest error affecting Mr. Chesney's constitutional right to a jury trial, the error is available for review.

Because of this, the convictions must be reversed and the case remanded for a new trial. *Kirkman*.

II. THE EVIDENCE WAS INSUFFICIENT TO ESTABLISH BEYOND A REASONABLE DOUBT THAT THE “NIGHTMARE” INCIDENT OCCURRED ON OR BETWEEN DECEMBER 3, 2002 AND DECEMBER 2, 2003.

In a criminal case, conviction requires proof beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). On review, evidence is not sufficient to support a conviction unless, after viewing the evidence in the light most favorable to the State, any rational trier of fact could find all of the elements of the crime charged beyond a reasonable doubt. *State v. DeVries*, 149 Wn.2d 842 at 849, 72 P.3d 748 (2003). The criminal law may not be diluted by a standard of proof that leaves the public to wonder whether innocent persons are being condemned. *DeVries*, at 849. The reasonable-doubt standard is indispensable, because it impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue. *DeVries*, at 849.

Although a claim of insufficiency admits the truth of the state’s evidence and all inferences that can reasonably be drawn from it, *DeVries*, at 849, this does not mean that the smallest piece of evidence will support proof beyond a reasonable doubt. In the end, the evidence must be

sufficient to convince a rational jury beyond a reasonable doubt. *DeVries, supra*. Since the reasonable doubt standard is the highest standard of proof, review is more stringent than in civil cases. In other words, the proof must be more than mere substantial evidence, which is described as evidence sufficient to persuade a fair-minded, rational person of the truth of the matter. *Rogers Potato v. Countrywide Potato*, 152 Wn.2d 387 at 391, 97 P.3d 745 (2004); *State v. Carlson*, 130 Wn. App. 589 at 592, 123 P.3d 891 (2005); *Northwest Pipeline Corp. v. Adams County*, 132 Wn. App. 470; 131 P.3d 958 (2006), citing *Davis v. Microsoft Corp.*, 149 Wn.2d 521 at 531, 70 P.3d 126 (2003). It also must be more than clear, cogent and convincing evidence, which is described as evidence “substantial enough to allow the [reviewing] court to conclude that the allegations are ‘highly probable.’” *In re A.V.D.*, 62 Wn.App. 562 at 568, 815 P.2d 277 (1991), *citation omitted*.

Where a specific charging period is incorporated into the “to convict” instructions without objection, the state bears the obligation of proving beyond a reasonable doubt that the offense occurred within the specified dates. *State v. Jensen*, 125 Wn. App. 319 at 326, 104 P.3d 717 (2005).

In this case, the prosecution was required to prove beyond a reasonable doubt that the “nightmare” incident charged in Counts II and

IV occurred “on or between December 3, 2002 and December 2, 2003.” Instruction Nos. 9 and 14, Supp. CP. A.C.’s testimony was insufficient to prove that the offense occurred between these two dates. First, she testified that the “nightmare” incident occurred when she was eight years old (which would have been within the charging period). RP (11/14/06) 43-45. Second, she testified that it occurred after her mother’s death, which occurred in 2004. RP (11/14/06) 40, 44, 68. Third, she testified that she couldn’t remember whether it was before or after her mother died. (11/14/06) 45. Fourth, she testified that family had moved into the house where the incident occurred when she was seven or eight years old (which would have been 2001 or 2002).² RP (11/14/06) 68.

This evidence was insufficient to convince a rational jury beyond a reasonable doubt that the offense occurred on or between December 3, 2002 and December 2, 2003. There may be “substantial evidence” sufficient to persuade a fair-minded, rational person under the preponderance standard. *Rogers Potato, supra*. There may even be

² One more piece of evidence could relate to the timing of the “nightmare” incident. According to A.C., her father often smelled of alcohol, but did not on this occasion. RP (11/14/06) 52, 53. Mr. Chesney testified that he stopped drinking when A.C. was one year old (1995), and started again when she was six (2001). (The transcript erroneously reports this period as starting in 1985). RP ?? 46. If the absence of the smell of alcohol implies that the “nightmare” incident occurred during this period of sobriety, it would have occurred before the charging period, no later than December 2, 2001.

evidence “substantial enough to allow the [reviewing] court to conclude that the allegations are ‘highly probable,’” as required under *In re A.V.D.*³ But A.C.’s uncertainty about the offense date and her contradictory statements about the timing in relation to her mother’s death require reversal: no rational jury could conclude *beyond a reasonable doubt* that the offense occurred within the specified dates. Accordingly, the convictions must be reversed and the case dismissed for insufficient evidence. *State v. Hickman*, 135 Wn.2d 97, 954 P.2d 900 (1998); *Jensen, supra*.

III. THE TRIAL COURT ERRED BY PLAYING THE UNREDACTED DVD TO THE JURY DURING DELIBERATIONS OVER MR. CHESNEY’S OBJECTION.

A trial court’s decision to admit evidence is reviewed under the abuse of discretion standard. *State v. Neal*, 144 Wn.2d 600 at 609, 30 P.3d 1255 (2001). An abuse of discretion occurs when the court’s decision is manifestly unreasonable or based upon untenable grounds or reasons. *Neal, supra*. A trial court’s failure to redact inadmissible material from an exhibit is an abuse of discretion. *State v. Redmond*, 150 Wn.2d 489 at 496, 78 P.3d 1001 (2003).

³ This is questionable, given A.C.’s contradictory statements.

It is improper to ask an accused if another witness is lying. *State v. Neidigh*, 78 Wn. App. 71 at 76, 895 P.2d 423 (1995). Doing so places irrelevant information before the jury, and carries the danger of unfair prejudice. *Neidigh*, at 76. The problem is especially acute where the accused is a parent of the complaining witness. No father wants to suggest that his daughter is lying, and an accused that does so risks condemnation by the jury simply for taking that path. On the other hand, by refusing to say the complaining witness is lying, an accused may lend credence to the accusation.

Mr. Chesney was faced with this insoluble problem when the police asked him if his daughter was lying. He refused to call her a liar, and this information was relayed to the jury when the DVD of the interview was shown. RP (11/14/06) 116-117; Exhibit 34, Supp. CP. Defense counsel cross-examined Detective Ensor about the “lying” question, but later acknowledged that he should have objected to the DVD, that he compounded the problem by bringing it up on cross-examination, and that he had made a mistake.⁴ RP (11/14/06) 143; (11/15/06) 11-16. The court denied Mr. Chesney’s motion for a mistrial.

⁴ Defense counsel’s mistake is addressed in an ineffective assistance of counsel claim elsewhere in this brief.

When the jury asked to view the DVD during their deliberations, defense counsel objected, arguing that the jury should not again be exposed to the prejudicial material. The court overruled the objection, and the DVD was played for the jury in its entirety. RP (11/16/06) 5-6.

The trial court's decision to play the interview in its entirety was an abuse of discretion. The DVD contained inadmissible material that should have been redacted. Although the DVD was initially admitted without redaction, this was due to an error which defense counsel sought to rectify first by moving for a mistrial, and second, by asking the court not to replay the inadmissible portions for the jury during deliberations. The trial court should have explored the possibility of redacting the inadmissible portions prior to allowing the jury to review the entire DVD. The court's failure to redact the inadmissible evidence was an abuse of discretion.⁵ *Redmond, supra*. Mr. Chesney's convictions must be reversed and the case remanded for a new trial.

⁵ This case is not controlled by *State v. Demery*, 144 Wn.2d 753 at 764-765, 30 P.3d 1278 (2001). In *Demery*, the Supreme Court upheld a trial court's decision to admit a taped interview in which officers accused the defendant of lying, in order to get a response. In that case, the court found that juries would be able to distinguish an investigative technique (accusing a suspect of lying) from in-court testimony under oath (that a defendant is lying.) Here, by contrast, it is the defendant's own words that are at issue, and there is no such distinction to be made. Mr. Chesney's response to the question should have been excluded, whether elicited during an interview or in court.

IV. MR. CHESNEY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853 at 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006). To prevail on a claim of ineffective assistance, an appellant must show (1) that defense counsel's conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wn.2d 126 at 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. Pittman*, 134 Wn. App. 376 at 383, ___ P.3d ___ (2006). There is a strong presumption of adequate performance; however, this presumption is overcome when "there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, at 130.

- A. Mr. Chesney was denied the effective assistance of counsel by his attorney's failure to timely object to inadmissible portions of his recorded statement.

Where a claim of ineffective assistance is based on a failure to challenge the admission of evidence, the appellant must show (1) an

absence of legitimate strategy for the failure to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *State v. Saunders*, 91 Wn. App. 575 at 578, 958 P.2d 364 (1998). The same analysis applies where defense counsel elicits damaging inadmissible evidence, either intentionally or inadvertently. *Saunders, supra*.

In *Reichenbach*, the defendant was charged with possession of methamphetamine. His trial counsel did not move to suppress the drugs, which the Supreme Court described as “the most important evidence the State offered” at trial. *Reichenbach*, at 130. Because an argument in favor of suppression was available to counsel, the Court ruled that “his failure to challenge the search...cannot be explained as a legitimate tactic, [and thus his] conduct was deficient.” *Reichenbach*, at 131. The Court then turned to the merits of the suppression argument, found that the methamphetamine was illegally seized, and reversed the conviction:

Because the methamphetamine was illegally seized and there was no tactical reason for failing to move to suppress, counsel's deficient performance was clearly prejudicial. *Reichenbach's* conviction for possession of methamphetamine was dependant on the baggie that was seized. Without that evidence, the State could not prove possession beyond a reasonable doubt. *Reichenbach's* right to the effective assistance of counsel was violated. *Reichenbach*, at 137.

As noted elsewhere, it is improper to ask an accused if another witness is lying. *Neidigh*, at 76. When Mr. Chesney was interviewed, the officers asked him if his daughter was lying. He refused to say she was, and this exchange was included on the DVD of the interview. Exhibit 34, Supp. CP. Defense counsel forgot to object to this portion of the DVD, and compounded the problem by asking about it on cross-examination. When he realized his mistake, he moved for a mistrial (and later asked the court not to play the unredacted DVD for the jury during their deliberations).⁶

Defense counsel's mistake deprived Mr. Chesney of the effective assistance of counsel. First, defense counsel made clear that the failure to object was a mistake, and was not part of a legitimate trial strategy. RP (11/15/06) 11-16. Second, an objection would have been sustained under *Neidigh, supra*, ER 401, and ER 403. Indeed, the trial judge noted on the record that he would have sustained a proper objection if one had been made. RP (11/15/06) 61. Finally, the result of the trial would have been different had the DVD been appropriately redacted. The outcome of the case hinged on the jury's assessment of A.C.'s credibility and that of Mr.

⁶ The trial court's decision to play the unredacted DVD during deliberations is challenged elsewhere in this brief.

Chesney. His refusal to condemn her as a liar increased the likelihood that the jury would believe her accusation. Accordingly, the conviction must be reversed and the case remanded for a new trial. *Saunders, supra*.

B. Mr. Chesney was denied the effective assistance of counsel by his attorney's failure to challenge A.C.'s competency as a witness.

Under RCW 5.60.020, all witnesses are presumed competent to testify; however, any person who appears "incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly" is disqualified from testifying. RCW 5.60.050(2). Where a party objects to the testimony of a child witness, the trial court must find that the child has (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the event to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the event; (4) the capacity to express in words her memory of the event; and (5) the capacity to understand simple questions about it. *In re Dep. of A.E.P.*, 135 Wn.2d 208 at 223, 956 P.2d 297 (1998).

In this case, defense counsel should have challenged A.C.'s competency. First, it is not clear that A.C. understood her obligation to speak the truth. The trial judge noted that he would not put A.C. under

oath,⁷ and that he assumed the prosecutor would “establish through testimony her understanding of the requirement to tell the truth.” RP (11/14/06) 20. When A.C. was called to the stand, she testified that the truth was “You look someone straight in the eye, you don’t fidget, and, yeah...” that “A lie is when you make up something that didn’t actually happen, you don’t make eye contact and you fidget around.” Although she said that the truth is “better” than a lie, she never promised to tell the truth during her testimony. RP (11/14/06) 37.

Second, there is every indication that she either lacked the mental capacity to receive an accurate impression of the events or that she lacked a memory sufficient to retain an independent recollection of the events. For example, A.C. testified that the first time she was molested she was three years old and attended kindergarten. RP (11/14/06) 42. Since kindergarten does not usually start until age five, this testimony is suspect. At one point she said their privates did not touch during this incident, but later testified that they did touch. RP (11/14/06) 90, 94. She also described her father rubbing her whole body against his, from his chest to his feet. RP (11/14/06) 41. Again, this unlikely description suggests

⁷ The transcript includes boilerplate indicating that the witness was sworn; however, it is not clear whether the court used the standard language, simplified language, or omitted the oath entirely. RP ?? 35.

deficiencies either in her perceptions at the time or in her memories at the time of her testimony. Similarly, A.C. couldn't remember whether the "nightmare" incident occurred before or after her mother died in 2004. RP (11/14/06) 45.

Because there was a reasonable basis to question A.C.'s competence, defense counsel's failure to object constituted deficient performance. A reasonably capable attorney would have objected to her testimony and demanded a competency determination.

Furthermore, Mr. Chesney was prejudiced by defense counsel's deficient performance. Had the trial court found A.C. incompetent with respect to the two charged incidents, the state would have been unable to proceed and the charges would have been dismissed. Even if the trial court determined that A.C. was competent to testify about the "nightmare" incident charged in Counts II and IV, he may have found that she was not competent to testify about the events charged in Counts I and III and/or the "Mexico" incident, because of her limited mental capacity at the time of those events or because of her difficulties in remembering those incidents. These additional incidents helped the state establish "lustful disposition," increased the possibility that the jury would convict Mr. Chesney of the "nightmare" incident based on propensity evidence, and generally prejudiced him. If the court had excluded her testimony of these

incidents on competency grounds, the likelihood of conviction on Counts II and IV would have been diminished.

Mr. Chesney was denied the effective assistance of counsel by defense counsel's failure to object to A.C.'s testimony and demand a competency determination. Accordingly, the convictions must be reversed and the case remanded for a new trial.

C. Mr. Chesney was denied the effective assistance of counsel by his attorney's failure to request instructions on Attempted Rape of a Child in the First Degree or Attempted Incest in the First Degree.

A criminal defendant may pursue inconsistent defenses at trial, and may even pursue a defense that contradicts the accused's own testimony.

State v. Fernandez-Medina, 141 Wn.2d 448 at 455, 6 P.3d 1150 (2000).

For example, a defendant who testifies that he was not present at the scene of a crime is nonetheless entitled to an inferior degree instruction under appropriate circumstances:

If the trial court were to examine only the testimony of the defendant, it would have been justified in refusing to give the requested inferior degree instruction. As we have observed above, [the defendant] claimed that he was not present at the incident leading to the charge at issue. A trial court is not to take such a limited view of the evidence, however, but must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given.

Fernandez-Medina, at 460-461.

Under RCW 10.61.003 and RCW 10.61.010, a defendant may be convicted of an attempt to commit the crime charged in the Information.

State v. Luther, 157 Wn.2d 63 at 70, 134 P.3d 205 (2006). A defendant commits the crime of Attempted Rape of a Child in the First Degree when she or he, with intent to commit Rape of a Child in the First Degree, takes a substantial step toward commission of that crime. *State v. Chhom*, 128 Wn.2d 739, 911 P.2d 1014 (1996). The penalty for Attempted Rape of a Child in the First Degree is 75% of the range for the completed crime. RCW 9.94A.533.⁸

An attorney's failure to seek instructions for an offense with lower penalties can deprive an accused of the effective assistance of counsel. *State v. Pittman; State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004). Counsel's failure to request appropriate instructions constitutes ineffective assistance if (1) there is a significant difference in the penalty between the greater and the inferior degree, (2) the defense strategy would be the same for both crimes, and (3) sole reliance on the defense strategy in hopes of an outright acquittal is risky. *Pittman, supra; Ward, supra*.

In *Pittman, supra*, the defendant was charged with attempted residential burglary. At trial, his attorney failed to request the lesser-included instruction of attempted trespass. The Court of Appeals reversed

⁸ A similar analysis applies to attempted incest.

his conviction, finding that defense counsel's failure to request the instruction constituted ineffective assistance:

[C]ounsel's failure to request a lesser included offense instruction left Pittman in [a] tenuous position... One of the elements of the offense charged was in doubt--his intent to commit a crime inside [the] home--but he was plainly guilty of some offense. Under those circumstances, the jury likely resolved its doubts in favor of conviction of the greater offense....His entire defense was that he never intended to commit a crime once he was inside [the] home. This was a risky defense [because] he clearly committed a crime similar to the one charged but the jury had no option other than to convict or acquit.
Pittman, at 387-389.

Similarly, in *Ward*, the defendant was charged with two counts of second degree assault, with firearm enhancements. His attorney failed to offer the lesser included offense instruction for unlawful display of a weapon. The Court of Appeals reversed for ineffective assistance:

First, the potential jeopardy for Ward was considerable. He faced 89 months in prison for the two assaults, including the mandatory firearm enhancements. Unlawful display of a weapon, by contrast, is a gross misdemeanor carrying a maximum penalty of one year in jail and revocation of a concealed weapons permit. Misdemeanor offenses are not subject to the imposition of firearm enhancements.

Second, Ward's defenses were the same on both the greater and lesser offenses. His theory at trial was lawful defense of self and property. These are complete defenses to both second degree assault and unlawful display of a weapon. An instruction on the lesser included offense was therefore at little or no cost to Ward. If the jury had believed Ward acted lawfully, he would have been acquitted of both the greater and lesser offenses. If the jury did not believe Ward acted lawfully, but doubted whether he pointed his gun, he would have been convicted only of the misdemeanor.

Finally, self-defense as an all or nothing approach was very risky in these circumstances, because it relied for its success chiefly on the credibility of the accused. Ward testified he believed Tuttle and Baldwin were there to steal his car...But the arresting officers testified Ward told them he was trying to stop a repossession. This greatly impeached Ward's credibility on the defense of property theory and also called into question his testimony that Baldwin was carrying a crowbar in a menacing fashion, thus undermining his theory of self-defense as well. Ward's credibility was further damaged when his testimony about the methamphetamine directly conflicted with his counsel's opening statement. Given the developments at trial and the starkly different potential penalties, it was objectively unreasonable to rely on such a strategy.

In these circumstances, we can see no legitimate reason to fail to request a lesser included offense instruction. The all or nothing strategy exposed Ward to a substantial risk that the jury would convict on the only option presented, two second degree assaults.

Ward, supra, at 249-250, citations and footnotes omitted.

In this case, defense counsel's failure to request instructions on Attempted Rape of a Child in the First Degree denied Mr. Chesney the effective assistance of counsel. There was some evidence that Counts II and IV involved an unsuccessful attempt to have intercourse, and that no penetration occurred. Regarding the "nightmare" incident, A.C. testified that Mr. Chesney pressed his penis against her vagina, but that his penis was soft. RP (11/14/06) 44, 56. This was in contrast to when she was three years old (Counts I and III), when she described his penis as hard. RP (11/14/06) 56, 57. She also testified that he put his fingers inside her when she was three and during the Mexico incident, but not during the

“nightmare” incident. RP (11/14/06) 57-58. She told Dr. Harrington that she had never had intercourse with Mr. Chesney. RP (11/14/06) 75; RP (11/15/06) 25.

As in *Ward* and *Pittman*, an all-or-nothing strategy exposed Mr. Chesney to greater jeopardy than if his attorney had offered attempt as an alternative. As convicted, he was subject to a maximum sentence of life in prison, with a minimum of 93-123 months.⁹ CP 8. If he’d been convicted only of attempt, his maximum sentence would have remained the same; however, his minimum sentence would have been 69.75 - 92.25 months. In other words, by submitting appropriate instructions on attempt, defense counsel could have reduced Mr. Chesney’s minimum term by approximately 23 - 31 months.

As in *Ward* and *Pittman*, Mr. Chesney’s defense-- that he had never touched his daughter inappropriately-- would have been the same for both charges. The attempt charge would not require an inconsistent strategy; thus, there was no cost to Mr. Chesney in submitting appropriate instructions on attempt.

⁹ The penalty for the incest charge was significantly less; however, if the defense had offered attempt instructions relating to Count II, it would have used the same strategy with regard to Count IV.

Finally, as in *Ward* and *Pittman*, relying solely on the complete defense was risky. First, Mr. Chesney had refused to call his daughter a liar during a police interview. Second, Mr. Chesney told the interviewing officers that the abuse could have occurred, although he didn't remember it. Third, Mr. Chesney was clearly in a position to have inappropriate contact with his daughter. Fourth, Mr. Chesney admitted to consuming alcohol, despite having an alcohol problem. Fifth, the denial defense rested entirely on his testimony.

There is a reasonable probability that the jury would have convicted Mr. Chesney of the attempted crime, had appropriate instructions been given. A.C. testified that Mr. Chesney rubbed his soft penis against her genital area, but never specifically said there was any penetration during the "nightmare" incident. This was in contrast to the first incident (when she was three) and the "Mexico" incident, where she explicitly testified that penetration-- including digital penetration-- occurred. RP (11/14/06) 56-58.

Given the conflicting evidence, the jury could reasonably have concluded that Mr. Chesney attempted to rape his daughter but that no penetration occurred. Under these circumstances, it is likely that the jury, "with no option other than to convict or acquit," would choose conviction, even if they had doubts about whether or not penetration actually

occurred. *Pittman*, at 389. An “all or nothing” strategy was unreasonable. Mr. Chesney was denied the effective assistance of counsel by his attorney’s failure to request instructions on Attempted Rape of a Child in the First Degree and Attempted Incest in the First Degree.

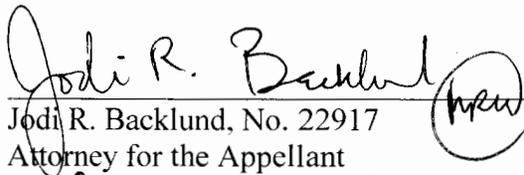
Mr. Chesney was prejudiced by his attorney’s failure to offer instructions on attempt. Both prongs of the *Strickland* test are met, and Mr. Chesney was denied the effective assistance of counsel. *Pittman, supra; Ward, supra*. The conviction must be reversed and the case remanded for a new trial.

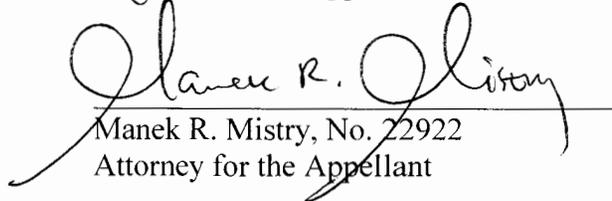
CONCLUSION

For the foregoing reasons, the convictions must be reversed and the case dismissed for insufficient evidence. In the alternative, the case must be remanded for a new trial.

Respectfully submitted on May 9, 2007.

BACKLUND AND MISTRY


Jodi R. Backlund, No. 22917
Attorney for the Appellant


Manek R. Mistry, No. 22922
Attorney for the Appellant

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

Robert T. Chesney, DOC#300558
C/O Christine Rice
3621 55th Avenue NE
Tacoma, WA 98422

and to:

Carol L. Case
Clallam County Prosecutor's Office
223 East 4th Street
Port Angeles, WA 98362-3015

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on May 9, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 9, 2007.



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
MAY 9 2007
OLYMPIA, WA