

ORIGINAL

No. 35762-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT TODD CHESNEY,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY [Signature]

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY

The Honorable Ken Williams, Judge
Cause No. 06-1-00260-1

BRIEF OF RESPONDENT

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APPELLANT'S ASSIGNMENT OF ERROR

1. Chesney claims his constitutional right to a jury trial was infringed.
2. Chesney claims Dr. Harrington expressed an explicit opinion on Chesney's guilt, thereby invading the province of the jury.
3. Chesney claims Dr. Harrington's testimony violated his constitutional right to a jury trial.
4. Chesney claims that the trial court erred by admitting Dr. Harrington's improper testimony over Chesney's objection.
5. Chesney claims his convictions on Counts II and IV were based on insufficient evidence.
6. Chesney claims that the State did not present sufficient evidence to prove beyond a reasonable doubt that the "nightmare" incident occurred "on or between December 3, 2002 and December 2, 2003."
7. Chesney claims that the trial court erred by playing the unredacted DVD for the jury during deliberations.
8. Chesney claims that the trial court erred by overruling his objection to inadmissible evidence contained on the DVD.
9. Chesney claims his counsel was ineffective.
10. Chesney claims his counsel was ineffective because his counsel failed to object to inadmissible evidence elicited during Mr. Chesney's police interview.
11. Chesney claims that his counsel was ineffective because his counsel elicited damaging and inadmissible evidence during cross-examination of Detective Ensor.
12. Chesney claims his counsel was ineffective because his counsel failed to challenge A.C's competence as a witness with respect to Counts I and II.

13. Chesney claims his counsel was ineffective because his counsel failed to challenge A.C's competence as a witness with respect to the "nightmare" incident, Counts II and IV.
14. Chesney claims his counsel was ineffective because his counsel failed to challenge A.C's competence as a witness with respect to the "Mexico" incident.
15. Chesney claims his counsel was ineffective because his counsel failed to offer instructions of Attempted Rape of a Child in the First Degree.
16. Chesney claims his counsel was ineffective because his counsel failed to offer instructions on Attempted Incest in the First Degree.

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Dr. Harrington's testimony included an improper opinion on Chesney's guilt. (Assignments of Error 1-4).
2. Whether Dr. Harrington's testimony included an improper opinion on A.C's credibility. (Assignments of Error 1-4).
3. Whether Dr. Harrington's opinion testimony unconstitutionally infringed on Chesney's right to a jury trial. (Assignments of Error 1-4).
4. Whether Dr. Harrington's testimony invaded the province of the jury. (Assignment of Error 1-4).
5. Whether the evidence was sufficient to convict Chesney. (Assignments of Error 5-6).
6. Whether the trial court erred by allowing the jury to replay the unredacted recording of Chesney's police interview during jury deliberations. (Assignments of Error 7-8).

7. Whether the trial court should have redacted the recording of Chesney's police interview prior to allowing the jury to play it during deliberations. (Assignments of Error 7-8).
8. Whether Chesney was denied effective assistance of counsel when his counsel did not object to inadmissible material contained on the recording of Chesney's police interview. (Assignments of Error 9-16).
9. Whether Chesney was denied effective assistance of counsel when his attorney elicited damaging and inadmissible evidence during cross examination of Detective Ensor. (Assignments of Error 9-16).
10. Whether Chesney was denied effective assistance of counsel when his counsel failed to object to A.C's testimony on competency grounds. (Assignments of Error 9-16).
11. Whether Chesney was denied effective assistance of counsel when his counsel failed to request a competency determination with regard to the three incidents that were the subject of A.C's testimony. (Assignments of Error 9-16).
12. Whether Chesney was denied effective assistance of counsel when his counsel failed to request instruction on Attempted Rape of a Child in the First Degree and Attempted Incest in the First Degree. (Assignments of Error 9-16).

C. STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State accepts Chesney's recitation of the facts set forth in his opening brief at pages 1 through 26, with the following additions:

On page one (1) of Chesney's brief he states, "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.

A.C. stated that when she disclosed it could have been as long as five to six months after Chesney resumed his relationship with Christine. RP (11/14/06) 103.

On page four of Chesney's brief he states, "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

A.C. testified that her mother died in February 2004. RP (11/14/06) 45. A.C. testified that she was born on December 3, 1994. RP (11/14/06) 36. In February 2004 A.C. would have been nine years old as she testified at RP (11/14/06) 44, or nine or ten years old as she testified at RP (11/14/06) 45.

D. ARGUMENT

- 1. DR. HARRINGTON'S TESTIMONY DID NOT INCLUDE AN OPINION ON CHESNEY'S GUILT, DID NOT BOLSTER A.C.'S CREDIBILITY, DID NOT INVAD THE PROVINCE OF THE JURY, AND DID NOT INFRINGE ON CHESNEY'S CONSTITUTIONAL RIGHT TO A JURY TRIAL.**

Evidence Rule 702. Testimony by Experts states:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

Evidence Rule 704. Opinion on Ultimate Issue states:

Testimony in the form of an opinion or inferences otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Prior to Dr. Harrington's testimony, Chesney asked the court to limit Dr. Harrington's testimony to her physical examination of her in findings with regard to any sexual abuse and any peripheral matters that have to do with sexual abuse. (11/15/06) RP 18-19. The court granted Chesney's motion in limine. RP (11/15/06) 19.

Dr. Harrington testified that her diagnostic impression was that A.C. had suffered sexual, physical, emotion abuse by her father. RP (11/15/06) 27. Defense counsel objected and when the court asked the nature of the objection defense counsel indicated that the court had already ruled on that prior motion in limine. RP (11/15/06) 27. The court overruled the objection and cautioned the State to make sure Dr. Harrington understood some of the limitations on testimony. RP (11/15/06) 27.

Chesney's motion in limine related to testimony from Dr. Harrington regarding A.C.'s statements about her father strangling/choking her, messing with her head, taking the head off her Barbie and hiding it in her bed, and turning the volume up to painful levels until A.C. and her friends would be crying and begging him to turn it down. RP (11/15/06) 18. At no time did Dr. Harrington mention any of these things related to her by A.C.

Dr. Harrington testified that she urged counseling and that she would be in a safe situation. RP (11/15/06) 28.

On cross examination, Dr. Harrington testified that, to a large degree, her impression or diagnosis depends in a sexual abuse case on the history related by the alleged victim, that she could make a finding based solely on history related by the victim of sexual abuse without any physical symptomology at all, that the history relayed by the victim is a very important part of her clinical impression, that she personally performed a physical examination of A.C., that she did see any obvious physical signs of abuse in her examination of A.C., and that she could not say, based purely on a physical examination, beyond a reasonable medical certainty that there was physical abuse or sexual abuse. RP (11/15/06) 28-31.

On redirect, Dr. Harrington testified that not finding any signs of sexually abuse didn't mean that there wasn't sexual abuse. RP (11/15/06) 33.

Chesney relies on *State v. Kirkman*, _____ Wn.2d _____, 155 P.3d 125; 2007 Wash. Lexis 210 (2005) to claim a manifest error affecting a constitutional right. "Manifest" in RAP 2.5(a)(3) requires a showing of actual prejudice. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). "Manifest error" requires a nearly explicit statement by the witness that the witness believed the accusing victim. *State v. WWJ Corp*, 138 Wn.2d, 595, 603, 980 P.2d 1257 (1999). Exceptions to RAP 2.5(a) must be construed narrowly. *Id.*

Chesney has made no plausible showing that the asserted error had practical and identifiable consequences in the trial of this case.

It has long been recognized that a qualified expert is competent to express an opinion on a proper subject event though he thereby expresses an opinion on the ultimate fact to be found by the tried of fact. *Gerberg v. Crosby*, 52 Wn.2d 795, 795-96, 329 P.2d 184 (1959); ER 704 (rejects strictures against allowing witnesses to express opinions on ultimate issues). The mere fact that the opinion of an expert covers an issue which the jury has to pass upon, does not call for automatic exclusion. *State v. Ring*, 54 Wn.2d 250, 255, 339 P.2d 461 (1959).

Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary. *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

The jury in this case received specific instructions relating their role in the process of deliberations. Jury Instruction No. 1 states that jurors “are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each.”

At no time during her testimony did Dr. Harrington come close to testifying that Chesney was guilty or that she believed A.C.'s account of what had happened. Dr. Harrington wanted to assure that A.C. would be in a safe situation; Chesney was A.C.'s sole parent and A.C. told Dr. Harrington that her father had sexually abused her.

Chesney's claim that Dr. Harrington's testimony invaded the province of the jury is simple rhetoric. There was no manifest constitutional error in this case. The conviction must be upheld.

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

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the

State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *Salinas*, 119 Wn.2d at 201.

A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201.

In considering the sufficiency of the evidence to support a criminal conviction, circumstantial evidence is no less reliable than direct evidence, and specific criminal intent may be inferred from conduct when it is plainly indicated as a matter of logical probability. *State v. Delmarter*, 94 Wn.2d 634, 637-638, 618 P.2d 99 (1980).

In analyzing the sufficiency of the evidence, the appellate court will defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences therefrom. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Witness credibility determinations are for the trier of fact to make, not an appellate court. *State v. McPherson*, 111 Wn.App. 747, 46 P.3d 284 (2002).

The trier of fact decides questions of conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Todd*, 101 Wn.App. 945, 950, 6 P.3d 86 (2000).

A.C. testified that she was born on December 3, 1994. RP (11/14/06) 36. A.C. testified that her mother died on February 12, 2004 and that she was eight or nine years old. RP (11/14/2006) 40, 44. A.C. testified that the nightmare incident occurred when she was eight years old and she thought the nightmare incident occurred after her mom had passed away. RP (11/14/06) 43, 44. A.C. testified that that she would have been nine or ten years old when her mom died. RP (11/14/06) 45. At RP (11/14/06) 68, AC testified that she was “like nine or something when her mother passed away. In February, 2004, A.C. would have been nine years old but she did not remember if the nightmare incident occurred before or after her mom died. RP (11/14/06) 45. A.C. testified that they moved to the house on West 11th street when she was seven or eight years old but wasn’t sure, she didn’t remember, but the nightmare incident occurred on West 11th Street and she was sure. RP (11-14-06) 68. Being sure that the incident occurred when she was eight years old and that it occurred when they lived in the house on West 11th Street would have made the time frame in 2002, the time frame the State charged.

The evidence was more than sufficient to convince a rational jury beyond a reasonable doubt that the offense occurred between December 3, 2002 and December 2, 2003 when A.C. was 8 years old. A.C. was certain that the offense occurred when she was eight years old, and she was sure it occurred in the house on West 11th Street. A.C. was eight years old between December 3, 2002 and December 2, 2003. Furthermore, A.C. testified that he touched the inside of her vaginal area with his penis but did not fully penetrate her vagina with his penis. RP (11/14/06) 97. The jury had sufficient evidence to find Chesney guilty beyond a reasonable doubt of Rape of a Child in the First Degree and Incest in the First Degree. The conviction should be affirmed.

III. THE TRIAL COURT DID NOT ERR BY PLAYING THE UNREDACTED DVD TO THE JURY DURING DELIBERATIONS OVER CHESNEY'S OBJECTION.

Chesney cites *State v. Neidigh*, 78 Wn.App. 71, 76, 896 P.2d 423 (1995) for the proposition that it is improper to ask an accused if another witness is lying. In *Neidigh*, the prosecutor asked the defendant, who took the witness stand, whether the informant was lying. The court found that the prosecutor had committed misconduct. *State v. Neidigh*, 78 Wn.App at 76. However, the Neidigh Court held that

misconduct is prejudicial only when, in context, there is a substantial likelihood that it affected the jury's verdict and without proper objection or a curative instruction, or a motion for a mistrial, the defendant cannot raise the issue of misconduct on appeal unless it was so flagrant and ill intentioned that no curative instruction could have obviated the resulting prejudice. Liar questions and comments are held to be harmless if they "were not so egregious as to be incapable of cure by an objection and an appropriate instruction to the jury.

State v. Neidigh 78 Wn.App at 77 citing *State v. Stith*, 71 Wn.App 14, 19, 856 P.2. 415 (1993); *State v. Echevarria*, 71 Wn.App. 595, 597, 860 P.2d 420 (1993); *State v. Stover*, 67 Wn.App. 228, 232, 834 P.2d 671 (1992).

In the instant case neither the State nor defense counsel asked the defendant from the witness stand if A.C. was lying. It was strictly an investigative technique employed by Detective Ensor during a recorded interview of Chesney. There was no error.

Chesney did not object to the admission of the DVD RP (11/14/06) 116 and did not object to the playing of the DVD to the jury. RP (11/14/06) 116.

Chesney's counsel questioned Detective Ensor about his techniques of interviewing a suspect in a criminal case including whether or not Detective Ensor asked Chesney several times in several ways if his daughter was lying. RP (11-14-06) 139-143, 146.

Chesney's counsel moved for a mistrial because Detective Ensor asked Chesney to comment on the truthfulness of A.C.. RP (11/15/06) 11-14, 16, 62. The Court took the motion under advisement RP (11/15/06) 15-16, 19-21 and later cited *State v. Demery*, 144 Wn.2d 753, 30 P.3d 1278 (2001) but believed Demery was a little different than the current case. RP (11-15-06) 19-20. The Court indicated that had an appropriate objection been made the Court likely would have sustained it and somehow excluded the questions Detective Ensor asked of Chesney regarding whether or not his daughter was lying. RP (11/15/06) 61.

Chesney cites *Demery, supra*, in footnote 3 on page 13 of his brief stating that *Demery* is not controlling in this case because in the current case, it is Chesney's own words that are at issue. However, Chesney's words arose out of a police interview as was the case in *Demery*. The Court in *Demery* found that a jury would be able to distinguish an investigative technique from in-court testimony under oath. Why would the jury not be able to distinguish those two situations in the current case? No one asked the defendant about his statements regarding whether or not A.C. was lying. The only questions asked in that regard were from defense counsel to Detective Ensor when defense counsel was establishing that those questions were part of an investigative technique. Counsel emphasized to the jury that the questions were part of an investigative

technique and had nothing to do with credibility of either A.C. or Chesney. It appears that *Demery* is controlling.

When the jury asked to view the DVD again during deliberations, defense counsel objected. RP (11/16/16) 5-6. The Court indicated that the jury would be allowed to view the DVD one more time so as not to over emphasize the objected to material stating that it was not a direct comment on A.C.'s credibility, it was not emphasized in argument or any other time, it would, because of that, probably be insignificant, and that it was consistent with Chesney's testimony that he was thinking of his daughter. RP (11/16/06) 5-6.

Because the Court did not err in allowing the jury to view the DVD one time during deliberations, the conviction must be upheld.

IV.. **CHESNEY WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.**

An appellate court will presume the defendant was properly represented. *Strickland v. Washington*, 466 U.S. 668, 688-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177

(1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L. Ed. 2d 112 (1992); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

A criminal defendant's must overcome this strong presumption of effectiveness of his trial counsel by proof that counsel's representation fell below an objective standard of reasonableness, i.e. that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687. Additionally, the criminal defendant must show there exists a reasonable probability that, but for defense counsel's deficient conduct, the outcome of the trial would have been different. *Strickland*, 466 U.S. at 687.

Washington courts use a two-prong test to overcome the strong presumption of effectiveness that courts apply to counsel's performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *Hendrickson*, 129 Wn.2d at 78; *State v. Bennett*, 87 Wn. App. 73, 77, 940 P.2d 299 (1997). The defendant must meet both prongs of the test to merit relief. *Thomas*, 109 Wn.2d at 225-226; *Bennett*, 87 Wn. App at 77.

A defendant must first demonstrate that defense counsel's representation was deficient. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

The test of incompetence is, after considering the entire record, can it be said that the accused was not afforded effective representation and a

fair and impartial trial. *State v. Johnson*, 92 Wn.2d 671, 682, 600 P.2d 1249 (1979), *cert. dismissed*, 446 U.S. 948 (1980).

For the second part, the defendant must show prejudice such that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

Because trial strategies and techniques may vary among lawyers, a defense attorney's decision that constitutes a trial tactic or strategy will not support a claim of ineffective assistance of counsel. *In re Personal Restraint of Benn*, 134 Wn.2d 868, 888, 952 P.2d 116 (1998); *Johnson*, 92 Wn.2d at 682; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second-guess lawyers' decisions with the benefit of hindsight. Many criminal defendants in the boredom of prison life have little difficulty in recalling particular actions or omissions of their trial counsel that might have been less advantageous than an alternate course. As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction. Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at

least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate.

State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978).

Finally, if the evidence supports a finding beyond a reasonable doubt that the defendant was guilty as charged, it cannot be asserted that his counsel was incompetent simply because the defendant was not acquitted. *Johnson*, 92 Wn.2d at 682.

In alleging ineffective assistance of counsel, the defendant bears the burden of showing there were no legitimate strategic or tactical reasons behind defense counsel's decision. *State v. Rainey*, 107 Wn.App. 129, 135-36, 28 P.3d 10 (2001), *review denied* 145 Wn.2d 1028 (2002).

A. Chesney cites *State v. Reichenback*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) for the proposition that failing to object to inadmissible portions of his recorded statement denied him effective assistance of counsel. Chesney contends that Detective Ensor's questions during a police interview about whether or not A.C. was lying and Chesney's refusal to call his daughter a liar were inadmissible.

The sole issue in *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278, (2001) was, "Do statements made by police officers in a taped interview accusing the defendant of lying constitute impermissible opinion

testimony regarding the veracity of the defendant when such statements are played before the jury during trial?”

Detective Ensor asked those questions as part of a commonly used police interview technique to determine whether a suspect will change his story. Those questions were not offered during live testimony at trial. Because neither the questions nor the responses were made under oath at trial, they do not fall within the definition of opinion testimony for purposes of any evidentiary prohibition.

There is an aura of reliability surrounding sworn statements. Logically, we can assume that a jury would not afford that same level of credibility to an out of court statement and such a statement would be much less likely to prejudice the jury against the defendant. *State v. Demery* at 760. The sole purpose of Detective Ensor’s questions was to see if Chesney would change his story.

The taped interview was not the most importance evidence the State offered at trial. The most important evidence came from A.C. A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes. *State v. Adams*, 91 Wn.2d at 91. Any error in admitting the non-redacted taped interview with Chesney was harmless error as it did not

have a material effect on the outcome of the trial. The conviction should be affirmed.

B. Chesney's contends that he was denied effective assistance because his counsel failed to challenge A.C. competency and he was prejudiced by that failure. Chesney's argument is filled with "if" this and "if" that. Chesney's argument is filled with speculation and conjecture; no prejudice has been shown. Chesney's argument is without merit. The conviction should be affirmed. (Because there is no case law cited, the State will further brief if requested by the court.)

C. Chesney contends that he was denied effective assistance of counsel because his counsel did not offer jury instructions on Attempted Rape of a Child in the First Degree and Attempted Incest in the First Degree. Chesney contends that, under *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 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.

In *State v. Ward*, 125 Wn.App. at 249, Ward faced 89 months in prison. Had a jury instruction on unlawful display of a weapon been

offered, Ward would have faced one year in jail without firearm enhancements.

In the current case, Chesney faced a standard range of 93 to 123 months on Rape of a Child in the First Degree and 12 plus to 14 months on Incest in the First Degree. A conviction for attempt would have lowered the standard range for Rape of a Child in the First Degree to 69.75 to 92.25 months and Incest in the First Degree to 9 to 11 months. However, being a non persistent offender, the maximum sentence for Rape of a Child in the First Degree would be life. RCW 9.94A.712. Two years to two and one half years is not a significant difference in the sentencing range for Attempted Rape of a Child in the First Degree; three months low to high end is not a significant difference in the sentencing range for Attempted Incest in the First Degree. An all or nothing approach was not that risky in the current case as Chesney maximum sentence under RCW 9.94A.712 would remain the same on either Attempted Rape of a Child in the First Degree or Rape of a Child in the First Degree.

Chesney contends that A.C. never said there was any penetration during the nightmare incident. A.C. testified that Chesney touched the inside of her vaginal area with his penis but did not fully penetrate her vagina with his penis. RP (11/14/06) 97. To say that there is a reasonable probability that the jury would have convicted Chesney of the attempted

crimes had appropriate jury instructions been given is pure speculation. The jury was given an instruction that sexual intercourse means penetration, however slight; the jury obviously found penetration, however slight as is evidenced by the verdict. Chesney's claim is without merit. The conviction should be affirmed.

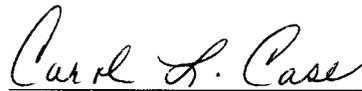
E. CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm Chesney's conviction.

DATED this 11 day of June, 2007, at Port Angeles,
Washington.

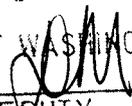
Respectfully submitted,

DEBORAH S. KELLY
PROSECUTING ATTORNEY



By Carol L. Case, WBA # 17052
Deputy Prosecuting Attorney
Attorney for Respondent

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COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON,)
)
 Respondent,) No. 35762-3-II
)
 vs.) DECLARATION OF
) FILING/MAILING
) PROOF OF SERVICE
 ROBERT TODD CHESNEY,)
)
 Appellant,)
)
 _____)

I, CAROL L. CASE, declare and state as follows:

On June 12, 2007, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Backlund & Mistry
203 East Fourth Ave. Ste 404
Olympia, WA 98501

Robert T. Chesney
DOC 300558
c/o Christine Rice
3621 55th Avenue NE
Tacoma, WA 98422

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

I, Carol L. Case, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 11th day of June, 2007 at Port Angeles, Washington.



Carol L. Case WSBA 17052
Attorney for Respondent