

Original

No. 35988-0-II

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

THE STATE OF WASHINGTON,

Plaintiff/Respondent

v.

JERRY CURTIS BERGMAN,  
Appellant/Defendant.

APPEAL FROM THE SUPERIOR COURT OF LEWIS COUNTY  
THE HONORABLE, RICHARD L. BROSEY, PRESIDING

BRIEF OF APPELLANT

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DIVISION II  
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### **III. ASSIGNMENTS OF ERROR**

1. The trial court erred in entering a verdict of guilty. CP 32, APP 1.
2. The trial court erred in entering the Felony Judgment and Sentence with Protective Order. CP 2-16; APP 2.
3. The trial court erred in finding that the victim was competent to testify. RP I at 126.
4. The trial court erred in admitting hearsay statements of the victim.

### **IV. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court violate appellant's rights to confront witnesses under United States Constitution, Amendment Six, and Washington Constitution, Article I, Section 22, by admitting the testimony of the victim? (Pertains to Assignments of Error 1-4).
2. Did the trial court violate appellant's rights to confront witnesses under United States Constitution, Amendment Six, and Washington Constitution, Article I, Section 22, by admitting hearsay statements of the victim? (Pertains to Assignments of Error 1-4).
3. Did the trial court violate RCW 9A.44.120 (1), by finding the victim competent to testify? (Pertains to Assignments of Error 1-4).

4. Did the trial court err in finding that all of the factors in *State v. Allen*, 70 Wn. 2d 690, 692, 424 P. 2d 1021 (1967) were met with respect to the testimony of the victim? (Pertains to Assignments of Error 1-4).
5. Did the trial court violate RCW 9A.44.120 (1), by finding that the hearsay statements of the victim were reliable? (Pertains to Assignments of Error 1, 2, 4).
6. Did the trial court err in finding that all of the factors in *State v. Ryan*, 103 Wn. 2d 165, 175-76, 691 P. 2d 197 (1984) were met or were inapplicable? (Pertains to Assignments of Error 1, 2, 4).
7. Did the trial court err in admitting hearsay statements of the victim through the testimony of the victim's mother? (Pertains to Assignment of Error 1, 2, 4).
8. Did the trial court err in admitting hearsay statements of the victim through the testimony of Deputy Bob Nelson? (Pertains to Assignment of Error 1, 2, 4).
9. Did the trial court err in admitting hearsay statements of the victim through the testimony of the victim's family counselor, Phillip Williams? (Pertains to Assignment of Error 1, 2, 4).
10. Does the record fail to contain substantial, admissible evidence sufficient to support the verdict, judgment and sentence? (Pertains to Assignments of Error 1-4).

## V. STATEMENT OF THE CASE

### A. FACTS

Defendant, Jerry Curtis Bergman (Jerry), is the father of S.T.B., a minor. RP IV at 56.<sup>1</sup> Jerry was born on May 27, 1979. RP IV at 56. S.T.B. was born on February 24, 1999. RP II at 64.

Jerry was married to S.T.B.'s mother, Brianna (nka Brianna Ramsey), in August 1998. RP II at 67. Jerry and Brianna divorced in April 2001. BR II at 68. S.T.B. was two years old when Jerry and Brianna divorced. RP II at 71. Jerry was awarded visitation with S.T.B. in the parties' parenting plan. RP II at 71. Jerry was awarded supervised visitation one night per week, for up to three hours. RP II at 72. Jerry did not start visitation with S.T.B. until January 2003. RP II at 71. At that time, Jerry had not seen S.T.B. since she was seven months old. RP II at 71.

In January 2003, Jerry moved in with his step-father, Arvid Schroeder. RP IV at 27-28. At that time, Arvid and Jerry's mother, Sheryl Schroeder, resided at 277 Woodard Road in Napavine. RP IV at 22, 45-46; EX 1. Arvid and Sheryl's Woodard Road house was painted tan. RP IV at 24; EX 1. At that time, Arvid was recovering from open heart surgery, and was not employed. RP IV at 27. Between January 2003 and February 2004, Arvid had very little occasion to leave his Woodard Road residence.

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<sup>1</sup> APP 1: Identification of Reports of Proceedings.

RP IV at 30-31. Arvid had no job at that time. RP IV at 29. Arvid took care of their farm animals when he was not working. RP IV at 46.

In March 2003, Brianna married Jeff Ramsey. RP II at 65. Jeff, Brianna and S.T.B. lived in Onalaska, and in August, 2003, they moved to Morton. RP II at 65.

Jerry occupied a bedroom at his parents' Woodard Road residence. RP IV at 28. There was a television and stereo at the Woodard Road residence, but no VHS or DVD player. RP IV at 28, 32, 54, 74, 78, 87. Jerry's bedroom contained a bed, dresser, a television, a Nintendo, a closet, but no home entertainment system, other than the television. RP IV at 73, 86. Jerry had basic cable at Woodard Road. RP IV at 97. There were no adult channels on the cable at Woodard Road. RP IV at 101. There was a bathroom across the hall from Jerry's room at Woodard Road. RP IV at 99.

In early 2003, Jerry commenced visitation with S.T.B. when she was four years old. RP II at 71. Jerry's visits took place at Brianna's grandparents house in Onalaska. RP II at 72. Brianna's grandmother is Irene King. RP II at 79. S.T.B. enjoyed her visits with Jerry. RP 72. Jerry and S.T.B. would play outside or play a board game or watch television. RP I at 72-73.

In February 2004, Jerry started dating Sabrina Rowton. RP IV at 84. Sabrina works as a billing specialist for Multicare. RP IV at 84. When Jerry and Sabrina started dating, Jerry lived with his parents at Woodard Road. RP IV at 85. Sabrina lived with her parents at that time. RP IV at 58.

In February 2004, Jerry began unsupervised visits with S.T.B. RP II at 73. Jerry and Brianna agreed on unsupervised visits for half a day on Saturday, ever other week. RP II at 75-76. S.T.B. reacted well to the unsupervised visits. RP II at 76. Brianna kept a log of Jerry's visits with S.T.B., but later acknowledged it was not accurate. RP II at 77. On her log, Brianna recorded what Jerry told her that he and S.T.B. did on a particular visit. RP II at 79. Sometimes Brianna would ask S.T.B. what she did on her visit with Jerry. RP II at 80-81. Brianna did not keep count of Jerry's unsupervised visits with S.B.T. RP II at 82.

Brianna recorded Jerry's first unsupervised visit with S.T.B on February 21, 2004. RP II at 78. The purpose of the visit on February 21, 2004 was a birthday party for S.T.B.'s cousin, Mason at Jerry's parents' house. RP II at 81. Mason is the son of Jerry's sister, Crystal, and is the same age as S.T.B. RP IV at 61.

Sabrina's first contact with S.T.B. was at the birthday party in February 2004. RP IV at 93. Sabrina has a nine-year-old daughter, K. RP

IV at 84. S.T.B. and K quickly became bonded. RP IV at 95. Sabrina would rent videos on her account and she, Jerry, K. and S.T.B. would watch children's movies. RP IV at 94. Jerry did not have a movie rental account, and could not rent movies on Sabrina's account. RP IV at 86, 94. Neither Sabrina, nor Jerry's sister, Crystal nor Arvid nor Sheryl ever saw pornographic movies or materials at Woodard Road. RP IV at 28-29, 54-55, 74, 87.

Neither Arvid nor Sheryl recalled seeing S.B.T. at Woodard Road, other than at the birthday party. RP IV at 30, 64. Sabrina accompanied Jerry on all visits with S.T.B since February 2004. Brianna acknowledged that Sabrina would sometimes accompany Jerry to pick up S.T.B. RP II at 80.

Arvid and Sheryl had sold their Woodard Road property, and on February 17, 2004, moved into their new house at 416 Hamilton Road. RP IV at 22-23; EX 2, 11. Arvid and Sheryl's Hamilton Road house is painted grey. RP IV at 24; EX 2. It took Arvid and Sheryl two to three days to move their belongings from Woodard Road to Hamilton Road. RP IV at 25-26, 70. Arvid and Sheryl were done moving by February 22, 2004. RP IV at 26. Arvid left some things in the garage, but nothing in the bedrooms, kitchen or bathroom. RP IV at 26-27. For a while after the sale, Arvid kept the utilities at Woodard Road in his name. RP IV at 38. No one

moved into Woddard Road after Arvid and Sheryl left. RP IV at 61-72. Crystal purchased Woodard Road from Arvid and Sheryl in October 2004. RP IV at 61, 72.

Jerry and Crystal both helped their parents move to Hamilton Road. RP IV at 71. Jerry helped Arvid and Sheryl move their horses to Woodard Road. RP IV at 60. Jerry occupied a bedroom at Hamilton Road. RP IV at 73. Jerry's bedroom at Woodard Road contained a bed, dresser, television, but no VHS or DVD. RP IV at 74, 77. Jerry's bedroom at Hamilton Road was on the second floor. RP IV at 95. There was an empty storage room across from Jerry's bedroom RP IV at 96. There was no bathroom or washroom on the second floor at Hamilton Road. RP IV at 96.

In the spring of 2005, Brianna and Jerry had discussions about increased visitation for Jerry with S.T.B. RP II at 82-83. In May 2005, Jerry contacted Brianna and expressed frustration that he was not getting sufficient time with S.T.B., due to pressure from his family to share time with S.T.B as well. RP II at 84-85. In July 2005, Jerry and Sabrina saw S.T.B at her swim lesson in Centralia. RP II at 85.

On March 5, 2006, Jerry served Brianna with a petition to modify their parenting plan. RP II at 87. The next morning, Brianna saw an attorney, Jennifer Johnson, to look over the papers. RP II at 87. On March 6 or 7,

around 8:30 p.m., after coming home from work, Brianna claimed to have watched an episode of Oprah on child molestation that she had recorded on TIVO. RP II at 87-88. Brianna claimed that S.T.B. came downstairs, watched a little of the episode, and then asked Brianna what molestation was. RP II at 89. Brianna claimed that she explained the term to S.T.B., and upon seeing S.T.B.'s reaction, asked S.T.B., "...has this ever happened to you?". RP II at 90. Brianna reported that S.T.B. answered "Yes", and she began to cry. RP II at 90. Brianna asked S.T.B. who did it and S.T.B. allegedly replied that it happened at Jerry's parents' house. RP II at 90-91. Brianna reported that S.T.B. did not tell her when it happened, but said it happened when she was little. RP II at 91. Brianna reported that S.T.B. said that they were both naked, and that Jerry made her watch a dirty movie and then rubbed lotion on her. RP II at 91.

Brianna called her husband, Jeff, who was then out of town on a business trip. RP III at 15. Jeff told Brianna to call 911. RP III at 15-16. Brian contacted the Lewis County Sheriff's Office, and spoke with Deputy Sue Shannon. RP III at 16. Deputy Shannon came to Brianna's house around 2:00 a.m. RP III at 17.

S.T.B. subsequently repeated her story to Lewis County Deputy Bob Nelson, Dr. Debra Hall at the St. Peter Sexual Assault unit in Olympia,

and Brianna's counselor, Phillip Williams. RP III at 152-60; 88-102; 104-126.

## **B. PROCEDURAL HISTORY**

In an amended information, the State of Washington charged Jerry under RCW 9A.44.083 with one count of child molestation in the first degree. CP 97. On July 7 and 11, 2004, the trial court held a hearing on the admissibility of S.T.B.'s hearsay statements. RP I. The trial court found S.T. B. to be competent, and found that all of the factors in *State v. Allen*, 70 Wn. 2d 690, 692, 424 P. 2d 1021 (1967) had been met. RP I at 126. The trial court found S.T.B.'s statements to be reliable, and that all of the factors under *State v. Ryan*, 103 Wn. 2d 165, 175-76, 691 P. 2d 197 (1984) were met or were inapplicable. RP I at 132-14. Following a trial, the jury returned a verdict of guilty on the single count of the amended information. CP 32. On January 30, 2007, a Felony Judgment and Sentence was entered in which Jerry was sentence to life imprisonment, and assessed penalty of \$50,000.00. CP 2-16.

## VI. ARGUMENT

### A. STANDARDS OF REVIEW

The trial court's decision to admit hearsay statements under RCW 9A.44.120<sup>2</sup> is reviewed for an abuse of discretion. *State v. Smith*, 148 Wn.2d 122, 134, 59 P.3d 74 (2003). A trial court necessarily abuses its discretion by denying a criminal defendant's constitutional rights. *State v. Petrina*, 73 Wn.App. 779, 787, 871 P.2d 637 (1994). Whether a criminal defendant's constitutional rights were violated is a question of law reviewed *de novo*. *State v. Elmore*, 121 Wn.App. 747, 757, 90 P.3d 1110, *affirmed*, 155 Wn.2d 758, 123 P.3d 72 (2005).

A trial court's determination of a witness' competency is reviewed for abuse of discretion. *State v. Woods*, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005); *Dependency of A.E.P.*, 135 Wn.2d 208, 223, 956 P.2d 297 (1998); *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). The Court may examine the entire record in reviewing the competency determination. *Woods*, 154 Wn.2d at 617.

Whether hearsay statements were sufficiently reliable to be admitted without violating the Sixth Amendment is a mixed question of law and fact. *Swan v. Peterson*, 6 F. 3d 1373, 1379 (1993). The Court reviews the trial court's factual determinations for substantial evidence, but the

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<sup>2</sup> APP 5.

ultimate determination whether admission of such statements violated Jerry's Sixth Amendment rights is reviewed *de novo* as a matter of law. *Swan*, 6 F. 3d at 1379; *State v. Hopkins*, 137 Wn.App. 441, 452, 154 P.3d 250 (2007).

In reviewing the sufficiency of the evidence to support the verdict, the court inquires 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. Williams*, 137 Wn.App. 736, 743, 154 P.3d 322 (2007). Whether or not there exists substantial evidence to support the existence of a fact is a question of law for the court on review. *State v. Hutton*, 7 Wn.App. 726, 728, 502 P.2d 1037 (1972).

**B. THE JUDGMENT AGAINST DEFENDANT WAS ENTERED IN VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS TO CONFRONT WITNESSES AND DUE PROCESS, AND IS THEREFORE VOID.**

Jerry assigns error to the verdict, judgment and sentence. CP 32; 2-16; APP 2; APP 3. Jerry is entitled the right to confront witnesses against him. U. S. Constitution Amendment 6 (*"In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him."*)<sup>3</sup> The Sixth Amendment's guaranty of the right to confront witnesses is applicable to state prosecutions. U. S. Constitution,

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<sup>3</sup> APP 4.

Amendment 14<sup>4</sup>; *Pointer v. Texas*, 380 U.S. 400, 406, 35 S. Ct. 1065, 13 L. Ed. 2d 923 (1965); *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004); *State v. Bird*, 136 Wn.App. 127, 136, 148 P.3d 1058 (2006). Jerry is also entitled “to meet the witnesses against him face to face...” Washington Constitution, Art 1, § 22.<sup>5</sup>

Jerry may assert a violation of his right to confront witnesses before this Court, regardless of whether he raised such an objection below. RAP 2.5 (a) (3) (“...[A] party may raise the following claimed errors for the first time in the appellate court... (3) manifest error affecting a constitutional right...”)<sup>6</sup>; *State v. Rohrich*, 132 Wn.2d 472, 476 n. 7, 939 P.2d 697 (1997); *State v. Clark*. 139 Wn.2d 152, 155-56, 985 P.3d 377 (1999).

The Sixth Amendment applies to “witnesses”, *i.e.*, those who “bear testimony”. *Crawford*, 541 U.S. at 51. Statements in the course of a police investigation are testimonial if the primary purpose of the investigation is to establish or prove past facts, and there is no ongoing emergency. *Davis v. Washington*, --U.S. \_\_\_, 126 S. Ct. 2266, 2273-74, 165 L. Ed. 2d 224 (2006); *Bird*, 136 Wn.App. at 137. S.T.B.’s statements to Lewis County Deputy Sheriff Bob Nelson regarding the alleged molestation of her by

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<sup>4</sup> APP 4.

<sup>5</sup> APP 4.

<sup>6</sup> APP 6.

Jerry are therefore testimonial. RP III at 155-57. Deputy Nelson referred S.T.B.'s family to Dr. Hall. RP III at 114, 157.

S.T.B.'s statements to Dr. Hall regarding the alleged molestation are also testimonial. RP III at 113-19; EX 6, 7, 8, 9. S.T.B.'s statements to Dr. Hall are also testimonial under *Crawford*, as an objective witness would reasonably believe that S.T.B. statement would be available for use at a later trial. *Crawford*, 541 U.S. at 51-52. S.T.B.'s statements to Phillip Williams a family counselor, are also testimonial under *Davis*, *Bird* or *Crawford*. RP III at 90-92, 97-99.

S.T.B.'s statements to her mother, Brianna Ramsey, are also testimonial under *Davis* and *Bird* and *Crawford*. *State v. Shafer*, 156 Wn.2d 381, 128 P.3d 87 (2006), does not compel a contrary conclusion here. *Shafer* recognized that a victim's casual remarks to family, friends or nongovernment agents are *generally* not testimonial. *Shafer*, 156 Wn.2d at 389 (*citing Crawford*, 541 U.S. at 51). Neither *Shafer* nor *Crawford* announced a bright-line rule for the testimonial character of a victim's statements to family. *Shafer* must be read in light of the further clarification, in *Davis* and *Bird*, of what is a testimonial statement for purposes of the Confrontation Clause. Moreover, in *Shafer*, the victim's disclosure to her mother, of the molestation by her aunt's boyfriend, came within hours of the incident, and was not prompted by the mother in any

way. *Shafer*, 156 Wn.2d at 389-90. Here, in contrast, S.T.B. disclosed the alleged molestation months after it allegedly occurred, and then only after her mother asked whether S.T.B. had been molested. RP II at 90. In *Shafer*, the three year old victim had no expectation that her statements would be used at trial. *Shafer*, 156 Wn.2d at 390. Here, in contrast, S.T.B. was seven years old when she told her mother. RP II at 63-64. S.T.B. also told Deputy Nelson that she wanted Jerry to go to jail for what he allegedly did to her. RP III at 157. S.T.B.'s mother, Brianna, called 911 within an hour after S.T.B.'s disclosure of the alleged molestation. RP III at 15-16. Thus, a reasonable, competent person in S.T.B.'s position would understand the import of her statement to Brianna. *Shafer* is therefore distinguishable from the facts of this case.

*Davis v. Washington* does not compel a contrary conclusion. In *Davis*, the victim's statements to the 911 operator were contemporaneous with the defendant's assault upon her, and were therefore properly characterized as having been made to enable the police to meet on ongoing emergency, and were therefore not testimonial. *Davis*, 2126 S. Ct. at 2276-77. Here, in contrast, there was no emergency pending when S.T.B. told Brianna of the alleged abuse. In fact, the last time S.T.B. saw Jerry was on July 14, 2005 at S.T.B.'s swim lesson, some eight months earlier. RP III at 85-86.

*State v. Hopkins* does not compel a contrary conclusion here. The disclosures in *Hopkins*, by the two-and-one-half-year-old victim to her mother and grandmother came shortly after the child returned from a visit with the defendant. *Hopkins*, 137 Wn.App. at 446. *Hopkins* thus resembles *Davis*, and not this case.

Equally distinguishable is *State v. Fisher*, 130 Wn.App. 1, 108 P.3d 1262 (2005). In *Fisher*, a spontaneous statement by a 29-month old victim to a family practice doctor the morning after he had been admitted to a hospital for a traumatic injury, that the defendant had struck him, was deemed nontestimonial, and therefore *Crawford* did not apply. *Fisher*, 130 Wn.App. at 13. The facts of *Fisher* bear no resemblance to the facts of this case.

*State v. Saunders*, 132 Wn.App. 592, 132 P.3d 743, *rev. denied*, 159 Wn.2d 1017, 157 P.3d 403 (2007) is also distinguishable here. In *Saunders*, a victim's statement made to a paramedic and an emergency room physician, that the defendant had choked her and threw her against a wall, were nontestimonial under *Crawford*. *Saunders*, 132 Wn.App. at 603. S.T.B.'s disclosures to Dr. Hall and Phillip Williams bear no resemblance to the disclosures in *Saunders*.

In order to satisfy the Sixth Amendment, the prosecution was required to ask S.T.B. about the facts of the event and the contents of her out-of-

court statements to Brianna, Dr. Hall, Deputy Nelson and Phillip Williams. *State v. Price*, 158 Wn.2d 630, 648, 146 P.3d 1183 (2006); *Clark*, 139 Wn.2d at 159. A recollection of the general conversation is not sufficient. *Price*, 158 Wn.2d at 646; *In re: Grasso*, 151 Wn.2d 1, 32-33, 84 P.3d 859 (2004) (*Sanders, J., dissenting*). S.T.B.'s testimony as to the acts of sexual contact alleged in the hearsay statements is a condition to admission of her out-of-court statements under RCW 9A.44.120. *Rohrich*, 132 Wn.2d at 481.

The State failed in its duty under *Price*, *Clark*, *Grasso*, and *Rohrich*. The State failed entirely in its direct exam of S.T.B. to inquire as to the contents of her statements to Dr. Hall, Deputy Nelson and Phillip Williams, as indicated by the State's questions to S.T.B. on direct:

Q: Okay. And who have you told?  
A: Deputy Bob, Toni.  
Q: This guy here?  
A: (Witness nods head affirmatively).  
Q: And Toni? Did you talk to a doctor as well?  
A: Yes.  
Q: Okay. Go ahead. That's all?  
MS. GAILFUS. Nothing further....  
RP II at 49.

Without the required testimony by S.T.B. as to the contents of her out-of-court statements to Dr. Hall, Deputy Nelson, and Phillip Williams, those statements were inadmissible under RCW 9A.44.120. *Rohrich*, 132 Wn.2d at 481.

The failure of the State to question S.T.B. as to the contents of her out-of-court statements to Dr. Hall, Deputy Nelson, and Phillip Williams is illustrated by the following question:

Q: Now did he ever try to put his private on your private?

A: He tried, but his mom pulled in before that.

RP II at 47.

In contrast, Dr. Hall's history taken from S.T.B. recites that "...*She said that he touched her privates with his private and it hurt...*" EX 7 at 2. In addition, Deputy Nelson testified over Jerry's hearsay objection that during his interview of S.T.B., that he asked her what Jerry had touched her with, and S.T.B. replied that he touched his private to her private, and it hurt. RP III at 156. By failing to ask S.T.B. about her statements to Dr. Hall and Deputy Nelson, and by introducing S.T.B.'s statements through those witnesses, the State effectively shielded S.T.B. from questioning on the most damaging evidence in the case, thereby thwarting the Confrontation Cause's preference for live testimony. S.T.B.'s hearsay statements were therefore inadmissible under RCW 9A.44.120. *Rohrich*, 132 Wn.2d at 482.

Neither *State v. Clark* nor *State v. Price* compel a contrary conclusion here. In *Clark*, at trial, the victim denied that the sexual contacts that she previously alleged ever happened, but was otherwise available for cross-examination. *Clark*, 139 Wn.2d at 161. In *Price*, the victim could not

remember events at trial, but was otherwise available for cross-examination. *Price*, 158 Wn.2d at 650. Neither such circumstance is present here.

**C. THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS OF THE ALLEGED CHILD VICTIM.**

Jerry assigns error to the trial court's finding that S.T.B. was competent. RP I at 126. The trial court erred by failing to enter written findings on competency. *Hopkins*, 137 Wn.App. at 451; *Dependency of A.E.P.*, 135 Wn.2d at 223.

A young child is competent to testify if she: (1) understands the obligation to speak the truth on the witness stand; (2) has the mental capacity, at the time of the occurrence concerning which she is to testify, to receive an accurate impression of it; (3) has a memory sufficient to retain an independent recollection of the occurrence; (4) has the capacity to express in words her memory of the occurrence; and (5) has the capacity to understand simple questions about the occurrence. *Allen*, 70 Wn.2d at 692; *Dependency of A.E.P.*, 135 Wn.2d at 223; *Woods*, 154 Wn.2d at 618.

The trial court erred in finding that all of the *Allen* factors were present. RP I at 126. In order to be competent to testify, S.T.B. must have had the mental capacity at the time of the alleged abuse to receive an

accurate impression of it. *Dependency of A.E.P.*, 135 Wn.2d at 223-24. At the competency hearing, S.T.B. could not recall how old she was when the alleged abuse occurred. RP I at 19. S.T.B. could not recall whether it was summer or winter when the alleged abuse occurred. RP II at 20-21, 35. S.T.B. could not recall what she did for her fourth birthday. RP I at 30-31. S.T.B. was confused about what she did for her third and fourth birthdays. RP I at 31. S.T.B. could not recall what she got for Christmas when she was four or five. RP I at 31. S.T.B. could not remember the first time she saw Jerry. RP I at 33. S.T.B. could not recall whether it was summer or winter when she first met Jerry. RP I at 33. S.T.B. could not remember the first thing she did with Jerry. RP I at 33. S.T.B. could not remember if Jerry ever tried to put his private part in her. RP I at 40. As a result of S.T.B.'s inability to provide a time frame in which the alleged abuse occurred, the second *Allen* factor was not satisfied. *Dependency of A.E.P.*, 135 Wn.2d at 224-25. (“*If the trial court has no idea when the alleged event occurred, the trial court cannot begin to determine whether the child had the mental ability at the time of the alleged event to receive an accurate impression of it.*”).

*State v. Woods* does not compel a contrary conclusion. In *Woods*, the record established a relatively narrow period of time, approximately nine months, in which the alleged abuse could have occurred. *Woods*, 154

Wn.2d at 618-19. The evidence in this case produced no such time period. *Woods* is therefore not controlling here.

If a child's memory of events has been corrupted by improper interviews, the third *Allen* factor, memory sufficient to retain an independent recollection of the occurrence, may not be satisfied. *Allen*, 70 Wn.2d at 692; *Dependency of A.E.P.*, 135 Wn.2d at 230. *See also, Idaho v. Wright*, 497 U.S. 805, 110 S. Ct. 3139, 111 L. Ed. 2d 638 (1990). Phillip Williams acknowledged using leading questions in his interview with S.T.B. RP I at 62; RP III at 100. The trial court therefore erred in finding that the third *Allen* factor had been met. *Allen*, 70 Wn.2d at 692; *Dependency of A.E.P.*, 135 Wn.2d at 230.

As the record does not support the trial court's findings that the *Allen* factors were satisfied, it follows that S.T.B.'s statements were improperly introduced through Brianna, Phillip Williams, Dr. Hall and Deputy Nelson. *State v. Ryan*, 103 Wn.2d 165, 203-04, 691 P.2d 197 (1984) (“*If the declarant was not competent at the time of making the statements, the statements may not be introduced through hearsay repetition.*”).

To the extent does support the trial court's finding that S.T.B was competent, under RCW 9A.44.120 (1), to be admissible, the trial court must find, in a hearing held outside the presence of the jury, “*that the time, content, and circumstances of the statement provide sufficient indicia of*

*reliability.*” Reliability is analyzed by examining the nine factors discussed in *State v. Ryan*: (1) whether the child had an apparent motive to lie, (2) the child's general character, (3) whether more than one person heard the statements, (4) the spontaneity of the statements, (5) whether trustworthiness was suggested by the timing of the statement and the relationship between the child and the witness, (6) whether the statements contained express assertions of past fact, (7) whether the child's lack of knowledge could be established through cross-examination, (8) the remoteness of the possibility of the child's recollection being faulty, and (9) whether the surrounding circumstances suggested the child misrepresented the defendant's involvement. *Ryan*, 103 Wn.2d at 175-76.

The possibility that S.T.B.'s memory was tainted by improper interviews with Phillip Williams undermines the fifth, eighth and ninth *Ryan* factors. *Dependency of A.E.P.*, 135 Wn.2d at 231. As noted in *A.E.P.*, “[t]he possibility of suggestive interviews leading to tainted child hearsay should definitely be considered by a trial court...” *Ibid.*

The trial court erred in finding that all of the *Ryan* factors were satisfied. RP I at 132-34. The trial court admitted that it did not understand the third *Ryan* factor. “*I never really quite understood what that means...*” RP I at 132. Nevertheless, the trial court found that factor satisfied. *Ibid.*

The trial court found the fourth *Ryan* factor, spontaneity of S.T.B. statements, was satisfied, despite the fact that her statements were elicited by questioning. RP I at 132. The trial court's finding is unsupported by the record. S.T.B. disclosed the alleged molestation months after it allegedly occurred, and then only after her mother asked whether S.T.B. had been molested. RP II at 90. S.T.B.'s disclosure of the alleged abuse came in response to Brianna's question, after S.T.B. watched part of an Oprah episode on child molestation, whether S.T.B. had ever been molested. RP II at 90. ("*And I asked her, [S.T.B.], has that ever happened to you?*"). Brianna's question suggested the answer. S.T.B.'s answer was therefore not spontaneous. In contrast, in *State v Henderson*, 48 Wn.App. 543, 550, 740 P.2d 329, *rev. denied*, 109 Wn.2d 1008 (1987), the victim's statements regarding her father were made in response to questions that did not suggest an answer.

Regarding the fifth *Ryan* element, the trial court was uncertain what the timing of the statements meant, commented that the delayed timing was a negative factor, but the fifth *Ryan* factor was not controlling. RP I at 133. S.T.B.'s disclosure of the alleged abuse was made in March 2006, whereas her last contact with Jerry was on July 14, 2005. RP II at 85. S.T.B. was equivocal when asked why she did not report the alleged abuse earlier. RP II at 48. The trial court's finding on the fifth *Ryan* element is

not supported by substantial evidence. The fifth *Ryan* element is also undermined by the improper interview techniques employed by Phillip Williams against S.T.B, as are the eighth and ninth *Ryan* factors. *Dependency of A.E.P.*, 135 Wn.2d at 231.

The trial court erred in ruling that S.T.B.'s out-of-court statements to Dr. Hall and Deputy Nelson were admissible under RCW 9A.44.120. RP I at 132. As the State had failed to adequately question S.T.B on direct, S.T.B.'s hearsay statements violated Jerry's constitutional right to confront witnesses, and were therefore inadmissible under RCW 9A.44.120. *Rohrich*, 132 Wn.2d at 482.

The trial court erred in overruling Jerry's hearsay objections to the testimony of Brianna, Deputy Nelson, and Phillip Williams concerning out-of-court statements made to them by S.T.B. RP II at 90; RP III at 12, 92, 155. S.T.B.'s out-of-court statements were hearsay, and should have been excluded. ER 801(c)<sup>7</sup>; ER 802<sup>8</sup>; *State v. Hendrickson*, -- Wn.App. \_\_\_, 158 P.3d 1257, 1260-61 (2007).

S.T.B.'s statements to Phillip Williams were not admissible under ER 803(a)(4),<sup>9</sup> as there was no showing that Williams explained to S.T.B. that her successful treatment depended upon S.T.B. providing truthful and

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<sup>7</sup> APP 7.

<sup>8</sup> APP 7.

<sup>9</sup> APP 7.

accurate information about what had happened to her. RP III at 88-102. Admission of S.T.B.'s out-of-court statements through Phillip Williams was therefore reversible error. *State v. Carol M.D.*, 89 Wn.App. 77, 87, 948 P.2d 837 (1998).

**D. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT.**

Jerry assigns error to the verdict and judgment. CP \_\_, \_\_; APP 2, 3.

As set forth in paragraphs A-C, above, S.T.B. was not competent to testify, admission of S.T.B.'s out-of-court statements to Brianna, Dr. Hall, Deputy Nelson and Phillip Williams violated Jerry's constitutional rights to confront witnesses and were therefore inadmissible, S.T.B.'s statements were inadmissible under RCW 9A.44.120, were otherwise inadmissible as hearsay under ER 801(c) and ER 802, and were not admissible under any applicable hearsay exception. It follows that there is no admissible substantial evidence to support the verdict, and the verdict must therefore be reversed. *State v. Hutton*, 7 Wn.App. at 729.

**VII. CONCLUSION**

In light of the foregoing, the Court should reverse the orders, verdict and judgment challenged above.

Respectfully submitted

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Attorney for Appellant

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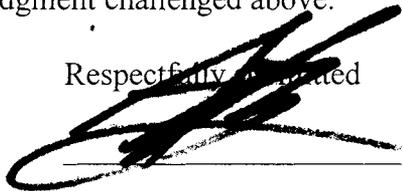
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**VII. CONCLUSION**

In light of the foregoing, the Court should reverse the orders, verdict and judgment challenged above.

Respectfully,  


Attorney for Appellant

## VIII. APPENDICES

- Appendix 1. Identification of Reports of Proceedings
- Appendix 2. Verdict
- Appendix 3. Judgment and Sentence
- Appendix 4. Constitutional Provisions
- Appendix 5. Revised Code of Washington
- Appendix 6. Rules of Appellate Procedure
- Appendix 7. Rules of Evidence

### **Appendix 1. Identification of Reports of Proceedings**

- RP I. Hearing of July 7 and 11, 2006.
- RP II. Hearing of December 4, 2006.
- RP III. Hearing of December 5, 2006.
- RP IV. Hearing of December 6, 2006.

**Appendix 2. Verdict**

### **Appendix 3. Judgment and Sentence**

#### **Appendix 4. Constitutional Provisions**

##### **U. S. Constitution Amendment 6.**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

##### **U. S. Constitution, Amendment 14.**

SECTION. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

SECTION. 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

SECTION. 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

SECTION. 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

SECTION. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

**Washington Constitution, Art 1, § 22.**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station or depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

[AMENDMENT 10, 1921 p 79 Section 1. Approved November, 1922.]

## Appendix 5. Revised Code of Washington

### RCW 9A.44.120

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

- (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
- (2) The child either:
  - (a) Testifies at the proceedings; or
  - (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.

[1995 c 76 § 1; 1991 c 169 § 1; 1985 c 404 § 1; 1982 c 129 § 2.]

## **Appendix 6. Rules of Appellate Procedure**

### **RAP 2.5 (a) (3)**

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

## **Appendix 7. Rules of Evidence**

### **ER 801(c)**

The following definitions apply under this article:

...

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

...[Amended effective September 1, 1992.]

### **ER 802**

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute. [Adopted effective April 2, 1979.]

### **ER 803(a)(4)**

(a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

...

(4) Statements for Purposes of Medical Diagnosis or Treatment.

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

...

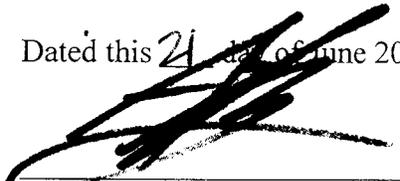
[Amended effective September 1, 1992.]

**IX. CERTIFICATE OF MAILING**

The undersigned hereby declares that on June 21, 2007, the undersigned served upon Respondent the BRIEF OF APPELLANT by depositing a copy of same in the United States Mail, First-Class Postage prepaid, addressed to the following:

TERRI GAILFUS  
Lewis County Prosecuting Attorney  
345 West Main Street, 2<sup>nd</sup> Floor MSPRO01  
Chehalis, WA. 98532-1900

Dated this 21 day of June 2007 at King County, WA.

  
\_\_\_\_\_  
Declarant

FILED  
COURT OF APPEALS  
JULY 25 11 09 AM '08  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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Dated this \_\_\_\_ day of June 2007 at King County, WA.

\_\_\_\_\_  
Declarant

Received & Filed  
LEWIS COUNTY, WASH  
Superior Court

JAN 30 2007

By Kathy A. Brack, Clerk  
Deputy

Superior Court of Washington  
County of Lewis

State of Washington, Plaintiff,

vs.

JERRY CURTIS BERGMAN;  
Defendant.

SID: WA

If no SID, use DOB: 5-27-79

No. 06-1-245-2

**Felony Judgment and Sentence (FJS)**

Prison  RCW 9.94A.712 Prison Confinement

Jail One Year or Less  RCW 9.94A.712 Prison Confinement

First-Time Offender

Special Sexual Offender Sentencing Alternative

Special Drug Offender Sentencing Alternative

Clerk's Action Required, ~~para 4.5 (SDOSA)~~,  
4.15.2, 5.3, 5.6 and 5.8

**I. Hearing**

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

**II. Findings**

There being no reason why judgment should not be pronounced, the court  **Finds:**

**2.1 Current Offense(s):** The defendant was found guilty on 12-07-06

by  plea  jury-verdict  bench trial of:

Count	Crime	RCW	Date of Crime
I	Child Molestation in the First Degree	9A.44.083	On, about, or between 1-1-03 and 6-1-05

(If the crime is a drug offense, include the type of drug in the second column.)  
as charged in the Amended Information.

Additional current offenses are attached in Appendix 2.1.

The court finds that the defendant is subject to sentencing under **RCW 9.94A.712.**

A special verdict/finding that the offense was predatory was returned on Count(s) \_\_\_\_\_, RCW 9.94A.\_\_\_\_.

A special verdict/finding that the victim was under 15 years of age at the time of the offense was returned on Count(s) \_\_\_\_\_, RCW 9.94A.\_\_\_\_.

*Felony Judgment and Sentence (FJS)*  
*(RCW 9.94A.500, .505)(WPF CR 84.0400 (6/2006))*

- A special verdict/finding that the victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense was returned on Count(s) \_\_\_\_\_ RCW 9.94A.\_\_\_\_, 9A.44.010.
- A special verdict/finding of **sexual motivation** was returned on Count(s) \_\_\_\_\_. RCW 9.94A.835.
- This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- A special verdict/finding for use of **firearm** was returned on Count(s) \_\_\_\_\_. RCW 9.94A.602, 9.94A.533.
- A special verdict/finding for use of **deadly weapon other than a firearm** was returned on Count(s) \_\_\_\_\_. RCW 9.94A.602, 9.94A.533.
- A special verdict/finding for **Violation of the Uniform Controlled Substances Act (VUCSA)** was returned on Count(s) \_\_\_\_\_, RCW 69.50.401 and RCW 69.50.435, taking place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- A special verdict/finding that the defendant committed a crime involving the manufacture of methamphetamine including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** was returned on Count(s) \_\_\_\_\_. RCW 9.94A.605, RCW 69.50.401, RCW 69.50.440.
- The defendant was convicted of **vehicular homicide** which was proximately caused by a person driving a vehicle while under the influence of intoxicating liquor or drug or by the operation of a vehicle in a reckless manner and is therefore a violent offense. RCW 9.94A.030.
- The court finds that the offender has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607.
- The crime charged in Count(s) \_\_\_\_\_ involve(s) **domestic violence**.
- Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

**2.2 Criminal History (RCW 9.94A.525):**

	<b>Crime</b>	<b>Date of Sentence</b>	<b>Sentencing Court (County &amp; State)</b>	<b>Date of Crime</b>	<b>A or J Adult, Juv.</b>	<b>Type of Crime</b>
1	Burglary in the First Degree	8-21-01 (resentence)	Lewis County, WA	3-11-99 3-12-99	A	Violent A
2	Theft of a Firearm	8-21-01 (resentence)	Lewis County, WA	3-11-99 3-12-99	A	C
3	Theft of a Firearm	8-21-01 (resentence)	Lewis County, WA	3-11-99 3-12-99	A	C
4	Theft of a Firearm	8-21-01 (resentence)	Lewis County, WA	3-11-99 3-12-99	A	C
5	Residential Burglary	8-21-01	Lewis County, WA	6-25-97 7-2-92	A	B
6	Burglary in the Second degree	8-21-01	Lewis County, WA	6-25-97 7-2-92	A	B
7	Theft in the Second Degree	8-21-01	Lewis County, WA	6-25-97 7-2-92	A	C

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement (adds one point to score).

*Felony Judgment and Sentence (FJS)*  
(RCW 9.94A.500, .505)(WPF CR 84.0400 (6/2006))

RCW 9.94A.525.

The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

The following prior convictions are not counted as points but as enhancements pursuant to RCW 46.61.520:

**2.3 Sentencing Data:**

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
1	6	X	98-130 to life under 9.94A.712		98-130 to Life under 9.94A.712	Life and or \$50,000

\* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8).

Additional current offense sentencing data is attached in Appendix 2.3.

**2.4  Exceptional Sentence.** Substantial and compelling reasons exist which justify an exceptional sentence:

- within  below the standard range for Count(s) \_\_\_\_\_.
- above the standard range for Count(s) \_\_\_\_\_.

The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

Aggravating factors were  stipulated by the defendant,  found by the court after the defendant waived jury trial,  found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4.  Jury's special interrogatory is attached. The Prosecuting Attorney  did  did not recommend a similar sentence.

**2.5 Ability to Pay Legal Financial Obligations.** The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are  attached  as follows: \_\_\_\_\_

**III. Judgment**

3.1 The defendant is **Guilty** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2  The court **Dismisses** Counts \_\_\_\_\_  The defendant is found **Not Guilty** of Counts \_\_\_\_\_

**IV. Sentence and Order**

**It is Ordered:**

4.1 Defendant shall pay to the clerk of this court:

JASS CODE

\$ 10.10 Restitution to: Brianna Ramsey

RTN/RJN

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_

(Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)

PCV \$ 500 Victim assessment RCW 7.68.035

\$ \_\_\_\_\_ Domestic Violence assessment RCW 10.99.080

CRC \$ \_\_\_\_\_ Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190

Criminal filing fee \$ 200 FRC

Witness costs \$ \_\_\_\_\_ WFR

Sheriff service fees \$ 1190.25 SFR/SFS/SFW/WRF

Jury demand fee \$ \_\_\_\_\_ JFR

Extradition costs \$ \_\_\_\_\_ EXT

Other \$ \_\_\_\_\_

PUB \$ \_\_\_\_\_ Fees for court appointed attorney RCW 9.94A.760

WFR \$ \_\_\_\_\_ Court appointed defense expert and other defense costs RCW 9.94A.760

FCM/MTH \$ \_\_\_\_\_ Fine RCW 9A.20.021;  VUCSA chapter 69.50 RCW,  VUCSA additional fine deferred due to indigency RCW 69.50.430

CDF/LDI/PCD \$ \_\_\_\_\_ Drug enforcement fund of \_\_\_\_\_ RCW 9.94A.760  
NTF/SAD/SDI

CLF \$ \_\_\_\_\_ Crime lab fee  suspended due to indigency RCW 43.43.690

\$ 100 Felony DNA collection fee  not imposed due to hardship RCW 43.43.7541

RTN/RJN \$ \_\_\_\_\_ Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000 maximum) RCW 38.52.430

\$ 1,000 Other costs for: Jail Fee

\$ \_\_\_\_\_ **Total** RCW 9.94A.760

The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.

is scheduled for \_\_\_\_\_

**Restitution** Schedule attached.

Restitution ordered above shall be paid jointly and severally with:

<u>Name of other defendant</u>	<u>Cause Number</u>	<u>(Victim's name)</u>	<u>(Amount-\$)</u>
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RJN

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The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ 25.00 per month commencing 60 days from entry of J&S. RCW 9.94A.760.

The defendant shall report as directed by the clerk of the court and provide financial information as requested. RCW 9.94A.760(7)(b).

In addition to the other costs imposed herein, the court finds that the defendant has the means to pay for the cost of incarceration and is ordered to pay such costs at the rate of \$50.00 per day, unless another rate is specified here: \_\_\_\_\_ . (JLR) RCW 9.94A.760.

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

**4.2 DNA Testing.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

**HIV Testing.** The defendant shall submit to HIV testing. RCW 70.24.340.

4.3 The defendant shall not have contact with Sydney Ramsey DOB 2-24-99 including, but not limited to, personal, verbal, telephonic, written or contact through a third party for LIFE years (not to exceed the maximum statutory sentence).

Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

The defendant is ordered to reimburse \_\_\_\_\_ (name of electronic monitoring agency) at \_\_\_\_\_, for the cost of pretrial electronic monitoring in the amount of \$ \_\_\_\_\_.

**4.4 Other:** \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

**4.5 C onfimenent Over One Year.** The defendant is sentenced as follows:

- (a) **Confinement.** RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

\_\_\_\_\_ months on Count 1A \_\_\_\_\_ months on Count \_\_\_\_\_  
\_\_\_\_\_ months on Count \_\_\_\_\_ \_\_\_\_\_ months on Count \_\_\_\_\_  
\_\_\_\_\_ months on Count \_\_\_\_\_ \_\_\_\_\_ months on Count \_\_\_\_\_

Actual number of months of total confinement ordered is: \_\_\_\_\_  
(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above.)

The confinement time on Count(s) \_\_\_\_\_ contain(s) a mandatory minimum term of \_\_\_\_\_.

All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: \_\_\_\_\_

The sentence herein shall run consecutively with the sentence in cause number(s) \_\_\_\_\_

but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: \_\_\_\_\_

- (b) **Confinement.** RCW 9.94A.712 (Sex Offenses only): The defendant is sentenced to the following term of confinement in the custody of the DOC:

Count I minimum term 120 maximum term LIFE  
Count \_\_\_\_\_ minimum term \_\_\_\_\_ maximum term \_\_\_\_\_

- (c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 55 days

**4.6**  **Community Placement** is ordered as follows: Count \_\_\_\_\_ for \_\_\_\_\_ months;  
Count \_\_\_\_\_ for \_\_\_\_\_ months; Count \_\_\_\_\_ for \_\_\_\_\_ months.

**Community Custody** for count I sentenced under RCW 9.94A.712, is ordered for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.

**Community Custody** is ordered as follows:

Count \_\_\_\_\_ for a range from \_\_\_\_\_ to \_\_\_\_\_ months;  
Count \_\_\_\_\_ for a range from \_\_\_\_\_ to \_\_\_\_\_ months;  
Count \_\_\_\_\_ for a range from \_\_\_\_\_ to \_\_\_\_\_ months;

or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses, which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and chapter 69.50 or 69.52 RCW offenses not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant committed a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine including its salts, isomers, and salts of isomers,		
vii) Offense for delivery of a controlled substance to a minor; or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment.		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOG approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC; and (8) for sex offenses, submit to electronic monitoring if imposed by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

The defendant shall not consume any alcohol.

Defendant shall have no contact with Sydney Ramsey.

Defendant shall remain  within  outside of a specified geographical boundary, to wit: as recommended by DOC.

Defendant shall not reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school). (RCW 9.94A.030(8)).

The defendant shall participate in the following crime-related treatment or counseling services: as recommended by DOC

The defendant shall comply with the following crime-related prohibitions: Appendix H is incorporated by reference

Other conditions: as recommended by CCO and or treatment provider.

For sentences imposed under RCW 9.94A.712, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

**4.7  Work Ethic Camp.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6

**4.8 Off Limits Order.** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: \_\_\_\_\_

## V. Notices and Signatures

**5.1 Collateral Attack on Judgment.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

**5.2 Length of Supervision.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

**5.3 Notice of Income-Withholding Action.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

**5.4 Restitution Hearing.**

Defendant waives any right to be present at any restitution hearing (sign initials): \_\_\_\_\_.

**5.5** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. RCW 9.94A.634.

**5.6 Firearms.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The clerk of the court shall forward a copy of the defendant's driver's license, identicard, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

**5.7 Sex and Kidnapping Offender Registration.** RCW 9A.44.130, 10.01.200.

**1. General Applicability and Requirements:** Because this crime involves a sex offense or kidnapping offense involving a minor as defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

**2. Offenders Who Leave the State and Return:** If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three business days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry on a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

**3. Change of Residence Within State and Leaving the State:** If you change your residence within a county, you must send signed written notice of your change of residence to the sheriff within 72 hours of

moving. If you change your residence to a new county within this state, you must send signed written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving and register with that sheriff within 24 hours of moving. You must also give signed written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

**4. Additional Requirements Upon Moving to Another State:** If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

**5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12):** If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination. (Effective September 1, 2006) If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. If you are enrolled on September 1, 2006, you must notify the sheriff immediately. The sheriff shall promptly notify the principal of the school.

**6. Registration by a Person Who Does Not Have a Fixed Residence:** Even if you do not have a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within 48 hours excluding weekends and holidays, after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You may be required to provide a list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

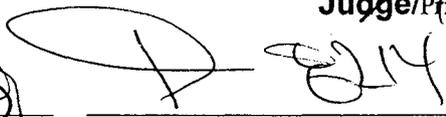
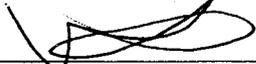
**7. Reporting Requirements for Persons Who Are Risk Level II or III:** If you have a fixed residence and you are designated as a risk level II or III, you must report, in person, every 90 days to the sheriff of the county where you are registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. If you comply with the 90 day reporting requirement with no violations for at least 5 years in the community, you may petition the superior court to be relieved of the duty to report every 90 days.

**8. Application for a name Change:** If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

- 5.8  The court finds that Count \_\_\_\_\_ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.
- 5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

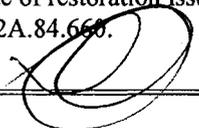
5.10 Other: \_\_\_\_\_

Done in Open Court and in the presence of the defendant this date: 1-30-07

 Deputy Prosecuting Attorney WSBA No. 30489 Print or Type Name: Terri J. Gailfus	 Attorney for Defendant WSBA No. _____ Print or Type Name: Robert Brungardt	 Defendant Print or Type Name: Jerry Curtis Bergman
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Judge/Print or Type Name: Richard L. Basso

**Voting Rights Statement:** I acknowledge that my right to vote has been lost due to felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 92A.84.660.

Defendant's signature: 

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the \_\_\_\_\_ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: \_\_\_\_\_

I, \_\_\_\_\_, Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

**Witness** my hand and seal of the said Superior Court affixed this date: \_\_\_\_\_

Clerk of the Court of said county and state, by: \_\_\_\_\_, Deputy Clerk

### Identification of Defendant

SID No. \_\_\_\_\_ Date of Birth \_\_\_\_\_  
(If no SID take fingerprint card for State Patrol)

FBI No. \_\_\_\_\_ Local ID No. \_\_\_\_\_

PCN No. \_\_\_\_\_ Other \_\_\_\_\_

Alias name, DOB: \_\_\_\_\_

**Race:**

- Asian/Pacific Islander     Black/African-American     Caucasian  
 Native American     Other: \_\_\_\_\_

**Ethnicity:**

- Hispanic  
 Non-Hispanic

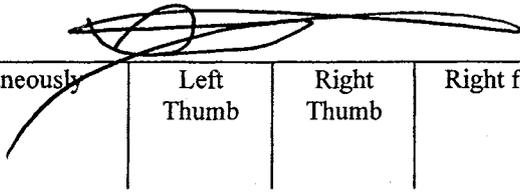
**Sex:**

- Male  
 Female

**Fingerprints:** I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto.

Clerk of the Court, Deputy Clerk, S. Tyler Dated: 1/30/07

**Defendant's Signature:**



Left four fingers taken simultaneously

Left  
Thumb

Right  
Thumb

Right four fingers taken simultaneously



THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR LEWIS COUNTY

STATE OF WASHINGTON,  
Plaintiff,

v.

Jerry Curtis Bergman;  
Defendant.

No. 06-1-245-2

ADDITIONAL CONDITIONS OF COMMUNITY  
CUSTODY

APPENDIX H  
TO JUDGMENT AND SENTENCE

**Community Placement/ Custody:** Defendant additionally is sentenced on convictions herein, for each sex offense to

Community custody for the remainder of the sentence under 9.94A.712. Community

Custody is to begin either upon

Completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of early release.

The conditions of Community Custody begin immediately.

**The following are additional conditions of community custody ordered in this Judgment & Sentence:**

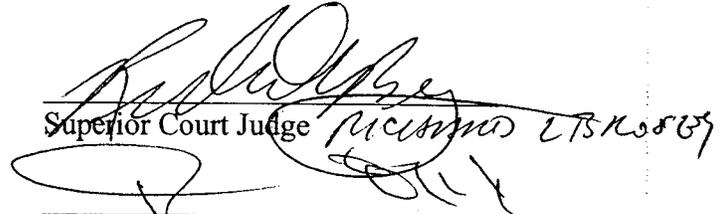
1. Report to and be available for contact with the assigned Community Corrections Officer as directed;
2. Work at Department of Corrections approved education, employment, and /or community service;

3. Not consume controlled substances except pursuant to lawfully issued prescriptions;
4. While in community custody not unlawfully possess controlled substances;
5. Pay supervision fees as determined by the Department of Corrections;
6. Receive prior approval for living arrangements and residence location;
7. Defendant shall not own, use, or possess a firearm or ammunition when sentenced to community supervision, or both (RCW 9.94A.120 (13));
8. Notify community corrections officer of any change in address or employment; and
9. Remain within geographic boundary, as set forth in writing by the Community Corrections Officer.
10. Shall not consume or possess any intoxicating beverages;
11. Shall submit to urinalysis and evaluation by a state approved agency as ordered by the Department Of Corrections;
12. Shall submit to regular polygraph and plethysmograph testing upon the request of his therapist and/or Community Corrections Officer.
13. Shall submit to DNA / HIV testing required by law within 30 days of sentencing.
14. Shall participate in and successfully complete sex offender treatment with a state certified sexual deviancy treatment provider.
15. Shall have no contact with minor children without supervision and approval from his treatment provider and/ or CCO.
16. Shall not develop any relationship with another person who has minor children in their care of custody without the approval of the therapist and or Community Corrections Officer.
17. Shall not frequent areas where children congregate such as schools, parks, playgrounds, shopping malls unless approved by the therapist and Community Corrections Officer.
18. Shall be prohibited from contacting S.B. DOB 2-24-99 for life without the permission of the court.

19. Shall complete Sex Offender Registration requirement within 24 hours of release of confinement per RCW 9.94A.030.
1. Shall participate in all program rules, department of corrections' guidelines, and state laws.

Dated this 30th day of January, 2007

  
Terri J. Galfus, WSBA #70489  
Deputy Prosecuting Attorney

  
Superior Court Judge *Richard L. Brungardt*  
Robert Brungardt, WSBA #  
Attorney for Defendant

FILED  
COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff,

VS

JERRY CURTIS BERGMAN, Defendant.

COA No. 35988-O-II  
Case No. 06-1-245-2

CERTIFICATE OF SERVICE

SID: WA  
If no SID, use DOB 5-27-79

I declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

I am employed by Alan M. Singer.

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above-entitled action, and competent to be a witnesses herein.

On the date set forth below I served in the manner noted the document(s) entitled:

**BREIF OF APPELLANT**

on the following persons:

/

**CERTIFICATE OF SERVICE**

**ALAN M. SINGER**  
ATTORNEY  
16400 Southcenter Parkway  
Suite #407  
Seattle, Washington 98188  
Office: 206-575-4440  
Fax: 206-575-8206

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Jerry Curtis Bergman  
DOC 803418  
CC-10  
1830 Eagle Crest Way  
Clallum Bay, WA 98326

U.S. Mail  
 Telecopier  
 Messenger

DATED this 21 day of June 2007, at Seattle, Washington.

  
Amy Redding

**CERTIFICATE OF SERVICE**

Page 2 of 2  
VMR

**ALAN M. SINGER**  
ATTORNEY  
16400 Southcenter Parkway  
Suite #407  
Seattle, Washington 98188  
Office: 206-575-4440  
Fax: 206-575-8206