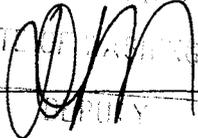


NO. 36602-9-II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

State of Washington, Respondent

v.

Jason Alan Swan, Appellant

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Appeal from the Superior Court of Pierce County  
The Honorable Vicki L. Hogan  
Pierce County Superior Court Cause No. 05-1-02947-3

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**BRIEF OF APPELLANT**

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2. Was trial counsel ineffective for failing to propose a limiting instruction pursuant to WPIC 5.30 where the state's witnesses testified that the defendant had been "humping" his daughter and that evidence was admitted as "lustful disposition" evidence?

3. Did the trial court err when it admitted impeachment evidence on a collateral matter which impermissibly and unfairly portrayed the defendant as a drunk and a drug user?

4. Should this court reverse the defendant's conviction where the state failed to prove beyond a reasonable doubt that the defendant committed the crime of child molestation?

5. Should this court reverse the defendant's conviction under the cumulative error doctrine?

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did trial counsel fail to provide constitutionally effective representation to the defendant?

2. Did the state adduce sufficient evidence to prove beyond a reasonable doubt that the defendant committed the crime of first degree child molestation?

3. Did the trial court err when it admitted impeachment evidence on a collateral matter where that evidence was unfairly prejudicial to the defendant?

4. Is the defendant entitled to relief under the cumulative error doctrine?

C. STATEMENT OF THE CASE.

1. Procedure.

The state charged JASON ALAN SWAN, hereinafter the defendant, with the crime of child molestation in the first degree. CP 1-2. The state alleged a charging period of July 1 – 30, 2004. *Id.*

The defendant entered a not guilty plea and the matter proceeded to trial before Pierce County Superior Court department 5, the Honorable Vicki L. Hogan. RP 1: 3.

Prior to trial the court held a hearing to determine the admissibility of child hearsay pursuant to RCW 9A.44.120<sup>1</sup>. The state called the following witnesses: Michelle Breland from Mary Bridge Children's Hospital; Keri Arnold-Harms, an interviewer with the prosecutor's office; Shawnte Papac, the mother of the alleged victim; and Morgan Papac, the alleged victim. RP<sup>2</sup> 2: 5, 20, 45, 51.

Shawnte Papac testified that her daughter Morgan was born on December 24, 1994 and that the defendant is her biological child. RP 2: 46. She related that in July 2004 she listened to a voice mail left by Morgan, who was visiting the defendant. *Id.* Morgan was crying and was difficult to understand. RP 2: 47.

When Morgan returned home the following day, she told her mother that the defendant had rubbed her back and then inserted his hands inside her clothes and rubbed her butt. RP 2: 49. Morgan later related that the defendant had "stuck his hand in her butt and vagina and his fingers wiggled." RP 2: 51.

Morgan also testified at the hearsay hearing. RP 2: 51.

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<sup>1</sup> See Appendix "A"

<sup>2</sup> The verbatim reports of proceedings are numbered by Volume. Volumes I, II, and III all start with page 1. Volume IV continues the pagination from Volume III. For purposes of convenience, the appellant refers to the Volumes 1, 2, 3, 4, and then the appropriate page number.

After the witnesses testified, the state argued for the admission of the hearsay statements under the Ryan factors. RP 2: 58-64.

The defendant conceded that the statements to Michelle Breland and Keri Arnold-Harms were admissible. RP 2: 64. The defendant argued that the statements to Shawnte Papac were not admissible because the content of those statements was “diametrically opposed” to the content of the later disclosures. RP 2: 65.

The court ruled that the hearsay statements from Morgan to her mother were admissible. RP 2: 72. The court also ruled that Morgan’s statements to Michelle Breland were admissible pursuant to ER 803(a)(3)<sup>3</sup>, as statements for medical diagnosis or treatment. RP 2:72.

The state also argued that the court should admit evidence of lustful disposition. RP 2: 82 -85. The state contended that testimony regarding “humping” or “straddling” of Morgan by the defendant should be admitted as prior misconduct. *Id.* The state maintained that the probative value of this evidence would be to establish that the defendant wanted to touch his daughter for purposes of sexual gratification. RP 2: 84. The court, after hearing argument and considering the relevant factors, ruled such testimony admissible. RP 2: 91-93. However, the court granted the defendant’s motion

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<sup>3</sup> See Appendix “B”

to prohibit the use of the term “lustful disposition” as a label for such evidence. RP 2: 94. Defense counsel also recognized the need for a limiting instruction, but thereafter failed to present any such instruction. RP 2: 88: *passim*.

Trial before the jury commenced on March 15, 2007. RP 3: 18.

After the trial began, the court held another hearing to determine the admissibility of statements made by Morgan to Michelle Wettig, a CPS supervisor in Mason County. RP 4:144-151. The court considered the Ryan factors and admitted the statements. RP 151.

During trial, the prosecutor elicited testimony from Shawnte Papac that at one time she had asked the court to limit contact between the defendant and his daughters because the defendant used drugs and alcohol. RP 3: 102. The defendant objected to this evidence as character evidence. RP 3: 102. During argument outside the presence of the jury, the prosecutor asked the court to admit the evidence “not for the truth of the matter asserted” but rather to explain why the mother limited or restricted visitation. *Id.* The court overruled the defendant’s objection. RP 3: 104. Neither the state nor the defendant proposed a limiting instruction and so the jury was free to use this evidence for any purpose. RP 3: 105.

Michelle Wettig, a CPS worker, testified that Morgan had stated that the defendant had been “humping” her for about 12 weeks. RP 4: 165-66. Defense counsel failed to ask for a limiting instruction regarding this evidence and so the jury was free to use this testimony for any purpose. RP 3: 166.

During closing argument, the prosecutor argued that the defendant’s contact with Morgan and her sister was conditioned on his completion of drug and alcohol treatment. RP 5: 254, 255. He argued that this was so because the mother wanted the children to be safe. *Id.*

On March 20, 2007, the jury convicted the defendant of the crime of child molestation in the first degree. RP 5: 288: CP 68.

On July 13, 2007, the court convened the sentencing hearing. RP 6: 297. The sentencing hearing was beyond the 40 day time limit because the Department of Corrections had done such a poor job on the first pre-sentence report. *Id.*; RP 6: 302. The state asked the court to sentence the defendant to the high end of standard range, 61 months in prison. RP 6: 298-99. The court sentenced the defendant to 55 months in prison. RP 6: 303.

The defendant thereafter timely filed this appeal. CP 95.

2. Facts.

Morgan Papac, birthdate December 24, 1994, is the daughter of the defendant. RP 3:66. During the summer between her third grade and fourth grade, she visited the defendant at his aunt's house in Buckley. RP 3: 67. The visits occurred every other weekend. *Id.*

When she visited, she shared a bedroom with the defendant. RP 3: 68. There was no door on the bedroom. RP 3: 78. She alleged that during this time, she was "sexually abused." RP 3: 71. Morgan stated that the defendant touched her "in the private area" when they were on their beds. RP 3: 71. She was lying down on her stomach on her bed. RP 3: 74. She alleged that the touching occurred on her skin. RP 3: 71. The television was on at this time. RP 3: 72-73. She described that the touching started when the defendant rubbed her back over her clothes and then went under her clothes to he private area. RP 3: 73-74. Morgan stated that the defendant touched her butt first and then touched her "private area." RP 3: 74-75. After the defendant removed his hand, she got up and walked out of the bedroom. RP 3: 75.

Morgan told her mother what had happened when her mother picked her up the next day. RP 3: 75.

Prior to this event, Morgan repeatedly had told her mother that she did not want to visit her father, the defendant. RP 3: 78. She started objecting to the visits about four visits prior to the visit after which she made the allegations. RP 3: 78. Over her objections, she was told that she needed to visit her father. RP 3: 78. Morgan's mother, Shawnte actively discouraged contact between the defendant and his daughters. For example, she refused to permit the defendant to talk by phone to his daughters on holidays. RP 5: 246-247.

Morgan did not like some of the people at her aunt's house as well as the movies that she watched there. RP 3:80, 82. Morgan did not like her grandma Nancy because she was "grumpy." RP 3: 80. She thought that "Star Wars" and "Three Musketeers" were scary and "inappropriate" movies for a nine year old girl. RP 3: 81-82. Morgan also alleged that the defendant would yell at her and be mean to her. RP 3: 83.

Morgan liked her aunt Debbie and would have told her if something bothered her. RP 3: 82. She did not tell Aunt Debbie about any touching. RP 3: 83. Morgan also thought that if she said something that might hurt her dad, her aunt and her grandma would back him up. RP 3: 84.

Shawnte Papac, Morgan's mother, received a phone message from Morgan the night before her daughter returned from the last visit with the defendant. RP 3: 90. Morgan sounded upset. *Id.* Shawnte called her daughter and noted that Morgan sounded "stressed." RP 3: 91. Had Shawnte believed that her daughter was in any danger, she would have taken immediate action. RP 3: 109.

Shawnte later recalled that she received the first message from Morgan in the early afternoon. RP 3: 98. This call occurred before Morgan even alleged that the so-called abuse had occurred. RP 3: 98.

After Shawnte picked up her daughter and returned home, she had a conversation with Morgan. RP 3: 92. Morgan related that the defendant touched her by rubbing her back and her butt. RP 3: 93. She also related he inserted a finger into her butt and her vagina. RP 3:93. Morgan described that the finger wiggled. RP 3:93. Shawnte called Child Protective Services (CPS) that night. RP 3: 94.

Shawnte works for the Department of Social and Health Services (DSHS). RP 3: 96. CPS is a division of DSHS. RP 3: 97. Even though she knew that her daughter had alleged criminal acts, she called CPS instead of the police. RP 3: 99.

Prior to this incident, Shawnte had asked the courts to prohibit the defendant from having any contact with his children. RP 3:100. Shawnte alleged that she did so because the defendant drank alcohol and used drugs. RP 3: 102. She averred that the defendant earlier had appeared intoxicated at a meeting with a guardian ad litem. RP 3: 105. Nevertheless, the parenting plan allowed him visitation every other weekend. RP 3: 106.

Michelle Breland, a nurse practitioner at Mary Bridge, examined Morgan on July 21, 2004. RP 4: 127. During the course of the examination, Morgan told Breland that the defendant "was basically humping me." RP 4: 131. She also stated that the defendant touched her private area and gave her the heebie-jeebies. RP 4: 132. Morgan informed Breland that she did not like her father because he had "a big attitude, a big, big, big attitude." RP 4: 132.

Although the medical exam affirmed that Morgan had a normal variant to her hyman, she otherwise showed no physical evidence of having been sexually assaulted. RP 4: 135, 137.

Keri Arnold-Harms, the prosecutor's interviewer, interviewed Morgan on August 10, 2004. RP 3: 32. That interview was audio-taped. RP 3: 43. The failure to video-record denied the jury the opportunity to view the body language employed by Morgan and the interviewer. RP 3: 43. During that interview, Arnold-Harms never asked Morgan about her relationship with her

father. RP 3: 55. Similarly, she never asked the child's mother about her relationship with the defendant. RP 3: 55. She failed to do so, despite knowing that such issues of family dynamics may be highly relevant to determining the existence of any motive to fabricate. RP 3: 55.

During the interview, Morgan related that the defendant had been "humping" on her. RP 3: 45-46. During the "humping", the defendant's butt reportedly was going back and forth. RP 3:50.

Michelle Wettig of CPS also interviewed Morgan on July 23, 2004, at the Tumwater CPS office. RP 4: 156-57, 161. Morgan related that the humping had been going on for a long time, about 12 weeks. RP 4: 166. Wettig never asked her why she had waited so long to disclose this. *Id.* Wettig repeatedly asked Morgan whether the defendant told her not to tell about the alleged conduct and Morgan stated that he had not. RP 4: 167-168. When Wettig asked Morgan whether she felt safe when she visited the defendant, she complained about old people and snakes. RP 4: 170. Wettig then asked her if she felt safe when the defendant humped her. RP 4:170. Morgan used the word "half-humping" and this related to play wrestling. RP 4: 171-72. Wettig introduced the term "straddling" into the interview. RP 4: 173.

Although the defendant had fathered two daughters with Shawnte, he and Shawnte had a very trying relationship for several years before Morgan's allegations were made. RP 4: 184. Because he left Shawnte, she made it very difficult for him to see his daughters. RP 4: 184. Because she did so, he established paternity through the court system and then cooperated with a guardian ad litem and the court to establish a parenting plan. RP 4: 184. After the court established the parenting plan, Shawnte started to make the relationship very trying and difficult. RP 4:184.

After the first parenting plan was established, the defendant had to go to court frequently for issues related to his visitation. RP 4: 185. He estimated that he had been to court more than ten or twenty times on this issue. RP 4: 185.

The defendant denied that he ever touched Morgan for sexual purposes. RP 185. The defendant stated that he had wrestled with his daughters during visitations. RP 4: 182. He never thrust his pelvic area into her. RP 4: 183. The defendant denied that he ever touched her private areas. RP 4: 185.

On the weekend before Morgan made her allegations, the defendant recalled that Morgan had become upset at least twice: on Friday when they visited Mud Mountain and again on Saturday afternoon during a family visit

to York Park near Bonney Lake. RP 4: 186, 208. She had been angry on Friday because the defendant took away a Dixie Chicks CD and also called her a “smart ass”. RP 4: 187, 208. She was also angry at the park. RP 4: 186-187 Morgan demanded to talk to her mother on the phone and he gave her his aunt’s cell phone to make the call. RP 4: 187. Shawnte later called Morgan and the defendant put Morgan on the phone to speak to her. RP 4: 188.

The visitations between the defendant and his daughters occurred at the residence of Debbie Swan, the defendant’s aunt. RP 5: 224-25. She recalled the weekend in July when Morgan became upset with the defendant. RP 5: 228. This happened when Morgan “got kind of smart” with the defendant in the car and he reacted by taking a CD away from her and calling her a smart ass. RP 5: 229. Morgan refused to get out of the car at Mud Mountain Park and instead used Debbie Swan’s phone to leave a message for her mother. RP 5: 229-230. Morgan and her mother talked by phone that evening. RP 230. Prior to returning to her mother, Morgan acted normally and the family had a pleasant day at a park. RP 5: 232.

D. ARGUMENT.

1. TRIAL COUNSEL FAILED TO PROVIDE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO PROPOSE A PETRICH INSTRUCTION REQUIRING UNANIMITY ON THE ACTS FORMING THE BASIS FOR THE CONVICTION.

Effective assistance of counsel is guaranteed under the federal and state constitutions. See U.S. Const., amend. VI<sup>4</sup>; Wash. Const., art. I, sec. 22<sup>5</sup>. This right was comprehensively discussed in Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984).

In Strickland, the U.S. Supreme Court observed that the right to counsel is crucial to a fair trial because “access to counsel’s skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution. 466 U.S. at 685 (citations omitted). Any claim of ineffective assistance must be judged against this benchmark: “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result.” 466 U.S. at 686.

To prove ineffective assistance of counsel, an appellant must show that (1) trial counsel’s performance was deficient; and (2) the deficient

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<sup>4</sup> See Appendix “C”

<sup>5</sup> See Appendix “D”

performance prejudiced him. In re Pers. Restraint of Woods, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005). Counsel's performance is deficient when it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1998). Put another way, the defendant must show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. 466 U.S. at 687. The prejudice requirement is satisfied by a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* In other words, the defendant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Reasonable probability is defined as "a probability sufficient to undermine confidence in the outcome." *Id.*

Although the reviewing court indulges a strong presumption that counsel's representation falls within the wide range of proper professional assistance, the defendant may overcome that presumption by showing that trial counsel had no legitimate strategic or tactical rationale for his conduct. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991); State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). To establish prejudice, the defendant must show that but for counsel's deficient performance, the result

likely would have been different. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

When the state presents evidence of several incidents that could form the basis of a single charged count, the state must either elect one incident for the jury to consider or the trial court must instruct the jury to agree unanimously on a specific incident. State v. Petrich, 101 Wn.2d 566, 570, 683 P.2d 173 (1984). Failure to do so is prejudicial error that is harmless only if no rational juror could have a reasonable doubt as to any one of the incidents alleged. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). This is so because the instructional error is “violative of a defendant’s state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial.” Kitchen, 119 Wn.2d at 409.

Counsel’s failure to request a Petrich instruction does not waive the issue for appeal where manifest constitutional error is present. RAP 2.5(a)(3)<sup>6</sup>. “A unanimity instruction is required, whether requested or not, when a jury could find from the evidence that the defendant committed a single charged offense on two or more distinct occasions.” State v. Simonson, 91 Wn. App. 874, 883, 960 P.2d 955 (1998), review denied, 137 Wn.2d 1016, 978 P.2d 1098 (1999).

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<sup>6</sup> See Appendix “E”

The jury instruction recommended for such cases in WPIC 4.25, which provides:

“There are allegations that the defendant committed acts of \_\_\_\_\_ on multiple occasions. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.”

This principle recently was reiterated by the Washington Supreme Court in State v. Coleman, 159 Wn.2d 509, 210, 150 P.3d 1126 (2007). In that case, the court held that when the state presents evidence of several acts that could form the basis for one charged count, prejudice is presumed if the state fails to elect the particular act on which it will rely for conviction and on which the jury must rely in its deliberations and the trial court fails to instruct the jury to agree on a specific criminal act and be unanimous as to that act in returning a conviction. Further, the error is harmless only if no rational juror could have a reasonable doubt as to any of the incidents alleged. *Id.* The Coleman court further clarified that the trial court’s failure to give a unanimity instruction constitutes prejudicial error if the evidence as to at least one of the acts is controverted. Put another way, the error is not harmless if a rational juror could have a reasonable doubt as to whether at least one incident supporting the charge occurred.

In cases involving a resident<sup>7</sup> child molester, the alleged victim's generic testimony can be used to support multiple counts. State v. Hayes, 81 Wn. App. 425, 432, 914 P.2d 788 (1996). However, at a minimum, the alleged victim must be able to describe (1) the kind of act or acts with sufficient specificity for the jury to determine which offense, if any, has been committed; (2) the number of acts committed with sufficient certainty to support each count alleged by the prosecution; and (3) the general time period in which the acts occurred. Hayes, 81 Wn. App. at 438.

The Coleman case mandates reversal in the instant case. Regarding the incident that was reported to have occurred at night in the defendant's bedroom, the state adduced testimony regarding several different acts of touching that could form the basis for a child molestation in the first degree conviction. Even assuming arguendo that no reasonable juror could have a reasonable doubt regarding any of those acts, a rational jury could have had a reasonable doubt as to whether the multiple "humping" incidents in fact occurred. As the record affirms, the state offered that evidence to show evidence of conduct where the defendant acted for purposes of his own sexual gratification. However, the failure to limit this evidence by the jury easily could have resulted in a juror/jurors convicting the defendant based on

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<sup>7</sup> A resident child molester is someone who resides the child.

testimony that multiple “humping” incidents occurred v. the other events in the bedroom.

The rule of Petrich has been in effect for more than 20 years. The Coleman case was decided prior to this trial. Every competent defense attorney who practices in the area of sex crimes cases knows about Petrich and the requirement of a unanimity instruction. Further, there is no legitimate tactical or strategic reason to fail to propose such an instruction. Failure to do so permits the state to convict the defendant on something less than evidence beyond a reasonable doubt for a specific crime.

For these reasons, trial counsel was ineffective for failing to offer a Petrich instruction.

Further, the unit of prosecution for the crime of child molestation in the first degree is each separate act of sexual contact. RCW 9A.44.089(1)<sup>8</sup>. This construction comports with the holding of State v. Tili, 139 Wn.2d 107, 112, 985 P.2d 365, 369 (1999). In Tili, the court noted that the unit of prosecution defined in the rape statute was violated on any penetration, no matter how slight. 139 Wn.2d at 115.

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<sup>8</sup> RCW 9A.44.089(1) defines sexual contact as: “Any touching of the sexual or intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.”

In this case, the jury heard evidence that the defendant had “humped” his daughter for a 12 week period, including during the charged period. The state adduced this evidence as “lustful disposition” evidence. However, the jury was never instructed that they could not consider this evidence as substantive evidence of the crime of first degree child molestation. Therefore some of the jurors could have convicted the defendant on the basis of these repeated incidents some of which occurred during the charging period.

Similarly, under the rule of Tili, the units of prosecution for the bedroom incident should have been (1) the alleged touching of the butt; and (2) the touching of the vagina.

Thus the jury could have convicted the defendant of the crime of child molestation on the basis of several different incidents.

The error is not harmless because there is insufficient evidence of the “humping” incidents to prove beyond a reasonable doubt that all of them occurred as alleged.

2. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE A LIMITING INSTRUCTION PURSUANT TO WPIC 5.30 WHERE THE STATE OFFERED EVIDENCE THAT THE DEFENDANT HAD "HUMPED" THE ALLEGED VICTIM FOR THE PURPOSE OF PROVING "LUSTFUL DISPOSITION."

The standard of review set forth in the preceding section applies to this argument as well.

When evidence of the defendant's prior misconduct is admissible under ER 404(b)<sup>9</sup> for a limited purpose, such as showing motive or intent, the court must, on request, instruct the jury on the limited purpose for which the evidence is admissible. State v. Fitzgerald, 39 Wn. App. 652, 694 P.2d 1117 (1985). Ordinarily the party requesting the limiting instruction has the burden of requesting it and, in the absence of such a request, any objection to the lack of the instruction is waived. *Id.*

In the instant case, the prosecutor offered the "humping" evidence as "lustful disposition" evidence. The prosecutor informed the court that a limiting instruction should be given and then failed to propose one. Defense counsel had an obligation to ensure that the "humping" evidence was not misused by the jury. As argued above, the failure to request a Petrich

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<sup>9</sup> See Appendix "F"

instruction was reversible error on the facts on this case. The failure to obtain a limiting instruction compounded that error by permitting the jury to consider the “humping” evidence as substantive evidence of the charged crimes. There was no legitimate or tactical reason for this oversight.

The prejudice to the defendant is apparent. He was convicted in violation of his state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial.” *Kitchen, supra*.

3. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPOSE A LIMITING INSTRUCTION PURSUANT TO WPIC 5.30 WHERE THE STATE OFFERED EVIDENCE THAT THE DEFENDANT HAD BEEN INTOXICATED AT A MEETING WITH THE GUARDIAN AD LITEM WHEN THAT MEETING WAS REMOTE IN TIME TO THE ALLEGATION IN THIS CASE.

The applicable standard of review is set forth above.

As noted in the statement of the case, the trial court permitted the state to elicit testimony from Shawnte Papac that she had asked the court to limit visitation with the defendant after he appeared intoxicated a meeting with the guardian ad litem at a time remote from these allegations. RP 3: 102, 104. The prosecutor argued that this evidence was not being offered for the truth of the matter asserted. RP 3: 104.

Despite the prosecutor’s stated intention to limit the purpose of the evidence, neither the prosecutor nor defense counsel proposed any limiting

instruction. Therefore the jury was free to consider this evidence for substantive purposes and could have concluded that the defendant was a poor father because he was a drunk. In the context of all of the evidence in this case, this testimony was unfairly prejudicial. This testimony was unfairly prejudicial. ER 403<sup>10</sup>.

4. THE TRIAL COURT ERRED WHEN IT ADMITTED INADMISSIBLE HEARSAY EVIDENCE THAT THE DEFENDANT APPEARED INTOXICATED AT A MEETING WITH THE GUARDIAN AD LITEM WHERE THIS EVIDENCE WAS NOT RELEVANT TO ANY ISSUE IN THE CASE AND WAS UNFAIRLY PREJUDICIAL TO THE DEFENDANT.

The admission of evidence rests within the discretion of the trial court. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). In this case, it is not apparent from the record how the trial court justified the admission of this evidence. If the trial court admitted the evidence as impeachment evidence, the trial court's ruling permitted unnecessarily prejudicial impeachment evidence. ER 607<sup>11</sup>. In this case, the trial court permitted the state to adduce testimony from Shawnte Papac regarding an occasion when the defendant, while intoxicated, attended a meeting with the guardian ad litem. The state offered the evidence as evidence that Shawnte Papac had not

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<sup>10</sup> See Appendix "G"

<sup>11</sup> See Appendix "H"

unreasonably restricted the defendant's visitation with her daughters. RP 2:102-103. However, the trial court should have limited her testimony to the number of times she sought to limited visitation. The testimony regarding the meeting with the guardian ad litem at which the defendant allegedly was intoxicated was impeachment on a collateral matter which is not permitted under the Washington law. *E.g., In re the Welfare of Shope*, 23 Wn. App. 567, 596 P.2d 1361 (1979).

The Washington courts have repeatedly acknowledged the extreme prejudice that results from the improper admission of evidence of alcohol and drug use. *E.g., State v. Hall*, 46 Wn. App. 689, 732 P.2d 524 (1987); *State v. Wood*, 57 Wn. App. 792, 790 P.2d 220 (1990).

In this case, the trial court's admission of such collateral impeachment evidence encouraged the jury to conclude that the defendant was a drunk whose substance abuse problems may well have loosened his inhibitions and made him likely to sexually assault his daughter,

Further, the trial in fact was a credibility contest between Morgan and her father. The jury therefore had to make crucial determinations regarding the credibility of each of these individuals. Evidence that the defendant had drug and alcohol addictions certainly played a part in that determination. This is so even though there was no evidence whatsoever that the defendant used

either substance in the summer of 2006. Absent such a showing, trial counsel was constitutionally deficient for failing to propose a limiting instruction. Such an instruction would have informed the jury that they could not use the defendant's prior substance abuse problems to determine his credibility in this case.

5. THE DEFENDANT'S CONVICTION FOR FIRST DEGREE CHILD MOLESTATION MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE ADDUCED AT TRIAL TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT.

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. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). 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. State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2f 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn there from. State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).

In this case, as argued above, the jury could have considered the “humping” testimony as evidence of the crime charged. The “humping” evidence was not established with a sufficient degree of particularity and detail to support a conviction.

6. THE DEFENDANT IS ENTITLED TO RELIEF UNDER THE CUMULATIVE ERROR DOCTRINE.

The cumulative error doctrine protects a criminal defendant’s right to fair trial and applies “to instances where there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial”. Thus, cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. Id.

In the instant case, the defendant is entitled to a new trial because of the cumulative effect of the errors regarding ineffective assistance of counsel, the absence of a Petrich instruction, the failure to give WPIC 5.30<sup>12</sup> limiting instructions, and the errors in the admission of evidence. As a result of these errors, the jury was allowed to consider the “humping” evidence (supposedly

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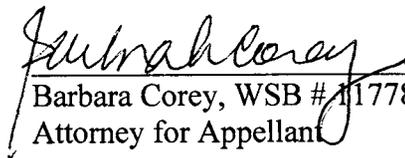
<sup>12</sup> See Appendix “I”

several such incidents over a twelve week period, some of which fell within the charged period) as substantive evidence of incidents of child molestation in the first degree. The state's election of a broad charging period permitted the jury to consider any evidence of child molestation that occurred during the period of July 1 – 30, 2004. The state never elected nor was the jury instructed that the charged crime was based on any particular activity during that time period.

E. CONCLUSION.

For the foregoing reasons, the defendant asks this court to reverse his conviction and remand the matter for a new trial.

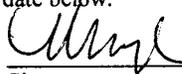
DATED this 4<sup>th</sup> day of April, 2008.

  
\_\_\_\_\_  
Barbara Corey, WSB # 11778  
Attorney for Appellant

CERTIFICATE OF SERVICE:

The undersigned certifies that on this day she delivered by U.S. Mail or ABC-LMI delivery to the Appellate Unit, Room 946 County-City Building, Tacoma, Washington 98402 and appellant a true and correct copy of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

4/4/08  
Date

  
\_\_\_\_\_  
Signature

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
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APPENDIX "A"

**RCW 9A.44.120**

**Admissibility of child's statement — Conditions.**

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 "B"

RULE ER 803

HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT  
IMMATERIAL

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

(1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) Then Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

APPENDIX "C"

**Amendment 4 - Search and Seizure. Ratified 12/15/1791.**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX "D"

# Washington State Constitution

## PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the Universe for our liberties, do ordain this constitution.

## ARTICLE I DECLARATION OF RIGHTS

**SECTION 22 RIGHTS OF THE ACCUSED.** 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.]

**Original text -- Art. 1 Section 22 RIGHTS OF ACCUSED PERSONS --** *In criminal prosecution, the accused shall have the right to appear and defend in person, and 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 alleged to have been committed, and the right to appeal in all cases; and, in no instance, shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.*

APPENDIX "E"

RULE 2.5  
CIRCUMSTANCES WHICH MAY AFFECT  
SCOPE OF REVIEW

(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 "F"

RULE ER 404  
CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT;  
EXCEPTIONS; OTHER CRIMES

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[Amended effective September 1, 1992.]

APPENDIX "G"

RULE ER 403  
EXCLUSION OF RELEVANT EVIDENCE ON GROUNDS OF PREJUDICE,  
CONFUSION, OR WASTE OF TIME

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[Adopted effective April 2, 1979.]

Comment 403

[Deleted effective September 1, 2006.]

APPENDIX "H"

RULE ER 607  
WHO MAY IMPEACH

The credibility of a witness may be attacked by any party,  
including the party calling the witness.

[Amended effective September 1, 1992.]

Comment 607

[Deleted effective September 1, 2006.]

APPENDIX "I"

**WPIC 5.30 GUIDES FOR EVIDENCE CONSIDERATION**

**WPIC 5.30**

**EVIDENCE LIMITED AS TO PURPOSE**

Evidence has been introduced in this case on the subject of \_\_\_\_\_ for the limited purpose of \_\_\_\_\_. You must not consider this evidence [for any other purpose] [for the purpose of \_\_\_\_\_].

**NOTE ON USE**

For a special instruction limiting evidence of criminal conviction of a witness to impeachment, see WPIC 5.06, Prior Conviction—Impeachment—Witness, and as to a defendant, WPIC 5.05, Prior Conviction—Impeachment—Defendant. Use bracketed material as applicable.

**COMMENT**

**ER 105.**

When evidence of the defendant's prior misconduct is admissible under ER 404(b) for a limited purpose, such as showing motive or intent, the court must, on request, instruct the jury on the limited purpose for which the evidence is admissible. *State v. Fitzgerald*, 39 Wn.App. 652, 694 P.2d 1117 (1985).

However, the party seeking a limiting instruction has the burden of requesting it and, in the absence of such a request, any objection to the lack of instruction is waived. *State v. Fitzgerald*, 39 Wn.App. 652, 694 P.2d 1117 (1985) and authorities therein.

Special limiting instructions are appropriate when a criminal conviction is admitted to impeach a witness. See WPIC 4.64, WPIC 5.05, and WPIC 5.06.

An instruction limiting the use of prior consistent statements of the prosecuting witnesses introduced to rehabilitate the witness was held proper and necessary in *State v. Pitts*, 62 Wn.2d 294, 382 P.2d 508 (1963). Similarly, an instruction that limits the jury's use of a prior inconsistent statement admitted for impeachment purposes to a determination of the credibility of a witness is proper. Impeaching and contradictory statements are "admitted only to destroy the credit of the witnesses, to annul and not to substitute their testimony." *State v. Johnson*, 40 Wn.App. 371, 699 P.2d 221 (1985).

**GENERAL PRINCIPLES OF EVIDENCE**

**WPIC 5.30**

WPIC 5.30 is cited with approval in *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988), *rehearing* 113 Wn.2d 520, 782 P.2d 1013 (1989), 787 P.2d 906 (1990) and *State v. Anderson*, 31 Wn.App. 352, 641 P.2d 728 (1982).

ER 105 is covered in detail in K. Tegland, 5 Washington Practice: Evidence §§ 23 and 24 (3rd Ed.1989).

**Library References:**

West's Key No. Digests, Criminal Law ¶783.

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STATE OF WASHINGTON  
BY DM  
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

and

JASON ALAN SWAN,

Appellant.

CAUSE NO. 36602-9

DECLARATION OF REBECCA  
TAYLOR, LEGAL ASSISTANT

I, Rebecca Taylor, declare under penalty of perjury that the following declaration is true and correct:

I am the Legal Assistant for Barbara Corey, counsel for Appellant in the above-noted matter. I deposited in the U.S. Mail, postage prepaid a true and correct copy of the Brief of Appellant, Jason Swan, DOC #304932, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

Dated this 2nd day of May, 2008



REBECCA TAYLOR

CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on this date, I faxed and delivered via ABC-LMI a copy of the Declaration of Rebecca Taylor to Kathleen Proctor, Sr. Appellate Deputy, 946 CC-Building, Tacoma, WA.

5-2-08  
Date

  
Signature

DECLARATION OF REBECCA TAYLOR  
Page 1

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