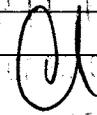


NO. 36965-6

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COURT OF APPEALS
DIVISION II

09 SEP 11 PM 3:15

STATE OF WASHINGTON
BY  DEPUTY

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

STATE OF WASHINGTON, RESPONDENT

v.

JOHN OTTO SMALANCKE, JR., APPELLANT

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

No. 06-1-03290-1

BRIEF OF RESPONDENT

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

1. Has defendant waived his right to challenge the attempted first degree child molestation jury instruction when he failed to object to the instruction at trial? Alternatively, did the trial court properly instruct the jury on the included offense of attempted first degree child molestation?
2. Was trial counsel effective when he stipulated to a jury instruction on the included offense of attempted first degree child molestation when the stipulation was a legitimate trial tactic?
3. Did the State adduce sufficient evidence to convict defendant of two counts of attempted first degree child molestation where A.C. testified that defendant touched her on her front privates and called her a “sexy mama” and K.D. testified that defendant had placed his hand down her pants?
4. Did the prosecutor elect which acts formed the basis of Counts I through IV when he told the jury that acts that occurred in the pool formed the basis for Counts I and II, defendant placing his hand down K.D.’s pants in the living room and rubbing her on the chest and on the bottom in the living room and bedroom formed the basis for Counts III and IV? Alternatively, was the court’s

unanimity instruction sufficient to ensure defendant's conviction on Count III was based upon a unanimous verdict?

B. STATEMENT OF THE CASE.

1. Procedure

On June 18, 2008, the Pierce County Prosecutor's Office charged John Otto Smalancke, Jr., hereinafter "defendant," with five counts of first degree child molestation. CP 1-3. The parties appeared for trial on July 24, 2007. RP 4¹. A child hearsay and competency hearing was held on July 26th and 27th. RP 31-113. The court found: 1) the two child victims', A.C.'s and K.D.'s, statements admissible under the child hearsay statute; and 2) that A.C. and K.D. were competent. RP 112-13. The jury returned verdicts of guilty for two counts of attempted first degree child molestation on August 8, 2008. CP 121, 123; RP 684-695. The jury convicted defendant of attempted first degree child molestation on counts III (K.D.) and V (A.C.). CP 121, 123; RP 693. The jury was unable to reach a verdict on counts I, II, and IV. CP 114-20, 122; RP 691-92. The court sentenced defendant on November 2, 2007, to an indeterminate life sentence with a minimum term of 66.75 months in custody and the balance of defendant's life on community custody. CP 131-45; RP 706.

¹ The Verbatim Report of Proceedings consists of eight volumes that shall be referred to as RP.

Upon the State's motion, the Court dismissed without prejudice counts I, II, and IV. CP 151-53; RP 703, 707-08, 710, 711.

This timely appeal followed.

2. Facts

a. A.C. molestation

In the present case, A.C. testified that defendant touched her with his hand on her front private spot. RP 144, 145, 151, 152. When she described this touch to her mother, A.C. pointed to her vagina. RP 199-200. When defendant touched her vagina, he touched her through her clothes. RP 146, 199. A.C. further testified that she was alone with defendant sitting on the downstairs couch when he touched her. RP 144, 147, 150. Defendant called her a "sexy mama." RP 145, 152, 153.

The day after defendant touched A.C., she told her mother, Rosalee Cowart, what defendant had done. RP 146. A.C. told her mother that defendant had told A.C. she was pretty and called her a "sexy mama." RP 177, 196. When Ms. Cowart asked if defendant had touched her, A.C. said he had and pointed to her private area. RP 177, 179, 180, 197, 198, 200, 207. A.C. told her mother that defendant said "it was okay for him to do this to her but not to Mikala because Mikala was his granddaughter." RP 177. Ms. Cowart testified that A.C. said that defendant had tried to kiss her, but she tightened up her lips and told him to stop. RP 178.

After talking to A.C., Ms. Cowart had Mikala's mother, Dawn Davis come over. RP 181. Ms. Cowart told Ms. Davis what A.C. had disclosed. RP 181. Ms. Davis went back to her house and told defendant to leave her house. RP 181, 556. Within a very short time, defendant left Ms. Cowart's residence. RP 181, 557, 583.

Ms. Cowart immediately contacted the police to report this incident. RP 184. On March 15, 2006, Ms. Cowart took A.C. to the Child Advocacy Center to have a forensic interview. RP 416. Kim Brune, a forensic interviewer met with A.C. at the Child Advocacy Center. RP 406, 416. Ms. Brune's interview with A.C. was audio and video recorded. Exhibit 2. A DVD of the interview was admitted into evidence without objection as plaintiff's exhibit 2 and played for the jury. RP 418; Exhibit 2. In that interview A.C. told Ms. Brune that defendant said bad words like sexy mama to her, which "was kinda hurting me inside." *Id.* After defendant called A.C. a "sexy mama" he touched the front "private area" of her pants with his hands. *Id.* A.C. told Ms. Brune that it hurt when defendant touched her privates. *Id.* A.C. told Ms. Brune that she moved her legs around and told defendant to stop because she didn't like him touching her, but he kept doing it. *Id.* Defendant stopped when M.D.'s mother came home. *Id.*

Defendant testified that on the day of this incident, A.C. came over to play with his granddaughter, but Mikala wasn't home. RP 550, 579. Defendant gave A.C. a bowl of strawberries and sat down on the living

room couch with her as she watched Sponge Bob Square Pants. RP 551, 552, 579. Defendant testified he touched A.C. one time when he thought she had dropped a strawberry on the living room couch. RP 552.

Defendant testified that A.C. said “oops” and he reached over and pushed her backwards and up with his hands on her thighs. RP 552, 553, 554, 580. Defendant said he had A.C. squat over the couch while he looked for the strawberry. RP 552-53. When he was looking for the strawberry, defendant was looking between her legs. RP 553. When he did this, defendant’s hands went up her thighs toward her waist. Defendant admitted he had called A.C. cute. RP 556.

A.C. was born on February 20, 1999, and this incident took place on February 24, 2006, when A.C. was seven years old. RP 139.

Defendant was born on August 26, 1942. CP 1-3.

b. K.D. Molestation

K.D. was Mikala’s best friend at the time of these incidents and was frequently over at Mikala’s house. RP 220, 221, 261. Mikala’s grandfather, defendant, was often at Mikala’s house and he babysat K.D. between 30 to 50 times. RP 221, 558-59. K.D. used to call defendant, “Grandpa.” RP 221-22.

K.D. testified that defendant used to take her, Mikala, and Junior to the pool. RP 222, 223. While in the pool, defendant would touch her private parts, which would make her feel uncomfortable. RP 225, 226,

227. K.D. testified that this happened on several occasions. RP 228. K.D. distinguished between defendant touching her in a good way when they played in the pool versus a “bad touch.” RP 229-30. K.D. also testified that defendant put his hands down her pants when she visited Mikala’s house. RP 253. She testified that “...it happened a lot...” RP 253.

The Assistant Principal at K.D.’s school, Dominique Dennis, testified that on February 27, 2006, she spoke with K.D. in her office. RP 238, 279. She asked K.D. if K.D. “remember[ed] Ms. Rosaaen coming into the classroom to talk about good touch, bad touch.” RP 279, 302. When K.D. responded that she did remember, Ms. Dennis asked if K.D. had anything to tell her. RP 280, 283, 302. In response, K.D.’s eyes welled up with tears and her face became pale. RP 280, 283, 302. K.D. told Ms. Dennis that for some time Mikala’s grandpa had been touching K.D. on her bottom inside her clothes. RP 280, 283, 306.

K.D. was also interviewed by Ms. Brune at the Child Advocacy Center. RP 418-19. This interview was audio and video recorded and a DVD of that interview was admitted into evidence without objection as plaintiff’s exhibit number 1.² In K.D.’s interview with Ms. Brune, K.D. told her that on more than one occasion defendant would touch her and

² The Exhibit Record lists Plaintiff’s Exhibit number 1 as a DVD of Mikala’s interview, however, the verbatim record of proceedings reflects that plaintiff’s exhibit number 1 was a DVD of Ms. Brune’s interview with K.D. CP 175-176; RP 422.

Mikala's "butts" with his hands when defendant took them swimming on Friday evenings. Exhibit 1. K.D. said that defendant also touched her chest with his hands while she was in the pool with him. *Id.* Defendant touched K.D. on her butt and chest through her bathing suit with his hands. *Id.* K.D. said it felt weird when defendant touched her because she had never had anyone do that to her before. *Id.* K.D. demonstrated how defendant would touch her by making grabbing motions with her hands. *Id.* When defendant touched her bottom and chest, he would touch her through her clothes. *Id.* K.D. told Ms. Brune she was nine years old when these incidents took place. *Id.*

K.D. also told Ms. Brune that defendant had also touched her while she was on the living room couch and in Mikala's bedroom. *Id.* K.D. told Ms. Brune that Mikala saw defendant touch her on the living room couch. *Id.* K.D. told Ms. Brune that defendant said that if they told anyone they would be in big trouble. *Id.*

Defendant testified that on one occasion, K.D. was jumping on some pillows by a glass coffee table in the living room. RP 544. When K.D. jumped off the pillows she jumped toward the glass coffee table. RP 545, 577. Defendant said he reached out and his hand to grab her and his hand went underneath the waistband of her pants. RP 545. Mikala was standing on the landing to the stairs and observed defendant's hand go inside K.D.'s pants. RP 546. When K.D. went up the stairs with Mikala,

K.D. told Mikala “Your grandpa touched my butt.” RP 546, 577, 578.

Defendant heard Mikala reply, “Yeah, I saw it.” RP 546.

Defendant admitted that over a period of two years he took care of K.D. between 30 and 50 times. RP 536-37. During that time, defendant took K.D. and his grandchildren to the swimming pool at Bally’s Fitness Center. RP 537. Defendant would play games including Marco Polo, shark, and trap door with the kids in the pool. RP 538. Defendant touched the children when they played these games. RP 539.

When playing trap door, the child straddled defendant’s outstretched arms, facing either forward or backward, while defendant walk around in the pool. Unexpectedly, defendant would drop either his right or left arm and the child would drop through the “trap door.” RP 539. When playing this game, defendant touched the children on their chests and bottoms. RP 539, 540.

Defendant testified that he babysat K.D. RP 541. While babysitting her, defendant would touch K.D. RP 541. Defendant recalled carrying K.D. around when she sprained her ankle or was ill, pounding on her back once when she choked, and tapping her on her lower back when she had a backache. RP 541, 542. Defendant would carry K.D. in his arms and over his shoulder in a fireman’s carry. RP 541. When defendant

pounded her on her back when K.D. was choking, his other arm was across her chest.

K.D. was born on March 18, 1996, these incidents took place between March 18, 2005 and March 14, 2006 when K.D. was nine years old and defendant was more than fifty years old. RP 216; CP 1-3.

In June 2006, approximately four months after A.C. and K.D. told their mothers that defendant had touched them inappropriately, defendant moved from Tacoma to Las Vegas, Nevada. RP 535.

C. ARGUMENT.

1. DEFENDANT WAIVED HIS RIGHT TO CHALLENGE THE ATTEMPTED CHILD MOLESTATION IN THE FIRST DEGREE JURY INSTRUCTION BECAUSE HE FAILED TO OBJECT TO THE INSTRUCTION AT TRIAL. ALTERNATIVELY, THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON ATTEMPTED CHILD MOLESTATION IN THE FIRST DEGREE.

As a general rule, a defendant who fails to object to a jury instruction at trial has waived any challenge to that instruction on appeal. *State v. Brown*, 36 Wn. App, 166, 170, 672 P.2d 1268 (1983). CrR 6.15 requires a party objecting to the giving or refusal of an instruction to state the reason for the objection. The purpose of this rule is to afford the trial court an opportunity to correct any error. *State v. Colwash*, 88 Wn.2d 468, 470, 564 P.2d 781 (1977). Consequently, it is the duty of trial

counsel to alert the court to his position and obtain a ruling before the matter will be considered on appeal. *State v. Rahier*, 37 Wn. App. 571, 575, 681 P.2d 1299 (1984), citing *State v. Jackson*, 70 Wn.2d 498, 424 P.2d 313 (1967). Only those exceptions to instructions that are sufficiently particular to call the court's attention to the claimed error will be considered on appeal. *State v. Harris*, 62 Wn.2d 858, 385 P.2d 18 (1963).

The exception to this general rule is where there is a "manifest error affecting a constitutional right." *State v. Salas*, 127 Wn.2d 173, 182 897 P.2d 1246 (1995); *see also* RAP 2.5(a)(3). RAP 2.5(a)(3) states in the relevant part:

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: ... (3) manifest error affecting a constitutional right.

Here, defendant asserts on appeal that the trial court erred when it instructed the jury on attempted child molestation in the first degree. Brief of Appellant at 27. However, defendant has failed to preserve this issue for appellate review. When proposed jury instructions were discussed, trial counsel for defendant agreed with the State that instructing the jury on attempted child molestation was appropriate.

DEFENSE COUNSEL: I've had an opportunity to review [the jury instructions]. They're right out of the WPICs. Other than the one duplicate form that I found, I'm sure Mr. Sheeran has corrected, they seem to me to comport to the

law as appropriate instructions to give. **The State is asking for the lesser of attempted child molestation, and I think they're entitled to that.**

RP 588 (emphasis added). Having failed to object to the State's proposed instructions, defendant cannot raise this issue for the first time on appeal because he cannot show the court's decision to instruct the jury on an included offense was "manifest error affecting a constitutional right" as required by *State v. Salas* and RAP 2.5(a).

Assuming *arguendo* that this court finds defendant has preserved this issue on appeal, defendant's argument still fails because an attempt to commit a crime is included in the crime itself. See *State v. Rowe*, 60 Wn.2d 797, 798, 376 P.2d 446 (1962) (person may be convicted of attempt to commit a crime even though evidence establishes that crime was actually committed); *State v. Arnold*, 144 Wash. 367, 368, 258 P. 20 (1927) (attempt is included in the crime); *State v. Romans*, 21 Wash. 284, 285-86, 57 P. 819 (1899) (defendant charged with a crime may be found guilty of attempt). In the present case, the parties agreed that the jury should be instructed on both first degree child molestation and attempted first degree child molestation and the court so instructed the jury. RP 588; CP 96-109. Because attempted first degree child molestation is included in the crime of first degree child molestation, the court properly instructed the jury on both crimes.

Finally, defendant asserts that attempted first degree child molestation is a lesser included offense and must satisfy the two prong test set out in *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). While the State does not concede that the *Workman* is applicable to the included offense of attempt, this issue is moot because defendant stipulated that the jury should be instructed on attempted first degree child molestation. RP 588. Because of this stipulation, defendant is precluded from challenging the jury instruction based upon the invited error doctrine.

Under the invited error doctrine, a defendant may not make a tactical choice in pursuit of some real or hoped for advantage and then later urge his own action as a ground for reversal. *State v. Lewis*, 15 Wn. App 172, 177, 548 P.2d 587 (1976) (where defendant offered erroneous instruction on lesser included offense, he could not later challenge the giving of that instruction on appeal). The doctrine of invited error applies whenever the party asserting an error materially contributed to it. *In re Dependency of K.R.*, 128 Wn.2d 129, 147, 904 P.2d 1132(1995); *see also State v. Miller*, 168 Wash. 687, 689, 13 P.2d 52 (1932). The invited error doctrine applies even to constitutional errors. *State v. Doogan*, 82 Wn. App 185, 188, 917 P.2d 155 (1995).

In the present case, defendant stipulated that the State was entitled to an instruction on attempted first degree child molestation. As argued below, defendant's decision to stipulate to an attempted first degree child molestation instruction was a legitimate trial tactic. Because of

defendant's stipulation, defendant cannot now challenge the Court's giving of that instruction

Defendant's claim that the court erred in instructing the jury on the included offense of attempted first degree child molestation is without merit.

2. DEFENSE COUNSEL'S DECISION TO STIPULATE TO THE ATTEMPTED FIRST DEGREE CHILD MOLESTATION INSTRUCTION WAS A LEGITIMATE TRIAL TACTIC.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. *Id.* "The essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 3582, 91 L. Ed. 2d 305 (1986).

To prevail on a claim of ineffective assistance of counsel, defendant must meet both prongs of a two-prong test set out in *Strickland*

v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). First, a defendant must establish that defense counsel's representation fell below an objective standard of reasonableness. Second, a defendant must show that defense counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687; *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

To satisfy the first prong, deficient performance, the defendant has the "heavy burden of showing that his attorney 'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *State v. Howland*, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992) (quoting *Strickland v. Washington*, 466 U.S. 668, 687). Defendant may meet this burden by establishing that, given all the facts and circumstances, his attorney's conduct failed to meet an objective standard of reasonableness. *State v. Huddleston*, 80 Wn. App. 916, 912 P.2d 1068 (1996). There is a strong presumption that counsel's representation was reasonable and, taking into consideration the entire record, that counsel made all significant decisions in the exercise of reasonable professional judgment. *State v. McFarland*, 127 Wn.2d at 335.

Matters that go to trial strategy or tactics do not show deficient performance. *State v. Hendrickson*, 129 Wn.2d at 77-78. The decision of when or whether to object is an example of trial tactics and only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336. When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection was meritorious, but also that the verdict would have been different if the motion or objection had been granted. *Kimmelman*, 477 U.S. at 375; *United States v. Molina*, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

To satisfy the second prong, resulting prejudice, a defendant must show that, but for counsel's deficient performance, the trial's outcome would have been different. *McFarland*, 127 Wn.2d at 337; *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.").

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude the defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-85, 763 P.2d 455 (1988).

In the present case, defendant argues his trial counsel was deficient for failing to object to the attempted first degree child molestation jury instructions. Brief of Appellant at 32. Defendant's argument fails for two reasons.

First as argued above the State was entitled to the instruction and the trial court would not have sustained trial counsel's objection had one been made. Once a defendant has been charged with a crime, that defendant is on notice that he may be convicted of the crime charged or an inferior degree of that charge or of an attempt to commit the crime charged.

Upon an indictment or information for an offense consisting of different degrees, **the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.**

RCW 10.61.003 (emphasis added); *see also* RCW 10.61.006, .010.

In *State v. Gallegos*, 65 Wn. App. 230, 828 P.2d 37 (1992), defendant was charged with second degree rape and the jury convicted

him of attempted second degree rape. On appeal, Gallegos alleged the original charging document was defective and, as a result, his conviction for attempted second degree rape was also defective because it was based upon a deficient charging document. *Gallegos*, 65 Wn. App. 230, 235. The court rejected Gallegos' argument. *Id.* at 235. In its analysis, the court noted that “[a]n attempted crime is a lesser included offense of the crime charged and the jury may convict a defendant of attempting to commit a crime charged, even though attempt was not specifically charged.” *Gallegos*, at 234.

Here, defendant was charged with five counts of first degree child molestation. CP 1-3. Attempted first degree child molestation is included in the offense of first degree child molestation. *See* RCW 10.61.003, .006, .010; *see also State v. Mannering*, 150 Wn.2d 277, 75 P.3d 961 (2003) citing *State v. Rowe*, 60 Wn.2d 797, 798 (person may be convicted of attempt to commit a crime even though evidence establishes that the crime was actually committed). Because attempted first degree child molestation is included in first degree child molestation, trial counsel properly stipulated that the State was entitled to an instruction on attempted first degree child molestation.

Second, defendant's ineffective assistance of counsel claim fails because it is a legitimate trial strategy to instruct the jury on attempt or another lesser crime rather than pursue the all or nothing tactic that could result in a defendant's conviction on the more serious offense.

Defendant's claim that the all or nothing approach should have been employed in his case is exactly the Monday morning quarterbacking that is consistently deplored by this court.

In *In re the Personal Restraint of Sims*, 118 Wn. App. 471, 473, 73 P.3d 398 (2003), defendant challenged his accomplice liability instruction for his first degree manslaughter conviction. Sims, along with his twin brother, had been charged with first degree murder and, in the alternative, second degree felony murder. *Id.* at 475. The court dismissed the first degree murder count and at Mose Sims' request, gave an instruction on the lesser offense of first degree manslaughter. *Id.* In a footnote, the court noted that in Sims' direct appeal the court did not find trial counsel ineffective for having proposed a first degree manslaughter instruction even though first degree manslaughter is not a lesser included offense of felony murder. The court found that it was a legitimate trial strategy to give the jury an alternative to conviction on the charged offense and acquittal. *In re Personal Restraint of Sims*, 118 Wn. App. 471, 475 n.2, citing *State v. Berlin*, 133 Wn.2d 541, 550 947 P.2d 700 (1997). Additionally, the court sustained the conviction "because Mose's attorney's request for the instruction could be viewed as a valid strategy, and it was the jury's prerogative to convict Mose of the lesser offense even though they technically should have found Mose guilty as an accomplice to felony murder, or not at all. *Sims*, 188 Wn. App. at 475 n.2.

Like *Sims*, in the present case trial counsel's decision to stipulate to an instruction on attempted first degree child molestation was a legitimate trial strategy. Here, defendant was facing a standard range sentence of 149-198 months if convicted as charged on all five counts of first degree child molestation. However, defendant's sentencing range was reduced by 25 percent to 111-148.5 months if convicted on all five counts of attempted first degree child molestation. A 3-5 year reduction in defendant's standard range is significant. This is especially true when defendant, who is over sixty years of age, testified at trial that he has numerous health issues including colon cancer, psoriatic arthritis, hypertension, and type two diabetes. RP 532-33, 535, 540; CP 1-3. It was a legitimate trial tactic to offer the jury an option that would result in significantly less jail time and trial counsel was not deficient.

However, even if this court were to find that trial counsel was deficient, defendant still cannot satisfy the second prong of the *Strickland* test. Defendant argues he was prejudiced by trial counsel's decision because defendant claims he would not have been convicted had jury not been instructed on attempted first degree child molestation. Brief of Appellant at 34. This argument is based upon speculation that 1) the jury would not have reached a verdict on any of the counts; and 2) had the jury been unable to reach any verdict, the State would not have retried defendant. Defendant's speculations about what would have occurred had the jury not been instructed on attempted first degree child molestation are

insufficient to show defendant was prejudiced. *See State v. McFarland*, 127 Wn.2d 332, 334-38.

Here, the jury was unable to reach a verdict on three of the five first degree child molestation counts, however, they convicted defendant of the included offense of attempted first degree child molestation on two of those counts. While the jurors were split between conviction and acquittal on Counts I, II, and IV, as is indicated by their inability to reach a verdict on those counts, the record does not reflect how many jurors voted to convict and how many voted to acquit. It is pure speculation that the jury would not have reached *any* verdict if they had not been instructed on attempted first degree child molestation. The jury could easily have continued to deliberate on all counts until they reached a verdict on each on the five charged offenses. We can only speculate whether those verdicts would have been convictions or acquittals or a combination of both. Defendant's speculation cannot satisfy his burden to show prejudice.

Instead of being prejudiced by trial counsel's actions, the record shows that defendant in fact benefited from those actions. Defendant was convicted of two counts of attempted first degree child molestation. Defendant's sentence was necessarily 25 percent less than it would have been if defendant had been convicted of the completed crime. Additionally, at sentencing the State dismissed without prejudice the three remaining original counts. CP 151-53. In the State's motion to dismiss, it

stated that “[t]he State is electing not to proceed on counts one, two and four, unless the convictions on counts three and five are overturned on appeal.” CP 151-53.

Because defendant can show neither deficient performance nor prejudice, his claim of ineffective assistance of counsel is without merit.

3. THE STATE ADDUCED SUFFICIENT EVIDENCE TO CONVICT DEFENDANT OF ATTEMPTED FIRST DEGREE CHILD MOLESTATION OF A.C. and K.D.

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

evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)).

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

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

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

In the present case, the jury was instructed that to convict defendant of attempted first degree child molestation of A.C. and K.D. the State had to prove beyond a reasonable doubt that:

- 1) defendant made a substantial step toward having sexual contact with the victim
- 2) the victim was less than twelve years of age at the time of the sexual contact and not married to defendant
- 3) defendant was at least thirty-six months older than the victim

CP 96-108. The jury was further instructed that a substantial step is conduct which strongly indicates a criminal purpose and which is more than mere preparation; and that sexual contact is any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party or a third party. CP 94, 103.

Defendant's sole challenge to the sufficiency of the evidence is that the evidence showed that defendant *had* sexual contact with both A.C. and K.D. and had not merely made a substantial step toward having sexual contact. Brief of Appellant at 39. Defendant argues in his brief "[t]he State's evidence, if believed, could only have proved completed sexual contact, not attempted." Brief of Appellant at 39. Defendant's cites no authority to support his argument that the jury could not convict defendant of attempt when the evidence proved he committed the completed crime.

In *State v. Mannering*, the Washington State Supreme Court held that the defense of duress was not available to a person charged with attempted murder. 150 Wn.2d 277, 285. In reaching its conclusion, the Supreme Court noted that duress was not a defense to murder and that murder includes the crime of attempted murder. *Id.* at 284. The Court stated that Washington precedent has held that an attempt to commit a crime is included in the completed crime. *Mannering*, 150 Wn.2d 277, 284, citing *State v. Rowe*, 60 Wn.2d 797, 798 (person may be convicted of attempt to commit crime even though the evidence establishes that crime was actually committed); *State v. Arnold*, 144 Wash. 367, 368, (attempt is included in crime); *State v. Romans*, 21 Wash. 284, 285-86 (defendant charged with crime may be found guilty of attempt).

Defendant's sufficiency of the evidence argument fails because in order for defendant to have committed first degree child molestation, he necessarily had to take a substantial step toward having sexual contact with the victims. Here defendant concedes that when the evidence is viewed in the light most favorable to the State proved defendant had sexual contact with both A.C. and K.D. Brief of Appellant at 36, 38-39. Because the evidence when viewed in the light most favorable to the State proved defendant had sexual contact with A.C. and K.D., this evidence

also proved defendant took a substantial step toward having sexual contact with both A.C. and K.D.

In the present case, A.C. testified that defendant touched her with his hand on her front private spot. RP 144, 145, 151, 152. When defendant touched her front private spot, he touched her through her clothes. RP 146, 199. A.C. further testified that she was alone with defendant sitting on the downstairs couch when he touched her. RP 144, 147, 150. Defendant called her a “sexy mama.” RP 145, 152, 153.

The day after defendant touched A.C., she told her mother what defendant had done. RP 146. When asked if defendant had touched her, A.C. said he had and pointed to her private area. RP 177, 179, 180, 197, 198, 200, 207. A.C. told her mother that defendant said “it was okay for him to do this to her but not to Mikala because Mikala was his granddaughter.” RP 177. Ms. Cowart testified that A.C. said that defendant had tried to kiss her, but she tightened up her lips and told him to stop. RP 178.

K.D. testified that defendant used to take her, Mikala, and Junior to the pool. RP 222, 223. K.D. testified that defendant would touch her private parts in the pool, which would make her feel uncomfortable. RP 225, 226. K.D. testified that this happened on several occasions. RP 228. K.D. also testified that defendant put his hands down her pants when she

visited Mikala's house. RP 253. She testified that "...it happened a lot..." RP 253.

Dominique Dennis testified that on February 27, 2006, she spoke with K.D. in her office. RP 279. She asked K.D. if K.D. "remember[ed] Ms. Rosaaen coming into the classroom to talk about good touch, bad touch." RP 279, 302. When K.D. responded that she did remember, Ms. Dennis asked if K.D. had anything to tell her. RP 280, 283, 302. K.D.'s eyes welled up with tears and her face became pale. RP 280, 283, 302. K.D. told Ms. Dennis that for some time Mikala's grandpa had been touching K.D. on her bottom inside her clothes. RP 280, 283, 306.

Defendant testified that on one occasion, K.D. was jumping on some pillows by a glass coffee table in the living room. RP 544. When K.D. jumped off the pillows she jumped toward the glass coffee table. RP 545, 577. Defendant reached out and his hand went underneath the waistband of her pants. RP 545. Defendant's granddaughter was standing on the landing to the stairs and observed defendant's hand go inside K.D.'s pants. RP 546. When K.D. went up the stairs with Mikala, K.D. told Mikala "Your grandpa touched my butt." RP 546, 577, 578. Defendant heard Mikala reply, "Yeah, I saw it." RP 546.

The above evidence was sufficient to support the jury's verdicts of two counts of attempted first degree child molestation for A.C. and K.D.

4. THE PROSECUTOR'S ELECTION IN CLOSING
COMBINED WITH THE COURT'S UNANIMITY
INSTRUCTION ENSURED THAT
DEFENDANT'S CONVICTION ON COUNT III
WAS BASED UPON A UNANIMOUS VERDICT.

Criminal defendants have a right to a unanimous jury verdict.

Const. art. 1, § 21. A defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980). Jury unanimity issues can arise when the State charges a defendant with committing a crime by more than one alternative means, *State v. Arndt*, 87 Wn.2d 374, 553 P.2d 1328 (1976), or when the State presents evidence of several acts that could form the basis of one count charged. *State v. Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984). When the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. *State v. Petrich*, 101 Wn.2d at 570-572. If the State fails to employ one of these options, error has occurred. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1998). The failure to either elect or give a unanimity instruction is subject to harmless error analysis under a constitutional standard. *Id.*

In the present case no error occurred because the State elected which acts it relied upon to prove the four counts in which K.D. was the

victim and the court's instructions included a unanimity instruction. RP 603, 624; CP 92.

PROSECUTOR: There are five charges, and I want to go through those a little bit each with you. Charges I through IV, involve [K.D.]. The first two involve [K.D.] at the pool. Not exactly – I mean, who they are is clear in the instructions, but the two incidents [K.D.] talked about happens two times in the pool, I and II. Counts III and IV are the living room in the Davis house and the bedroom in the Davis house, Makaila's bedroom in the Davis house. So those are the two other places she talked about specifically being molested by the defendant.

Count V is [A.C.], and that was just one incident the day before she talked to her mother. And that was at the Davis house.

RP 603. Later in the State's closing argument, the prosecutor reinforced his election.

PROSECUTOR: So I ask you to return a verdict that speaks the truth. Convict the defendant of child molest in the first degree for molesting [K.D.] while she was in the pool in Count I and Count II, and I ask to you [sic] convict the defendant of child molest in the first degree for putting his hand down her pants in the living room and rubbing her on the chest and on the butt in the living room and bedroom.

And I ask you to run [sic] a verdict that speaks the truth. Convict the defendant for rubbing [A.C.] in the crotch.

RP 624. It is clear from the above that Counts I and II involve touching that occurred in the Bally's pool, Count III involves defendant putting his hand down K.D.'s pants when she jumped off the living room couch's pillows, and Count IV involved an incident in Mikala's bedroom.

Even if this court were to find that the prosecutor's election in closing argument was not sufficient, the Court's instructions included a unanimity based upon WPIC 4.25. CP 92. The jury was instructed:

There are allegations that the defendant committed acts of Child Molestation in the First Degree or Attempted Child Molestation in the First Degree 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 act or acts have been proved beyond a reasonable doubt.** You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

CP 92 (Jury Instruction No. 8) (emphasis added). Because the prosecutor elected which acts were relied upon for each count and the court's instructions included a unanimity instruction defendant's argument that his right to a unanimous jury verdict was violated must fail.

Defendant relies upon a California case, *People v. Jones*, 51 Cal.3d 94, 792 P.2d 643, 270 Cal.Rptr. 611 (1990), to support his argument that "a unanimity instruction is confusing for a jury when there is no specific act for them to agree upon." Brief of Appellant at 44. Defendant's reliance on *Jones* is misplaced. Rather than finding a unanimity instruction confusing or insufficient as defendant suggests, *Jones* specifically "reject[s] the contention that jury unanimity is necessarily unattainable where testimony regarding repeated identical offenses is present in child molestation cases." *Jones*, 51 Cal.3d 294, 321. *Jones* goes on to state "[t]he unanimity instruction assists in focusing the

jury's attention on each such act related by the victim and charged by the People." *Id.* at 322.

In the present case evidence was adduced at trial that defendant had sexual contact with K.D. on multiple occasions over a one year period. Evidence was adduced that defendant touched K.D. on her bottom and chest in the pool at Bally's, that defendant put his hand down her pants when she jumped off some of pillows in the living room, and that he touched her bottom and chest in Mikala's bedroom. The jury was instructed that the jury must unanimously agree as to which act or acts have been proved beyond a reasonable doubt in order to convict defendant of any one count. CP 92. Jurors are presumed to follow the court's instructions. *State v. Grisby*, 97 Wn.2d 493, 509, 647 P.2d 6 (1982).

Finally, defendant argues that defendant is not adequately protected from the risk of double jeopardy because the jury's verdict lacks specificity. Brief of Appellant at 47. In support of his argument, defendant relies upon *State v. Heaven*, 127 Wn. App. 156, 110 P.3d 835 (2005). However, *Heaven* is distinguishable from the present case on its facts.

In *Heaven*, the State charged defendant with three counts of child molestation. *Heaven*, 127 Wn. App. 156, 158. The jury acquitted Heaven of two counts, but was unable to reach a verdict on the third. *Id.* at 158. A new trial date was set for the count on which the jury could not agree, but was ultimately dismissed because the court found that a new trial would

place Heaven in jeopardy of conviction for alleged acts of molestation for which he had already been acquitted. *Id.* The court reached this conclusion because the record in *Heaven* did not reflect which acts the jury acquitted Heaven and which acts the jury could not agree. *Id.* at 161. The court held that because jeopardy had terminated on the two counts on which defendant was acquitted and because there was no way to determine on which acts the jury had acquitted Heaven, any retrial on the third count would constitute double jeopardy as to the acts for which a jury had already acquitted Heaven. *Id.* at 165.

Defendant in the present case was not acquitted on any counts. Instead, the jury could not reach a verdict on Counts I, II, and IV. Rather than seek a new trial as to the counts on which the jury could not reach a verdict, the State dismissed these counts without prejudice. CP 151-53. Unlike *Heaven* where the State sought to retry Heaven, here the State dismissed the counts on which the jury could not reach a verdict. Because the State dismissed these counts, there is no retrial on which defendant can claim he has been twice put in jeopardy for the same offense.

Additionally, the State in the present case identified the location where each count occurred. Counts I and II relied upon acts that occurred in the Bally's pool, Count III relied upon acts that occurred in Mikala's living room and Count IV relied upon acts that occurred in Mikala's bedroom. Therefore, even if the State had elected to retry defendant on Counts I, II, and IV, there is no risk that defendant would again be placed

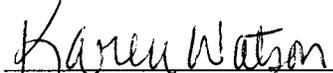
in jeopardy for putting his hand in K.D.'s pants in the living room of Mikalas house, which were the acts on which Count III was based.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests this Court to affirm the defendant's convictions.

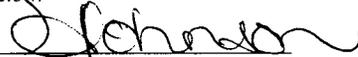
DATED: September 11, 2008.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


KAREN A. WATSON
Deputy Prosecuting Attorney
WSB # 24259

Certificate of Service:

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

9/11/08 
Date Signature

09 SEP 11 PM 9:15
STATE OF WASHINGTON
BY _____
COUNTY OF PIERCE
CLERK OF COURT