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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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**NO. 38018-8-II**

**COURT OF APPEALS OF THE STATE OF WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**BARRY DRAGGOO,**

**Appellant.**

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**BRIEF OF APPELLANT**

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

1. The trial court denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it refused to grant a mistrial after the defendant's wife testified that he was merely a "sperm donor" instead of a father, that he had also molested his other daughter, and when she then called the defendant an "asshole" in front of the jury.

2. The trial court's failure to give an aggravating factors unanimity instruction denied the defendant his right to a unanimous jury verdict under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment.

*Issues Pertaining to Assignment of Error*

1. In a case in which a defendant is charged with molesting his step-daughter, does a trial court deny the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it refuses to grant a mistrial after the defendant's wife, in violation of a pretrial order *in limine*, testifies that the defendant is merely a "sperm donor" instead of a father, that he also molested his other daughter, and when she calls the defendant an "asshole" in front of the jury.

2. Does a trial court's failure to give an aggravating factors unanimity instruction deny a defendant the right to a unanimous jury verdict under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment when the jury did not distinguish which acts constituting the aggravating factors the jury believed proven beyond a reasonable doubt?

## STATEMENT OF THE CASE

### *Factual History*

In February of 1998, Kristi Draggoo married the defendant Barry Draggoo. RP 217.<sup>1</sup> At the time, she had a four-year-old daughter by the name of D.E. living with her. RP 216. Following their marriage, Kristi and the defendant lived in Rochester in Thurston County. RP 218. In 1999, their daughter L.D. was born. RP 216. The family then moved to Elma in Grays Harbor County. RP 218. In February of 2000, the family moved to Centralia in Lewis County. *Id.* Three years later, their son N.D. was born. RP 216. During part of their time in Centralia, Kristi worked a 3:00 a.m. to 11:30 a.m. shift at a job in Olympia while the defendant took care of the children. RP 231. The family continued to reside in Lewis County until July of 2006, when they moved to Richland in Benton County. RP 218.

Just prior to Christmas in 2003, Kristi became aware of some allegations made against the defendant at a radio station where he worked. RP 234-235. As a result of these allegations, Kristi asked both D.E. and L.D. if the defendant had ever touched them inappropriately. RP 238-239. They both responded that he had not. *Id.* In August of 2005, while the family was

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<sup>1</sup>The record in this case includes three volumes of continuously numbered verbatim reports of the trial and one volume of the sentencing hearing. The former are referred to herein as “RP” and the latter as “RP 7/11/08.”

living in Centralia, Kristi found some things on the family computer that upset her. RP 218-220. As a result, she asked the defendant to leave the family home, which he did. *Id.* She then asked D.E. and L.D. a second time if the defendant had ever touched them inappropriately. *Id.* They again responded that he had not. *Id.* Within a few weeks, the defendant moved back into the family home. RP 220. In fact, although Kristi Draggoo believed that she had only twice asked her daughters if the defendant had inappropriately touched them, according to D.E., her mother asked her this question from 15 to 20 different times. RP 88-89.

Once the family moved to Richland, Kristi again became mad at the defendant about things she found on the family computer. RP 220-221. This time she kicked him out of the house and filed for divorce. *Id.* He has never been back in the family home since that date. RP 250-251. Finally, in 2007, Kristi yet again approached D.E. and asked her if the defendant had ever touched her inappropriately. RP 223. This time D.E. responded that he had continuously touched her sexually from the time he first moved into the family home until the time he moved out for the last time. RP 223, 228-229. Upon receiving this information, Kristi contacted the Lewis County Sheriff's Office. *Id.*

#### ***Procedural History***

By information filed July 25, 2007, the Lewis County Prosecutor

charged the defendant with eight counts of child molestation in the first degree and three counts of rape of a child in the first degree. CP 1-5. The state later amended the information to charge the defendant with seven counts of child molestation in the first degree against D.E., all counts having alleged to have occurred “between June 1, 2000, and July 31, 2006.” CP 50-54. The information did not contain any claims to distinguish one count from another in time, by place, or by any other distinguishing characteristic. *Id.* Each count in the amended information included an allegation that the defendant had committed “multiple incidents” of abuse over a “prolonged period of time” and while acting from a position of “trust and confidence.” *Id.*

This case eventually came to trial, with the state calling 10 witnesses, including Kristi Draggoo and D.E. RP 32-286. These witnesses testified to the facts set out in the preceding factual history. *See* Factual History. Just prior to trial, the court entered a number of orders *in limine*, including an order prohibiting the mention of any allegations of abuse by the defendant against any children. RP 4-31.

During the initial phases of Kristi Draggoo’s testimony, the prosecutor elicited the fact that the defendant was not D.E.’s biological father, although he was the father of Kristi’s two younger children. RP 215-216. Instead of simply acknowledging this fact, Kristi Draggoo refused to acknowledge that the defendant was L.D. and N.D.’s father. *Id.* Rather, she

told the jury that he was merely the “sperm donor.” *Id.* This testimony went as follows:

Q. Do you have any kids?

A. I have three children.

Q. What are their names?

A. [D.] and she’s 13, [L.], she’s eight, and [N.] is four.

Q. Any how many, if any, of those kids are fathered by Barry Draggoo?

A. He’s the sperm donor on the last two, [L.] and [N.]. And my oldest, [D.], has a different biological father.

RP 216.

A little later in the testimony, the prosecutor elicited the facts surrounding the two times when Kristi Draggoo asked her daughters whether or not the defendant had touched them inappropriately and they had replied that he had not. RP 219-223. During this testimony, and in spite of the court’s order *in limine*, Kristi Draggoo made the statement to the jury that the defendant had also molested their daughter N.D. RP 223. This occurred in the following exchange on direct by the state:

Q. After you asked him to leave, did you approach your daughters again?

A. Yeah, I did.

Q. And tell me how that went.

A. Actually, I asked them both together. And come to find out, neither one of them knew about each other, so . . .

MR. BLAIR: Objection. Ask for a hearing.

RP 223.

At this point, the court ordered the jury out of the courtroom to allow the defense to present a motion. RP 223. As this occurred, Kristi Draggoo, while still on the witness stand and in front of the jury, looked over at the defendant and, in front of the jury, mouthed the word “Asshole.” RP 223-230. Although the judge did not see it, both defense counsel and the court reporter did see it and related this fact to the court. *Id.* After the jury and the witness left the court room, defense counsel moved for a mistrial based upon three occurrences: (1) Kristi Draggoo’s derogatory reference to the defendant as a “sperm donor” instead of a father, (2) Kristi Draggoo’s statement to the jury that her two daughters did not know that the defendant had molested each other, and (3) Kristi Draggoo’s silent declamation to the defendant in front of the jury that he was an “asshole.” RP 223-230. The court denied the motion for a mistrial. *Id.*

Following the reception of evidence in this case, the court instructed the jury on each of the charged counts, and included the following statement on the necessity for unanimity on each count. RP 299-314.

#### **INSTRUCTION NO. 5**

The State alleges that the defendant committed acts of Child Molestation in the First Degree on multiple occasions. To convict the defendant on any count of Child Molestation in the First Degree, one particular act of Child Molestation must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Child Molestation in the First Degree.

CP 69.

Later in its charge to the jury, the court also gave the following instruction concerning the jury's consideration of aggravating factors charged as part of each count and the method by which the jury was to complete the special verdicts. RP 299-314. The court stated:

#### **INSTRUCTION NO. 21**

You will also be given special verdict forms for the crimes of Child Molestation in the First Degree as charged in count I to VII. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of any count of Child Molestation in the First Degree, you will then use the special verdict form with the corresponding letter and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer "no". If you unanimously have a reasonable doubt as to this question, you must answer "no".

CP 85.

Following closing argument by counsel, the jury retired for deliberation. RP 314-346, 347. During deliberation, the jury sent out three separate questions for the court. CP 61, 86, 77. The first occurred at 1:35

p.m. during the first day of deliberation and inquired concerning the existence of a protection order. CP 61. The second occurred on the second day of deliberations at 11:57 a.m., and indicated that the jury had a verdict on Count I but not on the remaining counts. CP 87. The jury sent the third inquiry out at 1:38 p.m., and asked the following question concerning the aggravating factors: "Please define 'prolonged period of time.'" CP 86. The court's response in each instance was to state that the jury had all of the evidence and statements of the law that would be provided. CP 61, 86, 87.

The jury later returned to the courtroom and rendered a verdict of "guilty" on Count I, and "yes" on each special verdict related to Count I. CP 88-92. However, upon being polled, each jury member stated that the jury was deadlocked on the remaining counts and special verdicts. CP 44-45. As a result, the court declared a mistrial on all of the remaining charges with the defendant's consent. CP 110-111.

The court later held a sentencing hearing, after which the court imposed an exceptional sentence of 120 months in prison plus 36 months community custody upon a standard range of from 51 to 68 months. CP 122-138. The court based the exceptional sentence upon the jury's findings in the special verdicts. CP 134-135. The defendant thereafter filed timely notice of appeal. CP 142.

## ARGUMENT

**I. THE TRIAL COURT DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT REFUSED TO GRANT A MISTRIAL AFTER THE DEFENDANT’S WIFE TESTIFIED THAT HE WAS MERELY A “SPERM DONOR” INSTEAD OF A FATHER, THAT HE HAD ALSO MOLESTED HIS OTHER DAUGHTER, AND WHEN SHE THEN CALLED THE DEFENDANT AN “ASSHOLE” IN FRONT OF THE JURY.**

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

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.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine

whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In addition, it is fundamental under our adversarial system of criminal

justice that “propensity” evidence, usually offered in the form of prior convictions or prior bad acts, is not admissible to prove the commission of a new offense. *See* 5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383 (3d ed. 1989). This common law rule has been codified in ER 404(b) wherein it states that “[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.” Tegland puts this principle as follows:

Rule 404(b) expresses the traditional rule that prior misconduct is inadmissible to show that the defendant is a “criminal type,” and is thus likely to have committed the crime for which he or she is presently charged. The rule excludes prior crimes, regardless of whether they resulted in convictions. The rule likewise excludes acts that are merely unpopular or disgraceful.

Arrests of mere accusations of crime are generally inadmissible, not so much on the basis of Rule 404(b), but simply because they are irrelevant and highly prejudicial.

. . . .

The rule is a specialized version of Rule 403, based upon the belief that evidence of prior misconduct is likely to be highly prejudicial, and that it would be admitted only under limited circumstances, and then only when its probative value clearly outweighs its prejudicial effect.

5 Karl B. Tegland, *Washington Practice, Evidence* § 114, at 383-386 (3d ed. 1989).

For example, in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), the defendant was charged with possession of cocaine after a police officer

found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The

court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

*State v. Pogue*, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

The decision in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), also illustrates this principle. In this case, the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert who testified that the defendant suffered from anti-social personality disorder but not diminished capacity. In support of this opinion the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction Acosta appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

*State v. Acosta*, 123 Wn.App. at 426 (footnote omitted).

To admit evidence under an exception to ER 404(b), the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify on the record the purposes for which it admits the evidence, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *State v. Pirtle*, 127 Wn.2d 628, 648-49, 904 P.2d 245 (1995). As the court stated in *State v. Saltarelli*, 98 Wn.2d 358, 363, 655 P.2d 697 (1982), "[a] careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest."

The decision in *State v. Escalona*, 49 Wn.App. 251, 742 P.2d 190

(1987), also explains why the admission of evidence of similar crimes denies a defendant the right to a fair trial. In *Escalona*, the defendant was charged with Second Degree Assault while armed with a deadly weapon, in that he allegedly threatened another person with a knife. In fact, Defendant had a prior conviction for this very crime, and prior to trial the court had granted a defense motion to exclude any mention of this conviction. During cross-examination, defense counsel asked the complaining witness about a prior incident in which four people (not including the defendant) had assaulted him, and whether or not he was nervous on the day of the incident then before the court. The complaining witness responded: "This is not the problem. Alberto [the defendant] already has a record and had stabbed someone." *State v. Escalona*, 49 Wn.App. at 253. After this comment, defense counsel moved for a limiting instruction, which the court gave, and then moved for a mistrial, which was denied. Following conviction, defendant appealed, arguing that the court abused its discretion in refusing to grant his motion for mistrial.

In addressing this issue, the court recognized the following standard:

In looking at a trial irregularity to determine whether it may have influenced the jury, the court [in *State v. Weber*, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983)], considered, without setting for a specific test, (1) the seriousness of the irregularity, (2) whether the statement in question was cumulative of other evidence properly admitted, and (3) whether the irregularity could be cured by an instruction to disregard the remark, an instruction the jury is presumed to follow.

*State v. Escalona*, 49 Wn.App. at 254.

In analyzing the defendant's claim under this standard, the court first found that the error was "extremely serious" in light of the fact that it was inadmissible under either ER 404(b) or ER 609, and particularly in light of the "paucity of credible evidence against [the defendant]" and the inconsistencies in the complaining witness's allegations, which constituted the majority of the state's entire case. Similarly, the court had no problem under the second *Weber* criterion finding that the statement was not cumulative of other properly admitted evidence, since the trial court had specifically prohibited its use.

As concerned the last criterion, the court stated:

There is no question that the evidence of Escalona's prior conviction for having "stabbed someone" was "inherently prejudicial." See *State v. Saltarelli*, 98 Wn.2d 358, 362, 655 P.2d 697 (1982). The information imparted by the statement was also of a nature likely to "impress itself upon the minds of the jurors" since Escalona's prior conduct, although not "legally relevant," appears to be "logically relevant." See *State v. Holmes*, 43 Wn.App. 397, 399-400, 717 P.2d 766, *review denied*, 106 Wn.2d 1003 (1986). As such, despite the court's admonition, it would be extremely difficult, if not impossible, in this close case for the jury to ignore this seemingly relevant fact. Furthermore, the jury undoubtedly would use it for its most improper purpose, that is, to conclude that Escalona acted on this occasion in conformity with the assaultive character he demonstrated in the past. See *Saltarelli*, 98 Wn.2d at 362.

While we recognize that in the determination of whether a mistrial should have been granted, "[e]ach case must rest upon its own facts," [*State v.*] *Morsette*, [7 Wn.App. 783, 789, 502 P.2d 1234 (1972)] (quoting *State v. Albutt*, 99 Wash. 253, 259, 169 P.2d 584

(1917)), the seriousness of the irregularity here, combined with the weakness of the State's case and the logical relevance of the statement, leads to the conclusion that the court's instruction could not cure the prejudicial effect of [the alleged victim's] statement. Accordingly, under the factors outlined in *Weber*, we hold that the trial court abused its discretion in denying Escalona's motion for mistrial.

*State v. Escalona*, 49 Wn.App. at 255-56.

The decisions in *Pogue*, *Acosta* and *Escalona* each explain the unfair prejudice that arises in the minds of the jury when the state is allowed to elicit evidence that the defendant previously committed the same type of offense for which he is currently charged. In the case at bar, the trial court understood the prejudice that would occur in the case before it if the jury heard allegations that the defendant was accused of committing similar crimes against other children. In recognition of this fact, the court entered an order *in limine* prohibiting the admission of any such evidence. In spite of this pretrial order, the defendant's wife told the jury that the defendant had also molested his other daughter. This occurred during the following portion of Kristi Draggoo's direct testimony.

Q. After you asked him to leave, did you approach your daughters again?

A. Yeah, I did.

Q. And tell me how that went.

A. Actually, I asked them both together. And come to find out, neither one of them knew about each other, so . . .

MR. BLAIR: Objection. Ask for a hearing.

RP 223.

In this case, the state elicited the fact that Kristi Draggoo had twice separated from the defendant, and on each instance asked both of her daughters whether or not the defendant had molested them. In this context, it beggars the imagination to think that the jury did not know exactly what Kristi Draggoo meant when she said: “And come to find out, neither one of them knew about each other . . .” The meaning was crystal clear to the jury that the defendant had also molested his other daughter and that his other daughter had revealed this at the same time D.E. revealed this fact. This statement denied the defendant a fair trial in the same manner as did the improper evidence of other crimes denied the defendants a fair trial in *Pogue*, *Acosta* and *Escalona*. However, as the following explains, the prejudice was exacerbated in this case by improper admission of Kristi Draggoo’s opinion that the defendant was guilty.

Under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment, every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result, no witness, whether a lay person or expert, may give an opinion as to the defendant’s guilt, either directly or inferentially, “because the determination of the

defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

"[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.' " (Citations omitted.) 5A K.B. Tegland, *Wash.Prac., Evidence Sec.* 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact.

To the expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury.

*State v. Carlin*, 40 Wn.App. 701 (some citations omitted).

For example, in *State v. Carlin*, *supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial, the dog handler testified that his dog found the defendant after following a "fresh guilt scent." On appeal, the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed, noting that "[p]articularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the

defendant a fair and impartial trial.” *State v. Carlin*, 40 Wn.App. at 703.

Similarly, in *State v. Haga*, 8 Wn.App. 481, 506 P.2d 159 (1973), the defendant was convicted of murder, and appealed, arguing, in part, that he was denied his right to an impartial jury when the court allowed an ambulance driver called to the scene to testify that the defendant did not appear to show any signs of grief at the death of his wife and daughter. The Court of Appeals agreed and reversed, stating as follows.

A witness may not testify to his opinion as to the guilt of a defendant. *State v. Harrison*, 71 Wash.2d 312, at page 315, 427 P.2d 1012, at page 1014 (1967), said:

Finally, it is contended that the trial court erred in refusing to permit the proprietor of the burglarized tavern to give his opinion as to whether or not appellant was one of the parties who participated in the burglary. The proprietor of the tavern was in no better position than any other person who investigated the crime to give such an opinion. The question literally asked the witness to express an opinion on whether or not the appellant was guilty of the crime charged. Obviously this question was solely for the jury and was not the proper subject of either lay or expert opinion.

This recognized the impropriety of admitting the opinion of any witness as to guilt by direct statement or by inference as *Harrelson* likewise clearly points out. See also *State v. Norris*, 27 Wash. 453, 67 P. 983 (1902); 5 R. Meisenholder, Wash. Prac. s 342 (1965).

The testimony of the ambulance driver was wrongfully admitted. It inferred his opinion that the defendant was guilty, an intrusion into the function of the jury.

*State v. Haga*, 8 Wn.App. At 491-492. See also *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an

impartial jury when it allowed a state's expert to testify in a rape case that the alleged victim suffered from "rape trauma syndrome" or "post-traumatic stress disorder" because it inferentially constituted a statement of opinion as to the defendant's guilt or innocence).

In the case at bar, Kristi Draggoo twice communicated her opinion of guilt to the jury. The first occurred when she refused to admit that the defendant was the father of her two youngest children and rather referred him as merely a "sperm donor." This exchange went as follows:

Q. Do you have any kids?

A. I have three children.

Q. What are their names?

A. [D.] and she's 13, [L.], she's eight, and [N.] is four.

Q. Any how many, if any, of those kids are fathered by Barry Draggoo?

A. He's the sperm donor on the last two, [L.] and [N.]. And my oldest, [D.], has a different biological father.

RP 216.

Kristi Draggoo then exacerbated this derogatory statement when, after telling the jury that the defendant had also molested his other daughter, she looked over at the defendant in front of the jury and mouthed the word "asshole" to him. By itself, one might be able to formulate an argument that this instance of vitriol was not sufficient to require a mistrial. Similarly, the

derogatory reference to the defendant as a "sperm donor" instead of a father might also be argued to be insufficient, of itself, to deny the defendant a fair trial. However, each of these offense remarks were not made alone. They were made together, and then added to a statement that the defendant had molested his other daughter. Taken together, these statements denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

Normally, under circumstances in which a defendant has been denied a fair trial by the reception of inadmissible, highly prejudicial evidence, that defendant is entitled to a new trial. However, the defendant in this case does not seek a new trial upon the charge for which he was convicted. Rather, he only seeks a new trial upon the aggravating factors that the jury found that the defendant had committed in conjunction with the one count for which he was convicted. In this case, the state alleged that the defendant had committed numerous acts of abuse over an extended period of time and had acted from a position of trust and authority in so doing. Since the state had the burden of proving these additional facts beyond a reasonable doubt in the same manner that the state had to prove the elements of Count I beyond a reasonable doubt, the improper admission of prejudicial evidence also denied the defendant a fair trial on the aggravating factors. In this case, the defendant only seeks retrial on the aggravating factors, not on the underlying

charge.

**II. THE TRIAL COURT'S FAILURE TO GIVE AN AGGRAVATING FACTORS UNANIMITY INSTRUCTION DENIED THE DEFENDANT HIS RIGHT TO A UNANIMOUS JURY VERDICT UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

Under Washington Constitution, Article 1, § 21, and under the United States Constitution, Sixth Amendment, the Defendant in a criminal action may only be convicted when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); *State v. Allen*, 57 Wn.App. 134, 137, 787 P.2d 566 (1990)). As the court stated in *Kitchen*, “[w]hen 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. *Kitchen*, at 409 (citing *State v. Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984)). Failure to follow one of these options is a constitutional error and may be raised for a first time on appeal, even though the defense fails to request either option at trial. *State v. Gooden*, 51 Wn.App. 615, 754 P.2d 1000 (1988). Furthermore, the error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 411 (quoting *State v*

*Loehner*, 42 Wn.App. 408, 411, 711 P.2d 377 (1985)). Once again quoting the court in *Kitchen*, “[t]his approach presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged.” *Kitchen*, 110 Wn.2d at 411, (citing *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)).

For example, in *State v. Petrich*, *supra*, the defendant was charged with one count of indecent liberties and one count of second degree statutory rape. At trial, numerous incidents of sexual contact were described in varying detail. The jury convicted him on both counts, and he appealed, arguing that the court’s failure to ensure a unanimous verdict required the reversal of the convictions and a retrial. The Washington Supreme Court agreed and reversed, stating as follows:

In petitioner’s case, the evidence indicated multiple instances of conduct which could have been the basis for each charge. The victim described some incidents with detail and specificity. Others were simply acknowledged, with attendant confusion as to date and place, and uncertainty regarding the type of sexual contact that took place. The State was not required to elect, nor was jury unanimity ensured with a clarifying instruction. The error is harmless only if a rational trier of fact could have found each incident proved beyond a reasonable doubt. We cannot so hold on this record. Petitioner is entitled to a new trial.

*State v. Petrich*, 101 Wn.2d at 573 (citation omitted).

In the case at bar, the defendant was charged with seven counts of first

degree child molestation over the same period of time against the same complaining witness, who made claims during her testimony of many more than seven instances of abuse. In light of these charges and allegations, the trial court gave the jury the following unanimity instruction.

#### **INSTRUCTION NO. 5**

The State alleges that the defendant committed acts of Child Molestation in the First Degree on multiple occasions. To convict the defendant on any count of Child Molestation in the First Degree, one particular act of Child Molestation must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Child Molestation in the First Degree.

CP 69.

The use of this instruction guaranteed jury unanimity on each count as the aforementioned cases note that Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, require. However, this is not where the issue of jury unanimity ends. Rather, the constitutional requirement for jury unanimity also applies to the finding of aggravating factors the trial court uses to impose a sentence in excess of the standard range. The following examines this argument.

In *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that under the Sixth Amendment “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum

must be submitted to a jury, and proved beyond a reasonable doubt.” The court subsequently clarified this rule in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and held that the term “prescribed statutory maximum” meant the “standard range” for the offense, not the “statutory maximum” for the offense. In recognition of these requirements, the Washington Legislature passed RCW 9.94A.537, which has become known as the “*Blakely* fix.” As is mandated under *Blakely*, subsection (3) of this statute requires that aggravating factors be unanimously proved to the jury beyond a reasonable doubt. This subsection states:

(3) The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. ***The jury’s verdict on the aggravating factor must be unanimous***, and by special interrogatory. If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.

RCW 9.94A.537(3) (emphasis added).

In the case at bar, the state made allegations that the defendant committed multiple instances of abuse over an extended period of time. In response to this allegation, the court gave an instruction that attempted to secure jury unanimity on these claims. It stated as follows:

#### **INSTRUCTION NO. 21**

You will also be given special verdict forms for the crimes of Child Molestation in the First Degree as charged in count I to VII. If you find the defendant not guilty of these crimes, do not use the special verdict forms. If you find the defendant guilty of any count of

Child Molestation in the First Degree, you will then use the special verdict form with the corresponding letter and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the special verdict forms “yes”, you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If any one of you has a reasonable doubt as to the question, you must answer “no”. If you unanimously have a reasonable doubt as to this question, you must answer “no”.

CP 85.

The problem with this instruction is that it treats each aggravating factor as if each was a discrete event to which the jury had to unanimously agree or not. However, the aggravating factors of “multiple incidents of abuse” and the aggravating factor of “occurring over an extended period of time,” are not discrete events. Rather, there are allegations of multiple discrete incidents. However, while the court gave a unanimity instruction that required the jury to agree on which acts constituted each charged crime, the court did not give an instruction that required the jury to agree on which acts constituted these aggravating factors. Thus, while each jury member might well have been convinced that the state proved multiple acts over an extended period of time, they might well have disagreed on which acts were proven and disagreed on what period of time they occurred.

For example, one juror might have only been convinced that the state had proved multiple acts over the period of time in which the family lived outside of Lewis County, while another juror was only convinced that the

state had proved multiple acts over the time the family lived in Lewis County, while yet another juror was only convinced that the state had proven one act in Lewis County but multiple acts in Benton County. Thus, the failure to give an unanimity instruction that required the jury to find the same “multiple acts” proven for the same “extended period of time,” denied the defendant the right under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, to unanimity on these aggravating factors.

In this case, the state may argue that even if the defendant’s analysis were true, the jury also found that the defendant had acted from a position of trust or confidence. However, this aggravating factor also requires a unanimity instruction under the facts of this case. For example, one juror might have found that the defendant only acted from a position of trust and confidence when he committed multiple acts while his wife was working in Olympia, while another juror did not agree and only found that the defendant acted from a position of trust and confidence when the complaining witness was below school age. The failure to give an appropriate unanimity instruction concerning the aggravating factors is best evinced by the fact that the jury was unable to render verdicts on six of the seven charged counts. This fact, in light of the correct unanimity instruction on those seven counts, indicates that had the court gave an appropriate unanimity instruction on the aggravating factors, the jury would also have been unable to render a

unanimous verdict on the aggravating factors.

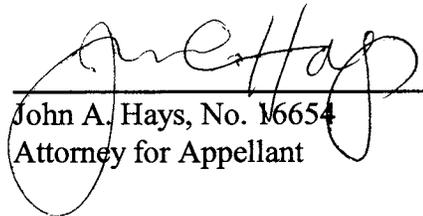
Thus, the failure to give a unanimity instruction that required the jury to agree on the times and places where the defendant acted from a position of trust and confidence also violated the defendant's right to jury unanimity under Washington Constitution, Article 1, § 21 and United States Constitution, Sixth Amendment. Consequently, this court should vacate the exceptional sentence and remand for a new trial on the aggravating factors.

**CONCLUSION**

The defendant is entitled to a new trial upon the state's allegations of aggravating factors on the one verdict rendered by the jury.

DATED this 2<sup>nd</sup> day of February, 2009.

Respectfully submitted,



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John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**UNITED STATES CONSTITUTION,  
SIXTH AMENDMENT**

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

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

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

**INSTRUCTION NO. 5**

The State alleges that the defendant committed acts of Child Molestation in the First Degree on multiple occasions. To convict the defendant on any count of Child Molestation in the First Degree, one particular act of Child Molestation must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Child Molestation in the First Degree.

### **INSTRUCTION NO. 21**

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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

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

STATE OF WASHINGTON,  
Respondent,

LEWIS CO. NO. 07-1-00498-4  
APPEAL NO: 38018-8-II

vs.  
DRAGGO, Barry,  
Appellant.

AFFIDAVIT OF MAILING

STATE OF WASHINGTON }  
COUNTY OF LEWIS } vs.

CATHY RUSSELL, being duly sworn on oath, states that on the **2nd day of FEBRUARY, 2009**, affiant deposited into the mails of the United States of America, a properly stamped envelope directed to:

MICHAEL GOLDEN  
LEWIS COUNTY PROSECUTING ATTY  
345 W. MAIN STREET  
CHEHALIS, WA 98532

BARRY DRAGGO - DOC #318681  
LEWIS COUNTY JAIL  
28 S.W. CHEHALIS AVE.  
CHEHALIS, WA. 98532

and that said envelope contained the following:

- 1. BRIEF OF APPELLANT
- 2. AFFIDAVIT OF MAILING

DATED this 2ND day of FEBRUARY, 2009..

[Signature: Cathy Russell]  
CATHY RUSSELL

SUBSCRIBED AND SWORN to before me this 2nd day of FEBRUARY, 2009..



[Signature: Heather Chittock]  
NOTARY PUBLIC in and for the  
State of Washington,  
Residing at: KELSO/LONGVIEW  
Commission expires: 11-04-2009