

NO. 38264-4

COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON, RESPONDENT

v.

GERMAINE D. CARTER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 07-1-02885-6

BRIEF OF RESPONDENT

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

1. Did the trial court properly find A.C.'s statements admissible under the child hearsay statute when the court found the statements reliable after applying the *Ryan* factors and A.C. testified at the proceeding?
2. Were defendant's double jeopardy rights protected where the jury was instructed that a separate crime was charged in each count and the prosecutor advised the jury in closing that to convict defendant on all four counts of first degree child rape, the jury had to find that defendant had committed four separate acts of rape?
3. Was the prosecutor's single rhetorical question in rebuttal closing asking whether A.C. would still be breathing if she had screamed during the rape a proper response to defense counsel's closing argument? Alternatively, if improper, has defendant satisfied his burden to show that there was a substantial likelihood that the statement affected the jury's verdict where defense counsel failed to ask for a curative instruction or move for a mistrial prior to the jury returning their verdicts?

B. STATEMENT OF THE CASE.

1. Procedure

On May 31, 2007, the State charged Germaine Carter, hereinafter “defendant,” with four counts of first degree rape of a child for anally raping his daughter, A.C., four times between December 10, 2003, and December 10, 2004. The parties appeared before the Honorable Thomas Feltnagle for trial on May 6, 2008. RP 3¹. Defendant stipulated to A.C.’s competency. RP 4-5. A CrR 3.5 hearing was held. RP 27-43. The court found defendant made a knowing and voluntary waiver of his Fifth Amendment rights and that defendant’s statements were admissible at trial. RP 45. A child hearsay hearing was held on May 6, 2008. RP 49-97. The court found A.C.’s statements to her friend, Angel Sanders, admissible as child hearsay. RP 97.

A jury convicted defendant as charged on May 22, 2008. RP 584-87; CP 76-79. After the jury returned its verdict, defendant asked the court to set a date for a CrR 8.3 motion for a new trial based upon prosecutorial misconduct. RP 588. The court set the hearing for the same day as sentencing. RP 588. On July 14, 2008, defendant filed a motion for a new trial based upon CrR 7.5(a)(2), (5), and (8) alleging that the prosecutor’s argument in rebuttal was improper. CP 80-83.

¹ The verbatim report of proceedings consists of 9 volumes and are referred to as RP (PAGE#) except the sentencing RP, which is referred to as SRP.

At the motion hearing, the court found there was no substantial likelihood that the prosecutor's statement affected the jury's verdict and denied defendant's motion. SRP 10. The court sentenced defendant to an indeterminate life sentence with a minimum sentence at the high end of the standard range: 318 months. SRP 28-31; CP 111-13.

2. Facts

a. Child Hearsay Hearing

Angel Sanders testified that at the time of the child hearsay hearing she was 12 years old and in the sixth grade. RP 54. She testified that she and A.C. have been friends for three years and best friends for most of that time. RP 54-55. A.C. is about one year younger than Angel. RP 55. When Angel met A.C., A.C. was living with A.C.'s grandmother, Jo Aerni. RP 55.

Angel testified that when A.C. was nine she came to Angel's house for a sleepover. RP 56. The girls were hanging out in Angel's room when Angel noticed that A.C. was sad. RP 56, 57. Angel went to A.C. and asked her what was wrong, but A.C. wouldn't tell her. RP 57. Angel asked A.C. questions to find out what was making her friend sad. RP 57. Angel asked if A.C. was mad at her or sad about something that had happened at home. RP 57. After a few minutes, A.C. said "Well, it's kind of about my dad." RP 58. Angel asked her what about her dad and A.C. replied "Well, he did something to me." RP 58. Angel asked what A.C.'s

dad had done and then started guessing. At one point, Angel asked if A.C.'s dad had raped her and A.C. said "No." because she didn't know what the word meant. RP 58, 65. Instead, she told Angel, "Well, he stuck something into me." RP 58. Angel asked if it was his private or his finger. RP 58. When Angel asked where A.C.'s dad stuck something, "I asked, you know, her mouth, her butt, her other part." RP 58. A.C. indicated to Angel that A.C.'s dad's wiener was stuck in her butt. RP 58-59.

After that sleepover, when A.C. would get sad, she and Angel would talk about what defendant did to A.C. RP 62. Angel and A.C. talked about what happened approximately five times after A.C. disclosed to Angel at the sleepover. RP 62-63.

Once when A.C. and Angel were riding in the car with A.C.'s grandmother, A.C. said that she loved her dad. RP 61. Angel asked A.C. how she could love her dad after what he did to A.C. RP 61. A.C.'s grandmother asked what A.C.'s father had done. RP 61. Angel told A.C.'s grandmother what A.C. had disclosed to her at the sleepover. RP 61.

A.C. also testified at the child hearsay hearing and was 11 years old at the time she testified. RP 68. A.C. testified that she currently lives with her grandmother, but has previously lived with her Aunt Ami and her father. RP 70. A.C. testified that Angel Sanders is her best friend. RP 71.

A.C. tells Angel a lot of stuff and has told Angel about the things A.C.'s father did to A.C. RP 71, 72. Angel has moved to a new house, but when Angel still lived in the big, white house across from A.C.'s grandmother's house, A.C. told Angel what A.C.'s father had done. RP 71, 72. After A.C. told Angel about A.C.'s father, A.C.'s grandmother became aware of what A.C.'s father had done when A.C. and Angel were riding in the car with A.C.'s grandmother. RP 72. A.C. testified that she did not tell anyone else about what happened except a counselor. RP 73-74.

Finally, A.C.'s grandmother, Josephine Aerni, testified at the child hearsay hearing. RP 77, 78. Ms. Aerni testified that A.C. currently lives with her, but previously lived with A.C.'s Aunt Ami and A.C.'s father, the defendant. RP 78. A.C. and Angel Sanders are friends and have been for the last three years. RP 81. Angel used to live right across the street from Ms. Aerni. RP 81.

Ms. Aerni recalled driving with A.C. and Angel in her car one day when A.C. said she missed her dad. RP 82. Ms. Aerni heard Angel ask A.C. how she could miss her dad after what he had done to A.C. RP 82. Ms. Aerni asked A.C. what her father had done. RP 82. Angel told A.C. to tell Ms. Aerni what happened, but A.C. bowed her head and said "No, Angel. I want you to." RP 82. Angel told Ms. Aerni that defendant put his "wiener in [A.C.'s] butt hole." RP 82.

Ms. Aerni testified that she contacted the Pierce County Sheriff's and later took A.C. to the Safe and Sound Building in Tacoma for an interview. RP 83.

b. Facts Adduced at Trial

A.C. lived with her father, Germaine Carter, for approximately one year in a big, blue house in Tacoma. RP 161, 163, 165, 170. The house had two bedrooms upstairs. RP 165. A.C.'s brother had one of the bedrooms upstairs and A.C. had the other, which she sometimes shared with Alyssa.² RP 165. Defendant anally raped A.C. repeatedly during the time she lived with him. RP 189-191.

Sometimes when A.C. was living with defendant he would look at her and her brother's bottoms. RP 177. The first time this happened, both A.C. and her brother were in the same room. RP 177. A.C. did not remember how or why defendant would check her bottom, but she knew it happened. RP 177-78. A.C. testified that when she lived with defendant there were times in the night when he would have her do things. RP 179. Sometimes he came in her room when she was doing homework, other times when she was sleeping. RP 179, 180. When defendant came into

² Alyssa is Melanie Warner's daughter. Melanie sometimes lived at the blue house with defendant during the year A.C. lived there. RP 163, 164, 343

her room in the middle of the night, he would wake her up. RP 181.

Defendant would have her lay on the floor and pull down her pants. RP 182. A.C. would lay on her knees with her bottom sticking up in the air. RP 185. Defendant would put his hands on her bottom. RP 182, 183.

Defendant would then move around; sometimes he used lotion that came in a white bottle. RP 184. When defendant moved around behind her, his body would come toward hers and move back and forth. RP 184. A.C.'s body would do the same thing. RP 185. As defendant's body moved back and forth his body touched A.C.'s bottom and something went inside of her bottom. RP 186, 187. A.C. testified that it hurt when something would go inside her bottom. RP 186, 187. Sometimes her bottom hurt for several minutes after her father was done. RP 188. A.C. said that the rape happened most nights and when it happened part of defendant's body would go inside of hers. RP 186. After it was over, defendant would tell her to go to bed or, sometimes, he would have her take a shower and then go to bed. RP 187, 188. A.C. testified defendant raped her between 40 and 50 times. RP 209.

Once when this was happening defendant's wife, Calina, came to the bedroom to tell defendant that he had a phone call. RP 188, 430.

Calina tried to open A.C.'s bedroom door, but wasn't able to because

defendant put his foot on the door to prevent it from opening. RP 189, 210. Defendant told A.C. to get in bed. RP 189.

A.C. testified that defendant raped her more than four times when she lived with him in the big blue house. RP 189, 189. Each rape happened in basically the same way. RP 190. Each time something went inside her bottom. RP 190. A.C. testified that she knew that something went inside because she could feel it going inside. RP 190. A.C. identified her father, the defendant, as the man who anally raped her more than four times when she lived with him in the big, blue house in Tacoma. RP 190-91.

After A.C. moved out of defendant's house, she moved in with her Aunt Ami and later in with her Grandmother, Ms. Aerni. RP 141, 159-60, 161. While living with her grandmother, A.C. met Angel Sanders and they became best friends. RP 140, 158-59. One night A.C. was spending the night at Angel's house. RP 143. A.C. appeared sad and Angel asked her why she was sad. RP 143. A.C. reluctantly told Angel that it was about her dad and something he stuck inside of her. RP 144. Angel asked A.C. a series of questions trying to figure out what A.C.'s father had done. RP 144, 146. A.C. ultimately disclosed that her father had put his private parts in her bottom. RP 146-47.

A.C.'s grandmother, Ms. Aerni, found out about the abuse during a car ride in which she overheard a conversation between A.C. and Angel. RP 149, 193. A.C. had said that she missed her dad, and Angel asked why A.C. would miss her dad after what he had done to her. RP 148. Overhearing this, Ms. Aerni asked what defendant had done to A.C. RP 148. A.C. asked Angel to tell Ms. Aerni what defendant had done, and Angel did. RP 149.

A.C. testified that she told Angel about the things her father did to her because she felt safe with Angel. RP 192. Also, after she told Angel, A.C. talked to a counselor about her feelings. RP 193. At trial a copy of a DVD showing the forensic interview with A.C. was admitted into evidence and played for the jury. RP 257-58; Ex. No. 3.

Defendant did not testify at trial.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY FOUND A.C.'S STATEMENTS ADMISSIBLE UNDER THE CHILD HEARSAY STATUTE.

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, review denied, 120 Wn.2d 1022 (1992). RCW 9A.44.120, commonly referred to as the child hearsay statute, provides for the admission of out-of-court statements of a

child victim of sexual abuse under certain circumstances. A trial court's decision to admit evidence under RCW 9A.44.120 is reviewed for an abuse of discretion. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003). "A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds." *Id.*

The child hearsay statute provides, in the relevant part, that:

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

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) The child either:

- (a) Testifies at the proceedings; or
- (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120. Essentially, the child hearsay statute requires a trial court to answer three questions in making its determination of the admissibility of child hearsay statements: (1) is the child victim's statement reliable; (2) is the child available to testify; and (3) if the child is

unavailable, is there corroborative evidence of the act. Here, only the first factor is at issue because A.C. testified at the hearing. RP 68-74.

RCW 9A.44.120 requires the court to hold a hearing in which it determines the admissibility of a child victim's statements. During that hearing, the court must first determine if the statement being offered is reliable. That determination is based on a set of reliability factors approved by the Washington Supreme Court in *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984). The *Ryan* factors are:

“(1) [W]hether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness [;] ... [(6)] the statement contains no express assertion about past fact[;] [(7)] cross examination could not show the declarant's lack of knowledge[;] [(8)] the possibility of the declarant's faulty recollection is remote[;] and [(9)]the circumstances surrounding the statement (in that case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented defendant's involvement.”

State v. Borboa, 157 Wn.2d at 121-22, 135 P.3d 469 (2006) (quoting *State v. Ryan*, 103 Wn.2d 165, 175-76). Not all of the factors must be satisfied for admissibility, but the factors must be “substantially met.” *State v. Woods*, 154 Wn.2d 613, 623-24, 114 P.3d 1174 (2005). Additionally, the court has expressly found that factors six and seven are of little relevance to the court's analysis and are no longer considered when determining reliability. *State v. Stange*, 53 Wn. App. 638, 769 P.2d 873, review

denied, 113 Wn.2d 1007, 779 P.2d 727 (1989); *State v. Borland*, 57 Wn. App. 7, 786 P.2d 810, *review denied*, 114 Wn.2d 1026, 793 P.2d 974 (1990).

Here, defendant alleges A.C.'s statements were not spontaneous because her disclosure came as the result of pointed questioning by her friend, Angel. However, the courts have defined the spontaneity factor broadly. A child's statement is spontaneous if it is volunteered or in response to a question that is not leading or suggestive. *State v. Henderson*, 48 Wn. App. 543, 550-51, 740 P.2d 329 (1987).

In *State v. Madison*, 53 Wn. App. 754, 756, 770 P.2d 662, *review denied*, 113 Wn.2d 1002, 777 P.2d 1050 (1989), Debra Muir observed her foster child, "D," exhibiting sexualized behavior in the form of frequent masturbation, including an incident in which D used a bath brush. Because of these observations, Ms. Muir asked D if anyone had touched her, but D refused to say. *Madison*, at 756. Later, Ms. Muir read a book to D on human reproduction. *Id.* After reading the book, Ms. Muir again asked D if anyone had touched her. *Id.* "After being reassured by Muir, D "said, 'My Uncle Steve put his,' and pointed at the picture in the book, which was the penis on the male, 'and put it here,' and pointed to her vagina." *Id.* Ms. Muir then asked D directed questions as to whether Uncle Steve had done anything else with his penis. *Id.* In response, D told Ms. Muir that Uncle Steve had put his penis in D's mouth. *Id.*

The *Madison* court found D's statements satisfied the spontaneous factor of the *Ryan* test. The court noted that D's statements were in response to Ms. Muir's showing D a book on human reproduction and asking D questions, but "the details of the event and the identity of the defendant were not suggested and were 'spontaneously' volunteered." *Madison*, at 759.

In *State v. Young*, 62 Wn. App. 895, 897, 802 P.2d 829 (1991), Jack Young was convicted of first degree statutory rape and indecent liberties for various sexual acts committed against his daughter, J. On appeal, Young challenged, among other issues, whether the court properly admitted J's child hearsay statements under *Ryan* because J's disclosures were the result of questions by medical and law enforcement professionals.

In *Young*, during a medical examination, J's doctor noticed that J's vaginal opening appeared to be larger than usual. *Young*, 62 Wn. App. 895, 897. The doctor asked J what she would do if someone tried to touch her there. *Id.* J responded "I do say no." *Id.* J then told the doctor that her daddy had touched her there the night before. *Id.* The following day Phyllis Schmidt of Children's Protective Services met with J and asked J many direct questions regarding sexual abuse. *Id.* at 897-98. Schmidt asked J if her daddy had ever hurt her with a stick, if she had seen her father nude, and whether her daddy's penis was flaccid or erect. *Id.* at 898. Schmidt asked J to demonstrate with dolls what J's father had done

to her. *Id.* J told Schmit that her father had placed his penis in J's vagina. *Id.* Schmidt then asked if her father had placed his penis near J's face or head and, if so, whether anything had come out. *Id.* J replied that he had. *Id.* "Schmidt asked if what came out had a taste, J replied that it tasted 'yucky' and that she had spit it out in the backyard." *Id.*

On appeal, Young alleged J's statements were not spontaneous because they were in response to questions about sexual abuse. *Young* at 901. The court looked at the entire context in which the statements were made and noted that as long as the questions were not leading or suggestive, then J's responses were spontaneous.

In the present case, the court applied each of the *Ryan* factors in turn. First, the court found that neither A.C. nor Angel had an apparent motive to lie. RP 93. There was no evidence that A.C. wanted to get defendant into trouble or that A.C. was in trouble and wanted to focus attention away from herself onto someone else nor was there evidence that A.C. wanted to move out of the house. RP 93. The court found no evidence that A.C. had a motive to lie. RP 93.

Second, the court found the A.C. had a general character of trustworthiness. RP 93. Specifically, the court noted there was no evidence that A.C. had anything other than a normal character, which the court felt would be the equivalent of trustworthiness. RP 93. The court noted that A.C. did not have a history of lying nor any crimes of

dishonesty. RP 93. The court found her general character to be trustworthy. RP 93.

Third, the court found that A.C. only disclosed to Angel, but that the disclosure happened on several occasions. RP 62. Angel testified that A.C. talked to her about what defendant did approximately different five times. RP 62. The court noted when Angel told A.C.'s grandmother what defendant had done to A.C., that A.C. was in the car and could have commented if Angel's recitation was not accurate. RP 94. The court also noted that what disclosures there were suggested reliability, but that "there's not the multiple disclosures to multiple people in a clear, chronological sense that one would like to see in this circumstance." RP 94.

Fourth, the court did not conclusively find the A.C.'s statements spontaneous, but neither did the court find they were not spontaneous. In fact, the court stated it was a "mixed bag." RP 94. A.C.'s demeanor on the night of the disclosure suggested something was wrong and, in response, her friend asked her questions for approximately 15 minutes to find out what was making A.C. sad. RP 94. The court stated that A.C. has a naiveté that suggests she would not make something like this up, but then one could argue that this lack of sophistication would give Angel more of a chance to substitute her version of events for A.C.'s. RP 94-95.

Fifth, the court found the timing of the statements and relationship between A.C. and Angel suggested trustworthiness. "This is a strong

factor suggesting reliability. If you can't tell your best friend at a sleep-over, I don't know who you can tell or when you can tell them." RP 95.

The sixth and seventh factors are no longer used in assessing reliability.

The eighth factor is the possibility that the declarant's recollection is faulty. The court noted that A.C.'s recollection of all events was not spot-on, but "she certainly did not demonstrate that her recollection was faulty." RP 95.

Finally, the ninth factor is whether the circumstances surrounding the statements give a reason to believe the declarant misrepresented the defendant's involvement. The court found the circumstances in this case strongly suggest reliability on both A.C.'s and Angel's parts. RP 97. Here, the court noted that Angel, the person to whom A.C. disclosed, appeared to be speaking without deception in a very straightforward manner. RP 96. Angel's testimony regarding A.C.'s disclosure had a logical flow that was consistent with what one would expect in a situation where a reticent nine-year-old discloses to a friend. RP 96.

Though the court did not make a finding on spontaneity, like *Young* and *Madison*, A.C.'s statements to Angel were spontaneous. When Angel noticed that A.C. was sad, she asked A.C. what was wrong. It was only after A.C. disclosed that it was something her father had done, that Angel asked pointed questions to determine what defendant had done to make A.C. sad. RP 58. When A.C. told Angel that defendant had put

something inside of A.C., Angel asked what it was that had been stuck inside of A.C. – a finger, a wiener. RP 58. When A.C. disclosed it was her father’s wiener, Angel asked if he had put his wiener in her mouth, butt or other place. RP 58-59. A.C. disclosed defendant had placed his wiener in her butt. RP 58-59. Like *Young* and *Madison* the disclosures A.C. made to Angel were made in response to direct questions regarding physical abuse. The disclosures came only after A.C.’s initial disclosure that she was sad about something her father had stuck inside her. The statements here, like those made in *Young* and *Madison*, were spontaneous.

Even if this court were to find that A.C.’s statements were not spontaneous, this finding is not fatal to the admissibility of A.C.’s statements under the child hearsay statute because not all the *Ryan* factors must be met in order for the court to find a child’s statements to be reliable. In the present case, the court found there were strong indicia of reliability in factors 5 and 9 and found all other factors, except spontaneity, had clearly been met.

Defendant also argues that court’s observation that Angel Sanders, A.C.’s friend to whom A.C. disclosed, was a strong and credible witness, improperly influenced the court’s finding that A.C.’s statements were reliable. Brief of Appellant at 24. Defendant’s argument is without merit because the court properly assessed both A.C.’s reliability as well as

Angel's³, and determined that A.C. statements to Angel were reliable only after applying the *Ryan* factors. RP 92.

The court properly found that A.C.'s statements to Angel were reliable under the *Ryan* factors and therefore, admissible as child hearsay. Defendant's arguments to the contrary are without merit.

2. DEFENDANT'S DOUBLE JEOPARDY RIGHTS WERE PROTECTED WHERE THE JURY WAS INSTRUCTED THAT A SEPARATE CRIME WAS CHARGED IN EACH COUNT AND THE PROSECUTOR ADVISED THE JURY IN CLOSING THAT TO CONVICT DEFENDANT OF ALL FOUR COUNTS THE JURY HAD TO FIND THAT DEFENDANT HAD COMMITTED FOUR DIFFERENT ACTS OF RAPE.

Defendant alleges that the jury instructions allowed the jury to convict him of four counts of rape of a child based upon the same criminal act. Brief of Appellant at (*). Defendant's argument is without merit because the charging documents, evidence presented, jury instructions and closing arguments all make clear that each count required proof of a separate act.

In *State v. Ellis*, 71 Wn. App. 400, 859 P.2d 632 (1993), Jerry Ellis was charged with two counts of first degree child molestation and two counts of first degree child rape. The victim for all four counts was

³ The court stated "We've got kind of the double question of is [A.C.] reliable, but is Angel also reliable in her recitation of what [A.C.] said or indicated." RP 92.

C.R., who testified to multiple acts of sexual abuse committed by Ellis. C.R. testified that Ellis (1) rubbed his penis against her buttocks; (2) put his hand up her shirt; (3) put his finger(s) in her vagina on at least 15 occasions; and (4) put his penis in her vagina on at least three occasions. *Ellis*, 71 Wn. App. 400, 401. On each occasion C.R. and Ellis were in Ellis' apartment either on the floor, on the hide-a-bed, or on Ellis' bed. *Id.* at 400.

The court's instructions included four "to convict" instructions, one for each count. *Id.* at 402. Instruction number 9 instructed the jury that to convict defendant on count I, the jury had to find beyond a reasonable doubt, that between January 1987 and December 1989, Ellis had sexual contact with C.R., that C.R. was less than 12 years old, and that Ellis was more than 36 months older than C.R. Instruction number 10 used the same elements as instruction number 9, but added that count II had to have occurred on a day other than Count I. *Id.* Instruction number 12 instructed the jury that to convict defendant on Count III, the jury had to find, beyond a reasonable doubt, that between January 1987 and June 1988, Ellis had sexual intercourse with C.R. that C.R. was less than 12 years old, and that Ellis was more than 24 months older. *Id.* Finally, instruction number 13 used the same elements as instruction number 12, but the dates were January 1988 and December 1989. *Id.*

In addition to the "to convict" instructions, the court also instructed the jury that a separate crime was charged in each count and on unanimity.

Ins. No. 4: A separate crime is charged in each count. You must decide each count separately as if it were a separate trial. Your verdict on one count should not control your verdict on any other count.

Ins. No. 5: Evidence has been introduced of multiple acts of sexual contact and intercourse between the defendant and [C.R.]. Although twelve of you need not agree that all the acts have been proved, you must unanimously agree that at least one particular act has been proved beyond a reasonable doubt for each count.

Id.

Jury instruction numbers 9 and 10 had the exact same elements and same time period, but instruction number 10 included language that count II must of occurred on day other than the one in count I. Jury instructions numbers 12 and 13 had the same elements and the time periods overlapped by six months. In instruction number 12, the acts were alleged to have occurred between January 1987 and June 1988 whereas in instruction number 13, the acts were alleged to have occurred between January 1988 and December 1989. Despite the six month overlap from January 1988 to June 1988, jury instruction number 13 did not have language indicating that count IV had to have occurred on a different day than count III.

On appeal, Ellis raised both jury unanimity and double jeopardy arguments based on the court's instructions. *Id.* at 403-404. The court rejected both arguments. Ellis' double jeopardy argument alleged that the jury may have used the same rape as the factual basis to convict him on both counts III and IV because the jury was not told that each of those

counts required a different act. *Ellis*, at 406. This court rejected Ellis' double jeopardy argument for three reasons: (1) an ordinary juror would understand that when two counts charge the very same crime that each count requires proof of a different act; (2) the court gave an instruction that a separate crime is charged in each count; and (3) the jury was instructed that they were required to unanimously agree that one act had been proved for each count.

Similarly, *State v. Hayes*, 81 Wn. App. 425, 440, 914 P.3d 788 (1996), held that "[n]o double jeopardy violation results when the information, instructions, testimony, and argument clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense." *Hayes* makes clear that the court's instructions are not the sole basis to ensure a defendant's right to be free from double jeopardy. Instead, a combination of factors, including argument of counsel, testimony, charging documents, and instructions ensure defendant's rights are protected. *Hayes*, 81 Wn. App. 425, 440.

Ralph Hayes was charged with four counts of first degree rape of a child alleged to have occurred on or about July 1, 1990 through May 31, 1992. *State v. Hayes*, 81 Wn. App. 425, 427. At trial the victim, defendant's daughter K., testified that from the summer of 1990 until mid June 1992, "Hayes 'put his private part in mine' at least four times and up to '[t]wo or three times a week.'" *Hayes*, at 429. K. was not able to give specific dates, but gauged time by where she and Hayes lived and with

whom when these incidents occurred. *Id.* at 428-29. The jury convicted Hayes of all four counts.

On appeal, Hayes alleged, along with other claims, that his double jeopardy rights were violated because the State used the same language in the charging document and alleged the same evidence for each count. *Id.* at 439. Division One of the Court of Appeals rejected Hayes' double jeopardy argument. *Id.* The court stated that a defendant is protected from any risk of double jeopardy when the evidence is sufficiently specific as to each act charged. *Id.* at 439-40. Additionally, the court stated that the State need not elect a specific act for each individual charge so long as the jury is instructed on unanimity and the State introduces different evidence to support each count.

Here, defendant was charged with four counts of rape of a child in the first degree. CP 1-2. The evidence at trial was that defendant repeatedly anally raped his daughter over a period of one year. The rapes all occurred in a very similar fashion. Each time defendant would have A.C. undress and lay on the floor with her knees underneath her and her bottom in the air; each time A.C. could feel something go inside her bottom and it hurt; each time defendant would move back and forth, which caused A.C. to move back and forth; and when defendant was done he would tell A.C. to go to bed. Only once did A.C. remember a variation in that Calina tried to come into A.C.'s bedroom while defendant was raping her. A.C. testified that defendant raped her at least 4 times and on cross

examination she testified that it happened as many as 40-50 times. In closing argument, the prosecutor explained that each count represented a different act of rape – 4 separate acts must be proved to convict defendant on all four counts. RP 508-10.

Here, the jury was given four separate “to convict” instructions, one for each count. CP 68-71. The elements in each jury instruction were identical, however, each instruction referenced a different count (count I, II, III, and IV). CP 68-71. Like *Ellis*, the court instructed the jury that a separate crime was charged in each count and a unanimity instruction was given.

Instruction No. 7

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

Instruction No. 15

There are allegations that the defendant committed acts of rape of a child in the first degree on multiple occasions. To convict the defendant on any count of rape of a child in the first degree, one particular act of rape of a child in the first degree must be proved beyond a reasonable doubt and you must unanimously agree as to which act has been proved beyond a reasonable doubt. You need not unanimously agree that the defendant committed all the acts of rape of a child in the first degree.

CP 64, 72.

Here, like *Ellis*, the ordinary juror would understand that each count requires proof of a different act. Also like *Ellis*, this understanding

is consistent with, and reinforced by, the court's instructions that a separate crime is charged in each count and that the jury must unanimously agree on one particular act of child rape for any count. This is especially true where, as was done in this case, the prosecutor emphasized in closing argument that each count represented a separate act and to convict defendant of all four counts, the jury had to find four separate acts of child rape occurred. RP 508-10.

Defendant relies on *State v. Borsheim* and *State v. Berg*, both Division One cases, to support his argument that his double jeopardy rights were violated by the four "to convict" instructions. Defendant's argument fails because *Borsheim* and *Berg* are not binding upon this court and they contravene *Ellis*, which is binding authority.

In *State v. Borsheim*, 140 Wn. App. 357, 363, 165 P.3d 417 (2007), Bryan Borsheim was charged with four counts of first degree child rape for acts alleged to have occurred with Borsheim's girlfriend's daughter, B.G. At trial, B.G. testified that over a period of 2 to 2½ years Borsheim showered with her daily and, during those showers, forced her to submit to vaginal or oral sex. *Borsheim*, 140 Wn. App. 357, 363. A jury convicted Borsheim on all four counts of child rape.

On appeal, Borsheim alleged his jury instructions were inadequate to protect him from double jeopardy or to ensure jury unanimity. *Id.* at 364. The primary issues were (1) rather than having four separate "to convict" instructions, one for each count, the court combined all four

counts into one instruction; and (2) the jury instructions did not tell the jury that there must be a different factual basis for each count. *Id.* at 367-68. The court rejected the unanimity argument because a unanimity instruction was included in the court's instructions to the jury. *Id.* at 366. However, relying on the "separate and distinct" language in *Hayes*, and the fact that all four counts were contained in one "to convict" instruction, Division One of the Court of Appeals found that Borsheim's right to be free from double jeopardy was violated. *Id.* at 367-69. Division One's reliance on the "separate and distinct" language in *Hayes* ignores that the holding in *Hayes* rested not only on the jury instructions, but on the record as a whole: charging documents, evidence presented, closing arguments, and jury instructions. *Hayes*, at 440.

In *Berg*, Division One extended *Borsheim* and embraced the "separate and distinct" language as the sole means to protect against double jeopardy violations in multiple acts cases. *State v. Berg*, 147 Wn. App. 923, 935, 198 P.3d 529 (2008). Edward Berg was convicted of one count of third degree rape and two counts of third degree child molestation. *Berg*, at 930. On appeal, Berg alleged that his right to be free from double jeopardy was violated because the jury instructions allowed the jury to convict him of two counts of child molestation based upon a single act. *Id.* at 930. The "to convict" instructions challenged by Berg were identical to each other and the court did not instruct the jury that each count had to be based upon a different "separate and distinct

act.” *Id.* at 934-35. The court found that without the “separate and distinct act” language, Berg was potentially exposed to multiple punishments for a single offense. *Id.* at 935.

The *Berg* court rejected the State’s arguments that Berg was protected from double jeopardy (1) based upon the facts of the case, in which the State presented evidence of multiple acts of child molestation; and (2) by the State’s closing argument in which the State explained that in order to convict Berg of two counts of child molestation the jury would have to find that two separate acts of child molestation occurred. *Id.*

To follow *Berg*, this court would have to abandon *Ellis* and ignore the well established doctrine articulated in *State v. Petrich*⁴. This court in *Ellis* looked to the instructions as a whole and the ordinary juror to ensure defendant’s double jeopardy rights are protected. This approach was reinforced in *Hayes* where the court looked at the information, evidence presented, argument of counsel, and jury instructions to determine if a double jeopardy violation occurred. In contrast, *Berg* looks only to the jury instructions to see if the “separate and distinct acts” language is present. If that language is not included in the jury instructions, the *Berg* court looks no further to find a double jeopardy violation. In addition to rejecting *Ellis*, to follow *Berg* this court would have reject the analysis of *Petrich*. While *Petrich* deal with a related constitutional issue, jury

⁴ 101 Wn.2d 566, 683 P.2d 173 (1984).

unanimity, it also looked beyond the court's instructions to ensure the defendant's rights are protected. In *Petrich*, also a multiple acts case, the Supreme Court held that a defendant's constitutional right to a unanimous verdict is protected by either a unanimity instruction or an election in closing argument. *State v. Petrich*, 101 Wn.2d 566, 572. If, as *Berg* held, the only way to protect a constitutional right is through the jury instruction, then the Supreme Court's holding in *Petrich* is error.

In the present case, there is no possibility that defendant's double jeopardy rights were violated. The court's instructions clearly instructed the jury that (1) a separate crime was charged in each count and that each count should be decided separately; (2) to convict the defendant on any count of rape...one particular act of rape must be proved beyond a reasonable doubt; and (3) there were four separate "to convict" jury instructions, each referencing a different count of rape. Additionally, in closing the prosecutor explained that the jury must find a separate and distinct act for each of the four counts. Finally, the ordinary juror would understand that when multiple counts charge the very same type of crime, each count requires proof of a different act. Defendant's double jeopardy argument is without merit and this court should so find. If the court disagrees with the State's analysis, because defendant was convicted on all four counts, on remand the State should have the option of sentencing of sentencing defendant on one count or retrying him on all four counts.

3. THE PROSECUTOR'S STATEMENT IN REBUTTAL CLOSING DID NOT RISE TO THE LEVEL OF MISCONDUCT; ALTERNATIVELY, DEFENDANT CANNOT SHOW HE WAS PREJUDICED BY THE STATEMENT.

Claims of prosecutorial misconduct are reviewed under an abuse of discretion standard. *State v. Allen*, 159 Wn.2d 1, 10, 147 P.3d 581 (2006). The prosecutor is afforded wide latitude in closing argument in drawing and expressing reasonable inferences from the evidence. *State v. Millante*, 80 Wn. App. 237, 250, 908 P.2d 374 (1995).

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). The challenged remarks are viewed in the context of the entire argument, the issues in the case, the evidence addressed in the argument and the instructions given. *State v. Russell*, 125 Wn.2d 24, 85-86. Improper comments are not deemed prejudicial unless "there is a *substantial likelihood* the misconduct affected the jury's verdict." *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (*quoting State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)) [italics in original]. If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. *State v. Binkin*, 79 Wn. App. 284, 293-94, 902 P.2d 673 (1995). Where the defendant did not object or request a curative instruction, the error is considered waived unless the

court finds that the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *Id.*

Defendant relies upon *State v. Stith*, 71 Wn. App. 14, 856 P.2d 415 (1993), to support his argument that there was a substantial likelihood that the prosecutor’s statement in this case affected the jury’s verdict. *Stith*, however, is distinguishable on its facts.

Robert Stith was convicted of unlawful delivery of a controlled substance. *Stith*, at 18. During closing argument, the prosecutor argued “[Defendant] knew exactly what he was doing. He knew what was up. He was just-he was out. He was out of jail for a week and he basically was just resuming his criminal ways. He was just coming back and he was dealing again.” After a sidebar, the jury was instructed to disregard any comment that Stith was incarcerated for any activities relating to the current charged and were told to “totally disregard any inference about his being out on the street and dealing again.” *Stith*, at 16. In response to defense counsel’s argument that the police officers were lying, the prosecutor argued in rebuttal that the criminal justice system has incredible safeguards in place that prevented police officer perjury and that the court had already determined probable cause existed in Stith’s case.

The court found the prosecutor’s arguments flagrantly improper and that there was a substantial likelihood the arguments affected the

jury's verdict. *Stith*, at 23. First, the court's concern regarding the prosecutor's argument that Stith was out of jail and "back dealing again" was that reference to Stith's prior drug conviction was in direct contravention of the court's order to exclude any evidence of Stith's prior drug convictions. *Stith*, at 22. The court stated the prosecutor's argument that Stith had committed drug crimes in the past and was doing it again was clearly impermissible and, in effect, the prosecutor's opinion that Stith was guilty of both the prior drug charges and the current ones. *Stith*, at 22.

Second, the court found the prosecutor's arguments regarding the incredible safeguards put in place to prevent officer perjury and the court's prior determination of probable cause tantamount to assuring the jury of defendant's guilt. *Stith*, at 22.

Finally, the court found the comments prejudicial because "[t]aken together these comments not only implied that the trial was a useless formality because the real issues had already been determined, but also directly stated that Stith was out of the streets dealing again. Such comments strike at the very heart of a defendant's right to a fair trial before an impartial jury." *Stith*, at 23.

Unlike *Stith*, in the present case the prosecutor did not violate a motion *in limine* that prohibited mentioning defendant's prior criminal activity, he did not offer his opinion that defendant was guilty of the charged offense, nor did he imply that the real issues in the trial had

already been decided at a prior hearing and that the trial was a useless formality. Additionally, unlike *Stith* where a curative instruction was requested and given to the jury, no such request was made by defendant in the present case.

Instead, the prosecutor's rhetorical question of whether A.C. would still be breathing if she had screamed, was in response to defense counsel's argument that A.C. was not credible because she claimed to have screamed where there was no testimony that anyone in the house heard her scream.

PROSECUTOR: The defense makes a big deal about screaming, about how [A.C.'s] screams would have been heard by other people in the house. Well, here's one thing that we do know: [A.C.] said that it was hurting, and at one point, she said that she didn't say that she was screaming. I'm sure she wanted to scream, and she may have thought that she was making more noise than she was, and she might have screamed at one point. What do you think the defendant did if she would make any noise? You know how concerned he was about anybody finding out about this. Do you think that he would have stood for that, and as he's anally raping her, if she lets out noise, do you think she would still be breathing? She was scared.

RP 571. The prosecution has wide latitude to respond to defendant's closing arguments. Even remarks that would otherwise be improper are not grounds for reversal when they are in response to defense counsel's statements, unless the remarks are so prejudicial that an instruction would not cure them. *State v. Swan*, 114 Wn.2d 613, 663, 790 P.2d 610 (1990) *cert. denied*, 498 U.S. 1046, 111 S. Ct. 752, 112 L. Ed. 2d 772 (1991).

Here, though inartfully worded, the prosecutor's argument was that defendant was in control of this situation and that A.C. was making as much noise as defendant would allow was in direct response to defense counsel's closing argument. *See* SRP 6. Once the objection was made and sustained, the prosecutor clarified his argument and no further objections were made. RP 571.

Even if the court were to find the State's comment improper, defendant's claim fails because he has not demonstrated that the deputy prosecuting attorney's comment prejudiced the verdict in any way. When the deputy prosecuting attorney's statement is looked at in the context of the whole argument, it is clear that his single statement that the victim would not be breathing if she had screamed did not prejudice the defendant.

The fact that defendant did not ask for a curative instruction indicates that, within the context of the argument itself, defendant did not perceive that the statement was prejudicial. This is consistent with the court's analysis of defendant's post-verdict motion for a mistrial where the court stated:

[I]n trying to determine whether or not there's a substantial likelihood that this affected the jury's verdict – part of this is kind of a you-had-to-be-there kind of argument. And I believe from listening to the argument at the time, that the cadence the State used, that the intonation the State used, that the placement of the statement in relation to the other argument or the flow of the argument that the State was making is that this wasn't a focus or a

highlight. It wasn't, you know, some dramatic pause where [the prosecutor] suggests that Mr. Carter is a murderer or a potential murderer. It was pretty much as the State's describing it, I believe. And while it could have been misinterpreted by the jury, and very reasonably so, it wasn't particularly inflammatory in the way it was made.

SRP 9.

Here, defense counsel objected to the prosecutor's statement and the objection was sustained. RP 571. The prosecutor moved on in his argument and did not return to the statement to which defendant objected. It is clear that defense counsel perceived no prejudice because he never asked for a curative instruction nor did he move for a mistrial until after the jury had deliberated and returned their verdicts. The defendant cannot choose not to ask for a mistrial or a curative instruction, gamble on the outcome, and when convicted, reassert the waived objection. *See State v. Lord*, 161 Wn.2d 276, 291, 165 P.3d 1251 (2007).

When the court denied defendant's motion for a mistrial, the court noted that even if the court assumed the State's statement constituted misconduct, the court did not find a substantial likelihood that the prosecutor's single statement affected the jury's verdict. SRP 8-9. The court based its determination that there was no substantial likelihood that the jury's verdict was affected by the statement on three factors: 1) the fact that the State placed no emphasis on the statement and it was not a highlight of the State's argument; 2) in the context of a child rape case, the jury would most likely not be unduly swayed by the statement; and 3) the

defense objected and the court sustained the object in addition to the jury instructions, which tell the jury to disregard inadmissible evidence and that arguments are not evidence. SRP 8-10.

Additionally, if this court was to find the prosecutor's statement improper, any impropriety was cured by the instructions to the jury. Jurors are presumed to follow the court's instructions. *State v. Farr-Lenzini*, 93 Wn. App. 453, 470-71, 970 P.2d 313 (1999). Here, like *Farr-Lenzini*, the trial court instructed the jury, "The lawyers' remarks, statements and arguments are intended to help you understand the evidence and apply the law. It is important for you to remember the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement or argument that is not supported by the evidence or the law in my instructions." CP 57.

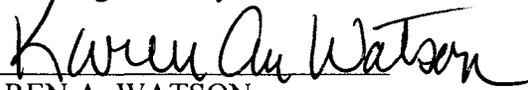
Defendant's allegations of prosecutorial misconduct are without merit.

D. CONCLUSION.

For the reasons argued above, the State respectfully asks this court to affirm defendant's four convictions for rape of a child in the first degree.

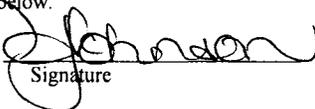
DATED: AUGUST 19, 2009

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Pierce County
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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.

8/19/09 
Date Signature

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