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## ***ASSIGNMENT OF ERROR***

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

1. Counsel's failure to move to disqualify a juror who revealed a connection to a complaining witness and failure to object to evidence that was more prejudicial than probative denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. RP 130-135, 286-292<sup>1</sup>.

2. The court's use of an erroneous Petrich instruction and erroneous "to convict" instructions denied the defendant his right to jury unanimity under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment. CP 111, 115-116.

3. The prosecutor committed misconduct and denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when he argued that jury should find the defendant guilty of child molestation because he had probably also twice raped the complaining witness. RP 349-351.

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<sup>1</sup>The record in this case includes three volumes of verbatim reports of the trial that began on January 30, 2009, referred to herein as "RP [page #]." The record also includes verbatim reports of the hearings held on January 30, 2009, and March 25, 2009. These two reports are referred to herein as "RP [date][page 3]."

*Issues Pertaining to Assignment of Error*

1. Does a defense counsel's failure to move to disqualify a juror who revealed a bias against the defendant through a connection to a complaining witness, and does a defense counsel's failure to object to evidence that was more prejudicial than probative, deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the jury would have returned verdicts of acquittal had counsel moved to disqualify the biased juror and had counsel properly objected to the evidence that was more prejudicial than probative?

2. Does a court's use of an erroneous Petrich instruction and erroneous "to convict" instructions that fail to assure jury unanimity on all counts deny a defendant the right to jury unanimity under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment?

3. Does a prosecutor commit misconduct and deny a defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if he argues that the jury should find the defendant guilty of child molestation because he had probably also twice raped the complaining witness even though she denies that claim?

## STATEMENT OF THE CASE

### *Factual History*

Between June of 2000 and July of 2006, the defendant Barry Royce Draggoo lived in a small two-bedroom apartment at 132 Elma Drive, in Centralia, Washington, with his wife Kristi, his step-daughter Danielle, and the two children he had with Kristi, named Laura and Nathan. RP 94-96. Danielle was born on April 11, 1995, Laura was born on December 2, 1999, and Nathan was born on June 23, 2003. *Id.* In 2002, Kristi and her children became acquainted with the Diaz family, who lived in an adjoining apartment. RP 96-98. The Diaz family consisted of father Fabion, mother Minerva, daughters Nayeli and Alondra, and a son. *Id.* Nayeli was born on April 24, 1993. RP 167-171. The Draggoo and the Diaz children became close friends, and would routinely have overnight visits with each other. RP 96-101, 167-171. In addition, the two Diaz daughters would occasionally go on outings and vacations with the Draggoo family. *Id.*

Laura Draggoo was also friends with a girl by the name of Amanda Shaffer, whose family attended the same church as the Draggoo family. RP 99-101, 252-254. Amanda would occasionally have overnight visits with Laura. *Id.* On a couple of occasions in which her mother and father were out of town, Laura's older sister Rachel would also spend the night at the Draggoo's apartment. RP 254-258. Rachael was born on September 6, 1993.

RP 237-241.

According to Nayeli Diaz, on a number of different occasions while she was either playing with or staying with the Draggoo children, the defendant touched her sexually. RP 182-195. Although she claimed that this happened about 20 different times, she stated that she could only remember the details of three specific events of molestation. RP 191-192. The first she remembered occurred in the kitchen when she and Laura came into the Draggoo apartment for a few minutes while playing outside. RP 182-184. According to Nayeli, when Laura walked back outside, the defendant locked the door behind her, took Nayeli by the arm, walked her over in front of the kitchen sink, and started grabbing and pinching her nipples and vaginal area over her clothing for about a minute. *Id.* He then stopped, and she went outside. *Id.*

Nayeli also reported that on another occasion she was with the Draggoo family staying at a motel in Forks, Washington, and playing in the motel swimming pool with the defendant and the other children. RP 188-190. The defendant was in the middle of the pool, and would pick each child up and throw them up out of the water. *Id.* When she took her turn, he grabbed her on her crotch with one hand and pushed his thumb against her vagina. *Id.* In her third specific claim of abuse, Nayeli reported that on one occasion in the Draggoo apartment the other girls were playing “dress up”

and she was sitting on the living room couch being the “judge.” RP 185-188. Both the defendant and his wife were also sitting in the living room. *Id.* According to Nayeli, at one point, all of the other children went into the bedroom to change, and the defendant’s wife went in to use the bathroom. *Id.* This left her alone in the living room with the defendant, who got up, walked over to her, and rubbed and pinched her nipples. *Id.*

Rachel Shaffer also made a claim that on one occasion the defendant touched her inappropriately. RP 255-265. According to Rachel, this happened on an evening in which her parents were out of town and she and her sister were staying the night with Draggoo family. *Id.* All of the children were in the living room watching a movie with the defendant, and Kristi Draggoo was in the kitchen. *Id.* At one point, the children asked the defendant to give each of them back rubs. RP 255-258. When the defendant went to give Rachel a back rub, he twice put his hand under her shirt, reached around, and touch her breast area, although he did not touch her nipples. RP 262-265.

### ***Procedural History***

By information filed July 9, 2008, and amended October 8, 2008, the Lewis County Prosecutor charged the defendant Barry Royce Draggoo, with two counts of first degree child molestation against Nayeli Diaz (counts I and II), and one count of first degree child molestation against Rachel Shaffer

(count III). The language in the body of the charges in counts I and II are essentially identical, and read as follows:

**COUNT I - CHILD MOLESTATION IN THE FIRST DEGREE**

By this Information the Prosecuting Attorney for Lewis County accuses the defendant of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, which is a violation of RCW 9A.44.083, the maximum penalty for which is life in prison and a \$50,000.00 fine, in that defendant on or about and between April 24, 2002, and April 23, 2005, in Lewis County, Washington, then and there being at least 36 months older than N.J.D., did have sexual contact with N.J.D., DOB: 04/24/1993, who was less than 12 years of age and not married to the defendant; furthermore, the defendant used his position of trust and confidence to facilitate the commission of the current offense, against the peace and dignity of the State of Washington.

**COUNT II - CHILD MOLESTATION IN THE FIRST DEGREE**

And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, which is a violation of RCW 9A.44.083, the maximum penalty for which is life in prison and a \$50,000.00 fine, in that defendant on or about and between April 24, 2002, and April 23, 2005, in Lewis County, Washington, then and there being at least 36 months older than N.J.D., did have sexual contact with N.J.D., DOB: 04/24/1993, who was less than 12 years of age and not married to the defendant; furthermore, the defendant used his position of trust and confidence to facilitate the commission of the current offense, against the peace and dignity of the State of Washington.

CP 13-14 (capitalization in original).

The amended charge in count III also included the language claiming that the defendant had abused a position of trust and confidence to facilitate the commission of the offense. CP 15. The state also filed a separate "Notice of Aggravating Factor for Purposes of Imposing Exceptional Sentences"

alleging that under RCW 9.94A.537 and RCW 9.94A.535(3)(n), the defendant has “used his position of trust or confidence to facilitate the commission of the current offenses.” CP 16.

This case later came on for trial before a jury in which the state called 10 different witnesses, including Nayeli Diaz and Rachel Shaffer. RP 77-329. The defense did not call any witnesses. RP 333. The state’s first two witnesses were an expert who opined that it was not unusual for child victims of sexual abuse to delay reporting. RP 77-91. The second witnesses testified that between January 5<sup>th</sup> and March 3<sup>rd</sup>, 2008, the defendant was housed in the Lewis County jail in a cell with a prisoner by the name of John Huggins. RP 91-93.

The state’s third witness was Kristi Eklund (fka Draggoo), who began her testimony by giving the names and ages of her children, as well as the names and ages of the Diaz and Shaffer children, including Nayeli Diaz and Rachel Shaffer. RP 94-130. In the middle of her testimony, the court took a noon recess. RP 130. Apparently, during her testimony prior to the break, one of the jurors realized that she actually was acquainted with the sister and parents of Nayeli Diaz. RP 130-135. Upon informing the bailiff of this fact, the court called the juror in for questioning. *Id.* She stated that she had been employed teaching in the computer lab at Fords Prairie Elementary school, and that Nayeli Diaz’s younger sister Alondra had been one of her students.

*Id.* She had also seen Alondra out on the playground. *Id.* According to this juror, at present she was the secretary at Fords Prairie Elementary, and that in that position she was acquainted with both Alondra, as well as her parents, and that she was privy to confidential information concerning the family. *Id.* After this questioning, the court inquired whether either counsel had any objections to this juror continuing on the panel in this case. *Id.* In spite of the fact that this juror had personal connections to the Diaz family, that Nayeli Diaz and her mother were endorsed as witnesses, and that the court had an alternate juror available to prevent the necessity of a mistrial, the defense did not move to disqualify this juror. RP 130-135, 397-398.

In its case-in-chief, the state also called a person by the name of John Huggins to the stand. RP 296. Mr. Huggins is currently serving a life sentence for rape of a child out of a Lewis County conviction. RP 286-288. Between January 5<sup>th</sup> and March 3<sup>rd</sup>, 2008, he was housed in the same cell in the Lewis County jail with the defendant. RP 91-93, 286-288. According to Mr. Huggins, during that period of time the defendant told him that about four years ago he twice raped a girl who was a friend of and two years older than his step-daughter Danielle. RP 86-91. Mr. Huggins went on to claim that the defendant bragged about what he had done, that he had claimed that he held the girl down, and that he claimed he had raped her while she was crying and begging him to stop. *Id.* The defense did not object to the

admission of this evidence. *Id.*

In fact, during closing argument, the prosecutor argued that the girl the defendant had supposedly brutally twice raped was Nayeli Diaz, in spite of the fact that Nayeli had made no such claims against the defendant. RP 349-351. This argument, given over defense objection, went as follows:

So defendant gives him some details, neighbor, older girl. And counsel may say, well, that's not a believable story for Mr. Huggins because the defendant told Mr. Huggins that he held her down and raped her two times. Well, he didn't go into any more detail than that. He just said rape. And what the defendant's version of rape may be, who knows.

Fishermen get together and they tell each other how big the fish they catch were. Fish that may have been that big, well, when you retell the story it may be that big. Same thing when they were down there trading their war stories. So either Mr. Draggoo was exaggerating what he had done or it's actually true.

Nayeli was molested around 20 times. She can only remember about three of them. He may have actually done that one of those 17 other times. When you think about it, when a traumatic event happens to a child, are they going to remember every detail about it? No. First off, is there a chance that she may have blocked those two out of her mind? Yeah, there is.

So he was either exaggerating what he had done --

MR. BLAIR: Objection; arguing facts not in evidence, speculative.

THE COURT: Overruled.

MR. HAYES: Either exaggerating what he had done to her or he did do it. But that's how this whole case started. If Mr. Huggins hadn't shared the information he had gotten we wouldn't be here and these two young girls would still be carrying around this horrible

secret inside eating away at them. Nayeli said -- “How did you feel after you told Detective Callas?” She said, “I felt better.” She'd gotten that horrible secret off her chest and finally told someone, like a weight had been lifted off of her. These poor girls would still be carrying that around. Who knows if they ever would have told anyone.

RP 349-351.

Following the close of the state's case, the court instructed the jury.

RP 333-346; CP 105-222. Instruction No. 4 stated as follows:

**Instruction No. 4**

The State alleged 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 in the First Degree 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 111.

The court also gave the following “to convict” instruction in regards to count I involving Nayeli Diaz:

**Instruction No. 8**

To Convict the defendant of the crime of Child Molestation in the First Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about and between April 24, 2002, and April 23, 2005, the defendant had sexual contact with Nayeli Diaz;
- (2) That Nayeli Diaz was less than twelve years old at the time of the sexual contact and was not married to the defendant.
- (3) That the defendant was at least thirty-six months older than

- Nayeli Diaz; and  
(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 115.

The court's "to convict" instruction in regards to count II involving Nayeli Diaz was identical to the preceding "to convict" except that it substituted a "II" for the "I" in the first instruction. CP 116. It stated as follows:

**Instruction No. 9**

To Convict the defendant of the crime of Child Molestation in the First Degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about and between April 24, 2002, and April 23, 2005, the defendant had sexual contact with Nayeli Diaz;
- (2) That Nayeli Diaz was less than twelve years old at the time of the sexual contact and was not married to the defendant.
- (3) That the defendant was at least thirty-six months older than Nayeli Diaz; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be

your duty to return a verdict of not guilty.

CP 117.

Given the fact that Nayeli Diaz had claimed approximately 20 instances of abuse, and had testified to three specific events that she could remember, the unanimity and “to convict” instructions apparently left the jury wondering what conduct the state was arguing constituted Counts I and II, as they sent out the following question during deliberations:

Can we get a description of what events are included with the counts one and two? We recall the kitchen incident, the incident on the chair when Kristie was in the bathroom & the pool incident. Which incident goes with which count?

CP 123.

The court refused to answer the question, instead telling the jury the following in writing: “You have all of the evidence and the court’s instructions.” CP 123.

The jury eventually returned verdicts of “guilty” to all three counts, along with special verdicts finding that the defendant had committed each offense using “his position of trust or confidence to facilitate the commission” of each crime. CP 124-129. The court later imposed sentences of life in prison on each count under RCW 9.94A.712, with a minimum mandatory time to serve of three consecutive terms of 198 months for a total of 594 months to serve before he could first be considered for release. *Id.*

The court ran the minimum terms consecutively as an exceptional sentence in reliance upon the aggravating factor found on each count. *Id.* The defendant thereafter filed timely notice of appeal. CP 168.

## ARGUMENT

### **I. COUNSEL'S FAILURE TO MOVE TO DISQUALIFY A JUROR WHO REVEALED A CONNECTION TO A COMPLAINING WITNESS AND FAILURE TO OBJECT TO EVIDENCE THAT WAS MORE PREJUDICIAL THAN PROBATIVE, DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel’s failure to move to disqualify a juror who revealed a connection to a complaining witness, and when he failed to object when the state elicited evidence that was more prejudicial than probative. The following sets out these arguments.

Under United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, a defendant has a right to an impartial jury. *State v. Brown*, 132 Wn.2d 529, 593, 940 P.2d 546 (1997). In order to uphold this right, our court rules and statutes provide for the *voir dire* of potential jurors, along with the right to unlimited challenges for cause, and up to six peremptory challenges for any reason. *United States v. Martinez-Salazar*, 528 U.S. 304, 311, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000) (citing Blackstone, 4 Commentaries 346-48 (1st ed. 1769)); *State v. Frederiksen*, 40 Wn.App. 749, 752-53, 700 P.2d 369 (1985). In addition, a

juror's failure to provide truthful information during *voir dire* may constitute a basis for a new trial if a defendant can show that (1) the juror intentionally failed to answer a material question and (2) a truthful disclosure would have provided a valid basis for a challenge for cause. *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 313, 868 P.2d 835, *clarified*, 123 Wn.2d 737, 870 P.2d 964 (1994). In addition, there are some circumstances in which a defendant may be entitled to a new trial upon a showing of implied bias without a showing that the concealment was intentional. *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556-57, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984).

In the case at bar, the defendant does not argue that the trial court should have granted a mistrial when juror No. 10 revealed her connection with and implied bias in favor of the Diaz family through her contacts with Nayeli's younger sister and parents. Neither was it necessary for defense counsel to seek a mistrial once this bias was discovered. The reason that a mistrial was not necessary or available was that there was an alternate juror sitting on the jury, who could have replaced the juror who discovered her connection to one of the complaining witnesses. What defendant does argue is that no reasonable defense attorney would have failed to move to disqualify a juror in a case of this nature once that juror revealed that she acted as a teacher for the young sister of one of the complaining witnesses, and that she had continued contacts with the parents of one of the complaining witnesses,

particularly in a school setting. In other words, the defendant argues that trial counsel's failure to move to disqualify juror no. 10 fell below the standard of a reasonably prudent attorney.

In addition, as the evidence revealed in this case, there was no physical evidence to support the claims of the two complaining witnesses in this case, there were no witnesses of the events, even though a number of people had been present when the abuse allegedly occurred, and the only alleged confession came from a convicted child molester whose claims about the defendant's alleged statement were contradicted by one of the complaining witnesses. With such equivocal evidence, it is more likely than not that had the defense moved to disqualify juror no. 10, the court would have granted the motion, replaced the dismissed juror with the alternate, who would have sat on a reconstituted jury that would have entered verdicts of acquittal. Thus, trial counsel's failure to move to disqualify juror no. 10 denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, thereby entitling the defendant to a new trial.

In addition, in the case at bar, trial counsel also failed to move to exclude the evidence of John Huggins concerning the defendant's alleged bragging confession to twice brutally raping a young child. The following explains this argument.

While due process does not guarantee every person a perfect trial, *Bruton v. United States, supra*, 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 the case at bar, the state called John Huggins to testify that the defendant had bragged to him that he had twice brutally raped a young friend of his step-daughter. This evidence was extraordinarily prejudicial both for that fact that it was a confession to a brutal crime as well as for the fact that the witness claimed that the defendant bragged about committing it. Thus, the potential for unfair prejudice was very high. By contrast, the relevance of the evidence was tenuous because neither of the complaining witnesses claimed that the defendant had committed any such acts upon them. Rather,

they both testified to fairly brief instances of inappropriate touching over their clothes without any physical or verbal coercion or threats. Thus, this evidence was far more prejudicial than probative. Given this conclusion, it is highly likely that had the defense objected to the admission of this evidence, the court would have sustained the objection.

Under the facts of the case at bar, there was no tactical reason for the defense attorney to fail to object to the admission of evidence that was at the same time highly prejudicial while being only remotely probative. Thus, counsel's failure to object to the admission of John Huggins' evidence fell below the standard of a reasonably prudent attorney. In addition, in a case such as the one before the jury, in which there was no evidence to corroborate the testimony of the two complaining witnesses, the admission of this improper evidence took what would have been verdicts of acquittal based upon reasonable doubt and changed them into verdicts of conviction. Thus, trial counsel's failure to object to the admission of John Huggins' evidence caused prejudice and denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

**II. THE COURT'S USE OF AN ERRONEOUS PETRICH INSTRUCTION AND ERRONEOUS "TO CONVICT" INSTRUCTIONS DENIED THE DEFENDANT HIS RIGHT TO JURY UNANIMITY 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 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 state charged the defendant with two counts of

child molestation in the first degree against Nayeli Diaz. The state then presented evidence of three specific and distinct instances of abuse: one in the kitchen, one in the living room, and one in a swimming pool. Each claimed instance of abuse was separated by time and circumstance. Thus, the use of a *Petrich* instruction in this case was a necessity in order to assure jury unanimity. This need was exacerbated by the fact that the state chose to allege the two counts in an information that failed to distinguish them from each other, and the court gave “to convict” instructions that also failed to even inform the jury that it had to find that different instances of abuse had occurred. The first two counts in the Information read as follows:

**COUNT I - CHILD MOLESTATION IN THE FIRST DEGREE**

By this Information the Prosecuting Attorney for Lewis County accuses the defendant of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, which is a violation of RCW 9A.44.083, the maximum penalty for which is life in prison and a \$50,000.00 fine, in that defendant on or about and between April 24, 2002, and April 23, 2005, in Lewis County, Washington, then and there being at least 36 months older than N.J.D., did have sexual contact with N.J.D., DOB: 04/24/1993, who was less than 12 years of age and not married to the defendant; furthermore, the defendant used his position of trust and confidence to facilitate the commission of the current offense, against the peace and dignity of the State of Washington.

**COUNT II - CHILD MOLESTATION IN THE FIRST DEGREE**

And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, which is a violation of RCW 9A.44.083, the maximum penalty for which is life in prison and a \$50,000.00 fine, in that defendant on or about and between April 24, 2002, and April 23,

2005, in Lewis County, Washington, then and there being at least 36 months older than N.J.D., did have sexual contact with N.J.D., DOB: 04/24/1993, who was less than 12 years of age and not married to the defendant; furthermore, the defendant used his position of trust and confidence to facilitate the commission of the current offense, against the peace and dignity of the State of Washington.

CP 13-14 (capitalization in original).

Why the state failed to include the phrase “at some other time than that mentioned in Count I” in the second count is uncertain in this case. However, what is certain is that a reasonable jury looking at these two charges might well assume that the two counts could arise out of one instance of abuse. This possibility was exacerbated by the trial court’s use of “to convict” instructions that also fail to inform that jury that it was required to find a separate instance of abuse to correspond with each charge. The “to convict” instructions for the first two counts read as follows:

**Instruction No. 8**

To Convict the defendant of the crime of Child Molestation in the First Degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about and between April 24, 2002, and April 23, 2005, the defendant had sexual contact with Nayeli Diaz;
- (2) That Nayeli Diaz was less than twelve years old at the time of the sexual contact and was not married to the defendant.
- (3) That the defendant was at least thirty-six months older than Nayeli Diaz; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to

return a verdict of guilty.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

#### **Instruction No. 9**

To Convict the defendant of the crime of Child Molestation in the First Degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about and between April 24, 2002, and April 23, 2005, the defendant had sexual contact with Nayeli Diaz;
- (2) That Nayeli Diaz was less than twelve years old at the time of the sexual contact and was not married to the defendant.
- (3) That the defendant was at least thirty-six months older than Nayeli Diaz; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 115-116.

The language of these “to convict” instructions is identical except that one relates to count “I” and one relates to count “II.” Nothing distinguishes one from the other, and under them the jury was free to convict the defendant on both counts, even if it only unanimously found one specific instance of abuse proved beyond a reasonable doubt. As the following review of instruction 4 reveals, the *Petrich* instruction the court gave did nothing to

inform the jury that different events were charged in each count. This instruction stated:

**Instruction No. 4**

The State alleged 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 in the First Degree 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 111.

The problem with this instruction, given the way the state charged the first two counts and the way the court worded the “to convict” instructions, is that it also fails to inform the jury that separate instances are charged in the two counts. As the instruction specifically states: “To convict the defendant on any count of Child Molestation in the First Degree, one particular act of Child Molestation in the First Degree must be proved beyond a reasonable doubt.” What the instruction should have stated is that in order “to convict the defendant on any count of Child Molestation in the First Degree, one particular act of Child Molestation in the First Degree *separate and distinct from any act of Child Molestation in the First Degree constituting another count* had to be proved beyond a reasonable doubt. The confusion that this instruction engendered in this case given the “to convict” instructions is

illustrated by the jury's obvious confusion expressed in the note it sent out to the court. This note stated:

Can we get a description of what events are included with the counts one and two? We recall the kitchen incident, the incident on the chair when Kristie was in the bathroom & the pool incident. Which incident goes with which count?

CP 123.

The following answer by the court, or anything like it would have cleared the confusion the jury had on the issue unanimity:

A verdict of "guilty" for Count I may be based upon any one of the three claims of abuse if, and only if, each and every juror is convinced beyond a reasonable doubt that that specific instance of abuse occurred. If the jury so finds, then a verdict of "guilty" on Count II may then be based upon any one of the two remaining claims of abuse if, and only if, each and every juror is convinced beyond a reasonable doubt that that specific instance of abuse occurred.

The problem in the case at bar is that the court did not attempt to clear the jury's confusion concerning both the need for unanimity, as well as the necessity that the verdicts on the first two counts be based upon unanimous findings of guilt on two separate instances of abuse. This failure to clear up the jury's confusion denied the defendant his right to jury unanimity under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment. As a result, the defendant is entitled to a new trial.

**III. THE PROSECUTOR COMMITTED MISCONDUCT AND DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN HE ARGUED THAT THE JURY SHOULD FIND THE DEFENDANT GUILTY OF CHILD MOLESTATION BECAUSE HE HAD PROBABLY ALSO TWICE RAPED THE COMPLAINING WITNESS.**

While due process does not guarantee every person a perfect trial, both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). The due process right to a fair trial is violated when the prosecutor commits misconduct. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978). To prove prosecutorial misconduct, the defendant bears the burden of proving that the state's conduct was both improper and prejudicial. *State v. Brown*, 132 Wn.2d 529, 940 P.2d 546 (1997). In order to prove prejudice, the defendant has the burden of proving a substantial likelihood that the misconduct affected the jury's verdict. *State v. Evans*, 96 Wn.2d 1, 633 P.2d 83 (1981).

For example in *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006), the defendant appealed his death sentence arguing in part that the prosecutor had committed misconduct by (1) obtaining an order in limine precluding the admission of any evidence concerning evidence of the conditions in prison of a person serving a sentence of life without release, and

(2) then arguing that the jury should consider such conditions in determining whether or not to impose the death penalty. The defendant appealed his sentence, arguing that this argument by the state constituted misconduct. The Supreme Court agreed with this argument and reversed the death sentence.

The court held:

Three factors weigh in favor of a finding of prosecutorial misconduct here. First, the violation of the trial court's order is blatant and the original motion in limine was targeted at preventing the defense from effectively responding to the prosecutor's argument. Second, although defense counsel attempted to paint a contrary picture of prison life, he was unable to introduce evidence to support his argument and his argument simply was not as compelling as the prosecutor's (perhaps because he did not expect to be allowed to make such an argument). Third, the images of Gregory watching television and lifting weights, when juxtaposed against the images of the crime scene, would be very difficult to overcome with an instruction. Again, these images would be central to the question of whether life without parole or death was the more appropriate sentence. Although this presents a close question, we conclude that the prosecutor's argument characterizing prison life amounted to prosecutorial misconduct that could not have been cured by an instruction. The prosecutor's misconduct independently requires reversal of the death sentence.

*State v. Gregory*, 158 Wn.2d at 866-867.

In the case at bar, the defense argues that the prosecutor committed misconduct when he argued that the jury should find the defendant guilty of twice molesting Nayeli Diaz because he probably twice brutally raped her even though she either doesn't remember it, or does remember it and won't tell anyone. This occurred when the prosecutor made the following argument to the jury:

So defendant gives him some details, neighbor, older girl. And counsel may say, well, that's not a believable story for Mr. Huggins because the defendant told Mr. Huggins that he held her down and raped her two times. Well, he didn't go into any more detail than that. He just said rape. And what the defendant's version of rape may be, who knows.

Fishermen get together and they tell each other how big the fish they catch were. Fish that may have been that big, well, when you retell the story it may be that big. Same thing when they were down there trading their war stories. So either Mr. Draggoo was exaggerating what he had done or it's actually true.

Nayeli was molested around 20 times. She can only remember about three of them. He may have actually done that one of those 17 other times. When you think about it, when a traumatic event happens to a child, are they going to remember every detail about it? No. First off, is there a chance that she may have blocked those two out of her mind? Yeah, there is.

So he was either exaggerating what he had done --

MR. BLAIR: Objection; arguing facts not in evidence, speculative.

THE COURT: Overruled.

MR. HAYES: Either exaggerating what he had done to her or he did do it. But that's how this whole case started. If Mr. Huggins hadn't shared the information he had gotten we wouldn't be here and these two young girls would still be carrying around this horrible secret inside eating away at them. Nayeli said -- "How did you feel after you told Detective Callas?" She said, "I felt better." She'd gotten that horrible secret off her chest and finally told someone, like a weight had been lifted off of her. These poor girls would still be carrying that around. Who knows if they ever would have told anyone.

RP 349-351.

In essence, the state was arguing to the jury that the defendant must

have committed the crimes of molestation, because his commission of two brutal rapes proved his propensity to commit molestations that actually were charged. However, 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.

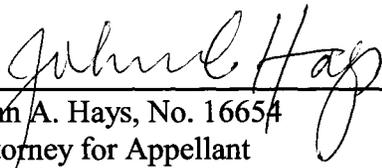
In the case at bar, the state's argument that the defendant had brutally raped Nayeli Diaz, even though she either didn't remember it or wouldn't admit it, constituted highly prejudicial propensity evidence that compelled the jury to convict. It constituted prosecutorial misconduct that denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, the defendant is entitled to a new trial.

**CONCLUSION**

This court should order a new trial based upon the fact that (1) the defendant was denied effective assistance of counsel, (2) the court's use of an incorrect Petrich instruction denied the defendant jury unanimity, and (3) prosecutorial misconduct denied the defendant a fair trial.

DATED this 21<sup>st</sup> day of September, 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.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

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

**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. 4**

The State alleged 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 in the First Degree 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. 8**

To Convict the defendant of the crime of Child Molestation in the First Degree as charged in Count I, each of the followign elements of the crime must be proved beyond a reasoanble doubt:

- (1) That on or about and between April 24, 2002, and April 23, 2005, the defendant had sexual contact with Nayeli Diaz;
- (2) That Nayeli Diaz was less than twelve years old at the time of the sexual contact and was not married to the defendant.
- (3) That the defendant was at least thirty-six months older than Nayeli Diaz; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

### **Instruction No. 9**

To Convict the defendant of the crime of Child Molestation in the First Degree as charged in Count II, each of the followign elements of the crime must be proved beyond a reasoanble doubt:

- (1) That on or about and between April 24, 2002, and April 23, 2005, the defendant had sexual contact with Nayeli Diaz;
- (2) That Nayeli Diaz was less than twelve years old at the time of the sexual contact and was not married to the defendant.
- (3) That the defendant was at least thirty-six months older than Nayeli Diaz; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

