

No. 40226-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROE RAMIREZ-ESTEVEZ,

Appellant.

FILED
COMPTON
10 APR 10 AM 11:58
STATE OF WASHINGTON
BY *cm*

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Anne Hirsch, Judge
Cause No. 09-1-00766-1

BRIEF OF RESPONDENT

John C. Skinder
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE 2

C. ARGUMENT 5

 1. There was no error in admission of the limited hearsay testimony offered by the State's witnesses..... 5

 2. There was no error in admission of E.O.'s prior statements to Detective Kolb. 18

 3. There was no constitutional error in the "To Convict" jury instructions 24

 4. The expert witness testimony was not an improper comment on the defendant's guilt..... 33

D. CONCLUSION..... 37

TABLE OF AUTHORITIES

U.S. Supreme Court Decisions

Chapman v. California,
386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824,
24 A.L.R.3d 1065 (1967)..... 33

United States v. Napier,
518 F.2d 316, 316-18 (9th Cir. 1975)..... 11, 12

White v. Illinois,
502 U.S. 346, 112 S. Ct. 736, 116 L. Ed. 2d 848, 859 (1992)..... 10

Washington Supreme Court Decisions

In re Pers. Restraint of Duncan,
167 Wn.2d 398, 219 P.3d 666 (2009)..... 19-20

Heg v. Mullen,
115 Wash. 252, 197 P. 51 (1921) 7

Johnston v. Ohls,
76 Wn.2d 398, 457 P.2d 194 (1969) 9

Mayer v. Sto Indus., Inc.,
156 Wn.2d 677, 132 P.3d 115 (2006) 20

Robbins v. Greene,
43 Wn.2d 315, 261 P.2d 83 (1953) 10

State v. Aldrick,
97 Wash. 593, 166 P. 1130 (1917) 7

State v. Chapin,
118 Wn.2d 681, 826 P.2d 194 (1992).....8, 9,10,11

State v. Cunningham,
93 Wn.2d 823, 613 P.2d 1139 (1980) 16

<i>State v. Dictado</i> , 102 Wn.2d 277, 687 P.2d 172 (1984)	19
<i>State v. Guloy</i> , 104 Wn.2d 412, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020 (1986).....	33
<i>State v. Harris</i> , 106 Wn.2d 784, 725 P.2d 975 (1986)	19
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007)	35
<i>State v. LeFaber</i> , 128 Wn.2d 896, 913 P.2d 369 (1996)	28
<i>State v. Noltie</i> , 116 Wn.2d 831, 809 P.2d 853 (1983)	26, 27,28,29,30
<i>State v. Owens</i> , 128 Wn.2d 908, 913 P.2d 366 (1996)	14,15,16,17
<i>State v. Ryan</i> , 103 Wn.2d 165, 691 P.2d 197 (1984)	12
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997)	19
<i>State v. Strauss</i> , 119 Wn.2d 401, 832 P.2d 78 (1992)	9
<i>State v. Vladovic</i> , 99 Wn.2d 413, 662 P.2d 853 (1983)	26-27
<i>State v. Young</i> , 160 Wn.2d 799, 161 P.3d 967 (2007)	10

Decisions Of The Court Of Appeals

<i>Seattle v. Heatley</i> , 70 Wn. App. 573, 854 P.2d 658 (1993), <i>review denied</i> , 123 Wn.2d 1011 (1994).....	34-35
<i>State v. Bilal</i> , 54 Wn. App. 778, 776 P.2d 153 (1989).....	33
<i>State v. Borsheim</i> , 140 Wn.App. 537, 165 P.3d 417 (2007).....	27, 28,30,31
<i>State v. Bouchard</i> , 31 Wn. App. 381, 639 P.2d 761 (1982).....	10-11
<i>State v. Brown</i> , 55 Wn. App. 738, 780 P.2d 880 (1989).....	25,26
<i>State v. Carlson</i> , 80 Wn. App. 116, 906 P.2d 999 (1995).....	35,36
<i>State v. Dixon</i> , 37 Wn. App. 867, 684 P.2d 725 (1984).....	17
<i>State v. Downey</i> , 27 Wn. App. 857, 620 P.2d 539 (1980).....	10
<i>State v. Ellis</i> , 71 Wn.App. 400, 859 P.2d 632 (1993).....	27,31
<i>State v. Ellison</i> , 36 Wn. App. 564, 676 P.2d 531 (1984).....	19
<i>State v. Fleming</i> , 27 Wn. App. 952, 621 P.2d 779 (1980).....	10
<i>State v. Griffith</i> , 45 Wn. App. 728, 727 P.2d 247 (1986).....	10
<i>State v. Harper</i> , 35 Wn. App. 855, 670 P.2d 296 (1983).....	20

State v. Hayes,
81 Wn. App. 425, 914 P.2d 788 (1996)..... 25, 27,28

State v. Hayward,
152 Wn. App. 632, 217 P.3d 354 (2009)..... 34,35

State v. Newman,
63 Wn. App. 841, 851, 822 P.2d 308, review denied,
119 Wn.2d 1002 (1992) 28

State v. Slider,
38 Wn. App. 689, 688 P.2d 538 (1984)..... 10,11

State v. Watkins,
136 Wn. App. 240, 148 P.3d 1112 (2006)..... 28

Statutes and Rules

ER 801(d)(1) 18, 19, 20

ER 803(a)(4) 34

ER 803(a)(ii)..... 8

Fed. R. Evid. 803(ii) 8

Other Authorities

1 *Francis Wharton & O.N. Hilton, A Treatise on the Law of Evidence in Criminal Issues* § 262 (10th ed. 1912)..... 7

1 C. Wright, *Federal Practice* § 125, at 365 (2d ed. 1982)..... 27

2 W. LaFave & J. Israel, *Criminal Procedure* § 19.2, at 446 (1984)27

6 *John Henry Wigmore, Evidence* § 1747, at 195 (Chadbourn rev. 1976)..... 9, 10

5A K. Tegland, Wash. Prac. § 342 (2d ed. 1982).....	19
U.S. CONST. amend. V; WASH. CONST. art. I, § 9.....	26

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in allowing the limited hearsay testimony of Elizabeth Wilcox and Maria Hinojoza?

2. Whether defense counsel's attempts to suggest that E.O. fabricated her allegation justified admission of the complete audio recording of E.O.'s prior interview with Detective Kolb?

3. Whether the wording of the jury instructions violated double jeopardy protections?

4. Whether the testimony of the State's medical expert invaded the province of the jury?

B. STATEMENT OF THE CASE.

The Respondent accepts the Appellant's Statement of the facts with the following additions and clarifications: Mr. Ramirez-Estevez was charged and convicted on five counts of Rape of a Child in the First Degree. These convictions were based on five separate occasions between January 1, 2006 and April 23, 2009, in which Mr. Ramirez-Estevez had anal and vaginal intercourse with a child, E.O., who was the daughter of his live-in girlfriend, Guillermina Bucio.

Mr. Ramirez-Estevez and Ms. Bucio lived with E.O., and E.O.'s two brothers in a mobile home park from 2005 until 2008. (RP 395). During this time, Mr. Ramirez-Estevez raped E.O. multiple times, who was eight to nine years old at the time. (RP

449). E.O. estimated that sexual intercourse occurred “more than five, but less than twenty” times. (RP 449—50, 738). However, it was not until several years later that E.O. first divulged this abuse to several friends, one of whose parents contacted the school. (RP 333). In response, the school launched an investigation which culminated in E.O.’s tearful disclosure to Ms. Elizabeth Wilcox, the school intervention specialist. (RP 328, 337). Subsequently, E.O. made a statement to Detective Kolb in which she described Mr. Ramirez-Estevez’s actions. (RP 346). This interview was audio-recorded. (RP 634). At Ms. Wilcox’s urging, E.O. also told her aunt, Maria Hinojoza, of the abuse. (RP 337).

Although E.O. could not name the exact number of times which Mr. Ramirez-Estevez raped her, she could remember distinct details of certain incidents, as well as describe the sexual acts in detail. (RP 449-454, 470-483, 490-541).

Brief hearsay statements made by E.O. to Ms. Wilcox and Ms. Hinojoza were admitted at trial: Ms. Wilcox testified, over objection by defense counsel, that E.O. told her that “her mom’s boyfriend . . . raped her.” (RP 336-7). Ms. Hinojoza testified, over defense objection, that E.O. told her, sometime after 2003, that Mr. Ramirez-Estevez had “raped her” when E.O. was living with him.

(RP 370, 374). At trial, in cross-examination of Ms. Wilcox, defense counsel insinuated that E.O. had fabricated the allegation of rape in order to get attention. (RP 349). On cross-examination, defense counsel asked, "It's pretty common for girls of that age to have insecurities . . . And sometimes girls of that age will say things that are not true in order to get attention. That occurs, doesn't it?" (RP 349). Defense counsel cross-examined Ms. Hinojoza as to E.O.'s poor grades, arguably insinuating that E.O. made allegations against Mr. Ramirez-Estevez as a defense for her poor grades and to get attention. (RP 378-80). The trial court found that defense cross-examination gave rise to "at least an inference" of recent fabrication. (RP 648).

At trial, in addition to the expert medical witness, Laurie Davis, who testified as to her physical exam of E.O., the State also put forward evidence that during the time E.O. lived in the trailer with Mr. Ramirez-Estevez, she experienced vaginal bleeding from a urinary tract infection, for which she received antibiotics. (RP 412-3, 424).

At trial, excerpts from Detective Kolb's interview were introduced by defense counsel in cross-examination of E.O. as prior inconsistent statements. (RP 646-7). The State subsequently

requested the court to admit the interview in full, as a prior consistent statement under ER 801(d)(1). (RP 647-8). The State argued that cross-examination by defense counsel was a clear allegation that E.O. fabricated testimony. (RP 647). The State reasoned that it was misleading to allow defense counsel to reference specific excerpts from the interview which, when repeated, appeared to conflict with E.O.'s testimony. *Id.* However, the whole of the interview with Detective Kolb, when evaluated in its entirety, revealed a picture of the evidence more favorable to the State. (RP 647). The trial court found this argument persuasive, admitting the full, audio statement on the basis that the line of questioning used by defense counsel gave rise to "at least an inference" of recent fabrication. (RP 648).

In closing argument, defense counsel stated,

"Ladies and gentleman, go back, talk about the facts, talk about these things, even though they're uncomfortable. It's the uncomfortable explanations that are the crux of this. That is the evidence, the proof that [E.O.] is not being honest with you, and she's not because she doesn't know about these things, and that's good. She made all these mistakes because she doesn't know how the physical intimacy of these acts actually work, and that's good. But she did hear the word rape and she used the word rape and then described it in an impossible way. That is plenty of reasonable doubt, and I ask you to go back and talk about these details and then come back with five counts of not guilty for each of these incidents". RP 778-779.

In closing argument, the deputy prosecuting attorney argued to the jury that they needed to assess the credibility of the victim and evaluate all of the evidence when considering whether the state had proved each of the charges beyond a reasonable doubt; as to the number of the charges the deputy prosecuting attorney stated,

“It takes all of you to agree, okay, to reach a verdict, but in a case like this where we’ve got multiple counts it’s just a little more than that and that is you all have to agree, you all have to unanimous that there is a separate act for each count, that justifies each count, okay? So very simply put, we’ve got five counts of rape of a child in the first degree that’s alleged here. That’s what’s before you here, five counts of rape of a child in the first degree. In your discussion you need to be unanimous that there are five acts of rape of a child in the first degree, five separate and distinct acts. So you don’t get to take just one and then convict him of all five of these counts, and you have to be unanimous that there are five distinct acts”. RP 719-720.

After deliberating, the jury returned five verdicts of guilty to each of the five charged counts of rape of a child in the first degree.

C. ARGUMENT.

1. There was no error in admission of the hearsay testimony.

On appeal, Mr. Ramirez-Estevez challenges the admission of testimony under the hearsay “excited utterance” exemption. The testimony of two witnesses Elizabeth Wilcox, the school

intervention specialist, and Maria Hinojoza, the aunt of the victim, included hearsay statements made by the victim. The statement by Ms. Wilson was admitted under the excited utterance hearsay exemption over defense objection, and Ms. Hinojoza's testimony was allowed over defense counsel's objection. (RP 336-337, 373-374).

It is the State's position that, given the limited scope of the hearsay testimony, these statements were admissible under the res gestae exemption. There was sufficient evidence adduced at trial to demonstrate that E.O. was under the stress of excitement at the time she made these utterances, and the content of the hearsay testimony was limited, consisting only of the statement that she "was raped." The State further submits that in the event this Court finds admission of these statements to be improper, any error was harmless given the evidence of guilt.

Admissibility under the res gestae doctrine is premised upon an evaluation of "[w]hat is said or done by participants under the immediate spur of a transaction becomes thus part of the transaction, because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinctively spoke or

acted.'" *State v. Aldrick*, 97 Wash. 593, 596, 166 P. 1130 (1917) (quoting 1 FRANCIS WHARTON & O.N. HILTON, A TREATISE ON THE LAW OF EVIDENCE IN CRIMINAL ISSUES § 262 (10th ed. 1912)). Res gestae statements "raise a reasonable presumption that they are the spontaneous utterances of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation or design." *Heg v. Mullen*, 115 Wash. 252, 256, 197 P. 51 (1921) (internal quotations omitted).

The hearsay statements in the present instance were necessary to explain why both witnesses acted the way they did. For example, Ms. Hinojoza stated that upon hearing E.O.'s statement, she urged the girl to tell her mother. (RP 376). Ms. Hinojoza also testified that she later spoke with Detective Kolb (RP 377). Without the brief hearsay statements, Ms. Hinojoza's narrative would have been disconnected and nonsensical. Likewise, Ms. Wilcox's testimony explained that she called E.O. to her office because she heard the girl was upset, and upon E.O.'s subsequent disclosure, she contacted Child Protective Services ("CPS"). (RP 339, 351). The statements by E.O. were slight in contrast to E.O.'s own testimony

at trial, and were required to explain the actions and response taken by the two witnesses.

The excited utterance exemption is stated in ER 803(a)(ii) was the basis of the trial court's decision to allow the limited testimony; this evidentiary rule states:

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

.....

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

[ER 803(a)(ii)]

Washington courts recognize that the proponent of excited utterance evidence must satisfy three "closely connected requirements" that (1) a startling event or condition occurred, (2) the declarant made the statement while under the stress of excitement of the startling event or condition, and (3) the statement related to the startling event or condition. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). A showing of unavailability is not required. ER 803(a)(ii); *accord*, Fed. R. Evid. 803(ii).

The underlying rationale for the excited utterance exception is that 'under certain external circumstances of physical shock, a

stress of nervous excitement may be produced which stills the reflective faculties and removes their control.' *State v. Chapin*, 118 Wn.2d at 686. The utterance of a person in such a state is believed to be 'a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock,' rather than an expression based on reflection or self-interest. *Id.* (quoting 6 John Henry Wigmore, *Evidence* § 1747, at 195 (Chadbourn rev. 1976)). In assessing the admissibility of a statement, the "key determination is 'whether the statement was made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.'" *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (quoting *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)).

Thus excited utterances are sufficiently reliable to warrant a hearsay exception because such utterances are "made while the declarant was still under the influence of the event to the extent that [the] statement could not be the result of fabrication, intervening actions, or the exercise of choice or judgment.'" *State v. Strauss*, 119 Wn.2d 401, 416, 832 P.2d 78 (1992) (quoting *Johnston v. Ohls*, 76 Wn.2d 398, 406, 457 P.2d 194 (1969)). "A statement that

has been offered in a moment of excitement--without the opportunity to reflect on the consequences of one's exclamation--may justifiably carry more weight . . . than a similar statement offered in the relative calm of the courtroom." *White v. Illinois*, 502 U.S. 346, 356, 112 S. Ct. 736, 116 L. Ed. 2d 848, 859 (1992).

The Washington Supreme Court recognizes that "the startling event or condition ... need not be the 'principal act' underlying the case." *State v. Young*, 160 Wn.2d 799, 161 P.3d 967 (2007) (citing *Chapin*, 118 Wn.2d at 686 (quoting 6 WIGMORE, *supra*, § 1753, at 225-26). An excited utterance need not be contemporaneous with the event; nor must it be completely spontaneous as responses to questions may be admissible. *State v. Griffith*, 45 Wn. App. 728, 737, 727 P.2d 247 (1986) (quoting *State v. Slider*, 38 Wn. App. 689, 692, 688 P.2d 538 (1984), *review denied*, 103 Wn.2d 1013 (1985)). Statements are not inadmissible solely due to the passage of time between the event and the declaration, *State v. Fleming*, 27 Wn. App. 952, 956, 621 P.2d 779 (1980); *State v. Downey*, 27 Wn. App. 857, 861, 620 P.2d 539 (1980), nor solely due to the fact that the declaration was made in response to a parent's questions. *Robbins v. Greene*, 43 Wn.2d 315, 321, 261 P.2d 83 (1953); *State v. Bouchard*, 31 Wn. App. 381,

384, 639 P.2d 761 (1982). However, Washington courts acknowledge that the aggregate effect of the passage of time and the leading nature of questioning in some instances can attenuate the degree of reliability beyond that tolerated under the strict limits of the excited utterance exception. *State v. Slider*, 38 Wn. App. at 692-3.

A later event may recreate “stress earlier produced and caus[e] the person to exclaim spontaneously.” *Id.* at 687. In such a situation, it is the later event, *not* the original trauma that satisfies the first element of the excited utterance exception. *Id.* at 686-87 (discussing with favor *United States v. Napier*, 518 F.2d 316, 316-18 (9th Cir. 1975), which explicitly stated that the startling event sustaining admission of a victim's outburst in response to a photograph of an alleged assailant was viewing the photograph, not the assault itself). In *State v. Chapin*, the court acknowledged that the “startling event or occurrence” inquiry can include consideration as to whether *some* event startled the declarant, rather than on whether there is proof that the specific event giving rise to the action is the event that elicited the declarant's statement. *Chapin*, 118 Wn.2d at 686-7.

For example, a later startling event may trigger associations with an original trauma, recreating the stress earlier produced, causing the person to exclaim spontaneously. This is illustrated in *United States v. Napier*, 518 F.2d 316 (9th Cir.), *cert. denied*, 423 U.S. 895 (1975). There, the victim of an assault was unexpectedly shown a picture of the alleged assailant in a newspaper 8 weeks after the attack. This caused her to become excited and to exclaim, "He killed me, he killed me". The court held that the statement was admissible as an excited utterance. *Napier*, 518 F.2d at 317-8. The court explicitly stated that the "startling event" was not the assault, but the victim being confronted with the photograph of her assailant. *Id.* at 318.

Here, the facts of this case clearly support that E.O. was under the stress of the incident when asked about the sexual assaults by the school counselor and her aunt. The fact that a statement is made in response to a question will not by itself require the statement to be excluded, but it is a factor that raises doubts as to whether the statement was truly a spontaneous and trustworthy response to a startling external event. *State v. Ryan*, 103 Wn.2d 165, 176, 691 P.2d 197 (1984).

At trial, the sole statement of hearsay in each instance was a single line of testimony, namely E.O.'s admission that she had been "raped." Ms. Wilcox testified, over objection by defense counsel, that E.O. told her that "her mom's boyfriend . . . raped her." (RP 336-7). Ms. Hinojoza testified, over defense objection, that E.O. told her, sometime after 2003, that Mr. Ramirez-Estevez had "raped her" when E.O. was living with him. (RP 370, 374). This statement was necessary to the narrative given the body of testimony offered by these two witnesses. The State provided these witnesses as evidence that E.O.'s was upset and emotional. (RP 31). E.O. disclosed the abuse on April 23, 2009, to her school counselor. (RP 328-337). At trial, Ms. Wilcox described E.O.'s demeanor at the time of her outburst:

A: She had tears in her eyes. She was – she didn't speak outright. She was really, really nervous, and her voice was really, really soft. I'd have to ask her to speak up. She was shaking. Lots of times she would put her head down. Very upset.

. . .
A: Her voice was shaky; sometimes I would say maybe a whisper . . . I asked her what she was so upset about . . . She said that her mom's boyfriend who used to stay with them had raped her.

Q: Okay. Was that the word she used?

A: Yes.

[RP 336-7]

Ms. Wilcox first spoke with E.O. in response to information provided by the school's English as a Second Language (ESL) teacher and a parent phone call. (RP 332-3). E.O.'s disclosure to her aunt was done at Ms. Wilcox's urging. (RP 341-2). E.O.'s aunt, Maria Hinojoza, testified as to E.O.'s disclosure of abuse and was also questioned in detail as to her demeanor:

Q: And how did she appear to you when she came to talk to you?

A: She wanted to talk to me – she wanted to talk to me. I was taking a shower, and when she was out of the room my little girl told me Esmeralda wants to tell you something very important, but Esmeralda didn't want to and my daughter asked to tell me, and then she start[ed] to cry and then she told me.

Q: Who started to cry?

A: Esmeralda

Q: What was her voice like when she was talking to you?

...

A: It was a voice like crying, like scared.

...

Q: She did tell you what she was scared of?

A: Yes, what was done to her?

Q: What did you see about Esmeralda that made you believe that she was scared?

A: Well, that she was crying.

Q: How would you describe her body?

A: She was shaking.

...

Q: Could you see tears?

A: Yes

[RP 373-4]

Mr. Ramirez-Estevez relies upon *State v. Owens*, 128 Wn.2d 908, 913 P.2d 366 (1996), to argue that an utterance in response to

leading questions which recreate the stress of the event is not sufficient to meet the hearsay exemption. (Appellate Brief 19). However, in *Owens*, the victim was questioned by his grandmother specifically as to whether he had been molested. *Owens* at 910-1. This question was repeated several times before the victim responded, and the questions were posed following a medical examination in which the doctor raised the possibility of molestation. *Id.* The court held that the extent of the questioning in *Owens* was persistent enough to be considered a significant action intended to affect the victim's exercise of judgment. *Id.* at 913. "Asking a victim what happened is different from the extended questioning [the victim] faced before he said he had been molested and identified Owens as his assailant." *Id.* It is the State's position that the reliability and spontaneity of these statements was apparent based upon the continuing stress experienced and exhibited by E.O.

In the event this court finds that E.O.'s statements to Ms. Wilcox and Ms. Hinojoza do not fall within the res gestae exemption or excited utterance exemption, it is the State's position that any error in admitting them was harmless given the evidence. An error is not prejudicial if, within reasonable probabilities, the error did not

affect the outcome of the trial. *State v. Cunningham*, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980). Mr. Ramirez-Estevez asserts that any error cannot be harmless because there was “no extensive medical evidence establishing penetration” to offer support to E.O.’s claims. (Appellate Brief 21). In doing so, the appellant mischaracterizes the scope of medical evidence that was presented at trial.

The expert witness testified that a medical examination seldom reveals breakage, fissures or injury to the anus of the victim unless the assault occurred within 12 to 24 hours. (RP 576). E.O.’s medical examination did not occur immediately following the assault, and thus based upon expert opinion, a lack of physical evidence in these circumstances was not unusual. (RP 592). The medical examination further identified “notches” and “divots” in the margins of E.O.’s hymen tissue, which the expert witness characterized as “clear disruption” of the tissue. (RP 589-90). The medical expert testified that the significance of this disruption is indicative of traumatic blunt force. (RP 591-2). Thus, while Mr. Ramirez-Estevez seeks to minimize the medical evidence, the expert witness was clear in the strength of the evidence, describing her observations as “significant” and “concerning.” (RP 590, 592).

Further, the scope of the hearsay testimony was extremely limited, and was independently confirmed by E.O.'s own testimony. The hearsay testimony of both Ms. Wilcox and Ms. Hinojoza comprised *only* the assertion that Ramirez-Estevez "raped" E.O., and that E.O. was scared. (RP 337, 372, 374). Neither Ms. Hinojoza nor Ms. Wilcox testified to any description of the rape. (RP 337-8.) Defense counsel, on cross-examination of the victim challenged her on her knowledge and understanding of the term "rape." (RP 495-7). The court in *Owens* found that a lack of detail or description as to the hearsay allegations, in conjunction with the victim's own testimony describing the events in more detail and further statements by a medical doctor, cumulatively resulted in any hearsay evidence as harmless error. *Owens*, 128 Wn.2d at 914.

In *State v. Dixon*, 37 Wn. App. 867, 684 P.2d 725 (1984) the court found admitted hearsay, while in error, was harmless based on the fact that the victim who uttered the statement testified at trial and thus the trier of fact heard essentially the same details testified as were included in the written statement. While in that instance, the testimony of the victim was unimpeached and the testimony of the defendant was impeached, this distinction is not relevant to the present case. In the present case, while the testimony of E.O. and

Mr. Ramirez-Estevez conflicted, there was no clear impeachment, given the admission of E.O.'s prior statement as a whole.

2. There was no error in admission of E.O.'s prior statements to Detective Kolb.

Mr. Ramirez-Estevez now challenges the trial court's admission of E.O.'s interview with Detective Eric Kolb as a "prior consistent statement" under Evidence Rule 801(d)(1). Mr. Ramirez-Estevez-Estevez argues that admission of this statement cannot be harmless because there was no other evidence to corroborate E.O.'s testimony. It is the State's position that this evidence was properly admitted because the challenged statements were first introduced by defense counsel on cross-examination in an attempt to suggest fabrication.¹

E.O.'s statements to Detective Kolb was admitted under ER 801(d)(1). ER 801(d)(1) states that prior consistent statements are not regarded as hearsay if (i) the declarant is subject to cross-examination and (ii) the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge

¹ Specifically the appellant challenges prior statements including that the defendant "grabbed me and raped me;" that he would "take my clothes off and lock the door" that "he told me not to tell my mom" that "it lasted an hour or so . . . like sometimes I would just push him off with my leg, and I told him to stop and stuff . . . since he's stronger than me, he would get back on," as well as admission of a prior consistent statement regarding the rape on the kitchen floor.

against the declarant of recent fabrication or improper influence or motive.” ER 801(d)(1); *State v. Ellison*, 36 Wn. App. 564, 676 P.2d 531 (1984). Washington courts have viewed this statute on its face as allowing prior consistent statements to rehabilitate an impeached witness immune from hearsay challenges. *Ellison*, 36 Wn. App. at 568 (citing 5A K. Tegland, Wash. Prac. § 342 (2d ed. 1982)). A prior consistent statement meeting the requirements of ER 801(d)(1) is nonetheless inadmissible if it is tainted by a motive to fabricate. *Ellison*, 36 Wn. App. at 568. While defense counsel insinuated that E.O. fabricated her statements out of a desire to distract from poor grades and gain attention, there was no evidence offered to support this contention. (RP 349, 378-80).

The standard of review, as noted by the appellate, is whether there was abuse of discretion. *State v. Dictado*, 102 Wn.2d 277, 290, 687 P.2d 172 (1984), abrogated on other grounds in *State v. Harris*, 106 Wn.2d 784, 790, 725 P.2d 975 (1986). A trial court abuses its discretion when its decision “is manifestly unreasonable or based upon untenable grounds or reasons.” *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). “A trial court's decision is manifestly unreasonable if it adopts a view “that no reasonable person would take.” In *re Pers. Restraint of Duncan*,

167 Wn.2d 398, 402-03, 219 P.3d 666 (2009) (quoting *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) citation omitted).

Mr. Ramirez-Estevez argues that “defense cross-examination never raised any claim that the victim was outright lying about the rape. Rather, the cross-examination called into question her credibility . . . Effectively calling into question the credibility of a witness does not itself open the door to rehabilitation via the admission of a prior consistent statement.” (Appellate Brief 25, citing *State v. Harper*, 35 Wn. App. 855, 858; 670 P.2d 296 (1983)). It is the State’s position that the nature, scope, and duration of defense counsel’s cross-examination gave rise to an inference of fabrication which the State was entitled to rebut. At trial, following cross-examination of E.O., the State sought admission of Detective Kolb’s full interview under ER 801(d)(1). The State argued that the defense counsel had clearly alleged that E.O. fabricated her testimony. (RP 647). This alleged fabrication was the defense theory of the case as seen from the defense examination of all of the witnesses and the defense closing argument.

At trial the State argued that it was misleading to allow defense counsel to reference specific excerpts from the interview which, when repeated, appeared to conflict with E.O.'s testimony in court; the deputy prosecuting attorney also pointed out that the defense attorney had made a clear allegation that E.O. had "fabricated things while she was testifying". *Id.*

The whole of the interview with Detective Kolb, when evaluated in its entirety, revealed a statement that was consistent with the court testimony of E.O.. (RP 647). The trial court found this argument persuasive, admitting the full, audio statement on the basis that the line of questioning used by defense counsel gave rise to "at least an inference being made of recent fabrication, including during the time E.O. was testifying in open court today and yesterday". (RP 648).

On direct examination of E.O., the State asked about the interview with Detective Kolb:

Q: . . . Did it surprise you at all –

A: Yeah.

Q: -- To have a detective there?

A: Yes.

Q: Okay. And while you were there, did Detective Kolb ask you questions about what happened to you with Roy?

A: Yeah.

Q: Okay. And did you answer those questions?

A: Yeah.

Q: Did you tell him the truth?

A: Yeah.

[RP 487]

. . .

Q: Do you remember how you were feeling when you were talking to Detective Kolb about what had happened to you?

A: Can you say it again?

Q: . . . When you talked to Detective Kolb, is that the first time that you'd ever really talked to somebody about the details of what happened with Roy?

A: Yes.

[RP 488]

However, there were repeated references to E.O.'s interview with Detective Kolb occurred throughout E.O.'s cross-examination. (RP 501-2). On appeal, Mr. Ramirez-Estevez now argues that the statements made by E.O. to Detective Kolb were not appropriate rebuttal to a claim that "E.O. lied about the number of times she was raped or about where these rapes occurred." (Appellate Brief 25). However, these statements reflect issues raised by defense counsel on cross-examination:

Q: Now, when – the very first time that you described the incident you said that Roy had raped you, right?

A: Yes.

[RP 493].

Q: Do you remember telling Detective Kolb that no, there was nothing that he did that made you feel uncomfortable, and then you said, 'well, he grabbed me and raped me.' Do you remember that?
[RP 520].

Q: Do you remember talking to Detective Kolb?

A: Yes.

Q: Do you remember telling him that it lasted an hour?

A: No

[RP 510]

Q: Now, today during the prosecutor's examination of you, you said Roy would stop – and let's talk about the first time. He stopped because your mom came home, right?

A: Yeah.

Q: And you also said that you didn't try to push him off or anything, that he just stopped when your mom came home. Do you remember that?

A: Yeah, yeah.

Q: Do you remember telling Detective Kolb that – he asked you the question – well, first he said "For an entire hour?" You didn't respond to that. Do you remember that?

A: No.

Q: Then he said, "What made it stop?" And you said, "Well, sometimes I would push him off with my leg and I told him to stop and stuff." Do you remember saying that?

...

Q: Do you remember telling Detective Kolb that when you tried to push him off because he was stronger than you he would just get back on?

[RP 529-30].

It is the State's position that the statements offered by defense counsel in cross-examination and the inference of fabrication

therein provide a reasonable basis for full admission of the tape recorded interview.

Now, on appeal, Mr. Ramirez-Estevez-Estevez argues that the “prior statements from the police interview simply served the purpose of bolstering the credibility of E.O.’s testimony.” (Appellate Brief at 26). Mr. Ramirez-Estevez-Estevez cannot have it both ways: defense counsel cannot introduce prior statements by the witness in an effort to discredit her testimony at trial, and then subsequently argue that Mr. Ramirez-Estevez was prejudiced by admission of these prior statements. Given the content of defense counsel’s cross-examination, it is reasonable to conclude that the trial court did not abuse its discretion in admission of the prior consistent statements.

3. There was no constitutional error in the “To Convict” Jury instructions.

Mr. Ramirez-Estevez challenges the jury instructions as insufficient due to the language used. The instructions read:

To convict the defendant of the crime of Rape of a Child in the First Degree, as charged in Count I, on an occasion different than alleged in Counts II, III, IV, or V, each of the following elements of the crime must be proved beyond a reasonable doubt.

[CP 117-21]

Mr. Ramirez-Estevez contends that the phrase “on an occasion different than alleged in Counts II, III, IV or V” carries a meaning that is legally distinct from the required language of “an occasion separate and distinct from.” (Appellate Brief 29). It is the State’s position that the appellant’s argument is without merit because this language carries an equivalent meaning. Further, the totality of the circumstances in which the jury instructions were conducted provided adequate protection against double jeopardy, based upon standards articulated in the relevant case law.

The term “distinct” in the context of jury instructions arises out of Washington case law dealing with the “generic” testimony of child witnesses who complain of multiple instance of sexual abuse, yet lack the maturity or mental capability to accurately assign dates or other distinguishing temporal characteristics to their allegations. Multiple count sexual assault convictions which rely upon “generic” child testimony have been affirmed by Washington courts, so long as specific minimum thresholds of credibility are met. *State v. Hayes*, 81 Wn. App. 425, 438, 914 P.2d 788 (1996). In *State v. Brown*, 55 Wn. App. 738, 741-2, 780 P.2d 880 (1989), the defendant challenged the use of “generic” testimony in support of a conviction for two counts of indecent liberties and four counts of

statutory rape. *State v. Brown*, 55 Wn. App. 738, 741-2, 780 P.2d 880 (1989). The victim's testimony was limited to estimates of the number of times the defendant molested her, and general descriptions of the frequency of particular acts, such as "sometimes," and "just about every day." *Id.* She did not specify dates, but described in detail the defendant's usual conduct. *Id.* The *Brown* court acknowledged the problems inherent in prosecuting cases of sexual molestation against children when the perpetrator is a "resident molester." *Id.* at 746-7. Recognizing that Washington courts have approved of such "general" testimony in the context of its admissibility, the court reiterated that "[t]o require [the victim] to pinpoint the exact dates of oft-repeated incidents of sexual contact would be contrary to reason." *Id.* at 747.

The right to be free from double jeopardy, on the other hand, is the constitutional guaranty protecting a defendant against multiple punishments for the same offense. *U.S. CONST. amend. V*; *WASH. CONST. art. I, § 9*; *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 853 (1983). The constitutional guaranty against double jeopardy protects a defendant from a second trial for the same offense and against multiple punishments for the same offense. *State v. Noltie*, 116 Wn.2d at 848 (citing *State v. Vladovic*, 99

Wn.2d 413, 423, 662 P.2d 853 (1983)). If one crime is over before another charged crime is committed and different evidence is used to prove the second crime, then the two crimes are not the same offense. *State v. Hayes*, 81 Wn. App. 425, 439, 914 P.2d 788 (1996). Thus, the perpetrator may be punished separately for each crime without violating double jeopardy. *Noltie*, 116 Wn.2d at 848. In reviewing allegations of double jeopardy, an appellate court may review the entire record to establish what was before the court. *State v. Noltie*, 116 Wn.2d 831, 809 P.2d 190 (1991) (citing 2 W. LaFave & J. Israel, *Criminal Procedure* § 19.2, at 446 (1984); 1 C. Wright, *Federal Practice* § 125, at 365 (2d ed. 1982)). A jury instruction which violates double jeopardy protections by allowing a jury to find guilt on multiple charges based upon the same factual basis is an error of constitutional magnitude that may be raised for the first time on appeal. *State v. Ellis*, 71 Wn.App. 400, 404, 859 P.2d 632 (1993).

In a trial which alleges multiple accounts of sexual abuse during the same charging period, there must be a separate and distinct underlying incident for each charge; proof of any one incident cannot support a finding of guilt on more than one count. *State v. Borsheim*, 140 Wn.App. 537, 165 P.3d 417 (2007). Thus a

defendant charged with multiple counts is adequately protected from any risk of double jeopardy when the evidence is sufficiently specific as to each of the acts charged. *State v. Newman*, 63 Wn. App. 841, 851, 822 P.2d 308, review denied, 119 Wn.2d 1002 (1992). This distinction between the charges must be reflected in the jury instructions.

As an initial proposition, jury instructions "must more than adequately convey the law. *State v. Borsheim*, 140 Wn.App. at 366-7. They must make the relevant legal standard 'manifestly apparent to the average juror.'" *State v. Watkins*, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006) (internal quotation marks omitted) (quoting *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996)). Accordingly, if it is not "manifestly apparent" to the jury that the State is not seeking to impose multiple punishments for the same offense, the defendant's right to be free from double jeopardy may be violated. See *Noltie*, 116 Wn.2d at 848-49. The trial court must instruct the jury "that they are to find 'separate and distinct acts' for each count." *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996) (quoting *Noltie*, 116 Wn.2d at 846).

Mr. Ramirez-Estevez argues that the language of "on an occasion different than" does not sufficiently emphasize the

distinction between the multiple sexual acts. Mr. Ramirez-Estevez argues that the phrasing of the jury instructions may have allowed jurors to conclude there was “one continuous act” spanning “separate occasions,” thus allowing them to predicate multiple convictions on one continuous act. (Appellate Brief 30). It is the State’s position that this argument is unreasonable given that in the present case, the court gave separate “to convict” instructions for each count, in addition to the unanimity instruction which distinguished between each criminal count.

In *State v. Noltie*, as in the present case, the trial court gave separate “to convict” instructions for each of two counts of statutory rape. *Noltie*, 116 Wn.2d at 849. Instruction for Count I read:

To convict the defendant Fredric Noltie of the crime of statutory rape 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 during a period of time intervening between November 29, 1983 and May 14, 1987, the defendant engaged in sexual intercourse with [the victim] *in an incident separate from and in addition to any incident that may have been proved in count I*;

Noltie, 116 Wn.2d at 849 (emphasis added).

The Washington Supreme Court found that the wording of these separate instructions, in combination with the unanimity

instruction and the closing argument by the deputy prosecutor which emphasized that the State was charging “two kinds of sexual intercourse,” the totality of these factors was sufficient to conclude that Noltie was tried and convicted for two separate offenses, and was therefore not placed in jeopardy twice for the same offense. *Nolite*, 116 Wn.2d at 849-50.

By contrast, in *Borsheim*, a single instruction was issued for four different charges. Division I found this jury instruction failed to make “manifestly apparent” to the jury that each of the four counts must be based on a different underlying act, thus exposing the defendant to multiple punishments for a single offense. *Borsheim*, 140 Wn.App. at 367. The relevant jury instructions read:

There are allegations that the Defendant committed acts of rape of child on multiple occasions. *To convict the Defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt.* You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

Instruction 3 (emphasis added).

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 4 (emphasis added).

To convict the defendant of the crime of Rape of a Child in the First Degree, *as charged in counts 1, 2, 3, and 4,*

each of the following elements of the crime must be proved beyond a reasonable doubt *as to each count*:

Borsheim, 140 Wn.App. at 364.

The court also distinguished *Ellis*, noting that in *Ellis* it was significant that the trial court gave four separate “to convict” instructions. *Id.* at 368. In *State v. Ellis*, this Court ruled that while a unanimity requirement which emphasized the “separate” nature of the crimes was not sufficient in and of itself, in the instance where the trial court provided both “separate and separately worded ‘to convict’ instructions” in addition to the “each count language instruction,” the jury instructions were adequate for the purpose of double jeopardy protection. *Ellis*, 71 Wn.App. at 370.

In *Ellis*, the unanimity instruction read, “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*.” *State v. Borsheim*, 140 Wn.App. 357, 165 P.3d 417 (2007) (quoting *Ellis*, 71 Wn.App. at 402). In the present case the unanimity instruction read:

The State alleges that the defendant committed multiple acts of Rape of a Child in the First Degree on multiple occasions. To convict the defendant on each of the alleged counts of Rape of a Child in the First Degree, only one particular act of Rape in the First Degree must be proved beyond a reasonable doubt,

for each alleged crime, and you must unanimously agree as to which act has been proven. You need not unanimously agree that the defendant committed all the acts of Rape of a Child in the First Degree.

[CP 72].

It is the State's position that this language adequately meets the standard set forth in *Ellis* because it specifies the distinction between each count: "to convict the defendant on each of the alleged counts" and refers to the separate counts a second time as "each alleged crime." When this instruction is considered in conjunction with the individual "to convict" instructions, it is unreasonable to conclude that the jury may have interpreted these instructions as allowing a conviction based upon "one continuous" act of rape.

Finally, the deputy prosecuting attorney, in closing statements, was clear with regard to the fact that the multiple charges were predicated upon different and distinct acts. He stated, "In your discussion you need to be unanimous that there are five acts of rape of a child in the first degree, five separate and distinct acts." (RP 720). This argument offered further clarification to the jury regarding the State's case, despite that the jury instructions themselves met the standard articulated in Washington case law.

Any error in this instance was harmless. The proper standard of review for constitutional error is "harmless beyond a reasonable doubt". *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986); *Chapman v. California*, 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824, 24 A.L.R.3d 1065 (1967). Thus, in multiple acts cases, when the State fails to elect which incident it relies upon for the conviction or the trial court fails to instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, the error will be deemed harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt. *State v. Bilal*, 54 Wn. App. 778, 783, 776 P.2d 153 (1989). It is the State's position that in the present case, the medical evidence, in conjunction with E.O.'s testimony, supported a finding of guilt and thus any error was harmless.

4. The testimony provided by the expert witness was not an improper comment on the defendant's guilt.

Mr. Ramirez-Estevez also challenges the testimony of Ms. Laurie Davis, a nurse practitioner who examined E.O, as improper opinion evidence. In the course of her testimony, when questioned

about the “notches” or “disruption of the tissue” that she observed on E.O.’s hymenal tissue as “consistent with her [E.O.’s] medical history.” (RP 595). It is the State’s position that Dr. Davis’ testimony proper as it falls within the ER 803(a)(4) exemption for hearsay pertaining to a medical diagnosis. ER 803(a)(4) allows the admittance of hearsay testimony if the statement was made for the purpose of a medical diagnosis or treatment. ER 804(a)(4) states in full:

Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

[ER 804(a)(4)]

Washington courts recognize that while expert witnesses may not testify as to a defendant’s guilt, “testimony is not objectionable simply because it embraces an ultimate issue the trier of fact must decide.” *State v. Hayward*, 152 Wn. App. 632, 217 P.3d 354 (2009). Rather, “[t]he fact that an opinion encompassing the ultimate factual issue *supports* the conclusion that the defendant is guilty does not make the testimony an improper opinion of guilt.” *Seattle v. Heatley*, 70 Wn. App. 573, 579, 854

P.2d 658 (1993), *review denied*, 123 Wn.2d 1011 (1994). In *Hayward*, this Court found that although a doctor's testimony used a phrase which almost mirrored a question of fact for the jury to decide, the testimony was not improper because it "did not directly discuss Hayward's guilt" or "his participation in the injury." *Id.*

In *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007), the court held that a doctor was not commenting either directly or indirectly on the victim's credibility nor on the defendant's guilt when he testified that although the results of a physical exam were normal, the victim's account of sexual abuse was not inherently inconsistent with his findings. *Kirkman*, 156 Wn.2d at 930. The *Kirkman* court said the doctor "did not come close to testifying that [the defendant] was guilty or that he believed [the victim's] account." *Id.* Nor, the court said, did another doctor "come close to testifying on any ultimate fact" because he "never opined [the defendant in that case] was guilty, nor did he opine [the victim] was molested or that he believed [her] account to be true." *Id.* at 933.

The court in *Kirkman* also reviewed the testimony of a detective who described his competency assessment of the child victim. *Id.* at 930. The detective testified that he found the child to be truthful, that she was able to distinguish between the truth and a

lie, and that she promised to tell the truth. *Id.* The court held this testimony did not enter the sphere of opinion evidence as it was not indicative “that he believed [the victim] or that she was telling the truth.” *Id.* at 931. Rather, the court found his testimony described police protocol used during the interviews, thus providing context to the jury. *Id.* The court noted that the detective’s testimony did not carry a “special aura of reliability” distinguishable from any other sworn witness, and that ultimately, the credibility of witness testimony rested with the jury. *Id.*

In *Carlson*, the case cited by Mr. Ramirez-Estevez, the expert witness testified as to the interview she conducted with the victim, E, and stated “My assessment on the basis of the validity of the interview was that I trusted the interview that [E] had been sexually abused by her father.” *State v. Carlson*, 80 Wn. App. 116, 120, 906 P.2d 999 (1995). The doctor went on to state that this conclusion was based “almost entirely on the interview” rather than the physical findings, and that an absence of physical findings “would not change my impression.” *Carlson*, 80 Wn. App. 120-1. This Court rejected the expert testimony on the the basis that Dr. Feldman’s scientific findings were inconclusive and the diagnosis of

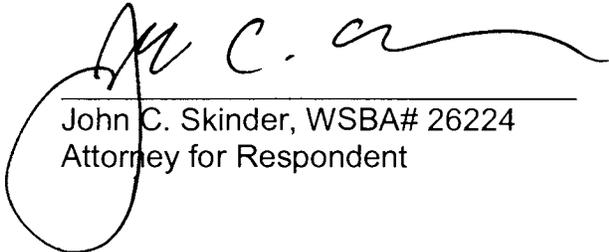
sexual abuse was based solely on the statements of the victim. *Id.* at 125.

In contrast, Dr. Davis stated only that the notches were consistent with E.O.'s medical history, without indicating any details regarding E.O.'s disclosure. (RP 595-6). Dr. Davis explained that "our main findings are history in this area of work. . . [V]ery few exams have any findings at all, and so we have to base our assessment on the history usually by itself." (RP 592). While this statement may support a finding of guilt, Dr. Davis' diagnosis did not constitute a comment or opinion on E.O.'s credibility because it was predicated not upon E.O. disclosure, but on medical observations which Dr. Davis found "significant" and "concerning."

D. CONCLUSION.

For the above reasons, the State respectfully requests this Court to affirm the convictions and sentence of Mr. Ramirez-Estevez.

Respectfully submitted this 9th day of August, 2010.



John C. Skinder, WSBA# 26224
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

TO: DAVID C. PONZOHA, CLERK
COURT OF APPEALS, DIVISION II
950 BROADWAY, SUITE 300
MS-TB-06
TACOMA, WA 98402-4454

FILED
COURT OF APPEALS
10 APR 10 AM 11:58
STATE OF WASHINGTON
BY em
TERRY

--AND--

JESSE CANTOR
MAZZONE AND CANTOR, LLP
1604 HEWITT AVE. SUITE 515
EVERETT, WA 98201

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 9th day of August, 2010, at Olympia, Washington.



Chong McAfee