

No. 40293-9-II
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GEORGE PATRICK WOODARD

Appellant.

FILED
10/27/10 PM 4:36
STATE OF WASHINGTON
BY [Signature]
COURT OF APPEALS
DIVISION II

Appeal from the Superior Court of Washington for RCWLewis
County

RESPONSE BRIEF

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SUPPLEMENTAL STATEMENT OF THE CASE

On Christmas Eve, 2008, the victim in this case, MMP., twelve years old at the time, wanted to go to a nearby store to get a snack. 1RP 121-124.¹ George Woodard offered to give MMP a ride to the store because he was visiting her parents that evening. 2RP 7. MMP rode in the passenger seat of Woodard's van, with Woodard driving, and the roads were snowy that evening. 2RP 8. After she bought the candy at the nearby store, they headed back towards MMP's house. 2RP 17. However, instead of taking the "regular" route back to MMP's house, Woodard turned down another road and came to a stop by doing a "cookie or donut" at the end of the road. 2RP 21. Woodard then told MMP to get in the back seat of the van and take her pants off. 2RP 22. Woodard told MMP, "take your pants down now, bitch." 2RP 22. Because she was afraid Woodard would hurt her if she didn't comply, MMP pulled down her pants. 2RP 22.

Woodard then performed oral sex on MMP. 2RP 24. Then Woodard put his fingers inside MMP's vagina and then he put his

¹ The trial transcripts referred to by the State are referenced as follows: 1RP (11/23/09 Vol. 1 of 2); 2RP (11/23/09 RP 2 of 2); 3RP (11/24/09); 4RP (11/25/09); 5RP (11/30/2009 and 1/25/2010).

penis inside her vagina and moved back and forth. 2RP 25.

Woodard then put his mouth on MMP's breast. 2RP 26. MMP said these acts "one after the other." 2RP 26. Woodard tried to get MMP to perform oral sex on him but when MMP balked, Woodard said, "Fine. I'll just have sex with you." 2RP 27. Afterwards, Woodard told MMP to tell the people waiting at her house that it took them so long to return because there was a long line in the store. 2RP 41. Woodard also told MMP that if she told anyone what really happened, both of them could get into trouble but most likely it was MMP who would be in trouble. 2RP 41. Later that evening, MMP went to stay with a friend and after Christmas MMP disclosed the rape to that friend. 2RP 48. The friend called MMP's mother and the police were called. 2RP 49.

Woodard was charged with one count of kidnapping in the first degree with sexual motivation; one count of rape of a child in the second degree; and one count of child molestation in the second degree. CP 13-15; 5RP 126. A jury convicted Woodard as charged, including returning a special verdict finding that Woodard committed the kidnapping with sexual motivation. 5RP 126.

Because Woodard has a prior felony sex offense conviction for child molestation in the first degree, his conviction for the

kidnapping in the first degree with sexual motivation or the rape of a child in the second degree in this case resulted in a mandatory life sentence under the "two-strike" sex offense statutes. Thus, the trial court sentenced Woodard to life without the chance of parole on the kidnapping and rape convictions, and to 41 months to 120 months on the child molestation second degree conviction. 5RP 173. Woodard filed a timely appeal. This Court should affirm, as fully argued below.

ARGUMENT

A. THE MERGER DOCTRINE DOES NOT APPLY HERE AND THE CASE CITED BY WOODARD FOR THIS PROPOSITION IS DISTINGUISHABLE.

Woodard claims that his kidnapping conviction merges into the rape of a child in the second degree and child molestation second degree convictions, relying upon the ruling in State v. Johnson, 92 Wn.2d 671, 600 P.2d 1249 (1979)(*disapproved on other grounds*, State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999)). The State disagrees, and all of Woodard's convictions should stand.

Merger issues are reviewed *de novo*. State v. Freeman, 153 Wn.2d 765, 108 P.3d 753 (2005). "The State may bring (and a jury

may consider) multiple charges arising from the same criminal conduct in a single proceeding." Id. at 756. However, courts may not enter multiple convictions for the same offense without offending double jeopardy. State v. Vladovic, 99 Wn.2d 413, 422, 662 P.2d 856 (1983). The "merger doctrine" is a judicial doctrine used to determine whether the Legislature intended to impose multiple punishments for an act that violates more than one statute. State v. Eaton, 82 Wn.App. 723, 729, 919 P.2d 116 (1996). "The doctrine applies only where the Legislature has clearly indicated that in order to prove a particular degree of crime . . .] the State must prove not only that a defendant committed that crime. . . but that the crime was accompanied by an act which is defined as a crime elsewhere in the criminal statute." Vladovic, 99 Wn.2d at 421. The merger doctrine avoids double punishment by merging a lesser offense "into the greater offense when one offense raises the degree of another offense." State v. Collicott, 118 Wn.2d 649, 657, 827 P.2d 263 (1992). However, for merger to apply, the definition of one crime must include commission of another crime -- not merely *intent* to commit it. In re Fletcher, 113 Wn.2d 42, 52-53, 776 P.2d 114 (1989). It is this final exception that defeats the merger doctrine in the instant case.

The ruling in Fletcher applies here and the kidnapping conviction does not merge. As explained by the Fletcher Court:

. . . . the first degree kidnapping statute specifically requires proof of another felony in order to elevate the crime to first degree kidnapping. *Vladovic*, at 421, 662 P.2d 853. However, the statute only requires proof of *intent* to commit various acts, some of which are defined as crimes elsewhere in the criminal code. It does not require that the acts actually be committed. RCW 9A.40.020. A reading of the statute makes it clear that the person who intentionally abducts another need do so only with the *intent* to carryout one of the incidents enumerated in RCW 9A.40.020(1)(a) through (e) inclusive; not that the perpetrator actually bring about or complete one of those qualifying factors listed in the statute. Thus, the Legislature has not indicated that a defendant must also commit another crime in order to be guilty of first degree kidnapping, and therefore the merger doctrine does not apply.

Petition of Fletcher 113 Wash.2d 42, 52-53, 776 P.2d

114(1989)(emphasis in original). In other words, kidnapping in the first degree is elevated by the intent to commit the other felony crime(s), not commission of the other felony crime(s), and therefore the merger doctrine does not apply. Id.; *accord*, State v. Louis, 155 Wn.2d 563, 571, 120 P.3d 936(2005); RCW 9A.40.020. Indeed, the Louis Court rejected the "kidnap-merger" doctrine or the "incidental crime" merger doctrine. Id. These rules thus prevent merger of the kidnapping first degree conviction in the present case. Here, Woodard carried out the kidnapping to facilitate the actual *commission* of the additional *completed* felony crimes of

rape of a child in the second degree and child molestation in the second degree. 2RP 21-24; CP57-65. Consequently, under Fletcher and Louis, the kidnapping first degree conviction does not merge and this Court should affirm all of Woodard's convictions.

Furthermore, Woodard relies on the ruling in Johnson, supra., to support his merger arguments. Brief of Appellant 8-15. However, the ruling in Johnson is irrelevant to this case because in Johnson, the rape was elevated to the first degree by virtue of the *kidnapping* crime. Johnson, at 681. Put differently, in Johnson, the kidnapping elevated the rape to first degree rape. Id. RCW 9A.40.020 . But that is not what happened in the instant case. Here, the "rape" charge is rape of a child in the second degree based upon the ages of the child and Woodard. CP 13-15. In other words, in this case neither the child rape nor the child molestation requires proof of another crime--so neither of these crimes merger into the kidnapping. RCW 9A.44.076 (rape child second); RCW 9A.44.086(child molest second); RCW 9A.40.020 (kidnapping). Accordingly, Johnson is not analogous and Woodard's reliance it is misplaced.

For all of the reasons discussed above, the merger doctrine does not apply to the facts or the crimes presented here. Fletcher,

supra; Louis, supra. Therefore, this Court should affirm all of Woodard's convictions and sentences.

B. THE COURT'S INSTRUCTION AS TO THE AGGRAVATING FACTOR FOR THE SPECIAL VERDICT IS NOT A MANIFEST CONSTITUTIONAL ERROR AND CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.

Woodard also claims the jury instruction for the special verdict form was "fatally flawed." But Woodard did not object to this instruction below, nor did he propose his own unanimity instruction as to this factor. Nor is this alleged error a "manifest constitutional error." Accordingly, this Court should affirm the jury's finding that the kidnapping offense was committed with sexual motivation, as set out in the special verdict.

For the first time on appeal, Woodard argues that the alleged error in the instruction on the aggravating factor requires that the special verdict be "vacated." Woodard relies on State v. Bashaw, 169 Wn.2d 133, 147, 234 P.3d 195 (2010) and State v. Goldberg, 149 Wn.2d 888, 72 P.3d 1082 (2003) for this argument. Bashaw relied on Goldberg to hold that a unanimous jury decision is not required to find the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. Bashaw, 169 Wn.2d at 146. The Court in Bashaw overturned a special verdict where the jury had been given the

same instruction given in this case, stating the instruction erroneously required the jury agree on their answer to the special verdict even if they did not unanimously find the presence of the special finding. Id. at 147.

In the present case, Woodard did not object to the special verdict instruction at trial, nor did he submit any jury instructions below. 5RP 4. 3 RP 410, 426. Generally, appellate courts do not consider issues raised for the first time on appeal. RAP 2.5(a), State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). An error which was not objected to at the trial level may be considered by the court if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3), State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). Whether the Court will consider an asserted error under these circumstances is determined by a four part analysis set out in Lynn.

First, reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was

committed, then, and only then, the court undertakes a harmless error analysis.

Lynn, 67 Wn. App. at 345.

This Court should decline to consider the issue pertaining to the special verdict in this case because the defendant has not identified any constitutional provision implicated by the instruction given in this case. The rule which the Court in Bashaw relied on to find the special verdict instruction in that case was erroneous is not compelled by double jeopardy protections. Bashaw, 169 Wn.2d at 146, n. 7. Since it is not readily apparent that the issue raised by the Woodard here implicates the constitution, the Court should decline to consider this issue for the first time on appeal.

Courts have recognized that “instructional errors may implicate constitutional due process.” Lynn, 67 Wn. App. at 343. Even if due process is implicated by the instruction given the jury here², no manifest error exists. “Manifest” within the meaning of RAP 2.5(a)(3) requires the defendant to show that he was actually prejudiced. State v. O’Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009), State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). The actual prejudice standard differs from the harmless

² The State does not concede that the defendant’s due process rights were violated by the special verdict instruction. However, it is addressed for the sake of argument.

error standard in that under the former test the focus is on “whether the error is so obvious on the record that the error warrants appellate review.” O’Hara, 167 Wn.2d at 99-100.

To show actual prejudice the defendant must show that the error had a practical and identifiable consequence in the trial of the case. Id. “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” McFarland, 127 Wn.2d at 333. Only after the Court concludes that manifest constitutional error has occurred does the Court then engage in a harmless error analysis. O’Hara, 167 Wn.2d at 99. Any error in this case does not satisfy the manifest requirement to justify review.

The evidence in the instant case established beyond a reasonable doubt that Woodard intentionally took a detour on the way back from the trip to the store with MMP in order to carry out the crimes of rape of a child in the second degree and child molestation in the second degree against MMP. 2RP 22-24. Physical evidence corroborated MMP's version of the crimes. 11/25/09 RP 127-131; 11/24/09 RP 121, 122; Ex. 23 & 28; 5RP 13-16, 24. Furthermore, two witnesses who were in the Lewis County jail at the same time as Woodard testified that Woodard admitted

having oral and digital sexual contact with MMP on the night in question. 4RP 64, 66,78,79. The jury was free to believe MMP over defendant Woodard, and it obviously did so. Camarillo, 115 Wash.2d at 71(credibility determinations are for the trier of fact and cannot be reviewed on appeal); 5RP 125,126 (verdicts are read in court, including the special verdict form). In light of the forgoing circumstances, Woodard cannot show that he was prejudiced by the special verdict jury instruction. In Goldberg the jury was actually hung on the aggravating factor before it reached a unanimous verdict. Goldberg, 149 Wn.2d at 894. Here the jury did not initially come back *without* a unanimous verdict on the aggravating factor of "sexual motivation," nor did the jury indicate it was confused about the aggravating factor. 5RP 125, 126.

In Bashaw there was conflicting evidence regarding the school zone enhancement. Bashaw, 169 Wn.2d at 138-39. Thus, in Bashaw, one or more jurors may not have been convinced that the facts supporting the enhancement were credible. Id. In the present case, however, the victim testified that Woodard did not take her directly home after their trip to the store and instead took a different road where he stopped to carry out the child rape and child molestation crimes. 2RP 22-27. As previously discussed and cited

above, there was also corroborative evidence presented to support the victim's version of these events. Where there is no evidence the jury was actually hung on the special verdict question, or that there would have been a basis for disagreement on that finding, Woodard cannot show that he was prejudiced by the instruction.

In addition, the nature of the rape of a child charge here forecloses the conclusion that the special verdict instruction had any practical and identifiable affect on the outcome of the case. Rape of a child in the second degree is an offense requiring sexual intercourse with a minor (as charged here). RCW 9A.44.076; CP 37,38,39. And the jurors were required to find the State proved all of the elements of that sexual offense beyond a reasonable doubt in order to find the defendant guilty of that sex offense. CP37, 38,39. The jury was also instructed that it was required to be unanimous in order to return a verdict on the rape of a child charge. CP 43, 19.

Thus, a unanimous verdict on the underlying offense of rape of a child in the second degree necessarily reflects a unanimous determination that Woodard committed kidnapping with "sexual motivation." The only aggravating factor in consideration for the special verdict form here was the factor of "sexual motivation."

Furthermore, Woodard's total failure to object to the special verdict instruction--or to propose his own instruction-- deprived the trial court (and the State) of the opportunity to prevent the instructional error he now raises. Kirkman, 159 Wn.2d at 935. Had Woodard argued the holding in Goldman applied to the special verdict instruction in this case the court could have easily modified the instruction to ensure jurors were not required to be unanimous on a "no" vote. I

Indeed, this extremely routine practice of defense counsel's complete failure to ever offer *any* jury instructions whatsoever in these criminal cases, and failing to object to the instructions is, in a word, inexcusable. See *e.g.*, In re Crace, 157 Wn.App. 81, 276 P.3d 914 (2010) where, in her *excellent* dissent Judge Quinn-Brintall notes this questionable-but-common "practice":

. . . . ordinary, reasonably competent defense counsel routinely ignores rules requiring the presentation of defense proposed instructions as required under CrR 6.15(a) and, to a lesser extent, the taking of exceptions to the trial court's jury instructions as required under CrR 6.15(c). This decision appears to be based on the fact that the invited error doctrine has been pretty consistently enforced, *see, e.g.*, State v. Momah, 167 Wash.2d 140, 153-55, 217 P.3d 321 (2009) (discussing application of the invited error doctrine), *cert. filed*, 78 USLW 3745 (June 7, 2010), while the ineffective assistance of counsel argument has undermined normal preservation requirements and resulted in appellate

courts *reviewing the merits* of issues never presented to or decided by the trial court. As such, in my opinion, the failure to propose or except to instructions has become either a tactical decision or has become conduct so pervasive that the ordinary, reasonably prudent defense counsel intentionally fails to comply with court rules requiring issue preservation to provide what amounts to de novo review of the trial on appeal. . . .

In re Crace 157 Wash.App. at 117-118 (dissent)(all emphasis added). This abuse of the rules pertaining to the defense's obligation to either propose its own jury instructions or make timely objections to the instructions should end. Here, Woodard neither proposed his own instructions regarding the special verdict "sexual motivation" factor, nor did he object. As such, this Court should affirm the special verdict in all respects.

Finally, even if the Court considers the issue and reverses the special verdict, the Court should decide what the appropriate remedy should be. The usual remedy for erroneous jury instructions is remand for a new trial. See, e.g., State v. Jackman, 156 Wn.2d 736, 745, 132 P.2d 136 (2008); State v. Johnston, 156 Wn.2d 355, 127 P.3d 707 (2006). This reflects fundamental considerations of justice:

Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were

every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction.

United States v. Tateo, 377 U.S. 463, 466, 84 S. Ct. 1587, 12 L. Ed. 2d 448 (1964)(emphasis added). This observation is particularly applicable to the present case, where no objection was raised to the alleged error and the evidence was overwhelming.

In Bashaw, the court set out policy reasons why a weapon enhancement should not be retried after a jury fails to agree on the special verdict. The court said that allowing retrials would violate the “policies of judicial economy and finality.” Bashaw, 163 Wn.2d at 146-47. When, however, a defendant successfully challenges his conviction, he loses any right to have that conviction treated as final. See State v. Ervin, 158 Wn.2d 746, 147 P.3d 567 (2006). As for “judicial economy,” it is not a waste of time for a court to determine whether a person deserves have an offense count as a second-strike sex offense--as the kidnapping crime here is with the special aggravator of being committed with sexual motivation. RCW 9A.40.020; RCW 9.94A.525(16)). Thus, if this Court reverses the aggravating factor

considered on the special verdict, then the remedy should be remand for a jury trial solely to allow a jury to consider just that aggravating factor. RCW 9.94A.535.

C. THERE IS NO "UNANIMITY" INSTRUCTION ISSUE REGARDING THE CHILD MOLESTATION CONVICTION BECAUSE THE ACTS FORMED A "CONTINUING COURSE OF CONDUCT" AND BECAUSE IT IS CLEAR WHICH SEPARATE AND DISTINCT ACT THE STATE RELIED UPON FOR THE CHILD MOLESTATION CHARGE.

Woodard alleges that "the multiple acts underlying the allegation of child molestation denied" Woodard his right "to be free from Double Jeopardy and to have a unanimous jury verdict." Brief of Appellant 15-21. This argument is without merit because no unanimity instruction was required for the child molestation charge here because the acts constituting that charge were part of a "continuing course of conduct." Additionally, the State explained in closing argument the specific act it "elected" to comprise the child molestation count--and that act was not one of the acts which formed the acts of penetration that formed the charge of rape of a child in the second degree. Finally, even if there should have been a unanimity instruction for the child molestation, any error should be held harmless because the evidence in this case for every charge was overwhelming.

Criminal defendants have a right to a unanimous jury verdict. State v. Kinchen, 92 Wn.App. 442, 451, 963 P.2d 928 (1998).

Where several acts could constitute the crime charged and those acts are not part of a continuing course of conduct, the jury must be unanimous as to which act constituted the crime. State v. Fiallo-Lopez, 78 Wn.App. 717, 724-726, 899 P.2d 1294 (1995). To ensure jury unanimity, the State must either elect the act it will rely on for conviction or the court must give a unanimity instruction. Id., 78 Wn.App. at 724. However, "[t]he State need not make an election and the trial court need not give a unanimity instruction if the evidence shows the defendant was engaged in a 'continuing course of conduct.'" Fiallo-Lopez, 78 Wn.App. at 724-726, *citing* State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989).

Whether multiple acts are a continuing offense is evaluated in a *commonsense* manner. Petrich, infra. 101 Wn.2d at 571; Fiallo-Lopez, 78 Wn.App. at 724-26.

In the present case, MMP said that the entire sexual assault--licking outside her vagina, inserting his finger into her vagina, putting his mouth on her breast, and then inserting his penis--all happened "one after the other" over a short time span. 2RP 25,26,27. As such, this was one continuing course of conduct

and a unanimity instruction was not necessary for the child molestation charge. Fiallo-Lopez, supra.

Furthermore, when reviewing a unanimity instruction issue, the reviewing Court may also examine the State's closing argument. Election of a particular act in closing argument is one way the State can demonstrate an election and/or harmless error. See State v. Bland, 71 Wn.App. 345, 352, 860 P.2d 1046 (1993) (State's closing argument clarifying the particular act for each count supported a conclusion that the State made an election); State v. Lee, 77 Wn.App. 119, 124, 889 P.2d 944 (1995), *reversed on other grounds*, 128 Wn.2d 151 (1995) (citing the State's election in closing as support for conclusion that error was harmless). In the instant case, as discussed below, the State elected the acts it relied upon for both the child rape and the child molestation in its closing argument.

In the present case, the relevant charges are Count II, Rape of a Child in the Second Degree--an act or acts requiring "sexual intercourse." RCW 9A.44.076; RCW 9A.44.010(1); and Child Molestation in the Second Degree--an act or acts requiring "sexual contact." RCW 9A.44.086; RCW 9A.44.010(2). The definition of "sexual intercourse" states:

"Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another

RCW 9A.44.010(1)(emphasis added). It was under (a) and (b) of this statute that the child rape charge was filed in this case. Here, the acts comprising Count I, "rape of a child" were Woodard's penile and digital penetration of MMP--as testified to by the victim herself. Woodard put his fingers *inside* MMP's vagina and then he put his penis *inside* her vagina and moved back and forth. 2RP 25.

In contrast, relevant to the child molestation charge as filed here, "sexual contact" is defined as " any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). As the State pointed out in its closing argument, the act comprising the "sexual contact" for the child molestation in the second degree charge was the act of Woodard placing his mouth on the outside of MMP's bare vagina--on her labia. 4RP 91. MMP testified about this

"sexual contact" when she said that Woodard licked her on the outside of her vaginal opening. 2RP 24,25. Woodard also admitted to witnesses Barnes and Neff that he (Woodard) performed oral sex on MMP. 4RP 64, 65, 79. Then, in closing, the State described the act comprising the "sexual contact" component of the child molestation charge when it said, "[i]t means any touching of the sexual or other intimate parts of a person done for purposes of gratifying sexual desires. . . . George Woodard put his mouth on her vagina." 5RP 91. Thus, it is quite clear that it was that particular act of sexual contact (the oral sex) that the State was referring to for the child molestation charge. Id.

Similarly, the State distinguished the "penetrative" acts that formed the rape of a child charge from the child molestation charge in closing as well--showing that neither of those acts went to the child molest charge. 5RP 89,90. For example, when explaining the evidence for the rape of a child charge the prosecutor said, "Mr. Woodard put his penis in her vagina. . . . Maranda told you he placed his penis inside her vagina. She also said he stuck his finger in her vagina and that also qualifies for sexual intercourse. . . . So there was actually two ways he committed that crime. One was with his penis and the second with his finger." 5RP 89,90.

The prosecutor then went on to explain the unanimity instruction that pertained to the rape of a child in the second degree charge. 5RP 90.

In sum, MMP's testimony shows the acts comprising the child molestation charge were a "continuing course of conduct" contemplated by cases like Handran, supra, and Fiallo-Lopez, supra. Plus, the State's detailed closing argument in which it described each act it relied upon to form each count charged--including the act it relied upon for the child molestation charge--a unanimity instruction was not needed for the child molestation charge. Therefore, this Court should affirm.

In the alternative, if this Court finds it was error to fail to give a unanimity instruction as to the child molestation charge, any error should be held harmless given the overwhelming evidence presented as to every count charged in this case. This is because in multiple act cases, if the State fails to elect which incident it relies upon for the conviction or the trial court fails to give a unanimity instruction, the error will be deemed harmless *if* no rational trier of fact could have entertained a reasonable doubt that *each incident* established the crime beyond a reasonable doubt. State v. Kitchen, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988)(modifying the

harmless error standard enunciated in State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984).

Applying this standard to the child molestation count in the present case, any error was harmless. No rational trier of fact could entertain a reasonable doubt that each incident established the crime of child molestation. Kitchen, supra. Here, the victim, MMP, clearly testified that Woodard performed oral sex on her, and two persons who met Woodard in the Lewis County jail testified that Woodard told them that he performed oral sex on MMP. 4RP 64,79; 2RP 24-26. Additionally, it is clear the State was relying only on the "penetration" incidents for the child rape incident (and a unanimity instruction was given for that charge), and because the State clearly pointed out in closing that it was the oral sex act that it relied upon for the child molest charge, the only other possible act that could constitute "sexual contact" for the molestation charge was Woodard's putting his mouth on MMP's breast. 2RP 22-26. For that act, there was MMP's testimony plus the saliva evidence as testified to by the crime lab expert. 4RP 129-132. These acts not only occurred in one brief continuing series of acts at the same time and place, but the State also proved beyond a reasonable doubt that each of the acts that could have comprised the child

molestation in the second degree charge occurred. Accordingly, any error in failing to give a unanimity instruction regarding the child molestation charge should be found harmless, and this Court should affirm. Kitchen, supra;

D. THE TRIAL COURT DID NOT "IMPERMISSIBLY COMMUNICATE" WITH THE JURY WHEN IT RESPONDED TO THE JURY'S QUESTION WITH THE WRITTEN RESPONSE, "ANSWER: REREAD ALL YOUR INSTRUCTIONS."

Woodard also claims that the trial court "impermissibly communicated with the deliberating jury without consulting Woodard or counsel." This argument is also without merit.

This issue is controlled by State v. Langdon, 42 Wn.App. 715, 713 P.2d 120, *review denied* 105 Wn.2d 1013 (1986). In Langdon, the court instructed the jury on the elements of robbery and accomplice liability and theft. After deliberating for fifty minutes, the jury sent a question to the judge asking, "Does 'committing' mean aid in escaping?" The judge replied, "You are bound by those instructions already given to you." Langdon, 42 Wn.App. at 717. On appeal, Langdon argued that this "ex parte communication" violated CrR 6.15(f)(1) and his right to be present at all states of the proceedings. The appellate court disagreed and found any error harmless because the response was neutral and only referred the jury back to the previous instructions. Langdon,

42 Wn.App. at 717-18. And that is *exactly* what happened in the instant case: the trial judge simply referred the jury back to the previous instructions. As such, as in Langdon, any error here was harmless.

E. WOODARD'S CLAIM REGARDING THE PERSISTENT OFFENDER FINDING IS NOT SUPPORTED BY ANY ON-POINT AUTHORITY AND IS IN FACT CONTRARY TO CURRENT LAW AND THUS SHOULD NOT BE CONSIDERED.

Woodard further claims that his prior convictions that establish him as a two-strike persistent sex offender should have been presented to the jury and proven beyond a reasonable doubt. However, as Woodard also admits, "Washington courts have declined to require that the prior convictions necessary to impose a persistent offender sentence of life without the possibility of parole be proven to a jury." Brief of Appellant 37 (citing State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003), *cert. denied*, Smith v. Washington, 124 S.Ct. 1616 (2004); State v. Wheeler, 145 Wn.2d 116, 123-24, 34 P.2d 799 (2001)). As such, Woodard has answered his own argument and this Court should refuse to consider this issue again in this case. Id. Furthermore, as can be seen by reviewing the sentencing transcript, the State put on a virtual "mini trial" in itself at sentencing when it submitted a good deal of evidence proving Woodard's prior child molestation in the

first degree conviction. 5RP 129-165. Accordingly, this Court should affirm Woodard's sentence in all respects.

F. FAILURE TO ENTER WRITTEN FINDINGS AFTER THE 3.5 HEARING IS HARMLESS BECAUSE THE TRIAL COURT MADE EXTENSIVE ORAL FINDINGS WHICH ALLOW FOR FULL APPELLATE REVIEW.

Woodard's argument that this case should be "reversed" because there were not written findings entered after the CrR 3.5 hearing held on the day of trial should not be persuasive to this Court.

First of all, Deputy Shannon testified that she did not ask Woodard any questions prior to reading Woodard his Miranda warnings. 11/20/09 RP 167. Deputy Shannon read those rights from the standard "Miranda warnings card" she keeps in her pocket. Id. 168, 171. Deputy Shannon read those rights in full into the record at the 3.5 hearing. Id. Woodard indicated to Deputy Shannon after she read him those rights that he understood his rights. Id. Deputy Shannon said that when she spoke with Woodard on December 26th, she stopped questioning him immediately after Woodard asked her to stop. Id. 173. Deputy Shannon explained, ". . . all of a sudden he said he was going to exercise his rights. I said fine or great. I said, great, not a problem. I timed him off--date and timed him off and left." 11/20/09 RP 174.

Deputy Shannon said when she re-contacted Woodard at the jail on December 26th, she made sure she re-administered the Miranda warnings to him. 11/20/09 RP 175. At no time did Woodard tell Deputy Shannon that he wanted to speak to any attorney, nor did he tell Deputy Shannon that he had supposedly told anyone else that he wanted a lawyer. 11/20/09 RP 185, 187. Woodard himself agreed that he did not tell Deputy Shannon that he wanted an attorney; instead, Woodard claimed he told "a booking officer" that he wanted an attorney but he was "not sure exactly which one it was." Id. 185. Woodard agreed that Deputy Shannon read him his Miranda warnings both times that she spoke with him. Id. 186, 187. Woodard agreed that he understood that he could stop Deputy Shannon's questioning of him at any time by telling her he wanted an attorney and that all questioning would stop at that time. 11/20/09 RP 187. There is no indication anywhere in the record that Woodard was under the influence of any substance at the time Deputy Shannon read him his rights, or that Woodard did not understand the meaning of the Miranda warnings. Indeed, Woodard obviously understood the warnings--he expressly exercised his rights by telling Deputy Shannon on the 26th that he wanted to exercise his rights--at which time all questioning ceased.

11/20/09 RP 174, 184,185, 187,188. During the 3.5 hearing, defense counsel said he had transcripts of the statements made by Woodard to Deputy Shannon so he was not going to ask the State to have Deputy Shannon testify as to what Woodard told her. The trial court then agreed it would not require testimony about the exact content of the statements at that time. 11/20/09 RP 169, 170.

At the end of the 3.5 hearing, the trial court explained as follows and some additional conversation ensued between the parties and the court:

As I understand the scenario he was detained, transported to the jail. She [Deputy Shannon] Mirandized him. He gave her a statement on tape. That ended. His [Woodard's] testimony is that when he was being booked in he told the booking officer he wanted an attorney, but he didn't tell Deputy Shannon the following day when she came back that he had asked for an attorney. She re-Mirandized him, there was questioning, and I'm not sure what if any statements were made, because I don't have the statements in evidence for some four minutes at most and he said I want an attorney and the questioning stopped.

DEFENSE COUNSEL: Right.

COURT: There's no disputed facts?

* * * *

COURT: According to the transcript. The State's position is he was properly Mirandized both times. Deputy Shannon had no idea that he had asked for an attorney. He didn't tell her that he asked for an attorney so there's nothing wrong with what happened here.

11/20/09 RP 188, 189. Defense counsel then went on to explain

that if the step-father of the victim later tried to testify about statements Woodard made to him and if Hazelrigg was "acting as a State agent" at the time Woodard spoke to him, he would move to exclude those statements. Id. 190. The trial court responded:

COURT: Wait a minute. If in fact the State attempts to elicit from Mr. Hazelrigg statements made by Mr. Woodard, and if in fact the defense at that point interjects an objection on the grounds of Mr. Hazelrigg is a State agent, I will expect some citations to authority for the proposition that he's a State agent and proper showing to be made, because I'm not just going to accept the idea that he's a State agent, just because he called him and picked him up in his car and made arrangements to go to a predetermined location, where he was pulled over and he was subsequently arrested.

DEFENSE COUNSEL: I'll take that as you giving me notice.

COURT: Right.

11/20/09 RP 192. As for Woodard's supposedly telling a booking officer that he wanted an attorney, the following exchange took place:

COURT: Well, it's also not established that the booking officer whoever that might have been actually heard his request. There's no evidence in the record that the booking officer heard or acknowledged his request for an attorney. [11/2009 RP 195]

DEFENSE COUNSEL: Well, it's undisputed that he asked the booking officer.

COURT: That's what he says. There's nothing to refute that because we don't even know who the

booking officer was or might have been.

DEFENSE COUNSEL: But your Honor previously established all of these things that were just testified to were undisputed. Mr. Woodard's testimony was he asked the booking officer . . .

COURT: My question is when he's been Mirandized once and then he gives a 21 minute or so statement and then he's booked into jail and he supposedly tells the booking officer I want an attorney then she comes back the next day and she again re-Mirandized him, at what point does he have some obligation to say I already asked for an attorney? What's the matter with you people? Why are you here? I already asked for an attorney. Where's my attorney?

DEFENSE COUNSEL: Well, my client told me he didn't know he had to do that, which is common for a lot of my clients. . . . The undisputed fact was that he did ask the booking officer--told him he wanted an attorney. [11/20/09 RP 196]

* * * *

COURT: I'll do some research on my own. In the meantime, there are no disputed facts here. The facts are established: He was detained, arrested--well, he was detained. He was transported to the Sheriff's Office interview room. He was Mirandized. He acknowledged receipt of the Miranda warnings, waived the right to remain silent, agreed to talk to the officer, made a . . . twenty-nine minute statement to Officer Shannon. The defendant says that thereafter when he was booked into jail he told the booking officer that he wanted an attorney. That fact was not conveyed to Officer Shannon and Officer Shannon the next day on the 26th asked for him at the jail at approximately 3:31 in the afternoon. She went on tape with him at 3:31. She re-Mirandized him. Four minutes later, he invoked his right to remain silent. Prior to invoking his right to remain silent

approximately four minutes after he was re-Mirandized by Officer Shannon the interview ceased and no questions were asked subsequent to the time that he invoked his right to counsel.

The statements made on December 25th are all admissible. They were Post-Miranda. I'm going to do some research. Conditionally it appears to me that the statements made on the 26th are also admissible, but I'm going to do some research on that over the weekend when I have time myself to find out and I may or may not change that ruling depending on what I find, but it appears to me that in a situation where if Officer Shannon had known that he'd requested counsel and had gone down as often seems to be the case in these reported decisions on this issue and basically interviewed him or tried to interview him anyway notwithstanding his request for counsel or ignored his request for counsel then I wouldn't have any qualms about saying they don't come in, but it's undisputed that Officer Shannon--especially as she put it today--if I had known about it was unaware that he had requested counsel and he didn't make it known to her that he requested counsel. I'm not even sure that he made it known to her that he requested counsel from the booking officer, when he invoked because he said in essence, "I want an attorney," which is different than saying, "hey, I already told you people that I want an attorney." [11/20/09 RP 198]

My ruling right now is conditionally they are coming in, all of them as being post-Miranda on separate occasions. But I'll do some research on my own on the second issue and see what I can find, as can counsel, so we can revisit this if we need to.

11/20/09 RP 195-199 (emphasis added).

Thus, the trial court did have a fairly lengthy discussion and findings orally on the record at the 3.5 hearing on November 20,

2009. Id. It is clear from the record exactly what the trial court "found" when it decided Woodard's statements were admissible--as set out in full above. As for the need for additional "research"--it is also clear that the trial court expected defense counsel to do some research as well--if that issue was something he wanted to pursue and the trial court just as clearly said it would consider the issue later if anyone wanted to do so. 11/20/09 RP 199. Furthermore, defense counsel was plenty capable of getting public funds for an investigator to question all of the booking officers on duty at the time Woodard was booked into jail to determine whether Woodard did indeed tell any of them he wanted an attorney at that time. It is always convenient to claim that the defendant requested an attorney to some "phantom" officer--and then present no proof of that other than the defendant's own self-serving claim--a claim that he never made during either of the two times he was questioned by Officer Shannon.

In sum, the trial court's oral findings at the 3.5 hearing are detailed and thorough and lengthy--and obviously the trial court gave much thought to all of Woodard's claims that were actually raised in the trial court. That Woodard did not bring up the admissibility of Woodard's statements at some later point in the trial

(as invited to do by the trial court) should not be fatal to the admission of Woodard's clearly voluntary statements now. This Court should affirm the trial court's oral findings admitting Woodard's voluntary statements. Given the overwhelming evidence presented in this case (as set out elsewhere in this brief), together with the detailed oral findings, any error in failing to enter written findings after the 3.5 hearing should be held harmless.

In the alternative, this Court should stay this matter and order that written findings be entered based solely upon the existing transcripts of the trial court's oral findings after the 3.5 hearing, and should allow Woodard to file supplemental briefing after the entry of the late written findings if he so desires.

G. UNINTENTIONAL VIOLATION OF THE COURT'S MOTION IN LIMINE BY A STATE'S WITNESS UPON DEFENSE QUESTIONING ON CROSS EXAMINATION DOES NOT REQUIRE REVERSAL.

Woodard claims that violation of the trial court's motion in limine during defense questioning of a State's witness on cross examination requires reversal. The State disagrees.

A reviewing Court applies an abuse of discretion standard in reviewing the trial court's denial of a mistrial for a violation of a motion in limine excluding certain evidence. State v. Rodriguez, 146 Wn.2d 260, 269, 45 P.3d 541 (2002). The reviewing Court will

find an abuse of discretion solely where it determines no reasonable judge would have made the same decision. Id. 146 Wn.2d at 269. The trial court is in the best position to assess the prejudice of a statement. State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996).

In the present case, Woodard moved for a mistrial after the State's witness mentioned the prohibited evidence when answering a question by *defense counsel on cross examination*. 4RP 68-71. As such, the violation of the motion in limine was unintentional and inadvertent, and occurred in response to defense questioning. Id. This exchange on cross examination went like this:

DEFENSE COUNSEL: Is it your testimony that George told you directly all of the things that you just testified to?

WITNESS: Yes, sir.

DEFENSE COUNSEL: Are you sure?

WITNESS: Yes. I'm positive.

DEFENSE COUNSEL: He told you he didn't have sexual intercourse with her?

WITNESS: On Christmas Day. On Christmas Eve he did not. He had six times of intercourse before that he bragged about.

4RP 68. Defense counsel immediately requested a hearing outside the presence of the jury and moved for a mistrial. Id.

The prosecutor responded that he had indeed instructed the witnesses not to mention these prior incidents. Id. 69.

Furthermore, the witness himself clearly stated that the prosecutor had definitely "stressed it to me not to bring up the whatever. . . .

[n]ot to speak of his past record or the intercours[es] [sic]." 4RP 74.

The trial court denied the defense motion for a mistrial, stating:

[w]ell, the problem that I have with that whole argument is that your question invited that response, as far as I'm concerned, contrary to your assertion that it didn't. The way the question was asked, the question was sufficiently broad. It's not at all surprising that the response was given in that way.

Id. The trial court then instructed the jury to "disregard the previous question and the answer." 4RP 76.

Thus, it was Woodard who invited the witnesses' response that let the proverbial cat out of the bag--and the violation was not "intentional." Id. The trial court instructed the jury to disregard the question and the answer. Id. The trial court has broad discretion in determining whether an instruction can cure an error. State v. Ecklund, 30 Wn.App. 313, 316, 633 P.2d 933 (1981). And the jury is presumed to follow the trial court's instructions. State v. Hanna, 123 Wn.2d 704, 711, 871 P.2d 135 (1994). Furthermore, given the entirety of the evidence indicating Woodard's guilt, there is no substantial likelihood the brief mention of this evidence in response

to a cross examination question would have affected the jury's verdict. Rodriguez, 146 Wn.2d at 269-70. The trial court acted within its discretion by deciding to correct the unintentional error by instructing the jury not to consider it. 4RP 76. The trial court's decision and Woodard's convictions and sentence should be affirmed.

CONCLUSION

For all of the foregoing reasons, Woodard's convictions and sentence should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 5th day of November, 2010.

by: L. MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR

LORI SMITH, WSBA 27961
Deputy Prosecutor

10/29/10 10:05
STATE OF WASHINGTON
BY:  DEPUTY
COURT REPORTER

Declaration of Service

The undersigned certifies that a copy of the document to which this certificate is attached was served upon the Appellant by U.S. mail, addressed to Appellant's Attorney as follows:

Nancy P. Collins
Washington Appellate Project
1511 Third Ave. Suite 701
Seattle, WA 98101

Dated this 8th day of November 2010, at Chehalis, Washington.

