

No. 41871-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**LEONARD EVERETT COLEMAN,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent Cross Appellant's Brief**

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## I. ASSIGNMENTS OF ERROR

1. The trial court erred by failing to find Coleman's pre-*Miranda* statements were admissible.
2. The trial court erred by failing to find Coleman's post-*Miranda* statements admissible.
3. The State assigns error to trial court's CrR 3.5 conclusion of law 2.4.
4. The State assigns error to trial court's CrR 3.5 conclusion of law 2.5.
5. The State assigns error to trial court's CrR 3.5 conclusion of law 2.6.

## II. ISSUES

- A. Did the trial court err when it suppressed Coleman's statements to law enforcement?
- B. Were Coleman's constitutional rights to appear and be present violated when the trial court failed to accommodate Coleman's inability to hear the proceedings?
- C. Did the trial court violate Coleman's public trial rights by holding an in chambers conference to discuss proposed jury instructions?
- D. Was Coleman's trial counsel ineffective in his representation of Coleman?
- E. Was there insufficient evidence presented to the trial court to sustain the convictions for child molestation in the second degree?

### III. STATEMENT OF THE CASE

The State filed an information, on June 7, 2010, charging Leonard Coleman with five counts of child molestation in the second degree, the victim in all counts was P.M.R.<sup>1</sup> CP 1-6 Coleman was 67 years old at the time of the filing. CP 7. P.M.R. was 13 at the time of the filing. CP 1-6. All counts were to alleged to have occurred on or about and between September 1, 2009 and June 5, 2010. CP 1-6. The State was also alleging that Coleman used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the crimes. CP 1-6. The State later filed a notice of aggravating factors for purpose of imposing exceptional sentences. CP 47. The State alleged that Coleman had committed multiple current offenses and his high offender score would result in some of the current charges going unpunished. CP 47. The State also alleged that the offenses were part of an ongoing pattern of sexual abuse of the same victim, who was under 18, there were multiple incidents over a prolonged period of time and/or Coleman used his position of trust or confidence to facilitate the commission of the child molestations. CP 47.

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<sup>1</sup> Due to the victim's tender age the State will refer to her by the initials of her name, P.M.R.

P.M.R. was born on October 2, 1996 to Diane Fryer and Bill Rose. 1RP 148-47.<sup>2</sup> Ms. Fryer and Mr. Rose split up in 2004 and Ms. Fryer moved to California with P.M.R. 1RP 151-52. In February 2008 P.M.R. moved back to Washington and began living with Mr. Rose in Randle. 1RP 152; 2RP 20. A family friend of Mr. Rose, Coleman, asked Mr. Rose if P.M.R. could babysit for a person who was living with Coleman. 1RP 178. Coleman lived on Kline Road in Randle, Washington. 1RP 183. Mr. Rose allowed P.M.R. to babysit on Friday nights and weekends, but not during the school week. 1RP 179. P.M.R. has never been married or in a domestic partnership with Coleman. 1RP 183.

According to P.M.R. she started babysitting at Coleman's house in December 2009. 2RP 21. P.M.R. recalled she heard about the babysitting opportunity from her friend Kylee, who is Brian Coleman's daughter. 2RP 22. Brian Coleman is Coleman's son. 1RP 173-74. P.M.R. was babysitting Chelsea, Lonnie Faubian's daughter, who was six. 2RP 23-4. Coleman would often pick P.M.R. up for babysitting and take her home. 2RP 24, 27-8.

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<sup>2</sup> There are five volumes of verbatim report of proceedings. One of the volumes contains five different proceedings. The State will therefore refer to the report of proceedings as follows: 1RP – proceedings 1/7/11, 1/21/11, 1/25/11, 2/7/11 and 2/25/11, 2RP – 1/26/11 jury trial day two, 3RP – 2/27/11 jury trial day three, 4RP – 3/9/11 sentencing, 5RP – 12/1/10 motion hearing.

P.M.R. testified that Coleman touched her in between her legs and her chest, always over her clothes. 2RP 28-9. P.M.R. explained the first time she could remember Coleman touching her she was sitting on the couch with Chelsea watching cartoons. 2RP 29. Coleman sat down beside P.M.R. and watched television for a few minutes, then Coleman put his hand on P.M.R.'s leg and started putting his hand in between her legs and touched her vagina over her clothes. 2RP 30. P.M.R. said she told Coleman to get his hands off of her and he did. 2RP 31. When asked if Coleman stopped, P.M.R. stated, "Usually after I told him to, but he would do it again." 2RP 31.

P.M.R. described another incident with Coleman when she was making breakfast for Chelsea on a Saturday morning. 2RP 31. P.M.R. said Coleman came up behind her in the kitchen and grabbed her breasts. 2RP 31. P.M.R. stated she was cooking eggs for Chelsea and Coleman came up behind her and put his hands underneath her arms and grabbed both of her breasts. 2RP 32. P.M.R. said she slapped Coleman in the face with a spatula. 2RP 32. According to P.M.R. Coleman touched her between 15 and 20 times, usually between her legs or her breasts. 2RP 33. P.M.R. also stated Coleman had touched her between her legs

when he drove her home. 2RP 38. P.M.R. explained that Coleman would slowly ease his hand over onto of her legs and touch her inner thigh, maybe an inch or two below her vagina. 2RP 38-9. P.M.R. also explained she kept babysitting because she did not want Chelsea to be alone in the house with Coleman, because if P.M.R. did not babysit Chelsea, Coleman would. 2RP 40.

P.M.R. quit babysitting sometime in April 2009. 2RP 40-1. P.M.R. told Ms. Faubion that Coleman was touching her inappropriately but Ms. Faubion did not believe P.M.R. 2RP 41. P.M.R. also told her mom over the phone. 1RP 154-56; 2RP 41. Ms. Fryer called Toni Nelson a day or two after she spoke to P.M.R. 1RP 157. Toni Nelson is a social worker advocate and nurse who works for White Pass Community Services Coalition in Morton, Washington. 1RP 125. The first time Ms. Nelson spoke with Ms. Fryer was April 17, 2010. 1RP 126-27. Per protocol, Ms. Nelson did not get involved in the case until P.M.R. contacted her directly in June 2010. 1RP 129. Ms. Nelson called law enforcement after being contacted by P.M.R. 1RP 132. Ms. Nelson sat in and assisted in an interview P.M.R. did with Deputy Humphrey in June 2010. 1RP 134. Ms. Nelson testified that P.M.R. was embarrassed and uncomfortable at the beginning of the

interview but got more comfortable as the interview went on. 1RP 134-35.

Deputy Humphrey and Sergeant Stull from the Lewis County Sheriff's Office contacted Coleman at his residence on June 6, 2010. 2RP 98-101. Before the officers could get to the residence Coleman came outside and onto the porch. 2RP 101. Deputy Humphrey asked Coleman if he knew why the officers were there. 2RP 102. Coleman stated he did and he did it. 2RP 102. Coleman stated, "I touched ... [P.M.R.'s] breast." 2RP 102. Coleman admitted to the officers that he had touched P.M.R.'s breasts at least five or six times. 2RP 175. Sergeant Stull asked Coleman if it excited Coleman and Coleman stated, "I'm an old man and she's a young girl." 2RP 173, 175.

Coleman testified at the trial. 2RP 138-168. Coleman denied purposely touching P.M.R.'s breast. 2RP 152-53. Coleman explained he inadvertently touched P.M.R.'s breast when he gave her a hug. 2RP 152-53. Coleman admitted there were times when he drove P.M.R. home. 2RP 155. Coleman acknowledged that Mr. Rose trusted him. 2RP 155. Coleman denied touching P.M.R.'s breasts for sexual gratification. 2RP 157.

The jury convicted Coleman on all five counts and returned the special verdict yes of on each special verdict form. CP 86-100. A sentencing hearing was held on March 9, 2011. 4RP 1. The court ensured Coleman could hear the proceedings. 4RP 2. The State requested the court impose an exceptional sentence. 4RP 2-3. The trial court imposed a sentence within the standard range, 116 months on each count, to run concurrently. 4RP 16; CP 11-25. Coleman timely appeals his conviction. CP 26-41.

The State will further supplement the facts as needed throughout its argument.

#### **IV. ARGUMENT**

##### **A. TRIAL COURT ERRED WHEN IT SUPPRESSED COLEMAN'S STATEMENTS TO POLICE.**

The Fifth Amendment<sup>3</sup> right to counsel attaches when a person is subject to (1) custodial (2) interrogation (3) by a state agent. *State v. Templeton*, 148 Wn.2d 193, 207-8, 59 P.3d 632 (2002); *State v. Post*, 118 Wn.2d 596, 605-6, 826 P.2d 172 (1992). The *Miranda*<sup>4</sup> rule only applies when a state agent interrogates a person who is in custody:

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<sup>3</sup> U.S. Const., amend. V

<sup>4</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

A suspect's Fifth Amendment privilege against self-incrimination and the corresponding right to be informed attaches when "custodial interrogation" begins. A "custodial interrogation" which requires law enforcement officers to administer *Miranda* warnings to a suspect is defined as questioning initiated by the officers after a person is taken into custody. Generally, in defining custody the Supreme Court has looked at the circumstances surrounding the interrogation and whether a reasonable person would have felt that person was not at liberty to terminate interrogation and leave.

*Templeton*, 148 Wn.2d at 208 (footnotes omitted); see also *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 694 (1966)<sup>5</sup>. The Court developed *Miranda* warnings to ensure that while a defendant is in the coercive environment of police custody his or her right not to make incriminating confessions is protected. *State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986), cert. denied, 480 U.S. 940, 107 S. Ct. 1592, 94 L.Ed.2d 781 (1987). A person cannot invoke their Fifth Amendment right to counsel if that person is not in custody. *State v. Warness*, 77 Wn. App. 636, 641, 893 P.2d 665 (1995).

A police officer does not seize a person by simply striking up a conversation or asking questions. *Florida v. Bostik*, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed.2d 389 (1991); *State v. Mennegar*,

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<sup>5</sup> "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

114 Wn.2d 304, 310, 787 P.2d 1347 (1990). Nor is there a seizure where the conversation between citizen and officer is freely and voluntarily conducted. *State v. Mennegar*, 114 Wn.2d at 310. Where an officer commands a person to halt or demands information from the person, a seizure occurs. *State v. O'Neill*, 148 Wn.2d 564, 577, 62 P.3d 489 (2003). But, no seizure occurs where an officer approaches an individual in public and requests to talk to him or her, engages in conversation, or requests identification, so long as the person involved need not answer and may walk away. *Id.* at 577-8. Additionally, Washington courts agree that a routine *Terry*<sup>6</sup> stop is not custodial for the purposes of *Miranda*. *State v. Heritage*, 152 Wn.2d 210, 218, 95 P.3d 345 (2004).

When determining whether *Miranda* warnings are required, the United States Supreme Court ruled that an officer's unarticulated plan to detain or arrest a suspect is irrelevant; the only relevant inquiry is how a reasonable person in the suspect's position would have understood the situation. *Berkemar v. McCarty*, 468 U.S. 420, 442, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984). The Washington State Supreme Court specifically rejected the contention that police must inform a suspect of *Miranda*

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<sup>6</sup> *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968).

warnings once probable cause to arrest exists, adopting the *Berkemer* test in *State v. Harris*.<sup>7</sup> See also *State v. Short*, 113 Wn.2d 35, 40-41, 775 P. 2d 458 (1989)<sup>8</sup>; *State v. McWatters*, 63 Wn. App. 911, 915, 822 P.2d 787 (1992)<sup>9</sup>; *State v. D.R.*, 84 Wn. App. 832, 836, 930 P.2d 350 (1997).

Noncustodial conversations with law enforcement officers at police stations or other coercive environments do not require *Miranda* warnings. See *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L.Ed.2d 714 (1977). Mathiason voluntarily went to the police station where he was informed he was not under arrest. At the end of the interview with police Mathiason freely left the police station without any hindrance. The Supreme Court held:

It is clear from these facts that Mathiason was not in custody "or otherwise deprived of his freedom of action in any significant way." Such a noncustodial situation is not converted to one in which *Miranda* applies simply because a reviewing court concludes that, even in the absence of any formal arrest or restraint on freedom of movement, the questioning took place in a "coercive environment." Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement

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<sup>7</sup> *State v. Harris*, 106 Wn.2d at 789-90.

<sup>8</sup> The existence of probable cause is not a factor to be considered in the determination of custody; the sole inquiry has become whether the suspect reasonably supposed his freedom of action was curtailed.

<sup>9</sup> Probable cause to arrest does not give rise to *Miranda* requirements; the existence of probable cause to arrest has no bearing on whether a suspect is in custody at the time he or she makes any statement to law enforcement officers.

system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer Miranda warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." It was that sort of coercive environment to which Miranda by its terms was made applicable, and to which it is limited.

*Oregon v. Mathiason*, 429 U.S. at 495; see also *State v. Burt*, 24 Wn. App. 867, 871, 605 P.2d 342 (1979)<sup>10</sup>.

The Court of Appeals held that a police interrogation of a juvenile suspect occurring in the suspect's residence, in the presence of his mother, was not custodial where the officer did not advise the suspect that he was free to leave or to refuse to answer questions. *State v. S.J.W.*, 149 Wn. App. 912, 928-9, 206 P.3d 355 (2009)<sup>11</sup>. Similarly, the Ninth Circuit Court of Appeals stated that a familiar setting negates the coercive aspects of police interrogation:

An interrogation conducted within the suspect's home is not *per se* custodial. On the contrary, courts have generally been much less likely to find that an

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<sup>10</sup> Miranda not required where defendant voluntarily came to the police station to pick up some documents, he stayed only a few minutes and then left the police station without hindrance; there was no evidence that he was either required to come to the station or stay for any length of time; the mere fact that questioning is carried on at a police station does not necessarily make it custodial interrogation.

<sup>11</sup> "Although *S.J.W.* was not told he could leave, unlike the "naturally coercive setting" in *D.R.*, [84 Wn. App. 832, 930 P.2d 350 (1997),] the interview here took place in a private residence familiar to *S.J.W.*"

interrogation in the suspect's home was custodial in nature. The element of compulsion that concerned the Court in *Miranda* is less likely to be present where the suspect is in familiar surroundings.

*U.S. v. Craighead*, 539 F.3d 1073, 1083 (9<sup>th</sup> Cir. 2008) (citations omitted). Other federal appellate courts also have opined that a suspect interview is less formal and coercive when it occurs at a suspect's home:

And although the setting of the interview is not singularly dispositive, an interview at a suspect's residence tends to be more neutral than one that occurs at a law enforcement facility. A more relaxed environment usually indicates less formal police control over the location or the defendant, and thus suggests a setting that is not of the degree typically associated with a formal arrest.

*U.S. v. Hargrove*, 625 F.3d 170, 180-1 (4<sup>th</sup> Cir. 2010)(citations omitted).

In the present case, Coleman voluntarily conversed with the deputies outdoors in front of his residence during daylight hours.

1RP 6-10, 26-35; CP 8. Law enforcement did not restrict Coleman's movements in any way or create an intimidating environment. 1RP 26-35; CP 8-9. Prior to making a formal arrest, the deputies did not make any mention to Coleman about any plan to detain or arrest him. 1RP 32-33; CP 8-9. When Coleman came out of his home and spoke to law enforcement he told them that he did it. 1RP 6, 28; CP 8-9. Deputy Humphrey asked Coleman what

did he do, Coleman replied he had touched P.M.R.'s breasts. 1RP 28; CP 9. Coleman conversed with law enforcement for approximately ten minutes prior to asking Coleman for a taped statement. 1RP 8, 29; CP 9. Deputy Humphrey asked Coleman if he would be willing to give a taped statement and Coleman agreed. 1RP 8-9, 29, 32; CP 9. Deputy Humphrey read Coleman his *Miranda* warnings from his Washington State Criminal Justice Training Commission *Miranda* card prior to taking the taped statement. RP 29-31; CP 9. Coleman did not express any confusion about his rights and did not request an attorney at any time during his statement to Deputy Humphrey. 1RP 32-3; CP 9;<sup>12</sup>. The trial court ruled that any statements Coleman made after the initial statement of "I did it" were inadmissible because the State failed to present testimony of the specific questions posed to Coleman by law enforcement and the specific responses Coleman gave to law enforcement. 1RP 58-60; CP 10.

Law enforcement's contact with Coleman, at his residence, outside, during daylight hours, did not create the type of coercive setting normally associated with custodial interrogation or formal

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<sup>12</sup> State will be filing a supplemental designation of Clerk's papers and exhibits to designate Exhibit 2 from the CrR 3.5 hearing conducted on 1/7/11. This is a transcript of Coleman's taped interview with law enforcement.

arrest. The circumstances of the interaction with law enforcement do not support the conclusion that a reasonable person in Coleman's position would not have felt free to terminate the contact with the deputies. The trial court only must find that the statements were not in response to custodial interrogation, the trial court does not need to hear each and every statement to make this determination. This court should find that the pre-*Miranda* statements were not in response to custodial interrogation and are therefore admissible. This court should also rule the post-*Miranda* statements that were given in the taped statement are also admissible. Therefore, this Court should reverse the trial court's ruling excluding Coleman's statements to Deputy Humphrey and Sergeant Stull.

**B. COLEMAN WAIVED ANY ARGUMENT REGARDING HIS RIGHT TO BE PRESENT AND APPEAR BY FAILING TO PRESERVE THE ISSUE IN THE TRIAL COURT.**

An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *State v.*

*O'Hara*, 167 Wn.2d at 98. The exception to this rule is “when the claimed error is a manifest error affecting a constitutional right.” *Id.*, citing RAP 2.5(a). There is a two part test in determining whether the assigned error may be raised for the first time on appeal, “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (citations omitted).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *State v. McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *State v. O'Hara* 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (citations omitted). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *State v. McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

**1. While The Claimed Error Affects A Constitutional Right, There Is No Showing Of Prejudice, Therefore The Error Is Not Manifest.**

Coleman is claiming his right to appear, be present at all critical states, confront witnesses and defend in person has been violated by his alleged inability to hear the proceedings. Brief of Appellant 14. The State agrees that an accused "shall have the right to appear and defend in person..." Const. art. 1, § 22. Further, under federal law, an accused has the right to confront witnesses at trial and be present for all critical stages of the proceedings. U.S. Const. amend. XIV. Washington State courts have recognized that "the right of a defendant in a criminal case to have an interpreter is based upon the Sixth Amendment constitutional right to confront witnesses 'the right inherent in a fair trial to be present at one's own trial'" *State v. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999), *citing State v. Woo Won Choi*, 55 Wn. App. 895, 901, 781 P.2d 505 (1989), *review denied* 114 Wn.2d 1002 (1990).

In the present case other than the self-serving statements by Coleman during his direct examination, there is no showing that Coleman was in fact in need of any additional accommodations for

his hearing impairment. See 2RP 138. At the beginning of the trial the trial court inquired:

THE COURT: Mr. Coleman, can you hear me all right?

THE DEFENDANT: Right now yes.

1RP 63. The trial court next went through Coleman's trial rights and asked Coleman if he understood his rights, to which Coleman responded, "Yes, sir." 1RP 63-4. Later, prior to any testimony being given, the following exchange took place:

MR. BLAIR: The only other thing I would ask is when the prosecutor is directing his question to the witnesses, if we can insure [sic] that they are speaking into the microphone, he's [Coleman] very hard of hearing. His hearing aids actually don't help in this room. The hearing assist device helps a little bit more.

THE COURT: All right. Mr. Coleman, if there's a time you can't hear, raise your hand and get my attention.

1RP 85. At no time, prior to his direct examination did Coleman, or his trial counsel, express to the trial court that Coleman was in need of any additional accommodations for his hearing or that Coleman had not heard or understood any of the testimony or legal arguments given. See 1RP 85-185; 2RP 3-138. This included testimony from the State's five witnesses and one witness Coleman called to testify on his behalf. See 1RP 85-185; 2RP 3-138.

There was no reason for the trial court to believe that Coleman could not hear or understand the proceedings. Except the self-serving statements that over the last two days of trial, "I missed quite a bit, but...", there is no evidence that Coleman did not hear or understand the trial. 2RP 138-39. Further, Coleman's prior statement to the court and his own testimony clearly shows he did not have any trouble hearing or understanding the proceedings. See 1RP 63-4, 85; 2RP 138-68. When called to the witness stand the following testimony occurred:

MR. BLAIR: If at any time you can't hear me, you let me know, okay?

COLEMAN: All right. Okay.

MR. BLAIR: Can you hear me now?

COLEMAN: Can you hear me?

MR. BLAIR: Yeah.

COLEMAN: Okay.

MR. BLAIR: Can you state your name, spelling your last name?

COLEMAN: Coleman, Leonard E. C-O-L-E-M-A-N.

2RP 138. Trial counsel then proceeded to ask a number of questions and at no time during his direct examination did Coleman state he could not hear, ask trial counsel to speak up or ask trial

counsel to repeat a question due to his inability to hear the question. 2RP 138-53. The same is true for Coleman during his cross-examination by the deputy prosecutor. 2RP 153-67. At no time during re-direct did Coleman express or exhibit an inability to hear. 2RP 167-68.

Therefore, while the right to be present, including the right to interpretation to ensure an accused understands the proceedings, is a recognized constitutional right to which Coleman is assigning error to, Coleman has not met the required burden of showing he was prejudiced by any alleged error, or even that an alleged error took place. It is clear from Coleman's conduct during trial, including his time on the witness stand, that Coleman heard and understood the proceedings and was able to be present in the context of his constitutional rights. The Court should affirm his conviction.

**2. Coleman And His Trial Counsel Had A Duty To Alert The Trial Court To Any Difficulty Coleman Was Experiencing In Regards To Coleman's Ability To Hear The Proceedings, The Doctrine Of Invited Error Precludes Coleman From Now Raising This Issue On Appeal.**

In addition to not being able to raise the issue of Coleman's alleged inability to hear the proceedings due to it not being a constitutional manifest error, Coleman is also precluded from raising the error under the invited error doctrine. The invited error

doctrine “prohibits a party from setting up an error at trial and then complaining of it on appeal.” *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), *citing State v. Boyer*, 91 Wn.2d 342, 588 P.2d 1151 (1979). The Supreme Court has held that even when the alleged error involves a constitutional issue, if that error was invited, appellate review is precluded. *State v. Boyer*, 91 Wn.2d at 345.

Washington State case law recognizes that a defendant and his attorney have a duty to inform the trial court of any difficulties the defendant may have in regards to hearing and/or the need for the defendant to be provided with accommodations for language or hearing. See *In re Marriage of Olson*, 69 Wn. App. 621, 623-24, 850 P.2d 527 (1993); *State v. Mendez*, 56 Wn. App. 458, 784 P.2d 168 (1990). In *Mendez Sandoval* alleged that even though neither he nor his attorney requested an interpreter the trial court at his guilty plea hearing should have provided an interpreter for him.

The court held,

[w]e see nothing . . . that imposes an affirmative obligation to appoint an interpreter for a defendant where the defendant’s lack of fluency or facility in the language is not apparent. The appointment of an interpreter is within the discretion of the trial court and will not be disturbed on appeal absent a showing of an abuse of discretion.

*State v. Mendez*, 56 Wn. App. at 462-63. Similarly in *Olson*, Mr. Olson, who suffered from substantial hearing impairment, did not request an interpreter to assist him for his court hearing. The court held that Mr. Olson's hearing impairment was accommodated by the trial court, which was evidenced by:

[f]ollowing his requests for the witness to speak louder, Mr. Olson was silent, suggesting that the witness' modified voice level allowed Mr. Olson to hear. Never did Mr. Olson indicate a need for additional help in hearing the proceedings, nor did he state that although the witness was speaking louder, he still could not hear. From the record, it appears the court had every reason to believe that Mr. Olson was accommodating his hearing problem by asking the witnesses to speak up.

*In re Marriage of Olson*, 69 Wn. App. at 624.

In the present case, neither Coleman nor his trial counsel alerted the court that Coleman needed further accommodations. Further, the trial court at Coleman's sentencing hearing asked, "[a]ll right. Mr. Coleman, is that working now?" to which Coleman replied, "[y]es, sir." 4RP 2. The trial court is clearly asking about the listening device provided to Coleman. Coleman cannot lie in the weeds and then make self-serving statements that could potentially invalidate the entire proceedings. It is fundamentally unfair and is what the invited error doctrine seeks to avoid. Because neither Coleman nor his trial counsel asked the trial court

to make any further accommodations, any possible error **would** be invited and Coleman cannot raise it on appeal. Coleman's convictions should be affirmed.

**C. COLEMAN'S PUBLIC TRIAL RIGHT WAS NOT VIOLATED WHEN THE TRIAL COURT CONDUCTED THE CONFERENCE REGARDING JURY INSTRUCTIONS OUTSIDE OF THE COURTROOM.**

The United States Constitution guarantees that a criminal defendant has the right to a public trial. U.S. Const. amend. IV. In Washington State, a criminal defendant has the right to a public trial. Const. art. I, § 22. The Washington State Constitution also requires that "[j]ustice in all cases shall be administered openly and without undue delay." Const. art. I, § 10. A court must weigh the five *Bone-Club* factors prior to closing a courtroom in a criminal hearing or trial. *State v. Bone-Club*, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995); *State v. Paumier*, 155 Wn. App. 673, 678, 230 P.2d 212 (2010), *review granted*, 169 Wn.2d 1017 (2010). The five *Bone-Club* factors are:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than the accused's right to a fair trial, the proponent must show a "serious imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.

3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

4. The court must weigh the competing interests of the proponent of closure and the public.

5. The order must be no broader in its application or duration than necessary to serve its purpose.

*State v. Bone-Club*, 128 Wn.2d at 258-59. A criminal defendant's public trial rights are violated if there is a proceeding that is subject to the public trial right and the trial court fails to conduct the *Bone-Club* inquiry. *State v. Brightman*, 155 Wn.2d 506, 515-16, 122 P.2d 150 (2005). Whether a trial court has violated the public trial right is a question of law and reviewed de novo. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009).

The right to a public trial extends to evidentiary hearings, voir dire and other adversary proceedings. *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008). A criminal defendant does not however have a public trial right on purely legal or ministerial matters. *Id.* The Supreme Court has previously held that in-chamber conference between the judge and counsel for legal matters does not trigger a criminal defendant's right to be present.

*In re Pirtle*, 136 Wn.2d 467, 484, 965 P.2d 593 (1998). The wording of jury instructions is a legal matter. *Id.*

In the present case, Coleman argues that the in-chambers conference conducted between counsel and the judge in regards to the jury instructions is a violation of Coleman's right to an open and public trial. Brief of Appellant 19. Coleman urges this Court to reject the exceptions for ministerial or legal matters. Brief of Appellant 19. In Coleman's case the judge met with the attorney's for an in-chambers conference in regards to the jury instructions. 1RP 188; 2RP 3. Both parties were given the opportunity to review the proposed instructions and place any objections or exceptions on the record. 2RP 3. The State respectfully requests this court to be consistent with its prior holdings in *Sadler* and *State v. Sublett*<sup>13</sup>, and find that an in-chambers conference regarding which jury instructions will be given is a legal proceeding and the right to an open and public trial is not violated by such activity. Coleman's right to an open and public trial was not violated and his convictions should be affirmed.

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<sup>13</sup> *State v. Sublett*, 156 Wn. App. 160, 181-82, 231 P.3d 231 (2010), review granted, 170 Wn.2d 1016 (2010).

**D. COLEMAN RECEIVED EFFECTIVE ASSISTANCE FROM HIS TRIAL COUNSEL THROUGHOUT THE PROCEEDINGS.**

To prevail on an ineffective assistance of counsel claim Coleman must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *State v. Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. Trial counsel's competency must be determined by evaluating the entire trial court record. *State v. McFarland*, 127 Wn.2d at 335. If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of

the proceeding would have been different.” *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

Coleman argues to this court that his trial counsel was ineffective for two reasons, first for failing to seek further accommodations for Coleman’s hearing disability and second, for not opposing the State’s motion to exclude evidence of Coleman’s good character. Brief of Appellant 24-28. First, Coleman’s trial counsel, while acknowledging that Coleman had difficulty hearing, had no reason to ask for further accommodations. 1RP 85; 2RP 138. Coleman could clearly hear and understand his counsel during his direct examination. 2RP 138-53. Coleman did not request his trial counsel to repeat any questions or demonstrate an inability to hear. 2RP 138-53. Coleman could even clearly hear the deputy prosecutor during cross-examination. 2RP 153-67. Coleman’s trial counsel was not deficient for failing to request further accommodations because further accommodations were clearly not needed.

The second issue Coleman raises in part is a mischaracterization of the State’s motion in limine. In his brief Coleman states his trial counsel did not “oppose a motion to

exclude evidence of good character.” Brief of Appellant 27. Yet, in a review of the record, the State’s motion in limine does not preclude Coleman from bringing in evidence of his good character in total, the motion in limine state’s: “[t]hat the defense be precluded from eliciting testimony regarding the defendant’s lack of prior criminal history in efforts to show good, or law-abiding character.” CP 56-7. Coleman further argues in his brief that his trial counsel should have presented the character evidence available to his trial counsel which showed Coleman’s good character. Brief of Appellant 27.

While character evidence may have been admissible under ER 401(a) it is not ineffective for trial counsel to choose not to present such evidence. If character evidence is offered the State may cross-examine such witnesses to impeach the witnesses. *State v. Fisher*, 130 Wn. App. 1, 17, 108 P.3d 1262 (2005). “By relating a personal history supportive of good character, defendant may be opening the door to rebuttal evidence along the same line.” *Id.* (citation omitted). It is possible trial counsel chose not to offer such evidence for fear of what evidence could be presented during the State’s rebuttal, which would be an appropriate trial strategy.

*See Shumate v. Newland*, 118 F.3d 1076, 1095 (N.D. Cal. 1999).<sup>14</sup> Further, the trial record does not contain information that positively identifies that trial counsel was aware of the character evidence prior to trial. The letters in support of Coleman that were introduced at sentencing are not dated until after the trial concluded and Coleman was convicted. See CP 102-145. Coleman must base his allegation of ineffective assistance on the existing trial court record. *State v. McFarland*, 127 Wn.2d at 335. A review of the verbatim report of proceedings does not include information that states trial counsel was aware of the potential character evidence prior to trial. See 1RP; 2RP; 3RP. Therefore, even if trial counsel's decision to not present character evidence is not considered a reasonable tactical decision, the record below does not contain the information necessary for Coleman to argue his trial counsel was ineffective.<sup>15</sup>

Coleman has not met the requisite burden of showing his trial counsel's performance was deficient. When looking at trial counsel's performance throughout the trial, it is clear trial counsel was competent and effectively advocated for Coleman. Further,

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<sup>14</sup> Failure to introduce character evidence in the prosecution for child molestation was not ineffective assistance of counsel, but a reasonable tactical decision.

<sup>15</sup> The State maintains that not producing character evidence was a legitimate tactical decision.

even if for the sake of argument, Coleman did show his trial counsel was deficient, Coleman has not shown that he is prejudiced by any deficiency in his trial counsel. Coleman's convictions should be affirmed.

**E. THERE WAS SUFFICIENT EVIDENCE PRESENTED TO THE JURY TO SUSTAIN A CONVICTION ON EACH CHARGE.**

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const., amend. XIV; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). When determining whether there is sufficient evidence to support a conviction, the evidence must be viewed in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). If "any rational jury could find the essential elements of the crime beyond a reasonable doubt", the evidence is deemed sufficient. *Id.* An appellant challenging the sufficiency of evidence presented at a trial "admits the truth of the State's evidence" and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial

evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Further, "the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." *State v. Delmarter*, 94 Wn.2d at 638.

To convict Coleman of child molestation the State was required to prove, beyond a reasonable doubt, that Coleman had sexual contact with P.M.R. RCW 9A.44.086; CP 66-70. Sexual contact is defined as "touching of the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desires of either party." RCW 9A.44.010(2); CP 84. Coleman cites to *State v. Powell*, arguing that when touching occurs through the child's clothing, there must be additional extrinsic evidence of sexual

gratification. Brief of Appellant 30, *citing State v. Powell*, 62 Wn. App. 914, 917, 816 P.2d 86 (1991).

The State acknowledges that *Powell* requires extrinsic evidence in a case where the touching was outside the child's clothing and in Coleman's case there was such evidence presented to the jury. P.M.R. testified that Coleman had touched her between her legs or her breast between 15 to 20 times. 2RP 33. P.M.R. would tell Coleman to stop and when asked if Coleman would stop P.M.R. stated, "[u]sually after I told him to, but he would do it again." 2RP 31. The fact that Coleman repeatedly touched P.M.R. in inappropriate places, her breasts and her vagina, although over her clothing, after P.M.R. told Coleman to stop is circumstantial evidence that Coleman did the touching for the purpose of sexual gratification. Why else would Coleman continually touch P.M.R. on her clothed breasts and vagina? Unlike *Powell*, there is no innocent explanation to continually inappropriately touch a child 15 to 20 times. Further, when Sergeant Stull asked Coleman if touching P.M.R. excited Coleman, Coleman's response was, "I'm an old man and she's a young girl." 2RP 173, 175. The jury had ample circumstantial evidence along with Coleman's statement to Sergeant Stull that the touching was done for Coleman's sexual

gratification. Therefore, there was sufficient evidence presented to the jury to prove all elements of child molestation in the second degree and this Court should affirm Coleman's convictions.

**V. CONCLUSION**

For the foregoing reasons, this court should affirm Coleman's convictions.

RESPECTFULLY submitted this 27<sup>th</sup> day of September, 2011.

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by: \_\_\_\_\_  
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**LEWIS COUNTY PROSECUTOR**

**September 27, 2011 - 9:52 AM**

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