

NO. 45607-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

GEORGE THOMAS STRANGE,

Appellant.

BRIEF OF APPELLANT

**John A. Hays, No. 16654
Attorney for Appellant**

**1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084**

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	
1. Factual History	3
2. Procedural History	5
D. ARGUMENT	
I. THE STATEMENTS OF 18 PROSPECTIVE JURORS IN FRONT OF THE ENTIRE VENIRE OUTLINING THEIR PERSONAL EXPERIENCES AS THE VICTIMS OR THE FAMILY MEMBERS OF THE VICTIMS OF CHILD MOLESTATION TAINTED THE REMAINDER OF THE VENIRE SUFFICIENTLY TO DENY THE DEFENDANT A FAIR AND IMPARTIAL JURY	12
II. TRIAL COUNSEL’S FAILURE TO OBJECT WHEN THE STATE PLAYED A RECORDED INTERVIEW IN WHICH THE INTERROGATING OFFICER REPEATEDLY TOLD THE DEFENDANT THAT HE WAS LYING AND THAT NEITHER THE OFFICER NOR A JURY WOULD EVER BELIEVE THE DEFENDANT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL	17
III. THE TRIAL COURT’S FAILURE TO GIVE A PETRICH INSTRUCTION AFTER THE STATE INTRODUCED TWO SEPARATE AND DISTINCT INCIDENTS OF SEXUAL CONTACT DENIED THE DEFENDANT HIS RIGHT TO A UNANIMOUS JURY	25

E. CONCLUSION	30
F. APPENDIX	
1. Washington Constitution, Article 1, § 3	31
2. Washington Constitution, Article 1, § 21	31
3. Washington Constitution, Article 1, § 22	31
4. United States Constitution, Sixth Amendment	32
5. United States Constitution, Fourteenth Amendment	32
6. ER 401	33
7. ER 402	33
8. ER 403	33
G. AFFIRMATION OF SERVICE	34

TABLE OF AUTHORITIES

Page

Federal Cases

<i>Bruton v. United States</i> , 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968)	18
<i>Church v. Kinchelse</i> , 767 F.2d 639 (9th Cir. 1985)	17
<i>Mach v. Stewart</i> , 137 F.3d 630 (9 th Cir. 1997)	12, 14, 15
<i>Smith v. Phillips</i> , 455 U.S. 209, 71 L.Ed.2d 78, 102 S.Ct. 940 (1982)	12
<i>Strickland v. Washington</i> , 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)	17
<i>United States v. Allsup</i> , 566 F.2d 68, 71 (9th Cir.1977)	12
<i>United States v. Eubanks</i> , 591 F.2d 513, 517 (9th Cir.1979)	12

State Cases

<i>State v. Allen</i> , 57 Wn.App. 134, 787 P.2d 566 (1990)	26
<i>State v. Baldwin</i> , 109 Wn.App. 516, 37 P.3d 1220 (2001)	20
<i>State v. Carlin</i> , 40 Wn.App. 698, 700 P.2d 323 (1985)	22, 23
<i>State v. Cobb</i> , 22 Wn.App. 221, 589 P.2d 297 (1978)	18
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 472 (1999)	18
<i>State v. Garrison</i> , 71 Wn.2d 312, 427 P.2d 1012 (1967)	22

<i>State v. Golladay</i> , 78 Wn.2d 121, 470 P.2d 191 (1970)	20
<i>State v. Gooden</i> , 51 Wn.App. 615, 754 P.2d 1000 (1988)	26
<i>State v. Johnson</i> , 29 Wn.App. 807, 631 P.2d 413 (1981)	18
<i>State v. Kendrick</i> , 47 Wn.App. 620, 736 P.2d 1079 (1987)	19
<i>State v. Kitchen</i> , 110 Wn.2d 403, 756 P.2d 105 (1988)	25, 26
<i>State v. Neal</i> , 144 Wn.2d 600, 30 P.3d 1255 (2001)	20
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984)	26, 27
<i>State v. Seagull</i> , 124 Wn.2d 719, 881 P.2d 979 (1994)	12
<i>State v. Swenson</i> , 62 Wn.2d 259, 382 P.2d 614 (1963)	18
<i>State v. Thamert</i> , 45 Wn.App. 143, 723 P.2d 1204 (1986)	21
<i>State v. Wilson</i> , 38 Wn.2d 593, 231 P.2d 288 (1951)	20

Constitutional Provisions

Washington Constitution, Article 1, § 3	18
Washington Constitution, Article 1, § 21	12, 16, 22, 25, 29
Washington Constitution, Article 1, § 22	17, 25
United States Constitution, Sixth Amendment	12, 16, 17, 22, 25, 29
United States Constitution, Fourteenth Amendment	18

Statutes and Court Rules

ER 401 20
ER 402 20
ER 403 19

Other Authorities

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) 20

ASSIGNMENT OF ERROR

Assignment of Error

1. The statements of 18 prospective jurors in front of the entire venire outlining their personal experiences as the victims or the family members of the victims of child molestation tainted the remainder of the venire sufficiently to deny the defendant a fair and impartial jury under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment.

2. Trial counsel's failure to object when the state played a recorded interview in which the interrogating officer repeatedly told the defendant that he was lying and that neither the officer nor a jury would ever believe the defendant denied the defendant his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

3. The trial court's failure to give a *Petrich* instruction after the state introduced two separate and distinct incidents of sexual contact denied the defendant his right to a unanimous jury under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. In a jury trial on a charge of child molestation, do the statements of numerous prospective jurors in front of an entire venire outlining their personal experiences as the victims or the family members of the victims of child molestation taint the remainder of the venire sufficiently to deny the defendant a fair and impartial jury under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment?

2. Does a trial counsel's failure to object when the state plays a recorded interview in which the interrogating officer repeatedly tells the defendant that he is lying and that neither the officer nor a jury would ever believe him deny that defendant the right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

3. Does a trial court's failure to give a *Petrich* instruction after the state introduces two separate and distinct incidents of sexual contact deny that defendant the right to a unanimous jury under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment when the jury might have accepted or rejected either one of the instances as proven?

STATEMENT OF THE CASE

Factual History

In 2009 the defendant George Thomas Strange married Melissa Mullins and they later moved into the defendant's house in Kelso along with Melissa's children JM and AM. RP 274-276¹. At the time JM was 9-years-old and AM was 3-years-old. RP 277-279. Later Melissa's oldest son CM moved in with them also. *Id.* Each one of the children had their own room in the house. *Id.* During this period of time Melissa was unemployed but spent a lot of time out of the house doing volunteer work with Habitat for Humanity through Americorps. RP 274-276. She later purchased and ran a small restaurant called "the Brits," where JM worked part time, along with one of Melissa's employees by the name of Jonathan Layman. RP 281-283.

According to JM, one evening when she was around 12-years-old the defendant came into her bedroom while she was laying on her back on her bed wearing a tank top and shorts. RP 225-227. At the time her mother was out of the house and her brothers were in their bedrooms. *Id.* When the defendant came in to tuck her into bed for the night he asked if he could show her how to perform a breast self-exam. *Id.* When he did he mentioned the

¹The record on appeal includes three continuously numbered volumes of verbatim reports of proceedings of the jury trial and sentencing hearing in this case. They are referred to herein as "RP [page #]."

word cancer. *Id.* In fact the defendant had attended one quarter at nursing school. RP 316-318. JM later reported that after stating this he pulled up her top and showed her how to do the exam, explaining that you were trying to feel for lumps. RP 225-229. He was pushing hard enough to “feel the inside” but it didn’t hurt. RP 227-229. He did not touch her nipples and did not rub her breasts with his open hand. RP 227-229, 251-254. He then told her to not tell her mother what he had done because she would get mad. *Id.*

On another occasion JM remembered the defendant coming into her bedroom when she was asleep, pulling out her pants and underwear at the waist and looking down at her vaginal area. RP 231-234. JM also reported that the defendant would occasionally give her back rubs. RP 241-242. On one of these occasions he rubbed her butt. *Id.* He would also give her hugs, kiss her on the cheek, and sometimes kiss her on the lips, which she did not like. RP 235, 238-239.

Eventually JM told one of her friends at school what was happening. RP 321-326. She also told Jonathan one evening when they were working together. RP 244-247, 327-338. When Jonathan asked whether or not she had told her mother, she replied that she had not because she did not want to ruin her mother’s relationship with yet another man. RP 332-335. However, Jonathan was successful in getting her to talk to her mother. RP 336-337. After this talk Melissa called the police to report her daughter’s claims. RP

293-294. After reporting the incident to the police Melissa took her children and moved out of the defendant's home. RP 294-295. The police then began an investigation by interviewing JM, her mother and siblings, Jonathan, and JM's school friend with whom she had confided. RP 353-354.

Eventually the detective in charge of the investigation called the defendant and asked if he would come to the police station for an interview. RP 354-356. The defendant agreed. *Id.* The interview lasted about one hour and was recorded on videotape with the defendant's consent. *Id.* While the defendant admitted that he had shown JM how to perform a breast examination on herself, he denied touching anything other than the side of her breasts, and he repeatedly denied that he had any sexual intent. RP 362-418. He also admitted that he had given JM back rubs but denied that he had ever intentionally touched her buttocks while doing so. RP 371, 375. Finally, he denied ever pulling out JM's clothing to look at her. RP 373.

Procedural History

By information filed May 15, 2013, the Cowlitz County Prosecutor charged the defendant George Thomas Strange with one count of Second Degree Child Molestation (DV) between April 29, 2011, and February 20, 2013, and one count of Voyeurism (DV) between those same dates. CP 1-2. Five months after the filing of the information the case was called for trial before a jury. RP 4. After a few preliminary motions, the court called in a

56 member jury venire and put them under oath. RP 18-19. The court then began the voir dire process by asking the venire members a number of general questions, including the following:

I'm – I'm interested in knowing if any of you have any personal experience with a similar type of case or incident. This is an allegation of child molestation and also voyeurism. So, I'm just curious if any of you have any personal experience with that, either as somebody who has been victimized, somebody who has been a witness to that or somebody who has been accused of that or if you have family members who have experienced – experienced that or have been a witness to that or if they – if they have been accused. So, – okay. We've got a few hands. And, again here, I'll – I'll give that disclaimer that if anybody is interested in sharing that information in a more private setting that's an option that we can make available to you and just let us know.

RP 27-29.

At this point 17 venire members, almost a third of the entire group, related, in front of the whole panel, how they either could not or probably could not be fair given the charges against the defendant and their experiences involving child molestation. RP 20-72. The following lists those juror's and summarizes their comments before the other venire members.

1. Heath: father was convicted of molesting a family member, RP 29-30;
2. Tolan: ex-husband convicted of molesting a neighbor girl who was visiting their daughter, RP 30-31;
3. Holt: uncle and husband's cousin both convicted of child molestation, RP 32;

4. Donaldson: neighbor convicted of similar crimes, RP 33;
5. Green: “My ex-son-in-law was charged with molesting my granddaughter . . . there was a resolution . . . it resulted in a slap on the hand . . . a couple of months ago.” RP 33-34;
6. Van Sant: granddaughter was molested four years ago and “he was let go” because there was “not enough investigation.” RP 35-36;
7. Parkhurst: brother-in-law, ex-husband’s cousin and numerous neighbors convicted of similar crimes, RP 36-37;
8. Ostrander: “we have had a family member who has had experience with this” - will only elaborate in private, CP 37-38;
9. Erickson: his wife was molested as a child, CP 38;
10. Searing: served on a jury and convicted a person of similar charges but the conviction was reversed on appeal, CP 39;
11. Perkins: “I’ve known multiple victims, some close, in my lifetime,” CP 39-40;
12. Kunz: “I’m having a really hard time being here because of personal history and family history.” (Juror begins to cry), CP 40;
13. Riley: adopted sibling molested and it caused “a pretty significant impact;” he is an elementary school principal and sees the results of molestation on the victims, CP 40-41;
14. Peroni: “My son was a victim . . . and I really am not going to be able to listen to the evidence . . . I’m not going to be able to listen to it.” CP 41-42;
15. Gragg: couple of very close friends molested and the perpetrator was not punished, RP 42-43;
16. Rushmer: mentors a girl at church who is a victim of molestation. Charges are pending and she wants to help the girl in court, RP 43-44;

17. Bolles: “my niece and my daughter were both sexually molested by an adult” and the perpetrator got off “Scot free” and now his daughter has to “live with the consequences.” CP 71.

The majority of these venire members stated that they either could not be fair or probably could not be fair. RP 29-71. One of these venire members then stated the following to the court in front of the entire venire;

JUDGE EVANS: Okay. Mr. Gragg?

JUROR: Um – what I said before, like, I know people that I know. Like it’s not an easy accusation to make. Like, it is hard for people (inaudible). It’s like if accusations were made there’s something behind that.

JUDGE EVANS: Okay. So, let me ask you this, Mr. Gragg, I mentioned this earlier that – we talked about the presumption of innocence. That a person that’s charged with a crime is – is presumed innocent and that presumption continues throughout the entire trial. Is that something that you think you could use and implement that – that presumption of innocence throughout the entire trial starting now going forward?

JUROR: I don’t – like, I don’t have a ton of experience but it has just been my experience people don’t make that accusation, you know, for no reason. Like, I feel like if an accusation was made there had to be something that had happened.

JUDGE EVANS: Okay. All right. Thank you.

RP 71-72.

At this point the court excused the venire from the court room and began individual examination of venire members who had requested it. RP 90-99. The court then called the venire back into the courtroom and allowed the state to question the panel. RP 100-128. During this questioning a

number of statements were made in front of the entire panel similar to the statements during the general questioning by the court. *Id.* These statements included: (1) “I’m not going to be able to listen to this,” (2) “It’s going to bring back memories of what happened to my son,” (3) “it did happen,” (4) “I can’t hear any of this,”² (5) “it’s not something I want to hear about,” (6) “hard time hearing these charges,” and (6) “I have to deal with the consequences of it.” RP 100-127.

Once the jury was selected and sworn, the state presented its case by calling eight witnesses, including JM, her brother, her mother, her friend, Jonathan Layman and Cowlitz County Sheriff’s Detective Todd McDaniel, who had investigated the case.. CP 218, 264, 274, 314, 321, 327, 339, 349. These witnesses testified to the facts contained in the preceding factual history. *See* Factual History. During the state’s case-in-chief the court allowed the state to play the entire one hour long video recording of Detective McDaniel’s interrogation of the defendant without objection from the defense and without request for redaction. RP 362-418.

During Detective McDaniel’s interrogation of the defendant he repeated the allegations JM had made against the defendant, including a claim that JM “said that you would reach under and you know, touch her rear

²At this point the court asked if the venire member was having problems hearing. The Bailiff then explained that she was refusing to listen.

end and she would roll over.” RP 371. The defendant denied this allegation and all other allegations of inappropriate conduct. RP 362-418. Although the defendant admitted teaching JM how to perform a breast examination at her request, he denied any sexual motivation. *Id.* At the end of the interrogation Detective McDaniel repeatedly stated that he could arrest the defendant, that he did not believe the defendant’s protestations of innocence, that the defendant was not being truthful with him, that the defendant took advantage of JM while her mother was gone, and that no jury would ever believe his story. RP 397-418. The detective also stated: (1) “So, we know better than that and you’re, you’re trying to feed me a line of baloney,” and (2) “So I think you’re giving out certain details just to make your story better.” RP 398-399. The defense did not object to the admission of any of this evidence. *Id.*

Following the close of the state’s case the defense rested without putting on any witnesses. RP 429. The court then instructed the jury without objection from either party. RP 429, 430-448. The court did not give an instruction under *State v. Petrich*, 101 Wn.2d 566, 573, 683 P.2d 173 (1984). RP 430-448; CP 18-41. Neither did either party request such an instruction. *Id.* The jury then listened to closing arguments and retired for deliberation, eventually returning verdicts of “guilty” on both counts. RP 448-480, 485-489; CP 42-44. About five weeks after the verdicts the court imposed

sentences within the standard ranges, after which the defendant filed timely notice of appeal. CP 46-60, 64.

ARGUMENT

I. THE STATEMENTS OF 18 PROSPECTIVE JURORS IN FRONT OF THE ENTIRE VENIRE OUTLINING THEIR PERSONAL EXPERIENCES AS THE VICTIMS OR THE FAMILY MEMBERS OF THE VICTIMS OF CHILD MOLESTATION TAINTED THE REMAINDER OF THE VENIRE SUFFICIENTLY TO DENY THE DEFENDANT A FAIR AND IMPARTIAL JURY.

Under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment, every person charged with a crime has the right to a fair trial in front of an impartial jury of 12 persons who must reach a unanimous verdict before a conviction can be entered. *State v. Seagull*, 124 Wn.2d 719, 881 P.2d 979 (1994); *Smith v. Phillips*, 455 U.S. 209, 71 L.Ed.2d 78, 102 S.Ct. 940 (1982). “Even if ‘only one juror is unduly biased or prejudiced,’ the defendant is denied his constitutional right to an impartial jury.” *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir.1979); *see also United States v. Allsup*, 566 F.2d 68, 71 (9th Cir.1977). Due process requires that the defendant be tried by a jury capable and willing to decide the case solely on the evidence before it. *Smith v. Phillips, supra*.

For example in *Mach v. Stewart*, 137 F.3d 630 (9th Cir. 1997), a defendant convicted of child molestation brought a *habeas corpus* proceeding in federal court arguing that he had been denied a fair and impartial jury when the trial court denied a motion for a mistrial after one potential juror named Bodkin made statements during *voir dire* that tainted the entire jury venire.

Specifically, this potential jury member stated that (a) she had taken child psychology courses and worked with psychologists and psychiatrists as a social worker and (b) that she had never been involved in a case in which a child accused an adult of sexual abuse where that child's statements had not been borne out. Although the court admonished all the potential jurors that they would be limited to considering only the evidence presented at trial, it allowed the potential jury to again state that she had never known a child to lie about sexual abuse. Following dismissal of the defendant's petition before a Federal District Court he sought review before the Ninth Circuit Court of Appeals.

In addressing the defendant's arguments the Court of Appeals first noted that the potential juror's statements were not merely general claims about personal bias or prejudice. Rather they were factual claims made as if the potential juror were a pseudo-expert on the subject. Second, they were statements that directly commented on the credibility of the state's complaining witness. Under these circumstances the court found that the trial court's refusal to grant the defendant's motion for a mistrial denied the defendant his right to a fair and impartial jury. The court held:

At a minimum, when Mach moved for a mistrial, the court should have conducted further voir dire to determine whether the panel had in fact been infected by Bodkin's expert-like statements. Given the nature of Bodkin's statements, the certainty with which they were delivered, the years of experience that led to them, and the

number of times that they were repeated, we presume that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused. This bias violated Mach's right to an impartial jury.³

³Furthermore, Mach's inability to confront and cross-examine Bodkin implicates the Sixth Amendment's Confrontation Clause. *Jeffries v. Wood*, 114 F.3d 1484, 1490 (9th Cir.1997), cert. denied, 522 U.S. 1008, 118 S.Ct. 586, 139 L.Ed.2d 423 (1997) ("When a juror communicates objective extrinsic facts regarding the defendant or the alleged crimes to other jurors, the juror becomes an unsworn witness within the meaning of the Confrontation Clause.").

Mach v. Stewart, 137 F.3d at 633.

The court then went on to discuss whether the error was structural and required automatic reversal or whether it was subject to a harmless error analysis. Ultimately the court declined to address the issue because the court ruled that the defendant was entitled to relief under either standard. The court's holding on this issue also illustrated why the potential juror's statements had been so damaging. The court explained as follows on this issue:

Nonetheless, because this error requires reversal under the harmless-error standard as well, we need not decide whether it constitutes structural error. Under the harmless-error standard, we must determine whether the error had "substantial and injurious effect or influence in determining the jury's verdict." Highly significant is the nature of the information and its connection to the case. See *Lawson v. Borg*, 60 F.3d 608, 612-613 (9th Cir.1995) (noting that "reversible error commonly occurs where there is a direct and rational connection between the extrinsic material and a prejudicial jury conclusion, and where the misconduct relates directly to a material aspect of the case"); *Dickson v. Sullivan*, 849 F.2d 403, 407 (9th Cir.1988) (finding prejudice when extrinsic information was "both

directly related to a material issue in the case and highly inflammatory”). The result of the trial in this case was principally dependant on whether the jury chose to believe the child or the defendant. There can be no doubt that Bodkin’s statements had to have a tremendous impact on the jury’s verdict. The extrinsic evidence was highly inflammatory and directly connected to Mach’s guilt. Bodkin repeatedly stated that in her experience as a social worker, children never lied about sexual assault. The bulk of the prosecution’s case consisted of a child’s testimony that Mach had sexually assaulted her. We thus find Bodkin’s statements to have substantially affected or influenced the verdict and therefore reverse the conviction

Mach v. Stewart, 137 F.3d at 634 (some citations omitted; footnote omitted).

A number of similarities exist between the facts from *Mach* and the facts from the case at bar. First, in *Mach* the prospective juror directly commented on the credibility of the state’s complaining witness, essentially telling the jury that in the opinion of prospective juror the complaining witness would be telling the truth. Similarly, in the case at bar, one of the prospective jurors commented directly on the credibility of complaining witnesses in the following exchange:

JUDGE EVANS: Okay. Mr. Gragg?

JUROR: Um – what I said before, like, I know people that I know. Like it’s not an easy accusation to make. Like, it is hard for people (inaudible). It’s like if accusations were made there’s something behind that.

JUDGE EVANS: Okay. So, let me ask you this, Mr. Gragg, I mentioned this earlier that – we talked about the presumption of innocence. That a person that’s charged with a crime is – is presumed innocent and that presumption continues throughout the entire trial. Is that something that you think you could use and implement that –

that presumption of innocence throughout the entire trial starting now going forward?

JUROR: I don't – like, I don't have a ton of experience but it has just been my experience people don't make that accusation, you know, for no reason. Like, I feel like if an accusation was made there had to be something that had happened.

JUDGE EVANS: Okay. All right. Thank you.

RP 71-72.

These statements in front of the entire panel in the case at bar are a direct assertion on the credibility of children making claims of sexual abuse. In this case the context of this statement was that it was made after almost a third of the entire venire revealed that they had family members who had been molested, and that in a number of those occasions the perpetrator had got off “scot-free.” Indeed, one of the venire members broke down into tears when she related that this case was similar to her “personal history and family history.” RP 40. Consequently, in the same manner that the statement made in front of the venire in *Mach* tainted the whole venire and denied the defendant his right to a fair jury, so the statements made in the case at bar tainted the whole venire and denied the defendant his right to a fair jury under Washington Constitution, Article 1, § 21. and United States Constitution, Sixth Amendment. As a result, the defendant in this case is entitled to a new trial.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE PLAYED A RECORDED INTERVIEW IN WHICH THE INTERROGATING OFFICER REPEATEDLY TOLD THE DEFENDANT THAT HE WAS LYING AND THAT NEITHER THE OFFICER NOR A JURY WOULD EVER BELIEVE THE DEFENDANT DENIED THE DEFENDANT HIS RIGHT TO A FAIR TRIAL.

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

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

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

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object when the state played a recorded interview in which the interrogating officer repeatedly told the defendant that he was lying and that neither the officer nor a jury would ever believe the defendant's claims. Specifically, the defense argues that this evidence was inadmissible because it was irrelevant and that its admission denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, because it was highly prejudicial. The following sets out this argument.

While due process does not guarantee every person a perfect trial, *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968), both our state and federal constitutions do guarantee all defendants a fair trial untainted from inadmissible, prejudicial evidence. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). It also guarantees a fair trial untainted by unreliable, prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472

(1999). This legal principle is also found in ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value.

This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403 to determine whether the danger of unfair prejudice substantially outweighs probative value, a court should consider the importance of the fact that the evidence is intended to prove, the strength and length of the chain of inferences necessary to establish the fact, whether the fact is disputed, the availability of alternative means of proof, and the potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987) . In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001).

In making this argument that counsel was ineffective for failing to object to the admission of Detective McDaniel's statements, the first thing that should be noted is that these statements did not meet the test for relevance. Under ER 401, "relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 402, "all relevant evidence is admissible" with certain limitations. By contrast, under this same rule "[e]vidence which is not relevant is not admissible." Thus, before testimony can be received into evidence, it must be shown to be relevant and material to the case. *State v. Wilson*, 38 Wn.2d 593, 231 P.2d 288 (1951). Finally, the "existence of any fact" as that term is used in these two rules cannot rest upon guess, speculation, or conjecture. *State v. Golladay*, 78 Wn.2d 121, 470 P.2d 191

(1970) .

For example, in *State v. Thamert*, 45 Wn.App. 143, 723 P.2d 1204 (1986), the defendant was charged with two counts of robbery, and he offered a diminished capacity defense, arguing that his voluntary drug usage prevented him from forming the requisite intent to commit the crime. During trial, he attempted to call a jail nurse as a lay witness to testify concerning her personal observations of the defendant following his arrest. However, the court excluded this witness and the defendant was convicted. The defendant then appealed, arguing that the trial court denied him a fair trial when it excluded his proposed witness.

In addressing the defendant's arguments, the court first noted that lay witnesses may testify concerning the mental capacity of a defendant so long as the witness' opinion is based on facts the witness personally observed. The court then noted that the trial court did not abuse its discretion when it excluded the defendant's proposed witness because she did not meet these criteria as she had never observed the defendant when he was abusing drugs.

In the case at bar the ultimate question before the jury was whether or not (1) the defendant touched JM with sexual intent when he showed her how to perform a breast exam, (2) whether or not he intentionally touched her buttocks when giving her a back rub, and (3) whether or not he pulled out her clothing so he could view her body. Since the defendant categorically denied

her allegations during the interview, the detective's statements to the defendant at the end of the interview that he did not believe the defendant, did not make any issue at trial either more or less likely. Thus, they were irrelevant and highly prejudicial because they constituted admission of the officer's opinion that the defendant was lying and that he was guilty. The following addresses this issue.

Under Washington Constitution, Article 1, § 21, and under United States Constitution, Sixth Amendment, every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result, no witness, whether a lay person or expert, may give an opinion as to the defendant's guilt, either directly or inferentially, "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

"[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77.

612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

To the expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. *See Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701.

For example, in *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial, the dog handler testified that his dog found the defendant after following a "fresh guilt scent." On appeal, the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed, noting that "[p]articularly where such an opinion is expressed by a government official, such as a sheriff or a police officer, the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial." *State v. Carlin*, 40 Wn.App. at 703.

In this case there was only one purpose in admitting the deputy's statements that he did not believe the defendant, that the defendant was "full of baloney" and that no jury would ever believe him. That purpose was to argue to the jury that it should rely upon the officer's opinion and find the defendant guilty. This evidence was all the more prejudicial because the state

took great pains at the beginning of the deputy's testimony to explain his extensive training and experience in investigating similar cases and in interviewing suspects of sex abuse. As such, the evidence was highly prejudicial.

In this case there was no possible tactical reason for the defense attorney to sit mute and fail to object to the admission of this evidence, particularly given the fact that he undoubtedly had previously viewed the videotape and knew what it contained. In fact, a review of the record on appeal demonstrates that trial counsel had little involvement in the trial. He did not make a single objection during trial (except one during voir dire), and he only briefly cross-examined two of the state's eight witnesses. There was no conceivable reason to refrain from objecting to that portion of the tape in which the officer repeatedly told the defendant that he was a liar and that no jury in the world would believe him. Thus, counsel's failure to object fell below the standard of a reasonably prudent attorney.

A careful review of the evidence in this case also reveals that trial counsel's failure to object caused prejudice. The reason is that the state's evidence was far from overwhelming. On this point the following should be noted: (1) during her testimony concerning the defendant's alleged act of pulling out her waistband and looking at her vagina JM testified that she was asleep when it happened and that she did not open her eyes, (2) although the

defendant did admit to showing JM how to perform a breast exam, he denied the allegation about pulling out the waistband, (3) JM admitted that while showing her how to perform a breast exam he did not touch her nipples, he did not rub her breasts; rather, he pushed with his fingers, and (4) although the defendant had unfettered access to JM over a number of years, this was the only incident, apart from the allegation of touching her buttocks, where she claimed he committed a crime. Given the equivocal nature of this admissible evidence, the inclusion of the officer's improper opinion statements on the defendant's guilt and credibility make it at least likely that the jury would have acquitted but for the admission of the improper evidence. Thus, trial counsel's failure to object denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, and the defendant is entitled to a new trial.

III. THE TRIAL COURT'S FAILURE TO GIVE A PETRICH INSTRUCTION AFTER THE STATE INTRODUCED TWO SEPARATE AND DISTINCT INCIDENTS OF SEXUAL CONTACT DENIED THE DEFENDANT HIS RIGHT TO A UNANIMOUS JURY.

Under Washington Constitution, Article 1, § 21, and under the United States Constitution, Sixth Amendment, the Defendant in a criminal action may only be convicted when a unanimous jury concludes that the criminal act charged in the information has been committed. *State v. Kitchen*, 110 Wn.2d

403, 409, 756 P.2d 105 (1988) (citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); *State v. Allen*, 57 Wn.App. 134, 137, 787 P.2d 566 (1990)). As the court stated in *Kitchen*, “[w]hen the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. *Kitchen*, at 409 (citing *State v. Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984)). Failure to follow one of these options is constitutional error and may be raised for the first time on appeal, even though the defense fails to request either option at trial. *State v. Gooden*, 51 Wn.App. 615, 754 P.2d 1000 (1988).

Furthermore, the error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. *Kitchen*, 110 Wn.2d at 411 (quoting *State v. Loehner*, 42 Wn.App. 408, 411, 711 P.2d 377 (1985)). Once again quoting the court in *Kitchen*, “[t]his approach presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational juror could have a reasonable doubt as to any one of the incidents alleged.” *Kitchen*, 110 Wn.2d at 411, (citing *State v. Burri*, 87 Wn.2d 175, 181, 550 P.2d 507 (1976)).

For example, in *State v. Petrich*, *supra*, the defendant was charged

with one count of indecent liberties and one count of second degree statutory rape. At trial, numerous incidents of sexual contact were described in varying detail. The jury convicted him on both counts, and he appealed, arguing that the court's failure to ensure a unanimous verdict required the reversal of the convictions and a retrial. The Washington Supreme Court agreed and reversed, stating as follows:

In petitioner's case, the evidence indicated multiple instances of conduct which could have been the basis for each charge. The victim described some incidents with detail and specificity. Others were simply acknowledged, with attendant confusion as to date and place, and uncertainty regarding the type of sexual contact that took place. The State was not required to elect, nor was jury unanimity ensured with a clarifying instruction. The error is harmless only if a rational trier of fact could have found each incident proved beyond a reasonable doubt. We cannot so hold on this record. Petitioner is entitled to a new trial.

State v. Petrich, 101 Wn.2d at 573 (citation omitted).

In the case at bar, the state charged the defendant in Count I with Child Molestation in the Second degree. This count alleged that the conduct constituting the crime occurred between April 29, 2011, and February 20, 2013. During trial the state specifically elicited two separate claims of sexual touching. The first was a claim that the defendant touched JM in a sexual manner when he showed her how to perform a breast exam. The second was a claim that he intentionally touched her buttocks on one or more occasions while giving her back rubs. The state specifically elicited the latter claim

from JM with the following question when asking about the defendant giving her back rubs.

Q. Okay. Did he ever – did he touch your butt when he massaged?

A. Yes.

RP 241.

This latter claim was repeated when the state played Deputy McDaniel's interview with the defendant, during which the following exchange took place:

DETECTIVE: Okay. So, let's talk about the morning and the kissing and things. So, that's consistent. You guys are consistent as far as the – the story as far as going in and kissing her goodnight. Um – but then, she said that you would reach under and you know, touch her rear end and she would roll over. She started listening for you to make sure she was rolled over and not give you an opportunity to do those type of things.

DEFENDANT: Oh, good grief. No way.

RP 371.

In this case it was well within the province of some of the jury members to determine that (1) that state had failed to prove beyond a reasonable doubt that the breast examination incident constituted an offense, given the defendant's admission to the breast exam in light of JM's description of the touching, but that (2) the state had proven beyond a reasonable doubt that defendant had touched JM's buttocks with sexual intent. Similarly, under the facts of this case it was also well within the

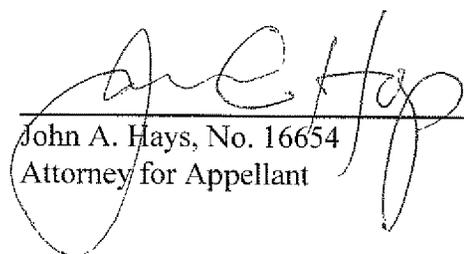
province of some of the jury members to determine the opposite on both these issues. Thus, in this case the court's failure to give the jury a *Petrich* instruction denied the defendant his right to a unanimous jury under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment. As a result the defendant is entitled to a new trial on the child molestation charge.

CONCLUSION

The defendant's conviction should be vacated and his case remanded for a new trial based upon (1) the denial of his right to a fair and impartial jury, (2) the denial of his right to effective assistance of counsel, and (3) the trial court's failure to give a *Petrich* instruction on Count I.

DATED this 22nd day of May, 2014.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

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

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

ER 401

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

ER 402

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

ER 403

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

GEORGE THOMAS STRANGE,
Appellant.

NO. 45607-9-II

**AFFIRMATION OF
OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Cowlitz County Prosecuting Attorney
312 S.W. First Avenue
Kelso, WA 98626
prosecutor@co.cowlitz.wa.us
2. George Strange
Stafford Creek Correctional Center
191 Constantine Way
Aberdeen, WA 98520

Dated this 22nd day of May, 2014, at Longview, Washington.


Diane C. Hays

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COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
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GEORGE THOMAS STRANGE,
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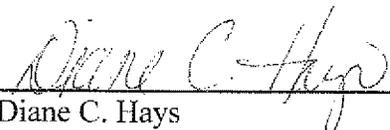
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Cowlitz County Prosecuting Attorney
312 S.W. First Avenue
Kelso, WA 98626
prosecutor@co.cowlitz.wa.us
2. George Strange, DOC# 369763
Stafford Creek Correctional Center
191 Constantine Way
Aberdeen, WA 98520

Dated this 23rd day of May, 2014, at Longview, Washington.



Diane C. Hays

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