

NO. 49466-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN JABS,

Appellant.

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

The Honorable Kevin D. Hull, Judge

BRIEF OF APPELLANT

DANA M. NELSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

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A. ASSIGNMENTS OF ERROR

1. The court erred in admitting unreliable hearsay under RCW 9A.44.120.

2. Appellant's convictions for counts II, IV, VI, VIII, and X violate the prohibition against double jeopardy given deficiencies in the jury instructions.

3. Appellant received ineffective assistance of counsel.

4. The trial court failed to give a unanimity instruction for Count XI, violating appellant's constitutional right to a unanimous jury verdict.

5. As a condition of sentence, the court was not authorized to prohibit appellant from joining or perusing any public social websites.

Issues Pertaining to Assignments of Error

1. Where the time, content and circumstances of C.G.'s, K.H.'s and K.K.'s out-of-court statements to the forensic child interviewer showed such statements to be unreliable, did the court err in admitting them?

2. Appellant was convicted of two counts of first degree rape of a child, allegedly committed against C.G. during the same charging period. The jury instructions failed to make it manifestly

apparent the counts must be based on separate and distinct conduct. Similarly, Appellant was convicted of two counts of first degree child molestation, allegedly committed against H.H. during the same charging period. Again, the jury instructions failed to make it manifestly apparent the counts must be based on separate and distinct conduct.

Appellant was also convicted of one count each of first degree child rape and one count each of first degree child molestation with respect to K.H., J.J. and K.K. The jury instructions likewise failed to indicate the rape and molestation counts must be based on separate and distinct conduct.

Did inadequate jury instructions expose appellant to multiple punishments for one criminal act, violating double jeopardy and necessitating vacation of one child rape conviction and four child molestation convictions?

3. Where the evidence supported a lack-of-volition defense, did appellant receive ineffective assistance of counsel where his attorney failed to request an instruction informing the jury it must acquit if it found – by a preponderance of the evidence – that appellant was asleep and therefore not acting volitionally at the time K.H., H.H. and J.J. reportedly engaged in oral sex with him?

4. Did the trial court violate appellant's constitutional right to a unanimous jury verdict by failing to give a unanimity instruction that required the jury to unanimously agree as to which act (or acts) of communicating with a minor for an immoral purpose was proven beyond a reasonable doubt?

5. Under the United States Supreme Court's recent opinion under Packingham, was the sentencing court without authority to restrict appellant's access to public social websites?

B. STATEMENT OF THE CASE

1. Procedural Facts

Following a lengthy jury trial in Kitsap Superior Court, appellant Stephen Jabs was convicted of the following counts: (1) first degree child rape of C.G., allegedly occurring between 1/1/14 and 3/14/14; (2) first degree child rape of C.G., allegedly occurring between 1/1/14 and 3/14/14; (3) first degree child rape of K.H., allegedly occurring between 11/30/08 and 9/29/14; (4) first degree child molestation of K.H., allegedly occurring between 11/30/08 and 9/29/14; (5) first degree child molestation of H.H., allegedly occurring between 11/30/08 and 9/29/14; (6) first degree child molestation of H.H., allegedly occurring between 11/30/08 and 9/29/14; (7) first degree child rape of J.J., allegedly occurring

between 11/30/08 and 9/29/14; (8) first degree child molestation of J.J., allegedly committed between 11/30/08 and 9/29/14; (9) first degree child rape of K.K., allegedly occurring between 11/30/08 and 9/29/14; (10) first degree child molestation of K.K., allegedly occurring between 11/30/08 and 9/29/14; and (11) communicating with a minor (K.K.) for an immoral purpose, allegedly occurring between 11/30/08 and 9/29/14. CP 226-238; 305-318. Stephen Jabs was also convicted of various aggravators. CP 305-18.

The court imposed exceptional indeterminate sentences of 491.5 months to life for each count except the misdemeanor communicating conviction. CP 309. As a condition of sentence, the court ordered that Stephen Jabs “[s]hall be prohibited from joining or perusing any public social websites, i.e. Facebook, Instagram, Craigslist, Backspace, etc.” CP 320. This appeal follows. CP 321.

2. Timeline Leading up to the Challenged Child Hearsay Statements¹

Stephen Jabs has always been actively involved with young people. RP 3225. Growing up, he volunteered with the YMCA and was a camp counselor. 3228, 3234. He met his now ex-wife Catherine in 1988 when she a single mother raising two small daughters, Katherine who was two years old and Kimberly who was six months old.² RP 3093-94. Steve began babysitting for Catherine and the two later married. 3094-95. They had daughter Stephanie in 1989. RP 3098. Steve acted just as much a father to Katherine and Kimberly as he did to his biological daughter Stephanie. RP 3096.

In 1999, the couple and their children settled in Seabeck, Washington, in a house on Holly Road. RP 3220. Growing up, Stephanie remembered lots of her girlfriends coming over to spend time with her and her sisters. RP 3124.

¹ These facts are taken from the trial testimony. Some of these facts were also elicited at the child hearsay hearing. To give this Court context, and to avoid repetition, this brief recounts the facts pre-dating the allegations as testified to at trial. However, any relevant fact that is different and/or relied upon by the court in its decision to admit the child hearsay will be set forth in the child hearsay hearing section below.

Steve and his wife separated in 2003. RP 3095, 3218, 3236. Although Catherine and the children moved out, Stephanie and Kimberly still visited Steve at the Holly Road house on weekends. Their sister Katherine was older and did not go as much. RP 3127, 3236.

Stephanie remembered lots of birthday parties on Holly Road. RP 3129. It was a fun place to relax and spend time with friends. RP 3131. When Stephanie was younger, they would watch movies, go up in the tree house or out in the woods to pick berries. RP 3131. Steve treated Stephanie and her sisters' friends like family. As Stephanie described it, anyone who stepped foot in the house was treated like family. RP 3129. Steve' ex-wife Catherine testified that's how Steve was raised. RP 3107-08. Steve was adopted as a child and has an inclusive view of what constitutes family. RP 3214.

In fact, Steve took in Stephanie's friend Celia when Celia was 15 years old and having trouble at home. RP 3132. Steve thought of Celia as his fourth daughter. RP 3233.

² Because some of the witnesses have the same last name and because the witnesses know each other and refer to each other by first names, this brief will refer to the adults by their first names.

Over time, some of Steve' daughter's friends began to have children of their own. RP 3133. Katherine's friend Kele Haynes was the first. RP 3247. One time Katherine and Kele wanted to go out for the evening and asked if Steve would babysit Kele's daughter E.H., who was approximately 10 months old.³ RP 3247. Steve agreed and gradually began to watch E.H. more and more often. "It gave [him] a sense of purpose." RP 3248. He enjoyed having a child in the house again. RP 3248.

One weekend in July 2006, Kele brought her friend LuVada Henehan over and asked if Steve would mind watching LuVada's 7-month-old daughter K.H. as well; Steve was already planning to watch E.H. RP 3251, 3269. Steve agreed and ultimately watched E.H. and K.H. almost every weekend in 2006, so their mothers could enjoy some free time. RP 2326, 3251. LuVada testified K.H. loved going to Steve's. RP 2326.

Steve and his daughter Kimberly had been in a car accident and could not work during this time period. RP 3252. Accordingly, he and Kimberly passed the time babysitting. RP 3252. Stephanie

³ At the time of trial in July 2016, Kele testified E.H. was 12 years old. Accordingly, E.H. must have been born in 2004. RP 2450. Accordingly, the record suggests Steve started babysitting E.H. in 2005. See RP 3245-47.

helped out, too, as did Celia who was still living with Steve at the time. RP 2971, 2978, 3255.

On April 23, 2007, LuVada had another daughter, H.H. Once H.H. was a year-or-so old, she began spending time with her big sister K.H. at Steve' house. RP 2329. By this time, Stephanie also had a daughter, J.J. – who was born on September 19, 2007. RP 3137. Stephanie testified Steve was extremely helpful with J.J. RP 3138.

While Celia was still living with Steve, she began babysitting K.K., who was between two and three years old;⁴ Celia met K.K.'s mother, Tierra Stefferud, through a friend. RP 2993. Celia would babysit K.K. on the weekends at Steve's. RP 2128. After Celia moved out, Steve asked Stefferud if K.K. could continue coming over to socialize.⁵ RP 2129. Stefferud agreed, as she trusted Steve and K.K. enjoyed socializing with the other girls. RP 2128-29.

Mandala Maitland attended high school with Katherine, Kimberly and Stephanie. RP 1892. In approximately 2006, when Mandala had her son C., she rekindled her friendship with Steve's

⁴ K.K. was born on November 22, 2004. RP 2195.

⁵ Celia eventually moved out because she had a child and wanted to start her own family. RP 2999.

daughters and attended Steve's frequent birthday parties and barbecues. RP 1983. Steve became more involved in Mandala's life after she had her daughter C.G. on September 8, 2009. RP 129, 1897, 1960. Mandala testified Steve was like a father to everyone. RP 1987.

In early 2014, Mandala was preparing to move to Florida and needed a temporary place to stay. RP 1898-900. Steve agreed Mandala and her children could stay with him. RP 1900.

Mandala testified that shortly before leaving for Florida, she was driving with C. and C.G. to their grandmother's so they could spend a couple of nights with grandma. Mandala claimed that on the way, C.G. made a startling accusation, i.e. that Steve had sexually abused C.G. RP 1903-04.

When Mandala reached her parents' house she contacted Kimberly. RP 1915. She also sent a Facebook message to LuVada and Kele. RP 1918. At trial, the defense introduced a Facebook message that purported to be from Kele to someone else that was forwarded to LuVada.⁶ RP 2352. As paraphrased by defense counsel during cross of Kele, it read: "[C.G.'s] mom, she

⁶ At the child hearsay hearing, LuVada testified the message was from Kele to someone named Tana, which was forwarded to LuVada, which LuVada forwarded to Kimberly. RP 387.

got pissed and told you that she was going to have [C.G.] say he touched her.” RP 2461. Kele remembered having a conversation with Kimberly in which Kele said: “She got pissed and told me she was going to have [C.G.] say he touched her.” RP 2465. However, Kele denied authoring the Facebook message. RP 2461-62.

C.G. underwent a forensic interview on March 18, 2014, but the deputy assigned to the investigation, Aaron Baker, was busy working on other cases. RP 432, 1789. In September 2014, Baker received a call from the Bremerton police who were investigating a child abandonment case involving Brandy Welch, who failed to pick up her youngest daughter from preschool but had Steve listed as her emergency contact.⁷ RP 1789-90, 3363, 3367. Baker decided to sit in on the meeting a CPS worker arranged to have with Welch. RP 1790.

Welch met Steve through Crown Hill Elementary, where her older daughter attended kindergarten. RP 2099, 3359. That fall, Welch was about to be evicted and was experiencing financial difficulty, which her kindergartener mentioned to others in her class.

⁷ Steve testified that at 5:32 p.m. on September 19, 2014, he received a call from the Naval Avenue Head Start informing him that Welch had failed to pick up her youngest daughter and asking if he could. RP 3363. Steve was cooking dinner and babysitting several kids but eventually went to pick up Welch's daughter at 8:00 p.m. that night. Welch did not return home until 1:30 a.m. RP 3365.

RP 2074. A school official contacted Welch to let her know that Steve, who was a teacher's aid at Crown Hill, would be willing to take her in so they would not have to change schools. RP 2074. After meeting and speaking with Steve's daughters, Welch agreed. RP 2074, 2099.

Steve had been volunteering at Crown Hill (where his granddaughter J.J. also went to school) since he could no longer work due to his diagnosed multiple sclerosis.⁸ RP 3143, 3359-61. He had worked as an electrician for many years, but experienced cognitive difficulties and low energy, which hampered job performance. RP 3221-3224. Steve volunteered to add purpose to his life. RP 3136-37.

Welch and her two daughters moved in with Steve on September 12, 2014. RP 3362-63. Although Welch stayed for only a couple of weeks, she remembered an unusual conversation she had with Steve at the kitchen table. RP 2081. Reportedly, Steve said he bought K.K. a vibrator for her to use in private, after he noticed she appeared to be using the hot tub jets to masturbate, as well as Steve' back massager. RP 2081. Steve said he bought the

⁸ Steve was diagnosed in 2007. RP 3223.

vibrator because he was concerned K.K. was using the jets and back massager in front of the other girls.⁹ RP 2017, 2085.

Following Welch's interview with CPS, Baker obtained a search warrant for Steve's residence. RP 1791. Baker met with Steve outside the residence. Baker told Steve he was the one Steve spoke to about C.G.¹⁰ RP 1796. Steve reiterated he never touched C.G. RP 1797. When asked about the vibrator, Steve acknowledged he bought one for K.K. to use in private away from the other girls. RP 1801-02. After speaking to others about it, however, he took it away. RP 1802. Steve also acknowledged he spoke to the girls about sex, specifically not to believe any boy who said they could not get pregnant the first time. RP 1804.

Steve reportedly said one of the girls once placed a crayon in her vagina and that K.H. lost her hymen when she fell onto the back of the couch. CP 1806. Steve said he examined between her legs to check for injury, got an icepack and Tylenol for her. RP 1806. Steve also said H.H. came home from school and told him she hit herself on the monkey bars. He checked and saw a drop of blood in her underwear. CP 1807.

⁹ Steve testified he took the vibrator away and locked it in his briefcase after speaking about it with others, who told him it was not a good idea. RP 3355-57

When executing the warrant, police located a vibrator and other sex toys in a briefcase (RP 2376-2380) and numerous pictures, a small percentage of which the state suggested were inappropriate because some of the children weren't wearing swimsuit tops or were naked, but a larger percentage of which suggested normal family activity.¹¹ RP 1835, 1865-75, 2175, 2821-41. Of the photos picked out by the state, they were not contained in a separate folder but were intermixed with the others. RP 2841.

As indicated above, child forensic interviewer Karen Sinclair interviewed C.G. on March 18, 2014. RP 432. On September 26, 2014, she also interviewed K.H. and K.K. RP 437-38. As will be discussed below, all girls initially denied anything untoward happened. Eventually, however, after what the defense expert characterized as suggestive questioning (see infra), the girls eventually accused Steve of sexual abuse. H.H. and J.J. were also interviewed, but they denied any sexual abuse. RP 297-312, 461-63, 496; see also RP 301-312, 500-521.

¹⁰ Following C.G.'s forensic interview, Baker left a message for Steve, who then returned his call. RP 3359.

¹¹ Steve testified he started photo albums for the girls so they would have something to look back on when they are older. RP 3284.

3. C.G.'s Statement to Her Mother that Prompted the Interview with Sinclair

At the child hearsay hearing, Mandala recounted the conversation she had with C.G. in the car. C.G. reportedly said, "I want to tell you something. You know, Papa Steve?" RP 174. When Mandala said yes, C.G. claimed, "You know, he touched my pee pee." RP 174. Mandala testified she said, "oh, okay. And then what happened?" RP 174. According to Mandala, C.G. said: "Well, he touched my pee-pee." RP 174. When Mandala asked if he touched with his fingers or a hand, C.G. said, "He touched me with fingers." RP 175. When Mandala asked if it was underneath or on top of underwear, C.G. reportedly said, "He moved my underwear, and he put his finger – tried to put his finger in, but it hurt really bad, and it felt like a rip, and it stung." RP 175. C.G. reportedly said it happened a second time. When Mandala asked how many times C.G. thought it happened, she said two times: once when "it was dry, and that hurt," and another time in the hot tub "and it didn't hurt because it was wet and warm in the water." RP 175. According to Mandala, C. became upset and called C.G. a liar. RP 178-79.

Mandala claimed C.G. said the hot tub touch happened when Mandala took C. to school. RP 177. Mandala remembered a time C. was late for school so she left C.G. with Steve to drive C. to school. RP 177. Mandala claimed that when she returned, Steve and C.G. were sitting on towels on the couch and Steve said they had just gotten out of the hot tub. RP 178.

4. C.G.'s Statement to Sinclair

C.G. was four years old at the time of her interview. CP 367; RP 434. Sinclair introduced herself and allowed C.G. to hold onto a stuffed puppy. CP 366. When asked its color, C.G. initially said it was white. RP 367.

While discussing the ground rules for the interview, Sinclair told C.G. a story in which "Johnny ate all the chocolate chip cookies that his mommy just made." CP 368. During the story, Johnny told his mom that the dog ate the cookies. When asked if Johnny told the truth or a lie, C.G. said Johnny told a lie. However, C.G. also said it was a lie when Johnny admitted he ate the cookies. RP 368. And when asked whether it would be the truth of a lie if Sinclair said the puppy was white, C.G. answered, "that's a lie." RP 368. When asked what color the puppy was, C.G. said, "whatever color him want to be." RP 368.

Sinclair asked C.G. about something she'd done lately. RP 371. C.G. said she went to her grandma's house. RP 371. C.G. said her grandma's name is Patty and her poppa is Dave. CP 372. Sinclair asked some follow-up questions:

Q. Dave. Got it. And that is grandma and who?

A. And.

Q. Poppa? Or poppi? What do you call him?

A. Um, and Poppa Steve.

CP 373. When asked, C.G. said Poppa Steve is her other grandfather. CP 373.

When Sinclair asked why C.G. was with her today, C.G. said, "because I am talking to you." CP 374. When asked what she was there to talk about, C.G. said, "Um, um, stuff." CP 374. When asked, "like what," C.G. answered "My poppa." CP 374. When asked which poppa, C.G. said, "like Poppa Steve and Poppa Dave, and grandma." CP 374. When asked again who she and Sinclair were going to talk about today, C.G. said "both of those" and her aunties. CP 374.

Sinclair said, "I heard you told your mommy something." CP 375. C.G. said "I know," but "I already forgot." CP 375. Sinclair

stated, "Well, I want you to tell me what you remember." CP 375. Sinclair repeated: "So tell me about what you talked to your mom about?" CP 375. When C.G. said, "I don't know," Sinclair reiterated: "I heard you told her something happened to you, [C.G.]." CP 375. C.G. maintained, "I already forgot the talking." CP 376.

Sinclair asked again about "Poppa Steve, and Poppa Dave, and grandma." CP 376. When asked about Poppa Dave, C.G. said once when she was leaving she "hugged Poppa" and "kissed Poppa." CP 375. She also kissed grandma. CP 376. When asked about Poppa Steve, C.G. said she hugged him everyday and sometimes kissed him. CP 377. When asked who watches her, C.G. said Poppa Dave, grandma, Mollie¹² and Jackie. CP 377.

Sinclair reiterated she heard C.G. talked to her mommy about something that happened to her. CP 378. Sinclair entreated: "So, C.G., I need to – I still need to talk to you about what you told your mom. She said that you told her something happened to you." RP 379. C.G. said she didn't "really know what my momma said." RP 379.

¹² Earlier, C.G. said Mollie was a dog. CP 371.

Sinclair said she “heard one time you were in a hot tub.” CP 379. C.G. answered it was with Poppa Steve. CP 379. When asked what happened, C.G. said they breathed under water “because it is fun.” CP 379. She said she was with her other friends K.H., H.H., E.H. and R.H.¹³ CP 379.

Sinclair asked what happened in the hot tub. C.G. said they “just go in there and play.” RP 380. CP 381. When asked about her clothes in the hot tub, C.G. said she wore a bathing suit, as did the other kids; “And Poppa” wore bathing suit shorts. CP 381. Her brother wore his underwear. CP 381.

Sinclair reiterated she heard C.G. told her mom something happened in the hot tub. CP 382. C.G. said she did not know what her mother said. CP 382. Sinclair said C.G. told her mom something that happened in the hot tub, “and it worried her.” CP 382. C.G. responded: “She said, um, come in the office, and, um, and, um, and talk to her.” CP 382. Sinclair asked what happened when C.G. went in the office. C.G. said, “I don’t know.” CP 382.

Sinclair asked if “Anybody ever talk to you ever and say not to say something or told you, you shouldn’t talk about something?” CP 382. C.G. said both her mother and brother. CP 382. C.G.

¹³ R.H. is Kele’s youngest daughter, whom Steve also watched on occasion.

said she was “yelling in the car, singing my voice, and the – and Bubba got a headache.”¹⁴ CP 382.

Sinclair asked why C.G. moved out of Poppa Steve’s house. CP 383. C.G. said she did not move out and still lived there. CP 383. Sinclair asked what C.G. told her mother before she went to stay at grandma’s. CP 384. C.G. said she stayed at grandma’s for three nights. CP 384. When asked why she left her house, C.G. said because “we misses grandmas.” CP 384.

Sinclair repeated, “I heard you told your mommy something happened, though, at your house.” CP 384. C.G. responded: “No. I don’t really know that.” CP 384.

Sinclair drew a stick figure and asked C.G. to identify certain body parts. CP 385. She asked “What do you call that place right there on your body?” C.G. first responded, “Human,” then “Skin.” CP 385. Sinclair asked “So what do you call the place you go potty?” CP 385. C.G. responded “peepee.” CP 385. When Sinclair asked C.G. if anyone touches her “peepee,” C.G. said “Nope.” CP 386.

When Sinclair said she heard C.G. told her mom something different, C.G. said “Only when I take a bath. And a shower.” CP

¹⁴ Bubba is C.G.’s brother C. CP 381.

386. When asked who touches her, C.G. said “just my mom. And me. Only on the outside.” CP 387.

Sinclair told C.G. she was worried because she heard C.G. told her “mommy something happened.” CP 387. Sinclair repeated:

C.G., I am kind of worried, C.G., because I heard you told your mommy something, OK? I heard you told your mommy something happened to you. I am very worried – I am worried about that, and it is important that I know if something happens –

CP 387. C.G. interrupted saying: “Um, I have no clue what my momma said.” CP 387.

Sinclair explained: “But this is something that you said.” CP 387. C.G. said “I told my momma something that I said, ‘OK, Momma.’ That I went in the office.” CP 387. Sinclair attempted to clarify, “But what did you tell your momma and she was worried about it. And maybe it was the thing in the office?” CP 387. C.G. responded, “Um.” CP 388.

Sinclair asked whom C.G.’s mom was worried about. CP 388. C.G. responded: “Me.” CP 388. When asked why, C.G. said, “Because my mom is just yelling at me, like, no yelling at my Bubba.” RP 388. When asked who else C.G.’s mom might be mad at right now, C.G. said Bubba “Because in the car him says no

talking.” RP 388. When asked if she would be mad at Poppa, C.G. said no. CP 388.

Sinclair asked again, “What did you tell your mommy about Poppa?” CP 388. When C.G. said she did not know, Sinclair asked whether she did not know or just didn’t want to say. CP 388. C.G. first said, “I just don’t want to tell you.” CP 389. But when asked why, C.G. said “Actually, I don’t know.” CP 389.

Sinclair told C.G., “you told your mom something about the hot tub.” CP 389. Sinclair repeated, “I want to hear again something that you told your mommy happened in the hot tub, OK?” CP 389. C.G. responded she did not know. CP 389. When asked if she remembered talking to her mom about something that happened in the hot tub, C.G. said she did not. CP 389.

Sinclair asked where are places on a body that are OK to touch? C.G. answered: “Poppa Steve, um, sometimes him touches my peepee.” CP 389. In response to further questioning, C.G. said Steve touched it with his hand more than once. CP 390. She said once was “in the nighttime, and I sleep with Poppa and he touched my peepee.” CP 390. When Sinclair asked about “Poppa Steve’s” clothes, C.G. said “My voice is getting a little tired.” CP 390.

Sinclair told C.G. they were almost done, but asked again about "Poppa Steve's clothes like in the bed." CP 391. C.G. said "him put blanket on." CP 391. Sinclair told C.G. to tell her "about the touch. What kind of a touch was it?" CP 391. C.G. said it was "just the outside" of her "peepee." CP 391. When asked what it felt like, C.G. said she did not know and that it felt "squishy." CP 391-92.

Sinclair asked whether the touch occurred on the inside or outside of her underwear. CP 392. C.G. said "the inside." CP 392. When asked how his hand got there, C.G. said, "Outside." RP 392. Sinclair repeated, "the outside of your underwear?" and C.G. said, "Um, yeah." CP 392. When asked if that ever changed, C.G. said "Him just, um, inside the peepee." CP 392.

When asked if there were any other kinds of touches, C.G. said hugs and kisses. CP 392. C.G. indicated she was getting tired. CP 394. Sinclair returned to the hot tub: "Did something happen in the hot tub?" C.G. said "Just that." CP 394. When asked "Just what," C.G. said "Sometimes put his finger in hot tub." CP 394. When Sinclair asked "His finger where?" C.G. said "inside my peepee." CP 394. C.G. indicated she was tired and Sinclair ended the interview. CP 395-96.

At the child hearsay hearing, C.G. testified Steve touched her on inside and outside of her private spot on the couch and in the hot tub. RP 135-41. C.G. did not remember her interview with Sinclair. RP 147.

5. K.H.'s Statements to Sinclair and Testimony at Child Hearsay Hearing

K.H.'s interview was "extremely long," Sinclair admitted.¹⁵ In hindsight, she would have taken a longer break during the questioning.¹⁶ Sinclair admitted they were both tired. CP 458. K.H. was 8 years old at the time of the interview. CP 458.

When asked what she likes to do for fun, K.H. said she likes to run but can't do it at her house. However, she used to run at Poppa Steve's house, "but, uh, he is somewhere in jail." CP 460. K.H. elaborated: "For nothing. I don't know why, but somebody told a lie about him." CP 460.

K.H. told Sinclair that C.G. said Steve was touching her "in a private spot" and that she "told a lie." CP 465. K.H. said she was "really sad about Poppa Steve." CP 465. K.H. said she knew C.G.

¹⁵ During her trial testimony, Sinclair acknowledged the interview was one hour and forty minutes. RP 2580.

¹⁶ Sinclair took a quick break in the midst of the interview to give K.H. a cheese stick. CP 518.

was lying because “I know Poppa Steve would never do anything like that.” CP 466.

When asked about what she likes to do at Steve’s, K.H. said she likes playing Marco Polo in the pool. 472. Sinclair asked what people wear in the pool. CP 472. K.H. described different swimsuits that the girls would wear. CP 473. She said Steve wears bottoms that “kind of look like Hawaii.” CP 477.

Sinclair asked if there were times people did not wear suits. CP 474. K.H. said that sometimes if there were no boys around, except for Steve, they (her sister, H.H., J.J. and K.K.) go “skinny dipping.” CP 475. K.H. said she never went skinny dipping, however. CP 475. K.H. said Steve would go in the pool when it’s “really hot out.” CP 476. K.H. clarified that Steve “never goes skinny dipping.” CP 478.

With respect to Marco Polo, Sinclair directed: “tell me about what happens with the tagging and the touching when there is skinny dipping going on and Poppa Steve is in the pool?” CP 481. K.H. said, “sometimes he accidentally touches our tushie.” CP 481. Sinclair asked K.H. the location of the tushie and, “What’s the front part called?” When K.H. said her belly, Sinclair clarified, “What’s the part – the other part that you use to go to the bathroom?” K.H.

responded "Your private." CP 483. K.H. explained she also calls it her "quantos." CP 483. As does her sister H.H. CP 484.

Sinclair returned to Marco Polo and asked "is there anything tagging or touching, or anything kind of that with the privates?" CP 484. K.H. said no, "Just only the tummy, the head, and the other places." CP 485.

Sinclair asked if any pictures were taken when this was happening. K.H. said Steve has a water camera that he uses and lets the girls use, as well. CP 485. K.H. clarified no pictures were taken during skinny dipping, or she "would only take pictures of their heads. Only their faces." CP 486. When pictures are taken, Steve "is just cleaning up the house." CP 486.

Sinclair continued: "Ok, so I am going to ask that question again. If there is skinny dipping going on by some of the girls, does Poppa Steve take pictures with the water camera?" CP 487. This time, K.H. said yes, that he takes pictures of them doing "gymnastic things like somersaults, handstands, and walking on our hands." CP 487.

Shortly thereafter, K.H. said, "how many more minutes do I have to talk?" CP 489. Sinclair said she was trying to hurry and switched to questions about the hot tub. CP 489.

K.H. said sometimes the other girls skinny dipped in the hot tub. CP 489. But K.H. never went skinny dipping in the hot tub or pool. CP 490. Sinclair asked if K.H. was telling the truth and asked again: "So, again, I am going to ask you: Have you ever gone in the hot tub and skinny dipped yourself? And it's – you know you're not in trouble." CP 490. K.H. explained she sometimes went in the hot tub in her suit but would take it off to rinse it out and dry off. CP 490. K.H. further explained that her suit sometimes slipped out of her hand and fell back in the hot tub and her sister would sit on it, so K.H. would have to get back in to get it. CP 490.

When asked where Steve was when this happened, K.H. said he was inside watching football. CP 491. Sinclair asked whether Steve was ever in the hot tub when they were skinny dipping. K.H. said yes but that he still wears the same bathing suit. CP 491-92.

Sinclair asked whether anyone has to sit on someone's lap when they are in the hot tub. CP 492. K.H. said the little kids would sometimes sit on her lap or E.H.'s or K.K.'s. Sometimes they sit on Steve's lap. CP 493.

Sinclair directed: "So, I want you to think, [K.H.], and I want you to think of a time when you sat on Poppa Steve's lap in the hot

tub, and I want you to tell me about that.” CP 493. K.H. said there was a time she tried to sit on Steve’s lap but her sister kept blocking her. Finally, Steve told H.H. to let K.H. sit on his lap. CP 493. K.H. had her usual swimsuit on, and Steve’s hands were above the water “just chillaxing like this.” CP 494.

Sinclair continued asking about Steve’s hands. Sinclair asked “How about anywhere else on you” when you are sitting on his lap? CP 496. When K.H. just responded “Uuuuhhh,” Sinclair stated: “It is really important that you tell me everywhere that Poppa Steve’s hands go.” CP 495-96. K.H. said sometimes her tummy. CP 497. Sinclair asked about “Quantos? How about that area?” CP 497. K.H. said “He doesn’t touch my quantos when he is in the hot tub.” CP 497.

Sinclair asked “how about somewhere else not in the hot tub?” CP 498. K.H. responded, “like on the couch” or “in the house?” CP 498. K.H. said Steve sometimes tickled her on the couch. CP 498.

After more questions about her “private” and the hot tub, K.H. said when she was three “he was holding me right here, like this, and hold me with my tummy because I was trying to swim.”

CP 498. K.H. repeated, "That's the only time he touched my quantos." CP 498.

Sinclair returned to the couch, noting: "since you told me that he hadn't touched you – Poppa Steve hadn't touched your quantos or your private in the hot tub, but then you said on the couch. What happened – [K.H.], what happened on the couch with Poppa Steve?" K.H. said Steve tickled under her arms and on her tushie, where she is very ticklish. CP 499. She said she wore her "owl pants." CP 499.

Sinclair responded, "I thought you were telling me something about the couch with your private?" CP 500. K.H. reiterated Steve only touched her private in the hot tub, not on the couch. CP 500. Sinclair seized upon this and asked K.H. to tell her about Poppa Steve touching her private in the hot tub. K.H. explained she already told Sinclair about this; it was when she was three and learning to swim. K.H. said, "That's the only time." CP 500.

When Sinclair reiterated "It's very important that you tell me everything," K.H. said, "I gotta remember." CP 501. She then remembered that Steve "accidentally kneed me in the private" when they were roughhousing. CP 501. She said it hurt. Sinclair responded, "I bet. So, [K.H.], -- and I want to know about any other

time that Poppa Steve – that something happened with that.” CP 502. When K.H. asked whether Sinclair wanted to know how old she was, Sinclair said “yeah, you can tell me how old you are, but I need to hear about it, what it – if something happened down there.” CP 502. Sinclair returned to the couch and asked if there was “tickling anywhere else.” CP 502. K.H. said on her neck, but she wasn’t tickly there anymore. CP 502.

Sinclair clarified she was talking about K.H.’s “quantos.” CP 503. K.H. said she could not remember another time. CP 503.

Sinclair switched subjects to pictures Steve took of K.H. CP 504. K.H. clarified Sinclair wanted to know about naked pictures. K.H. said Steve took pictures of her in the bathtub when she was four that were in her “baby book.” CP 504.

K.H. said there was another time when she was sick and Steve had her undress and lay on the couch with ice packs and a fan on her, to get her temperature down; she had been feeling woozy and her head was burning. CP 506-09. K.H. said Steve sat in a chair on the side of the couch and said she needed to lie there for 15 minutes. CP 507-08.

When asked about another time Steve took a picture of her naked, K.H. said she had to think again; that it was “[k]ind of hard to

remember.” CP 509. Sinclair noticed K.H. was “getting fidgety and tired,” but continued on. CP 510.

Sinclair said she “heard there was a time when there – maybe that you had some blood or something and Poppa John – Poppa Steve checked you.” CP 512. Sinclair clarified, “I heard there was a time when maybe you hurt your private.” CP 512. K.H. remembered a time she slipped, fell and landed on the hard part of the couch and “broke my quantos.” CP 513. She said Steve was baking cookies. CP 513. When he heard K.H. screaming, he came in and asked what happened. After K.H. explained, Steve took down her pants and underwear to look. K.H. said it was “kind of bloody” and Steve said, she “almost broke it.” CP 514, 517.

Sinclair said “I kind of heard that when you got hurt on the couch, I heard a little bit different. I want you to tell me. I heard that Poppa [Steve] kind of had to check you like that.” CP 519. K.H. said Steve pushed “[k]ind of above her private and asked if it hurt.” CP 519-20. He then wiped her private and put her underwear and pants back on. CP 520. K.H. said H.H. and J.J. were all in the room when this happened. CP 522.

K.H. asked, “How many – how many hours have we –.” CP 523. Sinclair responded she wanted to get K.H. “out of here as

soon as we can,” but that “that’s why I need to know every – everything that happened with Poppa Steve.” CP 523. When K.H. said that’s all he did, Sinclair, directed, “Well, tell me about something different that happened.” CP 523. K.H. said she was trying to think, but it was hard and she couldn’t remember any other time Steve touched her “quantos.” CP 524.

Sinclair asked where Steve sleeps. K.H. said he usually sleeps on the couch and that she sometimes sleeps on the other side of the couch. CP 524-525.

Sinclair asked whether anyone goes with K.H. to the bathroom. CP 527. K.H. said she once asked H.H. and J.J. to come in with her to show them a funny video. CP 527. When Sinclair asked about Steve, K.H. said he would come in to help the girls if they had diarrhea. CP 527-528.

Sinclair asked if Steve ever came in when she went pee. CP 528. K.H. described a time when she was taking a long time to go and Steve was right by the door because E.H. had to go too. CP 529. Sinclair asked if Steve ever took a picture of her going to the bathroom. K.H. said, “Duh, no.” CP 529. K.H. said Steve has been in the bathroom before when she was in there because he did not want to wait. CP 530. K.H. had him turn around. CP 530.

Sinclair asked whether K.H. had told her everything about any touching. CP 531. K.H. said sometimes her private gets red and Steve puts cream on it. CP 532.

Sinclair asked whether Steve ever asked K.H. to do something with his body. K.H. said he sometimes asked for a back massage. She said he also has a white back massager. CP 535.

When Sinclair asked if the massager goes anywhere else, K.H. said, "Sometimes he use it on my sisters quantos. Sometimes on mine, too." CP 536. K.H. said Steve gets the massager when they say their "quantos are really sore." CP 536. K.H. said she takes off her clothes and Steve puts it on the outside of her private. CP 537. K.H. said he does it to H.H. and J.J. as well. CP 538.

Sinclair told K.H. to tell her "about something different." CP 539. K.H. responded, "I think I'm out of memories about him touching my private." CP 539.

Sinclair reiterated: "It is really important that you tell me everything today, OK? Because it is hard to bring you back again. It is hard on you and everything." CP 541. K.H. said sometimes they are roughhousing and Steve "sometimes smacks my tushie." CP 542.

When Sinclair asked if Steve ever showed her pictures “when you guys have been naked?” K.H. said “No!” CP 543. When asked if she ever saw naked people on the computer, K.H. said, “No. No, no, no.” CP 544. Sinclair asked if K.H. ever saw Steve watching “inappropriate stuff” on the computer. CP 545. K.H. said she didn’t want to talk about it, but there were “these teenage girls, they are in Japan.” CP 545. K.H. said she was sleeping on the couch but woke up when she heard weird noises; Steve did not know she was awake. CP 546. Sinclair asked if K.H. ever saw Steve looking at naked kids, and K.H. had not. CP 547.

Sinclair asked if Steve ever asked the girls to do “anything with each other.” K.H. said “Uh, get along.” CP 549. When asked if she ever saw Steve’s private, K.H. said yes: “I was watching TV and then my sister and [J.J.] wanted to, uh, look at his privates when he was sleeping and they were sucking on it.” CP 550. K.H. said they were sucking on it “like a lollipop.” CP 550. When asked if it happened one time or more than one time, K.H. said “More.” CP 551. However, she said “We only done it when he was asleep.” CP 551.

Sinclair asked whether it happen with her as well. K.H. said she “thought it looked like a lollipop too,” and “started doing what

they were doing.” CP 550. She said Steve “was on the couch sleeping. He didn’t even feel us.” CP 550. When asked how she knew, K.H. said, “Because I saw him sleeping. He was like (snores). He was snoring.” CP 551. When asked if he was ever awake, K.H. said “We only done it when he was asleep.” CP 551. When asked what his private looked like, K.H. said it was “like a cylinder, but there is like a triangle on top.” CP 551. K.H. said “It was going this way, but we hold it up so.” CP 552. When asked if anything came out of his private, K.H. said no. CP 553.

K.H. said she thought she was four when this happened. CP 553. She said they stopped because they got tired. CP 553. K.H. said Steve did not know what they did. CP 554. However, when K.H. was five, she told him what happened, and Steve said, “What?” CP 554. The interview ended after a few more subjects were asked about.

At the child hearsay hearing, K.H. testified she never saw anyone use the back massager on his or her privates and that it was never used on her in that manner. RP 242-43. She testified K.K. pulled Steve’s pants down once when he was sleeping and touched him with her hands and mouth. H.H. did also. K.H. testified she saw K.K. watch a video of a woman doing that. K.H.

said she touched Steve with her hands and mouth during this incident, but only for a second. RP 263.

K.H.'s mother LuVeda testified both K.H. and H.H. heard of C.G.'s accusation a couple months prior to their forensic interviews. RP 375.

6. K.K.'s Statements to Sinclair and Testimony at Child Hearsay Hearing

K.K. was 9 years old at the time of the interview. CP 402. Sinclair asked why K.K. was there today. K.K. responded: "I don't know why I am here today. It is just that this is kind of new. Well, it is not new because I had done this before when I was younger I had to go to this office, except they got – they gave me hot chocolate." CP 406.

In 2013, K.K. accused her former stepfather James Hetrick of sexually abusing her. RP 63, 87; see also RP 113. K.K. told her mom Hetrick touched her privates. At the child hearsay hearing, K.K. admitted she lied about it to get attention. RP 66-67.

At the hearing, K.K.'s mother Tierra Stefferud confirmed K.K. lied about Hetrick. K.K. reportedly told her, "He put his tongue down there." RP 107. K.K. also said that when she was sleeping, she would feel his hands "moving down there." RP 107. Tierra

testified that shortly afterward, she learned from a counselor that it did not actually happen. RP 107.

However, Sinclair did not ask why K.K. had been to the office previously. Rather, she simply asked K.K. what her two moms told her about today. CP 406. K.K.'s understanding was that she was to talk about her life. CP 406.

Sinclair asked what a typical day is like for K.K. and she responded that if her two moms are busy, their houseguest usually watches her and her brother. CP 406-07. K.K. said Steve also babysits her. CP 407. When asked what it's like, K.K. said "It is really fun. He has a pool and a hot tub and a tree house that he made." CP 407.

Sinclair asked what happens in the pool. K.K. responded she and the other kids "do belly flops" and play games. CP 408. K.K. said some of the adults also go in the pool, including "Poppa Steve." CP 408.

Sinclair asked what kind of clothes they wear in the pool. K.K. said she usually wears a purple bikini, the grown-ups always wear shorts and her brother wears his underwear. CP 409. When Sinclair asked if the kids were "[s]ometimes not wearing stuff," K.K. responded "they always wear clothes." CP 409.

Sinclair asked about the hot tub. K.K. said usually she goes in with K.H., H.H., E.H. and J.J. K.K. said Steve sometimes goes in. CP 410.

Sinclair stated: "So I understand that sometimes in the hot tub, and in the pool, the clothing situation is a little different." CP 411. Sinclair asked what is it called when someone swims without clothing. K.K. responded, "skinny dipping." CP 411. K.K. said she and some of the other kids sometimes do it because it is more fun than wearing a soggy suit. CP 411.

Sinclair asked K.K. to tell her about Poppa Steve when she and the other girls are skinny dipping. CP 412. K.K. said Poppa Steve always wears shorts. CP 412. When asked what they would do when he was in the pool with them, K.K. said play "Marco Polo." CP 413.

Sinclair said, "I understand that sometimes there might be some pictures that are taken?" K.K. responded: "Yeah, um, except when he takes pictures, we have our clothes on." CP 413. Sinclair asked, "what is the camera that takes pictures?" K.K. explained, "on his phone" and that "[h]e has a waterproof camera and he takes pictures under the water[.]" CP 413. But if they were skinny dipping, K.K. would always go in the shade where it is too dark for

pictures. CP 413. K.K. said he had the camera only once when they were skinny dipping. CP 414.

Sinclair asked if K.K. and the others sometimes took pictures. K.K. said yes, but she would only go by the camera with her clothes on. CP 415. When asked, K.K. said she did not think Poppa Steve ever had them take pictures of one another. CP 415.

When asked about the hot tub, K.K. said she sometimes went skinny dipping, but the camera was not allowed because of the chemicals. RP 416. When asked what happened in the hot tub, K.K. said she, K.H., H.H. J.J. and E.T.¹⁷ would just sit down and relax with their backs against the air jets. CP 416. K.K.'s little brother sometimes went in, too. CP 416.

Sinclair asked about Poppa Steve and the hot tub. K.K. said that when he goes in, they wear their bathing suits. CP 416. Sinclair suggested: "Well, hasn't there been times when that hasn't been the case, and he has been in the hot tub? Because that happened in the pool, right?" CP 416. K.K. said it had happened but they kept their bodies under water. CP 417. When asked what happens when they are in the hot tub, K.K. said Steve tries to grab

¹⁷ E.T. is Kimberly's daughter. RP 3029.

them on their stomachs and they try to swim away. CP 417. She said Steve always wears swim trunks. CP 417.

K.K. said Steve would always sit in the place that had the most air jets because his back hurt. CP 419. She and H.H. would sometimes sit next to him and give him hugs. She said when they were not skinny dipping, she would sometimes make pictures out of his chest hair. CP 419.

K.K. said sometimes she and H.H. would sit on Steve's lap and "he would lock us in with his arms that we couldn't get out when we tried to." CP 420. She said they sometimes wore just bottoms. K.K. said H.H. sometimes does it without her bottoms on. CP 420. K.K. then said she sometimes does too. CP 421. K.K. reiterated Steve always kept his bottoms on. CP 421.

Sinclair asked K.K. to: "Tell me something else that, [K.K.] has happened in the hot tub with Poppa Steve? OK? I want you to think really hard the tell me something else." In response, K.K. said, "Um, I actually don't know." RP 421.

Sinclair reiterated: "Well, I heard that something else happened." CP 421. K.K. responded, "Hm . . . what else happened?" CP 422. Again, Sinclair entreated: "Well, I kind of need to hear it from you. When Poppa Steve is in the hot tub with

you and some of the other girls, and something happened.” K.K. maintained, “I don’t know.” CP 422. Sinclair suggested: “Something that maybe somebody might think was kind of embarrassing or wouldn’t want to talk about?” K.K. responded, “I don’t know. I’m sorry.” CP 422.

Sinclair switched gears and asked about other activities. K.K. told her about a time her little brother got a fat lip while they were swinging. CP 422. Sinclair stated, “I understand someone got hurt in another area there?” K.K. said she only knew about her brother. Sinclair asked: “OK. But any of the girls get hurt down in their area that – another area?” CP 422. K.K. said possibly, but she did not remember. CP 423.

Sinclair asked K.K. to point to her private parts. K.K. pointed to her chest, her front private part and her rear end. CP 423. Sinclair asked if anyone got hurt “down in there . . . in their private?” K.K. said H.H. once got sand in her private while in the sandbox, but Steve used a “dolphin thingy” to squirt water on her private part. CP 423. K.K. said Steve babysat H.H. since she was really little and she used to run around naked a lot. CP 424. K.K. said she did not actually see this happen. CP 424.

When asked if she had any kind of injury "down there," K.K. said no. CP 425. Sinclair said she heard "there is some medicine that sometimes gets used there." CP 425. K.K. said Steve sometimes gave her headache medicine. CP 425. In response to further questioning, K.K. said there was also medicine "for our teeth, and then our head, and those are the only ones I remember." CP 425. Sinclair stated: "Well, I understand that there is some medicine he uses for a different part, too." K.K. said she did not know. CP 425.

Sinclair said she heard there was an object someone gave her and "I need to hear about that." CP 426. When Sinclair clarified it was something used on the body, K.K. responded: "A back massager." CP 426. K.K. said she would use it on her back and stomach but H.H. used it on her private part. CP 427.

When Sinclair asked about a different one that might have been a different color that was given to K.K., K.K. responded "Oh. I know what you are talking about." She said she called it "a buzzy toy." CP 428. When asked whose it was, she said Steve's. CP 428. However, K.K. did not know where he kept it because he put it in the woods, "in case a cop comes, then that way we wouldn't be able to find it." CP 429.

K.K. said Steve put it under the cabinet where only she and H.H. knew where it was. K.K. said H.H. was the first one who used it. K.K. saw her in the bedroom using it on her private; after, K.K. did the same but in the bathroom. CP 430. K.K. later said Steve gave it to her and said it was for her "peepee." CP 431. She said sometimes she and H.H. would go in the bathroom and use it. CP 432. When asked what Poppa Steve told her when he gave it to her, K.K. said "He just gave it to me, and I didn't know what to do with it, then I put it on there." CP 432. When asked for more detail, K.K. said he said "that this was for your, um, a girl part that girls don't normally show." CP 433. When asked what he said to do with it, K.K. responded, "Mm, nuthin." CP 433. She said she'd use it in the bathroom or bedroom when he was not in there. CP 433. He'd be in the living room watching television. CP 434. K.K. said there was never a time when that changed. CP 434.

However, K.K. said Steve said she could put gel on it "That way it wouldn't hurt." CP 434.

Sinclair asked if there ever was "a time Poppa Steve talked about that buzzy toy that it might do something?" K.K. said no. When Sinclair asked how K.K. knew if it was ok to use, K.K. said she would ask. Steve said if there was company, to wait until they

are gone. CP 436. When asked, "was there ever a time where any pictures with that," K.K. said no. CP 436.

Sinclair asked if there was ever time a time "when Poppa Steve was around there when it happened." K.K. said yes, with her and H.H.; he would put it on K.K. then on H.H. and sometimes K.K. would put it on H.H. and vice-versa. It stayed on the outside of the skin. CP 438.

K.K. said it was a long time ago and she really did not remember. However, she said he did it more than once and that it happened in the bedroom. CP 439. K.K. said Poppa Steve always had his clothes on. CP 439.

Sinclair changed subjects and asked about a time when Poppa Steve was maybe "lying on the couch and it was you and maybe K.H. and H.H.? And he was sleeping? Or trying to sleep? Or acting like he was sleeping? Tell me what happened." CP 440. Twice, K.K. said she did not know. CP 440. After Sinclair asked again about Steve laying on the couch or maybe on his bed and said she needed to hear "from you what happened," K.K. responded: "What [H.H.] and Steve would do is that whenever they were in their room they would do inappropriate stuff. And I would also do it." CP 440.

When asked what, K.K. started crying. K.K. said, "But if my moms know, then I will never go there again." CP 441. Sinclair said let's cross that bridge later. CP 441.

K.K. said they would do inappropriate things for kids, such as things she had seen in videos on the computer of naked adults "making out" or having sex. CP 443. "The boy was putting his private part in the girls." CP 443. K.K. said E.H. showed it to her. CP 443.

K.K. said she and H.H. would "sort of do the making out thing" in the bedroom with Steve. CP 444. K.K. said "His, um, private would go, um, not in, but above ours." CP 444. She said it would go in between her legs close to her rear end. CP 444. K.K. said Steve would do that with her and H.H., at different times but in the same room. K.K. said she and H.H. would be on top of Steve most of the time and he would always put "white stuff" on H.H.'s belly or K.K.'s. CP 445. K.K. told Sinclair this happened more than once, not long ago, when she was 8. CP 447.

Sinclair asked whether "anybody's mouth involved?" K.K. said "me and [H.H.'s] on Poppa's." CP 447. When asked about Poppa's what, K.K. said "his thing that sticks out between his legs." CP 448.

Sinclair asked whether there was ever "one person doing something and another doing something else?" K.K. said "Steve would end up licking H.H.'s private in between her legs, and then H.H. would be sucking on his private." CP 449. And then he'd do the same with K.K. CP 449. K.K. said it happened more than once when she was 8. CP 450. K.K. said Steve sometimes licked her and H.H.'s private in the hot tub as well. CP 451.

In contrast to her statement to Sinclair, at the child hearsay hearing, K.K. changed her accusations to include vaginal and anal intercourse. RP 42, 47. She also now claimed that Steve did in fact show her pornography on the computer. RP 70, 81.

7. Defense Expert's Testimony as to Suggestive Nature of Sinclair's Questioning

Psychologist Mark Whitehill testified there were a number of factors that led him to conclude Sinclair's questioning likely tainted C.G.'s, K.H.'s and K.K.'s statements to her: (1) Sinclair failed to explore rival hypothesis; (2) she engaged in repeated questioning; (3) she engaged in dogged persistence, close to badgering; (4) she interjected facts; and (5) she resorted to emotion. As a result, the girls' statements were not reliable. RP 582-625.

Whitehill testified the exploration of “rival hypothesis” – i.e. exploring other explanations for the allegations – is critical to reliability. RP 575. Whitehill testified Sinclair failed to explore rival hypothesis in two of the interviews. For instance, C.G. spoke of two “poppas,” but Sinclair never explored whether there was any inappropriate touching with regard to Poppa Dave. RP 584.

Similarly, K.K.’s false accusation against her former step-father opened up a world of rival hypothesis, which Sinclair never inquired about. RP 584. K.K. also talked about watching pornography with E.H. RP 585. A rival hypothesis that should have been explored was whether K.K. obtained her sexually precocious knowledge from watching the videos, rather than from abuse. RP 585-87.

Whitehill testified repeated questioning about the same subject matter gives the interviewee the impression that her answer thus far is not good enough. Young children, such as C.G., are highly suggestible and want to please adults. RP 589. As a result, when confronted with repeated questioning, the child may feel she must disclose something to please the interviewer. RP 599.

Whitehill noted Sinclair engaged in repeated questioning with respect to Chloe and the hot tub, and with respect to the length

of Sinclair's questioning of K.H. and the repeated directive to "tell her everything," as if what she said before was not sufficient. RP 589-91. Whitehill testified Sinclair's questioning could be viewed as badgering. RP 603.

Whitehill testified Sinclair engaged in "dogged persistence" with all three interviews. In all three interviews, the girls denied anything untoward happened until near the end of the interviews. RP 593-94. To Whitehill, this tactic does not bode well for trustworthiness. RP 595.

In the interviews, Sinclair also repeatedly used the phrase, "I heard that ..." RP 596. Such phraseology introduced information into the interview that was not part of it. It also exemplified Sinclair's lack of a rival hypothesis. Whitehill noted all three girls denied anything happened until Sinclair introduced outside information. RP 599. As a result, it was not possible to know whether the information disclosed was truthful or a reaction to Sinclair's style of questioning. RP 600.

Another concern Whitehill had was Sinclair's recourse to emotion with C.G. Sinclair repeatedly told C.G. she was worried about something that may have happened. RP 601. Whitehill

testified that under such circumstances, a child may disclose to relieve the interviewer of her worry. RP 602.

With respect to C.G., Whitehill was also concerned with her failure to answer correctly Sinclair's questions about the truth and a lie. RP 601-02.

Whitehill also noted that K.H.'s and K.K.'s accounts had changed considerably over time. This also raised concerns regarding reliability. RP 614-15. K.K.'s admission she lied about Hetrick likewise undermined reliability. RP 618.

8. Court's Ruling

After addressing the Ryan¹⁸ factors, the court concluded the content and circumstances of the girls' statements supported reliability and admissibility. RP 910. However, RCW 9A.44.120 permits the admission of "[a] statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another[.]" Accordingly, defense counsel moved to exclude any statement by one child as to a sex act allegedly performed on different child, although any child could testify in open court as to what she saw. RP 968.

¹⁸ State v. Ryan, 103 Wash.2d 165, 175-76, 691 P.2d 197 (1984).

The court interpreted “with” in the statute to permit statements about something that purportedly happened at the same time but with more than one girl. RP 977. However, the court ruled the prosecutor would have to parse that out. RP 979.

As a result, the prosecutor presented the entire interview of C.G. RP 1599, 2016. However, the prosecutor did not believe she could redact K.K.’s interview to eliminate her statements about H.H. Accordingly, the prosecutor elected to show only a portion of K.K.’s interview on mute, to show her reactions during the interview. RP 1599. Initially, the prosecutor indicated she would do the same with K.H., showing only a portion of the interview where she demonstrates something she did. RP 1745, 2269.

Later, however, the prosecutor indicated she wished to play the portion of K.H.’s interview where she made statements about her, H.H. and J.J. performing oral sex while Steve was sleeping on the couch. RP 2270, 2486-87.

9. Trial Testimony Concerning Allegations

After Sinclair’s interview of K.H. and K.K., deputy Baker questioned Steve about the oral-sex-on-the-couch allegation. RP 1812. Steve said he did not allow the girls to do that. He stated his

M.S. affected his ability to have an erection and that even if he was "three sheets to the wind," it could not have happened. RP 1813.

C.G. testified similarly to her testimony at the child hearsay hearing. RP 1970-1977. Mandala also testified similarly to her testimony at the child hearsay hearing. RP 1903-07.

K.K. testified Steve touched her vagina with his hand and/or private part at night in his bedroom. RP 2207-08. She claimed it happened more than once. RP 2209. She testified they also engaged in mutual oral sex on more than one occasion. RP 2212-13. K.K. said sometimes it would just be her, but sometimes, H.H. would also be in the room "doing the exact same thing, basically." RP 2214. K.K. clarified that she believed they were doing the same thing, "but I could be wrong." RP 2216-17. K.K. testified Steve bought her and H.H. a "buzzy toy" they used to masturbate. RP 2220.

K.K. further claimed that she recognized from one of the pictures "slippery stuff" that she and H.H. would put on when Steve purportedly would rub his penis back and forth on their vaginas. RP 2224. K.K. described that she would be lying on her side and Steve would be lying behind her facing her back when this happened. RP 2209-2211. K.K. testified she did not remember

what she saw with respect to H.H., and that: "All I remember is seeing his back." RP 2225.

K.K. also claimed that Steve showed her and H.H. pornographic videos. RP 2228. According to K.K., Steve also used the back massager on her and H.H. like they used the "buzzy toy" on themselves. RP 2233.

Although K.K. claimed H.H. was present during the alleged abuse, H.H. denied being present or ever witnessing Steve touch any of the girls inappropriately, including herself. RP 2754-2761.

H.H. and K.H.'s mom LuVada testified that following Steve's arrest, she went into "panic mode" and had phone conversations K.H. eavesdropped on. RP 2346. K.H. acknowledged she overheard her mom talking to the other moms about the allegations. RP 2429. Before their interviews with Sinclair, K.H. and H.H. both told LuVada Steve did not touch them. RP 2371.

After being refreshed with the transcript of her interview with Sinclair, K.H. testified Steve used the back massager on H.H.'s vagina and that she thought he used it on hers too. RP 2401. When asked if she remembered telling Sinclair she took her clothes off when this happened, K.H. said she thought so. She agreed her memory was probably better when she talked to Sinclair. RP 2402.

After her memory was refreshed with the transcript of her interview with Sinclair, K.H. testified she saw the same thing happen with J.J. RP 2405. However, J.J. denied that any such contact happened. RP 2792-95.

Again, after being refreshed with the transcript of her interview with Sinclair, K.H. agreed there was a time she saw Steve's penis. RP 2407. K.H. testified she was in the living room with H.H. and J.J. Steve was sleeping. K.H. claimed H.H. and J.J. pulled down his pajamas and started sucking his "vagina," which she said looked like a "lollipop." RP 2409. K.H. claimed she also sucked it, as did K.K., H.H. and J.J. for approximately one minute. RP 2410. Steve did not wake up, but found out about it because K.H. told him later. Steve told her, "Don't do that again" and put her in time out. K.H. testified this happened only once. RP 2411.

Again, however, H.H. and J.J. denied this incident ever took place or that anything inappropriate ever happened. RP 2755, 2794, 2799.

Sinclair testified about K.K.'s statements during her interview. RP 2542-2546, 2556-2561. As Sinclair testified, K.K. 's demeanor changed when she started making statements about the alleged abuse, during the latter part of the interview. RP 2542-43.

According to Sinclair, K.K. started crying, hugged a teddy bear and put a blanket over her face. 2543. The prosecutor played portions of the video when K.K. became emotional. RP 2545-46, 2556, 2559-60.

Sinclair also testified about her interview with K.H. RP 2547, 2566-70. The prosecutor eventually was able to play that portion of the interview where K.H. talked about the couch incident. RP 2565-66, 3516.

Sexual assault nurse examiner Jolene Culbertson testified she examined C.G., K.H., H.H., K.K. and J.J. RP 2508-2516. There was no evidence of trauma for any of the girls. Id.

Jabs' nephew R.Y. lived with Jabs for several months in 2013, to give his parents a break. RP 3186. He testified he was high-school age and curious about sex. RP 3191-92. He sometimes looked at pornography on the computer in the girls' bedroom. RP 3193-94. Steve testified that once after R.Y. left, he found E.H. and K.K. on the computer watching a pornographic video.

Steve denied the state's accusations and testified he never inappropriately touched any of the girls. RP 3330-3334. He acknowledged he spoke to the girls about sex (after the

pornography-viewing incident) but as a parent would. RP 3340-41, 3388. When Steve was first questioned about C.G. in March 2014, he offered to take a lie detector test, but the police never followed up. RP 3369.

C. ARGUMENT

1. THE COURT ERRED IN ADMITTING C.G.'s, K.H.'s and K.K.'s HEARSAY STATEMENTS TO SINCLAIR.

RCW 9A.44.120¹⁹ governs the admissibility of child hearsay.

In order to admit a hearsay statement made by a child under the age of 10 related to sexual contact, the court must find that the statement is reliable. State v. Beadle, 173 Wash. 2d 97, 111–12, 265 P.3d 863, 870–71 (2011). If so, the statement may be admitted if the child testifies at trial or the child is “unavailable as a

¹⁹ RCW 9A.44.120 provides in pertinent part:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if: (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and (2) The child either: (a) Testifies at the proceedings; or (b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

witness,” and there is “corroborative evidence of the act.” RCW 9A.44.120(1)(b). Because all three girls testified, the question here is of reliability.

This Court reviews a trial court's admission of child hearsay statements for abuse of discretion. State v. Borboa, 157 Wash.2d 108, 121, 135 P.3d 469 (2006). “A trial court abuses its discretion ‘only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.’” Id. (quoting State v. C.J., 148 Wash.2d 672, 686, 63 P.3d 765 (2003)).

In State v. Ryan, 103 Wash.2d 165, 175–76, 691 P.2d 197 (1984), the Supreme Court adopted a set of factors applicable to determining the reliability of hearsay statements. They are:

(1) [W]hether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) whether the statements were made spontaneously; and (5) the timing of the declaration and the relationship between the declarant and the witness [;]” ... [(6)] the statement contains no express assertion about past fact [;] [(7)] cross examination could not show the declarant's lack of knowledge [;] [(8)] the possibility of the declarant's faulty recollection is remote[;] and [(9)]the circumstances surrounding the statement (in that case spontaneous and against interest) are such that there is no reason to suppose the declarant misrepresented defendant's involvement.

Id. (quoting State v. Parris, 98 Wash.2d 140, 146, 654 P.2d 77 (1982); Dutton v. Evans, 400 U.S. 74, 88–89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970)).

(i) C.G.'s Statements Were Not Reliable.

Several factors weigh against reliability and the court's decision to admit C.G.'s statements to Sinclair. First, C.G.'s general character weighs against reliability. She was only four years old at the time of the statement and therefore highly suggestible. Moreover, C.G. did not correctly answer Sinclair's questions about the difference between the truth and a lie. Second, the lack of spontaneity with regard to C.G.'s statements also weighs against reliability. It was not until after Sinclair asked C.G. six times about what she told her mommy and six times about what happened in the hot tub that C.G. made the statement that "sometimes him touches my peepee." CP 389. Such repetitive questioning – near badgering – does not result in a spontaneous, reliable statement.

Third, and for similar reasons, the timing of the declaration and the relationship between the declarant and the witness also weighs against a finding of reliability. As Whitehill noted, Sinclair explored no rival hypothesis, i.e. whether Poppa Dave may have

inappropriately touched C.G. Sinclair also engaged in a pattern of repeated questioning and dogged persistence that put undue pressure on young C.G. to disclose something. Sinclair interjected facts about the hot tub, by repeatedly stating "I heard that ...," thereby suggesting that something happened in the hot tub. Sinclair also repeatedly told C.G. she was worried about what C.G. told her mother, such that C.G. may have disclosed to relieve Sinclair of her worries. Under the circumstances of the interview, it is not possible to tell whether C.G.'s allegations were the result of Sinclair's interview style or the truth.

Fourth, the circumstances surrounding C.G.'s statements are such that there is plenty of reason to suppose C.G. misrepresented the defendant's involvement. The court therefore abused its discretion in admitting C.G.'s statements to Sinclair where the state failed to prove they were reliable.

Evidentiary error requires reversal if the defendant was prejudiced. State v. Thomas, 150 Wash.2d 821, 871, 83 P.3d 970 (2004). This Court must reverse if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." Id. (quoting State v. Tharp, 96 Wash.2d 591, 599, 637 P.2d 961 (1981)). "The improper admission of

evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” Id. (quoting State v. Bourgeois, 133 Wash.2d 389, 403, 945 P.2d 1120 (1997)).

There was not overwhelming evidence here. In fact, two of the named complainants denied anything happened. And with respect to the charges concerning C.G., there was no corroboration. No physical evidence or eye-witness testimony. As a result, the state’s case boiled down to the credibility of C.G. The admission of the prior statements bolstered C.G.’s credibility and therefore materially affected the trial. Reversal is required.

(ii) K.H.’s Statements Were Not Reliable.

The primary factor weighing against the reliability of K.H.’s statements is the length of time that the interview lasted – an hour and forty minutes. As a result, K.H.’s statements were not at all spontaneous. In fact, she did not allege anything happened until the very end of the interview, and it was only after Sinclair engaged in repeated questioning and dogged persistence. Although K.H. kept saying she could not remember anything additional about Steve allegedly touching her private (apart from the swim lesson and roughhousing incident), Sinclair persisted, stating “Well, tell me

about something different that happened.” CP 523. And when K.H. stated she could not remember anything else, Sinclair stated: It is really important that you tell me everything today, OK? Because it is hard to bring you back again. It is hard on you and everything.” CP 541.

As Whitehill noted, this suggested to K.H. that if she did not disclose something further, she would have to come back. It was not until after all this cajoling that K.H. made the couch allegation. Accordingly, the timing of the declaration and the relationship between the declarant and the witness also weighed against a finding of reliability.

Because K.H. denied anything until nearly the end, the circumstances surrounding her statement are such that there is reason to suppose she misrepresented the defendant’s involvement. The court therefore erred in admitting K.H.’s statements.

Because credibility was the key issue in the case, the court’s error in admitting K.H.’s prior statements requires reversal. By admitting the statements, the court unfairly bolstered the state’s case. And with respect to the couch/rape charge, the prejudice is also evidenced by the fact that in K.H.’s prior statement about the

couch, she said it happened more than once. However, at trial, she said it happened only once. Jurors would be more likely to believe Steve was in fact asleep when this happened, if it was not a reoccurring event. In fact, the prosecutor made this very argument in closing. RP 3571. This Court should therefore reverse.

(iii) K.K.'s Statements to Sinclair Were Not Reliable

The primary factor weighing against the reliability of K.K.'s statements to Sinclair is the general character of K.K. She admitted she lied and previously accused a close family member – her stepfather – of sexual abuse to gain attention. As Whitehill noted, this admission opened up a myriad of rival hypotheses that were not explored by Sinclair. Second, like the statements by C.G. and K.H., K.K.'s statements were not spontaneous but in response to repeated questioning. Third, the timing of the declaration and the relationship between the declarant and the witness also weighs against a finding of reliability. Not only did Sinclair fail to explore rival hypotheses with respect to James Hetrick, but she failed to explore rival hypotheses with respect to the pornography K.K. admittedly watched with E.H. In light of K.K.'s past lies about sexual abuse, Sinclair's repeated questioning and failure to explore

rival hypotheses, the circumstances surrounding K.K.'s statements are such that there are reasons to suppose K.K. misrepresented Steve's involvement. The court therefore erred in admitting K.K.'s statements to Sinclair.

This was not an overwhelming case with respect to K.K. Particularly since she testified H.H. was there during the majority of the abuse, but H.H. denied that anything untoward ever happened. The admission of K.K.'s prior statements bolstered her testimony at trial and likely affected the jury's determination of her credibility. As a result, reversal is required.

2. THE JURY INSTRUCTIONS VIOLATED APPELLANT'S RIGHT AGAINST BEING PLACED IN DOUBLE JEOPARDY BECAUSE THEY EXPOSED HIM TO MULTIPLE PUNISHMENTS FOR THE SAME CRIMINAL ACT.

Freedom from double jeopardy under the Fifth Amendment to the United States Constitution and article I, section 9 of the Washington Constitution "is the constitutional guarantee protecting a defendant against multiple punishments for the same offense." State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007). Appellate courts review double jeopardy claims de novo and permit them to be raised for the first time on appeal. State v. Mutch, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011).

Jury instructions “must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror.” Borsheim, 140 Wn. App. at 366 (quoting State v. Watkins, 136 Wn. App. 240, 241, 148 P.3d 1112 (2006)). On review, the court considers insufficient instructions “in light of the full record” to determine if they “actually effected a double jeopardy error.” Mutch, 171 Wn.2d at 664. A double jeopardy violation occurs if it is not “manifestly apparent to the jury that each count represented a separate act.” Id. at 665-66. The jury instructions used in Steve’s case fail under this standard.

- (i) The Instructions With Respect to C.G. Failed to Make it Manifestly Apparent that Each Count Represented a Separate Act.

Appellant was convicted of two counts of first degree rape, allegedly committed against C.G., both counts allegedly occurring between January 1, 2014, and March 14, 2014. With respect to these counts, the jury was instructed:

In alleging that the defendant committed rape of a child in the first degree as charged in counts I and II, the state relies upon evidence regarding a single act constituting each count of the alleged crime. To convict the defendant on any count, you must unanimously agree that this specific act was proved.

CP 256. While this may have insured unanimity, it did not insure each conviction was based on separate and distinct conduct. And significantly, the “to-convict” instructions likewise failed to include the “separate and distinct” language. CP 258, 261.

The Borsheim court held that an instruction that the jury must find a “separate and distinct” act for each count is required when multiple counts of sexual abuse are alleged to have occurred within the same charging period. 140 Wn. App. at 367-68. The court vacated three of Borsheim’s four child rape convictions for failing to instruct the jury using the separate and distinct language. Id. at 371. Reversal of one of the child rape charges with respect to C.G. is likewise required.

In response, the state may attempt to argue that the prosecutor’s election in closing remedied appellant’s exposure to double jeopardy. But counsel’s closing argument is just that: argument. In State v. Kier, 164 Wn.2d 798, 808, 194 P.3d 212 (2008), the State argued Kier’s assault and robbery convictions did not merge because they were committed against separate victims. Noting the case before it was somewhat analogous to a multiple acts case, the court indicated it was at best unclear whether the jury believed Kier committed the crimes against the same or

different victims. Id. at 811. The rule of lenity requires ambiguous jury verdicts to be resolved in the defendant's favor. Id. Therefore, because the evidence and instructions allowed the jury to consider whether a single person was the victim of both the robbery and assault, the verdict was ambiguous and it would violate double jeopardy to not merge offenses. Id. at 814.

Under Kier's reasoning, one of appellant's convictions for child rape of C.G. likewise violates double jeopardy.

- (ii) The Instructions With Respect to H.H. Failed to Make it Manifestly Apparent that Each Count Represented a Separate Act.

Appellant was convicted of two counts of first degree molestation, allegedly committed against H.H., both counts allegedly occurring between November 30, 2008 and September 29, 2014. With respect to these counts (V and VI), the jury was instructed:

The state alleged that the defendant committed acts of rape of a child in the first degree, and child molestation in the first degree, in counts III, IV, V, VI, VII, VIII, IX, and X on multiple occasions. To convict the defendant of rape of a child in the first degree or child molestation in the first degree, one particular act of rape of a child in the first degree or child molestation in the first degree must be proved beyond a reasonable doubt as to each respective count, and you must unanimously agree as to which act has been proved. You need not unanimously agree that

the defendant committed all the alleged acts of rape of a child in the first degree or child molestation in the first degree.

CP 256.

Like the instruction for counts I and II, set forth above, this instruction may have insured unanimity, but it did not insure each conviction was based on separate and distinct conduct. And significantly, the “to-convict” instructions likewise failed to include the “separate and distinct” language. CP 266, 267. Under Borsheim and Kier, discussed above, one appellant’s convictions for first degree molestation of H.H. must be reversed.

- (ii) The Instructions With Respect to K.H., J.J. and K.K., Failed to Make it Manifestly Apparent that Each Count Represented a Separate Act.

Appellant was convicted of one count of first degree rape of K.H. and one count of first degree child molestation of K.H. (III and IV), both counts allegedly occurring between November 30, 2008 and September 29, 2014. Appellant was convicted of the same two charges during the same period with respect to J.J. (VII and VIII) and K.K. (IX and X). As indicated above, with respect to these counts, the jury was instructed:

The state alleged that the defendant committed acts of rape of a child in the first degree, and child molestation in the first degree, in counts III, IV, V, VI,

VII, VIII, IX, and X on multiple occasions. To convict the defendant of rape of a child in the first degree or child molestation in the first degree, one particular act of rape of a child in the first degree or child molestation in the first degree must be proved beyond a reasonable doubt as to each respective count, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the alleged acts of rape of a child in the first degree or child molestation in the first degree.

CP 256.

This instruction did not make it manifestly apparent to the jury that it must rely on separate and distinct conduct for each count. Nor did any of the “to convicts” include the separate and distinct language. CP 262, 264, 269, 270, 271, 272.

In State v. Land, 172 Wn. App. 593, 598-603, 295 P.3d 782 (2013), Division I of this Court considered whether it violated double jeopardy where the jury was not instructed it must find separate and distinct acts of child rape and child molestation. Land was convicted of one count of child rape and one count of child molestation, both involving the same child and the same charging period. Id. at 597-98. Land argued these convictions violated double jeopardy because they might have been based on the same act of oral-genital contact. Id. at 598-99. The State argued the jury did not have to find separate and distinct acts because child

molestation is not the “same offense” as child rape for double jeopardy purposes. Id. at 599.

Two offenses are not the same when “there is an element in each offense which is not included in the other, and proof of one offense would not necessarily also prove the other.” Id. (quoting State v. Vladovic, 99 Wn.2d 413, 423, 662 P.2d 853 (1983)). Child rape and child molestation do not have the same elements. Id. Child molestation requires proof of “sexual contact,” which means “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” RCW 9A.44.010(2). Child rape requires proof of “sexual intercourse,” which includes “any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.” RCW 9A.44.010(1) (emphasis added). The jury in appellant’s case was instructed with these definitions of sexual intercourse and sexual contact. CP 259, 265.

In Land, the court explained that where the evidence of sexual intercourse supporting a count of child rape is evidence of penetration, “rape is not the same offense as child molestation.” 172 Wn. App. at 600. The touching of sexual parts for sexual gratification constitutes molestation until the point of actual penetration. Id. At

that point, the act of penetration alone supports a separately punishable conviction for child rape. Id.

However, the court made clear that where the evidence of sexual intercourse is evidence of oral-genital contact, “that single act of sexual intercourse, if done for sexual gratification, is both the offense of molestation and the offense of rape.” Id. In this circumstance, the two offenses “are the same in fact and in law because all the elements of the rape as proved are included in molestation, and the evidence required to support the conviction for molestation also necessarily proves the rape.” Id. Because of this potential double jeopardy problem, the court considered Land’s claim that the jury instructions exposed him to multiple punishments for the same offense. Id.

Land’s jury was not instructed that the two counts involving the same child required proof of separate and distinct acts. Id. at 601. The child did not testify Land’s mouth came in contact with her sex organs, and the only evidence of rape was the child’s testimony that Land penetrated her vagina with his finger. Id. at 601-02. Consistent with this testimony, the prosecutor argued in closing that the child’s testimony about penetration was the “crucial element proving rape.” Id. The prosecutor also emphasized that the child’s testimony about

sexual contact proved the molestation and her testimony about penetration proved the rape. Id. Under these circumstances, the Land court concluded the lack of a separate and distinct instruction “did not violate Land’s right to be free from double jeopardy.” Id. at 603.

This case presents the same issue as Land: appellant was convicted of one count of child rape and one count of child molestation within the same charging period (but with respect to three children here). As in Land, appellant’s jury was not instructed that the counts of child rape and the counts of child molestation must be based on separate and distinct acts.

Unlike Land, however, there was evidence of significant oral-genital contact for each child. K.H. testified she engaged in oral sex on the couch. Sinclair testified K.H. said it happened more than once. K.H. testified she saw J.J. do the same. K.K. testified to oral-genital contact occurring on multiple occasions. Because oral-genital contact constitutes both rape and molestation, the instructions improperly allowed appellant to be convicted twice for one act. Land, 172 Wn. App. at 600.

3. DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO REQUEST AN INSTRUCTION ON THE AFFIRMATIVE DEFENSE THAT APPELLANT WAS ASLEEP.

Every accused person enjoys the right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defense. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Appellate courts review ineffective assistance claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

(i) Appellant Was Entitled to the Lack-of-Volition Instruction.

The defense is entitled to a jury instruction on its theory of the case when that theory is supported by substantial evidence. State v. Kruger, 116 Wn. App. 685, 693, 67 P.3d 1147 (2003). The lack of volition is an affirmative defense to a charge of child rape. State v. Deer, 175 Wn.2d 725, 287 P.3d 539 (2012).

In Deer, the Supreme Court considered whether the prosecution is required to prove beyond a reasonable doubt the defendant was awake during the alleged sex acts that led up to the child rape prosecution. Deer, 175 Wn.2d at 731-32. At trial, Deer argued that some of her sexual acts were not voluntary, or “volitional” because she was asleep when they occurred. Pursuant to this theory, she asked the trial judge to instruct the jury to acquit if there was reasonable doubt that sexual intercourse was volitional on her part. The trial judge refused, instead instructing the jury to acquit if Deer proved by a preponderance of the evidence that sex had occurred without her knowledge or consent (Instruction 11). Id. at 729.

The Supreme Court held Instruction 11 was a correct statement of the law. The court reasoned that rape of a child is a strict liability offense. Therefore, while Deer “is entitled to argue a lack of conscious action, her claim is properly treated as an affirmative defense, much like claims of involuntary intoxication, insanity, or unwitting possession. Deer, at 733.

Thus, if there was evidence to support it, appellant was entitled to an instruction much like that was ultimately approved of

in Deer – that jurors must acquit if it found appellant proved by a preponderance of the evidence that he was asleep.

In evaluating whether substantial evidence supports a defense-proposed instruction, the court must interpret the evidence “most strongly” in the defendant’s favor and “must not weigh the proof, which is an exclusive jury function.” State v. Douglas, 128 Wn. App. 555, 561-62, 116 P.3d 1012 (2005).

Significantly, K.H. was adamant in both her statement to Sinclair and in her testimony that Steve was asleep during the couch incident. Accordingly, substantial evidence supported the lack-of-volition instruction and would have provided the defense with an alternative defense to alleged rapes of K.H. and J.J. and the alleged molestation of H.H.

(ii). Counsel’s Deficiency in Failing to Request the Instruction Prejudiced the Outcome of Appellant’s Trial.

Counsel’s performance is deficient when it falls below an objective standard of reasonableness. Thomas, 109 Wn.2d at 226. If counsel’s conduct demonstrates a legitimate trial strategy or tactic, it cannot serve as a basis for an ineffective assistance claim. Strickland, 466 U.S. at 689; State v. Yarbrough, 151 Wn. App. 66, 90, 210 P.3d 1029 (2009). Prejudice occurs when there is a

reasonable probability that but for counsel's deficiency, the result would have been different. Thomas, 109 Wn.2d at 226. A reasonable probability is one sufficient to undermine confidence in the outcome. Id.

Counsel is constitutionally ineffective for failing to request jury instructions on the law supporting the defense theory. See, e.g., Thomas, 109 Wn.2d at 229 (failure to request voluntary intoxication instruction); State v. Kruger, 116 Wn. App. at 688 (same); see also State v. Powell, 150 Wn. App. 139, 155-57, 206 P.3d 703 (2009) (failure to request reasonable belief instruction). For instance, in Kruger, the court held counsel to be ineffective for failing to request a voluntary intoxication instruction where there was substantial evidence of Kruger's intoxication. 116 Wn. App. at 692-93. Because the defense theory was lack of intent, the court concluded there was no strategic reason for not requesting the instruction. Id. at 693-94. Prejudice resulted because "[e]ven if the issue of Mr. Kruger's intoxication was before the jury, without the instruction, the defense was impotent." Id. at 694-95. Reversal was required. Id. at 695.

Here, counsel was ineffective in failing to request a lack-of-volition instruction. On Steve's direct, he acknowledged the possibility it could have happened as K.H. stated:

Q [defense counsel]. Did you ever have sexual contact with [H.H.] or [J.J.]?

A [Steve]. No.

Q. Did any of the girls suck on your private area ever?

A. Not to my knowledge.

Q. What do you mean by that?

A. If something like that ever happened, I would not know about it – I mean, to my – being awake asking cognizant –

Q. Well, is that something that happened, or it didn't, or why do you say, "Not to my knowledge"?

A. Because of the accusations that I've heard in this courtroom that something like that possibly happened when I was asleep. And I don't buy that, but I know I sleep soundly."

RP 3332-3333.

Thus, Steve tepidly acknowledged there was a possibility he was asleep. And although Steve's first line of defense was that nothing happened, there is nothing inconsistent about arguing that assuming he is mistaken, then he was asleep and should therefore still be acquitted. Thus, the circumstances show counsel's failure

to request the instruction was not based on any sound strategy in light of Steve's testimony.

Counsel's deficient performance prejudiced Steve. Even if the issue of Steve's being asleep during the couch incident was before the jury, without the instruction, the defense was non-existent. Kruger, 694-95. Jurors had not idea what impact – if any – that issue had on the charges. In other words, it is reasonably likely the outcome would have been different had jurors known they must acquit if they believed it 50+ percent possible Steve was asleep. This Court should reverse the child rape charges with respect to K.H. and J.J., as well as the molestation charge with respect to H.H. that was based on the same incident.

4. APPELLANT WAS DEPRIVED OF HIS RIGHT TO JURY UNANIMITY ON THE COMMUNICATING WITH A MINOR CHARGE.

In criminal prosecutions, the accused has a constitutional right to a unanimous jury verdict. U.S. Const. amend. VI; Wash. Const., art. 1, § 22. To convict a person of a criminal charge, the jury must be unanimous that the defendant committed the act. State v. Camarillo, 115 Wn.2d 60, 63, 794 P.2d 850 (1990); State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); State v. Badda, 63 Wn.2d 176, 182-83, 385 P.2d 859 (1963).

In Washington, a defendant can only be convicted when a unanimous jury concludes that the criminal act charged in the information has been committed. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). In multiple acts cases where several acts are alleged, any one of which could constitute the crime charged, the jury must be unanimous as to which act constitutes the crime. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

To ensure jury unanimity, either the State must elect the act upon which it will rely for conviction or the trial court must instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt. State v. Crane, 116 Wn.2d 315, 325, 804 P.2d 10 (1990), cert. denied, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991); Kitchen, 110 Wn.2d at 411; Petrich, 101 Wn.2d at 572.

When the trial court fails to give a proper unanimity instruction," 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. This approach presumes that the error was prejudicial and allows

for the presumption to be overcome only if no rational jury could have a reasonable doubt as to any one of the incidents alleged. Id.

Here, Jabs was charged with communicating with a minor for an immoral purpose under RCW 9.68A.090(1), which states: "Except as provided in subsection (2) of this section, a person who communicates with a minor for immoral purposes, is guilty of a gross misdemeanor."

The statute requires the State to prove that the defendant communicated with a minor for "immoral purposes." The Supreme Court has expressly held the phrase "immoral purposes" includes, but is not limited to, "participation by minors in sexual acts for a fee, or appearance on file or in live performance while engaged in sexually explicit conduct." State v. Jackman, 156 Wn.2d 736, 132 P.3d 136 (2007) (quoting State v. McNallie, 120 Wn.2d 925, 933, 846 P.2d 1358 (1993)). The statute also imposes a more general prohibition on communication with minors for the "predatory purpose of promoting their exposure to and involvement in sexual misconduct." Id. Thus, it incorporates within its scope a relatively broad range of sexual conduct including a minor. "Communication" under RCW 9.68A.090 may involve either a course of conduct or spoken words. Jackman, 156 Wn.2d at 748.

The court did not give the jury an instruction that they must be unanimous as to the underlying act comprising the communicating charge, despite defense counsel's request. RP 3452-54.

In closing, the prosecutor argued the jury could rely on any number of multiple acts to convict him of the charge:

Count XI, this is the Communicating With a Minor For Immoral Purposes, and this is more of a span of time. This is more of an overall behavior. This is the talking to the seven or eight or nine year old about sex, about using condoms, about keeping your legs together, about the myth that you won't get pregnant the first time you have sex, that conversation that he had with her in the hot tub. It also includes the videos that she describes him showing her. It also includes the vibrator. All of this behavior is Communicating With a Minor For Immoral Purposes.

And you don't have to – you don't have to find that, yes, he had the sex talk; yes, he showed her the videos; yes, he gave her a vibrator. The point is, this is all an overarching behavior, and he is communicating to her about things like masturbation, which, obviously, are a sexual nature. And when we're talking about a man who's over 40 years older than this seven, eight, nine year old, I think we can all agree that that's an immoral purpose.

RP 3525-26.

Thus, there was no instruction and no election by the prosecutor. These omissions resulted in the denial of Steve's right to a unanimous jury verdict.

In response, the state will likely argue it was a “continuing offense.” Jury unanimity is not required where the defendant’s acts form a continuing course of criminal conduct. Crane, 116 Wash.2d at 315 (no unanimity instruction required where multiple assaults during two hour period resulted in child’s death) (C.J., Dore dissenting), cert. denied, 501 U.S. 1237, 111 S. Ct. 2867, 115 L.Ed.2d 1033 (1991); see also Petrich, 101 Wash.2d at 568–71, 683 P.2d 173 (unanimity instruction required where victim described multiple separate incidents of sexual contact over period of more than one year). Instead, the jury must agree that the conduct occurred. Crane, 116 Wash.2d at 330, 804 P.2d 10. 67 The defendant’s actions must be evaluated in a “commonsense manner” to determine whether it forms one continuing offense. Petrich, 101 Wash.2d at 571, 683 P.2d 173. Factors in this determination include whether the acts occurred in a “separate time frame” or “identifying place.” Petrich, 101 Wash.2d at 571.

Evaluating Steve’s alleged actions in a common sense manner, the prosecutor’s accusations were separate acts. Purportedly showing K.K. pornographic videos was something that occurred at night away from the other children. Steve allegedly gave K.K. a vibrator, which she used in the bathroom. The sex talk

occurred in the hot tub with all the girls. These were separate acts, not a continuing course of conduct. See e.g. the unpublished opinion in State v. Roswell, 139 Wn. App. 1090 (2007) (jury properly given Petrich instruction for communicating with a minor charge); GR 14.1 (the case cited has no precedential value but is cited for whatever persuasiveness this Court attributes to it).

The error in this case was prejudicial because some jurors may have believed Steve's talk about not believing anyone who said a girl could not get pregnant the first time was not for an immoral purpose but actually to convey an important risk factor. This Court therefore should reverse the communicating charge.

6. THE SENTENCING COURT WAS WITHOUT AUTHORITY TO RESTRICT APPELLANT'S ACCESS TO PUBLIC SOCIAL WEBSITES.

In Packingham v. North Carolina, ___ U.S. ___, 137 S. Ct. 1730, ___ L. Ed. 2d ___ (2017), the Supreme Court struck down a North Carolina statute as unconstitutional that made it a felony for a registered sex offender to gain access to a number of websites, including common social media websites, like Facebook and Twitter. The Court held the prohibition violated the First Amendment. For the reasons stated in Packingham, the prohibition

in Steve's judgment and sentence likewise violates the First Amendment and must be stricken.

E. CONCLUSION

Because C.G.'s, K.H.'s and K.K.'s statements were unreliable and unfairly bolstered the state's case with respect to all charges, all of Steve's convictions should be reversed. Alternatively, the following convictions violated double jeopardy and must be vacated: II, IV, VI, VIII, and X. Because Steve received ineffective assistance of counsel with respect to counts III, VI and VII, those counts must be reversed as well. Count XI should be reversed because the court failed to insure a unanimous jury verdict. Finally, the condition prohibiting Steve from accessing social websites must be stricken.

Dated this 17th day of August, 2017

Respectfully submitted

NIELSEN, BROMAN & KOCH



DANA M. NELSON, WSBA 28239
Office ID No. 91051
Attorneys for Appellant

NIELSEN, BROMAN & KOCH P.L.L.C.

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