

NO. 49466-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN ROBERT JABS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-01041-7

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court abused its discretion in finding that the hearsay statements of three child victims reliable and admissible under the child hearsay statute?

2. Whether double jeopardy concerns were foreclosed by a comprehensive multiple-acts instruction and by the prosecutor's clear election of which alleged acts went to which counts?

3. Whether counsel was ineffective for not seeking a defense instruction that would have contradicted the defense theory and Jabs' own testimony?

4. Whether jury unanimity was compromised when several acts and statements were used to establish a single count of communicating with a minor for immoral purposes?

5. Whether a condition of sentence prohibiting Jabs from accessing social media should be stricken (CONCESSION OF ERROR)?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Stephen Robert Jabs was originally charged by information filed in Kitsap County Superior Court with three counts of rape of a child first degree. CP 1-4. A first amended information later charged 16 counts,

including eight counts of rape of a child first degree, six counts of child molestation first degree, and two counts of gross misdemeanor communication with a minor for immoral purposes with the sexual assault counts including special allegations of ongoing pattern of sexual abuse and use of a position of trust. CP 163-178.

The case proceeded to trial under a second amended information that charged as follows: Count I, rape of a child first degree against CG with special allegation of using a position of trust; Count II, rape of a child in the first degree against CG with special allegation of use of a position of trust; Count III, rape of a child first degree against KH with special allegations of ongoing pattern of sexual abuse and use of a position of trust; Count IV, child molestation first degree against KH with special allegation of ongoing pattern of sexual abuse and use of position of trust; Count V, child molestation first degree against HH with special allegations of ongoing pattern of sexual abuse and use of a position of trust; Count VI child molestation first degree against HH with special allegations of ongoing pattern of sexual abuse and use of a position of trust; Count VII, rape of a child first degree against JJ with special allegations of domestic violence, ongoing pattern of sexual abuse, and use of a position of trust; Count VIII, child molestation first degree against JJ with special allegation of domestic violence, ongoing pattern of sexual

abuse, and use of a position of trust; Count IX, rape of a child first degree against KK with special allegations of ongoing pattern of sexual abuse and use of a position of trust; Count X, child molestation first degree against KK with special allegations of ongoing pattern of sexual abuse and use of a position of trust; Count XI, communication with a minor for immoral purposes against KK; Count XII, communication with a minor for immoral purposes against HH. CP 226-37. The trial court dismissed Count XII. CP 242.

Pretrial, a child hearsay hearing was held based on the state's offer of hearsay statements from KK, KH, and CG made to their mothers and a forensic child interviewer. CP 301. That hearing lasted six days. CP 300; (testimony and argument in five volumes of the report of proceedings—1RP, 2RP, 3RP, 4RP, 5RP; trial court's oral ruling at 6RP 903-10).¹ The trial court entered Findings of Fact and Conclusions of Law for Hearing on Child Hearsay. CP 300. After full consideration of the *Ryan* factors², the trial court allowed the proffered hearsay concluding that the time, content, and circumstances of the statements evidenced reliability. CP 303.

The trial court entered Findings of Fact and Conclusions of Law

¹ This brief will follow the volume numbers used by the court reporter.

² *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1989).

for Hearing on CrR 3.5, ruling that Jabs' statements to police are admissible. CP 223.

Other pretrial motions and hearings in the case are not relevant to the issues raised.

The jury convicted Jabs on all eleven counts. CP 282-85. The jury gave affirmative answers on all of the special allegations. CP 286-97.

Jabs was sentenced to 491.5 months concurrent on counts I-X. CP 309. The trial court entered Findings of Fact and Conclusions of Law for Exceptional Sentence in support of this exceptional sentence. Supp.CP 335. Therein, the trial court ruled that the exceptional sentence is supported by substantial and compelling reasons--the jury findings of the special allegations or aggravating circumstances. Supp.CP 337.

The present appeal timely followed the entry of the Judgment and Sentence.

B. FACTS

1. Search warrant service and Jabs' statements to police.

The police had received a report regarding CG. 11RP 1787. CG was interviewed at the Kitsap County Prosecutor's Office Special Assault unit. 11RP 1788. That interview was recorded on a DVD. Id. Sometime later, Jabs name came up in a CPS referral: a mother, Brandy Welch, had failed to pick-up her daughter at school and Jabs was listed

as the emergency contact. 11RP 1789. Following the CPS meeting, police sought and received a search warrant for Jabs' home. 11RP 1791.

Several detectives were present when the warrant was served. 11RP 1793. Several detectives searched the residence while two detectives interviewed Jabs. 11RP 1794. Showing no force, the detectives had a relaxed conversation with Jabs. 11RP 1796. Jabs was told that the presence of the police and the warrant resulted from the report by CG. 11RP 1797.

Jabs claimed that he had not touched CG. *Id.* Jabs admitted that some of the girls he babysat would skinny-dip in his hot tub. 11RP 1799. They would also run around the house with no clothes on. 11RP 1809. Jabs admitted that he had bought a vibrator for one of the young girls, KK, because he had caught her using his back massager to rub her clitoris. 11RP 1800. Jabs described the item to the police. 11RP 1801. Jabs admitted that he had seen the girl use the vibrator. *Id.* He told KK that she had to ask for permission to use it and she was to use it in a locked bathroom only. 11RP 1802. After speaking to three adult women, Jabs took the vibrator away. 11RP 1802-03.

Jabs said that the vibrator was placed in a briefcase that also contained "anal toys and oil." 11RP 1803. Jabs claimed that these items were to pleasure himself. 11RP 1813. Jabs had told KH that if the thing hurt she could use the oil, but she declined. *Id.* Jabs admitted that when

the girls were around eight years old, he would discuss sex with them. 11RP 1804. Jabs volunteered that one of the girls had lost her virginity by sticking a crayon in her vagina. *Id.* Jabs claimed another girl, KH, had lost her hymen by falling and straddling the couch. 11RP 1805-06. Jabs claimed that HH had hurt herself on the monkey-bars at school causing blood in her underwear. 11RP 1807. Jabs comments about virginity and crouch injuries were not solicited by the interviewing officer. 11RP 1807.

After the police received more reports, Jabs was again interviewed. 11RP 1811. A girl had reported sucking on Jabs' penis, describing the penis as a lollipop. 11RP 1812. Jabs denied this report asserting that his penis doesn't work because he has "MS." 11RP 1812. But at one point he acknowledged that it could have happened if he was drunk but he quickly changed his mind and denied the allegation again. *Id.*

The search also revealed many photographs taken from a camera and a cell phone, and stored on DVDs, and "SD cards" (storage devices from a digital camera). 11RP 1815.

2. *Mandala Maitland and CLG.*

Mandala Maitland is CG's mother. 12RP 1890. She knew Jabs because she had gone to high school with his three daughters—Catherine Jabs, Stephanie Packard, Kimberly Packard. 12RP 1892. The women reconnected after they had children. 12RP 1894. Jabs' house became a

meeting place for all the mothers and kids for birthday parties and the like. 12RP 1895. They did anything a gandpa would do with a big family. Id.

Over time, CG spent more time at Jabs' house, including sleepovers that started when she was six months old. 12RP 1896-97. It was very common for the kids to spend the night there. 12RP 1897. When CG was four, she and her mother and brother lived with Jabs for a short time between residences of their own. 12RP 1898. Jabs seemed like a father to Ms. Maitland. 12RP 1902.

Ms. Maitland and the family were due to move to Florida. 12RP 1903. As Ms. Maitland drove CG for one last night with her grandmother, CG asked her mother if she knew "Papa Steve." Id. Ms. Maitland replied in the affirmative and CG said "Well he touched my pee-pee." 12RP 1903. Ms. Maitland tried to retain her composure and asked CG if she understood what she was saying. 12RP 1904. CG responded with the same remark "Papa Steve touched my pee-pee." Id. Asked whether she was asleep, the girl said she was on the couch with him and he was pretending to sleep and he touched her pee-pee. 12RP 1905. Mother asked whether it was an accident and CG said "no." Id. Mother asked whether it had happened before and CG related that it hurt when her pee-pee was dry but did not hurt as much in the hot tub because it was wet. 12RP 1905. She added that Jabs had moved her underwear when it was dry and hurt. 12RP 1921.

A couple of days earlier, Jabs had confided in Ms. Maitland that another girl, KK, had been using his back massager to masturbate and he did not want her using his massager so he bought her a vibrator. 12RP 1909. Ms. Maitland questioned that action and enquired as to whether he had told KK's mother. 12RP 1909. Ms. Maitland also remembered that a couple of days before CG's disclosure she had been at Jabs' when KK was pestering him about wanting her toy. 12RP 1911-12. Jabs told her to "just stop." Id.

Ms. Maitland contacted the SANE nurses at the hospital. 12RP 1914. CG was examined the next day. 12RP 1915. There were no findings from that exam. 12RP 1924.

Ms. Maitland contacted Jabs' daughter Kimberly and told her of CG's disclosure. Id. The day after the SANE exam, Ms. Maitland called the police. 12RP 1917. The day after that, CG was interviewed at the Special Assault Unit. 12 RP 1917-18.

Ms. Maitland had previously heard from Jabs that he did not like to babysit boys because they drive him nuts. 12RP 1921.

CG testified at trial that "I was laying on the couch, and then Steve touched my privates." 12RP 1970. When asked "Where was Papa Steve?" CG said "He was laying on the couch with me, and he touched my private, and that was really uncomfortable." Id. CG explained that her "privates" are "My pee-pee." Id. He touched her with his hand. 12RP

1971. His hand touched her pee-pee under her clothes. Id. It felt strange and she did not like it. Id. The touching scared CG. Id. She remembered seeing “dots” on the TV when it happened. 12RP 1972.

CG said that this happened more than one time. 12RP 1972. It happened on the couch and in the hot tub. 12RP 1973. In the hot tub, CG was sitting on Steve’s lap “and then he was just touching my privates, and I didn’t like it.” 12RP 1974. She tried to swim or paddle away but he was holding her too tight and “then I couldn’t get away from the hot tub.” Id. The feeling of being touched was different in the hot tub and on the couch. 12RP 1976. When asked if his hand was inside or outside her pee-pee, she responded “in.” 12RP 1976-77. And then she said “well, out and in...” 12RP 1977.

Karen Sinclair, the forensic child interviewer, (12RP 1993) interviewed CG. 12RP 2004. A video of the interview was admitted and played for the jury; the jury was given transcripts to read. 12RP 2006.

3. Brandy Welch

Ms. Welch and her three young children had lived with Jabs for a time. 13RP 2073. She was having financial difficulties and was preparing to move to Texas. 13RP 2073-74. Jabs knew her daughter because he was working in her kindergarten class. 13RP 2075. Jabs house seemed

like a good environment for her daughter. 13RP 2075. Jabs gave then the master bedroom saying that he always sleeps on the couch anyway. 13RP 2078. On weekends there were four or five female children there. 13RP 2087.

They comfortably lived with Jabs for about two weeks and then “things went crazy...” 13RP 2079. Jabs had told Ms. Welch that he had dated a nudist and was alright with nudity around the house. 13RP 2080. She noted that “the girls” would walk around nude. 13RP 2081. Jabs spoke to Ms. Welch about KK’s masturbation and the vibrator he had provided. 13RP 2081-82; 13RP 2084. When KK’s mother had been told about the vibrator, she was upset. 13RP 2086. Jabs referred to KK as a “horn dog.” 13RP 2093.

Jabs had told Ms. Welch that due to health problems his penis did not function. 13RP 2088-89. After failing to pick up her daughter at school on day, Ms. Welch went in for a meeting and was surprised to find Detective Baker present. 13RP 2090. She was questioned about what she knew about Jabs and his household. Id.

4. *Tiera Stefferud and KK*

Tiera Stefferud is KK’s mother. 13RP 2126. KK began going to Jabs’ house because her babysitter was friends with Jabs and asked Ms.

Stefferdud if she could have KK at Jabs' on the weekend. 13RP 2128. KK appeared to enjoy going there. 13RP 2129. Approximately six months later, Jabs asked if KK could come over without the babysitter. 13RP 2129. KK stopped going there when Jabs was arrested. 13RP 2131.

Jabs never spoke to Ms. Stefferud about the vibrator he bought for KK. 13RP 2132-33. After the arrest, KK told her mother that Jabs would hold the vibrator on her, sit on her face, and have her perform oral sex on him while he did so to her. 13RP 2133. First time it happened, Jabs told her that if she wanted to go in the hot tub that she would have to perform oral sex on him or "suck on his private part." 13RP 2133-34. When disclosing, KK was "very distraught." 13RP 2134. She was scared and felt like it was her fault; she thought she was in trouble. 13RP 2135.

KK testified at trial, recalling sleepovers at Jabs' house with HH, JJ, KH, and E. 13RP 2205. She recalled that when the girls went in the hot tub, some would be clothed but some would go skinny-dipping. 13RP 2205. She recalled that visits to Jabs' house stopped when she had to go somewhere and tell what happened and she came out crying. 13RP 2207. What happened was "he raped me." 13RP 2207. He would touch her with his hands and his private part. 13RP 2208. He touched her "rear end or somewhere else on the girl's body in front," not the chest. Id. At night he would touch her vagina with his hands. Id. He touched her rear and her

vagina with his penis. 13RP 2208-09. This happened more than once. 13RP 2209. On one occasion, she was on his bed laying down side by side with Jabs. 13RP 2210. He was facing her back as they lay. 13RP 2212. She described being on top of Jabs heads in different directions. 13RP 2213. She was sucking on his “dick.” 13RP 2213-14. He was licking her rear end and her vagina. 13RP 2214.

Sometimes this happened with just she and Jabs but sometimes HH was there too. 13RP 2214. So sometimes it was HH on top of him and the same thing that happened to KK happened to HH. 13RP 2215, 2216. Jabs had a “buzzy-toy” for KK and HH. 13RP 2219. Jabs had other similar things—“one that goes in the rear, and it had a remote control to it.” 13RP 2219. Jabs also used a back massager like he used the buzzy-toy. 13RP 2233. Both KK and HH rubbed themselves with the toy. 13RP 2220. KK identified a picture of the toy. 13RP 2221. They put slippery stuff on their privates so jabs’ penis would move faster. 13RP 2222. He moved it back and forth on top of KK’s and HH’s vagina’s. 13RP 2224. KK was too scared to tell. 13RP 2225. Jabs would ejaculate during these incidents, sometimes on KK and sometimes on HH. 13RP 2229-30.

KK recalled waking up at night and seeing Jabs watching sex on the computer. 13RP 2227. Sometimes she saw sex on the computer with Jabs and HH and sometimes he would leave and just KK and HH watched.

13RP 2228. Jabs put the sex stuff on the computer. 13RP 2229.

5. *LuVada Henehan and KH.*

Luvada Henehan is the mother of HH and KH. 14RP 2323. Ms. Henehan knew one of Jabs' daughters who also had a young daughter. 14RP 2325. KH started staying at Jabs' house at about seven months of age. 14RP 2325. KH appeared to enjoy staying at Jabs' House. 14RP 2326. KH and HH would be at Jabs' house almost every weekend. 14RP 2329. HH also appeared to enjoy being there. 14RP 2329-30.

Ms. Heneham was present when Jabs was arrested. 14RP 2332. Next day, she took KH and HH to the hospital to be examined. 14RP 2334. KH had not disclosed until after the forensic interview. 14RP 2348.

KH testified at trial that when she was little she spent every weekend at Jabs' house. 14RP 2390. She knew of Jabs' back massager and knew that HH used it "somewhere where it's kind of gross"; KH wrote down the word vagina. 14RP 2395-96. HH called her vagina "quantos." 14RP 2397. KH said that Jabs used the back massager on HH's quantos and on her. 14RP 2400. Jabs asked her if it felt good. 14RP 2404. She also saw it happen to JJ. 14RP 2405.

KH saw Jabs' privates at jabs' house. 14RP 2407. She was in the living room with HH and JJ. 14RP 2408. Jabs was on the couch "sleeping." 14RP 2408-09. HH and JJ pulled down his pants and "They

started sucking on his vagina.” 14RP 2409. It looked like a lollipop. Id. KH, HH, and JJ each sucked on it. 14RP 2410. Jabs never told KH’s mother about it. 14RP 2411.

Ms. Sinclair, the forensic child interviewer, testified at length about the conduct of her interviews with the children. 15RP 2539. Having spoken about CG’s interview earlier, she now discussed interviews of KH and KK. 15RP 2540. A video of KK’s interview was played for the jury. 15RP 2546. A video of KH’s interview was played for the jury. 15RP 2564.

III. ARGUMENT

A. THE TRIAL COURT’S UNCHALLENGED FINDINGS OF FACT SUPPORT ITS CONCLUSION THAT THE HEARSAY STATEMENTS WERE RELIABLE.

Jabs argues that the trial court abused its discretion by admitting hearsay statements of CG, KH, and KK. This claim is without merit because the trial court’s unchallenged findings support the trial court’s conclusions of law ruling that the statements were reliable.

A trial court's decision to admitted child hearsay is reviewed for abuse of discretion. *State v. Kennealy*, 151 Wn. App. 861, 879, 214 P.3d 200 (2009). Discretion is abused when a ruling is manifestly unreasonable or based on untenable grounds or reasons. 151 Wn. App. at 879.

By RCW 9A.44.120 child hearsay, otherwise inadmissible, is admissible if the trial court finds that the time, content, and circumstances of the statements provide sufficient indicia of reliability. To satisfy the confrontation right of the defendant, the child must either testify or be declared to be unavailable as a witness and with the unavailability there must be corroborative evidence.

In determining reliability, our Supreme Court requires consideration of the nine "*Ryan* factors." *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984). "No single *Ryan* factor is decisive and the reliability assessment is based on an overall evaluation of the factors." *Kennealy*, 151 Wn. App. at 881; *see also State v. Grogan*, 147 Wn. App. 511, 521, 195 P.3d 1017 (2008) (review was granted and the matter remanded for consideration of an issue not relevant to the present discussion) (factors substantially met where three factors militated against reliability). If the factors are "substantially met" then the statement is reliable. *Id.*, *citing, State v. Griffith*, 45 Wn. App. 728, 738-39, 727 P.2d 247 (1986). Further, "[A] child's competence to testify at trial is not relevant to the issue of

whether her hearsay statements are admissible.” *State v. Borboa*, 157 Wn.2d 108, 120, 135 P.3d 469 (2006).

The *Ryan* factors are:

- (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statements; (4) the spontaneity of the statements; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statement contained express assertions of past fact; (7) whether the declarant's lack of knowledge could be established through cross-examination; (8) the remoteness of the possibility of the declarant's recollection being faulty; and (9) whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement.

Ryan, 103 Wash.2d at 175–76, 691 P.2d 197. The trial court considered each of these factors in deciding the reliability of the proffered hearsay statements herein. CP 300 (Findings of Fact and Conclusions of Law for Child Hearsay (hereinafter “Findings and Conclusions”)); 6RP 903-10 (trial court’s oral ruling).

Typically, the trial court’s findings of fact are reviewed to determine whether or not they are supported by substantial evidence—enough to persuade a fair-minded person of the truth of the stated premise. *See State v. Hubbard*, __ Wn. App. __, ¶ 9, 402 P.3d 362 (2017). Jabs does not assign error to the trial court’s findings as required in order to assert that they were improperly made. RAP 10.3 (g). Further, with no assignment of error, the trial court’s findings are verities on this review.

Hubbard, ___ Wn. App. at ¶ 9, 430 P.3d 362, citing *State v. Valdez*, 167 Wn.2d 761, 767, 224 P.3d 751 (2009). Conclusions of law, when challenged, are reviewed de novo “to determine whether they are supported by the superior court’s findings of fact.” *Id.*

The task at hand, then, is to determine whether the trial court’s conclusions of law are supported by the verities in its findings of fact.³ *See Sunnyside Valley Irrig. Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.2d 369 (2004). The Findings and Conclusions recite that the child hearsay hearing was had on the state’s request to offer hearsay statements of KK, who was nine years old when the statements were made, KH, who was eight years old at the time of the statements, and CG, who was four years old when the statements were made. CP 301. The state sought to offer the hearsay through each girl’s mother and through the child forensic interviewer. *Id.* The trial court found that the three declarants were available as witnesses and that each had testimonial capacity. *Id.* It was found that each of the three statements contained allegations of sexual abuse by Jabs. *Id.* The trial court noted that each of the three declarants had testified and were each subject to cross-examination. *Id.* The trial court found that the time, content, and circumstances of each statement suggested reliability under RCW 9A.44.120. *Id.*

³ Jabs’ assignment of error questions the trial court’s conclusion that the hearsay was

1. Trial court's consideration of the *Ryan* factors

(a) Apparent motive to lie.

In Finding VIII, the trial court found that “no child exhibit a motive to lie about the events.” CP 301. The children in fact had a favorable impression of Jabs. Id. “There is no evidence of any motive to lie from the children.” Id. This lack of evidence must be here supported by the trial court's general assessment of the children during the hearing; we cannot point to specific instances of “no evidence.” Moreover, at no point in the trial court or in this appeal does Jabs assert or argue that the children had a motive to lie.

(b) General character of the declarants

Here, in Finding IX, the trial court found that “there is no evidence that any of the children had a general character for untruthfulness.” Again, no specific instances of “no evidence” may be briefed to support this finding. This factor again falls to the trial court's assessment of each witness. This factor looks to the child's reputation for truthfulness. *Kennealy*, 151 Wn. App. at 881. No testimony in the case bottoms an inference that these children had a reputation for falsehood.

(c) Whether more than one person heard the statements

reliable.

In Finding X, the trial court finds that CG disclosed to more than one person. *Id.* It was found that KK and KH did not disclose to more than one person but that finding did not detract from reliability. CP 301-02. In *Kennealy*, this Court opined that the factor was met where “each child told the accusations...to more than one person over time.” 151 Wn. App. at 883. Further, “when more than one person hears a similar story of abuse from a child, the hearsay statement is more reliable.” *Id.*, *citing*, *State v. Swan*, 114 Wn.2d 613, 651, 790 P.2d 610 (1990).

(d) Spontaneity of statements

In Finding XI it was found that CG’s statements to her mother were spontaneous. CP 302. KKK’s and KH’s statements were not spontaneous but this finding did not detract from the trial court’s conclusion of reliability. *Id.* In this context, spontaneity is broadly defined: Even “statements made in response to questioning are spontaneous so long as the questions are not leading or suggestive.” *Kennealy*, 151 Wn. App. at 883. The trial court expressly found that the defense expert’s assertions that the questioning was suggestive or tainted were “not convincing.” CP 302.

(e) Timing and relationship between declarant and witness

These factors are covered in Finding XII. CP 302. Since there was no time between the abuse and the disclosure with regard to CG, reliability is

enhanced. Id. And, although there was time between the disclosures of the other two, this is explained by the confusion, shock and disbelief of the mother's as shown by text messages between the mothers that were admitted at the hearing. Id. Here, the statements were made to the declarants' mothers and to the forensic interviewer. "When the witness is in a position of trust with a child, this factor is likely to enhance the reliability of the child's statement." 151 Wn. App. at 884. Even with strangers like police, or nurses, or forensic interviewers "the children likely trusted them because of their authoritative position in the community and because the discussion took place in a trusting and clinical atmosphere." Id.

(f) Express assertions of past fact

The trial court found this to be a "neutral" factor. CP 302. The statements did contain such assertions but this did not affect the conclusion of reliability. Id. Courts have found this factor to be inapplicable: In *State v. Strange*, 53 Wn. App. 638, 644, 769 P.2d 873 (1989), *review denied*, 113 Wn.2d 1007 (1989), it was noted that all such situations will include such assertions. Indeed, more recently this court said that "this factor is of little use in the child sexual abuse hearsay context..." *Kennealy*, 151 Wn. App. at 882.

(g) Whether lack of knowledge could be established by cross-

examination

As noted, the three declarants testified and were subject to cross-examination. In Finding XIV, the trial court notes inconsistencies in the statements. *Id.* However, it was found that the inconsistencies belie that the statements were contrived or premeditated. *Id.* This factor did not detract from the conclusion of reliability under RCW 9A.44.120. *Id.* Moreover, in Finding XV, the trial court found that the cross-examination of the children did not reveal a lack of knowledge. *Id.*

(h) Remoteness of the possibility of the declarant's recollection being faulty

Finding XVI finds the likelihood of faulty recollection is remote. CP 302. Although their recollections were not precise, this did not detract from the conclusion of reliability. *Id.*

(i) Whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement.

Here, the trial court found that "there is no evidence that the children misrepresented the Defendant's involvement." Finding XVII; CP 302. Further, "as noted in Finding VIII, the children appeared to have a favorable impression of the Defendant..." *Id.* Again, we cannot review specific instances of "no evidence," this factor is resolved by the trial

court's assessment of the witnesses before it. Further, it is manifest in the record that the children did indeed have a favorable impression of "Papa Steve." Also, in Finding XVIII, the trial court expressly finds that Dr. Whitehill's testimony that the children's statements were tainted by suggestive or leading questioning is "not convincing." CP 302. Further, there is "no evidence that the children were badgered into making any statements." CP 302-03.

From these finding the trial court ruled, concluding that the time, content, and circumstances of the statements evidenced reliability as to each declarant. CP 303. This conclusion applied to each statement to the forensic child interviewer. Id.

In this appeal, Jabs questions the trial court's conclusion by attempting to contradict the trial court's unchallenged findings. Jabs never in fact ties these perceived contradictions to any of those unchallenged findings. Regarding CG, Jabs argues that there was no corroboration. Brief at 58. But CG testified and under the statute no corroboration is required; such is only required if the witness is unavailable. RCW 9A.44.120 (2). Moreover, it is unremarkable that the admission of this reliable hearsay bolstered CG's credibility. Brief at 58. RCW 9A.44.120 is not concerned with credibility. Reliability under the statute affects admissibility of the hearsay. The trier of fact decides what weight and credibility to give the

evidence. Jabs argues apples about oranges.

Similarly, Jabs argues against the trial court's conclusion regarding the admissibility of KH's statements by again asserting the primacy of credibility in this case. Brief at 59. Again, the trial court was not charged with the duty to find that KH's hearsay statements were credible or not. That task, as always, falls to the trier of fact.

Finally, regarding KK, the same bolstering of credibility argument is asserted. Brief at 61. The same answer applies. The admissibility of these statements simply does not depend on the trial court's assessment of credibility.

The finding of reliability does not require precision in the testimony nor absolute precision in the application of the *Ryan* factors—the factors need be “substantially met” only. *Kennealy*, 151 Wn. App. at 881. Here, they were substantially met. The case partakes of the sentiment expressed by this Court some years ago:

Particularly when the accused resides with the victim or has virtually unchecked access to the child, and the abuse has occurred on a regular basis and in a consistent manner over a prolonged period of time, the child may have no meaningful reference point of time or detail by which to distinguish one specific act from another. The more frequent and repetitive the abuse, the more likely it becomes that the victim will be unable to recall specific dates and places. Moreover, because the molestation usually occurs outside the presence of witnesses, and often leaves no permanent physical evidence, the state's case

rests on the testimony of a victim whose memory may be clouded by a blur of abuse and a desire to forget.

State v. Brown, 55 Wn. App. 738, 746-47, 780 P.2d 880 (1989) (citation and page-breaks omitted), *review denied*, 114 W.2d 1014 (1990).

Jabs had unfettered access to these victims. He created an environment where he could repeatedly abuse and sexualize these children. The trial court's conclusion that the children's out-of-court disclosures are reliable was not based on improper or untenable grounds. There was no abuse of discretion and this issue fails.

B. DOUBLE JEOPARDY CONCERNS WERE FORECLOSED BY THE JURY RECEIVING BOTH A CLEAR MULTIPLE ACTS INSTRUCTION AND A CLEAR AND UNAMBIGUOUS ELECTION BY THE PROSECUTOR.

Jabs next claims that the jury was not adequately instructed on the multiple counts herein raising concern that the jury may have violated double jeopardy by finding guilt on multiple counts from a single criminal act. This claim is without merit because the jury was provided with a clear and un-confusing multiple acts instruction and because the prosecutor clearly and unambiguously advised the jury which act applied to which count.

Jury instructions must clearly convey the law: "They must make the relevant legal standard manifestly apparent to the average juror." *State v. Borsheim*, 140 Wn. App. 357, 366, 165 P.3d 417 (2007). "Accordingly

if it is not manifestly apparent to a criminal trial jury that the State is not seeking to impose multiple punishments for the same offense, the defendant's right to be free from double jeopardy may be violated.” 140 Wn, App at 367, *citing State v. Noltie*, 116 Wash.2d at 848–49, 809 P.2d 190. Review is de novo: the reviewing court considers the evidence, arguments, and instructions in decide the manifestly apparent question. *State v. Mutch*, 171 Wn.2d 646, 664, 254 P.3d 803 (2011).

Here, the jury instructions made it manifestly apparent that the state was not seeking multiple punishments for the same offense. First, the jury was instructed that Jabs’ not guilty plea “puts in issue every element of the crime charged” and requires the state to prove “each element of each crime beyond a reasonable doubt.” CP 251 (instruction 3). Second, the jury was instructed that

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

CP 255 (instruction 7). Finally, the jury was given a comprehensive multiple acts instruction

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.

The State alleges 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 (instruction 8).

Instruction 8 is a combination of WPIC 4.25 and WPIC 4.26. The first section is a direct paraphrase of WPIC 4.26; the second section similarly tracks WPIC 4.25. The unbinding comment provides that “If the instruction is being modified for multiple counts, then the instruction needs to clearly require unanimity for one particular act for each count charged.” 11Washington Practice, Washington Pattern Jury Instructions—Criminal, Comment to WPIC 4.25 (3rd Ed. 2008). It should be noted that the language of these instructions does not include the words “separate and distinct.” The comment does, however, advocate that if there is more than one count of the crime, “then the to-convict instructions need to clearly distinguish the acts that the jurors may consider for each count.” *Id.* No authority is noted for this suggestion. In the present case, that was not done. However, when the instructions here recited are read together they make it manifestly apparent to the jury that it must both find one act per count and that that act must be unanimously found.

In *State v. Borshiem*, 140 Wn. App. 357, 165 P.3d 417 (2007), the jury was instructed that

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

140 Wn. App. at 364 (emphasis by the court). This instruction was infirm because “neither this instruction, nor any other, informed the jury that each “crime” required proof of a different act.” *Id.* at 367. This infirmity is easily seen in the failure to refer to any count or crime in the italicized clause. In contrast, the present instruction not only required the finding of a specific act but also required that the particular act be tied to a particular count.

The Washington Supreme Court has never held that a modified *Petrich* instruction is required in cases where there is exact congruence between the number of incidents shown and the number of charges. *State v. Carson*, 184 Wn.2d 207, 222, 357 P.3d 1064 (2015). Nor has that court or the WPICs “provided an example of a multicount variation on the *Petrich* instruction.” 184 Wn.2d at 224. Moreover, such instructions are unnecessary when the state elects which acts it relies on for conviction on each count. 184 Wn.2d at 227. “[A]n election can be made by the

prosecuting attorney in a verbal statement to the jury as long as the prosecution “clearly identifie[s] the act upon which” the charge in question is based. *Id.*, citing *State v. Thompson*, 169 Wn. App. 436, 474-75, 290 P.3d 996 (2012) (bracket by the court). Finally, there is no authority found that requires a trial court in a multiple act case to include the phrase “separate and distinct” in its jury instructions. *See State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996) *review denied* 130 Wn.2d 1013 (1996) (“The trial court must also instruct the jury that they must be unanimous as to which act constitutes the count charged and that they are to find “separate and distinct acts” for each count when the counts are identically charged.”).

There are, then, at least three ways in which double jeopardy concerns are alleviated in a multiple-count case: by congruence of acts and charges, by the prosecutor’s clear election of which acts apply to which charge, and by modified *Petrich* instruction. Each is an acceptable method as long as it is manifestly apparent to the jury that a conviction must be based on one criminal act. *See also State v. Land*, 172 Wn. App. 593, 600-04, 295 P.3d 782 (2013), *review denied*, 177 Wn.2d 1016 (2013) (if evidence, argument, and instructions create clear distinction between different crimes, there child molestation and child rape, it is manifestly apparent that state was not seeking multiple punishment for same offense).

The prosecutor's election herein served to bolster instruction 8. Regarding counts I and II, which are about CG, the prosecutor first placed the acts within the charging date range. 20RP 3512. Count I involved the couch incident when CG was sleeping on the couch and Jabs was pretending to sleep and "he puts his hand in her underwear both outside and inside of her pee-pee, and it hurt." 20RP 3514. And count II was supported by "She described the same thing happened to her when she was in the hot tub." Id.

Counts III and IV related to KH. The prosecutor referred to count III as the lollipop incident. 20 RP 3516. More, "so the sexual intercourse would be the defendant's penis going inside the girl's vagina...not vagina, the mouth." 20RP 3519. Count IV is the use of the back massager on her "quantos." 20RP 3516, 3519.

Counts v. and VI related to HH. Count v. is HH lying with Jabs as he uses gel and puts his penis on top of her private and moves it back and forth. 20RP 3520. Count VI entails the incident when HH and the others are "sucking on the defendant's penis like it was a lollipop." 20RP 3520.

Counts VII and VIII are about JJ. Count VII is the lollipop incident. 20RP 3523. Count VIII is from Jabs using the back massager on JJ also. Id.

Finally, counts IX and X are about KK. Count IX is when they are

“in the bedroom lying on top of each other, and she is sucking on his penis and he is licking her vagina...” 20RP 3524. Count X involves lying together where “she was facing away, and he was facing her back, and he had his penis between her legs above her vagina and he is moving it back and forth with the white gel to make it go faster.” 20RP 3524.

Thus Jabs was protected from double jeopardy by both the modified *Petrich* instruction and by a clear elections of which facts support which count. Also, in this record it can be seen that each allegation made by the child-victims was a charge against Jabs. There was congruence between the incidents and the charges. On this de novo review, the evidence, instructions, and arguments made it manifestly apparent that each count required one distinct act and that guilt required unanimity on each count.

C. SINCE A LACK-OF-CONSCIOUSNESS INSTRUCTION WOULD HAVE BEEN CONTRADICTORY TO JABS’ DEFENSE THEORY AND UNDERCUT JABS’ OWN TESTIMONY, IT WAS A PROPER TACTICAL DECISION TO NOT SEEK THAT INSTRUCTION.

Jabs next claims that trial counsel was ineffective because he did not seek a lack-of-consciousness instruction with regard to the fellatio incident on the living room couch. This claim is without merit because although the defense may assert inconsistent defenses, nothing compels a

particular defendant to do so. Thus the question is a classic example of trial tactics.

Ineffective assistance claims are reviewed de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). In order to overcome the strong presumption of effectiveness that applies to counsel's representation, Jabs bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). To establish the prejudice prong of the test, Jabs must show that "there is a reasonable possibility that, but for counsel's errors, the

result of the trial would have been different.” *Strickland*, 466 U.S. at 687; *Hendrickson*, 129 Wn.2d at 78.

A criminal defendant has the right to present his defense. *State v. Hudlow*, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). “Due process requires that jury instructions (1) allow the parties to argue all theories of their respective cases supported by sufficient evidence, (2) fully instruct the jury on the defense theory, (3) inform the jury of the applicable law, and (4) give the jury discretion to decide questions of fact.” *State v. Koch*, 157 Wn. App. 20, 33, 237 P.3d 287 (2010), *review denied*, 170 Wn.2d 1022 (2011).

A criminal defendant may argue inconsistent defenses that are supported by substantial evidence. *State v. Frost*, 160 Wn.2d 765, 772, 161 P.3d 361 (2007), *cert. denied* 552 U.S. 1145 (2008). Defense counsel’s arguments can be limited to arguing facts in evidence and the law as set forth in the jury instructions. *Id.* But “trial courts cannot compel counsel to reason logically or draw only those inferences from the given facts which the court believes to be logical.” 160 Wn.2d at 772 (internal quotation omitted), *citing City of Seattle v. Arensmeyer*, 6 Wn. App. 116, 121, 491 P.2d 1305 (1971).

Volition or consciousness are not elements of child rape and the

state has no burden of proving the same beyond a reasonable doubt. *State v. Deer*, 175 Wn.2d 725, 733, 287 P.3d 539 (2012). As with involuntary intoxication, insanity, and unwitting possession, lack-of-consciousness is an affirmative defense which the defendant must establish by a preponderance of the evidence. 175 Wn.2d at 733. As the Supreme Court’s analysis of affirmative defenses shows, Jabs would be asserting, had he advanced this defense, that the fellatio actually occurred but that he is not criminally responsible because he was not conscious when it happened. *Id.* at 735; *see State v. Riker*, 123 Wn.2d 351, 367-68, 869 P.2d 43 (1994) (an affirmative defense, there duress, “admits that the defendant committed the act, but pleads an excuse for doing so.”); *see also State v. Frost*, 160 Wn.2d 765, 776, 161 P.3d 361 (2007), *cert. denied* 552 U.S. 1145 (2008).⁴ (defendant must admit the act but need not concede the crime). Moreover, the *Deer* Court noted that such a defense is “unusual and counterintuitive” and that “involuntary conduct is a statistical and subjective abnormality.” 175 Wn.2d at 740.

Many decisions by trial counsel are tactical. Where a legally permissible alternative defense exists, these decisions will always be subject to question post hoc. Moreover, on claims such as the present one,

⁴ *State v. Frost* ended up before the United States Supreme Court by way of lengthy Habeas Corpus proceedings—*Glebe v. Frost*, ___ U.S. ___, 135 S.Ct. 429, 190 L.Ed2d 317 (2014). That litigation does not affect the propositions here argued.

even the most focused hindsight cannot reveal the interactions of defendant and defense counsel. The result is that on review a defendant's rejection of a particular defense during such interaction will never be of record unless trial counsel made a record of such rejection, which he need not do. Here, as noted above, an assertion of the affirmative defense of lack-of-consciousness would allow that the fellatio in fact occurred but that Jabs is not legally responsible because he was asleep. Taking that position would be contrary to all other aspects of his trial strategy.

Jabs' defense theory was denial—"He didn't touch them improperly." 11RP 1772 (defense opening). His denial is based upon improper influence of the children by over-zealous adults: "This case is about a rush to judgment and kids who have been told things they shouldn't and improperly influenced." 11RP 1772 (which theory was repeated nearly word for word at the end of the defense opening, 11RP 1781). This theme repeats as counsel at one point refers to the prosecution of this case as a "witch hunt." 11RP 1774. Counsel for Jabs focused on some victims never saying he touched them and the other kids who denied abuse initially. *Id.* He notes the lack of physical evidence. 11RP 1774. He bolsters his primary theme of over-zealous adults by arguing that Dr. Whitehill "will opine that these kids were improperly questioned and the statements tainted—likely tainted." 11RP 1775.

Again, in closing argument, Jabs' defense is denial: "Mr. Jabs was nothing but a grandfather to these kids. He didn't touch them." 20RP 3541. "They [the girls] all denied at one time or another." Id. The over-zealous adult theme is seen again

Ladies and gentlemen, these kids at one point or another all denied sexual contact with Mr. Jabs. And the kids who are alleging or continuing to allege because of all this pressure, it's a snowball. It's something bigger than them.

20RP 3557-58. Counsel builds up Jabs' character, saying at one point

I mean, he raised these kids. You know, they were babies when he started interacting with them. They were part of his family. They were his kids. He acted toward them like a father or a grandfather would."

20RP 3545. Counsel spends many pages of transcript pointing out the inconsistencies and contradictions in the allegations. Regarding the fellatio incident that is the focus of the present issue, counsel says

KH states in the living room she saw HH and JJ pull down his pants and saw them sucking his private. According to HH and JJ, and I don't care what Ms. Lewis argues in terms of credibility, they got up on the stand and they testified that that never happened, they were never touched, and they never saw KH or KK or anybody else touched by him or other kids touching him. They never saw it."

20RP 3553-54. Further, "According to JJ, nothing happened when he was asleep." 20RP 3554.

Further, Jabs' own testimony places doubt on the use of this defense. 19RP 3332. Tepidly acknowledging the possibility of un-felt

fellatio because he sleeps soundly (Brief at 74) is hardly a ringing endorsement of the proposition advanced on this appeal that the fellatio happened but that Jabs slept through it. He admitted that he sleeps soundly after saying “I don’t buy that” to the idea that fellatio happened when he was asleep. 19RP 3332-33. Again, on cross-examination, Jabs was asked about his remarks on the point to interviewing detectives. 19RP 3396. He first said that could only happen if he was “three sheet to the wind.” Id. Then, Jabs added a denial: “And I believe I also said, “No, not even if I was three sheets to the wind.”” 19RP 3396. Thus Jabs twice denied that he could have slept through fellatio. Thus an instruction on lack-of-consciousness was not only unreasonably contradictory to the defense theory as seen in the defense opening and closing remarks but also contradicted the defendant’s own testimony.

Moreover, that exchange happens while Jabs is in the process of denying each specific allegation in turn. 19RP 3330-3333. Then, Jabs directly denies that he ever had sexual contact with any of the girls. 19RP 3333. He then similarly denies that they had sexual contact with him. 19RP 3333. But, in all, the point of the exercise is that the lack-of-consciousness defense was not merely inconsistent with his defense theory. Such a defense would be unreasonably contradictory to the actual theory advanced. This lack of reasonableness highlights that

this decision by the defense was tactical.

It is at difficult to see how an assertion that an instruction that Jabs' is not responsible for these little girls sucking on his penis would have changed the result of the decision on the counts related to the fellatio incident. First, it is manifest in this case that the jury gave Jabs no credibility. A reviewing court defers to the jury's credibility determinations. *See State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004) *abrogated in part on other grounds by Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). He was convicted as charged after a spirited defense that included direct denial of each allegation in Jabs' testimony. Second, after repeatedly claiming his love for these children, claiming that they were like his own children, claiming that his only motivation was to have a safe and happy place for them to stay, it once again is rather intolerably contradictory to admit that these safe and happy children would secretively give a 54 year old man fellatio while he slept. *See* 19RP 3286-87. No, Jabs' position throughout trial was that none of these sexual things happened and could not have happened because of his love and concern for them.

Due process requires that a defendant have the opportunity to argue his theory of the case. Lack-of-consciousness was not Jabs' theory of the case so the legal proposition is a bad fit. Similarly, since lack-of-

consciousness was not Jabs' theory of defense, a rule that finds ineffectiveness for failing to advance a jury instruction that supports a different defense theory is also a bad fit. Brief at 73, *citing State v. Thomas*, 1098 Wn.2d 222, 229, 743 P.2d 816 (1987). Counsel is ineffective if his performance falls below an objective standard of reasonableness. Here, the lack-of-consciousness defense was not objectively reasonable because contradictory to the actual defense theory and Jabs' own testimony. A competent trial lawyer would not place such a contradiction in the middle of his case. The performance of Jabs' counsel was not deficient in his tactical decision to not self-contradict the defense he was trying to build.

D. THE COMMUNICATION WITH A MINOR CONVICTION WAS PROPERLY SUPPORTED BY EVIDENCE OF A CONTINUING COURSE OF CONDUCT.

Jabs next claims that his conviction for communicating with a minor for immoral purposes is infirm because the jury was not properly instructed on the need for unanimity on that count. This claim is without merit because the state proved and argued a continuing course of conduct in various acts and spoken words done and uttered for immoral purposes.

The case proceeded to trial under the second amended information. CP 226. In count 11, Jabs was alleged to have, between the dates of

November 30, 2008 and September 29, 2014, communicated with KMK, a minor with a date of birth of 11/22/2004, “for immoral purposes of a sexual nature.” CP 236. The jury was instructed that

To convict the defendant of the crime of communicating with a minor for immoral purposes as charged in Count XI, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about or between November 20, 2008 and September 29, 2014, the defendant communicated with K.M.K. for immoral purposes of a sexual nature;
- (2) That K.M.K. was a minor; and
- (3) That this act occurred in the State of Washington.

CP 274 (instruction 25). The operative word “communicated” can be used in a singular or plural sense as in ‘she communicated her *ideas* to the group’ and ‘she communicated her *idea* to the group’ or, similarly, ‘she communicated her ideas *several times*’ and ‘she communicated her ideas *once*’. The word can either refer to continuing conduct or a singular act. Thus the necessity that the prosecution advise the jury which of these permutations is intended.

Here, the prosecution did just that: Jabs communicated with KK for immoral purposes of a sexual nature on an on-going basis or *several times*. The issue Jabs raises assumes that the word is being applied in a singular manner, *once*, and thus it is necessary that this one communication must be identified. Brief at 76 (“the jury must be

unanimous as to which act constitutes the crime”). Significantly, when the prosecutor advised the jury of the facts that support the communicating charge, she recited facts other than the facts supporting the sexual assault counts. 20RP 3525. In so doing, the prosecutor did in fact invite the jury to consider various different acts that constituted the on-going behavior of Jabs communicating with the child for immoral purposes of a sexual nature.

Since at least 1979, under the predecessor statute to RCW 9.68A.090, it has been consistently held that “the term “communicates” includes both a course of conduct and the spoken word.” *State v. Schimmelpfennig*, 92 Wn.2d 95, 100-01, 594 P.2d 442 (1979) (En Banc). This has not changed since then. In *State v. Flores-Rodriguez*, 196 Wn. App. 1033, __P.3d __ (2016) (UNPUBLISHED AND UNBINDING), the Court recently affirmed convictions for both communicating and sexual exploitation of a minor. The facts of that case indicate repeated electronic communications between the defendant and the victim. Nowhere in the decision is unanimity raised or discussed. Similarly, in *State v. Kang*, 158 Wn. App. 1024, __P.3d__ (2010) (UNPUBLISHED AND UNBINDING), convictions for two counts of communicating were affirmed where the conduct included sexually explicit conversations, solicitations of naked pictures from young girls, and sending them naked male pictures. *Id.* at 6.

The case involved multiple instances of sexualized “chatting” with minors on the internet. The case involved multiple acts of communication resulting in just two convictions. And nowhere does Kang or the Court argue or consider unanimity. This because all the instances together demonstrate on-going communication as allowed by the cases.⁵ *See also State v. Haack*, 158 Wn. App. 1018, 3 (ftnt. 3), __P.3d __ (2010) (UNPUBLISHED AND UNBINDING) (6 convictions based on 22 emails).

The state herein told the jury that count XI is “more of an overall behavior.” 20RP 2525-26. The charge included talking to a child about sexual matters, talking about condoms and keeping their legs together, included showing sexually explicit videos; also included talking about masturbation, and providing a vibrator for the purpose of masturbation. *Id.* In sum, the prosecutor described a course of conduct, including words and acts, that had as its purpose the sexualizing of the little girl in his care. The jury properly so found. There was no error.

E. THE CONDITION OF SENTENCE PROHIBITING ACCESS TO SOCIAL MEDIA WEBSITES SHOULD BE STRICKEN (CONCESSION OF ERROR).

Jabs next claims that that the condition of sentence prohibiting him

⁵ The decision does not indicate how the two communicating charges were differentiated,

from “joining or perusing public social websites”. CP 320. The argument has merit case.

Jabs correctly asserts that the United States Supreme Court’s holding in *Packingham v. North Carolina*, __U.S.__, 137 S.Ct. 1730, 198 L.Ed.2d 273 (2017) casts doubt on the validity of the type of prohibition placed on him. The state concedes that in this case there is no information that Jabs used the type of websites considered in *Packingham* to advance his sexual assaults. Were there such case-specific, crime-related facts, the decision would not foreclose this sort of prohibition.

The condition of sentence in Appendix F, 17 (CP 320) should be stricken.

IV. CONCLUSION

For the foregoing reasons, Jabs’s conviction and sentence should be affirmed.

e.g, by victim or by date range.

DATED October 16, 2017.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "John L. Cross". The signature is written in a cursive style with a large initial "J" and "C".

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KITSAP COUNTY PROSECUTOR'S OFFICE - CRIMINAL DIVISION

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