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Division II
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NO. 51298-0-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOHN MITCHELL BROOKS,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

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

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when, over defense objection, it allowed a witness to testify in a *Ryan* hearing via electronic means without first meeting the requirements of RCW 9AA.44.150, any other statute or any court rule.

2. The trial court erred when it gave a *Petrich* instruction that allowed the jury to convict the defendant of two counts of the same crime without jury unanimity on two separate events.

3. Trial counsel denied the defendant effective assistance of counsel when he failed to object to the state's rebuttal argument implying that the defendant had also sexually molested his younger daughter who was unable to verbalize any claims of that abuse.

Issues Pertaining to Assignment of Error

1. Does a trial court err in a criminal case if, over defense objection, it allows a witness to testify in a *Ryan* hearing via electronic means without first meeting the requirements of RCW 9AA.44.150, another statute or a court rule?

2. Does a trial court err if it gives a *Petrich* instruction that allows the jury to convict the defendant on two counts of the same crime without jury unanimity on two separate events?

3. In a case in which the state alleges that a defendant repeatedly raped his minor daughter, does a trial counsel's failure to object to a state's rebuttal argument implying that a defendant had also sexually molested his younger daughter who was unable to verbalize that claim deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when no evidence supports that argument?

STATEMENT OF THE CASE

Factual History

From May 20, 2015 to March 31, 2016, the defendant John Michael Brooks lived in an apartment at 5607 Finch Drive in Longview with his daughters AB and CB. RP VI & VII 119-124; RP VIII & IV 210-216, 218-238.¹ AB was born on September 9, 2009. RP VI & VII 126. During the time AB and her sister lived with the defendant, the girls' mother lived out of Washington State. RP VIII & IX 68-72. While living with the defendant on Finch Drive the girls would occasionally stay the night with the defendant's grandfather and step-grandmother Sherri Brooks. RP VI & VII 146-148. The defendant later moved to Virginia for work and left AB and her sister with his grandfather and Ms. Brooks. RP VI & VII 155.

According to Ms. Brooks, during one of their periodic overnight visits AB complained that her crotch and butt hurt. RP VI & VII 149-150. In response Ms. Brooks gave AB a bath and noted that AB's crotch area was red and raw. *Id.* AB then revealed to her step-grandmother that she and her father were routinely having "sex" and that her father wanted to keep this as their "secret." RP VI & VII 148-150. With no prompting from Ms

¹The record on review includes 10 volumes of verbatim reports. They are referred to herein as "RP Vol. # [page #]" or "RP Vol. #s [page #]".

Brooks, AB eventually described numerous occasions of fellatio, cunnilingus, penile-vaginal intercourse, digital-vaginal intercourse, penile-anal intercourse, and digital-anal intercourse with her father. RP VI & VII 156-163. Ms. Brooks later went to the police and reported what AB had told her. RP VI & VII 150-151. Ms. Brooks also noted that after the defendant moved to Virginia he would occasionally call AB via Skype. RP VI & VII 155. On one of these occasions when the defendant could not see that Ms Brooks was listening, he asked AB is she was still keeping their "secret." *Id.*

After Ms. Brooks revealed these claims of abuse to the police she took AB for an interview with John Hancock, a child forensics interviewer with the Children's Justice and Advocacy Center (CJAC) in Longview. RP VI & VII 174-177. According to Mr. Hancock he was unsuccessful in getting AB to reveal any of her claims of abuse to him. RP VI & VII 193-221. However, he did state that at one point he asked AB if her father ever hurt her and she responded with "no." RP VI & VII 225.

Once Ms. Brooks revealed AB's allegations against the defendant AB's mother Randi Brooks returned to Washington and took custody of AB and her sister. RP VII & VIII 68-79. After this reunion, AB repeated her claims of sexual abuse to her mother. *Id.* In addition, she revealed that her father had taught her how to use sex toys. *Id.* In fact, Randi Brooks did

occasionally find AB simulating sex play with toys. *Id.*

Following the unsuccessful interview with Mr. Hancock, AB returned to CJAC for an interview with forensic examiner Samantha Mitchell upon the belief that AB might be more open speaking with a woman. RP VIII & IX 228-241. During this first interview with Ms. Mitchell, AB repeated all of the claims of sexual abuse against her father that she had made to her step-grandmother Sherri Brooks. RP VI & VII 244-245; RP VIII & IX 1-48. This interview was recorded on video as was the interview with Mr. Hancock. RP VI & VII 185-186, 241.

Randi Brooks later took AB and her sister to live with her and other family members in Las Vegas. RP VIII & IX 98. Once in Las Vegas Ms Brooks had AB go to counseling with a psychologist by the name of Courtney Each. RP VIII & IX 98-109. Over numerous counseling sessions with Ms. Each, AB repeated the claims of sexual abuse she had made to her step-grandmother Sherri Brooks, her mother Randi Brooks, and child forensic interviewer Samantha Mitchell. RP VIII & IX 117-157.

Procedural History

By information filed September 22, 2016, and later amended, the Cowlitz County Prosecutor charged the defendant John M. Brooks with two counts of first degree rape of a child, alleging that between May 20, 2015,

and March 31, 2016, he had sexual intercourse with AB. CP 1-3, 34-36. The court subsequently held a *Ryan* hearing during which the state called six witnesses: (1) AB's therapist Courtney Each, (2) AB, (3) AB's mother Randi Brooks, (4) AB's step-grandmother Sherri Brooks, (5) John Hancock, a forensic examiner who had attempted to interview AB, and (6) Samantha Mitchell, a forensic examiner who had successfully interviewed AB. RP II-III 9-226.

AB's therapist Courtney Each testified at the *Ryan* hearing from Nevada via Skype, a telecommunications application software product that provides video and voice calls between computers, tablets, and other mobile devices. RP II-III 9. The defense objected orally and in writing to the court allowing Ms. Each to testify electronically. RP I 7-9; CP 17-19. Ms. Each and the other witnesses testified to the facts contained in the preceding factual history. *See Factual History, supra*. In addition, AB also testified and detailed her claims of abuse that she had made to her step-grandmother, her mother, Samantha Mitchell and Courtney Each. RP II & III 58-90.

Following this testimony and argument from counsel, the court ruled that Courtney Each, Randi Brooks Sherri Brooks, and Samantha Mitchell would all be allowed to testify to AB's claims of abuse to them and

that the video recordings of AB's claims to them would also be admitted into evidence. RP II-III 234-238. The court subsequently entered the following findings of fact and conclusions of law in support of its ruling:

THIS MATTER coming before the undersigned judge of the above entitled court on October 21, 2017, for a hearing , and the Defendant appearing in person and through counsel, THAD SCUDDER, and the Plaintiff appearing through Deputy Prosecuting Attorney, JASON HOWARD LAURINE, and the Court having considered the testimony of A.B., Samantha Mitchell, John Hancock, Randi Brooks, and Courtney Each, reviewed the recorded interviews of A.B., and having heard arguments and reviewing the Court filed, now, therefore makes the following:

I. FINDINGS OF FACT

1. The minor child was able to perceive and accurately relate information.
2. The statements regarding abuse were made by the minor child to four witnesses - Samantha Mitchell, Sherri Brooks, Randi Brooks, and Courtney Each.
3. All statements were made over a period of approximately one year, and were consistent.
4. The child also made corroborative statements to John Hancock.
5. John Hancock and Samantha Mitchell were both acting for law enforcement.
6. The statements A.B. made to Samantha Mitchell were spontaneous.
7. Sherri Brooks is A.B.'s step-grandmother.

8. It is clear A.B. trusts Sherri Brooks.

9. A.B.'s statements to Sherri Brooks were spontaneous and not responsive to questioning.

10. Randi Brooks is A.B.'s mother.

11. There is a relationship of trust between mother and daughter.

12. A.B.'s statements to Randi Brooks were spontaneous and not responsive to questioning.

13. Courtney Each is A.B.'s counselor. They have worked with each other since August 2016.

14. They have developed a relationship of trust.

15. A.B.'s statements to Courtney Each were spontaneous and not responsive to questioning.

16. Courtney Each was not employed by law enforcement but did discuss the court process with A.B.

17. The surrounding circumstances did not suggest any misrepresentation of the defendant's involvement.

18. The consistency of statements made by the minor child to the various witnesses established sufficient indicia of reliability.

19. The timing, content, and circumstances of the statements provide sufficient indicia of reliability.

20. Further corroborative evidence provided assurances of the veracity of the statements. A.B. demonstrated oral sex to both Sherri Brooks and Samantha Mitchell, and described the appearance of semen. Both indicate a precocious knowledge of sexual acts.

BASED ON THE FOREGOING Undisputed Findings of Fact, the

Court Now Enters the Following:

II. CONCLUSIONS OF LAW

1. The minor child, A.B. is competent to testify.
2. All statements made by A.B. to the various witnesses are admissible at trial.
3. The statements made to Samantha Mitchell, John Hancock, and Courtney Each are testimonial in nature.
4. The statements made to Randi Brooks and Sherri Brooks are non-testimonial.

CP 38-41.

On November 11, 2017, this case came on for trial before a jury. RP VI & VII 119. During that trial the state called eight witnesses, including AB, Sherri Brooks, John Hancock, Samantha Mitchell, Randi Brooks, and Courtney Each. RP IV & VII 119, 125, 145, 176, 228; RP VIII & IX 9, 68, 98. These witnesses repeated the testimony they had given during the *Ryan* hearing as noted in the preceding Statement of Facts. *Id.* In addition, the state called Monica Turk, who was the manager for the apartments the defendant rented in Longview in 2015 and 2016. RP VI & VII 119-124. She testified that the defendant lived at that location during the time alleged in the information with his two daughters, AB and AB's younger sister CB. *Id.* In addition the state called a Longview Police Department civilian employee

by the name of Hillary Hughes who took a telephone call during which the defendant stated that “They think I might have had sex with my daughter,” and that the allegation was that it had occurred at his apartment at 5607 Finch Dr. #131. RP VIII & IX 203-207.

After the state rested its case the defense called the defendant’s mother as its first witness. RP VIII & IX 210-216. The defendant then took the stand on his own behalf and denied all allegations of sexual abuse. RP VIII & IX 218-238. After the defense rested its case, the state called two brief rebuttal witnesses. RP VIII & IV 240-243. At this point the court instructed the jury without objection from either party. CP 90-108; RP X 19-32. The court included the following *Petrich* instruction:

Instruction No. 11

The state alleges that the defendant committed acts of Rape of a Child in the First degree on multiple occasions. To convict the defendant of Rape of a Child in the First Degree, as charged in count I, one particular act of Rape of a Child in the First degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. To convict the defendant of Rape of a Child in the First Degree, as charged in count II, one particular act of Rape of a Child in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Rape of a Child in the First Degree.

CP 103.

Although the state proposed and the court gave two separate “to convict” instructions for the two counts charged, the state’s proposed instruction on Count II and the instruction the court gave on Count II did not include any language indicating that in order to convict the defendant on that latter count the jury had to unanimously find that the act constituting that crime occurred on an occasion separate and distinct from the act constituting Count I. CP 60-61, 88-89.

After the court instructed the jury the parties presented closing argument. RP X 32-49, 52-68, 68-75. The state’s rebuttal argument included the following:

And let’s think about then why it is that over a period of time after she’s finally processed her feelings about this man who repeatedly raped her over a year, why it is that she’s scared for her little sister? This is a little girl who finally found her voice when she spoke with her grandmother after a couple of weeks of living there with her. This is a little girl who is finally processing and becoming able to talk to you people about it, about her feelings and about what happened to her. This is a little girl who has known her sister all her life, she has known that her sister has absolutely no voice, is incapable of talking.

So you ask why it is that she might be scared that the Defendant could do this to her little sister? Her sister can’t talk to you about what happened to her, that is why. She doesn’t want it to happen to her little sister because no one can defend her little sister. She is defending herself. She told you people what happened. She was terrified of doing so, and she still was able to tell you that she sucked his penis; that his penis went inside her vagina like this.

RP X 73-74.

In this case defense counsel did not object to this argument when the state made it. *Id.* However, as soon as the jury retired for deliberation, defense counsel moved for a mistrial based upon this portion of the state's rebuttal argument. RP X 78-79. Defense counsel stated:

MR. SCUDDER: -- didn't -- didn't want to interrupt Counsel during argument.

There was a portion of his rebuttal I was concerned about regarding her little sister could not tell what happened to her. This little girl who can't talk and I'm concerned that that's pretty inflammatory. I understand the context, but I still think it's too much so I'm going to object and ask for a mistrial. I'm not really sure what kind of curative instruction could cure that. Thank you.

RP X 78-79.

The trial court denied the motion. RP X 80-81.

The record reveals that the jury retired for deliberation at 11:39 am.

RP X 82. At 2:03 pm that afternoon, the jury sent out the following question:

Instruction 9 mentions Count I, Instruction 10 mentions Count II - with exception of Count I, Count II They read exactly the same. Instruction No. 11 reads the same for count I and count II. What is the difference between Count I and Count II? Thank you.

CP 87.

Following discussion on the jury's question, the court withdrew its

original Instruction No. 10 (the “to convict” instruction on Count II) and replaced it over defense objection with the following instruction:

I am withdrawing instruction number 10, which I gave you earlier. This means that you are not to consider that instruction for any reason. The bailiff will remove [all copies of] it from the jury room. If you have formed any opinion or conclusion based on the withdrawn instruction, you must reconsider the issues before you without regard to the withdrawn instruction. Instead of instruction number 10, I am given you the following corrected instruction to replace it in your deliberations:

To convict the defendant of the crime of rape of a child in the first degree in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on, about, or between May 20, 2015 and March 31, 2016, on an occasion separate and distinct from Count I, the defendant had sexual intercourse with [AB];

(2) That [AB] was less than twelve years old at the time of the sexual intercourse and was not married to the defendant or in a stated registered, domestic partnership;

(3) That [AB] was at least twenty-four months younger than the defendant; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements had been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Consider the instruction that I just gave you along with all of

the other instructions that I have given you. Do not attach special importance to the fact that this instruction as substituted for the previous one or that it was read separately to you.

You will now return to the jury room to continue your deliberations.

CP 102 (first brackets in original, all other brackets added).

Following further deliberation the jury returned with guilty verdicts on both counts. RP X 99-100; CP 110-111. After polling, the court accepted the verdicts, released the jury and ordered a pre-sentence investigation report. RP X 101-105, 105-109.

The parties returned to court on December 19, 2017 for sentencing. RP I 20-39. At that time the court imposed concurrent sentences of life in prison on each count and set a mandatory minimum sentence of 318 months on each count concurrent, which was at the top of the standard range. CP 127-142; RP I 20-39. The defendant thereafter filed timely notice of appeal. CP 145.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN , OVER DEFENSE OBJECTION, IT ALLOWED A WITNESSES TO TESTIFY IN A RYAN HEARING VIA ELECTRONIC MEANS WITHOUT FIRST MEETING THE REQUIREMENTS OF RCW 9A.44.150, ANOTHER STATUTE OR ANY COURT RULE.

Under the rules for civil procedure there is a provision that grants the trial court authority to allow for electronic testimony at trial if the proponent of that evidence meets certain requirements. This rule, CR 43(a)(1), states as follows:

(a) Testimony.

(1) Generally. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise directed by the court or provided by rule or statute. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

CR 43(1)(a).

Although there are many complimentary provisions with the civil rules and the criminal rules, there is no criminal equivalent to CR 43(a)(1). In addition, while “the civil rules can be instructive in matters of procedure for which the criminal rules are silent,” the civil rules apply only to civil cases; they do not apply in criminal cases. *State v. Gonzalez*, 110 Wn.2d 738, 744, 757 P.2d 925 (1988) (citing 4A L. Orland & D. Dowd, Wash.Prac., Rules Practice §§ 6101, 6142 (3d ed. 1983) and *Mark v. KING Broadcasting*

Co., 27 Wn.App. 344, 349, 618 P.2d 512 (1980), *aff'd on other grounds*, 96 Wn.2d 473, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124, 102 S.Ct. 2942, 73 L.Ed.2d 1339 (1982)). Thus, in the case at bar, the trial court's decision to allow electronic testimony from Courtney Each at the *Ryan* hearing cannot be justified under CrR 43(a)(1).

By contrast, in criminal cases, electronic testimony is allowed only in certain instances under RCW 9A.44.150. Section (1)(a) of this provision states:

(1) On motion of the prosecuting attorney in a criminal proceeding, the court may order that a child under the age of fourteen may testify in a room outside the presence of the defendant and the jury while one-way closed-circuit television equipment simultaneously projects the child's testimony into another room so the defendant and the jury can watch and hear the child testify if:

(a) The testimony will:

(i) Describe an act or attempted act of sexual contact performed with or on the child witness by another person or with or on a child other than the child witness by another person;

(ii) Describe an act or attempted act of physical abuse against the child witness by another person or against a child other than the child witness by another person;

(iii) Describe a violation of RCW 9A.40.100 (trafficking) or any offense identified in chapter 9.68A RCW (sexual exploitation of children); or

(iv) Describe a violent offense as defined by RCW 9.94A.030

committed against a person known by or familiar to the child witness or by a person known by or familiar to the child witness;

RCW 9A.44.150(1)(a).

There is an interesting difference between CR 43(a)(1) and RCW 9A.44.150(1)(a) in the scope of the rule as opposed to the scope of the statute. Under the specific language of the former, the civil rule specifically limits its application to “testimony” at “trials.” It does not appear to apply to testimony given during hearings. By contrast, RCW 9A.44.150 has no such limitation. This statute applies to “testimony” at all “criminal proceedings,” given by a child “under the age of fourteen,” not just “testimony” given at “trials.” Thus, in the case at bar, the statute would also apply to “testimony” given in a *Ryan* hearing.

In the case at bar, the statute might have allowed for the electronic presentation of AB’s testimony since she was under the age of fourteen, provided the other requirements of the statute were met. However, it can not be used as a basis to present therapist Courtney Each’s electronic testimony at the *Ryan* hearing. Rather, the state was simply asking the court to allow electronic testimony because it didn’t want to put Ms. Each or itself to the inconvenience of bringing her to Washington for the *Ryan* hearing. Thus, in this case, neither CR 43(a)(1) nor RCW 9A.44.150

authorized the court to allow Ms. Each's electronic testimony at the *Ryan* hearing, particularly given the fact that the defense specifically objected to this procedure, arguing that there was no court rule or statute that relieved the state of its burden of presenting live testimony. CP 17-19.

In the case at bar the trial court allowed four separate witnesses at trial to testify at length concerning the claims of sexual abuse that AB made against her father. These witnesses were: (1) Sherri Brooks, AB's step grandmother; (2) Samantha Mitchell, a child forensic interviewer, (3) Randi Brooks, AB's mother, and (4) Courtney Each, AB's therapist. RP VI & VII 145-174, 228-245; RP VIII & IX 13-66, 98-202. The court found this evidence admissible after the *Ryan* hearing it held during which the court erroneously allowed Courtney Each to testify electronically. Thus, since the trial court erred in allowing Ms. Each's electronic testimony as just explained, the trial court also necessarily erred when it allowed this witness to testify to AB's statements to her.

In this case at bar the only evidence supporting the state's claim that the defendant committed the crimes of first degree rape of a child came from AB's claims on the witness stand and the testimony of the four witnesses who testified to AB's claims to them. Ms. Each's testimony concerning AB's statements was by far the most comprehensive and

compelling. In fact, she testified to many hours of therapy over a number of months during which AB detailed her claims of abuse far beyond what she said to the other witnesses. In addition, in spite of AB's allegations of repeated, extremely painful penile and digital penetration both of the anus and the vagina, the state did not present any medical testimony concerning the results of any physical examination of AB, or any medical testimony to explain any negative results of such an exam if one was ever taken. Thus, absent the bolstering to AB's testimony that occurred through Ms. Each's detailed testimony, it is likely the jury would have acquitted the defendant based solely upon AB's claims and those of the remaining witnesses to AB's claims. Consequently, the erroneous admission of Ms. Each's testimony should compel this court to reverse the defendant's conviction and remand for a new trial.

II. THE TRIAL COURT ERRED WHEN IT GAVE A *PETRICH* INSTRUCTION THAT ALLOWED THE JURY TO CONVICT THE DEFENDANT OF TWO COUNTS OF THE SAME CRIME WITHOUT JURY UNANIMITY ON TWO SEPARATE EVENTS.

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

Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); *State v. Allen*, 57 Wn.App. 134, 137, 787 P.2d 566 (1990)). As the court stated in *Kitchen*, “[w]hen the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act. *Kitchen*, at 409 (citing *State v. Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984)). Failure to follow one of these options is constitutional error and may be raised for a first time on appeal, even though the defense fails to request either option at trial. *State v. Gooden*, 51 Wn.App. 615, 754 P.2d 1000 (1988).

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

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

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

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

In the case at bar, the state charged the defendant by amended information with two counts of first degree rape of a child against AB, with both counts of rape alleged to have occurred between "5/20/15 and 3/31/16." CP 34-35. In its case-in-chief, the state presented evidence that the defendant committed separate and distinct sexual crimes against AB including multiple acts over 10 months period of fellatio, cunnilingus,

penile-vaginal intercourse, penile-anal intercourse, digital-vaginal intercourse, and digital-anal intercourse. Given these allegations and the evidence of multiple acts that could form the basis of either count charged, the law required the court to instruct the jury to agree on a specific criminal act for each count. The court attempted to do so with the following instruction:

Instruction No. 11

The state alleges that the defendant committed acts of Rape of a Child in the First degree on multiple occasions. To convict the defendant of Rape of a Child in the First Degree, as charged in count I, one particular act of Rape of a Child in the First degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. To convict the defendant of Rape of a Child in the First Degree, as charge in count II, one particular act of Rape of a Child in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Rape of a Child in the First Degree.

CP 103.

The error in this instruction is that it fails to tell the jury that in order to convict the defendant in Count II, “a particular act of Rape of a Child in the First Degree *different from the particular act alleged in count I* must be proved beyond a reasonable doubt.” (emphasis language added). In fact, the way the instruction reads makes no requirement at all that the jury

make a unanimous findings of more than one act of sexual intercourse. As such, this instruction fails to meet the unanimity requirements under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, as set out in *State v. Petrich, supra*.

As was set out in the prior argument, the only admissible evidence presented at trial to support the state's allegations of abuse was AB's claims that the abuse occurred. No medical evidence was presented and no evidence was presented to explain that absence of any medical evidence. Thus, in this case the state cannot meet its burden of proving beyond a reasonable doubt that but for this error the jury would still have convicted the defendant. As a result, this court should reverse the defendant's convictions and remand for a new trial.

III. TRIAL COUNSEL DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL WHEN HE FAILED TO OBJECT TO THE STATE'S REBUTTAL ARGUMENT IMPLYING THAT THE DEFENDANT HAD ALSO SEXUALLY MOLESTED HIS YOUNGER DAUGHTER WHO WAS UNABLE TO VERBALIZE ANY CLAIMS OF THAT ABUSE.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper

functioning of the adversary process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel’s failure to object when the state argued in rebuttal that

the defendant had molested his younger daughter who was unable to communicate that crime to anyone. This occurred in the following statement to the jury:

And let's think about then why it is that over a period of time after she's finally processed her feelings about this man who repeatedly raped her over a year, why it is that she's scared for her little sister? This is a little girl who finally found her voice when she spoke with her grandmother after a couple of weeks of living there with her. This is a little girl who is finally processing and becoming able to talk to you people about it, about her feelings and about what happened to her. This is a little girl who has known her sister all her life, she has known that her sister has absolutely no voice, is incapable of talking.

So you ask why it is that she might be scared that the Defendant could do this to her little sister? Her sister can't talk to you about what happened to her, that is why. She doesn't want it to happen to her little sister because no one can defend her little sister. She is defending herself. She told you people what happened. She was terrified of doing so, and she still was able to tell you that she sucked his penis; that his penis went inside her vagina like this.

RP X 73-74.

In making this argument the state was asking the jury to convict the defendant based upon the argument that if the jury did not act to convict it would be placing AB's especially vulnerable young sister in danger of the same abuse. In essence the state was arguing that the jury should convict based upon something other than the evidence or the law. This type of argument was inflammatory and highly improper. *See i.e., State v. Russell,*

125 Wn.2d 24, 882 P.2d 747 (1994). However, as is also set out in *Russell, supra*, if the defendant fails to object at trial, the complained-of errors are waived unless the defendant establishes that the misconduct is “so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.” *State v. Russell*, 125 Wn.2d at 86.

In this case defense counsel did not object to this argument when the state made it. However, this was no tactical decision by defense counsel. Rather, it was an error. In fact, defense counsel did move for a mistrial based upon these statements immediately after the jury retired for deliberation. RP X 78-79. Counsel stated:

MR. SCUDDER: – didn’t – didn’t want to interrupt Counsel during argument.

There was a portion of his rebuttal I was concerned about regarding her little sister could not tell what happened to her. This little girl who can’t talk and I’m concerned that that’s pretty inflammatory. I understand the context, but I still think it’s too much so I’m going to object and ask for a mistrial. I’m not really sure what kind of curative instruction could cure that. Thank you.

RP X 78-79.

Defense counsel’s statement given almost immediately after the state’s improper rebuttal argument supports two conclusions. The first is that counsel recognized that he should have objected and that his failure

to do so fell below the standard of a reasonably prudent attorney. The second conclusion is that, at least in counsel's mind, the prosecutor's improper argument was so prejudicial that it denied the defendant a fair trial.

In fact, a review of the evidence presented at trial supports this latter conclusion. As was mentioned in the prior two arguments in this case, the only evidence the state presented to support its claims of multiple acts of sexual abuse was AB's own testimony. The state presented no physical evidence nor medical evidence. Neither did the state present any evidence as to (1) whether a physical exam was performed, (2) as to why one was not performed if that was the case, or (3) what the results of a physical examination were if performed. Thus, this case turned solely upon AB's credibility. While her unsupported claims are certainly sufficient to sustain a conviction at law, they were far from compelling. Even the argument of precocious sexual knowledge was blunted by the fact that AB admitted surreptitiously watching pornography on her father's computer. Thus, in this case, trial counsel's failure to make a timely objection to the state's improper rebuttal argument undermines confidence in the jury's verdicts. As a result, trial counsel's failure to object denied the defendant effective assistance of counsel and entitles him to a new trial.

CONCLUSION

For the reasons set out herein this court should reverse the defendant's convictions and remand for a new trial.

DATED this 25th day of June, 2018.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

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

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

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

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

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

**RCW 9A.44.150
Testimony of Child by Closed-circuit Television**

(1) On motion of the prosecuting attorney in a criminal proceeding, the court may order that a child under the age of fourteen may testify in a room outside the presence of the defendant and the jury while one-way closed-circuit television equipment simultaneously projects the child's testimony into another room so the defendant and the jury can watch and hear the child testify if:

(a) The testimony will:

(i) Describe an act or attempted act of sexual contact performed with or on the child witness by another person or with or on a child other than the child witness by another person;

(ii) Describe an act or attempted act of physical abuse against the child witness by another person or against a child other than the child witness by another person;

(iii) Describe a violation of RCW 9A.40.100 (trafficking) or any offense identified in chapter 9.68A RCW (sexual exploitation of children);
or

(iv) Describe a violent offense as defined by RCW 9.94A.030 committed against a person known by or familiar to the child witness or by a person known by or familiar to the child witness;

(b) The testimony is taken during the criminal proceeding;

(c) The court finds by substantial evidence, in a hearing conducted outside the presence of the jury, that requiring the child witness to testify in the presence of the defendant will cause the child to suffer serious emotional or mental distress that will prevent the child from reasonably communicating at the trial. If the defendant is excluded from the presence of the child, the jury must also be excluded;

(d) As provided in (a) and (b) of this subsection, the court may allow a child witness to testify in the presence of the defendant but outside the presence of the jury, via closed-circuit television, if the court finds, upon motion and hearing outside the presence of the jury, that the child will suffer serious emotional distress that will prevent the child from reasonably communicating at the trial in front of the jury, or, that although the child may be able to reasonably communicate at trial in front of the jury, the child will suffer serious emotional or mental distress from testifying in front of the jury. If the child is able to communicate in front of the defendant but not the jury the defendant will remain in the room with the child while the jury is excluded from the room;

(e) The court finds that the prosecutor has made all reasonable efforts to prepare the child witness for testifying, including informing the child or the child's parent or guardian about community counseling services, giving court tours, and explaining the trial process. If the prosecutor fails to demonstrate that preparations were implemented or the prosecutor in good faith attempted to implement them, the court shall deny the motion;

(f) The court balances the strength of the state's case without the testimony of the child witness against the defendant's constitutional rights and the degree of infringement of the closed-circuit television procedure on those rights;

(g) The court finds that no less restrictive method of obtaining the testimony exists that can adequately protect the child witness from the serious emotional or mental distress;

(h) When the court allows the child witness to testify outside the presence of the defendant, the defendant can communicate constantly

with the defense attorney by electronic transmission and be granted reasonable court recesses during the child's testimony for person-to-person consultation with the defense attorney;

(i) The court can communicate with the attorneys by an audio system so that the court can rule on objections and otherwise control the proceedings;

(j) All parties in the room with the child witness are on camera and can be viewed by all other parties. If viewing all participants is not possible, the court shall describe for the viewers the location of the prosecutor, defense attorney, and other participants in relation to the child;

(k) The court finds that the television equipment is capable of making an accurate reproduction and the operator of the equipment is competent to operate the equipment; and

(l) The court imposes reasonable guidelines upon the parties for conducting the filming to avoid trauma to the child witness or abuse of the procedure for tactical advantage.

The prosecutor, defense attorney, and a neutral and trained victim's advocate, if any, shall always be in the room where the child witness is testifying. The court in the court's discretion depending on the circumstances and whether the jury or defendant or both are excluded from the room where the child is testifying, may remain or may not remain in the room with the child.

(2) During the hearing conducted under subsection (1) of this section to determine whether the child witness may testify outside the presence of the defendant and/or the jury, the court may conduct the observation and examination of the child outside the presence of the defendant if:

(a) The prosecutor alleges and the court concurs that the child witness will be unable to testify in front of the defendant or will suffer severe emotional or mental distress if forced to testify in front of the defendant;

(b) The defendant can observe and hear the child witness by

closed-circuit television;

(c) The defendant can communicate constantly with the defense attorney during the examination of the child witness by electronic transmission and be granted reasonable court recesses during the child's examination for person-to-person consultation with the defense attorney; and

(d) The court finds the closed-circuit television is capable of making an accurate reproduction and the operator of the equipment is competent to operate the equipment. Whenever possible, all the parties in the room with the child witness shall be on camera so that the viewers can see all the parties. If viewing all participants is not possible, then the court shall describe for the viewers the location of the prosecutor, defense attorney, and other participants in relation to the child.

(3) The court shall make particularized findings on the record articulating the factors upon which the court based its decision to allow the child witness to testify via closed-circuit television pursuant to this section. The factors the court may consider include, but are not limited to, a consideration of the child's age, physical health, emotional stability, expressions by the child of fear of testifying in open court or in front of the defendant, the relationship of the defendant to the child, and the court's observations of the child's inability to reasonably communicate in front of the defendant or in open court. The court's findings shall identify the impact the factors have upon the child's ability to testify in front of the jury or the defendant or both and the specific nature of the emotional or mental trauma the child would suffer. The court shall determine whether the source of the trauma is the presence of the defendant, the jury, or both, and shall limit the use of the closed-circuit television accordingly.

(4) This section does not apply if the defendant is an attorney pro se unless the defendant has a court-appointed attorney assisting the defendant in the defense.

(5) This section may not preclude the presence of both the child witness and the defendant in the courtroom together for purposes of establishing or challenging the identification of the defendant when identification is a legitimate issue in the proceeding.

(6) The Washington supreme court may adopt rules of procedure regarding closed-circuit television procedures.

(7) All recorded tapes of testimony produced by closed-circuit television equipment shall be subject to any protective order of the court for the purpose of protecting the privacy of the child witness.

(8) Nothing in this section creates a right of the child witness to a closed-circuit television procedure in lieu of testifying in open court.

(9) The state shall bear the costs of the closed-circuit television procedure.

(10) A child witness may or may not be a victim in the proceeding.

(11) Nothing in this section precludes the court, under other circumstances arising under subsection (1)(a) of this section, from allowing a child to testify outside the presence of the defendant and the jury so long as the testimony is presented in accordance with the standards and procedures required in this section.

Instruction No. 11

The state alleges that the defendant committed acts of Rape of a Child in the First degree on multiple occasions. To convict the defendant of Rape of a Child in the First Degree, as charged in count I, one particular act of Rape of a Child in the First degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. To convict the defendant Rape of a Child in the First Degree, as charge in count II, one particular act of Rape of a Child in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Rape of a Child in the First Degree.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

NO. 51298-0-II

vs.

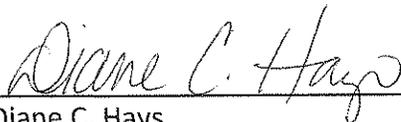
AFFIRMATION
OF SERVICE

JOHN MITCHELL BROOKS,
Appellant.

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

1. Mr. Ryan Jurvakainen
Cowlitz County Prosecuting Attorney
312 SW First Avenue
Kelso, WA 98626
sasserm@co.cowlitz.wa.us
2. John Mitchell Brooks, No.403472
Monroe Corrections Center
P.O. Box 777
Monroe, WA 98272

Dated this 25th day of June, 2018, at Longview, WA.



Diane C. Hays

JOHN A. HAYS, ATTORNEY AT LAW

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