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No. 53592-1-II

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

STATE OF WASHINGTON,

Respondent,

vs.

SIMEON REYES JUAREZ,

Appellant.

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

The Honorable Monty D. Cobb, Judge

Mason County Superior Court Cause No. 18-1-00434-23

APPELLANT'S OPENING BRIEF

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INTRODUCTION

On November 27, 2018, Mr. Reyes Juarez was arrested following claims made by his then 12 year-old cousin, N.J.V. that he had raped her multiple times between August 10, 2011 and August 10, 2017. Mr. Reyes Juarez was subsequently charged and went to trial on three identical counts of rape of a child in the first degree. At the end of a trial based upon sparse facts and fraught with error, including erroneous instructions, prosecutorial misconduct in closing arguments, and ineffective assistance of counsel, Mr. Reyes Juarez was convicted on all counts and sentenced to 210 months in prison. Mr. Reyes Juarez seeks reversal of his convictions and a new trial.

ISSUES AND ASSIGNMENT OF ERROR

Assignment of Error. The trial court erred when it gave a Petrich instruction and did not include the requirement for the jury to find separate and distinct acts to support any of the three counts.

Issue i. whether there was an instructional error.

Issue ii. whether the State committed prosecutorial misconduct by trivializing the State's burden of proof by comparing it to a belief one develops after watching a TV show, and whether defense

counsel rendered ineffective assistance of counsel by failing to object.

Issue iii. whether there was sufficient evidence to support a finding of guilt on counts II and III.

Issue iv. whether defense counsel rendered ineffective assistance of counsel when he introduced evidence of N.J.V.'s collateral suffering and her claim that she had seen numerous underaged females on Mr. Reyes Juarez' cell phone and Instagram account.

Issue v. whether cumulative error deprived Mr. Reyes Juarez of a fair trial as guaranteed by Article 1, Section 22 of the Washington State Constitution and by the Sixth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Defendant, Simeon Reyes Juarez, lived in his uncle, Malesio Juarez's, residence for 11 years, from approximately sometime in 2006 until sometime in 2017. RP150, 151. Also in the home was his uncle's wife, ¹Obdulio Villa and their children, a son and two daughters, N.J.V. being one of the daughters. RP 150. During his

¹ To avoid confusion of the parties, first names are at times used when referring to Malesio Juarez' family members.

time in his uncle's home, Mr. Reyes Juarez would leave the residence with his uncle for work between 4:00 A.M. and 5:00 A.M., and they would return home together between 6:30 P.M. and 8:00 P.M., Monday through Saturday each week. RP 154, 155. The two worked together at the same location. RP 154.

During the 11 years living and working together, Malesio never saw Mr. Reyes Juarez and N.J.V. alone, was never suspicious of anything improper, and believed that they always got along. RP 156.

Obdulia had worked exclusively in the residence as a homemaker from at least January of 2009 up until the present time. RP 172, 173. The only work that took her out of the residence was to care for their approximately 60 to 65 chickens outside in the yard, which would take approximately 40 minutes to two hours per day. RP 189. In the time before she began staying home full-time, Obdulio's sister watched the children. RP 181.

On or about May of 2017, Mr. Reyes Juarez moved residences with the family, but into an RV on the same lot, and no longer resided in the residence.

One and-a-half years later, on Sunday, October 21, 2018, N.J.V. made claims to her mother, Obdulio, that while living in their

residence, on numerous occasions while Mr. Reyes Juarez resided in their home, Mr. Reyes Juarez had sexually abused her. RP 175, 237. Obdulio and N.J.V. contacted ²BHR three days later and an investigation ensued. RP 176.

Mr. Reyes Juarez was ultimately arrested on November 27, 2018 and initially charged with multiple counts of rape and molestation. RP 278,29.

On May 20, 2018, the day before trial began, the State filed an Amended Information which, in relevant parts, ³read as follows:

COUNT I: RAPE OF A CHILD IN THE FIRST DEGREE

That the said defendant, SIMEON REYES JUAREZ, in the County of Mason, State of Washington, on or between August 10, 2011 and August 10, 2017, *in an act distinct from those alleged in Counts II and III*, and being at least twenty-four (24) months older than N.J.V. (DOB: 08/10/2006), had sexual intercourse with N.J.V. (DOB: 08/10/06), who was less than 12 years old and was not married to SIMEON REYES JUAREZ; contrary to RCW 9A.44.073, and against the peace and dignity of the State of Washington.

COUNT II: RAPE OF A CHILD IN THE FIRST DEGREE

That the said defendant, SIMEON REYES JUAREZ, in the County of Mason, State of Washington, on or between August 10, 2011 and August 10, 2017, *in an act distinct from those*

² “Behavioral Health Resources”.

³ The charging maximum penalty advisement following each charge in the Information is omitted here for space considerations.

alleged in Counts I and III, and being at least twenty-four (24) months older than N.J.V. (DOB: 08/10/2006), had sexual intercourse with N.J.V. (DOB: 08/10/06), who was less than 12 years old and was not married to SIMEON REYES JUAREZ; contrary to RCW 9A.44.073, and against the peace and dignity of the State of Washington.

COUNT III: RAPE OF A CHILD IN THE FIRST DEGREE

That the said defendant, SIMEON REYES JUAREZ, in the County of Mason, State of Washington, on or between August 10, 2011 and August 10, 2017, *in an act distinct from those alleged in Counts I and II*, and being at least twenty-four (24) months older than N.J.V. (DOB: 08/10/2006), had sexual intercourse with N.J.V. (DOB: 08/10/06), who was less than 12 years old and was not married to SIMEON REYES JUAREZ; contrary to RCW 9A.44.073, and against the peace and dignity of the State of Washington.

CP 32 (emphasis added). This was the ⁴Information read to the jury venire at the beginning of trial.

At trial, N.J.V. testified that she had been raped or otherwise sexually abused by Mr. Reyes Juarez a “couple of times per week” throughout the entire six-year charging period. RP 219.

⁴ On the third day of trial, a Second Amended Information was filed which appears identical to the Amended Information, but which includes the words, “Second Amended Information” in the first paragraph.

During trial, N.J.V. testified that she was sexually abused by Mr. Reyes Juarez hundreds of times, but the State focused her testimony on only three specific incidences as follows:

COUNT I:

N.J.V. testified that when she “was around five and seven years old”, Mr. Reyes Juarez began sexually abusing her. RP 210. She recalled it being in the living room of the residence and that all family members, other than her father, were home. RP 211. She testified that Mr. Reyes Juarez had her stand up and turn with her back to him, facing the curtains, and he put his penis in her vagina from behind. RP 212-14. Only this first incident occurred in the living room and all other incidences were in Mr. Reyes Juarez' bedroom. RP 220. She was never threatened at any time, but was told to be silent. RP 222.

COUNT II:

The second time included a claim that Mr. Reyes Juarez had N.J.V. “get into all these different positions” for sex. RP 223. N.J.V. would be moved into a new position and then he would put his penis into her vagina. RP 224. She answered “yes” to the State’s question of whether Mr. Reyes Juarez had an erection, but did not say that she knew what an erection was. RP 224,5. She

quickly corrected herself, however, and said, “no, he didn’t ... I’m thinking of another time”. RP 225. This incident lasted for 15 to 20 minutes. RP 226. No details are given as to when this may have occurred and no details of Mr. Reyes Juarez’ room are provided.

COUNT III:

N.J.V. testified that she remembered the third charged incident because “he shoved his penis inside [her] mouth”. RP 227. She offered no other details other than to say that it was in Mr. Reyes Juarez’ bedroom, he held the back of her neck, and did not have an erection and he did not penetrate her otherwise. Id.

N.J.V. then went on to say that she had not been penetrated vaginally before he placed his penis her mouth, but was penetrated afterward and that she did not recall wether he had an erection. RP 228. In her very next answer to the State’s leading questions, however, she said that “sex”, meaning vaginal penetration, came first. RP 229.

In response to the State’s question whether she had ever experienced pain during the sexual abuse, N.J.V. responded, “I can only remember one time”. Id. She said that Mr. Reyes Juarez wore a condom some of the time and that she did not recall him ever ejaculating. RP 229, 246.

Just as in her testimony surrounding Count II, no details are given as to when this may have occurred and no details of Mr. Reyes Juarez' room are provided.

DEFENSE COUNSEL'S CROSS EXAMINATION OF N.J.V.:

On cross, defense counsel ⁵clarified that the abuse occurred “two or three times a week for five years”, and that N.J.V. could not recall whether or not a lubricant had been used. RP 242.

Even though no mention had been made by the State on direct, defense counsel developed N.J.V.'s claims that, as a result of Mr. Reyes Juarez' abuse, her grades declined at school during the abuse, she developed behavior problems, and that she had begun cutting herself, in the following exchange:

Question by Defense Counsel: ... You had issues at school?

A: Yes.

Q: You went from being a good student to –

A: Yes.

⁵ Defense counsel's trial strategy in developing N.J.V.'s corroborating testimony of her suffering and the character evidence of Mr. Reyes Juarez having pictures of underaged females on his cell phone may somewhat be devined from his closing argument infra.

Q: - not so good a student? And did you also - did I remember correctly that you'd also reported to us, and perhaps two others, that you had cut yourself?

A: Yes.

Q: You'd been - you started cutting yourself?

A: Yes.

Q: Are you familiar with that term? How often would - would that happen?

A: I don't know. Just there as times when I just couldn't take the pain anymore.

Q: Uh-Huh.

A: And it, kind of, and then I started going to counseling and I got over that addiction.

Q: Okay. That's good that you were able to overcome that.

A: Thank you.

RP 243.

Defense counsel then went on to develop N.J.V.'s claim that she had seen numerous pictures of underage girls, about her age, on Mr. Reyes Juarez' cell phone during the years when the abuse

would occur. RP 244-46. The questions and testimony was as follows:

Question by defense counsel: You remember telling either one of the detectives or perhaps us or somebody that you thought that Mr. Reyes Juarez had pictures of girls on his phone or that you had seen a picture of a girl on his phone?

A: I said that I thought he – he was in contact, maybe through social media, with other girls.

Q: And you thought that because you saw pictures on his cell phone?

A: He was always texting just random girls. I could just see their names pop up on his phone, and he would always, like, if I tried to read them, I was like, "who's that?"

He just – he'd be like, "don't worry about it." And he hide his phone. And then I, like, when I started having social media, I would, like, stalk his account, and see who he was

following and stuff. And I just saw so many, like, young girls that weren't -

Q: What do you mean?

A: - family.

Q: I'm sorry.

A: Sorry.

Q: No, finish your sentence. I'm sorry.

A: He - so he would be following these girls that looked about my age, you know.

Q: On what social media? Like Facebook or -

A: Instagram.

Q: Instagram? Did - you recall ever having pictures of you taken?

A: Not - I don't think, naked. Sometimes he would just randomly take pictures of me.

Q: In the bedroom or just during -

A: Anywhere.

Q: - in the house or anywhere?

A: Yeah.

With the door now opened, the State on redirect went into further detail about N.J.V.'s addiction to cutting her body and her

testimony that she had seen other young females on Mr. Reyes Juarez' cell phone, with N.J.V. adding, "... I always seen [sic] that he would always be texting these random girls at all times. Like, if he was having sex with me, like his phone would be blowing up, you know". RP 247, 48.

During the testimony of the detective, Alfonso Mercado, defense counsel confirmed that law enforcement had made no attempt to seize and search Mr. Reyes Juarez' cell phone. RP 284.

JURY INSTRUCTIONS:

During a discussion with the court with the jury absent, the State explained that he did not "carry forward" into the to-convict instructions the "separate and distinct" language contained in the Second Amended Information because he had included a *Petrich* instruction. RP 290. The State went on to say, "I'm always leery of introducing a comment on the evidence unintentionally and I think that instruction with our arguments, it'll be clear that we're relying on three separate acts. I just wanted to make sure we do agree that that's the appropriate way to cast the instructions." *Id.* In response, defense counsel stated, "I informed [the prosecutor] to defer to the Court on that." *Id.* The court then noted that "It's always been a

challenging instruction, but I have looked at it, and I think it will work as written, ..." RP 291.

Mr. Reyes Juarez testified on his own behalf. RP 298-308.

The Defense then recalled N.J.V. to further clarify the issue of her cutting herself:

Question by defense counsel: ... you testified earlier, remember, this morning of course?

A: Yes, I did.

Q: And we talked briefly about you cutting yourself?

A: Yes.

Q: Remember that? And I - I neglected to ask you other - what other things you experience - the cutting and I believe that it was also reported that your grades dropped?

A: Yes.

Q: Is that correct?

A: Yes. Well, at that time I was obviously being abused, and in a span of three years, I lost two - two of my really close friends. They both killed themselves. And it - it was just too

much, you know. And then my grades started dropping because of all the things on the scale, like, he was, like, my best friend and he - it - it was kind of recent and then stuff started, you know, getting worse at school -

Q: Uh-Huh.

A: - and, like, I was just having so - so much trouble. I was getting into trouble at school. My mom started getting complaints from my teachers. My mom noticed that I just started, and you know, walking away from everything I used to do, you know. I used to play the guitar. I don't anymore. I just started to walk in - it seemed like I had two personalities. Like, I was this happy girl, and then I turned into this girl that didn't care, you know.

Q: And, then, the cutting and the grades and behavior?

A: Uh-Huh.

RP 308-9. On cross, the State was now able to clarify:

Question by the State: Did the fact that, as you testified, that your father's nephew, a man that was your godfather and that you called uncle, had been having sexual intercourse with you the course of five or six years, did that have any effect on you emotionally and mentally?

A: Obviously, it had the most.

...

Q: Did the loss of the two classmates or friends cause you to make up what you testified about what happened with your – your uncle Simeon Reyes Juarez?

A: No. Actually, the reason I, like, decided – part of the reason I decided I would speak out was because of it – it was just too much to hold in because I had that stress, you know. And I just didn't know what to do. I had the pain of having them been gone and then having to deal with the abuse was just too much.

Q: Have you been better since you got it out and have talked about it?

A: We're working on it.

RP 310, 11.

In his cross examination of the State's lead detective on the case, Alfonso Mercado, defense counsel clarified that no attempt had been made to seize the phone to search for the "Pictures of the little girls on his phone". RP 284.

The selected jury instructions below were given to the jury:

INSTRUCTION NO. 3: 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.

INSTRUCTION NO. 10: The State alleges that the defendant committed acts of rape of a child in the first degree on multiple occasions. To convict the defendant on any count of rape of a child in the first degree, one particular act of rape of a child in the first degree must be proved beyond a reasonable doubt, and you must unanimously agreed as to which act has been proved. You need not unanimously agreed that the defendant committed all the acts of rape of a child in the first degree.

The to-convict instructions were given as follows:

INSTRUCTION NO. 11: To convict the defendant of the crime of rape of a child in the first degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the time intervening between August 10, 2011 and August 10, 2017, the defendant had sexual intercourse with ⁶N.J.V.;
2. That N.J.V. was less than 12 years old at the time of the sexual intercourse and was not married to the defendant;
3. That N.J.V. 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 has 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 anyone of these elements, then it will be your duty to return a verdict of not guilty.

With the exception of reference to the different Count numbers, to-convict Instructions 12 and 13 are identical in all respects to Instruction number 11:

INSTRUCTION NO. 12: To convict the defendant of the crime of rape of a child in the first degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the time intervening between August 10, 2011 and and August 10, 2017, the defendant had sexual intercourse with N.J.V.;
2. That N.J.V. was less than 12 years old at the time of the sexual intercourse and was not married to the defendant;
3. That N.J.V. was at least twenty-four months younger than the defendant; and

⁶ The information actually sets forth the child's Full name, however, in compliance with court rule, only her initials are used in this Brief.

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

If you find from the evidence that each of these elements has 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 anyone of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 13: To convict the defendant of the crime of rape of the the child in the first degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

1. That on or about the time intervening between August 10, 2011 and and August 10, 2017, the defendant had sexual intercourse with N.J.V.;
2. That N.J.V. was less than 12 years old at the time of the sexual intercourse and was not married to the defendant;
3. That N.J.V. 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 has 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 anyone of these elements, then it will be your duty to return a verdict of not guilty.

STATE'S CLOSING:

In closing, the State made a clear election of the three specific incidents it was relying upon for the three counts that N.J.V. described during her testimony. RP 333, 342.

The State addressed proof beyond a reasonable doubt by comparing it to the level of belief one develops after watching a TV show, saying,

[a]nd finally, [the instruction] ends up by saying that if after such careful consideration, you have an abiding belief in the truth of the charge, you have been satisfied beyond a reasonable doubt. And I will leave it to you to work out what that means to you as a panel, but I would suggest to you that an abiding belief is one that – you know, if you think about a Dateline or 20/20 episodes where, you know, you would watch – I don't know if any of you have ever seen those shows, but you watch the beginning of the show and they sort of give you one side of the story you're kind of wondering why this even merits a television show because it seems pretty obvious what happened. And then they might start giving the other side of the story after the first major commercial break. And then you're thinking, like, gosh, nothing is

as I thought it was. There is a whole other side to this. And then there is the wrap-up. And ultimately *in the end – perhaps not, but typically, people formed an opinion on what they believe happened, what’s – what was proved.*

And that's a lot like what this is like. *That's what an abiding – I would suggest to you, and abiding belief is.*

RP 347 (emphasis added). Defense counsel did not object on behalf of his client.

DEFENSE COUNSEL’S CLOSING:

Defense counsel focused upon N.J.V.’s collateral suffering saying,

She reported different disorders. She reported an ⁷eating disorder. She reported cutting. She reported her attitude at school changed. She reported that her grades dropped. None of this was supported. She said those things, but you didn't hear any testimony from anybody that supported those assumptions. And there would have

⁷ An eating disorder does not appear in the Record of Proceedings.

been people that notice that, maybe not necessarily be cutting, but the school, the grades, her attitude. You heard nothing that supports that, and so that's a basis for reasonable doubt.

RP 350. With regard to the other children N.J.V. claimed to have seen on Mr. Reyes Juarez' cell phone, defense counsel said, Another thing that was said was that she told law-enforcement – not ⁸this detective but the ones that worked this originally, that he had – that was never investigated. That might substantiate the state's case if they had seized his cell phone and sent it to the crime lab or analyzed themselves to see if what she said is true about having other children on his cell phone. You would think they would do it for public safety reasons; but besides that, it doesn't – her testimony is not supported by the investigation, I guess, is the point I'm trying to make.

⁸ The detective who originally investigated this case retired prior to the trial and Detective Marcado took over as the lead testifying officer at trial. RP 278.

RP 351, 52.

During rebuttal, the state pointed out that police were not able to follow up on things that they had not been told or were told “much after-the-fact”. RP 366.

ARGUMENT

i. There was an instructional error which denied Mr. Reyes Juarez' Constitutional right to not be subjected to double jeopardy.

The Fifth Amendment of the U.S. Constitution and Article I, §9 of the Washington State Constitution guarantees the right to be free from double jeopardy. That is to say that a defendant in a criminal case is protected by the Constitution against multiple punishments for the same offense. *State v. Borsheim*, 140 Wn.App. 357, 165 P.3d 417, (Div. 1 2007).

Moreover, a defendant also has a right to a unanimous jury verdict on each criminal count. *State v. Petrich*, 101 Wash.2d 566, 569, 683 P.2d 173 (1984). A jury must therefore be unanimous as to which act or incident constitutes a particular charged count of criminal conduct. *State v. Noltie*,

116 Wash.2d 831, 842-43, 809 P.2d 190 (1991); *Petrich*, 101 Wash.2d at 572, 683 P.2d 173.

In cases where several acts could form the basis of conviction for one charged count, the State must elect the specific act on which it relies for conviction or the court must instruct the jury that it must unanimously agree that a specific criminal act has been proved beyond a reasonable doubt.

Petrich, 116 Wash.2d at 843, 809 P.2d 190; *Petrich*, 101 Wash.2d at 572, 683 P.2d 173. *State v. Borsheim*, 140 Wn.App. 357, 165 P.3d 417, (Div. 1 2007).

In *Borsheim*, the defendant was convicted of four counts of rape of a child in the first degree pursuant to a single to-convict instruction which included all four counts, covering the same 29-month time range, and did not specify that each count was separate and distinct from all other counts.

Borsheim, at 365,6.

Even though the jury instructions also included Instruction No.12, a *Petrich* instruction (WPC 4.25) as well as Instruction No. 3 which provided that

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

WPIC 3.01, these same instructions were found to be deficient.

The Court found that this combination of instructions did not honor Borsheim's Constitutional right to be free from multiple punishments for a single act, reasoning that jury instructions "must do more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror." *Borsheim* at 140, citing *State v. Watkins*, 136 Wash.App. 240, 148 P.3d 1112 (2006).

The Court noted that, "in sexual abuse cases where multiple identical counts are alleged to have occurred within the same charging period, the court must instruct the jury that they are to find 'separate and distinct acts' for each count". *Id.*, quoting *State v. Hayes*, 81 Wash.App. 425, 431, 914 P.2d 788 (1996).

In our case, as in *Borsheim*, a *Petrich* instruction as well as WPIC 3.01 were both given. This, however, was not sufficient to guarantee that Mr. Reyes Juarez was not punished multiple times for single act even though each count was addressed in separate, identical instructions with the same charging period. The separate,

but identical to-convict instruction issue has been addressed since *Borsheim*.

In 2008, a Division I Court of Appeals case with instructions identical to the ones given in *Borsheim*, but where, rather than one to-convict instruction being given for multiple, identical counts, separate, identical to-convict instructions were given, but again without the “separate and distinct” language. The Court found this combination of instructions to be insufficient to avoid a double jeopardy violation. *State v. Berg*, 147 Wn.App. 923, 198 P.3d 529, (Div. 1 2008). Just as in *Borsheim* and as in our case, the prosecutor clearly established and argued separate facts to support the separate charges, but did not include the separate and distinct act language.

The *Berg* decision reaffirmed that in cases where multiple, identical charges are tried and the trial court did not give a “separate and distinct act” instruction or otherwise require that the jury base each charged count on a “separate and distinct” underlying event ... as in *Borsheim*, the missing language potentially exposed *Berg* to multiple punishments for a single offense.” Just as in *Borsheim*, the Court reversed and ordered the

trial court to vacate all but one of the duplicate counts. *State v. Berg*, 147 Wn.App. 923, 198 P.3d 529, (Div. 1 2008).

Similarly, in an unpublished, 2009 case, Division I reversed four identical convictions with instructions to vacate all but one because, it said, “[w]here the State charges multiple counts of the same crime within the same charging period, the court must instruct the jury that a separate and distinct act must support each conviction. Because no such instruction was given in this case, three of Barnes’ four convictions must be vacated.” *State v. Bennett Barnes*, 62112-2-1.

In a 2010, unpublished Division II case, this Court vacated multiple convictions where separate, but identical instructions which omitted the separate and distinct requirement were given to the jury. In *State v. Hernandez*, 39148-1-II, the State argued that the to-convict instruction given was distinguishable from the one in *Borsheim* because the instructions were separate for each count. The Court found that the “to convict” instruction given in *Borsheim* was inadequate because it failed to inform the jury that a separate and distinct act was needed for each count. “The fact that a single instruction encompassed all four counts only ‘compounded’ this error”. *Borsheim*, 140 Wn. App. at 368. Our conclusion is consistent

with the court's holding in *State v. Berg*, 147 Wn. App. 923, 934-35, 198 P.3d 529 (2008), where separate "to convict" instructions were given for each count but the instructions were still found inadequate to protect against double jeopardy violations. Thus, although the trial court here gave separate "to convict" instructions for each count, the instructions were inadequate because they did not inform the jury that it had to find a "separate and distinct" act for each count. *State v. Hernandez*, 39148-1-II.

The State may argue that the *Petrich* instruction addressed any concerns that may exist regarding unanimity on a single charge, however, in a case where there are alleged multiple, identical counts, using the same, broad time range, and where the State has made a clear election as to which occurrences it is relying upon, a *Petrich* instruction does more harm than good. In fact, when "there is evidence of multiple distinct occurrences of the crime, but the prosecution elects to rely upon a specific occurrence to support a conviction, then [the] *Petrich* instruction should not be used." WPIC 4.25, Notes on Use. The *Petrich* Instruction only provides a Constitutional guarantee of unanimity.

In a multiple count case, this instruction needs to be modified to clearly require unanimity for one particular act for each

count charged. *State v. Watkins*, 136 Wn.App. 240, 148 P.3d 1112 (2006). It is error to give the instruction without telling the jury that it must unanimously agree as to which act or acts have been proved beyond a reasonable doubt for each count in a multiple count case. *State v. Hayes*, 81 Wn.App. 425, 914 P.2d 788 (1996). Therefore, it appears that it was plain error to give the *Petrich* instruction at all in this case.

For the reasons set forth above, this matter should be reversed and remanded with instructions to vacate two of the three convictions of rape of a child in the first degree. However, as addressed below, since there was insufficient evidence upon which to base at least one of the three convictions at trial, the entire case should be remanded for a new trial.

ii. The State committed prosecutorial misconduct by trivializing the State's burden of proof by comparing it to a belief one develops after watching a TV show; and defense counsel rendered ineffective assistance of counsel by failing to object.

Prosecuting attorneys are quasi-judicial officers and have a duty to ensure that defendants receive a fair trial. *State v. Boehning*, 127 Wash.App. 511, 518, 111 P.3d 899 (2005). Prosecutorial misconduct violates this duty and can constitute

reversible error. *Boehning*, 127 Wash.App. at 518, 111 P.3d 899.

When a prosecutor compares the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the gravity of the standard and the jury's role. *State v. Anderson*, 153 Wn.App. at 431

In order to prevail upon a claim of prosecutorial conduct, a defendant bears the burden of establishing the impropriety of the prosecuting attorney's comments and their prejudicial effect. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007 (1998).

Prejudice requires a showing that "there is a substantial likelihood the instances of misconduct affected the jury's verdict." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003) (quoting *Pirtle*, 127 Wn.2d at 672).

If the defendant fails to object and request a curative instruction, the claim is waived unless the comment was so flagrant or ill intentioned that an instruction could not have

cured the prejudice. *State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995).

The improper comments in question are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions given. *Dhaliwal*, 150 Wn.2d at 578; *Brown*, 132 Wn.2d at 561. Such misconduct requires reversal only if the comments are "so prejudicial that a curative instruction would be ineffective." *State v. Gentry*, 125 Wn.2d 570, 643-44, 888 P.2d 1105, cert. denied, 516 U.S. 843 (1995).

On review, the Court presumes that the jury followed the trial court's instructions. *State v. Swan*, 114 Wn.2d 613, 661-62, 790 P.2d 610 (1990), cert. denied, 498 U.S. 1046 (1991); *State v. Anderson*, 153 Wn.App. 417, 428, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010). Here, the State equated being convinced beyond a reasonable doubt with the level of certainty one develops after watching an investigative TV show. This had the effect of trivializing the State's burden by equating it with an everyday, inconsequential decision.

In *State v. Lindsay*, 171 Wn.App 808, 288P.3d 641 (2012) the Court found misconduct when the prosecutor equated beyond a reasonable with being able to see that a jigsaw puzzle depicted the Space Needle even though 50 percent of the pieces had yet to be put in place.

Similarly, in *State v. Johnson*, [158 Wn.App. 677](#), 682, [243 P.3d 936](#) (2010) the prosecutor defined the reasonable doubt standard as being similar to being able to see that a jigsaw puzzle depicted the City of Tacoma even though only half of he pieces had been assembled. There, the Court reversed saying that "a misstatement about the law and the presumption of innocence due a defendant, the `bedrock upon which [our] criminal justice system stands,' constitutes great prejudice because it reduces the State's burden and undermines a defendant's due process rights." *Id.* at 685-86, [243 P.3d 936](#) (quoting *State v. berg*, [161 Wn.2d 303](#), 315, [165 P.3d 1241](#) (2007)).

On the other hand, In *State v. Curtiss*, [700](#), [250 P.3d 496](#) the court did not find that the Constitution had been offended when the prosecutor stated, "There will come a time when you're putting that puzzle together, and even with pieces missing, you'll be able to say,

with some certainty, beyond a reasonable doubt what that puzzle is: The Tacoma Dome." *Id.* at 700, 250 P.3d 496.

In *State v. Fuller*, 169 Wn.App 797, 282 P.3d 126, the difference between *Johnson* and *Curtiss* was addressed and the court explained that the analogy given in *Johnson* was improper because it gave a specific quantification while the analogy in *Curtiss* did not.

While the present case does not involve specific numbers or percentages, it does involve equating the juror's determination of beyond a reasonable doubt to how certain one feels about the facts of a story presented by an investigative TV show — a trivial, everyday decision of little consequence.

In *Lindsay*, 171 Wash. App. at 828, 288 P.3d 641, the Court found the prosecutor's comparison of the reasonable doubt standard to a pedestrian's decision to cross an intersection when encountering a car at a crosswalk to be improper. There, the prosecutor gave an example, saying that when you approach a crosswalk as a pedestrian, and an oncoming car approaches a red light, you see one another and then you walk across the intersection because you know beyond a reasonable doubt that it is safe to cross. The Court stated that "When a prosecutor compares

the reasonable doubt standard to everyday decision making, it improperly minimizes and trivializes the gravity of the standard and the jury's role." *Lindsay*, 171 Wash. App. at 828, [288 P.3d 641](#) (citing *State v. Anderson*, 153 Wn.App. 417, 431, 220 P.3d 1273 (2009)).

In *Lindsay*, at least the prosecutor was comparing a reasonable doubt determination to a decision which could potentially cause the pedestrian bodily harm or even death. In our case, the State trivialized the burden even further by equating it to a truly inconsequential decision like whether or not you believe what is presented in a TV show.

The State's comparison in this case was misconduct. The next step is determining whether there was prejudice.

In the absence of an objection, the defendant must show that the prosecutor's improper statements caused prejudice, that is to say that there is a substantial likelihood that the prosecutor's statements affected the jury's verdict. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (citing *Anderson*, 153 Wash.App. at 427, 220 P.3d 1273).

In the absence of an objection, the defendant must also show that a jury instruction would not have cured the potential prejudice. *Id.* at 761, 278 P.3d 653.4

Here, the only likely curative instruction that could have been given would be to say that the jury instructions are the law and that the jurors should follow the law. However, the “abiding belief” in the instruction on reasonable doubt is undefined, and serves as the only possible key to the reasonable doubt instruction. Being a term that few people use on a regular basis, and not being commonly understood by the average juror, once the State gave the trivial example of what it meant, only a lengthy discussion and resort to a dictionary may have cured the error, and a dictionary is never allowed in jury deliberations. In fact, the admonishment given at all breaks from trial includes the warning not to “consult dictionaries or other reference materials”. WPIC 1.01. Regardless, once the improper example was given, the jury had an indelible impression of how casual the reasonable doubt standard was to be viewed.

Granted, defense counsel should have objected and his failure to object was performance which fell below the standard of the profession. Moreover, there does not appear to be any legitimate trial strategy, either expressed or implied which could

explain a valid purpose for failing to object to the example given by the State. As such, failure to object was ineffective assistance of counsel. The prejudice which must be shown, as set forth below, is interdependent with how flagrant was the State's improper example of proof beyond a reasonable doubt.

Here, the misconduct of the State was so flagrant that it deprived Mr. Reyes Juarez of the very Constitutional right he had to a fair trial. As such, a new trial is required.

iii. There was insufficient evidence to support a finding of guilt on counts II and III.

In a claim of insufficient evidence, a reviewing court examines whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" viewing the evidence in the light most favorable to the State. *State v. Hughes*, 154 Wash.2d 118, 152, 110 P.3d 192 (2005) (internal quotation marks omitted) (quoting *State v. Green*, 94 Wash.2d 216, 221, 616 P.2d 628 (1980)), overruled on other grounds by *Washington v. Recuenco*, --- U.S. ---, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006). "Determinations of credibility are for the fact finder and are not reviewable on

appeal." *Id.* (citing *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990)). *State v. Brockob*, 159 Wn.2d 311, 150 P.3d 59, (2006).

The sole evidence of the sexual abuse in this matter came from N.J.V.'s testimony which consisted of general, and at times, contradictory statements.

In the first instance, N.J.V. recalled being between five and seven years old and generally described, without much detail, that the abuse took place in the living room while her other family members were home, with the exception of her father. She recalled facing the curtains and being penetrated by Mr. Reyes Juarez' penis from behind. There are few other details, and this incident is described in substantially more compelling detail than the other two incidences. There is no corroboration or evidence of collateral suffering, and very little emotional appeal other than the disturbing facts inherent in child sex abuse cases. The first instance, as well as the other two, relied solely upon N.J.V.'s credibility.

The second instance primarily involved being placed into different positions and having her vagina penetrated. She said Mr. Reyes Juarez had an erection, but then quickly contradicted herself, saying that he did not. Again, no significant details and no corroboration and no evidence of collateral suffering was presented.

The third instance had even less detail than the first two, with the only details being that Mr. Reyes Juarez had put his penis in her mouth, without an erection. She also said that Mr. Reyes Juarez penetrated her vagina, without an erection after placing his penis in her mouth, but then immediately contradicted herself, saying that the vaginal penetration came first. Again, no corroboration and no collateral suffering was presented.

Though the first instance is better supported than the other two, it still suffers from insufficiency. From the three identical instructions, to convict the defendant of any one of the crimes of rape of the child in the first degree the State had to prove, among other elements that sexual intercourse in

each count occurred between August 10, 2011 and and August 10, 2017.

On August 10, 2011, N.J.V. had just that day turned five years old. Her testimony was that she was about five to seven years old. She could have been younger than five. But importantly, there are no dates, ages or other circumstances which would indicate when the other two instances occurred. They could have all occurred at the same time. Even though there is instructional error, which was developed above, the law requires that the instances supporting the three different counts be separate and distinct. Here, there is no proof beyond a doubt, reasonable or otherwise, that counts II and III were separate and distinct acts, or that they actually occurred at all.

Moreover, though credibility issues are not reviewable at the appellate level, N.J.V.'s stating in Count II that Mr. Reyes Juarez had an erection, but that no, he did not, amounts to no testimony at all. It also undermines the element that it had been done for purposes of sexual

gratification, an element usually met by establishing that the defendant had an erection.

Of the three Counts, Count II appears to be the least supported and is not based upon sufficient evidence.

iv. Defense counsel rendered ineffective assistance of counsel when he introduced evidence of N.J.V.'s collateral suffering and her claim that she had seen numerous underage females on Mr. Reyes Juarez' cell phone and Instagram account.

To prevail on a claim of ineffective assistance of counsel, a an appellant must show (1) that counsel's representation was deficient and (2) that the deficient representation prejudiced him. *State v. Aho*, 137 Wash.2d 736, 745, 975 P.2d 512 (1999).

The first part requires a showing that the representation fell " below an objective standard of reasonableness based on consideration of all of the circumstances." *State v. Thomas*, 109 Wash.2d 222, 226, 743 P.2d 816 (1987). There is a strong presumption of reasonableness." *Thomas*, 109 Wash.2d at 226, 743 P.2d 816.

The second part requires a showing that there is " a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different, "but the appellant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland v. Washington*, 466 U.S. 668, 693-94, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). *In re Personal Restraint Petition of Crace*, 157 Wn.App. 81, 236 P.3d 914, (Div. 2 2010).

Conduct that may be characterized as legitimate trial strategy or tactics does not constitute deficient performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

Prejudice is a reasonable probability -a probability sufficient to undermine confidence in the outcome- that the result of the proceeding would have differed. *Yates*, 177 Wn.2d at 36. *In re Personal Restraint of McAllister*, 49417-5-II.

Once the State had completed N.J.V.'s testimony, she had succeeded only in describing three rather vague incidences of sexual abuse.

On cross, however, defense counsel then reminded N.J.V. that she had earlier claimed to have developed an eating disorder; had become addicted to cutting herself; had developed behavioral problems; and that her grades had suffered — all as a result of the abuse she had suffered at the hands of Mr. Reyes Juarez. Of all of the testimony that N.J.V. gave, her responses to his line of defense counsel's questions were the most detailed and compelling.

Defense counsel went on to have N.J.V. tell the jury about the numerous pictures of other underaged girls she had seen on Mr. Reyes Juarez' cell phone during those years. N.J.V. clarified that this was during the time he would be having sex with her. This was all evidence the State, for whatever reason, chose not to develop.

Defense counsel then recalled N.J.V. to have her compound the evidence before the jury by disclosing that she had lost two close friends to suicide during the same time period.

During closing, though briefly stated, defense counsel pointed out to the jury that, had N.J.V. actually experienced the suffering she claimed, someone would have noticed and testified

about it at trial. Though a strategy, under these circumstances, bringing up an abundance of collateral suffering which only gained N.J.V. sympathy and made Mr. Reyes Juarez look like a true monster, was not a legitimate one.

To add to Mr. Reyes Juarez' woes, defense counsel brought up the numerous pictures of other underaged girls N.J.V. claimed to have seen on Mr. Reyes Juarez' phone and attempted to challenge the evidence by noting that Mr. Reyes Juarez' phone had not been seized and examined. That, defense counsel said, might have substantiated the State's case — “if they had seized his cell phone and sent it to the crime lab or analyzed it themselves to see if what she said is true about having other children on his cell phone. You would think they would do it for public safety reasons.” Rather than attacking the credibility of N.J.V., this argument may have been a jab at the investigation, but at the very least, it gave the jurors the impression that Mr. Reyes Juarez may have had numerous pictures of other underaged girls on his cell phone — character evidence the State likely would not have been able to introduce. Defense counsel's performance fell below an objective standard and was deficient. Absent this performance, a good deal of the more damaging evidence would not have been introduced and the State

would have been left arguing for convictions on rather sparse, vague claims. Because of defense counsel's deficient performance, there is a reasonable probability -a probability sufficient to undermine confidence in the outcome- that the result of the proceeding would have differed. Mr. Reyes Juarez is entitled to a new trial free of the damaging evidence introduced by his attorney.

v. cumulative error deprived Mr. Reyes Juarez of a fair trial as guaranteed by article 1, section 7 of the Washington state constitution and by the Sixth Amendment of the US Constitution.

Under the cumulative error doctrine, a reviewing court may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant his right to a fair trial, even if each error standing alone would be harmless. *Weber*, 159 Wn.2d at 279. The Cumulative error doctrine, however, provides a defendant no relief where the errors are few and have little or no effect on the outcome of the trial. *Weber*, 159 Wn.2d at 279. *State v. Lindsay*, 171 Wn.App. 808, 288 P.3d 641, (2 2012).

First, in this case, there was clear instructional error, both in the failure to include the separate and distinct language as required in a multiple count case where the State has made an election as to

facts; and in the very inclusion of the *Petrich* instruction which has been deemed inadvisable and confusing in such a case.

Second, the State lessened and trivialized its burden by telling the jury, without objection, that they only needed to be as sure as they were about a story told on the TV show, *Dateline* or 2020, in order to be satisfied beyond a reasonable doubt and convict Mr. Reyes Juarez of three counts of rape of a child in the first degree.

Third, these errors, all of which favored the State, occurred in a case where the sole evidence of the crimes was the rather vague and, at times, the conclusory and contradictory testimony of the child.

And fourth, the one person who was in the room to assist Mr. Reyes Juarez actually may have succeeded in snatching defeat from the jaws of victory by bringing up damaging evidence against the defendant, which the State had not attempted to introduce. Moreover, the defense counsel brought into evidence the evidence of Mr. Reyes Juarez having multiple photos of underaged girls on his cell phone which, at the very least, characterized Mr. Reyes Juarez as a predatory pedophile.

Taken together, the errors which occurred at trial in this matter were, even by themselves, significant, but in combination, effectively denied Mr. Reyes Juarez his right to a fair trial. The errors in this case went to the very core of Mr. Reyes Juarez' right to a fair trial. A new trial is warranted.

CONCLUSION

For all of the reasons above, the Defendant's conviction should be reversed and remanded for vacation of Counts II and III and for a new trial on Count I.

DATED this 13th day of July, 2020.

Respectfully Submitted,

/s/Brian A. Walker
BRIAN A. WALKER, WSBA # 27391
Attorney for Appellant

CERTIFICATE OF SERVICE

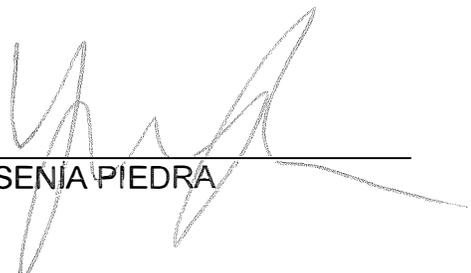
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Dated this 13 day of July, 2020



YESENIA PIEDRA

BRIAN WALKER LAW FIRM, P.C.

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