

FILED  
Court of Appeals  
Division II  
State of Washington  
7/23/2020 2:15 PM

No. 54170-0-II

---

---

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

JASON DONALD STREIFF,

Appellant.

---

---

REPLY BRIEF OF APPELLANT

---

---

On Appeal From Lewis County Superior Court  
The Hon. James Lawler, Presiding

---

NEIL M. FOX  
Attorney for Appellant  
WSBA No. 15277  
2125 Western Ave. Suite 330  
Seattle WA 98121

Phone: (206) 728-5440  
Fax: (866) 422-0542  
Email: [nf@neilfoxlaw.com](mailto:nf@neilfoxlaw.com)

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
A. ARGUMENT IN REPLY .....	1
1. <u>Mr. Streiff’s Right to a Jury of the County For         Count III was Violated</u> .....	1
a. <i>The Constitutional Error Was Manifest</i> .....	1
b. <i>The Error Cannot Be Written Off as             “Harmless”</i> .....	5
c. <i>The Error Was Not Waived</i> .....	7
2. <u>Venue For Count III Was Not In Lewis County</u> .....	9
3. <u>Kissing Alone Is Not Child Molestation</u> .....	11
4. <u>Mr. Streiff’s Statements Were Custodial and Should         Have Been Suppressed</u> .....	13
5. <u>The Deputy’s Conclusion Testimony Was Not         Harmless</u> .....	17
6. <u>Prosecutorial Misconduct Should Lead to Reversal</u> .....	18
7. <u>Improper Prosecutorial Questioning Was Error</u> .....	20
8. <u>The Trial Court’s Use of the Complainants’ Birth         Dates and Initials in the Jury Instructions Should         Lead to Reversal</u> .....	21
9. <u>Double Jeopardy Was Violated by Multiple         Punishments for the Same Act</u> .....	28

10.	<u>Effective Representation and Cumulative Error Should Lead to Reversal</u> . . . . .	30
B.	CONCLUSION . . . . .	30
	Statutory Appendix	
	Certificate of Service	

**TABLE OF CASES**

**Page**

***Washington Cases***

<i>Allied Daily Newspapers v. Eikenberry</i> , 121 Wn.2d 205, 848 P.2d 1258 (1993) . . . . .	23,24
<i>City of Bothell v. Barnhart</i> , 156 Wn. App. 531, 234 P.3d 264 (2010), <i>aff'd</i> 172 Wn.2d 223, 257 P.3d 648 (2011) . . . . .	5,6
<i>Hundtofte v. Encarnación</i> , 181 Wn.2d 1, 330 P.3d 168 (2014) . . . . .	22
<i>In re Welfare of Adams</i> , 24 Wn. App. 517, 601 P.2d 995 (1979). . . . .	11
<i>Doe L. v. Pierce County</i> , 7 Wn. App. 2d 157, 433 P.3d 838 (2018) . . . . .	22
<i>In re Dependency of Lee</i> , 200 Wn. App. 414, 404 P.3d 575 (2017). . . . .	22
<i>In re Detention of Morgan</i> , 180 Wn.2d 312, 330 P.3d 774 (2014) . . . . .	25
<i>Leschi v. Washington Territory</i> , 1 Wash. Terr. 13 (1857) . . . . .	2
<i>Pasco v. Mace</i> , 98 Wn.2d 87, 653 P.2d 618 (1982) . . . . .	2
<i>Seattle Times Co. v. Ishikawa</i> , 97 Wn.2d 30, 640 P.2d 716 (1982) . . . . .	24
<i>State v. Allen</i> , 57 Wn. App. 134, 787 P.2d 566 (1990). . . . .	12
<i>State v. Ashe</i> , 182 Wash. 598, 48 P.2d 213 (1935). . . . .	5
<i>State v. Bright</i> , 129 Wn.2d 257, 916 P.2d 922 (1996) . . . . .	22
<i>State v. Burns</i> , 193 Wn.2d 190,, 438 P.3d 1183 (2019) . . . . .	8,9
<i>State v. Butler</i> , No. 50328-0-II, 2019 Wash. App. LEXIS 69 (1/15/19) (unpub.) . . . . .	19

<i>State v. Campos-Cerna</i> , 154 Wn. App. 702, 226 P.3d 185 (2010) . . . . .	14
<i>State v. Carroll</i> , 55 Wash. 588, 104 P. 814 (1909) . . . . .	5
<i>State v. Gifford</i> , 19 Wash. 464, 53 P. 709 (1898) . . . . .	23
<i>State v. Gore</i> , 101 Wn.2d 481, 681 P.2d 227 (1984) . . . . .	12
<i>State v. Graham</i> , 14 Wn. App. 1, 538 P.2d 821 (1975) . . . . .	5
<i>State v. Halbert</i> , 14 Wash. 306, 44 P. 538 (1896) . . . . .	23
<i>State v. Hobbs</i> , 71 Wn. App. 419, 859 P.2d 73 (1993) . . . . .	11
<i>State v. Tien Thuy Ho</i> , 8 Wn. App. 2d 132, 437 P.3d 726 (2019) . . . . .	15
<i>State v. Jackson</i> , 145 Wn. App. 814, 187 P.3d 321 (2008) . . . . .	11
<i>State v. Jennen</i> , 58 Wn.2d 171, 361 P.2d 739 (1961) . . . . .	23
<i>State v. McNallie</i> , 64 Wn. App. 101, 823 P.2d 1122 (1992), <i>aff'd</i> , 120 Wn.2d 925, 846 P.2d 1358 (1993) . . . . .	19
<i>State v. Mutch</i> , 171 Wn.2d 646, 254 P.3d 803 (2011) . . . . .	28,29
<i>State v. Myrberg</i> , 56 Wash. 384, 105 P. 622 (1909) . . . . .	23
<i>State v. Reese</i> , 112 Wash. 507, 192 Pac. 934 (1920) . . . . .	5
<i>State v. R.P.</i> , 67 Wn. App. 663, 838 P.2d 701 (1992), <i>aff'd in part and rev'd in part</i> , 122 Wn.2d 735, 862 P.2d 127 (1993) . . . . .	12,13
<i>State v. Rosas-Miranda</i> , 176 Wn. App. 773, 309 P.3d 728 (2013) . . . . .	16
<i>State v. Schierman</i> , 192 Wn.2d 577, 438 P.3d 1063 (2018) . . . . .	25,26
<i>State v. S.J.W.</i> , 149 Wn. App. 912, 206 P.3d 355 (2009) . . . . .	14,15

<i>State v. Stearman</i> , 187 Wn. App. 257, 348 P.3d 394 (2015) . . . . .	8
<i>State v. Sublett</i> , 176 Wn.2d 58, 292 P.3d 715 (2012) . . . . .	9
<i>State v. Tingdale</i> , 117 Wn.2d 595, 817 P.2d 850 (1991) . . . . .	5
<i>State v. Zimmerman</i> , 135 Wn. App. 970, 146 P.3d 1224 (2006) . . . . .	27
<i>Wilcox v. Basehore</i> , 187 Wn.2d 772, 389 P.3d 531 (2017) . . . . .	8

***Federal Cases***

<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979) . . . . .	13
<i>Peterson v. Williams</i> , 85 F.3d 39 (2d Cir. 1996) . . . . .	26
<i>United States v. Anderson</i> , 328 U.S. 699, 66 S. Ct. 1213, 90 L. Ed. 1529 (1946) . . . . .	3
<i>United States v. Cabrales</i> , 524 U.S. 1, 118 S. Ct. 1772, 141 L. Ed. 2d 1 (1998) . . . . .	3
<i>United States v. Craighead</i> , 539 F.3d 1073 (9th Cir. 2008) . . . . .	14,15,16
<i>United States v. Durham</i> , 139 F.3d 1325 (10th Cir. 1998) . . . . .	7,8
<i>United States v. Gonzalez-Lopez</i> , 548 U.S. 140, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) . . . . .	26
<i>United States v. Gupta</i> , 650 F.3d 863 (2d Cir. 2011) ( <i>Gupta I</i> ), <i>reconsidered and vacated</i> , 699 F.3d 682 (2d Cir. 2012) ( <i>Gupta II</i> ) . . . . .	26
<i>United States v. Marcus</i> , 560 U.S. 258, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010) . . . . .	26
<i>United States v. Reyes</i> , 18 F.3d 65 (2d Cir. 1994) . . . . .	21

<i>Weaver v. Massachusetts</i> , ___ U.S. ___, 137 S. Ct. 1899, 198 L. Ed. 2d 420 (2017).....	26
---	----

***Other State Cases***

<i>Lynch v. Commonwealth</i> , 131 Va. 762, 109 S. E. 427 (1921) .....	16,17
<i>People v McBurrows</i> , 504 Mich. 308, 934 N.W.2d 748 (2019).....	3

***Statutes, Constitutional Provisions, Rules and Other Authority***

W. Blackstone, Commentaries on the Laws of England (1768).....	16
CrR 5.1 .....	10
ER 401-403.....	18,21
ER 701 .....	18,21
Robert Frost, “The Death of the Hired Man,” THE POETRY OF ROBERT FROST (Edward C. Latham ed., 1967) .....	16
LaFave <i>et al</i> , <i>Criminal Procedure</i> (4th ed).....	3
RAP 2.5.....	1,9
RCW 2.36.050 .....	6
RCW 9.01.130 .....	4
RCW 9.61.260 .....	4
RCW 9A.44 .....	4
RCW 9A.44.089 .....	4

RCW 36.23.070 .....	25
U.S. Const. art. III, § 2 .....	1
U.S. Const. amend. I .....	15,25,27
U.S. Const. amend. II .....	15
U.S. Const. amend. III .....	15
U.S. Const. amend. V .....	9,14,17,29
U.S. Const. amend. VI .....	1,1,18,20,21,26,27,30
U.S. Const. amend. XIV .....	1,13,14,17,18,20,21,27,29,30
Wash. Const. art. I, § 3 .....	13,18,20,21,27,30
Wash. Const. art. I, § 5 .....	27
Wash. Const. art. I, § 9 .....	14,17,29
Wash. Const. ar. I, § 10 .....	27
Wash. Const. art. I, § 21 .....	1,2,18,20,21,27,30
Wash. Const. art. I, § 22 (amend. 10) .....	1,2,5,8,18,20,21,27,30
Wash. Const. art. IV, § 16 .....	27

**A. ARGUMENT IN REPLY**

**1. Mr. Streiff's Right to a Jury of the County For Count III was Violated**

**a. *The Constitutional Error Was Manifest***

When Mr. Streiff objected to the trial of Count III in Lewis County on venue grounds, the State agreed that “Cowlitz County is the jurisdiction where the third count happened.” RP 7. The State also now agrees that all jurors who decided Count III resided, not in Cowlitz County, but rather in Lewis County. *Respondent's Brief* (“BOR”) at 11. Nonetheless, the State argues that the Court should not consider vicinage issues for the first time on appeal. The Court should reject this argument.

RAP 2.5(a)(3) allows a party to raise an error for the first time on appeal involving “manifest error affecting a constitutional right.” The right to have “an impartial jury of the county in which the offense is charged to have been committed” is certainly a constitutional right protected by article I, sections 21 and 22 of the Washington Constitution, if not Article III, § 2, and the Sixth and Fourteenth Amendments to the United States Constitution.

Mr. Streiff acknowledges that U.S. Supreme Court has not yet determined whether U.S. Constitution's vicinage requirement has been incorporated into the Fourteenth Amendment's Due Process Clause. Yet,

even without a state constitution, as a territory, Washington had a vicinage requirement whose source was either in the Sixth Amendment or in “that stringent rule of the common law which required that a party charged with crime should be tried in the county in which the offense was committed.” *Leschi v. Washington Territory*, 1 Wash. Terr. 13, 21 (1857).<sup>1</sup>

In any case, *Leschi* supports Mr. Streiff. The purported vicinage issue raised there was when Pierce County was simply changed from one district to the next: “*It is not the case of an assumption of jurisdiction, by the courts of one county to try felonies committed in another.* It is not the case of carrying the person, having committed the crime in one State, into another for trial, or into a separate and distinct district.” *Id.* (emphasis added). What took place here was exactly what the Court in *Leschi* described as a vicinage violation – the assumption of jurisdiction by the court of one county to try a felony allegedly committed in another.

The State disputes whether the issue here was “manifest.” Here, the State backtracks on its concession in the trial court that Count III occurred in

---

<sup>1</sup> While article I, section 22, explicitly sets out the vicinage requirement, article I, section 21, provides that “trial by jury shall remain inviolate.” “In construing section 21, this court has said that it preserves the right as it existed at common law in the territory at the time of its adoption.” *Pasco v. Mace*, 98 Wn.2d 87, 96, 653 P.2d 618 (1982). Thus, the common law vicinage requirement, referenced by *Leschi*, is independently required by both article I, sections 21 and 22.

Cowlitz County, arguing instead that Mr. Streiff’s plan and motive occurred in Lewis County before he went to Cowlitz County. Thus, the State argues, the “vicinage requirement was met because the jury pool could have been drawn from either Lewis or Cowlitz County.” *BOR* at 14. This is incorrect.

Because of the constitutional history of requiring criminal trials to be held close to the scene of the alleged offense, the Supreme Court has taken a restrictive approach in this area. *See United States v. Cabrales*, 524 U.S. 1, 6, 118 S. Ct. 1772, 141 L. Ed. 2d 1 (1998) (recounting Founders’ complaints about the King transporting colonists “beyond Seas to be tried.”). Generally, if the pertinent statute does not reveal “where Congress considered the place of committing the crime to be . . . the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it.” *United States v. Anderson*, 328 U.S. 699, 703, 66 S. Ct. 1213, 90 L. Ed. 1529 (1946). While not the exclusive means, courts frequently rely on the “verb test” – “scrutinizing the key verbs in a criminal statute” to determine *locus delicti*. *People v McBurrows*, 504 Mich. 308, 316, 934 N.W.2d 748, 753 (2019) (citing 4 LaFave *et al*, *Criminal Procedure* (4th ed), § 16.2(c), p. 848).

RCW 9A.44 does not contain any special language about the location of where the crimes are committed.<sup>2</sup> Thus, one must look at the nature of the crime. Here, the “essential verb” in RCW 9A.44.089, child molestation in the third degree, is “having sexual contact” with another. For Count III, according to the prosecutor below, the alleged act of having sexual contact occurred in Cowlitz, not Lewis County.

RCW 9A.44.089 does not ban traveling from one county to another with the intent to have sexual contact with another, nor does it ban thinking about having sexual contact with another.<sup>3</sup> People who commit crimes may cross through any number of counties before the *actus reus* occurs and may continue on to other counties cashing in on the fruits of their actions, but that

---

<sup>2</sup> In contrast are statutes where the Legislature declared that certain crimes could be committed at multiple locations. *See, e.g.*, RCW 9.61.260(4), RCW 9.01.130.

<sup>3</sup> The criminal act was also not saying “good morning, beautiful” to C.M.J. in Lewis County, *BOR* at 13, although the testimony was slightly different than how the State characterizes it. C.M.J. did not actually testify that Mr. Streiff said those words to her: “I walked upstairs and *he was like*, ‘Good morning, beautiful,’ and I just sat at the table and ignored him.” RP 169 (emphasis added).

Similarly, the State claims that it was *Mr. Streiff* who “decided” to have lunch with Brandon – “Second, Streiff did not ask Brandon if he wanted to have lunch, Streiff “decided” to have lunch with Brandon.” *BOR* at 13. Actually, the testimony from Brandon was not so clear. While he did say that “Jason decided he wanted to go out to lunch with me,” when asked how he knew that, Brandon said: “Because *we already agreed* before I left that we were going to go out to lunch. . . . *We just decided* we were going to go to lunch and so.” RP 229 (emphasis added).

does not allow the State to prosecute that person anywhere in the State unless one of the acts constituting the crime occurred within the county of trial.<sup>4</sup>

**b. *The Error Cannot Be Written Off as “Harmless”***

The State disputes that a violation of the vicinage rights of article I, sections 21 and 22 is structural. *BOR* at 11-12. Yet, while the Supreme Court in *City of Bothell v. Barnhart*, 172 Wn.2d 223, 235, 257 P.3d 648 (2011), declined to address the City’s harmlessness arguments, the Court of Appeals did reach the issue:

A material departure from the statutory scheme for selecting a jury results in presumptive prejudice requiring reversal and remand for a new trial. *State v. Tingdale*, 117 Wn.2d 595, 602-03, 817 P.2d 850 (1991). Similar deviation from a constitutional requirement can be no less consequential. Accordingly, reversal and remand for a new trial is required.

---

<sup>4</sup> See *State v. Reese*, 112 Wash. 507, 192 P. 934 (1920) (prosecution in Spokane for stealing watch on train between Tacoma and Adams County, but where watch was pawned in Spokane, violated article I, section 22); *State v. Carroll*, 55 Wash. 588, 104 P. 814 (1909) (violation of article I, section 22, to prosecute burglary in King County for burglary in San Juan County even though stolen property brought to King County); *State v. Graham*, 14 Wn. App. 1, 538 P.2d 821 (1975) (prosecution for driving while habitual traffic offender improper in county of HTO declaration, rather than county where defendant pulled over). Compare *State v. Ashe*, 182 Wash. 598, 603, 48 P.2d 213 (1935) (upholding conviction for placing a girl in a house of prostitution in Pierce County, charged in King County where the defendants abducted the victim, because a critical portion of the crime took place in King County – “Taking possession of the girl, under the age of consent, was the same as if they had seized and bound her, which would have been a forcible assault in King county, and taken her by force from one county to the other.”).

*City of Bothell v. Barnhart*, 156 Wn. App. 531, 538, 234 P.3d 264 (2010), *aff'd* 172 Wn.2d 223, 257 P.3d 648 (2011). Then, in a footnote, after mentioning how Bothell had not raised harmless until late in the process, the Court of Appeals stated:

We also note that the city’s argument concerning prejudice and harmless error is based on the premise that Barnhart bears the burden of showing prejudice. The city acknowledges that prejudice will be presumed when there is a material departure from statutory requirements for jury selection but argues that no such presumption is warranted because the trial court herein substantially complied with RCW 2.36.050. However, as is explained above, RCW 2.36.050 cannot relax the protection afforded under the state constitution, which was ignored in this case. The city does not explain why the presumption does not arise in Barnhart’s favor.

*Id.* at 538 n.2.

This presumption of prejudice makes sense given the fact that the seating on a jury of even *one juror* from outside the county where the alleged crime occurred *is* the constitutional violation, and thus can never be “harmless” in the way a trial error can be “harmless.” Notably, in prior cases upholding the vicinage right, there was never any discussion of the concept of “harmlessness” at all.<sup>5</sup> In any case, although the State argues that a vicinage error can be harmless, it makes no argument that it was harmless in

---

<sup>5</sup> See authorities cited in fn.4, *supra*.

this case (other than by denying that there was a violation). Thus, the State follows the City of Bothell by also failing to rebut the presumption of prejudice.

**c. *The Error Was Not Waived***

Despite the fact that there was a manifest constitutional error in this case that is presumed prejudicial, the State wishes to avoid reversal of Count III because it claims that the vicinage issue was “waived” when it was not raised below. *BOR* at 14-18. The State admits that “Washington cases have not directly addressed whether failure to challenge vicinage constitutes a waiver of the right, but many cases have discussed venue.” *Id.* at 14-15 (citing cases waiving venue issues if not objected to below).

However, the similarity between the vicinage and venue cases supports Mr. Streiff here because he in fact objected to Count III being tried in Lewis County, making a venue objection which the trial court denied based on Lewis County’s “jurisdiction.” RP 4-8. This is different than the one federal case cited by the State (*BOR* at 16), *United States v. Durham*, 139 F.3d 1325 (10th Cir. 1998), where defense counsel explicitly made a tactical decision to keep a juror who had moved outside the district on the jury rather

than to take an alternate who appeared not taking notes during testimony. *Id.* at 1332-33.

Venue and vicinage both have their roots in the same constitutional provision of article I, section 22. *See State v. Stearman*, 187 Wn. App. 257, 265 & 271, 348 P.3d 394 (2015) (“Venue in the proper county is a constitutional right,” earlier citing article I, section 22). When Mr. Streiff’s lawyer objected, prior to jury selection, to trial of Count III in Lewis County based upon “venue,” he was putting the trial court and the State on notice that it was improper to treat Count III as the State and the Court were treating Counts I and II – trial by a Lewis County jury in Lewis County.<sup>6</sup>

The Supreme Court has curtailed review of constitutional issues under RAP 2.5(a)(3) that were not raised below in very limited circumstances. For instance, in the Confrontation Clause context, where a timely objection below may have led the prosecutor to bring in the missing witnesses (possibly harming the defendant), the Court has not allowed such objections to be raised for the first time on appeal. *State v. Burns*, 193 Wn.2d 190, 206-11, 438 P.3d 1183 (2019). Other cases where the Court has refused review under

---

<sup>6</sup> The purpose of requiring objections below is give the court below an opportunity to address the issue before it becomes reversible error. *Wilcox v. Basehore*, 187 Wn.2d 772, 788, 389 P.3d 531 (2017). That interest was satisfied in this case.

RAP 2.5(a)(3) contain the same theme of giving the lower court the opportunity to cure the error or noting the necessity of creating a proper record for review.<sup>7</sup>

Such concerns do not exist in this case where Streiff's lawyer asked that Count III be dismissed and not tried in Lewis County. When the trial judge explicitly ruled that Lewis County had "jurisdiction" to try Count III, it is not as if Mr. Streiff's lawyer had uttered the word "vicinage" the State would have brought in jurors from Cowlitz County to try Count III (while proceeding with another set of jurors from Lewis County for Counts I and II). While trial counsel did not use the term "vicinage," he put the general nature of his objection on the record. The failure to use the word "vicinage" here should not bar review and the Court should reverse.

## **2. Venue For Count III Was Not In Lewis County**

The State argues that venue for Count III was properly in Lewis County because children sometimes minimize the details of sexual assaults before juries and because there was a continuing course of conduct such that

---

<sup>7</sup> See *Burns*, 193 Wn.2d at 211 (citing *State v. Sublett*, 176 Wn.2d 58, 124-25, 292 P.3d 715 (2012) (Madsen, C.J., concurring) (discussing constitutional rights the United States Supreme Court has listed can be waived by failure to object, including the right to be present, Fourth Amendment right against unlawful search and seizure, unlawful postarrest delay, double jeopardy defense, Fifth Amendment claims, and the right of confrontation).

a jury unanimity instruction was not necessary and the State could elect to submit one or two charges based on the same course of conduct. *BOR* at 21-22. Yet, there is no exception to the venue rules based upon vagueness of complainant's testimony or because two crimes might be part of a continuing course of conduct for jury unanimity purposes.

CrR 5.1(a)(2) requires that actions be commenced either in the county where the offense was committed or an element of the offense occurred. As noted, that requires examining the key verbs in the statute. Here, no element of Count III was allegedly committed in Lewis County<sup>8</sup> – the key element is having sexual contact and no one, not even the prosecutor below, claimed that such contact took place in Lewis County.

The State then complains that Mr. Streiff's attorney raised the venue objection too late. The State claims that the discovery made it clear that Count III took place in Castle Rock and chastises defense counsel for not filing a motion for a bill of particulars. *BOR* at 22-24. However, the State did not make any discovery part of the record so it is unknown, other than the deputy prosecutor's assertions, what the discovery actually showed. Given the allegations of two different contacts with C.M.J. in Lewis County, there

---

<sup>8</sup> To the extent that Count III did occur in Lewis County, Counts I and III must merge to avoid a double jeopardy violation. *See* section A(9), *infra*.

is no reason to assume Streiff's trial counsel would have known that Count III was intended only to deal with the allegations in Cowlitz County.

More importantly, even if the State made an error as to venue in the Amended Information, filed on April 19, 2019 (CP 11-13), defense counsel had no obligation to object any sooner than the time the prosecutor filed an amended information.<sup>9</sup> Here, as soon as the State filed an amended information, changing the venue from Lewis County to the State of Washington, Mr. Streiff's attorney objected. He had no obligation to bring this issue to the State's attention earlier. The Court should reverse Count III.

### **3. Kissing Alone Is Not Child Molestation**

The State argues that a simple kiss on the lips is sufficient to constitute child molestation in the third degree. *BOR* at 27-29.<sup>10</sup> While the State cites cases that are not necessarily pertinent,<sup>11</sup> the State rests its

---

<sup>9</sup> See *State v. Hobbs*, 71 Wn. App. 419, 424, 859 P.2d 73 (1993) (defense attorney knew of venue issue, but did not raise it until closing argument for strategic reasons: "The State now characterizes this defense strategy as 'lying in the weeds' on a 'technicality'. We disagree. This was a valid defense strategy under these circumstances. Defense counsel is an advocate for her client, not a 'law clerk' for the prosecutor.").

<sup>10</sup> The State also argues that Mr. Streiff's act of unzipping his own pants was part of the evidence of sexual contact. *BOR* at 29. However, while the alleged act of Streiff unzipping his own pants may well constitute evidence of a sexual purpose, that act (as opposed to unzipping someone else's pants) is not evidence of sexual *contact*.

<sup>11</sup> *State v. Jackson*, 145 Wn. App. 814, 187 P.3d 321 (2008) (ejaculation on child); *In re Welfare of Adams*, 24 Wn. App. 517, 601 P.2d 995 (1979) (touching of hips while unbuttoning and taking down *complainant's* pants).

argument admittedly on a jury unanimity case from 1990 where kissing was combined with touching between the legs and on the chest. *BOR* at 28-29 (citing *State v. Allen*, 57 Wn. App. 134, 787 P.2d 566 (1990)). Apart from the obvious differences between *Allen* and this case (kissing alone was not the issue in *Allen* and thus the discussion was *dicta*), the State simply wishes to ignore the Supreme Court's decision in *State v. R.P.*, 122 Wn.2d 735, 862 P.2d 127 (1993), holding that hugging, kissing, and sucking on the neck with such force as to leave a "hickey" was not sexual contact.

While the State may not like the fact that the Supreme Court in 1993 did not "elaborate" its holding, the holding is obviously binding on this Court. *See State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984). The State questions whether the Supreme Court's decision was based the lack of sexual contact or the lack of a purpose of sexual gratification. *BOR* at 28. But not only did the Supreme Court describe the "hickey" as a "passion mark," *R.P.*, 122 Wn.2d at 736, but a review of the dissenting opinion of Justice Andersen (*id.* at 736-37) and the Court of Appeals' decision, *State v. R.P.*, 67 Wn. App. 663, 838 P.2d 701 (1992), *aff'd in part and rev'd in part*, 122 Wn.2d 735, 862 P.2d 127 (1993), makes it clear that R.P. had a sexual motivation and the only issue was whether kissing alone could be sexual

contact. As the Court of Appeals explained, the incident with the kissing was the second sexual assault on the same victim within a few days. R.P. had previously restrained and kissed the victim, reaching up her shirt and touching her breasts, touching her buttocks and then attempting to touch the frontal part of her groin area. *R.P.*, 67 Wn. App. at 665. The issue on appeal was not whether the second incident had a sexual motivation, but whether there was contact with the sexual or intimate areas of the victim. *Id.* at 667-68. While the Court of Appeals held that kissing on the lips was on the victim's intimate body parts, the Supreme Court disagreed with this holding, despite the prior incident.<sup>12</sup>

Thus, following *R.P.*, in this case, there was insufficient evidence to sustain a conviction under the protective standard of the Fourteenth Amendment's and article I, section 3's Due Process Clauses and *Jackson v. Virginia*, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979).

**4. Mr. Streiff's Statements Were Custodial and Should Have Been Suppressed**

The State criticizes Mr. Streiff for including facts elicited at trial in the discussion of the issues related to the police interrogation of Mr. Streiff

---

<sup>12</sup> See also *R.P.*, 122 Wn.2d at 737 (Andersen, C.J., dissenting) (the kissing in this case was on a sufficiently intimate area to constitute sexual contact).

at his home. *BOR* at 31. The State fails to cite to any authority to support its proposition that this Court must ignore Deputy Scrivner's trial testimony when determining if there was a violation of the Fifth and Fourteenth Amendments and article I, section 9. Yet, this Court has specifically recognized its power to review a Fifth Amendment violation under RAP 2.5(a)(3) if there is a sufficient record for review even it was not raised below at all. *State v. Campos-Cerna*, 154 Wn. App. 702, 710, 226 P.3d 185 (2010). Certainly, where a defendant contests the admissibility of their statements prior to trial, and the officer's testimony at trial creates a fuller record of what transpired, this Court on appeal can examine the complete record to determine if the admission of the statements violated the Fifth and Fourteenth Amendments and article I, section 9.

Substantively, arguing that Deputy Scrivner did not engage in custodial interrogation, the State concentrates on the fact that Scrivner questioned Mr. Streiff in his home, relying on *State v. S.J.W.*, 149 Wn. App. 912, 928-29, 206 P.3d 355 (2009), and *United States v. Craighead*, 539 F.3d 1073, 1083 (9th Cir. 2008). *BOR* at 34-35. Both cases actually support Mr. Streiff.

In *S.J.W.*, the officer questioned the juvenile respondent in his own home, but key to the court’s conclusion that the interrogation was not custodial was the fact that the respondent’s mother was present during the interview and the interview was not “obviously accusatory.” *S.J.W.*, 149 Wn. App. at 929.<sup>13</sup> In contrast, in this case, Deputy Scrivner questioned Mr. Streiff alone, without anyone being present for support and transitioned from small talk to the accusatory interrogation – the “hot question,” or “the hot button” -- where the mood changed and Streiff became defensive and upset about the nature of the questioning. RP 126-33, 344-45, 363-64.

In *United States v. Craighead*, *supra*, the Ninth Circuit suppressed statements and reversed a conviction after federal agents intruded on the defendant’s privacy and questioned him in his own home. Noting that the “home occupies a special place in the pantheon of constitutional rights,” citing the First, Second and Third Amendments, *id.* at 1077, the court described the problem of someone interrogated in their home who is supposedly “free to leave”:

The usual inquiry into whether the suspect reasonably believed he could "leave" the interrogation does not quite capture the uniqueness of an interrogation conducted within

---

<sup>13</sup> See also *State v. Tien Thuy Ho*, 8 Wn. App. 2d 132, 145, 437 P.3d 726 (2019) (“She was not isolated from her husband, Yang.”).

the suspect's home. "Home," said Robert Frost, "is the place where, when you go there, they have to take you in." Robert Frost, *The Death of the Hired Man*, in *THE POETRY OF ROBERT FROST* 38 (Edward C. Latham ed., 1967). If a reasonable person is interrogated inside his own home and is told he is "free to leave," where will he go? The library? The police station? He is already in the most constitutionally protected place on earth. To be "free" to leave is a hollow right if the one place the suspect cannot go is his own home.

*Id.* at 1082-83. While an interrogation in the home is not *per se* custodial, *id.* at 1083, the Ninth Circuit looked at a series of factors such as the number of police officers and whether they were armed, whether there was restraint by physical force or threats, whether the suspect was isolated from others, and whether the officer informed the suspect they were free to leave or terminate the interview. *Id.* at 1084.

Applying those factors here, although there was only one police officer, Mr. Streiff was isolated and there was no one present; he was not physically restrained but the officer, who apparently had a gun and a tazer on him, RP 124, laid hands on him,<sup>14</sup> and when it was clear that Mr. Streiff did

---

<sup>14</sup> Compare *State v. Rosas-Miranda*, 176 Wn. App. 773, 784, 309 P.3d 728 (2013) ("The absence of restraint weighs against a finding that the atmosphere in Elvia's apartment was police-dominated."). While Scrivner did not handcuff Streiff, putting his hands on his body is a significant physical act that ratcheted up the atmosphere from a cordial conversation to an coercive interrogation – any reasonable person would find a police officer laying hands on one's person to be an offensive and coercive act. See 3 W. Blackstone, *Commentaries on the Laws of England* 120 (1768) (least touching of another's person, willfully or in anger, is a battery); *Lynch v. Commonwealth*, 131 Va. 762, 765-66, 109 S. E.

(continued...)

not want to talk to Deputy Scrivner, the latter kept asking questions and never told him at the outset that he was free to leave.<sup>15</sup> Given these factors, Mr. Streiff's rights under the Fifth and Fourteenth Amendments and article I, section 9, were violated and the Court should reverse.

**5. The Deputy's Conclusion Testimony Was Not Harmless**

The State acknowledges that improper opinion testimony can violate various constitutional rights and can be raised for the first time on appeal. The State, though, dismisses Deputy Scrivner's statements as being in the nature of "hearsay" – that he was relaying what he found out from the witnesses. *BOR* at 42-43.<sup>16</sup> However, the deputy did not simply give a recitation of what others told him, but rather he repeatedly testified in

---

<sup>14</sup>(...continued)  
427, 428 (1921) (assault by putting hand on shoulder)..

<sup>15</sup> The prosecutor asked the deputy if "at any point tell him that he is not free to leave," to which the deputy answered "No." RP 124. There is no evidence of the converse, though – that the deputy affirmatively told Streiff he could in fact leave.

<sup>16</sup> In Mr. Streiff's opening brief, counsel referenced testimony that Deputy Scrivner testified that Mr. Streiff was "essentially downplaying the crime itself." *BOA* at 38 (citing RP 346). The State properly points out that it was *Deputy Scrivener* who downplayed "the crime," *BOR* at 41, and counsel apologizes for any inconvenience caused by this error. However, the issue is not who was "downplaying," but the use of the conclusory term "the crime" since whether there was a "crime" at all was an issue for the jury.

conclusory terms about what he “found out” – what the prosecutor described as the “big picture.”<sup>17</sup>

While the jury was certainly told it was the sole judge of credibility, CP 52, given Mr. Streiff’s general denial defense and his decision to contest all of the allegations against him, when a police officer tells the jury that he found out that Mr. Streiff had sexually assaulted two teenagers, that type of conclusion testimony cannot be harmless. Based on the violation of Mr. Streiff’s rights to due process of law and a jury trial, protected by Sixth and Fourteenth Amendments, article I, sections 3, 21 and 22, and ER 401-403 and ER 701, the convictions should be reversed.

**6. Prosecutorial Misconduct Should Lead to Reversal**

The State defends its deputy telling the jury to hold Mr. Streiff “accountable,” dismissing the remark as coming at the end of the closing

---

<sup>17</sup> See, e.g., RP 339-40:

Q [By Ms. Irimescu] So just in big picture, what did you find out during that conversation with [C.M.J.]?

A [By Deputy Scrivner] I found out that she was at a birthday party in the early time of August -- around August 11th and 12th and at this birthday party she was sexually assaulted by a gentleman named Jason Streiff.

Imagine if defense counsel asked defense witnesses the “big picture” of what they found out, and they stated they learned that the C.M.J. had lied and falsely accused Mr. Streiff of crime.

argument. *BOR* at 48. But the fact that the argument came at the end of the State’s rebuttal, and Mr. Streiff could not respond, was significant – the last words the jury heard was an invitation to hold Mr. Streiff “accountable” rather than to hold the State accountable by holding it to its burden of proof.

The State relies on *State v. McNallie*, 64 Wn. App. 101, 823 P.2d 1122 (1992), *aff’d*, 120 Wn.2d 925, 846 P.2d 1358 (1993), but there the prosecutor stated that the jury decision will determine if “the defendant will be set free or held to account.” 64 Wn. App. at 110-11. Division One concluded, “that is indeed the jury’s responsibility and function.” *Id.* at 111. By offering the jury the two alternatives based on acquittal or finding someone guilty, there was no misconduct. In contrast, here, the State did not offer the jury the alternatives, and instead made the emotional pitch to tell the jury it was “time for him to be held accountable for his actions.” RP 410.<sup>18</sup>

As for the “scales of justice,” the State does not fully appreciate that the prosecutor did not generally talk about the scales of justice as the defense attorney did, but rather she told the jurors that given the witnesses “that

---

<sup>18</sup> See *State v. Butler*, No. 50328-0-II, 2019 Wash. App. LEXIS 69 at \*20 (1/15/19) (unpub.) (asking jury to hold defendant accountable for not respecting the meaning of “no” – “This statement asked the jury to hold Butler accountable for all of the crimes charged based on a social commentary, rather than law, and invited the jury to send a broader message by finding Butler guilty of rape. This was improper.”).

balance falls for justice. So I am asking to you find him guilty of the three counts of child molestation in the third degree.” RP 444. In other words, there are two sides, one side is “justice” and a conviction, and the other is something else. This is an appeal to emotion and misstates the burden of proof.

Prosecutorial misconduct violated Mr. Streiff’s rights to due process and a fair jury trial, protected by the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22. Given Mr. Streiff’s defense of contesting all aspects of the State’s case, the misconduct was not harmless and the Court should reverse the convictions.

**7. Improper Prosecutorial Questioning Was Error**<sup>19</sup>

The State is correct that Mr. Streiff argues that the deputy prosecutor’s persistent questions assuming Mr Streiff’s guilt need to be evaluated cumulatively with the other misconduct and the other improper opinion and conclusion testimony. *BOR* at 55. The entire tenor of the State’s case, from the questioning of the witnesses to the conclusory terms used by the witnesses in their testimony, was based on the assumption that Mr. Streiff had in fact committed a series of sexual assaults. To be sure, a prosecutor can

---

<sup>19</sup> The reference to RP 285 at *AOB* at 39 n.26 was a typo (a transposition of RP 258 that was not removed).

ask preliminary questions to set a narrative, but such devices, while making the evidence more exciting, cannot be a subterfuge for putting inadmissible evidence (i.e. conclusion testimony) before the jury. *See United States v. Reyes*, 18 F.3d 65, 69-71 (2d Cir. 1994). Here, the deputy prosecutor consistently assumed guilt in her questions. This persistent questioning violated ER 401-403 and ER 701, due process and the right to a fair jury trial, protected by the Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22, and should lead to reversal.

**8. The Trial Court's Use of the Complainants' Birth Dates and Initials in the Jury Instructions Should Lead to Reversal**

The State argues that the trial court's inclusion in the "to convict" instructions of the complaining witness's birth dates and initials, rather than names, is not a basis for reversal. In doing so, the State claims variously that using pseudonyms<sup>20</sup> comported with "experience and logic," that the use in "to convict" instructions was *de minimis*, that there was not a comment on the evidence and lowering of the burden of proof, and that any error was harmless. The Court should reject the State's arguments.

---

<sup>20</sup> The State disputes whether using initials is the same as using pseudonyms. *BOR* at 57 n.13. Initials, though, are no different than a "fictitious name" since it is not how one normally is referred to and the ultimate effect is to hide the person's name from public scrutiny.

The State argues that no rule requires the use of people’s names in court and that it can refer to participants in court in any manner it wishes to. *BOR* at 62-64. In fact, the Supreme Court has criticized as demeaning the use of anything less than courtesy titles at least for adult witnesses,<sup>21</sup> while Division One has pointed out the depersonalizing practice of using initials for a severely disabled child.<sup>22</sup> However, the key thing is not how the State refers to its own witnesses in its own pleadings, but rather how *a court* refers to witnesses in the very documents that the jury uses to determine whether the State has proven its case beyond a reasonable doubt – the “to convict” instructions.<sup>23</sup> The use of pseudonyms in general in court filings has to be analyzed in conjunction with the resulting comment on the evidence and the effect on the burden of proof.

---

<sup>21</sup> See *State v. Bright*, 129 Wn.2d 257, 264 n. 23, 916 P.2d 922 (1996) (“Participants in all court proceedings are entitled to be addressed with courtesy titles, such as ‘Ms. Mary Hamilton’ or ‘Ms. Hamilton’ instead of ‘Mary.’”).

<sup>22</sup> See *In re Dependency of Lee*, 200 Wn. App. 414, 419 n. 1, 404 P.3d 575 (2017), *rev. denied* 190 Wn.2d 1006, 415 P.3d 99 (2018). Notably, the petition for review in *Lee* raised only the issue of the use of the full name of the child.

<sup>23</sup> The State tries to distinguish *Hundtofte v. Encarnación*, 181 Wn.2d 1, 330 P.3d 168 (2014) and *Doe L. v. Pierce County*, 7 Wn. App. 2d, 157, 433 P.3d 838 (2019), arguing here, “the court took no action to restrict the public’s access to any portion of any filed document.” *BOR* at 68. However, the court here did exactly that by not using the witnesses’ names in the jury instructions, thereby restricting the public’s access to that information.

While the State disputes the historical practice of not using pseudonyms or initials for witnesses or litigants, *see BOR* at 63-64 (citing cases going back only to 1995), the practice of using initials for witnesses is of relatively recent origin. The traditional rule in Washington was for court documents to use, not the legal name of a child complainant in a sex case, but the actual name “he or she is generally known by in the neighborhood where the crime is committed.” *State v. Myrberg*, 56 Wash. 384, 386, 105 P. 622 (1909) (using full name of nine year old child).<sup>24</sup>

That this historical experience is essential to an analysis under article I, section 10 (the “experience” prong), is confirmed by *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993), which explicitly struck down on article I, section 10, grounds a statute that required redaction or sealing of a child victim’s name in all court proceedings. The State tries to distinguish this case on the ground that the children here testified using their real names: “*Eikenberry* is immediately distinguishable because C.M.J and K.L.W.’s real names were used at trial,” whereas in *Eikenberry* there was no individualized inquiry and “the use of

---

<sup>24</sup> *Accord: State v. Jennen*, 58 Wn.2d 171, 174-75, 361 P.2d 739 (1961) (15-year old “prosecutrix” in carnal knowledge case). *See also State v. Halbert*, 14 Wash. 306, 44 P. 538 (1896) (naming carnal knowledge victim under 16 years of age); *State v. Gifford*, 19 Wash. 464, 53 P. 709 (1898) (naming victim of rape under 18).

initials was not compelled, but voluntarily done by the parties, presumably as a courtesy to the victims.” *BOR* at 65.

However, there was no individualized inquiry in this case either – no recitation of the factors set out in *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 37-39, 640 P.2d 716 (1982). Moreover, the fact that the trial court extended a ‘courtesy’ to the child witnesses in this case, as opposed to the blanket statutory requirement at issue in *Eikenberry*, actually makes the error more egregious. If there was a uniform procedure applicable to all cases involving minor witnesses, then the impact of the practice in a particular case would be minimized – the jurors and public would know that what was being done was required by law – whereas here the deviation from the normal practice of identifying witnesses’ identities suggests that there is something about this case that was different, that the trial judge needed to protect the witnesses’ identities in this particular case. This suggestion that something was different about this case ties directly to the issues about a comment on the evidence and reducing the burden of proof since it telegraphed to the jury something about this case that was different and required hiding the identities of the witnesses.

The State argues that using full names in court documents does not advance any purposes behind public access to information, particularly where the witnesses' full names were used in open court during testimony (the "logic" prong). *BOR* at 65-67. Yet, the fact that the complainants were identified in court by their names suggests that there is even less of a reason to use initials in court documents.

The State cites *In re Detention of Morgan*, 180 Wn.2d 312, 326, 330 P.3d 774 (2014), *BOR* at 66, but that case, as the State recognizes, dealt with a status conference where the evidence that was discussed in chambers was ultimately filed in the public file. Here, the converse exists where the identities of the complaining witnesses were released in court, but anyone down the road who was examining the court file to find out what happened in Mr. Streiff's case would not easily be able to determine who the alleged victims were by reference to the jury instructions. While someone would be able to order the transcripts of the trial, this might not be possible years from now – after the 15 year retention period required by RCW 36.23.070.

The State also argues the use of the initials was a *de minimis* closure, citing *State v. Schierman*, 192 Wn.2d 577, 438 P.3d 1063 (2018). Yet, the U.S. Supreme Court has not recognized such an exception under the First and

Sixth Amendments and in fact such an exception flies in the face of the U.S. Supreme Court’s designation of closed courts as a structural error on direct appeal.<sup>25</sup> But whether the *Schierman* majority was correct or not, the use of the initials here cannot be written off as *de minimis* given their use in the jury instructions.

In contrast to the brief in-chambers taking of “for cause” challenges – “which involved no juror questioning, witness testimony, or presentation of evidence, and was simultaneously transcribed and immediately afterward memorialized in open court,” *Schierman*, 192 Wn.2d at 615 (McCloud, J., opinion) – here the use of initials was contained in the very jury instructions given to the jurors to use to decide if the State had proven its case. Not only is the public’s ability to find out what took place limited years into the future, but the open court violation must be viewed in the context of the comment on the evidence violation and reduction in the State’s burden of proof that

---

<sup>25</sup> See *Weaver v. Massachusetts*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1899, 1905 & 1908, 198 L. Ed. 2d 420 (2017). See also *United States v. Marcus*, 560 U.S. 258, 263, 130 S. Ct. 2159, 176 L. Ed. 2d 1012 (2010) & *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149, 126 S. Ct. 2557, 165 L. Ed. 2d 409 (2006) (both cases listing public trial violations as falling within the category of structural error). Even the Second Circuit, which had earlier applied a “triviality” exception in *Peterson v. Williams*, 85 F.3d 39, 42-44 (2d Cir. 1996), relied on by the State and the plurality opinion in *Schierman*, later limited and narrowed the rule. See *United States v. Gupta*, 650 F.3d 863 (2d Cir. 2011) (*Gupta I*), *reconsidered and vacated*, 699 F.3d 682, 684, 688-89 (2d Cir. 2012) (*Gupta II*) (overruling decision that applied the *de minimis* doctrine to allow the intentional exclusion of public from voir dire without making any specific findings, and finding the defendant’s Sixth Amendment rights were violated).

exists when the Court uses initials of witnesses. While the State argues, the “usage did not alter or otherwise taint any witness testimony or legal argument,” *BOR* at 69, in fact, such a taint existed here because the initials were used in the instructions.

Moreover, it was not just that the initials were used, but the jury instructions contained the birth dates of the complainants as well. While the birth dates were not necessary to the charge, the age of the complainants was certainly an essential element and the inclusion of a birth date in the jury instructions effectively removed that element from the jury – the court essentially directed a verdict on that element. Even if such an error can be harmless, which Mr. Streiff has argued it cannot be, *BOA* at 48, where Mr. Streiff contested every element of the State’s case against him, this error cannot be harmless in this case. The Court should reverse based on the violation of Mr. Streiff’s right to an open and public jury trial, due process of law, and the right to be free from comments on the evidence. U.S. Const. amends. I & XIV; Const. art. I, §§ 3, 5, 10, 21 and 22; Const. art. IV, § 16.<sup>26</sup>

---

<sup>26</sup> While the State relies on *State v. Zimmerman*, 135 Wn. App. 970, 146 P.3d 1224 (2006), it ignores the key line of the holding: “Critical to our conclusion is the fact that Zimmerman is J.C.’s biological father and, even though he denied molesting her, he knew and never disputed knowing her age.” *Id.* at 975. Here, Mr. Streiff did not testify and did not admit anything.

**9. Double Jeopardy Was Violated by Multiple Punishments for the Same Act**

For purposes of arguing that Count III was properly tried in Lewis County with a Lewis County jury, the State argues one continuing course of conduct between Counts I and III. *BOR* at 13-14, 20-22. However, for purpose of its double jeopardy analysis, the State argues that everything that allegedly occurred with C.M.J. in Winlock was very different than what supposedly took place in Castle Rock. *See BOR* at 80-81 (quoting closing argument to show how there was a “clear breaking point between the two offenses”). Of course, the jury was not bound by arguments of counsel and had an independent duty to review the evidence and instructions and decide the case based on their own conclusions. *Inst. No. 1, CP 52*. However the State may have argued the case, the jury could have based conviction on Count III for acts that occurred the same day in Winlock, not Castle Rock.

The case that the State relies on, *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011), actually supports reversal. There, the State alleged five counts of rape based on the victim’s testimony of five “separate episodes of rape,” and there were five separate “to convict” instructions. *Id.* at 665. Given a defense of consent, the Supreme Court held that *Mutch* was “a rare circumstance where, despite deficient jury instructions, it is nevertheless

manifestly apparent that the jury found him guilty of five separate acts of rape to support five separate convictions.” *Id.* The Court concluded,

the defense did not argue insufficiency of evidence as to the number of alleged criminal acts or question J.L.'s credibility regarding the number of rapes but instead argued that she consented and was not credible to the extent she denied consenting. In light of all of this, we find that it was manifestly apparent to the jury that each count represented a separate act; *if the jury believed J.L. regarding one count, it would as to all.*

*Id.* at 665-66 (emphasis added).

In contrast, here, the jurors could easily have had a reasonable doubt that anything took place in Castle Rock, given the extreme unlikelihood that C.M.J. could be unobtrusively molested while her father was sitting in the same room playing video games a few feet away and did not see or hear anything. Yet, the jurors could have returned guilty verdicts for Counts I and III for the same acts that occurred in Winlock. This case is not the “rare” case as set out in *Mutch*. The Court should vacate either Count I or III due to a violation of the double jeopardy provisions of the Fifth and Fourteenth Amendments and article I, section 9.

**10. Effective Representation and Cumulative Error  
Should Lead to Reversal**

The State's argument about effective assistance of counsel and cumulative error is simply to deny that there was error. *BOR* at 82-86. However, as noted, there were significant errors; counsel should have objected to each and every one of them; and these errors need to be assessed cumulatively. U.S. Const. amends. VI & XIV; Const. art. I, §§ 3, 21 & 22.

**B. CONCLUSION**

For the foregoing reasons and those set out in the opening brief, the Court should reverse the convictions and remand for a new trial or new sentencing hearing.

DATED this 23<sup>rd</sup> day of July 2020.

Respectfully submitted,

s/ Neil M. Fox  
WSBA No. 15277  
Attorney for Appellant

**STATUTORY APPENDIX**  
Supplemental to Opening Brief

## **Relevant Statutory Provisions and Rules**

RCW 2.36.050 provides:

In courts of limited jurisdiction, juries shall be selected and impaneled in the same manner as in the superior courts, except that a court of limited jurisdiction shall use the master jury list developed by the superior court to select a jury panel. Jurors for the jury panel may be selected at random from the population of the area served by the court.

RCW 9.01.130 provides:

Whenever any statute makes the sending of a letter criminal, the offense shall be deemed complete from the time it is deposited in any post office or other place, or delivered to any person, with intent that it shall be forwarded; and the sender may be proceeded against in the county wherein it was so deposited or delivered, or in which it was received by the person to whom it was addressed.

RCW 9.61.260 provides:

(4) Any offense committed under this section may be deemed to have been committed either at the place from which the communication was made or at the place where the communication was received.

RCW 36.23.070 provides:

A county clerk may at any time more than six years after the entry of final judgment in any action apply to the superior court for an authorizing order and, upon such order being signed and entered, turn such exhibits of possible value over to the sheriff for disposal in accordance with the provisions of chapter 63.40 RCW, and destroy any other exhibits, unopened depositions, and reporters' notes which have theretofore been filed in such cause: PROVIDED, That

reporters' notes in criminal cases must be preserved for at least fifteen years: PROVIDED FURTHER, That any exhibits which are deemed to possess historical value may be directed to be delivered by the clerk to libraries or historical societies.

U.S. Const. art. III, § 2, ¶ 3 provides:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. Const. amend. II provides:

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed

U.S. Const. amend. III provides:

No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Wash. Const. art. I, § 5 provides:

Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

CERTIFICATE OF SERVICE

I, Neil Fox, certify and declare as follows:

On July 23, 2020, I served a copy of the REPLY BRIEF OF APPELLANT on counsel for the Respondent by filing this pleading through the Portal.

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 23<sup>rd</sup> day of July 2020 at Seattle, Washington.

s/ Neil M. Fox

WSBA No. 15277

**LAW OFFICE OF NEIL FOX PLLC**

**July 23, 2020 - 2:15 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 54170-0  
**Appellate Court Case Title:** State of Washington, Respondent v. Jason D. Streiff, Appellant  
**Superior Court Case Number:** 18-1-00972-8

**The following documents have been uploaded:**

- 541700\_Briefs\_20200723141211D2256090\_8232.pdf  
This File Contains:  
Briefs - Appellants Reply  
*The Original File Name was Streiff Reply Final 072320.pdf*
- 541700\_Motion\_20200723141211D2256090\_0419.pdf  
This File Contains:  
Motion 1 - Accelerated Review  
*The Original File Name was Objection Re Release or Motion to Accelerate Review.pdf*
- 541700\_Other\_Filings\_20200723141211D2256090\_0041.pdf  
This File Contains:  
Other Filings - Other  
*The Original File Name was Motion to file overlength reply brief 072320.pdf*

**A copy of the uploaded files will be sent to:**

- appeals@lewiscountywa.gov
- sara.beigh@lewiscountywa.gov
- teri.bryant@lewiscountywa.gov

**Comments:**

Objection regarding release pending appeal or motion for accelerated review

---

Sender Name: Neil Fox - Email: nf@neilfoxlaw.com  
Address:  
2125 WESTERN AVE STE 330  
SEATTLE, WA, 98121-3573  
Phone: 206-728-5440

**Note: The Filing Id is 20200723141211D2256090**