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Division II
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No. 54170-0-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JASON DONALD STREIFF,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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I. ISSUES

- A. Did the trial court properly deny Streiff's motion to sever or dismiss, on the basis of improper venue, on Count III and does Streiff fail to show his vicinage argument is a manifest constitutional error, due to his failure to assert the issue when he raised his venue motion?
- B. Did the State present sufficient evidence to sustain the jury's verdict of guilty for Count I, Child Molestation in the Third Degree?
- C. Did the trial court, following a CrR 3.5 hearing, erroneously admit Streiff's statements after finding Streiff voluntarily spoke to the deputy in a noncustodial environment?
- D. Is Deputy Scrivner's alleged improper testimony a manifest constitutional error Streiff may raise for the first time on appeal?
- E. Did the deputy prosecutor commit error during closing argument or during questioning of the witnesses, and if so was it flagrant and ill intentioned?
- F. Did the use of the victims' initials in the to-convict instructions implicate the public trial right or violate Streiff's right to a fair trial because it was a judicial comment on the evidence?
- G. The State concedes Streiff is not subject to indeterminate sentencing and his community custody must be reduced.
- H. Does sentencing Streiff to Counts I and III violate double jeopardy?
- I. Did Streiff receive ineffective assistance from his trial counsel throughout the proceedings?
- J. Is there cumulative error warranting reversal?

II. STATEMENT OF THE CASE

Family and friends gathered in Winlock, Washington, for a barbeque to celebrate Mat's¹ birthday on August 11, 2018. RP 202-03, 227, 311. Mat's immediate family attended, his girlfriend Clara, their daughter, Natalie, and Clara's 15-year-old daughter K.L.W. RP 203, 265, 309. Mat's brother, Brandon, his wife, Christina, and their children, including their 14-year-old daughter, C.M.J., also attended the birthday party. RP 162, 201-03. Also in attendance was Jason Streiff, Mat's best friend and a good friend of Brandon's. RP 202-03, 227, 325.

The birthday party went into the early hours of August 12, with the people in and out of the pool until around 2:00 a.m., and the adults all consumed alcohol. RP 326. K.L.W. went to bed earlier than usual, around midnight, because she had plans to go to an event with her boyfriend and his family in the morning. RP 268, 279-80. In contrast, C.M.J. hung out in Natalie's room, watching television with one of her brothers and Natalie until around 3:00 a.m. RP 165-66.

Mat put Streiff to bed in Natalie's room because no one was sleeping in there. RP 326. When the kids came into the room, Streiff was laying on

¹ The State will refer to all family members (other than the victims) by their first names to protect the identity of the victims, no disrespect intended. Due to the prevalence of datamining, by adding the last names of the family members it then becomes quite easy for someone to post the identity of the victim on the internet. While the victim's identity is not a secret, the State does not believe with a simple keystroke a victim of sexual assault should easily be identified by anyone doing an internet search on his or her name.

the bed, and he eventually fell asleep. RP 166. C.M.J. fell asleep and awoke to Streiff getting on top of her. RP 166. Streiff was kissing C.M.J. on her lips. RP 167. C.M.J. started to get up, but Streiff grabbed her hand. RP 167. Streiff told C.M.J. “[t]o come cuddle with him.” RP 167. C.M.J. said “no,” and pulled her hand away. RP 167. Streiff started to unzip his pants. RP 167. C.M.J. ran to where her brother and Natalie were sleeping on a futon, got in between the two, and lay down. RP 167.

C.M.J. was scared but managed to fall halfway asleep again. RP 168. C.M.J. woke back up because Streiff was lying on top of her. RP 168. Streiff was trying to find C.M.J.’s lips to kiss C.M.J. again, but she turned her head. RP 168. C.M.J. told Streiff to go away, which he did not do until C.M.J.’s brother made a noise. RP 168-69.

K.L.W. woke when her alarm went off at 6:00 a.m, laid in bed, and reset her alarm for 15 more minutes. RP 276. K.L.W.’s door opened, somebody got into bed with K.L.W., put their arm over her, and kissed K.L.W. on the neck, by her ear. RP 277. K.L.W. could feel facial hair, but she was too scared to see whom it was. RP 277. K.L.W. turned over and discovered Streiff in her bed. RP 277. Streiff then put his hand under K.L.W.’s shirt and touched her breast. RP 277. According to K.L.W., “I told him to stop. He said, ‘No. You like it.’ And I said, ‘No, I don’t. Stop.’ and then he proceeded to take his hand and push it downwards down my body

down to my lower private part. Over my clothes he did touch that but not under.” RP 277. Streiff’s hand was touching K.L.W.’s vaginal area, rubbing it a little bit. RP 278. K.L.W. pushed Streiff off her, got up, and walked out of her room. RP 278. Streiff followed K.L.W. out of her room and then went back into Natalie’s room. RP 278.

K.L.W. called her boyfriend at the time, Hayden Allbritton, because she was upset and felt she needed to tell someone what happened. RP 279. Ultimately, K.L.W. decided to not tell her mom until after she returned home from the function with Mr. Allbritton’s family. RP 280-81. K.L.W. told Clara what happened with Streiff. RP 281. Clara then informed Mat. RP 282. Mat called Streiff, told him he was not welcome at the house anymore. RP 292, 328. As a family they decided to not involve the police, and K.L.W. did not tell anyone else what had happened. RP 287.

C.M.J. and her family went back to their home in Castle Rock, Washington the morning after Mat’s party. RP 169, 209. C.M.J. was hanging out with Brandon in the living room while he played video games. RP 232. Streiff came over because he and Brandon were going to go out lunch. RP 229, 233. Brandon was sitting on the couch and C.M.J. was sitting on the loveseat. RP 232. Streiff sat on the loveseat with C.M.J.. RP 233. Streiff talked to C.M.J.’s dad for a little while, then when her dad was not looking he would grab her breasts or vaginal area over her clothes. RP 170-

71. Streiff did this every time C.M.J.'s dad was not looking. RP 170. C.M.J. was scared to tell someone because her dad and Streiff were so close and she did not want anything to happen. RP 171.

On October 19, 2018, C.M.J. disclosed what had happened to her parents. RP 172-73. Once her parents found out, Brandon called Mat. RP 236. Brandon then called Streiff and told him to never talk to Brandon or his family again. RP 237. Streiff did not ask Brandon any question, said okay, and hung up the phone. RP 237.

Law enforcement contacted Streiff. RP 121-24. Streiff agreed to meet with the deputy and they arranged a time to speak in person. *Id.* Streiff told the deputy he could not remember anything due to his heavy alcohol consumption the night of Mat's party. RP 125-26. Streiff denied he would inappropriately touch children. RP 356.

The State initially charged Streiff with two counts of Child Molestation in the Third Degree, one for C.M.J. and one for K.L.W., occurring after the birthday party at the house in Winlock. CP 1-5. The State later amended the charges to add an additional count of Child Molestation in the Third Degree to include Streiff's additional assault on C.M.J. at her residence the morning after the party. CP 11-13, 18-20, 47-49; RP 6-7. Streiff elected to exercise his right to a jury trial, and he was convicted on all counts. *See* RP, CP 67-69. Streiff was sentenced to 54 months on all

counts to run concurrently. CP 86. Streiff timely appeals his conviction and sentence. CP 101-14.

The State will submit additional facts as they apply in its argument section below.

III. ARGUMENT

A. STREIFF ASSERTS FOR THE FIRST TIME ON APPEAL THAT HIS RIGHT TO VICINAGE WAS VIOLATED BECAUSE HE DID NOT RAISE THE ISSUE WHEN HE ARGUED HIS VENUE MOTION, WHICH THE TRIAL COURT PROPERLY DENIED.

Streiff argues, for the first time on appeal, his constitutional right to vicinage was violated when the jury pool for Count III was drawn from Lewis County rather than Cowlitz County. Appellant's Opening Brief (AOB) 9-16. Streiff cannot show the alleged violation of his vicinage right is a manifest constitutional error, therefore the issue may not be raised for the first time on appeal. Streiff also asserts the trial court erred in denying his motion for a change of venue. Streiff is incorrect, the trial court properly ruled on the venue motion and this Court should affirm his convictions.

1. Streiff Cannot Assert His Constitutional Right Regarding Vicinage Was Violated For The First Time On Appeal As He Cannot Make The Requisite Showing That It Is A Manifest Constitutional Error.

Streiff asserts his constitutional right to have the jury panel comprised of residents from the county where the charged crime was committed was violated by the trial court, and therefore, his conviction must

be reversed. AOB 11-16. Streiff failed to assert his constitutional right to vicinage at the trial court, he did not object to the jury panel, and he proceeded with voir dire and trial. Streiff cannot show the error was manifest therefore, this court should not grant Streiff the relief he seeks.

a. Standard of review.

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012).

b. Streiff cannot assert the vicinage requirement was violated as he not only failed to object to the jury panel but waived the issue below when he chose to only challenge venue, therefore it is not a manifest constitutional error that may not be raised for the first time on appeal.

An appellate court generally will not consider an issue a party raises for the first time on appeal. RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O'Hara*, 167 Wn.2d at 98. The exception to this rule is “when the claimed error is a manifest error affecting a constitutional right.” *Id.*, citing RAP 2.5(a). There is a two-part test in determining whether the assigned error may be raised for the first time on appeal, “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (citations omitted).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333.

An error is manifest if the appellant can show actual prejudice. *O'Hara*, 167 Wn.2d at 99. The appellant must show the alleged error had an identifiable and practical consequence in the trial. *Id.* This requires the appellate court to “place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error.” *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253 (2015).

i. The right to vicinage was not violated by the jury pool being drawn exclusively from Lewis County.

Vicinage is a right imparted on citizens of Washington through the Washington State Constitution. Const. art. 1, § 22. The Sixth Amendment guarantees a defendant the right to trial “by an impartial jury of the State and district wherein the crime shall have been committed.” U.S. Const. amend. VI. The Sixth Amendment only applied to federal prosecution at the time of its adoption. *Stevenson v. Lewis*, 384 F.3d 1069, 1071 (9th Cir.

2004). While the Fourteenth Amendment has extended certain rights guaranteed by prior amendments of the constitution “to protection against state action,” it has not extended all rights guaranteed by Sixth Amendment. *Stevenson*, 384 F.3d at 1071. “The Supreme Court has not decided whether the Fourteenth Amendment incorporated the Sixth Amendment’s vicinage right.” *Id.* The Ninth Circuit noted that all the circuit courts and many state courts have concluded the Fourteenth Amendment “did not extended federal vicinage protection to the states.” *Id.* (collection of cases). The Ninth Circuit declined decide the issue. *Id.* at 1072. This Court should similarly decline Streiff’s invitation to adopt the position that the Fourteenth Amendment incorporates the Sixth’s Amendment’s vicinage right and extended it to the states.

The Washington State Constitution guarantees a defendant the right to “have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed.” Const. art. I, § 22. Vicinage is distinct from venue. *State v. Howell*, 40 Wn. App. 49, 51, 696 P.2d 1253 (1985), *citing* 2 W. LaFave & J. Israel, *Criminal Procedure* § 16.1 at 334 (1984). Vicinage is the “concept which has to do with the place from which the jurors are to be drawn.” *Id.*

Washington State has recognized a defendant’s vicinage right since territorial times. *Leschi v. Washington Territory*, 1 Wash. Terr. 13, 20-21

(1857). Common law required a jury to be assembled from neighborhood, or vicinage, of the place where the defendant was alleged to have committed the crime. *State v. Newcomb*, 58 Wash. 414, 418, 109 P. 335 (1910). If some given number of jurors were “not summoned from the hundred” in that neighborhood, “it was a ground of challenge.” *Newcomb*, 58 Wash. at 418. The rule changed over time to include jurors from any part of the county. *Id.*

The framers of the Washington State Constitution understood county to be a legal subdivision of the state, therefore the inclusion of the word “county” in article I, section 22, can mean only that type of boundary line. *City of Bothell v. Barnhart*, 172 Wn.2d 223, 230, 257 P.3d 648 (2011). It is permissible for a county to establish subdivisions from which the jury pool is pulled. *Barnhart*, 172 Wn.2d at 230. The plain language of the Washington State Constitution requires a juror be selected only from within the county where the crime was committed. *Id.* at 230-33. “The criminal act, the motive of the perpetrator, the cause, and the effect, are but parts of the complete transaction. Wherever any part is done that becomes the locality of the crime as much as where it may culminated.” *State v. Ashe*, 182 Wash. 598, 48 P.2d 213 (1935), citing *Commonwealth v. Jones*, 118 Ky. 889, 82 S.W. 643 (1904).

Streiff asserts the jury pool composition for Count III violated the vicinage requirement because the acts occurred in Cowlitz County rather than Lewis County, where the matter was tried and the jury pool was drawn from. AOB 15. The State acknowledges the jury pool was drawn from residents of Lewis County, per the jury questionnaire completed by people who respond to their jury summons. CP 121. Streiff argues “[t]he vicinage requirement is such that its violation is *essentially* a structural error that defies a harmless error analysis.” AOB 15 (emphasis added). Therefore, according to Streiff, the inclusion of any juror outside of the county where the crime was committed requires this court to automatically reverse his conviction. *Id.* at 16. Streiff also notes, in passing, vicinage is of constitutional magnitude and can be raised for the first time on appeal. *Id.*

To support his structural error argument, Streiff cites to the reversal of the conviction in *Barnhart* where jurors were seated from King County in a case that occurred in a portion of the City of Bothell that was in Snohomish County. *Id.* at 15-16, *citing Barnhart, supra*. In *Barnhart*, the defendant attempted to exercise for-cause challenges to two jurors who were residents of King County. *Barnhart*, 172 Wn.2d at 227. The trial judge denied the challenges and the defendant chose not to use his preemptory challenges on the King County jurors. *Id.* *Barnhart* was convicted of stalking and appealed to King County Superior Court. *Id.* *Barnhart* asserted

a number of issues on appeal including a violation of article I, section 22, for the inclusion of the two King County jurors because the crime occurred in Snohomish County. *Id.* The City only argued the selection procedure was constitutional and failed to assert alternative arguments such as waiver or harmless error. *Id.* The Superior Court affirmed the conviction, finding no error in the jury selection process. *Id.*

Barnhart filed a motion for discretionary review, which was granted by the Court of Appeals, but only regarding the composition of the jury. *Id.* The Court of Appeals reversed the conviction, found it violated article I, section 22, and noted in a footnote it would not consider the City's waiver or harmless error arguments. *Id.* Because it would be imprudent to consider the City's alternative grounds due to they were not briefed or addressed below. *Id.* at 227-28. The City failed to sufficiently argue why it should prevail. *Id.*

The City petitioned the Supreme Court for review. *Id.* at 228. The Supreme Court affirmed the Court of Appeals, as stated above. *Barnhart, supra.* Therefore, contrary to Streiff's assertion, the Supreme Court in *Barnhart* did not equate a violation of the vicinage requirement with structural error. The Supreme Court declined to address waiver or harmless error due to the City of Bothell's failure to assert those arguments and properly brief the issues before the courts below.

While the act of molesting C.M.J. culminated at her residence in Cowlitz County, Streiff put the plan into motion in Lewis County. RP 170-71, 229, 233, 229. Streiff's actions on August 12 may appear as simply a friend wanting to go out to lunch with a good friend, a closer inspection of the facts show that is simply not the case. First, Streiff greeted C.M.J. that morning with "Good morning, beautiful." RP 169. Second, Streiff did not ask Brandon if he wanted to have lunch, Streiff "decided" to have lunch with Brandon. RP 229. Third, Streiff actually ate breakfast with Mat in Winlock right before he left to go to Castle Rock to have lunch with Brandon. RP 326. Then when Streiff arrived at Brandon's residence, he came into the living room and sat next to C.M.J. on the loveseat. RP 170, 233. Streiff could have sat next to his good friend on the full sized couch, but entered and immediately sat next to the 14-year-old child on the love seat. RP 170, 230-31, 233.

Streiff set his plan in motion to seek out and victimize C.M.J. while still in Lewis County. Streiff planned and took steps to gain access to the victim by arranging to spend time with her father. Streiff's motive was his desire to continue, and take farther, what he had started the night/early morning hours before, which is exactly what Streiff did when he arrived at C.M.J.'s home. RP 170-71. Motive, cause, effect, and the criminal act are all part of the complete transaction and therefore the locality of the crime is

wherever any part is completed not simply where it criminal act culminated. *Ashe*, 182 Wash. at 603. The vicinage requirement was met because the jury pool could have been drawn from either Lewis or Cowlitz County. Therefore, Streiff cannot show prejudice as there was no error, and his vicinage claim is without merit.

ii. Streiff waived the article I, section 22, vicinage argument by electing only to raise venue and then proceeding with jury selection.

The right of vicinage right is similar in many respects to the right to be tried in the venue where the crime was committed. Both rights ensure the community in which the crime as committed will be the community deciding the case. Vicinage addresses who will sit on the jury; venue addresses where that jury will sit.

Washington cases have not directly addressed whether failure to challenge vicinage constitutes a waiver of the right, but many cases have discussed venue. The Washington Supreme Court and the Washington Courts of Appeal have uniformly held a defendant who fails to challenge venue waives the right to be tried in a different county. *State v. Dent*, 123 Wn.2d 467, 479-80, 869 P.2d 392 (1994) (conspiracy to commit first degree murder; venue waived where not objected to until after verdict); *State v. Hardamon*, 29 Wn.2d 182, 188, 186 P.2d 634 (1947) (venue is not an element of the crime, not jurisdictional, waived if not timely raised in felony

assault case); *State v. Johnson*, 45 Wn. App. 794, 796, 727 P.2d 693 (1986), *review denied*, 107 Wn.2d 1035 (1987); *State v. Price*, 94 Wn.2d 810, 620 P.2d 994 (1980); *State v. Miller*, 59 Wn.2d 27, 365 P.2d 612 (1961) (failure to object to venue waived the issue as to a justice court proceeding); *State v. McCorkell*, 63 Wn. App. 798, 822 P.2d 795, *review denied*, 119 Wn.2d 1004 (1992) (defendant waived challenge to venue by failing to present it by time jeopardy attached).

As our supreme court observed long ago, this rule of waiver is in accord with the general rule. *See State v. Hardamon*, 29 Wn.2d 1 at 187-188 (citing 14 Am.Jur., Criminal Law, 930, § 233, ("Constitutional right to be tried in the county in which an offense is committed is a personal privilege which may be waived") and 22 C.J.S., Criminal Law, § 176 ("The right which the constitution gives to an accused to be tried in the county in which the offense was committed or his right to object to the locality of the trial generally is a personal privilege and may be waived by him")).

There is no reason in the law or in logic that a different analysis should apply to vicinage. Venue must be raised before trial so that the trial court can change venue, if warranted, before trial has taken place in the wrong county. Similarly, a vicinage claim, or any other claim that a jury is improperly constituted, must be made before the jury is seated, so that the trial court can attempt to rectify problems before they have occurred.

Presuming in response that Streiff may argue his waiver must be knowing, intelligently, and voluntarily waived, such as the Supreme Court held in regards to the waiver of a twelve person jury in *State v. Stegall*, 124 Wn.2d 719, 723, 881 P.2d 979 (1994), there is a distinction between whether a defendant may complete waiver of one's right to a twelve-person jury and whether they fail to preserve a claim of error regarding the manner of jury selection. See *United States v. Durham*, 139 F.3d 1325 (10th Cir. 1998) (waiver of vicinage is distinct from waiver of jury trial; not required that there be a personal expression of waiver by defendant). The former requires a formal waiver, whereas the latter, like venue, is not preserved if no objection is made before trial.

Moreover, as argued above, courts have recognized that, although the vicinage right is a sub-set of the right to jury trial, it is not equivalent to the general right to jury trial, and thus has not been included in those rights applicable to the states through the federal constitution. This is because "[t]he Supreme Court has applied to the states only those provisions of the sixth amendment that the Court finds "'fundamental and essential to a fair trial.'" *Cook v. Morrill*, 783 F.2d 593, 595 (5th Cir. 1986), citing *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S. Ct. 792, 9 L. Ed. 2d 799, 804 (1963) (quoting *Betts v. Brady*, 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595

(1942)); *see also Price v. Superior Court*, 25 Cal.4th 1046, 1064-65, 108 Cal.Rptr.2d 409, 423, 25 P.3d 618, 629-30 (2001).

The geographic location from which the jury is selected has no bearing on how the jury selection is influenced by the prosecutor or on the competence and ethics of the judge. ... Additionally, ... trial in the locality in which a crime was committed, although important when early common law vicinage rights were created because jurors were expected to have knowledge about the defendant, the witnesses, and the crime itself, was no longer the case when the Sixth and Fourteenth Amendments were adopted. Today, jurors must render their verdict based only on evidence introduced in court.

Price, 25 Cal.4th 1046, 1064-65, 108 Cal.Rptr.2d 409, 423, 25 P.3d 618, 629-30.

Streiff understood Count III occurred in Cowlitz County. RP 4-5. Streiff's counsel never indicated any misunderstanding that the physical act of the offense occurred any place other than Cowlitz County. CP 11-12, 16-17; *see also* CP generally (for failure to file additional discovery demand or bill of particulars). Streiff's counsel only raised an objection to venue, requesting Count III be severed from the current trial or dismissed. RP 5. "But we believe that the conduct is clearly in Cowlitz County and my client has a right to object based on venue." *Id.* Streiff's counsel then stated the objection was based upon CrR "5.1 and relevant case law regarding venue." RP 6. The trial court denied Streiff's venue motion. CP 8.

There were numerous other pretrial matters dealt with, including motions in limine, prior to jury selection. RP 6-28. Not once during the pretrial matters did Streiff raise the vicinage requirement with the trial court. *Id.* At no point during voir dire did defense counsel inquire regarding county of residence or raise an objection to anyone in the panel due to their failure to live in the county where the crime was alleged to have been committed. RP 63-82, 97-110. Streiff actively participated in jury selection and accepted the panel. *Id.* There is no objection to any of the jurors after the jury was impaneled. RP 110-14, 139-40, 247.

Streiff's asserted error is not manifest because he cannot show that the means of choosing a jury caused any practical difference in the jury selection in his case. Streiff should not be allowed to claim now, after judgment, that the jury was unsatisfactory. Streiff elected to only to raise an objection to venue and then proceeded with jury selection. The Court should find Streiff waived the article I, section 22, vicinage requirement by failing to object the morning of trial.

2. Lewis County Was The Proper Venue For Count III, And Even If Count III Should Have Been Transferred To Cowlitz County, Streiff Waived Such A Right By Failing To Timely Object.

Streiff argues venue was improper in Lewis County for Count III, there was not even a colorable claim Count III occurred in Lewis County, the prosecutor conceded the allegations were solely in Cowlitz County, and

CrR 5.2 required the trial court to change the venue. AOB 19. Streiff's arguments fail. Venue was proper in Lewis County, and his failure to timely object constituted a waiver of his right to request a change venue. This Court should find the trial court properly denied the motion to sever or in the alternative dismiss Count III.

a. Standard of review.

The reviewing court employs an abuse of discretion standard for a trial court's decision on motions to change venue. *State v. Stearman*, 187 Wn. App. 257, 265, 348 P.3d 394 (2015). A trial court abuses its discretion if its decision is manifestly unreasonable, applies an incorrect legal standard, or relies on unsupported facts. *State v. Coley*, 180 Wn.2d 543, 559, 326 P.3d 702 (2014) (internal quotations and citations omitted).

b. The trial court properly denied Streiff's motion to sever or dismiss Count III on the basis of improper venue.

The deputy prosecutor's response to the change of venue motion, in whole, raises a number of defenses to the motion. RP 6-7. The deputy prosecutor argued if acts are part of a continuing act that two or more offenses may be joined, or if they are of similar character or conduct, or in a series of acts connected together constituting parts of a single plan or scheme then there is proper venue. RP 6-7. Then the deputy cited to *State*

v. Price.² RP 7. The trial court disagreed insomuch stating the deputy's argument was not responsive to the motion. *Id.* The deputy then stated that she disagreed, but Cowlitz was the jurisdiction where the crime occurred, and then gave further arguments as to why the case could be heard in Lewis County. *Id.*

The court rule states that it is proper to commence an action “[i]n any county wherein an element of the offense was committed or occurred.” CrR 5.1(a)(2). “When there is reasonable doubt whether an offense has been committed in one of two or more counties, the action may be commenced in any such county.” CrR 5.1(b). If the State elects to file a case pursuant to CrR 5.1(b), the defendant has “the right the change the venue to any other county in which the offense may have been committed.” CrR 5.1(c). A defendant who wishes to avail themselves of their right to change venue must object to venue “as soon after the initial pleading is filed as the defendant has knowledge upon which to make it.” CrR 5.1(c).

The State originally charged Streiff with two counts of Child Molestation in the Third Degree. CP 1-2. The allegations regarding the two counts were from the overnight hours after the birthday party at Mat's house. CP 1-5. Count I encompassed the conduct of the sexual assault against C.M.J. CP 1, 4-5. As this Court can see, the original factual

² 94 Wn.2d 810.

allegations encompass more physical contact between C.M.J. and Streiff occurring at Mat's house. *Id.* The State later added Count III, again with C.M.J. as the victim. CP 11-12. The deputy prosecutor noted during the venue motion that the discovery made it clear Count III took place in Castle Rock. CP 5-6.

The State is permitted to file multiple charges that may encompass the same criminal conduct, but a defendant may not receive multiple punishments for the same criminal conduct. *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991); *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). In a case of alleged sexual abuse, it is not uncommon for victims to minimize the details of the assault while testifying before juries. Claudia L. Marchese, *Child Victims of Sexual Abuse: Balancing a Child's Trauma against the Defendant's Confrontation Rights – Coy v. Iowa*, 6 J. Contemp. Health L. & Pol'y 411 (1990).³ Therefore, in a case such as Streiff's, where it could be argued that there was a continuing course of conduct from the events in the early morning hours to the abuse at C.M.J.'s residence, it is understandable why the deputy prosecutor would file the charge in Lewis County.

³ See <https://scholarship.law.edu/cgi/viewcontent.cgi?article=1594&context=jchlp> (last visited 6/19/20) (discussing difficulties arising from testifying child sexual assault victims).

“Evidence that multiple acts were intended to secure the same objective supports a finding that the defendant’s conduct was a continuing course of conduct.” *State v. Rodriguez*, 187 Wn. App. 922, 937, 352 P.3d 200 (2015). Continuing course of conduct has been found in cases where there was one victim and multiple acts of a singularly charged crime was committed over a short period of time. *State v. Locke*, 175 Wn. App. 779, 782-83, 307 P.3d 771 (2013). A short period of time does not mean only mere minutes. The State in this matter, after the evidence was presented could have elected to only argue Count III, under a continuing course of conduct claim. The State also was free to submit the case to the jury as it did and it was for the jury to determine the facts that sufficiently proved each of the charged offenses, individually, with the unanimity instruction. CP 63 (Instruction 11, *citing* WPIC 4.25). Therefore, Count III met the requirements of CrR 5.1(a),(b), and was properly filed in Lewis County.

Streiff’s counsel failed to timely object as required by CrR 5.1(c). Streiff’s counsel filed a demand for discovery with his notice of appearance on December 20, 2018. CP 6. There was no indication on the omnibus order, entered on April 11, 2019, of discovery issues that needed to be resolved. CP 9-10. The State filed the amended the information adding Count III on April 19, 2019. CP 1-2, 11-12. Streiff’s counsel never filed a motion regarding necessity for additional discovery or a bill of particulars. *See* CP.

Streiff's counsel never indicated he needed additional time to prepare due to the addition of Count III. CP 16-17. The only change made in the information filed on July 18, 2020 was to remove the scrivener's error including the Lewis County Prosecutor's Office standard charging language that offense occurred in Lewis County. RP 6; CP 18-19.

Streiff's counsel argued he could not object to venue when the State's information alleged the crime occurred in Lewis County. RP 5. Streiff's counsel asserted he therefore objected to venue and brought his motion at the first possible instance when the State amended its information removing the Lewis County element from Count III. *Id.* Whether or not the charging document wrongfully identified the county where the incident occurred as an element is not the same as a defendant having knowledge that the act may have been committed in another county. *See* CrR 5.1. The State does not fault Streiff's counsel for not raising the venue argument sooner, and if the State had not corrected its information he would have had an argument to the jury that the State had not proven all of the elements to the charged offense and possibly garnered an acquittal.⁴ Unfortunately, the court rule does not allow for a defendant to hedge his or her bets in such a

⁴ The State is not conceding any argument regarding a portion of the crime occurring in Lewis County, merely noting defense counsel had a justifiable argument to make if the State had not changed its information.

fashion. A defendant must object to venue timely, failure to do so waives the objection. CrR 5.1(c); *Price*, 94 Wn.2d at 815-16.

Streiff had the information in April, when the Count III was added that the events took place, or at least culminated, in Cowlitz County. Streiff's failure to timely object waives the objection. The trial court did not abuse its discretion when it denied Streiff's motion to sever or dismiss Count III.

B. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S VERDICT THAT STREIFF COMMITTED THE CRIME OF CHILD MOLESTATION IN THE THIRD DEGREE AS CHARGED IN COUNT I.

There was sufficient evidence presented to show beyond a reasonable doubt that Streiff committed the crime of Child Molestation in the Third Degree, as charged in Count I. Contrary to Streiff's assertion, the State proved the essential element that Streiff touched an intimate part of C.M.J. in Winlock. Therefore, the facts taken in the light most favorable to the State sustain all of the essential elements of the charged offense. The Court should sustain the jury's verdict.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182 (2014).

2. The State Proved, As It Is Required To, Each Element Of Child Molestation in the Third Degree.

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The role of the reviewing court does not include substituting its judgment for the jury’s by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). “The fact finder...is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence.” *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

To convict Streiff of Child Molestation in the Third Degree, as charged in Count I, the State was required to prove, beyond a reasonable doubt, that Streiff had sexual contact with C.M.J. (DOB: 06/16/04), who was at least 14 but less than 16, not married to Streiff, and Streiff was at least 48 months older than C.M.J. RCW 9A.44.089; CP 47. The State also had to prove the date and location of the incident. *Id.* The to-convict jury instruction required the jury to find:

To convict the defendant of the crime of child molestation in the third degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about and between August 11th, 2018 and August 12th, 2018, the defendant had sexual contact with C.M.J. (D.O.B. 06/16/2004);
- (2) The C.M.J. was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That C.M.J. was at least forty-eight months younger than the defendant; and
- (4) That this act occurred in the County of Lewis, 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 any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 57 (Instruction 5), *citing* WPIC 44.25. The Court’s instructions defined sexual contact by the pattern instruction, “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party.” CP 60 (Instruction 8), *citing* WPIC 45.07.

C.M.J. testified she awoke to Streiff climbing on top of her. RP 166. Streiff then began to kissing C.M.J. on the lips, when she tried to get up, Streiff than grabbed her hand and said asked C.M.J. “[t]o come cuddle with him.” RP 166-67. Streiff started to unzip his pants and C.M.J. ran away and got into bed with her brother and her cousin. RP 167. Streiff contends this conduct is not sufficient to sustain his conviction because kissing on the lips is not sexual contact. AOB 21-22. Streiff argues simple kissing on the lips, without more, such as groping sexual areas, or French kissing, does not qualify as a sexual contact because the lips, in this context, are not intimate parts. *Id.* Streiff’s contention is incorrect. It was for the trier of fact to determine if the kiss on the lips was factually an intimate part, and under the facts and circumstances of this case there was sufficient evidence presented to sustain the jury’s finding of guilty.

An intimate area of the body is not defined by statute. It is possible to touch an intimate area through clothing. *In re Welfare of Adams*, 24 Wn. App. 517, 519, 601 P.2d 995 (1979). The term, intimate area, when defining a part of the body is “somewhat broader than the term ‘sexual.’” *In re*

Adams, 24 Wn. App at 519. What areas on the body, apart from a person's breasts and genitalia, are intimate is to be determined by the trier of fact. *Id.* at 520. "Contact is 'intimate' within the meaning of the statute if the conduct is of such a nature that a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper." *State v. Jackson*, 145 Wn. App. 814, 819, 187 P.3d 321 (2008).

Streiff relies upon *State v. R.P.*, 122 Wn.2d 735, 862 P.2d 127 (1993) to support his argument that kissing a child on the lips does not qualify as sexual contact. AOB 21-22. This reliance is misplaced. The Supreme Court, held in a two paragraph opinion, without any elaborations, "that there was insufficient evidence of sexual contact to sustain" the conviction of indecent liberties. *R.P.*, 122 Wn.2d at 736. The court recited the basic facts, that R.P. was juvenile in junior high school who kissed and hugged a fellow classmate and left a hickey on her neck. *Id.* There was no analysis or explanation except to simply state there was insufficient evidence. *Id.* The court did not explain what aspect of the evidence of sexual contact was insufficient, whether it be for purposes sexual gratification or intimate parts. *Id.*

In contrast, *State v. Allen*, 57 Wn. App. 134, 787 P.2d 566 (1990), the Court of Appeals suggests that evidence of kissing was sufficient to

prove sexual conduct for a conviction for indecent liberties. While the issue in *Allen* was the absence of a unanimity instruction to the jury, the court discussed the various acts constituting indecent liberties as presented to the jury. *Allen*, 57 Wn. App. at 137-39. The defendant's first contact with the victim was to pick the victim up, place her on a table, and then kiss her. *Id.* at 139. Thereafter Dixson engaged in touching C.P. on her skin between the legs and on the chest during each visit to his mobile home." *Id.* The court found that "all of the foregoing acts, if they occurred, constitute indecent liberties." *Id.* Therefore, a kiss alone was sufficient.

Streiff, a man in his thirties, climbed on top of a fourteen-year-old sleeping girl, and began kissing her on the lips. RP 166-67, 183-84. The kiss on the lips, in this context, is kissing C.M.J. in an intimate part. A person of common intelligence would know, under the circumstances, that kissing C.M.J. in this fashion, her lips were intimate, and the touching was improper. *See, Jackson*, 145 Wn. App. at 819. Therefore, Streiff kissing C.M.J. on the lips and then unzipping his pants was sufficient evidence of sexual contact. This Court should affirm Streiff's conviction for Child Molestation in the Third Degree as charged in Count I.

C. THE TRIAL COURT PROPERLY ADMITTED STREIFF'S STATEMENTS AFTER DETERMINING STREIFF WAS NOT IN CUSTODY AND MADE THE STATEMENTS VOLUNTARILY.

Streiff asserts the trial court erroneously found statements he made to the officer voluntary and noncustodial, thereby wrongfully allowing the State to introduce the statements during trial. AOB 23-30. Streiff's assertions are incorrect. Streiff voluntarily spoke to the officer in a noncustodial environment. This Court should affirm the trial court's ruling finding Streiff's statements admissible during the State's case in chief, as the record and the law support it.

1. Standard Of Review.

A "trial court's decision after a CrR 3.5 hearing" is reviewed to determine "whether substantial evidence support's the trial court's findings of fact, and whether those findings support the conclusion of law." *State v. Grogan*, 147 Wn. App. 511, 516, 195 P.3d 1017 (2008). Evidence sufficient to persuade a rational, fair-minded person of the truth of the finding is substantial evidence. *Grogan*, 147 Wn. App. at 516. (internal quotations omitted). The court conducts a de novo review to determine if the trial court "derived proper conclusions of law from its findings of fact." *Id.*, citing *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002).

2. There Was Substantial Evidence To Support The Trial Court's Findings Of Fact.

Streiff challenges four of the trial court's findings of fact from the CrR 3.5 hearing: 1.3, 1.4, 1.5, and 1.8. AOB 23-30; *See* CP 82-83. Throughout Streiff's argument he incorporates Deputy Scrivner's CrR 3.5 and trial testimony. AOB 23-30. Streiff acknowledges the incorporation of the trial testimony, but when determining if substantial evidence supported the trial court's findings of fact and if from those facts the court derived proper conclusions of law, it would be improper to consider facts outside the trial court's knowledge when it made its ruling. There was no motion for reconsideration or objection drawn during Deputy Scrivner's testimony regarding additional facts showing Streiff was in custody. RP 338-66. Streiff does not argue manifest constitutional error regarding any additional testimony. While this Court conducts a de novo review of the conclusions, it is a de novo review based upon what occurred during the CrR 3.5 hearing. The State requests this Court disregard any extrinsic, additional facts from Deputy Scrivner's trial testimony.

Finding of Fact 1.4, "Deputy Scrivner interviewed the Defendant for approximately 45 minutes, until the Defendant told Deputy Scrivner he did not want to answer any more questions." CP 82. Deputy Scrivner testified the interview lasted approximately 30 to 45 minutes. RP 130. Streiff requested, at one point, for Deputy Scrivner to stop asking a particular type

of question, which was whether Streiff touched young girls inappropriately. RP 129, 133. Deputy Scrivner continued to talk to Streiff about the incident, but changed the questioning as requested even though the subject matter stayed the same. RP 133. Streiff eventually asked Deputy Scrivner to leave. RP 134. And Deputy Scrivner responded to Streiff, that it was “his opportunity and when I walk out he will no longer have an opportunity to talk to me.” *Id.* Deputy Scrivner then left. *Id.*

Contrary to Streiff’s assertion, he only requested Deputy Scrivner leave once and when requested, the deputy left. Asking the deputy to stop asking a specific line of questioning is not the same as terminating the contact. The deputy continuing to discuss the incident, which was a party and the overnight hours, and other facts, is permissible. Further, informing a defendant of the consequences of terminating an interview is also permissible. Deputy Scrivner was simply informing Streiff that he would not have a further opportunity to speak with the deputy on the matter. These facts are sufficient to establish substantial evidence. This evidence also supports Conclusions as to Disputed Facts 3.1: “The Defendant was able to end the interview effectively and he did that when he asked the officer to leave.” CP 83.

Finding of Fact 1.5: “Throughout the interview, Deputy Scrivner touched the Defendant’s shoulder and knee in a friendly manner for

purposes of facilitating the conversation.” CP 83. Deputy Scrivner placed his hand on Streiff’s shoulder in a friendly way and asked Streiff to answer his questions and tell the truth. RP 125. Deputy Scrivner stated he did not place his hand on Streiff’s shoulder very often, and it was for a few seconds. RP 133. Deputy Scrivner’s hand was not placed on Streiff’s shoulder to restrict Streiff’s movements. RP 125. Streiff asked Deputy Scrivner to not touch his shoulder and Deputy Scrivner stopped touching his shoulder. RP 129. Deputy Scrivner also testified it was possible he put his hand on Streiff’s leg. RP 133. The testimony provided by Deputy Scrivner was sufficient for this Court to find substantial evidence to support the trial court’s finding of fact. This evidence also supports Conclusions as to Disputed Facts 3.2: “The fact the officer put his hand on Defendant’s shoulder or on his knee was an innocuous thing, not a threat of force or anything that would make the statements involuntary.” CP 83

The State will address the remaining findings of fact and the challenged conclusions on admissibility (4.1, 4.2) below.

3. There Was No Custodial Interrogation Of Streiff, Therefore *Miranda* Was Not Required And His Statements Were Properly Admitted.

The Fifth Amendment right to counsel attaches when a person is subject to (1) custodial (2) interrogation (3) by a state agent. U.S. Const., amend. V; *State v. Templeton*, 148 Wn.2d 193, 207-8, 59 P.3d 632 (2002);

State v. Post, 118 Wn.2d 596, 605-6, 826 P.2d 172 (1992). The *Miranda* rule only applies when a state agent interrogates a person who is in custody:

A suspect's Fifth Amendment privilege against self-incrimination and the corresponding right to be informed attaches when "custodial interrogation" begins. A "custodial interrogation" which requires law enforcement officers to administer *Miranda* warnings to a suspect is defined as questioning initiated by the officers after a person is taken into custody. Generally, in defining custody the Supreme Court has looked at the circumstances surrounding the interrogation and whether a reasonable person would have felt that person was not at liberty to terminate interrogation and leave.

Templeton, 148 Wn.2d at 208 (footnotes omitted); *see also Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 694 (1966)⁵. When determining whether *Miranda* warnings are required, an officer's unarticulated plan to detain or arrest a suspect is irrelevant; the only relevant inquiry is how a reasonable person in the suspect's position would have understood the situation. *Berkemar v. McCarty*, 468 U.S. 420, 442, 104 S. Ct. 3138, 82 L.Ed.2d 317 (1984); *State v. Harris*, 106 Wn.2d 784, 789-90, 725 P.2d 975 (1986), *cert. denied*, 480 U.S. 940, 107 S. Ct. 1592, 94 L.Ed.2d 781 (1987).

The Court developed *Miranda* warnings to ensure that while a defendant is in the coercive environment of police custody his or her right

⁵ "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

not to make incriminating confessions is protected. *Harris*, 106 Wn.2d at 789. Noncustodial conversations with law enforcement officers at police stations or other coercive environments do not require *Miranda* warnings. See *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L.Ed.2d 714 (1977). Mathiason voluntarily went to the police station, was informed he was not under arrest, and freely left the police station at the end of the interview. *Mathiason*, 429 U.S. at 495. The Supreme Court held any interview by a police officer of a suspect of a crime has coercive aspects due to the officer being part of the criminal justice system that may charge the suspect of a crime. *Id.* Yet, a suspect such as Mathiason, was not in custody because a “noncustodial situation is not converted to one in which *Miranda* applies because a reviewing court concludes that, even in the absence of formal arrest or restraint on freedom of movement, the questioning took place in a “coercive environment.” *Id.*

The Court of Appeals held a police interrogation of a juvenile suspect occurring in the suspect’s residence, in the presence of his mother, was not custodial where the officer did not advise the suspect that he was free to leave or to refuse to answer questions. *State v. S.J.W.*, 149 Wn. App. 912, 928-9, 206 P.3d 355 (2009). Similarly, the Ninth Circuit Court of Appeals stated that a familiar setting negates the coercive aspects of police interrogation, as “[t]he element of compulsion that concerned the Court in

Miranda is less likely to be present where the suspect is in familiar surroundings.” *U.S. v. Craighead*, 539 F.3d 1073, 1083 (9th Cir. 2008) (citations omitted).

Streiff asserts the deputy’s intrusion into his home without a warrant, intimately touching him during a “structured interrogation” gave Streiff no place to leave or retreat from, and therefore he was arrested, contrary to Finding of Fact 1.3 because no reasonable person would not think they were in custody and simply leave. AOB 28. Streiff further asserts his statements were the product of coercion, contrary to Finding of Fact 1.8. *Id.* 29. Streiff’s assertions is erroneous⁶. Streiff called Deputy Scrivner after the deputy left his card, agreed to meet with Deputy Scrivner and talk about the investigation, and set up a time to meet at his home because it was convenient location for Streiff. RP 121-24. Streiff invited the deputy inside his home. RP 124. Streiff felt comfortable enough and free to ask the deputy to not touch him and Streiff’s request was promptly complied with. RP 129.

Similarly, Streiff felt comfortable enough to request the deputy stop asking a particular line of questioning. RP 133. Deputy Scrivner, perhaps somewhat inarticulately, explained that Streiff told him he did not want to answer any more questions about whether he inappropriately touched little

⁶ Although there is no dispute that Deputy Scrivner did not give Streiff *Miranda* warnings.

girls, and in response to that, Deputy Scrivner changed his questioning but still discussed the incident. RP 133. Asking if the “subject matter stayed the same,” as defense counsel did, does not mean Deputy Scrivner continued to ask Streiff if he inappropriately touched the girls. RP 133. The subject matter of the investigation encompasses not only the direct conduct of the assault on the victims, but the surrounding facts, such as the events of the evening, relationships of the people, and other information the investigation officer may deem necessary.

Finally, Streiff was comfortable enough to terminate the contact, requesting the deputy to leave, which request was complied with within one minute. RP 124-25, 134. Streiff was not arrested. The statements Streiff made were not the products of coercion. The deputy was alone, did not threaten Streiff, he changed the questioning when requested, and left when requested. RP 124-25, 133-34. This was not custodial or a coercive environment. Sufficient evidence was presented to persuade a rational, fair-minded person of the truth of Findings of Fact 1.3 and 1.8 therefore, there is substantial evidence to support the findings.

The findings of fact entered by the trial court support the conclusions that Streiff’s statements were voluntary, noncustodial, and admissible in the State’s case in chief. CP 83 (Conclusions on Admissibility 4.1, 4.2). Streiff was in his own home, a noncustodial environment. Streiff was not under

arrest. *Miranda* was not required. Streiff's Fourteenth and Fifth Amendment Rights have not been violated.⁷ This Court should affirm the trial court's decision from the CrR 3.5 hearing and rule that the statements were admissible.

D. STREIFF DID NOT OBJECT TO DEPUTY SCRIVNER'S TESTIMONY HE NOW CLAIMS WAS IMPROPER OPINION TESTIMONY AND CANNOT MEET THE STANDARD OF SHOWING THE TESTIMONY CONSTITUTES A MANIFEST CONSTITUTIONAL ERROR REQUIRING REVERSAL.

Streiff failed to object to Deputy Scrivner's testimony he now complains is improper opinion testimony. Streiff cannot meet his burden to show the alleged error was a manifest constitutional error. This Court should find Streiff is barred from raising the issue for the first time on appeal and affirm the trial court.⁸

1. Standard Of Review.

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012). Admissibility

⁷ Streiff cites to article I, section 9 in his brief. Streiff's passing reference to a constitutional right is insufficient to raise an independent state constitutional claims. Binding precedent, moreover, establishes that article I, section 9 is coextensive with the Fifth Amendment. *See, e.g., State v. Earls*, 116 Wn.2d 364, 374-75, 805 P.2d 211 (1991) ("[R]esort to the *Gunwall* analysis is unnecessary because this court has already held that the protection of article 1, section 9 is coextensive with, not broader than, the protection of the Fifth Amendment.").

⁸ The State will address Streiff's allegation regarding prosecutorial misconduct for making conclusory statement regarding Streiff's guilt and eliciting questions that do the same in the section below on prosecutorial error.

of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted).

2. Streiff's Alleged Error, That Deputy Scrivner's Testimony Was Impermissible Opinion Testimony, Is Not A Manifest Constitutional Error That May Be Raised For The First Time On Appeal.

Streiff attempts to assert, for the first time on appeal, a number of statements made during Deputy Scrivner's testimony were impermissible opinions and conclusions regarding Streiff's guilt. AOB 37-42. Streiff asserts he can raise the issue for the first time on appeal and cites to RAP 2.5(a)(3) and *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007).

As outlined in the above, an appellate court generally will not consider an issue a party raises for the first time on appeal absent "the claimed error being a manifest error affecting a constitutional right." RAP 2.5(a); *O'Hara*, 167 Wn.2d 91, 97-98. Streiff must show the error is of constitutional magnitude and actual prejudice, meaning the alleged error had an identifiable and practical consequence in his trial. *O'Hara*, 167 Wn.2d at 99. While Streiff's alleged error is of constitutional magnitude, he cannot show prejudice; therefore, Streiff cannot meet his burden and his claim fails.

Generally a witness may not give an opinion, while testifying, of the veracity or guilt of a defendant. *State v. King*, 167 Wn.2d 324, 331, 219

P.3d 642 (2009). This rule applies to both lay and expert witnesses. *King*, 167 Wn.2d at 331. The reason for this rule is “such testimony is unfairly prejudicial to the defendant because it invades the exclusive province of the jury.” *Id.* (internal quotations and citations omitted). A law enforcement officer’s testimony can carry a “special aura of reliability,” and therefore may be especially prejudicial to the defendant. *Id.* (internal quotations and citations omitted). The reviewing court will consider a number of factors and circumstances to determine if there was impermissible opinion testimony, “(1) including the type of witnesses involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact.” *Id.* at 332-33.

Admission of opinion testimony, without objection, from a witness regarding the guilt of the defendant is not automatically reviewable as a manifest constitutional error. *State v. Blake*, 172 Wn. App. 515, 530, 298 P.3d 769 (2012). If the testimony is improper opinion testimony then it must be determined if the defendant was prejudiced by the testimony. *O’Hara* 167 Wn.2d at 99. “Important to determination of whether opinion testimony prejudices the defendant is whether the jury was properly instructed.” *Blake*, 172 Wn. App. at 531. If the jury is properly instructed this eliminates the possibility of prejudice. *Id.*

The alleged error does encompass a constitutional right, the right to a trial by jury, and therefore the only question is whether the alleged error is manifest. U.S. Const. amend. VI, XIV; Const. art. I, § 21, 22; *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). Streiff alleges six specific statements from Deputy Scrivner’s testimony, none of which he objected to, are impermissible and violate his constitutional rights, thereby requiring this Court to reverse his conviction. AOB 37-38, 41-42, *citing* 339-40, 340, 342, 346-47. The State will address the last two first.

Streiff argues Deputy Scrivner noted “Streif was *essentially downplaying the crime itself.*” *Id.* (emphasis added by Appellant, *citing* RP 346). Deputy Scrivner did not state Streiff was downplaying the crime. RP 345-46. Deputy Scrivner was explaining his conduct. *Id.* “I continued to keep questioning [Streiff] about it and rephrasing my question, essentially down playing the crime itself. I’m like, ‘Hey, if you made a mistake, just talk to me about it.’” *Id.* Next, Streiff finds fault with the deputy stating Streiff needing to “be willing to tell [Deputy Scrivner] the truth or if he continued down this path to not tell the truth that it’s going to be difficult for them ever to forgive him.” RP 347. Yet, this statement was made in the context of discussing Streiff’s relationship with Brandon and Mat, and that the family could move on more easily and “get over this hump, this hurdle, this mistake [Streiff] may or may not have made, if he just told me the

truth.” RP 347. Deputy Scrivner stated Streiff may or may not have committed the acts he was accused of; he just needed to tell Deputy Scrivner what happened. *Id.* None of those statements are impermissible opinion evidence.

Streiff takes issue with four statements taken during testimony regarding his interviews with the victims. AOB 37-38, *citing* RP 339-40, 342. Three statements were made regarding his interview with C.M.J. *Id.*, *citing* RP 339-40. Deputy Scrivner stated the he “found out that she was at a birthday party...and at this birthday party she was sexually assaulted by a gentleman named Jason Streiff.” RP 339-40. Deputy Scrivner explained he contacted K.L.W. because while interviewing C.M.J. he “found out that her cousin was also sexually assaulted at the same event.” RP 340.

In regards to the last statement, Deputy Scrivner was testifying to what K.L.W. told him, stating, “When she went to bed, she explained to me - - or in the early morning hours she was awoken by Mr. Streiff who sexually assaulted her.” RP 342. This statement made by Deputy Scrivner is clearly hearsay, not opinion testimony, as he was stating what the victim told him. *Id.* K.L.W. had already testified to these facts, so at most this testimony was cumulative and hearsay, not improper opinion evidence. ER 403; ER 801; ER 802; RP 277-78, 342.

The other statements were also in the context of what a victim had *told* Deputy Scrivner. RP 339-40. While Deputy Scrivner stated, “I found out” he was obviously testifying as to what C.M.J. had discussed with him during her interview. *Id.* Similarly, it was clearly C.M.J. who told Deputy Scrivner her cousin had been sexually assaulted. RP 340. The statements could be classified as hearsay. ER 801. The one regarding C.M.J. being sexually assaulted, similar to K.L.W.’s statement above, was cumulative because C.M.J. had already given her testimony regarding the facts that occurred during the birthday party, what Streiff had done to her. ER 403; RP 166-69. These statements are not improper opinion testimony. Further, because both victims testified any error in eliciting hearsay was not of constitutional magnitude because Streiff had the ability to confront both victims. *State v. Stevens*, 58 Wn. App. 478, 485-86, 794 P.2d 38 (1990).

It also appears that Streiff is taking issue with Deputy Scrivner responding affirmatively that he received “a report regarding a child molestation” and it was Christina who reported the assault. RP 339. This testimony simply explains Deputy Scrivner’s actions in responding to C.M.J.’s residence, not an improper opinion regarding Streiff’s guilt.

If this Court finds any Deputy Scrivner’s testimony to be improper, the evidence overwhelmingly proved, through the victims’ testimony, the sexual assaults. The State has already outlined in detail in its argument

above why C.M.J.'s testimony was sufficient regarding Count I. C.M.J. testified how, while at her home the day after the birthday party, Streiff sat on the loveseat with her, talked to C.M.J.'s dad for a little while, then when her dad was not looking he would grab her breasts or "like do down there with his hands over clothes." RP 170. K.L.W. detailed how the morning after the party, somebody got into bed with her, put their arm over her, and kissed her on the neck, by her ear. RP 277. K.L.W. testified she realized it was Streiff, he put his hand under her shirt, touched her breast, and then proceeded to touch her vaginal area over her clothes. RP 277-78.

Streiff did not deny any of the instances on the night of the party, he only stated he blacked out and could not remember, but did actively deny having inappropriate contact with C.M.J. at her residence in Castle Rock. RP 345-46, 360. Yet, when without warning, his good friend Brandon suddenly tells him to never speak to him or his family every again, Streiff does not ask a single question as to why. RP 234-37. Streiff simply says, okay. RP 237. This evidence strongly rebuts Streiff's denial that he inappropriately touched Brandon's daughter.

Finally, we presume the jury follows its instructions, "absent evidence proving the contrary." *Kirkman*, 159 Wn.2d at 928. The jury was instructed it was the sole judges of credibility and factors to consider when

considering a witness' testimony. CP 52. Further, there is no allegation or evidence the jury was unfairly influenced.

Therefore, looking at all of these factors, Streiff cannot show he was prejudiced by the alleged constitutional error. It is not manifest, and this Court should decline to allow Streiff to raise the matter for the first time on review. This Court should affirm Streiff's convictions.

E. THE DEPUTY PROSECUTOR'S DID NOT COMMIT PROSECUTORIAL ERROR BY DURING HER CLOSING ARGUMENT BY IMPROPERLY APPEALING TO JURORS EMOTIONS OR BY MISTATING THE BURDEN OF PROOF; THE IMPROPER QUESTIONS BY THE DEPUTY, WHILE ERROR, WERE NOT NOR WAS HER QUESTIONING OF THE WITNESSES IMPROPER.

Streiff claims the deputy prosecutor committed prosecutorial error (misconduct)⁹ by (1) improperly appealing to jurors emotions, and (2) misstating the burden of proof, (3) expressing her personal opinion of guilt through improper questioning of the witnesses, and (4) asking questions to improperly elicit witnesses opinions of Streiff's guilt. AOB 30-37, 39-42.

⁹ "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). A number of appellate courts agree that the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g., State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007); *State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State will be using this phrase and urges this Court to use the same phrase in its opinions.

Streiff's argument is without merit, and this Court should affirm his convictions.

1. Standard Of Review.

The standard for review of claims of prosecutorial error is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

2. The Deputy Prosecutor Did Not Commit Error When Discussing Accomplice Liability During Her Closing Argument.

To prove prosecutorial error, it is the defendant's burden to show the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), citing *State v. Kwan Fai Mak*, 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). There are two standards of review for prosecutorial error, one if the defendant objected at trial and a heightened standard if the defendant failed to object. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). If a defendant objects to the alleged error, the inquiry is whether the error "resulted in prejudice that had a substantial likelihood of affecting the jury's verdict." *Emery*, 174 Wn.2d at 760 (internal citations omitted).

In contrast, a defendant's failure to object waives the alleged error, "unless the prosecutor's misconduct was so flagrant and ill intentioned that

an instruction could not have cured the resulting prejudice.” *Id.* at 760-61, citing *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). A defendant is required to show the reviewing court, “(1) no curative instructions would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict.” *Id.* at 761 (internal quotations and citations omitted).

“[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence.” *State v. Lewis*, 156 Wn. App. 230, 240, 233 P.3d 891 (2010), citing *Gregory*, 158 Wn.2d at 860. That wide latitude is especially true when the prosecutor, in rebuttal, is addressing an issue raised by a defendant’s attorney in closing argument. *Id.* (citation omitted).

A prosecutor commits prosecutorial error when he or she shifts the burden of proof onto the accused. *State v. Walker*, 164 Wn. App. 724, 732, 265 P.3d 191 (2011). A prosecutor may commit error during closing argument by minimizing or misstating the law regarding the burden of proof. *State v. Johnson*, 158 Wn. App. 677, 685, 243 P.3d 936 (2010), *review denied*, 171 Wn.2d 1013 (2011).

a. The deputy prosecutor did not improperly appeal to the passion and prejudice of the jury.

Streiff asserts the deputy prosecutor committed error by appealing to the passions and prejudice of the jurors. AOB 33-37. Streiff also asserts such conduct was flagrant and ill intentioned on the part of the deputy prosecutor, as Streiff's trial counsel did not object. *Id.* The deputy prosecutor did not commit error.

A prosecutor cannot encourage a jury to convict a defendant based upon emotion, rather than the evidence presented, by appealing to the passions of the jury. *State v. Berube*, 171 Wn. App. 103, 118-19, 286 P.3d 402 (2012). "A trial in which irrelevant and inflammatory material is introduced, which has a natural tendency to prejudice the jury against the accused, is not a fair trial." *Berube*, 171 Wn. App. at 119, *citing*, *State v. Miles*, 73 Wn.2d 67, 70, 436 P.2d 198 (1968).

Streiff argues the deputy prosecutor's following statement was an error,

These girls endured and their families endured with them through this process and not so for Jason Streiff to endure, not strife for Jason Streiff to face his actions. It's time for him to be held accountable for his actions. So at the conclusion of this trial, I am asking you to find him guilty of all counts.

RP 410. There was no objection to the deputy prosecutor's argument. Streiff argues these final two sentences, at the end of 12 pages, of closing argument

is sufficient for reversible error because the demand for accountability is so flagrant and ill intentioned it resulted in prejudice that could not be neutralized by admonition to the jury. Streiff takes issue with the deputy prosecutor asking he be held accountable for his actions.¹⁰ He argues this is an appeal to emotion rather than reason.

A single instance of a deputy prosecutor asking the jury to hold the defendant accountable for the actions she outlined in her closing argument is not error. *State v. McNallie*, 64 Wn. App. 101, 110-11, 823 P.2d 1122 (1992); *State v. Backman*, No. 46070-0-II, at , LEXIS2926 (Wash. Ct. App. Dec. 1, 2015)(unpublished)(a single instance of the prosecutor stating the defendant “needs to be held accountable” was not error).¹¹ Because there was no error, Streiff’s claim fails.

b. The deputy prosecutor did not improperly instruct the jury or minimize the State’s burden of proof.

Streiff asserts the deputy prosecutor committed error when in her rebuttal closing she stated:

There's scales of justice. As you heard, there's a balance. And in this case I want you to put all the witnesses that came here and all the evidence that has been introduced and have been nine witnesses that testified and tenth person is the defendant who's also apologizing and willing to turn himself

¹⁰ Streiff also asserts the deputy prosecutor even mocked his name, but a reading of the sentence does not make contextual sense and it is more likely the deputy prosecutor misspoke than was trying to use his name in such a fashion. AOB 30; RP 410.

¹¹ Cited per GR 14.1 as persuasive authority.

in and that 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; AOB at 31. Streiff claims the deputy prosecutor's response to defense counsel's argument, which used the scales of justice, blatantly misstated the burden of proof, making it seem like a preponderance standard and urging the jury to convict on an emotional sense of "justice." AOB at 34-36. The deputy prosecutor's statement was within the permissible bounds of responding to defense counsel's argument and did not misstate the burden of proof.

Jurors were they must decide a case based upon the evidence presented at trial and accept the law as given in the jury instructions. WPIC 1.02. Jurors were also instructed a lawyer's remarks, arguments or statements are not evidence, the law is contained in the instructions and the jury must disregard any statement, argument or remark by the lawyer that is not supported by the law in the instructions or the evidence. WPIC 1.02. A jury is presumed to follow the jury instructions. *State v. Yates*, 161 Wn.2d 714, 763, 168 P.3d 359 (2007) (citations omitted). A lawyer's statements to the jury regarding the law "must be confined to the law as set forth in the instructions given by the court." *State v. Davenport*, 100 Wn.2d 757, 760, 675 P.2d 2113 (1984) (citation omitted).

It is improper conduct for a deputy prosecutor to mischaracterize the State's burden of proof as "anything less than an abiding belief that the evidence presented established the defendant's guilty beyond a reasonable doubt." *State v. Feely*, 192 Wn. App. 751, 762, 368 P.3d 514 (2016). It is not a jury's job to declare the truth or solve a case, but to determine from the evidence presented if the State has proven the case beyond a reasonable doubt. *State v. Anderson*, 153 Wn. App. 417, 220 P.3d 1273 (2009), *review denied*, 170 Wn.2d 1002 (2010).

Defense counsel told the jurors to have a picture in their minds of the scales of justice, then told them it was not their job to decide the case based upon emotion, reminded them it was for the State to prove, and who did they believe, and then went through what he believed were inconsistencies. RP 421-26. The response from the deputy prosecutor did not reduce the State's burden, somehow using the scales to show it if it tipped just ever so slightly in the State's favor the jury must convict. RP 444. The deputy prosecutor went back through the inconsistencies in the testimony, discussed how they made sense, and then concluded with reminding the jury how many witnesses the State had presented, all of its evidence, and the defendant's own statements. RP 437-44. She did use the scales of justice analogy, because it was used by the defense, who told the jurors to have a picture of it in their minds. There was no error.

c. If There Was Error, It Was Not Flagrant And Ill Intentioned.

While not conceding error, if the deputy prosecutor committed error when using the scales of justice in closing argument, there was no objection, the jury was instructed on the correct burden of proof and that the attorney's remarks are not evidence and they should disregard any argument that is not supported by the law in the instructions or the evidence presented, therefore, Streiff has not met his burden to show the deputy acted flagrantly or that he was prejudiced in any way. Streiff correctly notes that sufficiency of evidence is not a proper factor to consider when determining if an argument is flagrant and ill intentioned, but then proceeds to make such an argument. AOB 36, *citing State v. Walker*, 182 Wn.2d 463, 479, 341 P.3d 976 (2015). This court should disregard these statements. The deputy prosecutor's statements are not flagrant and ill intentioned, and within the context of the entire record, Streiff cannot show he was prejudiced by any alleged misstatement, therefore, there is no prosecutorial error and Streiff's convictions should be affirmed.

3. The Prosecutor Did Not Commit Error By Improperly Opining Streiff's Guilty During Her Questioning of Witnesses.

As stated in the section above, generally a witness may not give an opinion, while testifying, of the veracity or guilt of a defendant. *King*, 167 Wn.2d at 331. A prosecutor commits error when his or her questioning

seeks to compel a witness to opine regarding the guilt of the defendant or the veracity of truth of another witness. *King*, 167 Wn.2d at 331; *State v. Jerrels*, 83 Wn. App. 503, 507 P.2d 209 (1996).

Streiff argues a number of questions asked by the deputy prosecutor were improper because the improperly assumed Streiff was guilty. AOB 39, fn.26.¹² Three of the exchanges have objections. RP 213, 236-37, 283-84. The remaining questions were asked without objection. RP 284, 316-17, 328, 339.

Streiff argues that the deputy prosecutor asking Ms. Parsons about C.M.J. telling her “what happened” was improper questioning because it assumed his guilt. AOB 39, fn.26, *citing* RP 285. There is nothing in this question that invokes any such thing. C.M.J. disclosed to Ms. Parsons, therefore it was important to have Ms. Parsons testify that C.M.J. told her something. This is not an improper question.

Streiff similarly asserts the initial questions to Deputy Scrivner regarding why he went out to contact C.M.J. were improper. AOB 39. The State is permitted to explain the deputy’s actions. The fact the deputy was responding to a report of a child molestation and that it was the mother who

¹² It is difficult for the State to figure out exactly which questions or statements Streiff is citing to in some instances, as some of the RP citation does not match any questions or testimony he complains of, such as RP 285 does not contain any questioning or testimony, yet it is cited to in fn.26. Because Streiff only states parts of the questions in footnotes and never fully cites all of the complained conduct, the State is doing its best to answer this allegation.

called it in simply set the scene for why Deputy Scrivner was contacting the family. RP 339. This is similarly, not improper.

K.L.W. testified in detail about Streiff sexually assault her. RP 276-78. Streiff complains about the deputy prosecutor's question at the close of K.L.W.'s direct examination, "After the assault, have you noticed anything different about yourself?" RP 284. The victim had just testified about her sexual assault and the deputy was asking her if after the incident she noticed anything different. This is not an impermissible question and it was not impermissibly phrased given the testimony that had just occurred.

The other question and responses all of the questions to the lay witnesses had similar wording and was asked to individuals about another person's assault, such as "[d]id you eventually find out [C.M.J.] was also assaulted the same night?" or "at what point did you find out that [K.L.W.] was also assaulted by Jason?" RP 237, 283-84. The common thread throughout most of questions was the use of the word "assault." Yet not of the complained of questions had such wording. Streiff asserts the deputy prosecutor's questioning of Mat was also error. AOB 39, *citing* RP 328. He alleges the deputy impermissibly asked "did you know anything had happened to [C.M.J.]" and "[d]id you tell anybody else what Jason had done to [K.L.W.]?" RP 328. Streiff also takes issue with Clara testifying

that her husband called Mat and she “thought they were discussing my daughter’s assault and they weren’t.” RP 316

Streiff’s insistence that the deputy prosecutor’s perhaps inartfully phrased questions constituted misconduct is accurate, particularly in light of the fact he fails to apply any standard to the alleged error (perhaps only arguing its somehow cumulative effect?). AOB 40-42. Further, Streiff takes issue with these foundational questions regarding what occurred, in most part to trigger K.L.W.’s family to finally report the incident to the police, but fails to identify how the question could be properly asked. *Id.* Had the deputy prosecutor used “the incident” Streiff would likely argue it has the same connotation, as he takes issue with “what happened.” It appears the deputy could not even ask “what happened next” under Streiff’s issue with the wording because that would somehow suggest something had happened. The English language is imprecise. Further, when there was an objection that was sustained, the deputy prosecutor changed the wording of her question. RP 236-37. If the deputy prosecutor’s phrasing was truly an issue, defense counsel would have continued to object throughout the proceedings at every instance.

Streiff must show the deputy prosecutor’s conduct was error, and it was flagrant and ill intentioned. *In re Pers. Restraint of Phelps*, 190 Wn.2d 155, 166, 410 P.3d 1142 (2018). “[P]rosecutorial misconduct is flagrant and

ill intentioned only when it crosses the line of denying a defendant a fair trial.” *In re Phelps*, 190 Wn.2d at 166. Streiff did not object to the majority of the questioning he now complains is erroneous. The jury was properly instructed that the evidence it was to consider consisted of the testimony it “heard from witnesses, stipulations, and exhibits...” CP 51, *citing* WPIC 1.02. The jury is also instructed that “the lawyers’ statements are not evidence. The evidence is the testimony and exhibits.” CP 52. Finally, we presume the jury follows its instructions, “absent evidence proving the contrary.” *Kirkman*, 159 Wn.2d at 928. Therefore, Streiff cannot and does not show that the conduct caused him “prejudiced incurable by a jury instruction.” *In re Phelps*, 190 Wn.2d at 166. He requested no additional instructions and the instructions given to the jury were sufficient. There was no error, and if there was, it was not flagrant and ill intentioned. This Court should affirm Streiff’s convictions.

F. THE USE OF THE VICTIM’S INITIALS AND DATE OF BIRTH IN THE TO-CONVICT INSTRUCTIONS DID NOT IMPLICATE THE PUBLIC TRIAL RIGHT, WAS NOT A COMMENT ON THE EVIDENCE, AND DID NOT VIOLATE STREIFF’S RIGHTS TO A FAIR TRIAL OR DUE PROCESS.

Streiff argues the use of the victims’ initials and date of birth on the to-convict instruction violated the right to an open and public trial. AOB 42-44. Streiff argues this use also constituted a comment on the evidence and reduced the burden of proof. *Id.* 44-49. The use of initials was

permissible, does not implicate the public's right to open and public trials, the verdict forms were not a comment on the evidence, and even if they were, any such comment from the inclusion of the birth dates was harmless.

1. Additional Facts.

The Court's Instructions to the Jury included three to-convict instructions, one for each count of Child Molestation in the Third Degree. CP 57-59 (Instructions 5, 6, and 7). Each instruction used the victim's initials and date of birth rather than their name.¹³ *Id.* For Count I the jury is instructed it must find...“That on or about and between August 11th, 2018 and August 12th 2018, the defendant had sexual contact with C.M.J. (DOB 06/16/2004).” CP 57 (Instruction 5). The other two to-conviction instructions are constructed in the same fashion. CP 58-59. Streiff demanded changes to all of the to-convict instructions to conform with the State's charging documents, but did not request for the trial court to substitute the initials and dates of birth with victims' names. RP 376-79.

2. The Use Of The Victims' Initials In This Case Did Not Implicate The Public's Right To The Open Administration Of Justice

The Washington constitution requires that “[j]ustice in all cases shall be administered openly,” and also guarantees the related right to a

¹³ Streiff throughout his brief refers the court using pseudonyms. Initials are not pseudonyms. A pseudonym is a fictitious name. *See Webster's Third New International Dictionary*, 1831 (2002).

public trial. Const. art. I, § 10, 22. The public trial right in article I, section 22 is a personal right of the defendant, while the complementary right to open proceedings under article I, section 10 is a “command to the judiciary” vested with the general public. *State v. Herron*, 177 Wn. App. 96, 105, 318 P.3d 281 (2013). The “core concern” of article I, section 10 is to ensure the public can observe “the operations of the courts and the judicial conduct of judges.” *Bennett v. Smith Bunday Berman Britton, PS*, 156 Wn. App. 293, 306, 234 P.3d 236 (2010) (quoting *Dreiling v. Jain*, 151 Wn.2d 900, 908, 93 P.3d 861 (2004)). Article I, section 10 protects the public’s access to court records as well as oral proceedings. *State v. Waldon*, 148 Wn. App. 952, 957, 202 P.3d 325 (2009). A “court record” includes “[a]ny document, information, exhibit, or other thing that is maintained by a court in connection with a judicial proceeding.” GR 31(c)(4).

The public’s right to court records is not absolute, and may be restricted to protect other important interests. *E.g., Federated Publications, Inc. v. Kurtz*, 94 Wn.2d 51, 60, 615 P.2d 440 (1980). The administrative process to seal or redact court records is governed by GR 15. However, to satisfy constitutional requirements, courts must generally undergo an individualized five-part inquiry before restricting public access.¹⁴

¹⁴ “1. The proponent of closure and/or sealing must make some showing of the need therefor...2. Anyone present when the closure (and/or sealing) motion is made must be given an opportunity to object...3. The court, the proponents and the objectors should

Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 37, 640 P.2d 716 (1982); *Waldon*, 148 Wn. App. at 961. The analysis is the same regardless of whether an alleged public trial violation implicates article I, section 10, or article I, section 22. *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

However, “[n]ot all arguable courtroom closures require satisfaction of the five factor test.” *State v. Slerf*, 181 Wn.2d 598, 604, 334 P.3d 1088 (2014); *Ringhofer v. Ridge*, 172 Wn. App. 318, 325, 290 P.3d 163 (2012) (“...when the core concern of article I, section 10 is not implicated, our constitution does not mandate public access to the requested court documents.”). Analyzing an alleged public trial violation is a three-step process. *State v. Smith*, 181 Wn.2d 508, 513-14, 334 P.3d 1049 (2014). A reviewing court first determines using the “experience and logic” test whether the process at issue implicates the public trial right. *Id.* If the public trial right applies to the relevant process, the court next determines whether a closure in fact occurred. *Id.* If the public trial right does not attach, or if no closure occurred, there is no need to apply the *Ishikawa* test. *Doe G v. Department of Corrections*, 190 Wn.2d 185, 199, 410 P.3d 1156 (2018).

carefully analyze whether the requested method for curtailing access would be both the least restrictive means available and effective in protecting the interests threatened...4. The court must weigh the competing interests of the defendant and the public...5. The order must be no broader in its application or duration than necessary to serve its purpose...” *Ishikawa*, 97 Wn.2d at 37 (quoting *Federated Publications, Inc.*, 94 Wn.2d at 62). The details of this test are irrelevant here as the trial court did not consider it below.

Only if a closure occurred must the court then decide whether it was justified. *Id.*

The defendant has the burden of showing that the public trial right attached to a given procedure and that a closure actually occurred. *State v. Love*, 183 Wn.2d 598, 605, 354 P.3d 841 (2015). If the defendant cannot make both showings, his claim fails. *State v. Magnano*, 181 Wn. App. 689, 698-99, 326 P.3d 845 (2014). If the defendant successfully carries the first two factors, the burden shifts to the State to demonstrate that any closure was justified. *Love*, 183 Wn.2d at 605. Alleged public trial violations are reviewed *de novo*. *Magnano*, 181 Wn. App. at 694.

Courts use the “experience and logic” test to determine whether article I, section 10 applies to a given set of facts. *State v. S.J.C.*, 183 Wn.2d 408, 412-13, 352 P.3d 749 (2015). The “guiding principle” of this test is whether public access to the relevant documents will increase the fairness, or the appearance of fairness, of the judicial process. *State v. Turpin*, 190 Wn. App. 815, 820, 360 P.3d 965 (2015). Both the experience and logic prongs must be satisfied before the public trial right attaches. *State v. Karas*, 6 Wn. App. 2d 610, 619, 431 P.3d 1006 (2018).

Courts have declined to find entire topical categories implicated wholesale by article I, section 10, preferring a narrow and fact-specific

analysis of any challenged process. *See Slerf*, 181 Wn.2d at 605;¹⁵ *see State v. Jones*, 185 Wn.2d 412, 422, 372 P.3d 755 (2016).¹⁶ Streiff has not shown that the specific process at issue here – using a crime victim’s initials on the to-convict instructions– implicates the public trial right.

a. Experience shows that litigants have not historically been required to use crime victim’s full names in all court filings.

The “experience” prong examines “whether the place and process have historically been open to the press and the general public.” *State v. Sublett*, 176 Wn.2d 58, 73, 292 P.3d 715 (2012). In the context of this case, Streiff must show that the public has historically been entitled to use to-convict documents to learn the identity of sexual assault victims. *See Smith*, 181 Wn.2d at 516 (“...[w]ithout any evidence the public had traditionally participated in sidebars, the experience prong cannot be met.”).

It is the availability of information, not its particular format, which satisfies the public trial right. *See Love*, 183 Wn.2d at 607 (“...written

¹⁵ “Whether this portion of jury selection raises public trial rights has not been settled by cases where jurors were taken into chambers after being sworn in and after formal voir dire had begun. Thus application of the experience and logic test is called for.” *Slerf*, 181 Wn.2d at 605.

¹⁶ “Thus, whether a specific task could generally be considered part of voir dire is not dispositive. *Jones* has not provided any historical or legal resources showing that the press and general public have traditionally been able to observe the specific, nondiscretionary, ministerial task of physically drawing the alternate jurors according to a procedure chosen by the defendant that was described both before and after the fact on the record in open court.” *Jones*, 185 Wn.2d at 423-24.

peremptory challenges are consistent with the public trial right so long as they are filed in the public record.”); *see Sublett*, 176 Wn.2d at 77.¹⁷ Thus, the experience prong is not satisfied if purportedly sealed information is discoverable by the public. *See Smith*, 181 Wn.2d at 518. In *Smith*, the defendant challenged the trial court’s practice of holding sidebars outside the courtroom. *Id.* at 512. The Supreme Court found the experience prong was not satisfied in part because the sidebars were separately memorialized for the record, and thus “any inquiring member of the public can discover exactly what happened...” *Id.* at 518.

In this case, any member of the public who desired to know the victims’ identity could have learned it by attending the trial or later requesting a copy of the trial record. Also, an interested member of the public could have made a public disclosure request directed to the police agency. The availability of C.M.J. and K.L.W.’s identity satisfied the public’s right to the open administration of justice.

Washington precedent is also clear that the prosecutor need not identify crime victims in most court documents. *See State v. Plano*, 67 Wn.

¹⁷ Finding the trial court did not err by responding to jury question in chambers because “[n]one of the values served by the public trial right is violated under the facts of this case. No witnesses are involved at this stage, no testimony is involved, and no risk of perjury exists. The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record pursuant to CrR 6.15. Similarly, the requirement that the answer be in writing serves to remind the prosecutor and judge of their responsibility because the writing will become part of the public record and subject to public scrutiny and appellate review.” *Sublett*, 176 Wn.2d at 77.

App. 674, 679-80, 838 P.2d 1145 (1992) (the name of the victim is not an element of fourth degree assault); *State v. Johnston*, 100 Wn. App. 126, 134, 996 P.2d 629 (2000) (trial court did not err by omitting victim's name from jury instructions in murder prosecution); *State v. Airhart-Bryon*, No. 78805-1-I, slip op. at 9, LEXIS922 (Wash. Ct. App. Feb. 20, 2020) (unpublished) (a victim's name is not an essential element to the crime of child molestation)¹⁸; Gen. Order 2011-1 (Division II's order requiring the court and the parties identify juvenile witnesses in sexual assault cases by initials or pseudonyms). If experience shows that the State could have properly removed the victim's name entirely from the cited documents, it cannot also be that the public had a right to see the victim's full name in those same materials.

Numerous opinions of our Supreme Court constitute further evidence that Washington has not historically required reference to victims' full names in all public documents. For decades the Court has identified adult victims by initials, without conducting any *Ishikawa* analysis, "in order to protect [their] identit[ies] as [] victim[s] of sexual assault." *E.g.*, *State v. Emery*, 174 Wn.2d 741, 746, n.1, 278 P.3d 653 (2012); *State v. Corstine*, 177 Wn.2d 370, 373-74, 300 P.3d 400 (2013); *State v. Tili*, 139 Wn.2d 107, 110-11, 985 P.2d 365 (1999); *State v. Bright*, 129 Wn.2d 257,

¹⁸ Cited under GR 14.1 for persuasive authority only.

261, n.1, 916 P.2d 922 (1996); *State v. Brown*, 127 Wn.2d 749, 751, 903 P.2d 459 (1995); *State v. Aumick*, 126 Wn.2d 422, 424, 894 P.2d 1325 (1995). There is no textual reason why article I, section 10 should not apply to appellate courts. If the Supreme Court’s use of initials is not error, it suggests the same result in this case.

Streiff ignores the “experience and logic” test and relies primarily on *Allied Daily Newspapers of Washington v. Eikenberry*, 121 Wn.2d 205, 848 P.2d 1258 (1993).¹⁹ *Eikenberry*, though topically related, is distinguishable, and does not provide historical evidence for Streiff’s argument.

Eikenberry analyzed a statute prohibiting identifying child sexual assault victims in any way “at any court proceeding,” including trial. *Id.* at 208-09. The statute was sweeping in its scope, preventing any disclosure to the press or public of the victim’s “name, address, location, photographs” and relationship to the perpetrator. *Id.* The statute also required that “any portion of any court records, transcripts, or recordings of court proceedings” containing any identifying information be automatically sealed or redacted. *Id.*

¹⁹ This is one of the many reasons the State’s briefing is more extensive and therefore it’s brief considerably longer than Streiff’s. The State has one opportunity to respond and must fully flesh out its legal analysis to Streiff’s many issues. This takes a considerable amount of time and space. The State has attempted to edit and cull as much of its brief as possible, while still completing the necessary legal and factual arguments.

Our Supreme Court struck down the statute because it required courts to conceal victims' identities without any individualized inquiry. *Id.* at 211-14. *Eikenberry* is immediately distinguishable because C.M.J and K.L.W.'s real names were used at trial. Furthermore, the use of initials was not compelled, but voluntarily done by the parties, presumably as a courtesy to the victims. Nothing in *Eikenberry* forces a litigant to write out a victim's full name in the to-convict instruction. Rather, it held that the legislature cannot prospectively compel redaction in all cases, and thus prohibit compliance with article I, section 10. *Id.* at 211-12.

b. The logic prong is not satisfied because public access to the victims' full names in the to-convict instructions would not have benefitted the public's role in the proceeding.

The "logic" prong asks "whether public access plays a significant positive role in the functioning of the particular process in question." *Smith*, 181 Wn.2d at 519. Courts consider the "values served by open courts," such as the similarity of the implicated process to trial proceedings, as well as the fairness, and the appearance of fairness, of the system. *State v. Burdette*, 178 Wn. App. 183, 192, 313 P.3d 1235 (2013). The appearance of fairness is implicated where the public's mere presence might deter procedural violations and remind lawyers of their duty to the public. *State v. Anderson*, 187 Wn. App. 706, 719, 350 P.3d 255 (2015). In this case, Streiff must

identify how the trial process benefits from public access to victims' identities in these court documents. *See Magnano*, 181 Wn. App. at 699.

The logic prong is not met if the purportedly sealed information is found elsewhere in the available court record, as interested citizens have thereby been afforded "meaningful public access." *See In re Detention of Morgan*, 180 Wn.2d 312, 326, 330 P.3d 774 (2014);²⁰ *see Peterson v. Williams*, 85 F.3d 39, 43 (2d. Cir. 1996).²¹ In this case, the victims' identity was repeated throughout the trial. The public trial right is a mechanism for the citizenry to "weigh the defendant's guilt or innocence for itself." *Smith*, 181 Wn.2d at 518. This purpose was served by permitting the public to evaluate C.M.J. and K.L.W.'s live, fully identified testimony. It was through this testimony, not their names on the to-convict instructions, that the public could gauge the veracity of their complaints.

Streiff does not really explain how the public's role was appreciably diminished by using the victims' initials on the to-convict instruction. *See*

²⁰ "Turning to the logic prong, public access to the in-chambers conference would have made little difference to the functioning of the conference or the involuntary medications proceeding overall. The evidence that was eventually admitted and the decision that followed were filed in the open record. Thus, there was meaningful public access to the court proceedings that concerned involuntary medication." *Morgan*, 180 Wn.2d at 326.

²¹ "But, in fact, the public may not have missed much of importance as a result of the accidental closure, since just about all of the defendant's testimony that was relevant was repeated soon after he testified, as part of the defense counsel's summation." *Peterson*, 85 F.3d at 43 (cited with approval by *State v. Schierman*, 192 Wn.2d 577, 614, 438 P.3d 1063 (2018)).

Sublett, 176 Wn.2d at 77.²² Nor does he explain what harm would be guarded against by further promulgating their names. Because Streiff cannot satisfy the experience and logic test, the public trial right does not apply to the use of initials in this case. Streiff's convictions should be affirmed.

c. Even if, *arguendo*, the use of the victims' initials implicates the public trial right, there was no closure in this case.

Even if the specific process at issue implicates the public trial right, Streiff still bears the burden of showing a sealing actually occurred. Streiff cannot make this showing because no documents were ever actually redacted or sealed.

To "seal" a court record means "to protect [it] from examination by the public and unauthorized court personnel." GR 15(4). To "redact" a court record means "to protect from examination...a portion or portions of a specified court record." GR 15(5).

The trial court below took no action to seal or redact the to-convict instructions cited by Streiff. The documents were simply authored using the victims' initials, and no party ever made a motion to seal or redact. This

²² "None of the values served by the public trial right is violated under the facts of this case. No witnesses are involved at this stage, no testimony is involved, and no risk of perjury exists. The appearance of fairness is satisfied by having the question, answer, and any objections placed on the record..." *Sublett*, 176 Wn.2d at 77.

procedure does not meet the definitions outlined in GR 15. The public had full access to all filed documents in their original condition. Streiff's position would impliedly require parties to identify all potential witnesses by their full names in all filings. Such a rule would be misplaced because for most crimes, including child molestation, the State is not required to plead the specific identity of the victim.

These facts are thus distinguishable from cases like *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 5, 330 P.3d 168 (2014), where a party filed a motion to redact their name from a document after it had been filed. It is also distinguishable from cases like *Doe L. v. Pierce County*, 7 Wn. App. 2d, 157, 167-68, 433 P.3d 838, 845 (2019), where a captioned party, as opposed to a potential witness, affirmatively moved to litigate the case anonymously. There was no legal requirement in this case that any party list either victim's full name. Furthermore, the court took no action to restrict the public's access to any portion of any filed document. Thus, there was no closure.

d. Even If, *Arguendo*, Using the Victims' Initials Was Improper, The Error Was *De Minimis*.

If a reviewing court finds that a closure occurred, it must also determine whether the closure was *de minimis*. *Karas*, 6 Wn. App. 2d at 617-18. To determine whether a closure was *de minimis*, courts ask "to what extent the particular closure in question undermined the values furthered by

the public trial right.” *State v. Schierman*, 192 Wn.2d 577, 614, 438 P.3d 1063 (2018). These values include reminding the parties of their responsibilities to the public, checking any possible bias, promoting confidence in the courts, and “ensur[ing] an outlet for community emotions.” *Id.* 611, 615. A *de minimis* error does not violate the public trial right. *Karas*, 6 Wn. App. 2d at 617-18, n.4.

A *de minimis* inquiry is “necessarily case specific,” and no formal test exists. *Schierman*, 192 Wn.2d at 614. However, the *Schierman* Court suggested consideration of the following factors: (1) the length and reason for the closure; (2) the substance of the closed proceeding; (3) whether the substance was memorialized in open court; (4) whether there was any objection; and (5) whether any trial-type processes occurred during the closure. *See id.* The facts in *Schierman* involved an in-chambers conference. *Id.* at 614-15. Some of these factors, the length of the closure for instance, translate poorly to an analysis of names voluntarily omitted from documents. Those that can be reasonably applied weigh in favor of a *de minimis* finding.

The use of the victims’ initials was not intended to conceal the workings of the judicial process from the public. The usage did not alter or otherwise taint any witness testimony or legal argument. *United States v. Ivester*, 316 F.3d 955, 960 (9th Cir. 2003) (cited with approval by

Schierman, 192 Wn.2d at 614)). The use of initials did not implicate the establishment of facts or any other trial-like process. *Schierman*, 192 Wn.2d at 611-14. The substance of the “closure,” C.M.J.’s and K.L.W.’s identities, was memorialized in open court through the testimony of various witnesses. *Id.* Given the trial testimony, using the victims’ full name in the to-convict instruction would not have discouraged perjury or served as a meaningful check on the judicial process. *Id.* at 611-12. Defense counsel declined to object. The lack of a defense objection is evidence “that the trial remained fundamentally fair.” *Id.* at 614. Reversing a sexual assault of a child conviction when the alleged “sealing” involved “no testimony, no evidence, and no secrets,” would damage, not bolster, public confidence in the judiciary. *See id.* at 615.²³

While the public has the right to observe most aspects of a trial proceeding, there was no separate right to view the victim’s identity in the to-convict documents. Given that the State need not have included the victims’ identity in the documentary record, it follows that any error in using her initials was *de minimis*.

²³ “Indeed, it is more realistic to say that reversing four convictions for aggravated murder resulting from a months-long trial on the basis of a 10-minute in-chambers discussion...would be more likely to diminish public confidence in the judiciary.” *Schierman*, 192 Wn.2d at 615.

3. Using The Victims' Initials In The To-Convict Jury Instruction, Did Not Constitute A Comment On The Evidence, And Even If It Did, It Was Harmless Error.

Article IV, section 16 of the Washington constitution states that “[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” This language prohibits a trial judge from conveying their personal opinion of the evidence. *State v. Jackman*, 156 Wn.2d 736, 743-44, 132 P.3d 136 (2006). A comment on the evidence occurs when “the trial court’s attitude toward the merits of the cause is reasonably inferable from the nature or manner of the court’s statements.” *State v. Miller*, 179 Wn. App. 91, 107, 316 P.3d 1143 (2014). Judicial comments may occur either directly or by implication. *Jackman*, 156 Wn.2d at 744. This court considers the totality of the circumstances to determine if a comment on the evidence occurred. *State v. Francisco*, 148 Wn. App. 168, 179, 199 P.3d 478 (2009).

A claim that the trial judge commented upon the evidence in a jury instruction may be raised for the first time on appeal. *Jackman*, 156 Wn.2d at 743. The court presumes the judicial comment on the evidence contained within the jury instruction is prejudicial, and it is the State’s burden “to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted.” *Id.* at 743, citing *State v. Levy*,

156 Wn.2d 709, 725, 132 P.3d 1076 (2006).²⁴ This court reviews the alleged comment *de novo*. *Id.* Jury instructions are reviewed *de novo*. *Id.* A challenged jury instruction is reviewed in the context of the jury instructions as a whole. *Id.*

Streiff takes issue with the use of the initials and dates of birth of the victims' in the "to-convict" instructions, which are identical per the elements with the exception of Count III, which excludes Lewis County. CP 58-57 CP 57 (Instruction 5, C.M.J. (DOB 06/04/2004)) (Instruction 6, K.L.W. (DOB 12/20/2002)) (Instruction 7, C.M.J. (DOB 06/04/2004)). Contrary to Streiff's assertion, there is nothing impermissible about the to-convict instructions, and if the instructions are erroneous, the error is harmless.

In *Jackman*, the our Supreme Court reversed after finding the inclusion of birth dates in the to-convict instructions were judicial comments on the evidence and the record did affirmatively show that Jackman suffered no prejudice as a result. *Jackman*, 156 Wn.2d at 744-45. The Court found in a prosecution for three counts of communicating with a minor for immoral purposes, three counts sexual exploitation of a minor, one count of patronizing a juvenile prostitute, one count of furnishing liquor

²⁴ The Supreme Court did not accept Jackman's invitation to find a judicial comment on the evidence was automatically prejudicial or structural error when the error was the inclusion of birthdates. *Jackman*, 156 Wn.2d at 742-44.

to minors, a privacy act violation, the foundational basis for all of the crimes was that the *victims were minors*. *Id.* at 740, 744 (emphasis original). Without the victims being minors, the defendant's actions were not illegal. *Id.* "By stating the victims' birth dates in the instructions, the court conveyed the impression that those dates had been proved to be true." *Id.*

The defendant was a 20-year old bowling alley manager who approached and propositioned male patrons of the bowling alley to see if they would be interested in masturbating on film in exchange for money. *Id.* at 739-40. The patrons, who were not known to Jackman, were all under 18 years of age. *Id.* There was evidence presented that Jackman tried to ascertain two of the boys' ages, by way of asking for the identification and the boys were not forthcoming. *Id.* at 739, fn.1. Evidence presented at trial included the victims testifying regarding their birth dates, and corroborating evidence was presented for three of the victims. *Id.* at 740.

Our Supreme Court found there was not harmless error because "the record did not affirmatively show that no prejudice could have resulted." *Id.* at 745. The Court notes the fact the boys were minors was critical element. *Id.* The boys did testify giving their correct dates of birth and Jackman did not challenge that the victims were minors. *Id.* Yet, Jackman also did not stipulate, nor does the record reflect he admitted to the boys' ages. *Id.* Jackman asserted he had tried to ascertain their ages. *Id.* One of jury

instructions had the incorrect birthdate for one of the victims, which the jury requested clarification. *Id.* The boys' credibility was also at issue, as two testified they had lied to the defendant about their ages. *Id.* at 744, fn.7. Therefore, it was "still conceivable that the jury could have determined the boys were not minors at the time of the events, if the court had not specified the birth dates in the instructions."

Streiff argues that in accordance with *Jackman*, this Court must reverse his convictions. Respectfully, the State disagrees that simply adding dates of birth of minors in the to-convict should simply yield the result that it is a judicial comment on the evidence. The State is not required to have the jury find the victim's specific age, the State is required to have jury find that the victim is between the required age range at the time of the sexual contact for the crime to be classified as whichever level of child molestation is appropriate. RCW 9A.44.083; RCW 9A.44.086; RCW 9A.44.089. The inclusion of the dates of birth in the to-convict instruction made them become an element of the crime the State was now required to prove beyond a reasonable doubt to the jury. *State v. Dreewes*, 192 Wn.2d 812, 821, 432 P.3d 795 (2019). Pursuant to the law of the case doctrine, the State assumed the burden to prove C.M.J. and K.L.W.'s birthdates when it was not required to do so. *Dreewes*, 192 Wn.2d at 821. Streiff does not challenge that the State presented insufficient evidence of the girls' birthdates. AOB

42-49. Even if Streiff made such an argument, there was ample evidence presented to the jury of the girls' birthdates. Clara testified to C.M.J.'s birthdate. RP 310-11. K.L.W. testified regarding her birthdate. RP 283. Deputy Scrivner testified to both victims' birthdates. RP 341. The State accepted the burden of proving the birthdates as an element and did so; this is not a judicial comment on the evidence.

Arguendo, if this Court follows *Jackman*, contrary to Streiff's assertion his case is distinguishable from *Jackman*, similar to how *State v. Zimmerman* was distinguishable. The Court of Appeals, on remand from the Supreme Court, considered whether the inclusion of birthdates was prejudicial in consideration of the Supreme Court's recent decision in *Jackman*. *State v. Zimmerman*, 135 Wn. App. 970, 971, 146 P.3d 1224 (2006), *review denied* 161 Wn.2d 1012 (2007). This Court concluded the record affirmatively showed the inclusions of the birth date of the victim was not prejudicial. *Zimmerman*, 135 Wn. App. at 975-76. *Zimmerman* was convicted of child molestation in the first degree of his biological daughter. *Id.* This Court noted multiple witnesses testified regarding the victim's age, including the victim. *Id.* at 975. This Court also stated, "[c]ritical 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 her age." *Id.* Also, unlike *Jackman*, there was no dispute regarding the victims age at any

point during the proceedings. *Id.* The Court held “no jury could reasonably conclude J.C. was over 12 jury the charged period.” *Id.*

As argued above, there was ample evidence regarding the girls’ actual dates of birth. Streiff grew up with C.M.J.’s father and had known C.M.J. her entire life. RP 162, 176, 215, 345. Streiff told Deputy Scrivner that he continued his relationship with Mat and Brandon “and became essentially to C.M.J. and K.L.W. as Uncle Jason.” RP 345. Streiff’s immediate response to Deputy Scrivner was “I don’t twiddle little kids.” RP 356. K.L.W. came into Streiff’s life when her mom and Mat started a relationship in 2014. RP 310. Mat was Streiff’s best friend. RP 325. Further, while there was no stipulation, Streiff’s counsel during questioning of Deputy Scrivner referred to C.M.J. as “being 14 years old...” RP 352. Also, during closing argument, Streiff’s counsel argues “If my client and his size and difference for a 12-year-old, 14-year-old is climbing onto the futon that they’re sleeping on over C.M.J. and no one else notices...” RP 435.²⁵ The evidence presented by the State, the victims’ ages, and the long term close friendship between Streiff and the families to the point where he was essentially family, coupled with that at no point during any of the proceedings were the girls’ ages contested, shows that no prejudice could

²⁵ Natalie is 12 as was C.M.J.’s younger brother, who were sleeping on the futon with her. RP 179, 203, 313.

have resulted. No jury could reasonably conclude C.M.J. and K.L.W. were not at least 14 years of age and less than 16 year of age at the time of assaults. This Court should affirm Streiff's convictions.

G. THE STATE CONCEDES STREIFF IS NOT SUBJECT TO INDETERMINATE SENTENCING AND HIS COMMUNITY CUSTODY EXCEEDS MUST BE REDUCED.

Streiff argues his sentence is defective because he is not subject to indeterminate sentencing and his maximum community custody should be only six months, not 36 months. AOB 49-52.²⁶ The State concedes Streiff's judgement and sentence erroneously has the box check indicating he is subject to indeterminate sentencing. CP 85; *See* RCW 9.94.507. This must be stricken.

The State similarly concedes Streiff's community custody exceeds the maximum time allowed due to the length of his sentence. RCW 9.94A.701(9); RCW 9A.20.021(1)(a)(c); RCW 9A.44.089. The maximum punishment for Child Molestation in the Third Degree, a Class C felony, is five years. RCW 9A.20.021(1)(a)(c); RCW 9A.44.089. Streiff was sentenced to 54 months in prison on each count, with 36 months of community custody on each count, to run concurrent. CP 86-87. The 54 months sentence leaves the trial court only 6 months left of the statutory maximum sentence for the imposition of community custody. The statute

²⁶ The State will address Streiff's double jeopardy argument in a separate section below.

mandates the trial court to reduce the amount of community custody so it does not exceed the statutory maximum sentence. RCW 9.94A.701(9). This Court must remand Streiff's matter back to the trial court to fix these two sentencing errors.

H. SENTENCING STREIFF TO COUNT I AND COUNT III DOES NOT VIOLATE DOUBLE JEOPARDY.

Streiff argues his sentences for Count I and Count III violate double jeopardy. AOB 52-56. Streiff's sentence for two separate acts, each individually found by the jury, does not violate double jeopardy. This Court should affirm Streiff's sentence.

1. Standard Of Review.

Double jeopardy claims are reviewed de novo. *State v. Barbee*, 187 Wn.2d 375, 382, 386 P.3d 729 (2017).

2. A Review Of The Entire Record Makes It Manifestly Apparent The State Was Not Seeking To Impose Punishment Upon Streiff Using The Same Conduct Of Child Molestation For Counts I and III, Therefore, The Convictions For Counts I And III Do Not Violate Double Jeopardy.

The Fifth Amendment of the United States Constitution and article one, section nine of the Washington State Constitution provide that no person shall be put in jeopardy twice for the same offense. "In Washington, a defendant is subject to double jeopardy if convicted of two or more offenses that are identical in law and in fact." *State v. Taylor*, 90 Wn. App.

312, 318, 950 P.2d 526 (1998), *citing State v. Calle*, 125 Wn.2d 769, 777, 888 P.3d 155 (1995). This analysis is commonly known as the *Blockburger* test. *State v. Marchi*, 158 Wn. App. 823, 829, 243 P.3d 556 (2010), *citing Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180 (1932). The remedy for a double jeopardy violation is vacation of the lesser of the offenses. *Marchi*, 158 Wn. App. at 829.

There are two parts to the double jeopardy analysis. *Marchi*, 158 Wn. App. at 829. “[W]hether the two charged crimes arose from the same act and, if so, whether evidence supporting conviction of one crime was sufficient to support conviction of the other crime.” *Id.*, *citing In re Pers. Restraint of Orange*, 152 Wn.2d 795, 820, 100 P.3d 291 (2004).

Double jeopardy claims may be raised for the first time on appeal. *State v. Mutch*, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011). Jury instructions lack clarity when “the need to find that each count arises from a “separate and distinct” act in order to convict” is not expressly stated in the jury instructions. *Mutch*, 171 Wn.2d. at 662; *quoting State v. Berg*, 147 Wn. App. 923, 925, 198 P.3d 529 (2008); *see State v. Carter*, 156 Wn. App. 561, 568, 234 P.3d 275 (2010). When flawed jury instructions are given to a jury, a defendant will *potentially* receive multiple punishments for the same offense, but that does not necessarily mean a defendant has received multiple punishments for the same offense. *Id.* at 663 (emphasis added).

When considering a double jeopardy claim, “review is rigorous and is among the strictest” when a court looks to the entire trial record for consideration. *Id.* at 664. When considering the totality of the court record, if the record lacks clarity that it was “*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense,” and that each count was based on a separate act, a double jeopardy violation has occurred. *Id.*, quoting *Berg*, 147 Wn. App. at 931 (emphasis added by Court in *Mutch*).

Streiff argues the jury could have convicted him based upon the same evidence of Streiff kissing C.M.J. the morning of August 12, 2018 in Winlock for Count I and III. AOB 53. Streiff argues this is because of the wording of the to-convict instructions, 5 and 7, both including the August 12 date, and the jury unanimity instruction did not require separate and distinct act for each count. *Id.*; CP 57 (Instruction 5); CP 59 (Instruction 7); CP (63 Instruction 11, *citing* WPIC 4.25); *see also* WPIC 4.26. While Streiff is correct that the jury was not instructed that it “must unanimously agree that this specific act was proved” for each single act,” the election of the conduct for each act was clear. *See* WPIC 4.26. The attorneys during closing arguments discussed with the jury the conduct for each offense. RP 339-05, 417-24. The deputy prosecutor, while discussing C.M.J.’s testimony in total, makes a clear breaking point between the two offenses. RP 402-03.

She states, "...and then she wakes up the next morning. She doesn't say a word to anybody. She doesn't say what happened. She tried to forget. She puts this event in a box....She pretends like nothing happened." RP 402-03. This is the culmination of discussing Count I, that occurred in the overnight hours after the party. RP 399-403. The deputy prosecutor then states, "But then [C.M.J.] goes home, she's goes home where it's safe...But this relief does not last long because, as you heard, just later Jason comes over for a hangout with her dad." RP 403.

Then there is defense counsel's argument. RP 417-24. Streiff's counsel creates a clear demarcation between the events surrounding Counts I and III. *Id.* Everything pertaining to Count III occurred in Castle Rock, while the events surrounding Count I occurred at Mat's house after the party. *Id.* The testimony from C.M.J. also contained the same break in events. RP 166-71. There can be no confusion as to what the understanding for all participating in the trial when the evidence was presented what conduct was being alleged for each count of child molestation.

The record shows it was manifestly apparent to the jury that Counts I and III were separate and distinct conduct. Therefore, the trial court's sentence, three individual counts of Child Molestation in the Third Degree, does not violate Streiff's double jeopardy right. CP 85-86. Streiff's sentence for 54 months on each count should be affirmed.

I. STREIFF RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE PROCEEDINGS.

Streiff argues he received ineffective assistance from his trial counsel throughout the proceedings, ticking off a list of items, without any further analysis beyond what was previously argued above in his briefing. AOB 56-58. The record does not support Streiff's assertion and he received effective assistance from his trial counsel.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Streiff's Attorney Was Not Ineffective During His Representation Of Streiff Throughout The Proceedings.

To prevail on an ineffective assistance of counsel claim Streiff must show (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The right to effective assistance of counsel extends throughout all proceedings including sentencing. *State v. Calhoun*, 163 Wn. App. 153, 168, 257 P.3d 693 (2011) (internal citations omitted). The presumption is the attorney's conduct was not deficient.

Reichenbach, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel’s actions were “outside the wide range of professionally competent assistance.” *Strickland*, 466 U.S. at 690. The Court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption an attorney’s conduct is not deficient “where there is no conceivable legitimate tactic explaining counsel's performance.” *Reichenbach*, 153 Wn.2d at 130.

If counsel’s performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice occurs if, but for “counsel’s deficient performance, there is a reasonable probability” the defendant’s “sentence would have been different.” *Calhoun*, 163 Wn. App. at 168.

Streiff’s argument is that for all of the issues he raises in his brief, his trial counsel was ineffective. AOB 57-58.²⁷ Streiff’s counsel had no reason to raise vicinage, because as argued above vicinage was proper in Lewis County. Streiff’s counsel likely did not raise the venue issue earlier because he believed that the prosecutor would not change the information

²⁷ Streiff also spends a paragraph explaining he will likely file a personal restraint petition, something that is of no consequence to this direct appeal.

for Count III, therefore the State would have to prove the incident occurred in Lewis County, which it likely could not do. This is trial strategy, not ineffective assistance of counsel. Sometimes strategy does not work out in the end, as it did not here because of the State' late amendment to the information removing Lewis County from the elements of Count III.

As argued above, there was nothing objectionable about the deputy prosecutor's closing argument or the questions asked during the direct examination. Moreover, counsel, who is in the courtroom and sitting in the presence of the jury, is in the best position to determine the impact of a particular piece of evidence, and whether the impact was such that reemphasizing the evidence is worth that risk. Trial counsel's failure to object to the remarks at the time they were made "strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990), *cert. denied*, 498 U.S. 1046 (1991).

The use of initials was permissible and not a violations of the public trial right or a comment on the evidence, as argued above. Therefore, there was no reason why Streiff's counsel would object. Deputy Scrivner's testimony regarding Streiff's statements was permissible within the scope of the CrR 3.5 hearing, and there was no reason to object. Counts I and III did not violate double jeopardy, as everyone participating the trial

understood. Finally, while there is a scrivener's error including a checkbox for indeterminate sentencing and there was an erroneous 36 months of community custody, these are simple errors on the part of filling out the judgment and sentence and will be corrected. These are not indicative of ineffective assistance of counsel. This Court should affirm Streiff's convictions.

J. THE STATE ALREADY DEALT WITH THE ALLEGED ERRORS RAISED AND THERE IS NO NEED TO CONDUCT A CONSTITUTIONAL HARMLESS ERROR ANALYSIS.

Streiff also argues there is cumulative error requiring reversal of his convictions. AOB 59. The doctrine of cumulative error applies in situations where there are a number of trial errors, which standing alone may not be sufficient justification for a reversal of the case, but when those errors are combined the defendant has been denied a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citations omitted). When a defendant/petitioner fails to demonstrate prejudice arising from any single error, he is not entitled to relief under a cumulative error analysis. *Thompson v. Calderon*, 109 F.3d 1358, 1369 (9th Cir. 1996). Alleged errors that are individually insufficient to require relief do not become meritorious simply by aggregating them into one claim. "The fact that many claims of . . . error are pressed does not alter fundamental math – a string of zeros still adds up to zero." *Hunt v. Smith*, 856 F. Supp.

251, 258 (D. Md. 1994); *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) (“Twenty times zero equals zero.”). This Court should find Streiff’s cumulative error argument without merit and affirm his convictions.

IV. CONCLUSION

Streiff received a fair trial, in proper location, by a proper jury pool. After hearing the properly admitted testimony from the witnesses, the jury had sufficient evidence to convict Streiff of all the separate and distinct charged counts of Child Molestation in the Third Degree. While there are simple error in the judgment and sentence that must be correct, a reduction in community custody and a scrivener’s error of an improperly checked box, Streiff was properly sentenced for his crimes. This Court should affirm the convictions and sentences with the exceptions noted above.

RESPECTFULLY submitted this 23rd day of June, 2020.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

APPENDIX A



FILED
Lewis County Superior Court
Clerk's Office
AUG 27 2019

Scott Tinney, Clerk
By _____, Deputy

IN THE SUPERIOR COURT OF WASHINGTON STATE
IN AND FOR LEWIS COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

JASON DONALD STREIFF,

Defendant.

NO. 18-1-00972-21

FINDINGS OF FACT AND CONCLUSIONS
OF LAW FOR 3.5 HEARING

THIS MATTER came before the Honorable James Lawler of the above-entitled Court for a 3.5 Hearing on July 23, 2019. The Defendant was present and represented by his attorney Joshua Baldwin. The State was present and represented by Deputy Prosecuting Attorney Silvia Irimescu. The Court considered the argument of the parties and the testimony of Deputy Andrew Scrivner of the Lewis County Sheriff's Office. The Court now makes the following Findings of Fact and Conclusions of Law:

UNDISPUTED FACTS

- 1.1 On October 21, 2018, Deputy Scrivner interviewed the Defendant at Defendant's residence.
- 1.2 The meeting with Deputy Scrivner was pre-arranged and when the Deputy arrived at his residence, the Defendant invited Deputy Scrivner inside his home.
- 1.3 Deputy Scrivner did not arrest the Defendant and did not read the Defendant his Miranda rights.
- 1.4 Deputy Scrivner interviewed the Defendant for approximately 45 minutes, until the Defendant told Deputy Scrivner he did not want to answer any more questions.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW FOR 3.5
HEARING
Page 1 of 3

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- 1 1.5 Throughout the interview, Deputy Scrivner touched the Defendant's shoulder and
2 knee in a friendly manner for purposes of facilitating the conversation.
- 3 1.6 The Defendant told Deputy Scrivner that he did not want to be asked particular
4 questions.
- 5 1.7 During the interview, the Defendant explained his relationship with the victims and
6 the victims' families, what he did on the days of the alleged assaults, that he did
7 not remember molesting the two victims, that he had a lot to drink on the nights of
8 the alleged child molestations, and that he would not do something like that.
- 9 1.8 There was no coercion of the Defendant.

9 **DISPUTED FACTS**

- 10 2.1 The Defendant was in custody for Miranda purposes because the officer touched
11 him and continued to ask him questions.

11 **CONCLUSIONS AS TO DISPUTED FACTS**

- 12 3.1 The Defendant was able to end the interview effectively and he did that when he
13 asked the officer to leave.
- 14 3.2 The fact that the officer put his hand on Defendant's shoulder or on his knee was
15 an innocuous thing, not a threat of force or anything that would make the
16 statements involuntary.

16 **CONCLUSIONS ON ADMISSIBILITY**

- 17 4.1 The Defendant's statements were voluntary and noncustodial.
- 18 4.2 The Defendant's statements are admissible in the State's case in chief.
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APPENDIX B

No. 5

To convict the defendant of the crime of child molestation in the third 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 and between August 11th, 2018 and August 12th, 2018, the defendant had sexual contact with C.M.J. (DOB 06/16/2004);
- (2) That C.M.J. was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That C.M.J. was at least forty-eight months younger than the defendant; and
- (4) That this act occurred in the County of Lewis, 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 any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 6

To convict the defendant of the crime of child molestation in the third 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 August 12th, 2018, the defendant had sexual contact with K.L.W. (DOB 12/20/2002);
- (2) That K.L.W. was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That K.L.W. was at least forty-eight months younger than the defendant; and
- (4) That this act occurred in the County of Lewis, 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 any one of these elements, then it will be your duty to return a verdict of not guilty.

No. 7

To convict the defendant of the crime of child molestation in the third 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 August 12th, 2018, the defendant had sexual contact with C.M.J. (DOB 06/16/2004);
- (2) That C.M.J. was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That C.M.J. was at least forty-eight 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 any one of these elements, then it will be your duty to return a verdict of not guilty.

LEWIS COUNTY PROSECUTORS OFFICE

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Transmittal Information

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Appellate Court Case Title: State of Washington, Respondent v. Jason D. Streiff, Appellant
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