

NO. 34346-4

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON

RESPONDENT

v.

MICHAEL BROUSSARD

APPELLANT,

BRIEF OF RESPONDENT

KARL F. SLOAN
Prosecuting Attorney
237 4th Avenue N.
P.O. Box 1130
Okanogan County, Washington

509-422-7280 Phone
509-422-7290 Fax

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A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. The Trial Court properly excluded inadmissible evidence and did not deny the defendant the ability to offer competent evidence or present his defense.
2. Trial counsel was not ineffective for not objecting to admissible testimony from the victims.
3. Factual observations of a change in N.C.'s behavior by her parent were properly admitted.
4. There was no unanimity instruction required for the acts of molestation where substantial evidence supported each act.
5. Substantial evidence supported the conviction for furnishing, where the alternative means were a single means to commit the crime.
6. The crimes of child molestation and rape were not same criminal conduct, and the defendant failed to carry his burden.
7. The objection to appeal costs and cost bill are premature.

B. STATEMENT OF THE CASE

Okanogan County Sherriff's Deputy Laura Wright received Child Protective Services referral, concerning T.D. The report was made by counselor Lisa Spitzmiller. RP 21, 37. The report was received by Deputy Wright on October 11, 2013. RP 21. Deputy Wright learned the sexual assault being reported occurred in August of 2013. RP 23.

T.D. was interviewed and identified other persons present when the sexual assault occurred, including N.C., the defendant Michael Broussard, Bradly Peters, Bailey Knato, Beatrice Mears, and Brittany Peterson. RP 23-24

T.D. was able to provide Deputy Wright directions to the house where the sexual assault occurred, and was able to locate the address for the residence. Beatrice Mears had been renting the downstairs apartment portion of the residence. RP 25-26

Deputy Wright took photographs of the exterior and interior of the residence, after receiving permission from the owner in January 2014. RP 26

Deputy Wright and Detective Debbie Behymer contacted the defendant and Brad Peters in June of 2014. RP 27. The defendant and Mr. Peters were placed under arrest and interviewed. RP 27-28.

Deputy Wright spoke with T.D. again on June 18, 2014, after the defendant's arrest. RP 28. In that contact, T.D. reported being contacted by the defendant's girlfriend, Amanda Reece. Ms. Reece and N.C. also attended Liberty Belly High School. RP 28-29.

Det. Behymer also identified N.C. as an additional possible victim, after speaking with N.C.'s mother, Jamie Adams. RP 39.

N.C. was interviewed in December 2013, about the conduct of the defendant and Brad Peters. RP 40.

Deputy Behymer also spoke with Bailey Knato, in January 2014, about the same gathering that N.C. and T.D. were at, when the sexual assault occurred. RP 41.

Det. Behymer interviewed the defendant on June 9, 2014. RP 42. The defendant knew why he was being contacted. RP 44, 50. The defendant described going to a party at the residence of Beatrice Mears. RP 44. He indicated Brad Peters, Beatrice Mears, N.C., T.D., and another girl were present. RP 45. The defendant said he had brought alcohol to the party, and said he knew it wasn't the right thing to do with people under twenty-one. RP 45-46. The defendant said people at the party got intoxicated. RP 46.

The defendant said that N.C. and T.D. entered into a shower and that he had joined the girls in the shower. RP 46. The defendant said at different points in the interview that T.D. had clothes on and another where she had only a towel on. RP 47. He said he took his clothes off, down to his shorts. RP 47. The defendant said he did not realize the age of T. D. and N.C. until the day after the party. RP 47, 204. The defendant described to law

enforcement touching both girls' breast areas, and rubbing N.C.'s vagina with his fingers and he might have used his fingers on T.D. RP 47.

The defendant said at first, he, T.D. and N.C. were in the shower and then Beatrice and Brad joined them. RP 48.

After the shower, the defendant said he was in a bedroom and called T.D. inside and that he might have used his penis to touch her. RP 49. T.D. then went back to the shower where he and N.C. joined her. RP 49. The defendant then called Brad to join them. RP 49. The defendant admitted to having sexual contact with T.D. and N.C., and said during the interview that he figured he was going to prison. RP 50, 53.

The defendant said he knew if he told the truth that he was still going to be in trouble. RP 204.

T.D.'s brother, Justin Dod, testified that he had attended Liberty Bell High School and graduated in 2008. RP 73. T.D. was 7 years younger than Justin Dod. RP 74. One of Justin Dod's best friends was Brad Peters, who graduated the same year from Liberty Bell as Justin Dod. RP 74. Brad Peters would visit the Dod household, and knew T.D. RP 74. After graduation, Justin Dod joined the US Army, but would still socialize with Mr. Peters on

return visits. RP 75. During some of those visits, he also met the defendant, seeing the defendant five to seven times between 2008 and 2012. RP 75-76, 82.

Justin Dod went as far as warning Mr. Peters to stay away from his younger sister T.D., based on the sexual comments Mr. Peters and Mr. Dodd made about younger females. RP 76-77.

At the time of trial, T.D. had just turned 18 the day before she testified, and was a senior at Liberty Bell High School, where she had attended all four years. RP 84

Her friend, N.C., was one grade above, and one year older, than T.D. The defendant's girlfriend Amada Reece was also one grade above T.D. RP 85, 92, 138.

T.D. knew Bailey Knato from school. Ms. Knato was one year ahead of T.D. RP 89. T.D. had known Brad Peters since she was seven or eight years old, and he was a friend of her brother. RP 90.

T.D. knew Beatrice Mears through N.C., and in August of 2013, she attended a gathering at a residence rented by a Beatrice Mears after being invited through Facebook. RP 85-86, 87.

T.D. thought it was going to be a sleepover, with Beatrice Mears and N.C. RP 86. T.D. was 15 years old at the time.

T.D. knew who the defendant was. RP 90. T.D. had seen the defendant at a friend's sixteenth birthday party, and learned that he knew T.D.'s brother. RP 110-113. T.D. also saw the defendant at a party earlier the same week as the sexual assault. RP 90-91. At the party, the defendant was arguing with his girlfriend, Amanda Reece, whom T.D. knew from school. RP 90-91, 119-120. The defendant and his girlfriend were screaming at one another about one of them giving the other an STD. RP 93.

T.D. did not have any conversation with the defendant at the party, nor his girlfriend, nor did she communicate to the defendant any information about her age. RP 92, 93, 120.

Later in the week, T.D. went to the sleepover at the house of Ms. Mears. The defendant and Brad Peters arrived later. RP 94. The defendant and Mr. Peters asked for money to buy alcohol, then left for the store together to purchase it, and then returned and gave alcohol to T.D. RP 94. T.D. felt affected by the alcohol she drank. RP 95.

After receiving the alcohol, the defendant joined T.D. and N.C. who were dancing. The defendant got in between the girls and began grinding on them, which made them uncomfortable. RP 96, 97. T.D. and N.C. met in the bathroom and talked about it. RP 97-98.

After leaving the bathroom, T.D., N.C., the defendant, Brad Peters, and Ms. Mears laid on an outdoor bed on a screened porch. RP 98. While on the bed, the defendant tried to kiss T.D., which made her uncomfortable, so she left and went to shower. RP 99-100. T.D. showered with her clothes on. RP 100.

While T.D was in the shower, N.C. came into the shower, and was followed by the defendant, Mr. Peters and Ms. Mears. RP 100. At that time, the defendant and Brad Peters started taking the girls' clothes off in the shower. RP 101

While in the shower, the defendant alternately fingered (digitally penetrated) T.D.'s vagina and fingered N.C.'s vagina. RP 101, 132, 133, 138. The defendant also touched T.D.'s breasts. RP 101.

T.D. became uncomfortable and left the shower to find her clothes. RP 102. After leaving the bathroom, the defendant pulled T.D. into a bedroom, and tried to have sex with her. The defendant pulled out his penis and tried to put it in T.D. approximately three times, while on top of her. RP 102-103.

T.D. pushed the defendant off and went to find N.C. T.D. and N.C. called a friend to pick them up and hid outside the house until they were picked up. RP 103-104. T.D. and N.C. were picked

up and taken to Molly LaChapelle's home. Ms. LaChapelle was the mother of one of T.D and N.C.'s friends. RP 104. T.D. and N.C. disclosed to Ms. LaChapelle what had happened. RP 104-105.

T.D. later told her counselor, Lisa Spitzmiller, about the incident, who then contacted law enforcement. RP 105-106.

Ms. Spitzmiller was a therapist who worked with children and families. RP 209. Ms. Spitzmiller counseled T.D. RP 209. T.D. disclosed the sexual assault to Ms. Spitzmiller in August 2013. RP 210. It was difficult for T.D. to discuss the incident, but she was able to describe the suspect and provided additional details in a subsequent session RP 211-212. Ms. Spitzmiller contacted law enforcement. RP 213.

T.D. did not tell the defendant that she was over fifteen. RP 106-107.

After the defendant was arrested, his girlfriend Amanda Reece called T.D. a slut at school, and texted T.D. asking her not to say anything about the sexual assault. RP 107-109.

N.C. attended Liberty Bell High School and resided in the Methow Valley her whole life. RP 145. N.C. knew T.D. from going to the same schools, from the time T.D. was in 8th grade and N.C.

was in 9th grade. RP 145 N.C. was in the same grade as Amanda Reece. RP 14

During summer of 2013, N.C. worked at the Red Apple store in Winthrop with Beatrice Mears and Bailey Knato. RP 146-147.

N.C. was visiting at T.D.'s house when Ms. Mears invited them to her house. RP 147-148. After N.C. and T.D. arrived at Ms. Mears residence, the defendant and Brad Peters showed up. RP 149.

N.C. had seen the defendant a few days before while at a party at the home of a friend named Alex. RP 149. At the party, N.C. saw both the defendant and his girlfriend, Amanda Reece, there. RP 149-150. N.C. spoke briefly with the defendant, but did not see T.D. speak with the defendant. RP 169-170. N.C. did not discuss her age with the defendant or claim that she had graduated high school. RP 170.

N.C. observed the defendant and Amanda Reece arguing in front of other people at the party, based on one of them accusing the other of passing an STD. RP 151-152.

Previously N.C. had seen the defendant when he showed up uninvited at her friend's sweet 16-birthday party. RP 152.

At Beatrice Mears' house, the defendant showed up with alcohol and then collected money to purchase more. RP 153.

Later in the evening, the defendant and Brad Peters were in the shower with N.C., T.D., and Ms. Mears. RP 155-156, 174. N.C. and T.D.'s clothes were removed. RP 156. The defendant placed his hand into N.C.'s underwear and tried to finger her, and began kissing her. RP 156-157, 175.

N.C. and T.D eventually went outside to get away and called for someone to pick them up. RP 158-159. They told their friend Chloe and her mother, Molly LaChapelle, what had happened. RP 159. After the incident, N.C. continued to meet with Ms. LaChapelle for counseling, and was ultimately referred to law enforcement. RP 161-162. N.C. never told the defendant she was older than her actual age. RP 163-164.

In August 2013, N.C.'s mother, Jamie Adams, observed a change in N.C.'s behavior. RP 180. She was withdrawn, combative, and disinterested. It was a significant change from her previous joyful, gregarious, and humorous demeanor. RP 181. Ms. Adams also saw indications of recent self-harm by her daughter. RP 191. Ms. Adams made counseling appointments for her daughter with Ms. LaChapelle and then with law enforcement. RP 191-192.

On cross exam, Ms. Adams indicted there were no other family issues going on during the time when she notice the change in N.C.'s behavior. RP 194-195.

The defense called Amanda Reece. Ms. Reece stated she met the defendant in 2010 or 2011. RP 216. Ms. Reece claimed to have spoken with the defendant only once or twice at Alex's party. RP 219. She claimed that N.C. and T.D. spoke with the defendant while he was acting as a DJ at the party. RP 220.

The defense asked Ms. Reece if she heard statements made by N.C. or T.D. about their age. RP 221. The State objected based on hearsay. RP 221-223, 232. The State requested a limiting instruction if the defendant was offering the testimony for impeachment, that it would not be substantive evidence. RP 223-225. The defendant agreed that the testimony was hearsay, did not seek to offer the testimony as impeachment, but as substantive evidence to prove the defense they were offering. RP 226-227.

The court sustained the State's objection as to Ms. Reece's testimony, but ruled that if the defendant chose to testify, he could testify to his version of any conversations he had with T.D. and N.C. RP 236.

Ms. Reece testified that T.D. was a few years younger than Ms. Reece. RP 239.

Ms. Reece also testified that at the time of trial, she and the defendant had a child together. RP 237.

The defendant stated he moved to the Twisp area in 2010. RP 242. The defendant stated he met T.D. at Alex's party. RP 245. The defendant said he asked both T.D. and N.C. if they recently graduated and how old they were. RP 247. He said they both answered and T.D. said she had just graduated and was 18. RP 248. However, the defendant told law enforcement when interviewed, that he "figured" they were 18. RP 268.

The defendant said he saw T.D. and N.C. later that week at Beatrice Mears' residence. RP 248-249. The defendant said he was 26 years old at that time. RP 251. The defendant brought alcohol. RP 266, 276.

The defendant admitted that neither T.D nor N.C. made any statements about their age at Ms. Mears's residence. RP 270.

The defendant admitted dancing/grinding with T.D nor N.C. RP 525. He testified that while in the shower, he touched T.D.'s breasts and inserted his finger in her vagina. RP 253-254, 259, 271. The defendant also testified he inserted his finger into N.C.'s

vagina. RP 254, 271. The defendant said he called Brad Peters into the shower and that Mr. Peters joined in. RP 266. The defendant testified that T.D. asked him to stop. RP 272.

The defendant testified that after the shower, he called T.D. into a bedroom and tried to have sex with her, and that his penis was used in the attempt. RP 267-268, 277.

Following the close of evidence, the defense did not object to any of the jury instructions given by the court. RP 287, 294-305.

The jury found the defendant guilty of child molestation third degree in Count 1, rape of a child in the third degree in Count 2, and furnishing liquor to a minor in Count 4. The jury could not reach a verdict in Count 3 alleging assault in the fourth degree against N.C. CP 37-38.

At sentencing, defense argued that Count 1 and 2 should be considered same criminal conduct. RP 410-415. The Court stated that a finding of same criminal conduct is an exception to the default rule that all convictions must count separately, and that the defendant bears the burden to show sufficient facts to warrant the exercise of discretion. RP 423. The Court found that the shower incident and the bedroom incident were separate and the rape and molestation were not the same intent. RP 419, 423-425, 427.

The defendant was sentenced to a total of 26 months, with Count 2 being the controlling charge. CP 23-35.

C. ARGUMENT

1. The Trial Court properly excluded inadmissible evidence and did not deny the defendant the ability to offer competent evidence or present his defense.

Defendant argues his right to present his defense was impaired when the court ruled Amanda Reece would not be permitted to offer a hearsay statement allegedly made by the victims.

The defendant was allowed to testify about the alleged statement he claimed the victims made about just graduating and being 18 years of age.

Defendant now erroneously argues Ms. Reece's proposed testimony about the alleged statements of the victims, was not hearsay, because it was offered for the *defendant's* state of mind (and not for the purpose of either the victims' or Ms. Reece's state of mind). This contradicts defense counsel's concession to the trial court that the proposed testimony was hearsay.

Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. ER 801(c). Unless an exception or exclusion applies, hearsay is inadmissible. ER 802.

The Defendant cites to *State v. Jones*, 168 Wash. 2d 713, 230 P.3d 576 (2010), for support, but the case does not support the proposition. Unlike the present case, in *Jones*, 168 Wash. 2d 713, the defendant argued that the trial court improperly refused to let *him* testify or cross-examine witnesses about the events on the night of the alleged sexual encounter, and that the ruling violated his Sixth Amendment right to present a defense. *Jones*, 168 Wash. 2d at 720.

Although a defendant's right to an opportunity to be heard in his defense, the rights to examine witnesses against him, and to offer testimony, is basic in our system of jurisprudence, these rights are not absolute. *E.g.*, *Jones*, 168 Wash. 2d at 720. Evidence that a defendant seeks to introduce must be of at least minimal relevance. *E.g.*, *Jones*, 168 Wash. 2d at 720. Defendants have a right to present only relevant evidence, with no constitutional right to present *irrelevant*, incompetent, or inadmissible evidence. *State*

v. Gregory, 158 Wash. 2d 759, 786 n. 6, 147 P.3d 1201 (2006), as corrected (Dec. 22, 2006) overruled by *State v. W.R., Jr.*, 181 Wash. 2d 757, 336 P.3d 1134 (2014); *Taylor v. Illinois*, 484 U.S. 400, 410, 108 S. Ct. 646, 98 L. Ed. 2d 798 (1988);

The defendant's right to present a defense is subject to “established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *State v. Lizarraga*, 191 Wash. App. 530, 553, 364 P.3d 810, 823 (2015), as amended (Dec. 9, 2015), review denied, 185 Wash. 2d 1022, 369 P.3d 501 (2016) (quoting *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)).

For example, in *Lizarraga*, 191 Wash. App. 530, The Court of Appeals found that the trial court did not violate the defendant’s constitutional right to present a defense by refusing to admit the out-of-court hearsay statements, even though it had a significant impact on the defense that was being offered. The hearsay rule has long been recognized and respected by virtually every State and is based on experience and grounded in the notion that

untrustworthy evidence should not be presented to the triers of fact. *Chambers*, 410 U.S. at 298.

Although the defendant argues that the hearsay testimony of Ms. Reece was offered as an exception the hearsay rule for the *defendant's* state of mind, the *actual* reason was stated in Appellants Brief at page 10: "*He sought to corroborate his own account with Ms. Reece's testimony...*" The desire to corroborate or bolster testimony is not a valid hearsay exception, and repetition is not a valid test for veracity. *State v. Harper*, 35 Wash. App. 855, 857, 670 P.2d 296 (1983).

The attempt to offer hearsay, under the exception for "state of mind", was without any basis. It was not offered for either the speaker's state of mind, or the hearer's (Ms. Reece's) state of mind. There is no support for the defendant's assertion that even a false statement should be admitted to a jury, as long as it is proffered for someone's "state of mind".

A statement is not hearsay if it is used only to show the effect on the listener, without regard to the truth of the statements. *State v. Edwards*, 131 Wash. App. 611, 614, 128 P.3d 631 (2006). However, such evidence frequently lacks materiality in the criminal

trial, when the guilt of the accused, not the conduct of the person who offered the statement, is at issue. Out-of-court declarations may be admitted to demonstrate the hearer or the declarant's state of mind only if their state of mind is relevant to a material issue in the case; otherwise, such declarations are hearsay. *State v. Johnson*, 61 Wash. App. 539, 545, 811 P.2d 687 (1991); *State v. Aaron*, 57 Wash. App. 277, 279–81, 787 P.2d 949 (1990); *State v. Stamm*, 16 Wash. App. 603, 610–12, 559 P.2d 1 (1976). See also *Edwards*, 131 Wash. App. at 614 (An officer testified about what a confidential informant told him and the State argued that the statement was not hearsay because it explained why the officer initiated an investigation of the defendant. The Court rejected this, because the officer's state of mind was not relevant to the issue of whether the defendant had sold cocaine).

In the present case, neither Ms. Reece's, nor the victim's, state of mind was a material issue, and the attempt to offer the victim's statement through Ms. Reece to show the *defendant's* state of mind, was inadmissible hearsay, and speculative. Instead, the defendant simply sought to bolster his own testimony by repeating the alleged victim statements through Ms. Reece's testimony.

Even a declarant's own prior out-of-court statements, consistent with the declarant's testimony, are not admissible simply to reinforce or bolster the testimony. *E.g.*, *State v. Osborn*, 59 Wash. App. 1, 4, 795 P.2d 1174, 1176 (1990). Yet in the present case, the defendant's attempt to bolster his own testimony was even more removed, where he attempted to offer the hearsay statement of the victim through another witness.

There is a substantial likelihood of prejudice in the admission of such testimony, where it is inadmissible and bears only a remote or artificial relationship to the legal or factual issues raised in the case. When testimony that would otherwise be inadmissible hearsay is admitted to show the state of mind or intention of a person, it may be misused by the jury. *State v. Parr*, 93 Wash. 2d 95, 98–100, 606 P.2d 263 (1980).

Evidentiary decisions of the trial court are reviewed under an abuse of discretion standard. *E.g.*, *State v. Brockob*, 159 Wash. 2d 311, 348–49, 150 P.3d 59 (2006), *as amended* (Jan. 26, 2007). A trial court's decision will not be disturbed absent a clear showing that it was manifestly unreasonable or exercised on untenable grounds. *State v. Rohrich*, 149 Wash. 2d 647, 654, 71 P.3d 638 (2003). In other words, discretion is abused if no reasonable

person would take the view adopted by the trial court. *State v. Blight*, 89 Wash. 2d 38, 41, 569, 569 P.2d 1129 (1977) P.2d 1129 (1977).

In the present case, unlike *Jones*, 168 Wash. 2d 713, the defendant was not prevented from presenting his defense and offering the victims' alleged statements to him regarding their grade and age. But the trial court properly limited hearsay testimony from Ms. Reece where there was no hearsay exception, and where such testimony would have been improper bolstering of the defendant's anticipated testimony.

An appellate court may review de novo an alleged denial of the Sixth Amendment right to present a defense, but only if the defendant's need to present the evidence outweighs the State's interest in precluding the evidence. *State v. Darden*, 145 Wash. 2d 612, 622, 41 P.3d 1189 (2002)). However, in the present case the defendant was permitted to present his defense and to testify about the alleged statements of the victims.

The defendant was simply not allowed to offer inadmissible evidence through the testimony of Ms. Reece. The trial court did not abuse its discretion in limiting the improper testimony. There

was no error by the trial court, and therefore no error of constitutional magnitude.

Even if there had been an error of constitutional magnitude, it would be harmless if shown beyond a reasonable doubt that any reasonable jury would have reached the same result without the error. *State v. Smith*, 148 Wash. 2d 122, 139, 59 P.3d 74 (2002).

2. Trial counsel was not ineffective for not objecting to admissible testimony from the victims.

Defendant argues trial counsel was ineffective for not objecting to testimony from the victims about their observations of the defendant and Ms. Reece arguing at the party about an STD. Defendant argues that the testimony indicated the defendant passed on an STD to Ms. Reece – but that is not what the testimony stated. Both T.D. and N.C. indicated the defendant and Ms. Reece were arguing back and forth in front of a group of people at the party about one of them having given an STD to the other. Neither T.D. nor N.C. knew who allegedly passed on an STD, nor did they indicate that it was the defendant.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's

representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Thomas*, 109 Wash. 2d 222, 225, 743 P.2d 816 (1987)(applying the 2-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)). Competency of counsel is determined based upon the entire record below. *State v. White*, 81 Wash. 2d 223, 225, 500 P.2d 1242 (1972)(citing *State v. Gilmore*, 76 Wash. 2d 293, 456 P.2d 344 (1969)).

The first prong requires a showing of errors so serious that counsel was not functioning as “counsel” guaranteed by the Sixth Amendment. The second prong requires a showing that counsel’s errors were so serious as to deprive the defendant of a trial whose result is reliable. *Strickland*, 466 U.S. at 694; *State v. Jeffries*, 105 Wash. 2d 398, 417–18, 717 P.2d 722 (1986).

Courts engage in a strong presumption counsel's representation was effective. *State v. Brett*, 126 Wash. 2d 136, 198,

892 P.2d 29 (1995); *Thomas*, 109 Wash. 2d at 226. The presumption of effective representation can be overcome only by a showing of deficient representation based on the record established in the proceedings below. *State v. McFarland*, 127 Wash. 2d 322, 336, 899 P.2d 1251, 1257 (1995), as amended (Sept. 13, 1995), as amended (Sept. 13, 1995).

A defendant is not denied effective assistance of counsel where the record as a whole shows that he or she received effective representation and a fair trial. *State v. Smith*, 104 Wash. 2d 497, 511, 707 P.2d 1306 (1985). Rather, the defendant must make “an affirmative showing of actual prejudice” demonstrating a manifest constitutional error. *McFarland*, 127 Wash. 2d 322, citing, RAP 2.5(a)(3)).

Appellate courts are hesitant to find the assistance of counsel ineffective based solely on questionable trial tactics and strategies that fail to gain an acquittal. *Matter of Richardson*, 100 Wash. 2d 669, 675, 675 P.2d 209 (1983); see also *State v. Adams*, 91 Wash. 2d 86, 91–93, 586 P.2d 1168 (1978). Ineffective assistance may be found, however, if the tactics used would be considered incompetent by lawyers of ordinary training and skill in

the criminal law. See *Adams*, 91 Wash. 2d at 91. In *Adams*, 91 Wash. 2d 86, the Washington State Supreme Court found that defendant's conviction would not be reversed where the trial tactics at issue constituted an exercise of judgment. In *Adams*, 91 Wash. 2d 86, the court declined to adopt a "more objective" standard for a Sixth Amendment ineffective assistance challenge because trial counsel was effective under either standard. *Adams*, 91 Wash. 2d at 89.

The evidence in the present case was not hearsay, as it was not offered for the truth of the matter asserted (i.e. the presence of an STD). The evidence was offered to show that the defendant and Ms. Reece were engaged in a heated personal argument at the party, indicating they were in a romantic relationship; making it unlikely that the victims then engaged in any alleged conversation with the defendant about their age; or that they expressed any sexual interest in the defendant at the party or at the residence of Ms. Mears later that same week.

The testimony was not barred by ER 404, as it was not offered for the purpose of proving character of the accused or a witness. Even if hearsay, it would have been admissible as a

hearsay exception under ER 803 to show the victims knowledge of the relationship between the defendant and Ms. Reece. The evidence of the relationship between the defendant and Ms. Reece also made it less likely the defendant was unaware of the ages of victims who were attending school with his girlfriend, Ms. Reece.

Defendant argues that defense counsel's failure to object constituted ineffective assistance of counsel. The decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal. *Strickland*, 466 U.S. 668; *State v. Ermert*, 94 Wash. 2d 839, 621 P.2d 121 (1980).

Defense counsel was not ineffective by failing to object to the admissible testimony. The defendant has not made an affirmative showing of actual prejudice demonstrating a manifest constitutional error.

3. Factual observations of a change in N.C.'s behavior by her parent were properly admitted.

Defendant objects to the admission of the testimony of the parent of N.C. about the demeanor of N.C. following her contact with the defendant. The testimony was properly admitted.

Cases involving alleged child sex abuse make the child's credibility "an inevitable, central issue." *State v. Petrich*, 101 Wash. 2d 566, 575, 683 P.2d 173 (1984) *holding modified by State v. Kitchen*, 110 Wash. 2d 403, 756 P.2d 105 (1988). Where the child's credibility is thus put in issue, a court has broad discretion to admit evidence corroborating the child's testimony. *Petrich*, 101 Wash. 2d 566. A witness may also properly describe the manner and demeanor of a child at the time he is making such statements, and that description may include inferences. *State v. Madison*, 53 Wash. App. 754, 760, 770 P.2d 662, 666 (1989).

No witness may express an opinion that the defendant is guilty. *Madison*, 53 Wash. App. at 760. Witnesses also may not express an opinion as to the truth of a child's statement to the witness, hence, indirectly opining that the defendant is guilty. *Madison*, 53 Wash. App. at 760. The general rule is that witnesses are to state facts, and not to express inferences or opinions. *Madison*, 53 Wash. App. 754 (citing *State v. Dukich*, 131 Wash. 50,

228 P. 1019 (1924)). Expressed definitively, it is said that a layman who sees the commission of a crime can describe the acts, the appearance and the demeanor of a defendant, from which inferences as to a defendant's mental processes may be drawn. *Dukich*, 131 Wash. 50 (citing *State v. Farley*, 48 Wash. 2d 11, 290 P.2d 987 (1955)).

Under ER 801, an utterance, writing or nonverbal conduct that is not assertive is not hearsay. Nonverbal conduct that is not intentionally being used as a substitute for words to express a fact or opinion is not hearsay. An involuntary act such as trembling would be admissible as nonassertive nonverbal conduct whereas the act of nodding one's head affirmatively or pointing to identify a suspect in a lineup would be hearsay and not admissible because it is assertive nonverbal conduct. *In re Dependency of Penelope B.*, 104 Wash. 2d 643, 652, 709 P.2d 1185, 1191 (1985) (citing *Cole v. United States*, 327 F.2d 360, 361 (9th Cir. 1964); *State v. McCaughey*, 14 Wash. App. 326, 328, 541 P.2d 998 (1975)).

The admissibility of nonassertive verbal or nonverbal conduct as circumstantial evidence of a fact in issue is governed by principles of relevance, not by hearsay principles. An assertion that

is circumstantial evidence proves a fact indirectly, by implication; credibility of the declarant is not important because the relevance of the assertion does not depend on its truth. *In re Dependency of Penelope B.*, 104 Wash. 2d at 652–53. For example, the testimony of a witness that he or she observed a person limping may be offered as circumstantial evidence that the person was injured. *In re Dependency of Penelope B.*, 104 Wash. 2d 643

The weight to be accorded all such non-hearsay testimony, is for the trier of fact. *In re Dependency of Penelope B.*, 104 Wash. 2d at 655.

In the present case the observations of N.C.'s behavior following her contact with the defendant were relevant and supported an inference that a traumatic event had occurred. The observations were also relevant to weigh N.C.'s credibility. There was no error in admitting the testimony of the observations regarding the change in demeanor and behavior of N.C. following the contact with the defendant.

Even if error had occurred, any error was harmless. The jury did not find the defendant guilty of the assault charge that involved N.C.

4. There was no unanimity instruction required for the acts of molestation where substantial evidence supported each act.

A defendant has a state constitutional right to a unanimous verdict, and a federal constitutional right to a jury trial. *State v. Kitchen*, 110 Wash. 2d 403, 409, 756 P.2d 105 (1988); Wash. Const. art. I, § 22; U.S. Const. amend. VI. The right to a unanimous jury verdict requires that the jury members unanimously conclude that the defendant committed the criminal act with which he is charged. *Petrich*, 101 Wash. 2d at 569. Where the evidence indicates that several distinct criminal acts have been committed and can form the basis of the one count charged, the State must inform the jury of the criminal act on which the charge is based or, alternatively, the court must inform the jury to agree on the specific criminal act. *Petrich*, 101 Wash. 2d at 572.¹

The presumption of error resulting from the failure to give a unanimity instruction is overcome where no rational juror could have a reasonable doubt as to any of the incidents alleged.

¹ The *Petrich* unanimity rule is applicable only in situations where the State presents evidence of several distinct acts. *State v. Handran*, 113 Wash. 2d 11, 17, 775 P.2d 453 (1989) (citing *Petrich*, 101 Wash. 2d at 571). The rule does not apply where the evidence shows a continuing course of conduct. *Handran*, 113 Wash. 2d at 17 (quoting *Petrich*, 101 Wash. 2d at 571).

Kitchen, 110 Wash. 2d at 411. When a defendant challenges a conviction for sufficiency, a reviewing court considers whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements beyond a reasonable doubt. *State v. Armstrong*, 394 P.3d 373, 378–79 (Wash. 2017). Similarly, the right to jury unanimity requires that each member of the jury find that the State has proved each element beyond a reasonable doubt. When one element of the crime can be satisfied by alternative means, jury unanimity is satisfied if the jury unanimously agrees the State proved that element beyond a reasonable doubt and the evidence was sufficient for each alternative means of committing that element. *State v. Armstrong*, 394 P.3d 373, 378–79 (Wash. 2017). If the evidence is uncontroverted, a unanimity instruction is not required. *State v. Coleman*, 159 Wash. 2d 509, 514, 150 P.3d 1126 (2007).

In the present case, the evidence was substantial and uncontroverted. Both the victim and the defendant testified as to the conduct constituting molestation. Both the victim and the defendant testified to two instances of molestation – in the shower, and in the bedroom. There was evidence of each act of

molestation beyond a reasonable doubt. The defendant admitted the acts of molestation, but argued he believed the victim was of sufficient age that the admitted conduct was not a crime.

5. Substantial evidence supported the conviction for furnishing, where the alternative means were a single means to commit the crime

The defendant challenges the sufficiency of the evidence on the furnishing conviction in Count 4. At trial, defense did not object to the jury instruction #13 that advised the jury they did not need to be unanimous as to subpart (a) or (b) of element number two.

On a challenge to the sufficiency of the evidence, this court must decide whether, viewing the evidence in a light most favorable to the State, any rational trier of fact could have found all the essential elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wash. 2d 216, 221, 616 P.2d 628 (1980). The elements of a crime may be established by direct or circumstantial evidence, one being no more or less valuable than the other. *State v. Delmarter*, 94 Wash. 2d 634, 638, 618 P.2d 99 (1980). All reasonable inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *State v.*

Salinas, 119 Wash. 2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. *Salinas*, 119 Wash. 2d 192 "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." *State v. Camarillo*, 115 Wash. 2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wash. App. 539, 740 P.2d 335 (1987)). Thus, this court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. *State v. Walton*, 64 Wash. App. 410, 415–16, 824 P.2d 533 (1992) *abrogated by In re Cross*, 180 Wash. 2d 664, 327 P.3d 660 (2014) (citing *State v. Longuskie*, 59 Wash. App. 838, 801 P.2d 1004 (1990)).

The Furnishing Liquor to Minors, RCW 66.44.270(1) states:

It is unlawful for any person to sell, give, or otherwise supply liquor to any person under the age of twenty-one years or permit any person under that age to consume liquor on his or her premises or on any premises under his or her control. For the purposes of this subsection, "premises" includes real property, houses, buildings, and other structures, and motor vehicles and watercraft. A violation of this is a gross misdemeanor punishable as provided for in chapter 9A.20 RCW.

Although a fundamental protection accorded to a criminal defendant is that a jury of his peers must unanimously agree on guilt. Wash. Const. art. I, § 21; *State v. Stephens*, 93 Wash. 2d 186, 607 P.2d 304 (1980).

A defendant may not simply point to an instruction or statute that is phrased in the disjunctive in order to trigger a substantial evidence review of his conviction. Likewise, where a disputed instruction involves alternatives that may be characterized as a means within a means, the constitutional right to a unanimous jury verdict is not implicated and the alternative means doctrine does not apply. *Petition of Jeffries*, 110 Wash. 2d 326, 339, 752 P.2d 1338 (1988) (refusing to accept defendant's claim that the jury should be additionally instructed on the sub-alternatives of the statutory alternatives at issue)

Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed. See *State v. Arndt*, 87 Wash. 2d 374, 384, 553 P.2d 1328 (1976).

Washington cases suggest some guidelines for analyzing the alternative means issue. Merely stating methods of committing a crime in the disjunctive does not mean that there are alternative means of committing a crime. *State v. Peterson*, 168 Wash. 2d 763, 770, 230 P.3d 588 (2010). Definitional statutes do not create additional alternative means for a crime. *State v. Smith*, 159 Wash. 2d 778, 785, 154 P.3d 873 (2007).

The State Supreme Court has disapproved of recognizing alternative means crimes simply by the use of the disjunctive “or.” *State v. Owens*, 180 Wash. 2d 90, 96, 323 P.3d 1030 (2014). Rather, the statutory analysis focuses on whether each alleged alternative describes “*distinct acts* that amount to the same crime.” *Peterson*, 168 Wash. 2d at 770. The more varied the criminal conduct, the more likely the statute describes alternative means. But when the statute describes minor nuances inhering in the same act, the more likely the various “alternatives” are merely facets of the same criminal conduct. *State v. Sandholm*, 184 Wash. 2d 726, 734, 364 P.3d 87, 90 (2015)

For example, in *Peterson*, 168 Wash. 2d 763 the Court used this interpretive analysis regarding the failure to register as a sex

offender statute, former RCW 9A.44.130 (2003). The defendant had argued that the statute created three different alternative means to commit the offense of failing to register as a sex offender: (1) failing to register after becoming homeless, (2) failing to register after moving between fixed residences within a county, and (3) failing to register after moving from one county to another. The Court found the reading too simplistic. Rather than describing distinct acts, The Court concluded the alleged “alternatives” each described the same single act: failure to register as a sex offender without alerting the appropriate authorities. Thus, the statute created a single means to commit the crime. *Peterson*, 168 Wash. 2d at 770.

Similarly, in *Owens*, 180 Wash. 2d 90, the Court held that the trafficking in stolen property statute, RCW 9A.82.050, describes two—not eight—alternative means to commit the offense. The first seven alleged “alternatives” represented multiple facets of a single means, while the eighth alternative was a true alternative because it described a separate category of conduct. *Owens*, 180 Wash. 2d at 97–98. See also *Sandholm*, 184 Wash. 2d at 734–35 (former RCW 46.61.502 (2008) did not create alternative means to commit the offense of DUI and unanimity was not required.)

In the present case, the alterative means are multiple acts of a single means to commit the crime of furnishing liquor to a minor. There was no requirement of unanimity and the instruction to the jury was correct.

6. The crimes of child molestation and rape were not same criminal conduct, and the defendant failed to carry his burden.

The defendant argues that the rape conviction and molestation conviction should have been sentenced as the same criminal conduct.

A determination of same criminal conduct at sentencing affects the standard range sentence by altering the defendant's offender score, which is calculated by adding a specified number of points for each prior conviction. RCW 9.94A.525; *State v. Graciano*, 176 Wash. 2d 531, 535–36, 295 P.3d 219 (2013). For the purposes of this calculation, current offenses are treated as prior convictions. RCW 9.94A.589(1)(a). However, if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. *Graciano*, 176 Wash. 2d 531 Crimes constitute same criminal conduct when they “require the same criminal intent, are committed

at the same time and place, and involve the same victim.”

Graciano, 176 Wash. 2d 531. RCW 9.94A.589(1)(a) is generally construed narrowly to disallow most claims that multiple offenses constitute the same criminal act. *Graciano*, 176 Wash. 2d at 540.

A Court reviews the sentencing court's determination of same criminal conduct for abuse of discretion or misapplication of law. *Graciano*, 176 Wash. 2d at 536–37. Under this standard, when the record supports only one conclusion as to whether crimes constitute same criminal conduct, the sentencing court abuses its discretion in arriving at a contrary result. *Graciano*, 176 Wash. 2d at 537–38. But, where the record adequately supports either conclusion, the matter lies within the court's discretion. *Graciano*, 176 Wash. 2d at 538.

The Supreme Court held that the defendant bears the burden of production and persuasion for same criminal conduct. *Graciano*, 176 Wash. 2d at 540. Each of a defendant's convictions counts towards his offender score *unless* he convinces the court that they involved the same criminal intent, same time, same place, and same victim. *Graciano*, 176 Wash. 2d 531 If the defendant fails to prove any of these elements, the crimes do not constitute same

criminal conduct. *Graciano*, 176 Wash. 2d 531 Therefore, where the record is unclear, the trial court does not abuse its discretion in refusing to enter a finding of same criminal conduct. *Graciano*, 176 Wash. 2d at 541.

The State's burden to prove the existence of prior convictions at sentencing does not include establishing that *current* offenses—treated as prior convictions for purposes of offender score calculation—constitute separate criminal conduct. These determinations differ in a critical respect: one favors the State, the other the defendant. This distinction matters because, in general, the burden is on a moving party to come forward with sufficient facts to warrant the exercise of discretion in his or her favor. *State v. Hoffman*, 116 Wash. 2d 51, 74, 804 P.2d 577 (1991).

It is because the existence of a prior conviction favors the State (by increasing the offender score over the default) that the State must prove it. See RCW 9.94A.500(1) (If the court is satisfied by a preponderance of the evidence that the defendant has a criminal history, the court shall specify the convictions it has found to exist); *State v. Lopez*, 147 Wash. 2d 515, 519, 55 P.3d 609 (2002).

In contrast, a “same criminal conduct” finding favors the defendant by lowering the offender score below the *presumed*

score. *State v. Lopez*, 142 Wash. App. 341, 351, 174 P.3d 1216 (2007); *In re Markel*, 154 Wash. 2d 262, 274, 111 P.3d 249 (2005) (a same criminal conduct finding is an exception to the default rule that all convictions must count separately). Because this finding favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct. *Graciano*, 176 Wash. 2d at 538–39

The Trial Court in this case exercised appropriate discretion in finding the crimes did not constitute same criminal conduct. The defendant did not establish the crimes of child molestation and rape of a child involved the same criminal intent, or was committed at the same time and place.

Sexual contact, is an element of child molestation and requires a showing of purpose or intent; rape of a child does not. Rape of a child also requires a finding of penetration whereas child molestation does not. The two crimes are separate and can be charged and punished separately. *State v. French*, 157 Wash. 2d 593, 610–11, 141 P.3d 54, 63 (2006). Child molestation and child rape have different statutory intent elements. *State v. Saiz*, 63 Wash. App. 1, 4, 816 P.2d 92 (1991). Child molestation includes the element of sexual contact, which requires proof that the contact

was made for the purpose of sexual gratification. *Saiz*, 63 Wash. App. 1 In contrast, rape of a child is a strict liability offense meaning that the crime has no mens rea element that would require proof of knowledge or intent. *State v. Deer*, 175 Wash. 2d 725, 731, 287 P.3d 539 (2012). Rape of a child requires sexual intercourse, which can occur without proof of sexual gratification. *Saiz*, 63 Wash. App. at 4.

In the present case the time and place between the additional acts of molestation was not the same as the rape. As the trial court found when it found the crimes were not same criminal conduct - there was a break in time and change in location leading to the sexual contact in the bedroom.

Because the defendant bore the burden to establish each element of same criminal conduct under RCW 9.94A.589(1)(a), and failed to do so as to the same intent and the same time and place, the trial court's refusal to enter a finding of same criminal conduct was not an abuse of discretion.

7. The objection to appeal costs and cost bill are premature.

Under RCW 10.73.160, an appellate court may provide for the recoupment of appellate costs from a convicted defendant.

State v. Blank, 131 Wash. 2d 230, 234, 930 P.2d 1213 (1997);
State v. Mahone, 98 Wash. App. 342, 989 P.2d 583 (1999). The
award of appellate costs to a prevailing party is within the discretion
of the appellate court. RAP 14.2; *State v. Nolan*, 141 Wash. 2d
620, 8 P.3d 300 (2000).

In *Nolan*, 141 Wash. 2d 620, as in most of other cases
discussing the award of appellate costs, the defendant began
review of the issue by filing an objection to the State's cost bill.
Nolan, 141 Wash. 2d at 622. As suggested by the Supreme Court
in *Blank*, 131 Wash. 2d at 244, this is an appropriate manner in
which to raise the issue. The procedure invented by Division I in
State v. Sinclair, 192 Wash. App. 380, 389–390, 367 P.3d 612,
review denied, 185 Wash. 2d 1034, 377 P.3d 733 (2016),
prematurely raises an issue that is not before the Court. *If* the
defendant does not prevail; and *if* the State files a cost bill, the
defendant can argue regarding the Court's exercise of discretion in
an objection to the cost bill.

If appellate costs are imposed, the Legislature has provided
a remedy in the same statute that authorizes the imposition of
costs. RCW 10.73.160(4) provides:

A defendant who has been sentenced to pay costs and who is not in contumacious default in the payment may at any time petition the court that sentenced the defendant or juvenile offender for remission of the payment of costs or of any unpaid portion. If it appears to the satisfaction of the sentencing court that payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the sentencing court may remit all or part of the amount due in costs, or modify the method of payment under RCW 10.01.170.

The defendant argues that the Court should not impose costs on indigent defendants. However, through the language and provisions of RCW 10.73.160, the Legislature has demonstrated its intent that indigent defendants contribute to the cost of their appeal. This is not a new policy.

The legal principle that convicted offenders contribute toward the costs of the case, and even appointed counsel, goes back many years. In 1976, the Legislature enacted RCW 10.01.160, which permitted the trial courts to order the payment of various costs, including that of prosecuting the defendant and his incarceration. *Id.*, .160(2). In *State v. Barklind*, 87 Wash. 2d 814, 814, 557 P.2d 314 (1976), the Supreme Court held that requiring a defendant to contribute

toward paying for appointed counsel under this statute did not violate, or even “chill” the right to counsel. *Barklind*, 87 Wash. 2d at 818.

In 1995, the Legislature enacted RCW 10.73.160, which specifically authorized the appellate courts to order the (unsuccessful) defendant to pay appellate costs. In *Blank*, 131 Wash. 2d 230, the Supreme Court held this statute constitutional, affirming this Court’s holding in *State v. Blank*, 80 Wash. App. 638, 641–642, 910 P.2d 545 (1996), *aff’d*, 131 Wash. 2d 230, 930 P.2d 1213 (1997).

By enacting RCW 10.01.160 and RCW 10.73.160, the Legislature has expressed its intent that criminal defendants, including indigent ones, should contribute to the costs of their cases. RCW 10.01.160 was enacted in 1976 and 10.73.160 in 1995. They have been amended somewhat through the years, but despite concerns about adding to the financial burden of persons convicted of crimes, the Legislature has yet to show any sympathy.

In *State v. Blazina*, 182 Wash. 2d 827, 344 P.3d 680 (2015), the Supreme Court interpreted the meaning of RCW 10.01.160(3). As *Blazina* instructed, trial courts should

carefully consider a defendant's financial circumstances, as required by RCW 10.01.160(3), before imposing discretionary LFOs. But, *Blazina* does not apply to appellate costs. As *Sinclair* points out at 389, the Legislature did not include the "individual financial circumstances" provision in RCW 10.73.160. Instead, it provided that a defendant could petition for the remission of costs on the grounds of "manifest hardship". See RCW 10.73.160(4).

The Legislature's intent that indigent defendants contribute to the cost of representation is also demonstrated in RCW 10.73.160(4), above, which permits a defendant to petition for remission of part or all of the appellate costs ordered. In *Blank*, 131 Wash. 2d 230, the Supreme Court found that this relief provision prevented RCW 10.73.160 from being unconstitutional.

Not only does the Legislature intend indigent defendants to contribute to the costs of their litigation, the Legislature has decided that the defendants should pay interest on the debt. RCW 10.82.090(1) provides that such legal debts shall bear interest at the rate applicable to civil judgments, which is found in RCW 4.56.110. This can be as

much as 12%. *Blazina*, 182 Wash. 2d 827. RCW

10.82.090(2) establishes a means for defendants to obtain some relief from the interest, much as the cost remission procedure in RCW 10.73.160(4). But, the limits included in statutory scheme show that the Legislature intends that even judgments on defendants serving prison sentences accrue interest:

(2) The court may, on motion by the offender, following the offender's release from total confinement, reduce or waive the interest on legal financial obligations levied as a result of a criminal conviction...

RCW 10.82.090. The rest of the "relief" is equally limited and demonstrative of the Legislature's intent and presumption that the debts be paid:

(a) The court shall waive all interest on the portions of the legal financial obligations that are not restitution that accrued during the term of total confinement for the conviction giving rise to the financial obligations, *provided the offender shows that the interest creates a hardship for the offender or his or her immediate family;*

(b) The court may reduce interest on the restitution portion of the legal financial obligations only if the principal has been paid in full;

(c) The court may otherwise reduce or waive the interest on the portions of the legal financial obligations that are not restitution *if the offender shows that he or she has personally made a good faith effort to pay and that the interest accrual is causing a significant hardship. For purposes of this section, "good faith effort" means that the offender*

has either (i) paid the principal amount in full; or (ii) made at least fifteen monthly payments within an eighteen-month period, excluding any payments mandatorily deducted by the department of corrections;

(d) For purposes of (a) through (c) of this subsection, the court may reduce or waive interest on legal financial obligations *only as an incentive for the offender to meet his or her legal financial obligations.* The court may grant the motion, establish a payment schedule, and retain jurisdiction over the offender for purposes of reviewing and revising the reduction or waiver of interest.

RCW 10.82.090(2)(emphasis added). This is not some legislative relic of the past. It was enacted in 1989, after RCW 9.94A, the Sentencing Reform Act, and most recently amended in 2015.

The unfortunate fact is that most criminal defendants are represented at public expense at trial and on appeal. Almost all of the defendants taxed for costs under RCW 10.73.160 are indigent. Subsection 3 specifically includes “recoupment of fees for court-appointed counsel”. Obviously, all these defendants have been found indigent by the court. If the Court decided on a policy to excuse every indigent defendant from payment of costs, such a policy would, in effect, nullify RCW 10.73.160(3).

The question for the Court is not whether the Legislative intent or result of these laws is wise or even fair. The question is: are these laws legal or constitutional? Those questions were settled in the affirmative by the Supreme Court in *Blank*, and what the Court did *not* do in *Blazina*. It is for the Legislature to change the statute if it so desires.

D. CONCLUSION

The Courts evidentiary rulings were not an abuse of discretion. The defendant was not denied effective assistance of counsel.

There was no requirement of unanimity for acts of molestation that were shown by substantial evidence. There was not a requirement of unanimity for the crime of furnishing, where multiple acts were means to commit the same overall crime.

The defendant did not carry his burden to show that the crimes of rape and molestation were the same criminal conduct.

The defendant's argument regarding costs is premature.

The defendant's convictions should be affirmed.

Dated this 12 day of June 2017

Respectfully Submitted by:


KARL F. SLOAN, WSBA #27217
Attorney for Respondent

PROOF OF SERVICE

I, Shauna Field, do hereby certify under penalty of perjury that on the 12th day of June, 2017, I provided email service to the following by prior agreement (as indicated), a true and correct copy of the Brief of Respondent:

E-mail: backlundmistry@gmail.com

Jodi R. Backlund
Backlund & Mistry
POB 6490
Olympia, WA 98507-6490



Shauna Field, Legal Assistant

KARL F. SLOAN
Okanogan County Prosecuting Attorney
P. O. Box 1130 • 237 Fourth Avenue N.
Okanogan, WA 98840
(509) 422-7280 FAX: (509) 422-7290

OKANOGAN COUNTY PROSECUTING ATTORNEY'S OFFICE

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