

FILED
Court of Appeals
Division III
State of Washington
5/5/2020 1:13 PM
36978-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHNATHON HANCOCK, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Brett Pearce
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. APPELLANT’S ASSIGNMENTS OF ERROR 1

II. ISSUES PRESENTED 1

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 7

 A. THE TRIAL COURT’S JURY INSTRUCTIONS DID NOT RESULT IN AN ACTUAL DOUBLE JEOPARDY VIOLATION. 7

 1. Mr. Hancock did not preserve this argument, and it is not manifest. 7

 2. Mr. Hancock invited this error by agreeing to the instruction and failing to propose his own. 14

 3. The jury instructions adequately guarded against a double jeopardy violation, and the record demonstrates no violation occurred. 15

 a. The completed crimes of child rape and child molestation as alleged in this case do not offend double jeopardy. 16

 b. The challenged instruction adequately protected against a double jeopardy violation. 16

 c. An examination of the record demonstrates the jury found Mr. Hancock guilty of separate acts. 21

 B. THE TRIAL COURT PROPERLY PLACED THE BURDEN OF REBUTTING WITNESS COMPETENCY ON THE CHALLENGING PARTY AND DID NOT ABUSE ITS DISCRETION IN DETERMINING COMPETENCY. 25

 1. Mr. Hancock did not challenge the trial court’s findings of fact, rendering them verities for his challenge on appeal. 26

 2. The Supreme Court overruled Mr. Hancock’s authority and held the party challenging witness competency bears the burden of proof. 26

3. The trial court did not manifestly abuse its discretion when determining Mr. Hancock did not meet his burden to challenge K.F.'s competency..... 28

C. THE COURT DID NOT ERR BY ADMITTING CHILD HEARSAY BECAUSE K.F. TESTIFIED AT THE PROCEEDINGS..... 33

V. CONCLUSION 34

TABLE OF AUTHORITIES

Washington Cases

Golberg v. Sanglier, 96 Wn.2d 874, 639 P.2d 1347 (1982),
amended, 96 Wn.2d 874 (1982)..... 33

Goodman v. Boeing Co., 75 Wn. App. 60, 877 P.2d 703 (1994),
aff'd, 127 Wn.2d 401 (1995), amended (Sept. 26, 1995)..... 14, 15

In re Francis, 170 Wn.2d 517, 242 P.3d 866 (2010)..... 16

State v. Acheson, 48 Wn. App. 630, 740 P.2d 346 (1987)..... 29

State v. Allen, 70 Wn.2d 690, 424 P.2d 1021 (1967)..... 27, 30, 31

State v. Avila, 78 Wn. App. 731, 899 P.2d 11 (1995)..... 29

State v. Bailey, 52 Wn. App. 42, 757 P.2d 541 (1988),
aff'd, 114 Wn.2d 340 (1990)..... 29

State v. Beadle, 173 Wn.2d 97, 265 P.3d 863 (2011)..... 34

State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008) 17, 19

State v. Borland, 57 Wn. App. 7, 786 P.2d 810 (1990) 29, 31

State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007)..... 18, 19

State v. Brousseau, 172 Wn.2d 331, 259 P.3d 209 (2011) 31

State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008)..... 10

State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995) 16

State v. Carlson, 61 Wn. App. 865, 812 P.2d 536 (1991) 29

State v. Carson, 179 Wn. App. 961, 320 P.3d 185 (2014),
aff'd, 184 Wn.2d 207 (2015)..... 14

State v. Carter, 156 Wn. App. 561, 234 P.3d 275 (2010)..... 17, 20

<i>State v. Dunleavy</i> , 2 Wn. App. 2d 420, 409 P.3d 1077 (2018), <i>review denied</i> , 190 Wn.2d 1027 (2018).....	9, 10
<i>State v. French</i> , 157 Wn.2d 593, 141 P.3d 54 (2006).....	12
<i>State v. Fuentes</i> , 179 Wn.2d 808, 318 P.3d 257 (2014)	22, 23
<i>State v. Henderson</i> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	14
<i>State v. Hughes</i> , 166 Wn.2d 675, 212 P.3d 558 (2009).....	21
<i>State v. Hunsaker</i> , 39 Wn. App. 489, 693 P.2d 724 (1984).....	29
<i>State v. Jackman</i> , 156 Wn.2d 736, 746, 132 P.3d 136 (2006), <i>as corrected</i> (Feb. 14, 2007).....	8
<i>State v. Kalebaugh</i> , 183 Wn.2d 578, 355 P.3d 253 (2015).....	9, 10
<i>State v. Land</i> , 172 Wn. App. 593, 295 P.3d 782 (2013).....	12
<i>State v. Momah</i> , 167 Wn.2d 140, 217 P.3d 321 (2009).....	27
<i>State v. Mutch</i> , 171 Wn.2d 646, 254 P.3d 803 (2011).....	passim
<i>State v. Noltie</i> , 116 Wn.2d 831, 809 P.2d 190 (1991)	16
<i>State v. O’Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	26
<i>State v. O’Hara</i> , 167 Wn.2d 91, 217 P.3d 756 (2009), <i>as corrected</i> (Jan. 21, 2010).....	10, 11
<i>State v. Perez</i> , 137 Wn. App. 97, 151 P.3d 249 (2007).....	29
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984)	8
<i>State v. Robinson</i> , 171 Wn.2d 292, 253 P.3d 84 (2011).....	10
<i>State v. S.J.W.</i> , 149 Wn. App. 912, 206 P.3d 355 (2009), <i>aff’d on other grounds</i> , 170 Wn.2d 92, 239 P.3d 568 (2010).....	26, 27, 29, 30
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988)	9
<i>State v. Strange</i> , 53 Wn. App. 638, 769 P.2d 873 (1989).....	29

<i>State v. Strine</i> , 176 Wn.2d 742, 293 P.3d 1177 (2013).....	8, 9
<i>State v. Walker</i> , 38 Wn. App. 841, 690 P.2d 1182 (1984).....	29
<i>State v. Wilkins</i> , 200 Wn. App. 794, 403 P.3d 890 (2017), <i>review denied</i> , 190 Wn.2d 1004 (2018).....	passim
<i>State v. Woods</i> , 154 Wn.2d 613, 114 P.3d 1174 (2005), <i>as amended</i> (July 27, 2005)	29, 31
<i>State v. Woodward</i> , 32 Wn. App. 204, 646 P.2d 135 (1982).....	29

Constitutional Provisions

Const. art. I, § 9.....	16
U.S. Const. amend. V	16

Statutes

Laws of 1986, ch. 195, § 2.....	28
RCW 5.60.050	28, 29
RCW 5.60.050 (1985).....	28, 30
RCW 9.94A.589.....	25
RCW 9A.44.010.....	12
RCW 9A.44.120.....	34

Rules

RAP 2.5.....	9
--------------	---

Other Authorities

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.25 (4th ed. 2016)	8, 11
ER 601	28

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. Mr. Hancock's conviction for child molestation in the first degree violates both the federal and state prohibitions against double jeopardy.
2. The trial court failed to instruct the jury that convictions for both charges must be based on separate and distinct conduct.
3. The trial court applied the incorrect test to determine a child's competency to testify.
4. The trial court erroneously found K.F. competent to testify.
5. The trial court improperly shifted the burden to the defense to rebut the presumption K.F. was competent to testify.
6. The trial court erroneously admitted K.F.'s hearsay statements after incorrectly determining she was competent to testify.

II. ISSUES PRESENTED

1. Is Mr. Hancock's alleged instructional error manifest error involving a constitutional right that he may assert for the first time on appeal?
2. Did Mr. Hancock invite his alleged instructional error?
3. Was the instruction requiring the jury to be unanimous as to which act constituted first degree child rape and which act constituted first degree child molestation adequate, when read in context of the evidence, crimes charged, and remainder of the instructions?
4. If the challenged instruction was not adequate, does a review of the record lead to the conclusion that Mr. Hancock did not suffer a double jeopardy violation?
5. Did the trial court err by placing the burden of disproving competency on Mr. Hancock when he challenged K.F.'s competency to testify, when the Washington Supreme Court

explicitly has held that the party challenging competency bears the burden?

6. Did the trial court manifestly abuse its discretion when it determined that Mr. Hancock did not meet his burden in challenging K.F.'s competency?
7. Did the trial court err by admitting child hearsay when it properly determined K.F. was competent to testify and she testified at trial?

III. STATEMENT OF THE CASE

Johnathon Hancock appeals from his convictions for first degree child rape and first degree child molestation.

In 2016, K.F. resided primarily with her father and step-mother in Montana. RP 377-78, 406. K.F. was born April 23, 2012, making her three-and-one-half to four-years old in 2016. RP 376. K.F. had visits with her biological mother, who lived in Spokane, Washington. RP 379-80. K.F.'s father noticed K.F. began to act out and act violently after returning from a week-long visit with her biological mother. RP 380. K.F.'s step-mother noticed that K.F. stopped playing with boys her age and had a bedwetting accident despite being potty trained. RP 409-11. K.F. described the bedwetting as "bleeding." RP 411. In the fall of 2016, K.F. disclosed to her step-mother that she had been sexually abused. RP 381, 411.

K.F. stated that a man named "Famous" had abused her. RP 382, 421. Using the internet, K.F.'s father located the picture of a person that K.F. identified as "Famous" on one of K.F.'s mother's social media

accounts. RP 382, 421. “Famous” was later identified as Mr. Hancock, who dated K.F.’s biological mother around the time that K.F. was abused. RP 469, 471-73, 550.

K.F. recounted various instances of abuse that had occurred at times when she was alone with Mr. Hancock, such as when Mr. Hancock would stay the night at K.F.’s mother’s home. RP 385, 400, 544. For example, K.F. refused to brush her teeth because she associated it with Mr. Hancock’s semen, that Mr. Hancock caused to be in her mouth and vagina. RP 385. K.F. explained it came from Mr. Hancock’s penis. RP 385-86, 414-16. K.F. explained that Mr. Hancock had touched her with his penis in her mouth and below her waist. RP 416-17. She also felt blood coming out of her after he touched her with his penis below her waist. RP 417. K.F. was visibly distressed when making these disclosures. RP 387-88.

Nurse Mary Vermillion physically examined K.F., but discovered no injuries, which she explained was common, occurring in 85 to 95 percent of cases. RP 456-57, 460. K.F. disclosed instances of Mr. Hancock’s abuse to Ms. Vermillion similar to those she had earlier described to her father and step-mother. RP 461.

Social worker Valerie Widmer orally interviewed K.F. RP 479, 493. The interview was recorded, and later admitted at trial. RP 495. During the interview, K.F. generally recounted the acts of rape and child molestation

that Mr. Hancock had performed on her. RP 495-506, 510-13. She also drew visual representations of the abuse, also admitted at the trial. RP 499-500.

The State charged Mr. Hancock with one count of first degree child rape and one count of first degree child molestation, alleged to have occurred between January 1, 2016, and September 1, 2016. CP 1. The State notified Mr. Hancock of its intent to introduce the child hearsay statements from the forensic interview. CP 6, 16-23. The State's briefing cited authority indicating the party challenging child witness competency bore the burden of rebutting competence. CP 18.

The court held a child hearsay hearing, and K.F. testified. RP 215-30. K.F., now seven-years-old, did not recognize Mr. Hancock, and in general could not relate the details of the abuse she had suffered years prior, although she remembered other details from that time. RP 215-30. The State's argument mostly concerned the test for child hearsay, although the State did reiterate that all witnesses are presumed competent, and the challenging party must rebut that presumption. RP 338, 337-47.

In response, Mr. Hancock agreed he had the burden of challenging competency. RP 347. Concerning competency, he argued only:

But the third factor here is the one I find most concerning, I suppose, as far as competency, and that's the child's memory sufficient to maintain independent recollection. Well, Judge, it wasn't that she

left out certain details. She left out all the details. She remembered certain events around that time, but she didn't remember any of the events that we're talking about here, any of the events that are relevant at trial. I believe she may have mentioned on the stand being locked in a bathroom or something that Tori did to her. But there was nothing about Mr. Hancock.

And as the Court made clear yesterday, and Ms. Fry made clear, she couldn't even identify Mr. Hancock. So she has no independent recollection of the specific events we're talking about here, and that being the sexual assault, the allegations of sexual assault. So that's the biggest concern.

And as the Court knows, that -- I think Ms. Fry is accurate in saying, yeah, the witness doesn't have to remember everything. They can forget some details. Then it goes to the weight rather than admissibility. But they have to remember something. And at this point she doesn't recall any of these sexual assaults. So I would argue that competency is an issue at this point in time.

RP 348-49. After rebuttal argument, the trial court mused that the challenge was really two-fold: whether K.F. was competent, and, if so, whether her child hearsay statements were reliable. RP 352. The trial court agreed that Mr. Hancock bore the burden of challenging competency, and was challenging K.F.'s competency under the basis of RCW 5.60.050(2).

RP 352. The court reasoned on the record:

And the totality of [K.F.]'s testimony showed her ability to relate the facts that occurred when she was four years old, not related to what's before the court but the circumstances surrounding these events, meaning she talked about where she was living, who she was living with and some of the things that were occurring during that time.

So it does appear that she has the ability to relate those facts even though her memory as to the allegations isn't very strong.

RP 353. After further discussion of child hearsay, the court entered findings of fact and conclusions of law and ruled that K.F. was competent to testify and that the State would be permitted to introduce her recorded child hearsay statements. CP 50-52.

The trial court and parties engaged in a jury instruction conference, at which Mr. Hancock only proposed an instruction concerning his lack of testimony, and only objected to the State's instruction defining the word vagina. RP 568-72. Relevant to the appeal, the court instructed the jury that a separate crime was charged in each count, and although the State presented evidence of multiple acts, the jury must be unanimous as to which act the State proved beyond a reasonable doubt. CP 35, 43. The court also gave the jury the standard definitional instructions for sexual intercourse and sexual contact, as well a separate to-convict instruction for each charged crime. CP 36-42.

During its closing argument, the State argued to the jury that it must unanimously agree that one act of child rape and one act of child molestation had been proven beyond a reasonable doubt. RP 599. The State also distinguished between acts that could constitute child rape, and acts that could constitute child molestation. RP 598-99, 601.

The jury found Mr. Hancock guilty of both counts. CP 46-47. The trial court sentenced Mr. Hancock concurrently to 236 months to life confinement for the charge of child rape, and 144 months to life confinement for the charge of child molestation, based on Mr. Hancock's offender score of 7. CP 58, 60. Mr. Hancock timely appeals.

IV. ARGUMENT

A. THE TRIAL COURT'S JURY INSTRUCTIONS DID NOT RESULT IN AN ACTUAL DOUBLE JEOPARDY VIOLATION.

Mr. Hancock contends that the jury instructions in his case inadequately protected against a possible double jeopardy violation. This alleged error is not manifest, the crimes as alleged do not violate double jeopardy, the instructions were nonetheless adequate, and a review of the record demonstrates Mr. Hancock did not suffer a double jeopardy violation.

1. Mr. Hancock did not preserve this argument, and it is not manifest.

Generally, a defendant may assert a double jeopardy claim for the first time on appeal. *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011) (citing *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136

(2006)).¹ The State disagrees that Mr. Hancock is alleging a manifest constitutional error because he acknowledges that the trial court gave a modified pattern *Petrich*² instruction typically used in the context of jury unanimity claims but related to double jeopardy principles. Appellant’s Br. at 12-13. Mr. Hancock makes a more nuanced claim: he contends the instruction should have been worded differently in his case to include an additional phrase that the crimes involved “separate and distinct” acts. *Id.* Therefore, this claim is really a challenge to the language of the jury instruction to which Mr. Hancock did not object to below. RP 569, 572.

A party may not assert a claim on appeal that was not first raised at trial. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). It is a fundamental principle of appellate jurisprudence in Washington and in the federal system that a party may not assert on appeal a claim that was not first raised at trial. *Id.* at 749. This principle is embodied in Washington

¹ The State disagrees in part with this proposition. *Mutch* relied on *Jackman*, but there appears to be no analysis in either case using RAP 2.5 to determine whether this narrow issue is manifest. *Mutch*, 171 Wn.2d at 662; *Jackman*, 156 Wn.2d at 746. The absence of “separate and distinct” language in the jury instruction only presents the *possibility* of a double jeopardy violation, strongly suggesting the error is not manifest. *Id.* This Court should undertake a RAP 2.5 analysis.

² *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984). The comments to the pattern instruction clarify the typical usage of the instruction. *See* 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 4.25 (4th ed. 2016). This includes the “separate and distinct” act modification.

under RAP 2.5. The rule is principled as it “affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal.” *Strine*, 176 Wn.2d at 749.

Although RAP 2.5 permits an appellant to raise for the first time on appeal an issue that involves a manifest error affecting a constitutional right, our courts have indicated that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988).

Because there was no objection below to the unanimity instruction, the claim must be a manifest constitutional error in order to merit review for the first time on appeal. RAP 2.5(a)(3) analysis involves a two-prong inquiry: first, the alleged error must truly be of constitutional magnitude and, second, the asserted error must be manifest. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). Double jeopardy is obviously an issue of constitutional magnitude.

Analysis of whether an issue is manifest must strike “a careful policy balance between requiring objections to be raised so trial courts can correct errors and permitting review of errors that actually resulted in serious injustices to the accused.” *State v. Dunleavy*, 2 Wn. App. 2d 420, 427, 409 P.3d 1077 (2018), *review denied*, 190 Wn.2d 1027 (2018). To establish

manifest error, the complaining party must show actual prejudice. *Kalebaugh*, 183 Wn.2d at 584. “To demonstrate actual prejudice, there must be a plausible showing ... that the asserted error had practical and identifiable consequences in the trial of the case.” *Id.* (internal quotations omitted). The “consequences should have been *reasonably obvious* to the trial court, and the facts necessary to adjudicate the claimed error must be in the record.” *Dunleavy*, 2 Wn. App. 2d at 427 (internal quotations omitted) (emphasis added).

In order to ensure the actual prejudice and harmless error analyses are separate, the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review... It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object. Thus, to determine whether an error is practical and identifiable, the appellate court must 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. O'Hara, 167 Wn.2d 91, 99-100, 217 P.3d 756 (2009), *as corrected* (Jan. 21, 2010). Manifest error is “unmistakable, evident or indisputable.” *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008). The appellant bears the burden of demonstrating manifest error. *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011).

Mr. Hancock does not meet his burden to demonstrate manifest error. The relevant instruction in this case is based on the pattern instruction.

CP 43; WPIC 4.25. This alleged error does not fit within the Washington Supreme Court's description of manifest because it is not obvious or identifiable. The trial court's instruction was clearly based on the standard WPIC, and no exception was taken below. WPIC 4.25; RP 568-72. This is not to say that pattern instructions approved by the Washington Supreme Court cannot contain errors, particularly if modified as in this case; however, if Mr. Hancock had wished to litigate this error in this Court, he should have raised the allegation at the trial court to preserve it for review. *See O'Hara*, 167 Wn.2d at 100.

Another reason this error is not manifest is because a single incident may support convictions for both child rape and child molestation without offending double jeopardy. *State v. Wilkins*, 200 Wn. App. 794, 808, 403 P.3d 890 (2017), *review denied*, 190 Wn.2d 1004 (2018). *Wilkins* determined that the crimes of rape and molestation were not the same in law and fact, and did not offend double jeopardy because the molestation occurred when the defendant had sexual contact with the victim for sexual gratification, whereas the rape occurred when there was penetration of the same victim. *Id.* at 808. Despite arising out of the same incident, Division Two determined there were two separate offenses requiring proof of a fact that the other did not. *Id.*

In *Wilkins*, the victim described an incident where she was in the defendant's bedroom. *Id.* at 799-800. The defendant made the victim remove her clothing, get on his bed, and then he climbed on top of her. *Id.* at 800. Eventually, he placed his penis into her vagina. *Id.* The defendant was convicted of both child rape and child molestation, but the trial court found that the crimes constituted the same criminal conduct, sentencing the defendant concurrently for each conviction but calculating the offender score as if the defendant had only committed one crime. *Id.* at 802. On appeal, the defendant argued the convictions themselves violated double jeopardy because they constituted the same offense. *Id.* at 804-05.

Division Two of this Court disagreed, reasoning that the child molestation occurred when the defendant had sexual contact with the victim for sexual gratification, whereas the rape occurred when the molestation turned into sexual intercourse via penetration; sexual gratification is not an element of child rape. *Id.*; RCW 9A.44.010(2). Even when they arise out of the same incident, there may be two separate offenses requiring proof of a fact that the other does not. *Wilkins*, 200 Wn. App. at 804-05; *see also State v. French*, 157 Wn.2d 593, 610-11, 141 P.3d 54 (2006); *State v. Land*, 172 Wn. App. 593, 600, 295 P.3d 782 (2013).

Mr. Hancock's claim is predicated on the premise that the jury instruction invited the jury to erroneously convict him of both crimes for a

single incident, but that very premise is expressly permissible by *Wilkins*. Mr. Hancock's claim is appropriate in a situation where the State had charged multiple counts of either first degree child rape or first degree child molestation. Mr. Hancock did not present argument concerning double jeopardy, leaving the State and trial court with no reason to develop the record. In Mr. Hancock's case, the State did distinguish between acts of rape involving penetration from acts of child molestation involving touching of sexual organs, in closing argument. RP 599-601. On these facts, the alleged error is not manifest.

Additionally, the trial court found that the two crimes constituted the same course of conduct and counted both as one crime for purposes of calculating Mr. Hancock's offender score and sentence, so there is no prejudice. CP 57. The trial court properly instructed the jury on the following concepts:

- (1) separate crimes were charged in each count, CP 35 (multiple crimes instruction);
- (2) the jury must unanimously agree on which act constituted each charge of child molestation or child rape, (CP 43 (jury unanimity instruction));

- (3) the definition of sexual contact differs from that of sexual intercourse, CP 38 (definition of sexual intercourse) 42, (definition of sexual contact); and
- (4) different elements constitute the charged crimes, CP 37, 41 (to-convict instructions).

These instructions properly protected Mr. Hancock's right to be free from double jeopardy. This Court should decline to review this unpreserved alleged error because it is not so obvious on the record that it warrants appellate review.

2. *Mr. Hancock invited this error by agreeing to the instruction and failing to propose his own.*

Mr. Hancock is also barred from belatedly raising this issue because, if error occurred, he invited it. The invited error doctrine precludes appellate review of an alleged error affecting even a constitutional right of a defendant. *State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). "The invited error doctrine is a strict rule that precludes a criminal defendant from seeking appellate review of an error he helped create." *State v. Carson*, 179 Wn. App. 961, 973, 320 P.3d 185 (2014), *aff'd*, 184 Wn.2d 207 (2015). If a party is dissatisfied with an instruction, it is that party's duty to propose an appropriate instruction and, if the court fails to give the instruction, take exception to that failure. *Goodman v. Boeing Co.*,

75 Wn. App. 60, 75, 877 P.2d 703 (1994), *aff'd*, 127 Wn.2d 401 (1995), *amended* (Sept. 26, 1995). If a party does not propose an appropriate instruction, it cannot complain about the court's failure to give it. *Id.*

Mr. Hancock did not propose any jury instructions, other than requesting an instruction relating to his decision not to testify. RP 568, 572; *see* CP at *passim*. When the trial court asked whether Mr. Hancock had any comments to the court's instructions, defense counsel offered none, other than an objection to a definitional instruction from the State. RP 568-72. Because Mr. Hancock failed to propose language that would have cured his claimed error in the instruction, and because he did not object to the court's instructions as proposed or given, he invited the error he now raises. This Court should, therefore, decline to review this claim.

3. *The jury instructions adequately guarded against a double jeopardy violation, and the record demonstrates no violation occurred.*

The State maintains that this Court should resolve this alleged error by declining review because Mr. Hancock has not demonstrated it is a manifest constitutional error, or because he invited it. However, if this Court does review the alleged error, there is no double jeopardy violation because the crimes as alleged do not implicate double jeopardy, and, even under Mr. Hancock's analysis, the record is clear there was no double jeopardy violation.

- a. The completed crimes of child rape and child molestation as alleged in this case do not offend double jeopardy.

“The constitutional guaranty against double jeopardy protects a defendant ... against multiple punishments for the same offense.” *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991); *see* U.S. Const. amend. V; Const. art. I, § 9. A “defendant’s double jeopardy rights are violated if he or she is convicted of offenses that are identical both in fact and in law.” *State v. Calle*, 125 Wn.2d 769, 777, 888 P.2d 155 (1995). “However, if each offense, as charged, includes elements not included in the other, the offenses are different and multiple convictions can stand.” *Id.* Review of a double jeopardy claim is *de novo*. *In re Francis*, 170 Wn.2d 517, 523, 242 P.3d 866 (2010).

Here, there is no double jeopardy violation. The jury instructions in this case were adequate, and, failing that, review of the record demonstrates there is no possibility the jury found Mr. Hancock guilty of two separate offenses from the same distinct act.

- b. The challenged instruction adequately protected against a double jeopardy violation.

Turning to Mr. Hancock’s authorities, in *Mutch* the defendant was accused of five counts of second degree rape and one count of kidnapping. 171 Wn.2d at 651-52. The victim testified to four separate and distinct acts of rape over the course of one night, and then a fifth act of rape the next

morning. *Id.* at 652. On appeal, the defendant challenged his convictions for second degree rape by claiming a double jeopardy violation, alleging the trial court's jury instructions were too vague and "allowed the possibility that the jury erroneously convicted him of all five counts based only on a single criminal act." *Id.* at 662.

Our Supreme Court, after reviewing *State v. Carter*, 156 Wn. App. 561, 234 P.3d 275 (2010), and *State v. Berg*, 147 Wn. App. 923, 198 P.3d 529 (2008), agreed that ambiguous jury instructions can create the potential for a double jeopardy violation. *Mutch*, 171 Wn.2d at 662. The court noted that the jury instructions in that case failed to protect against a double jeopardy violation because: (1) to-convict instructions were not sufficiently distinct because they specified the same date range for each count of second degree rape; and (2) the jury instructions did not include an instruction specifying that each charged count of rape represented an act distinct from the other charged counts. *Id.* at 662-63. The court held that the separate crime instruction is not adequate, standing alone, to protect against a double jeopardy violation. *Id.* at 663. The court disapproved of *Carter* and *Berg* by holding that the potential violation can nonetheless be cured by a review of the record. *Id.* at 664. The first step of the *Mutch* analysis is to consider whether the instructions are flawed. *Id.* at 661-63.

In another double jeopardy case, *State v. Borsheim*, the defendant was charged with four identical counts of first degree rape of a child, but the victim testified to dozens of acts of child rape over a years-long period of time. 140 Wn. App. 357, 362, 165 P.3d 417 (2007). The trial court instructed the jury:

There are allegations that the Defendant committed acts of rape of child on multiple occasions. *To convict the Defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt.* You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

Id. at 364 (emphasis in original). Additionally, the single to-convict instruction “confusingly” encompassed all four identical counts. *Id.* at 368. Division One of this Court held that the instructions adequately protected the defendant’s right to jury unanimity, but failed to protect against a double jeopardy violation. *Id.* at 365-68. The court noted that where the State charges “multiple *identical* counts,” the trial court should inform the jury that they must find separate and distinct acts for each count. *Id.* at 367 (emphasis added).

Mr. Hancock’s case is distinguishable from both *Mutch* and *Borsheim*. Unlike *Mutch*, the trial court gave a modified unanimity instruction in Mr. Hancock’s case:

The State alleges that the defendant committed acts of Rape of a Child in the First Degree and Child Molestation in the First Degree

on multiple occasions. *To convict the defendant of Rape of a Child in the First Degree or Child Molestation in the First Degree, one particular act of Rape of a Child in the First Degree or Child Molestation in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved.* You need not unanimously agree that the defendant committed all the acts of Rape of a Child in the First Degree or Child Molestation in the First Degree.

CP 43 (emphasis added). Apparently, no similar instruction was present in *Mutch*, as the opinion made no reference to one. *See* 171 Wn.2d 646. The concern that the separate crime instruction alone is insufficient is not present in Mr. Hancock's case.

That same instruction distinguishes *Borsheim*; a comparison of the emphasized portion of the instruction in Mr. Hancock's case reveals a modification. In *Borsheim*, the instruction vaguely asserted that one or more acts must be proved beyond a reasonable doubt, and that the jury must be unanimous as to the act proved. 140 Wn. App. at 364. That case also contained four identical charges in one to-convict instruction. *Id.* at 368.

First degree child molestation and first degree child rape are different crimes. The State did not charge Mr. Hancock with "multiple identical crimes," which distinguishes all of Mr. Hancock's authorities. *See Borsheim*, 140 Wn. App. at 367 (four counts of first degree child rape); *Mutch*, 171 Wn.2d at 652 (five counts of second degree rape); *Berg*,

147 Wn. App. at 934 (two counts of third degree child molestation); *Carter*, 156 Wn. App. at 563-64 (four counts of first degree rape of a child).

The State charged Mr. Hancock with only two counts, each count charged a separate crime, and trial court gave the jury a different to-convict instruction for each crime. CP 37, 41. As discussed above, the jury was given the separate crime instruction and the crimes are defined differently. The unanimity instruction differs from *Borsheim* in that it required the jury to agree on one specific act of child rape to convict of child rape, and one specific act of child molestation to convict of child molestation.

Mr. Hancock asserts that the instruction should have been further modified with the “separate and distinct” language, to also make clear one specific act of child rape cannot serve as the basis for one specific act of child molestation, but the jury instructions are read with each other, not in isolation. In addition, *Wilkins* makes clear that one incident may constitute both crimes without offending double jeopardy. 200 Wn. App. at 808. The jury was instructed that the crimes are defined differently, contain different elements, a separate crime is charged in each count, and that the jury must unanimously agree as to one specific act of child rape to convict on child rape and one specific act of child molestation to convict of child molestation. The jury instructions in Mr. Hancock’s case as a whole, as well as the fact that the charges are not identical, cure the defects in both *Mutch*

and *Borsheim*. If this Court disagrees, any defect can still be cured by a review of the record. *Mutch*, 171 Wn.2d at 664.

- c. An examination of the record demonstrates the jury found Mr. Hancock guilty of separate acts.

The second and final step of the *Mutch* analysis is, if the instructions are faulty, to examine the entire trial record in a rigorous fashion to determine whether there are potentially redundant convictions. 171 Wn.2d at 664. This Court must determine whether it was “manifestly apparent” to the jury that the State was seeking separate punishments for separate acts. *Id.* If this Court does not find this proposition was manifestly apparent, it must vacate the lesser, redundant conviction. *Id.*; *State v. Hughes*, 166 Wn.2d 675, 686 n.13, 212 P.3d 558 (2009). This Court may look to the evidence, jury instructions, and the arguments of the parties. *Mutch*, 171 Wn.2d at 664.

The jury instructions have been discussed, as has the precision of seven-year-old (three-and-a-half-years-old at the time of the abuse) K.F.’s statements. What remains for this Court to consider are the arguments of the

parties.³ Here, as discussed below, the State made clear that one act of child molestation should not serve as the basis for one act of child rape.

State v. Fuentes, 179 Wn.2d 808, 318 P.3d 257 (2014), although decided prior to *Wilkins*, is instructive. There, the appellant was charged with first degree child rape and two counts of first degree child molestation. *Id.* at 815. On appeal, the defendant challenged that the instructions for child rape “did not include an instruction that the conduct must have occurred on an occasion separate and distinct from the child molestation charges.” *Id.* at 823. Addressing only the argument of the parties, our Supreme Court determined there was no double jeopardy violation because the record made it manifestly apparent the convictions were based on separate acts: “the prosecution made a point to clearly distinguish between the acts that would constitute rape of a child and those that would constitute child molestation.” *Id.* at 825. Additionally, the court reasoned that the defendant’s strategy was not to challenge “the number of incidents or whether they overlapped, but rather he chose the strategy of attacking [the victim’s] credibility.” *Id.* The court held that the record as a whole made it clear that the rape was based

³ Mr. Hancock claims the jury was instructed not to rely on the parties’ arguments, rendering those arguments meaningless for the analysis, but *Mutch* specifically instructed appellate courts to consider the parties’ arguments in its review. Appellant’s Br. at 15; *Mutch*, 171 Wn.2d at 664. Further, the instruction did not instruct the jury to disregard the arguments, but simply that the arguments were not evidence. CP 29.

on acts of penetration while the molestation charges were based on acts that did not rise to the level of penetration. *Id.* at 826.

Mr. Hancock's case is similar to *Fuentes*. The State recounted K.F.'s hearsay statements from the forensic interview and to the other witnesses, and explained why the charging range was January 1, 2016, to September 1, 2016. RP 586-88. The State acknowledged that K.F. had the vocabulary of a four-year-old in the recording, referencing "vacuum cleaners" and "toothpaste" to describe sexual terms such as semen. RP 592-94, 596-98. The State acknowledged that K.F. could not recall many of the details she had described during the forensic interview at the present trial. RP 594-95.

Then, the State referred to the jury instructions, and reiterated the definitions of sexual contact and sexual intercourse. RP 589-90. The State argued concerning child rape:

And every time the defendant penetrated [K.F.]'s vagina with either his penis or any other object, including a vibrator, and you know that he—that penetration occurred because she's bleeding from that area, those were each acts of rape. And every time that he put his penis in her mouth, that is an act of child rape under the law.

And because [K.F.] said this happened more than one time, that this was multiple incidents, you also have an instruction that tells you what you have to agree on for these charges. And that's your Instruction No. 14.

So that tells you that in order to convict the defendant you don't have to agree that every act described by [K.F.] happened but you have to agree that one particular act of child rape happened to her. And

you have to agree on which act was proven. So that's true with both of the counts.

What this means is you don't have to agree that every single thing she described happened, but you do have to agree one of those things happened. So, for example, for the child rape, if you all agree that during one of these times the defendant put his penis into [K.F.]'s mouth, then that meets the sexual intercourse prong of Count No. 1 for child rape.

RP 598-99. The State next distinguished child rape from child molestation:

So the difference is in Element No. 1, that the type of sexual act the State has to prove for the child molestation is that the defendant had sexual contact with [K.F.]. Sexual contact is defined for you in Instruction No. 13. It means any touching of the sexual or other intimate parts of a person done for purpose—the purpose of gratifying sexual desires of either party.

So this charge is for any of the acts that didn't rise to the level of sexual intercourse; so any acts that didn't amount to penetration or oral sex. This would include things like touching her vagina area if it wasn't oral sex or penetration *at that time*. So just rubbing that area. If it's only on the outside, that is sexual contact for the purposes of Count No. 2, child molestation. And it has to be done for the purposes of sexual gratification.

RP 600-01 (emphasis added). Mr. Hancock, like the defendant in *Fuentes*, attacked K.F.'s credibility and ability to recall events. RP 603-11.

Like *Fuentes*, rigorous review reveals the State specifically argued which acts could constitute first degree child rape and distinguished them from the acts that could constitute first degree child molestation. The State told the jury that child molestation “is for any of the acts that didn't rise to the level of sexual intercourse; so any acts that didn't amount to penetration or oral sex.” RP 601. This argument, made in the context of the jury

instructions, informed the jury that each count was separate from the other, that the jury must unanimously agree as to a specific act for each incident of child rape or child molestation, and that any act of child molestation should not serve as the basis for an act of child rape. Mr. Hancock does not establish that the possibility of a double jeopardy violation in this case resulted in an actual violation.

If this Court disagrees, the State agrees with Mr. Hancock that the remedy is for this Court to vacate the count of first degree child molestation. Appellant's Br. at 18.⁴

B. THE TRIAL COURT PROPERLY PLACED THE BURDEN OF REBUTTING WITNESS COMPETENCY ON THE CHALLENGING PARTY AND DID NOT ABUSE ITS DISCRETION IN DETERMINING COMPETENCY.

Mr. Hancock claims the trial court erred by placing the burden of challenging K.F.'s competency on him. His authority has been overruled so this challenge fails.

⁴ The trial court determined the counts constituted the same criminal conduct and counted as one crime to determine Mr. Hancock's offender score. CP 57. Mr. Hancock's sentence would not change. RCW 9.94A.589(1); *see also Wilkins*, 200 Wn. App. 794 (distinguishing same criminal conduct analysis from double jeopardy analysis).

1. *Mr. Hancock did not challenge the trial court's findings of fact, rendering them verities for his challenge on appeal.*

The court made findings of fact and conclusions of law in conjunction with its ruling on the child hearsay motion and concluded K.F. was competent. CP 50. Mr. Hancock does not challenge the findings of fact related to competency, so they are verities on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Related to competency, but with some overlap with the child hearsay factors, the court found: (1) at the time of the hearing K.F. was seven-years-old; (2) K.F. demonstrated an understanding of the difference between the truth and a lie; (3) K.F. demonstrated an understanding of her obligation to tell the truth; (4) K.F. demonstrated the capacity to understand questions about the occurrence; (5) K.F. was asked questions during direct examination about the alleged incident and her prior statements about the incident; and (6) K.F. demonstrated an ability to relay circumstances surrounding the time of the incident. CP 50.

2. *The Supreme Court overruled Mr. Hancock's authority and held the party challenging witness competency bears the burden of proof.*

Mr. Hancock relies on *State v. S.J.W.* for his claim that a trial court must presume a child is not competent to testify unless the proponent of the child witness demonstrates competency by a preponderance of the evidence,

and that a trial court must find all five *Allen*⁵ factors are met before it can find a child witness competent to testify. 149 Wn. App. 912, 922, 206 P.3d 355 (2009), *aff'd on other grounds*, 170 Wn.2d 92, 239 P.3d 568 (2010). That holding was overruled after the State sought review by our Supreme Court, despite being the prevailing party below. *See S.J.W.*, 170 Wn.2d 92. The Supreme Court explicitly held “courts should presume all witnesses are competent to testify regardless of their age.” *Id.* at 100. The “party challenging the competency of a child witness has the burden of rebutting [the] presumption [of competency] with evidence indicating that the child is of unsound mind, intoxicated at the time of his production for examination, incapable of receiving just impressions of the facts, or incapable of relating facts truly.” *Id.* at 102. The trial court need not find all five *Allen* factors because they serve only as a guide for the trial court if a party challenges competency. *Id.* Considering this authority, the trial court in Mr. Hancock’s case did not err.

However, even if the Supreme Court did not overrule the holding of the Court of Appeals in *S.J.W.*, Mr. Hancock agreed below that he bore the burden of challenging competency, making any claimed error in assigning the burden invited. RP 347; *see State v. Momah*, 167 Wn.2d 140, 153,

⁵ *State v. Allen*, 70 Wn.2d 690, 424 P.2d 1021 (1967),

217 P.3d 321 (2009). Mr. Hancock’s remaining child competency and child hearsay claims fail because these claims are premised on his contention that the trial court should have assigned the State the burden of proving competency.

3. The trial court did not manifestly abuse its discretion when determining Mr. Hancock did not meet his burden to challenge K.F.’s competency.

If this Court chooses to address this issue, Mr. Hancock does not demonstrate the trial court manifestly abused its discretion in determining K.F. was competent to testify.

ER 601 provides, “every person is competent to be a witness except as otherwise provided by statute or by court rule.” In turn, RCW 5.60.050 provides:

The following persons shall not be competent to testify:

- (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
- (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

Before a 1986 amendment, RCW 5.60.050(2) read: “Children under ten years of age, who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.” Laws

of 1986, ch. 195, § 2. This legislative amendment suggests children under the age of ten may be suitable witnesses. *S.J.W.*, 170 Wn.2d at 100.⁶

Because RCW 5.60.050 no longer references an individual's age, the default rule that all witnesses are presumed competent to testify applies to child witnesses. *S.J.W.*, 170 Wn.2d at 100. The burden is on the party opposing testimony from the witness to prove incompetence. *Id.* A party challenging the competency of a child witness has the burden of rebutting that presumption with evidence indicating that the child is incapable of

⁶ K.F. was seven years of age at the time of trial. RP 6. In the following decisions, the courts held a five-year-old child competent to testify: *State v. Avila*, 78 Wn. App. 731, 734, 899 P.2d 11 (1995); *State v. Hunsaker*, 39 Wn. App. 489, 693 P.2d 724 (1984); and *State v. Woodward*, 32 Wn. App. 204, 207, 646 P.2d 135 (1982). In the following decisions, the courts held a four-year-old competent to testify: *State v. Woods*, 154 Wn.2d 613, 616, 114 P.3d 1174 (2005), *as amended* (July 27, 2005); *State v. Perez*, 137 Wn. App. 97, 100, 105, 151 P.3d 249 (2007); *State v. Borland*, 57 Wn. App. 7, 9, 11, 786 P.2d 810 (1990), *overruled on other grounds by State v. Rohrich*, 132 Wn.2d 472, 939 P.2d 697 (1997); *State v. Strange*, 53 Wn. App. 638, 639, 642, 769 P.2d 873 (1989); *State v. Acheson*, 48 Wn. App. 630, 631, 637-38, 740 P.2d 346 (1987); and *State v. Walker*, 38 Wn. App. 841, 845-46, 690 P.2d 1182 (1984). In *Borland*, the child encountered difficulty in responding to some questions and inconsistencies were found in her statements. In *State v. Carlson*, 61 Wn. App. 865, 868, 812 P.2d 536 (1991), the court allowed testimony from a child who was three and one-half years old at the time of the abuse, the same age as K.F. when Mr. Hancock abused her in this case. In *State v. Bailey*, 52 Wn. App. 42, 757 P.2d 541 (1988), *aff'd*, 114 Wn.2d 340 (1990), the court permitted testimony from a three-year-old victim.

receiving just impressions of the facts or incapable of relating facts truly.
Id. at 102.

In *Allen*, 70 Wn.2d 690, our Supreme Court listed five factors for assessing a child's competency to testify. Although *Allen* was decided before the 1986 amendment to RCW 5.60.050, our Supreme Court continues to suggest that trial courts may use the five factors as a guide, when a party challenges the competency of a child witness. *S.J.W.*, 170 Wn.2d at 97. Those considerations are:

- (1) an understanding of the obligation to speak the truth on the witness stand;
- (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it;
- (3) a memory sufficient to retain an independent recollection of the occurrence;
- (4) the capacity to express in words his memory of the occurrence;
and
- (5) the capacity to understand simple questions about it.

Allen, 70 Wn.2d at 692. The child must not only be able to relate facts truly at the time of trial but must have been capable of receiving just impressions of the facts at the time of the events about which they testify. *Id.* at 691.

Critically, the court in that case also identified the proper appellate standard of review:

The determination of the witness's ability to meet the requirements of this test and the allowance or disallowance of leading questions

rest primarily with the trial judge who sees the witness, notices his manner, and considers his capacity and intelligence. These are matters that are not reflected in the written record for appellate review. Their determination lies within the sound discretion of the trial judge and will not be disturbed on appeal in the absence of proof of a manifest abuse of discretion.

Id. at 692 (citation omitted). Appellate courts afford significant deference to trial courts when making this determination. *State v. Brousseau*, 172 Wn.2d 331, 340, 259 P.3d 209 (2011).

The defendant also bears the burden of establishing that the trial court manifestly abused its broad discretion when permitting child testimony. *Woods*, 154 Wn.2d at 622. “There is probably no area of law where it is more necessary to place great reliance on the trial court’s judgment than in assessing the competency of a child witness.” *Borland*, 57 Wn. App. at 11.

Mr. Hancock does not meet his burden to demonstrate the trial court manifestly abused its discretion. As discussed above, the trial court properly placed the burden on Mr. Hancock to rebut competency, and the trial court did not need to find all five *Allen* factors in order to determine a child witness is competent. Mr. Hancock’s remaining argument is that “K.F. lacked any independent recollection of events leading to the charges against Mr. Hancock.” Appellant’s Br. at 22. Mr. Hancock does not discuss any of the other *Allen* factors individually and does not explain how the trial court

abused its discretion in determining K.F. did remember events from that time. Review of K.F.'s testimony during the child hearsay hearing demonstrates the other factors are satisfied.

Given the highly deferential standard of review, it is proper to start with the argument Mr. Hancock made to the trial court below. *See* RP 347-49. Mr. Hancock brought his competency challenge during the child hearsay hearing, and he conflated the two tests to some degree. He only argued the third factor from *Allen*. RP 348-49. Mr. Hancock conceded that K.F. remembered “certain events around that time” but argued she did not remember any of the details of the sexual assaults themselves. RP 348. In response to *this* claim, the trial court looked at the totality of K.F.'s testimony and determined that she did indeed show an ability to relate facts that had occurred when she was four-years-old, which was the time of the sexual assaults. RP 350-52. The trial court pointed out that K.F. articulated details of her life when she was four-years-old, such as where she was living, with whom she was living, and other facts that occurred at the same time. There was no competency challenge as to her relation of facts at the time of trial.

Because Mr. Hancock did not contest the other *Allen* factors, the trial court had no reason to further elucidate those factors on the record. Additionally, the absence of a finding on a material issue is presumptively

a negative finding entered against the party with the burden of proof. *Golberg v. Sanglier*, 96 Wn.2d 874, 880, 639 P.2d 1347 (1982), *amended*, 96 Wn.2d 874 (1982). The court did not make additional findings on the *Allen* factors in its child hearsay ruling. *See* CP 50-51. Where Mr. Hancock had the burden of challenging competency but only argued one of the five child competency factors at the trial court below, the absence of trial court findings concerning the unchallenged factors should be construed against him.

Mr. Hancock cannot show the trial court manifestly abused its discretion on this record. His only contention below was that K.F. could not remember details when she was four-years-old, but the court reviewed her statements and found that she did retain a memory of events occurring when she was that age. Even assuming the trial court erred in assessing this factor, it is only one of five factors and Mr. Hancock did not challenge the remaining factors. Contrary to Mr. Hancock's arguments on appeal, the burden to challenge competency was his. The trial court did not manifestly abuse its discretion when it determined he did not meet that burden.

C. THE COURT DID NOT ERR BY ADMITTING CHILD HEARSAY BECAUSE K.F. TESTIFIED AT THE PROCEEDINGS.

Mr. Hancock's final contention is "the trial court improperly ruled K.F. was competent to testify. Absent this erroneous finding, K.F. would

not have testified at trial, rendering her out-of-court statements inadmissible under RCW 9A.44.120 (c)(i).” Appellant’s Br. at 24. Because the trial court did not abuse its discretion when it ruled K.F. was competent, this claim fails.

RCW 9A.44.120 (c)(i) permits child hearsay when the child testifies at the present trial. That occurred in this case. RP 393. Mr. Hancock does not assert a separate reliability argument on appeal. *See State v. Beadle*, 173 Wn.2d 97, 111-12, 265 P.3d 863 (2011). There is no error.

V. CONCLUSION

Mr. Hancock’s claims do not succeed. Mr. Hancock does not demonstrate manifest constitutional error concerning his alleged instructional error. The State’s charging decision and argument cured any possibility of a double jeopardy violation. Mr. Hancock’s authority concerning the burden of challenging witness competency has been overruled. The State respectfully requests this Court affirm.

Dated this 5 day of May, 2020.

LAWRENCE H. HASKELL
Prosecuting Attorney



Brett Pearce, WSBA #51819
Deputy Prosecuting Attorney
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

JOHNATHON HANCOCK,

Appellant.

NO. 36978-1-III

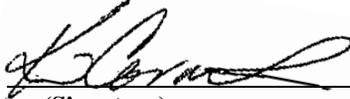
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on May 5, 2020, I e-mailed a copy of the Brief of Appellant in this matter, pursuant to the parties' agreement, to:

Gregory Link
wapofficemail@washapp.org

5/5/2020
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

May 05, 2020 - 1:13 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36978-1
Appellate Court Case Title: State of Washington v. Johnathon James Hancock
Superior Court Case Number: 18-1-02232-1

The following documents have been uploaded:

- 369781_Briefs_20200505130942D3273985_0599.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Hancock Johnathon - 369781 - resp br - BBP.pdf

A copy of the uploaded files will be sent to:

- greg@washapp.org
- lsteinmetz@spokanecounty.org
- wapofficemai@washapp.org
- wapofficemail@washapp.org

Comments:

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

Filing on Behalf of: Brett Ballock Pearce - Email: bpearce@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:
1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-2873

Note: The Filing Id is 20200505130942D3273985