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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

81413-9

No. 25673-1-III

IN THE COURT OF THE APPEALS  
OF THE STATE OF WASHINGTON

DIVISION III

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THE STATE OF WASHINGTON, Respondent

v.

PHILLIP J. BOBENHOUSE, Appellant.

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**BRIEF OF RESPONDENT**

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## I. SUMMARY OF ISSUES

1. Is the State required to articulate accomplice liability in a charging document?
2. Did the State invade legislative prerogative in charging Appellant with rape of a child in the first degree using RCW 9A.08.020(2)(a)?
3. Did the person who perpetrated the act need to have committed a statutorily defined criminal offense in order for Appellant to be held criminally responsible for the act?
4. Was it error to fail to instruct the jury on unanimity as to the underlying means of commission of the offenses listed in counts one and four?
5. Was there evidence to support the State's contention that the actions for which Appellant was convicted took place within the charging period specified in the information and "To-convict" instructions?
6. Was Appellant's right to a speedy trial violated, and if so, did Appellant properly preserve any argument concerning what he perceives to be a violation of his right to a speedy trial?
7. If a violation of Appellant's right to a speedy trial occurred, was it ineffective assistance of counsel for his attorney not to cure the defect?
8. Was Appellant properly notified of the State's intent to seek an exceptional sentence?
9. Could the trial court make findings in support of an exceptional sentence absent a jury determination in this matter?

10. Even if it was improper for the trial court to make findings concerning aggravating factors other than "free crimes," is the error such that re-sentencing would be required?
11. Should any of the offenses for which Appellant was convicted be considered "same criminal conduct" with respect to any other offenses which also resulted in conviction in this case?
12. Is Appellant entitled to modification of the protection order as to the foster parents in this case if he did not object to it at the trial court level?

## **II. SUMMARY OF ARGUMENT**

1. The State is under no obligation to specify in the charging document that it intends to proceed on the theory of accomplice liability.
2. The Legislature explicitly provides that one party may be liable for the conduct of another.
3. The fact that the children who were commanded to engage in sexual intercourse by Appellant were not, themselves, committing an act that satisfies all elements of rape of a child in the first degree does nothing to obviate Appellant's culpability.
4. No unanimity instruction was required, because to the extent that the State presented evidence of alternative means of commission of the offense, the State did not allege multiple acts.
5. The actions alleged by the State were proved to have taken place within the charging period.

6. Appellant has not properly preserved any issue for appeal with respect to his right to speedy trial; moreover, no violation of the applicable 90 day time for trial took place.
7. Even if a violation of Appellant's speedy trial right were found, he has shown no actual prejudice from his counsel's failure to act in accordance with CrR 3.3, and therefore cannot prevail under a theory of ineffective assistance of counsel.
8. Appellant received timely and proper notice of the State's intent to seek an exceptional sentence.
9. Grounds for an exceptional sentence could be determined by a judge at sentencing under RCW 9.94A.712.
10. Even if the trial court improperly found other statutory aggravating factors, the fact that the exceptional sentence would have been the same even if only "free crimes" were considered makes any such impropriety harmless error.
11. No two offenses for which Appellant was convicted can be considered "same criminal conduct" for offender scoring purposes.
12. Appellant did not object to a no-contact order with the foster parents at sentencing; further, there is no statutory requirement that a community placement condition be crime related.

### III. STATEMENT OF THE CASE

While the State accepts much of Appellant's version of the facts in this matter, some details in the procedural history were left out. A total of 72 days elapsed—omitting excluded periods referred to in Appellant's statement of the case—between the date of arraignment (November 28, 2005) and February 21, 2006, when the Honorable Judge Robert Zagelow orally granted prior counsel's motion to withdraw (because of Appellant's action of filing a bar complaint against the former). RP 4-5.

Disqualification of counsel re-set the speedy trial clock under CrR 3.3(c)(2)(vii). In light of that, and in view of the 90 speedy trial clock (*see Infra*), expiration of the time for trial would have been May 22, 2006. On April 24, 2006, Appellant's new counsel made a motion for funds to hire a defense expert at State's expense. The Honorable Judge Robert Zagelow granted that motion on May 23, 2006. Because of the time needed to retain an expert and allow that expert to take action necessary to be prepared to testify, counsel for Appellant moved to continue the trial date on June 1, 2006. CP 95-96. That motion was granted on June 6, 2006. CP 122-123.

#### IV. DISCUSSION

1. The State is under no obligation to specify in the charging document that it intends to proceed on the theory of accomplice liability.

Appellant argues that the State improperly added an element to the “to convict” instructions in counts two, three and five by including language that allowed the jury to find him guilty under an accomplice liability theory. This contention is directly contradictory to well-settled law. “[A] trial court may instruct the jury on accomplice liability even if the State failed to charge that theory in the information.” State v. Becklin, 133 Wn.App. 610, 620, 137 P. 3d 882 (Div. 3, 2006) (C.J. Sweeney dissenting); *citing* State v. Davenport, 100 Wn.2d 757, 764-765, 675 P.2d 1213 (1984); *see also* State v. Carothers, 84 Wn.2d 256, 525 P.2d 731 (1974); State v. Frazier, 76 Wn.2d 373, 456 P.2d 352 (1969). The only caveat is that the trial court must instruct the jury on accomplice liability. Davenport, 100 Wn.2d at 764-765. Since that was done in this case, Appellant’s assignment of error is without merit. See CP 143-145. Moreover, the record is bereft of any claim by Appellant that he was unaware of the theory behind the charges in counts two, three and five, just as it is lacking any motion for a bill of particulars and/or motion to make more definite and certain.

Appellant submitted an Additional Statement of Authorities in

which he cites to State v. Haack 88 Wn.App. 423, 958 P.2d 1001 (Div. 1, 1997) in apparent support of the notion that the State is under an obligation to elect between principal and accomplice liability. That proposition is not at all what Haack stands for. As will be seen below, there is no distinction made by the Legislature or the Courts in Washington between the principal and accomplice. Haack merely underscores this fact. The relevant portion of the “to-convict” instruction under review in that case stated that “[T]he defendant *or an accomplice* assaulted Ernie Castro.” Haack, 88 Wn.App. at 427 [emphasis supplied]. The Court found no error with this instruction, stating “Although we agree with Haack that these two instructions, read together, would allow the jury to convict based on splitting the elements of the crime between Haack and his brother, such is not an incorrect statement of the law of accomplice liability.” Id. The Court affirmed Haack’s conviction. Id. at 441. In short, Haack does nothing to impugn the legitimacy of the “to-convict” instructions at issue here.

2. The Legislature explicitly provides that one party may be liable for the conduct of another.

The idea that a person acting as a principal can be held accountable for actions undertaken by another person under his control is hardly revolutionary or even unusual. It is a principle so fundamental and ingrained in the framework of crime and punishment

that any attempts to distance the principal from the culpable act have been soundly rebuffed by our highest Court as follows:

[W]e have made clear the emptiness of any distinction between principal and accomplice liability...The legislature has said that anyone who participates in the commission of a crime is guilty of the crime and should be charged as a principal, regardless of the degree or nature of his participation. Whether he holds the gun, holds the victim, keeps a lookout, stands by ready to help the assailant, or aids in some other way, he is a participant. The elements of the crime remain the same.

State v. McDonald, 138 Wn. 2d 680, 688, 981 P. 2d 443 (1999); *citing* Carothers, 84 Wn.2d at 264. While the theory of accomplice liability presented by the State in this matter is not the one most frequently employed, it is nonetheless as viable as any of the others allowed for by RCW 9A.08.020. Any claim that the State invaded legislative prerogative and created a new crime is therefore as empty as the distinction sought to be created in this matter between Appellant and the children he directed to commit the offenses listed in counts two, three, and five.

Appellant makes much of the fact that the State's theory of accomplice liability fell under the prong of RCW 9A.08.020 that defines culpability for the principal when he causes an innocent or irresponsible person to engage in proscribed conduct.<sup>1</sup> RCW

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<sup>1</sup> A person is legally accountable for the conduct of another person when:  
(a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct.  
RCW 9A.08.020.

9A.08.020(2)(a). In Appellant's view, if an instrument used to commit a crime is not chargeable, then the person who wields the instrument is not chargeable absent express permission by the Legislature. This position defies both logic and the clear wording of the applicable statute. By inviting the Court to manipulate the unambiguous meaning of RCW 9A.08.020(2)(a), Appellant is asking this Court to disregard the core principles of statutory construction:

To determine the meaning of a statute, courts apply the general rules of statutory construction to ascertain and carry out the intent of the Legislature. If the language of a statute is clear on its face, courts must give effect to its plain meaning and should assume the Legislature means exactly what it says. If a statute is unambiguous, its meaning must be derived from the wording of the statute itself. A statute that is clear on its face is not subject to judicial interpretation.

State v. Chapman, 102 Wn.2d 436, 450, 998 P.2d 282 (2000).

Applying the above rules to the appropriate prong of RCW 9A.08.020 yields a clear-cut path for the State in seeking to hold Appellant responsible for his conduct. It also illustrates the flaw in Appellant's argument that the accomplice must be found to have committed a crime in order for the principal to be accountable.

The jury was instructed that legal accountability in this context meant that, "[A]cting with the kind of culpability that is sufficient for the commission of a crime, [Appellant] caused an *innocent* or *irresponsible* person to engage in such conduct." CP 143 (emphasis added). This language is taken from—and is identical to—the statutory

definition of legal accountability provided for in RCW 9A.08.020(2)(a). Appellant has not taken issue on appeal with the jury's determination that he was legally accountable for the actions of his children. Any factual finding that is not challenged is treated as a verity on appeal. See State v. Neeley, 113 Wn.App. 100, 105, 52 P.3d 539 (Div. 3, 2002). It is therefore a verity that Appellant acted with the kind of culpability sufficient for the commission of rape of a child in the first degree and incest in counts two, three and five. Similarly, it is a verity that Appellant caused his children to have sexual intercourse with each other. As long as it amounts to a criminal act for Appellant to force a young child to have sexual intercourse, then, he is guilty of the offense whether or not any part of his body was used.

For further clarification, the United States Code mirrors Washington's standard for determining the criminal responsibility of a principal for the acts committed by an innocent using the following language:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

***(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.***

18 U.S.C.A. §2 (Emphasis added). This has been interpreted to mean that "[A] person who causes an innocent party to commit an act

which, if done with the requisite intent, would constitute an offense may be found guilty as a principal even though he personally did not commit the criminal act.” U.S. v. Gleason, 616 F.2d 2, 20 (2<sup>nd</sup>. Cir. 1979), *cert. denied by Gleason v. U.S.*, 444 U.S. 1082, 100 S. Ct. 1037 (1980). Contrary to Appellant’s assertions, it takes little ingenuity to calculate that a criminal act conceived of and orchestrated by a person to satisfy his own ends can and should be grounds to hold that person legally accountable.

3. The fact that the children who were commanded to engage in sexual intercourse by Appellant were not, themselves, committing an act that satisfies all elements of rape of a child in the first degree does nothing to obviate Appellant’s culpability.

In the present case, the State readily concedes that K.B. and P.B. themselves committed no criminal act when they engaged in sexual intercourse with each other. Moreover, as to counts two, three and five, the State has never alleged that Appellant used any appendage of his own to perpetrate the offenses charged. The principle of liability upon which Appellant was charged and convicted in those counts makes clear that, even though the person committing the physical act of the crime is an innocent, the person manipulating the innocent is as guilty as he would be if he himself committed the physical act.

Appellant’s argument centers on his belief that, since the

instruments he used to carry out the crimes in counts two and three were not of the proper age disparity with regard to each respective victim, that no crime was committed. As discussed above, however, the plain language of RCW 9A.08.020(2)(a) states that the instrument that carries out the culpable act need not be guilty of or responsible for any wrongdoing.

Appellant vaguely cites to State v. B.J.S., 72 Wn. App. 368, 864 P.2d 432 (Div. 3, 1994) in an apparent attempt to bolster the claim that an older person cannot be convicted for a sexual act that he or she causes two young children to perform. In fact, to the extent that B.J.S. can offer useful precedent, it would appear to support the exact opposite conclusion.<sup>2</sup> B.J.S. did indeed involve a thirteen year old who caused three year old children to perform sex acts on each other. B.J.S., 72 Wn.App. at 369. In reviewing the findings of fact, however, the Court noted that “Although the trial court did not find BJS personally touched the victims, she could still be found guilty of the crime.” Id. at 371. The Court went on to cite to RCW 9A.08.020(2)(a) in support of that conclusion. Id. at 372. It is true, as Appellant notes, that a subsequent statutory change added an explicit caveat that child molestation could also be committed by a person

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<sup>2</sup>It should be noted that B.J.S. was abrogated on grounds that are not relevant to the present matter by State v. Lorenz, 152 Wn.2d 22, 30, 93 P.3d 133 (2004).

who causes two children to engage in sexual contact. However, that language was clearly not needed at the time of the B.J.S. decision in order for the State to prevail on this theory of criminal responsibility.

In amending the language of the child molestation statute in 1994, the Legislature made the propriety of the State's course of action in this matter even more apparent. The changes alluded to by Appellant and described above were prefaced with the following statement:

The legislature hereby **reaffirms** its desire to protect the children of Washington from sexual abuse and further **reaffirms** its condemnation of child sexual abuse that takes the form of causing one child to engage in sexual contact with another child for the sexual gratification of the one causing such activities to take place.

271 Wa. Legis. §301 (1994) (emphasis added). If it were not clear enough by the plain language of the statutes at issue that Appellant was properly charged and convicted, the Legislature went a step further with this language in clarifying its intent on child sexual abuse crimes. In so doing, it specifically condemned the argument currently being advanced by Appellant.

The principle of liability advocated by the State in this case has been used successfully in other matters as well. State v. Parmelee, 108 Wn.App. 702, 32 P. 3d 1029 (Div. 1, 2001) dealt with a factual scenario that was conceptually identical to the present circumstance. In that matter, the Defendant encouraged inmates at a correctional

facility where he was incarcerated to write sexually explicit letters to his ex-wife. Parmelee, 108 Wn.App. at 706. In so doing, the Defendant went so far as to circulate a flyer containing his ex-wife's personal information, and stating that she desired to receive such correspondence, along with photographs and solicitations for responses. Id. Ultimately, Defendant was charged with and convicted of felony stalking and for several violations of the protective order that had been earlier entered against him. Id. at 704. On appeal, it was never suggested by either party or the Court that the Defendant was wrongfully prosecuted because he enlisted innocent people to commit his crime for him. Neither was it suggested that the inmates who wrote the letters to the Defendant's ex-wife committed any act for which they could—or should—be prosecuted. Nevertheless, the stalking conviction was upheld. Id. at 711.

As has been clearly demonstrated above, statutory law, common law, and legislative intent support the State's theory of Appellant's criminal responsibility. What has not been fully addressed to this point, however, is the rather offensive suggestion by Appellant that using a young child as an instrument to commit a rape of another young child is a lesser crime than if the rape were committed using an inanimate object. In attempting to arrive at some skewed interpretation of the Legislative intent behind RCW 9A.08.020, Appellant has asked the Court not only to disregard the law and

sound legal principle, but also to cast aside common sense and logic.

According to the sentencing guidelines, under which higher level offenses are punished more severely, rape of a child in the first degree is defined as a level twelve offense. RCW 9.94A.525(16). Child molestation in the first degree, which appellant urges was the appropriate offense to charge, is a level ten offense. Id. Presumably, had Appellant inserted a kitchen utensil into the vagina or anus of one of his young children, he would not be before this Court arguing that the kitchen utensil was incapable of committing the crime of rape of a child in the first degree and therefore neither was he. Incredibly, Appellant's choice to create a second victim by using another young child in lieu of a kitchen utensil to commit child rape is now invoked by him in an attempt to avoid responsibility for the act. The greatest irony of all is Appellant's characterization of the State's theory as creative and "critically flawed."

B.J.S., Parmelee, and the present case all bear the common factual thread of an offender who employs the innocent to do his or her bidding. As between the person carrying out the act and the victim, there exists no criminal responsibility. Nevertheless, in the cited cases, criminal responsibility was properly found with the offender who caused the act just the same as it would have if the offender personally carried out the act. The present facts offer no basis to deviate from this pattern. Because no support exists in

statutory law, common law, or common sense to aid Appellant's contrary argument, this Court should reject it out of hand.

4. No unanimity instruction was required, because although the State presented evidence of alternative means of commission of the offense, the State did not allege multiple acts.

Appellant urges this Court to find error with the verdicts in counts one (rape of a child in the first degree) and four (incest in the first degree) based upon his contention that a unanimity instruction was required. In support of this argument, Appellant cites, inter alia, to an excerpt of the Washington Supreme Court's decision in State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). Appellant fails, however, to provide a complete picture of the Court's rationale in Kitchen. As a result, the portions of the Court's reasoning that apply to the present circumstances are not mentioned in Appellant's brief.

To better apply Kitchen and the line of related cases before and after it, an examination of the factual basis for Appellant's argument is needed. Appellant refers to the portion of P.B.'s testimony where he described the sexual activity that he was forced to engage in with Appellant. See RP 156-161. In relevant part, P.B. testified as follows:

Q. [State's attorney] Did [Appellant] ever order you to do anything that made you feel uncomfortable?

A. [P.B.] Yes.

Q. Did you do what he asked you to do?

A. Ah, he didn't ask me, he told me to, and yes.

Q. You did do it? All right. I am going to – I am going to have to ask you point blank, what was it?

A. (Pause) It's hard to answer.

Q. I understand

A. He made me suck his privates.

...

Q. Did your dad ever, ah, do anything with you, other – with his penis, other than just make you suck on it?

A. Yes.

Q. What did he do?

A. (Pause) He stuck his finger in my butt.

RP 156-157, 159. Appellant takes exception to the fact that the testimony offered by P.B. contained more than one means of committing the offenses listed in counts one and four. In his view, since oral sex and anal penetration are both legally defined methods of sexual intercourse, the jury needed to be instructed to find one or the other unanimously before they could declare a proper verdict.

Kitchen consisted of three related cases which were consolidated before the Supreme Court. Kitchen, 110 Wn.2d at 405. Two of the cases—involving defendants James Kitchen and Albert Coburn—were similar enough in relevant facts to warrant the same analysis. Id. at 409. It is from this analysis that Appellant borrowed the language quoted in his brief. Understanding the parallels in these two and how they differ from the facts currently before this Court is critical. With such an understanding, it becomes easy to see how the standard cited to by Appellant is clearly inapplicable to the present circumstances.

For Kitchen, who was charged with Rape of a Child in the

Second Degree for actions against his daughter, the relevant facts were as follows:

The victim described in detail the place and circumstances surrounding several incidents that could constitute the crime charged, but was not always certain as to exact dates. The defense introduced evidence of several past contradictory statements made by the victim, in which she stated that the allegations against her father were fabricated. The jury also heard testimony from witnesses testifying generally to Mr. Kitchen's and his daughter's character and reputation, and to circumstances and conversations surrounding and following the alleged acts.

Id. at 406-407. Coburn, on the other hand, had been charged with several counts of indecent liberties arising out of actions he took against a number of children:

The complaining witness in count 1 testified that Mr. Coburn touched her "private spot" with his hands and tongue on 5 to 10 separate occasions. Other witnesses testified to circumstances surrounding several of the alleged incidents. For example, a cousin refuted the victim's testimony that Mr. Coburn also tried to touch the cousin. The complaining witness in count 3 testified that Mr. Coburn touched her "private spot" on more than one occasion. Her testimony was impeached by statements made in a prior interview wherein she asserted that Mr. Coburn only touched the outside of her clothing and her breasts. Other witnesses offered alternative reasons why the victim was upset at those times Mr. Coburn allegedly touched her; for example, one witness explained that the victim was upset because she feared that her grandfather would fall from a footstool. Mr. Coburn denied both victims' allegations, and the jury heard testimony pertaining to his reputation in the community for truth, veracity and good morals.

Id. at 407. The Court determined that reversal of both Kitchen's and Coburn's convictions was appropriate, since there were clear

distinctions between the acts alleged by the State to have been committed by each of the defendants, as well as conflicting testimony by witnesses concerning certain aspects of those incidents. Id. at 412. As the Court noted:

[S]ome jurors may have based their verdict in State v. Albert Coburn on the testimony of the complaining witness in count 1 that Mr. Coburn touched her and attempted to touch her cousin when they were in the woods, while others may have based their decision on incidents that allegedly took place in the bedroom. Some jurors may have believed that Mr. Coburn touched the complaining witness in count 3 on the night she became upset while others determined that she was upset that night for other reasons, relying upon another act as basis for their verdict. Similarly, a reasonable juror could have doubted the Kitchen complaining witness' testimony that incidents occurred in a shower and believed that only those acts before school in the trailer actually occurred.

Id. The Court further stated that constitutional error exists if no unanimity instruction is given in cases where multiple distinct acts are alleged to bolster one count, as long as any one of them could end in a conviction for the single crime charged. Id. at 409. "The error stems from the possibility that some jurors may have relied on one act or incident and some another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction." Id. at 411. Therefore, in so-called "multiple acts" cases, the unanimity instruction called for by Appellant is indeed required. Id.; see also State v. Loehner, 42 Wn.App. 408, 711 P.2d 377 (Div. 1, 1985) (Defendant was charged with one count of rape of a child in the second degree, supported by

testimony concerning “five or six” instances of sexual abuse at distinct times and places, carried out in different fashions, while in the presence of different witnesses who testified); State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984) (Numerous distinct instances of sexual abuse rolled into one count and described by witness in “varying detail”).

The standard used in “multiple acts” cases is very different from the standard that applies in circumstances like those presented here. Appellant’s assignment of error is based entirely on the fact that P.B. testified about two different ways in which Appellant abused him. Appellant would have this Court believe that P.B.’s testimony about Appellant inserting a finger into P.B.’s rectum while also forcing P.B. to perform fellatio on him equates to separate and distinct acts in the same vein as in the cases discussed above. However, as clear and consistent as Washington’s appellate courts have been in dealing with “multiple acts” cases, they have been at least equally clear in differentiating them from “alternative means” cases such as this one.

Nowhere is the above illustrated more clearly than in State v. Whitney, 108 Wn.2d 506, 739 P.2d 1150 (1987). In Whitney, the defendant was convicted of first degree rape after the jury heard evidence of two alternate means by which the defendant could have committed the offense. Whitney, 108 Wn.2d at 507. The jury was instructed that, in order to convict the defendant of the offense, “it

must find beyond a reasonable doubt “the defendant used or threatened to use a deadly weapon or kidnapped the victim.” Id. The jury was given the general instruction that any verdict it reached would need to be unanimous, but was not given an instruction that required it to be unanimous in finding one of the above-listed alternative means of committing the offense. Id.

The Supreme Court affirmed the conviction in Whitney. Id. at 512. In so doing, the Court determined that “both of the charged alternative means are supported by substantial evidence such that any jury could find guilt beyond a reasonable doubt.” Id. at 512. The Court went on to state that a special unanimity instruction could be useful in cases where one of the alternative means was not supported by substantial evidence; however, “in light of the general instruction on jury unanimity, it is idle to speculate that there is any possibility that the verdict or the underlying predicate finding was less than unanimous.” Id. The principle set forth in Whitney was re-stated in Kitchen:

In an “alternative means” case, where a single offense may be committed in more than one way, there must be jury unanimity as to guilt for the single crime charged. Unanimity is not required, however, as to the means by which the crime was committed so long as substantial evidence supports each alternative means (citations omitted). ***In reviewing an “alternative means” case, the court must determine whether a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt.***

Kitchen, 110 Wn.2d at 410-411 (emphasis added); *citing State v. Franco*, 96 Wn.2d 816, 823, 639 P.2d 1320 (1982). To summarize, a special unanimity instruction in "multiple acts" cases is a matter of constitutional necessity. In "alternative means" cases, on the other hand, no such instruction is needed so long as there is substantial evidence to support each of the alternatives in evidence.

Given the very different approach taken by the Court in "alternative means" as opposed to "multiple acts" cases, the question of how to differentiate between the two is of paramount importance. A four-part analysis has been offered by the Court to aid in proper classification:

[1] the title of the act; [2] whether there is a readily perceivable connection between the various acts set forth; [3] whether the acts are consistent with and not repugnant to each other; [4] and whether the acts may inhere in the same transaction.

Whitney, 108 Wn.2d at 510; *citing State v. Arndt*, 87 Wn.2d 374, 379, 553 P.2d 1328 (1976). In applying these factors to the present case, it becomes clear that the methods of sexual intercourse engaged in by Appellant with P.B. represent alternative means rather than multiple acts.

RCW 9A.44.073 is titled "Rape of a child in the first degree." It proscribes only sexual intercourse between a person under the age of twelve and a person greater than 24 months older. RCW 9A.44.073. RCW 9A.64.020 is titled "Incest," and RCW 9A.64.020(1)

describes incest in the first degree, the offense listed in count four of this matter. RCW 9A.64.020. As with rape, sexual intercourse is a prerequisite of incest in the first degree. Sexual intercourse is defined, in relevant part, as "any penetration of the vagina or anus, however slight...and [a]lso means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another." RCW 9A.44.010(1). Although in reference to the broader crime of first degree rape, the Court of Appeals noted in Whitney that "This title is evidence that the statute proscribes a single crime, rape, which may be committed by one or more of the specified statutory alternative means." State v. Whitney, 44 Wn.App. 17, 24, 720 P.2d 853 (Div. 1, 1986). The different methods of sexual intercourse engaged in by Appellant merely amount to sub-categories within the definition of that term. Therefore, the titles at issue clearly support classification of this as an "alternative means" case.

The Court of Appeals in Whitney went on to state, in reference to the second prong of the test, that "the readily perceivable connection between the acts [of use of a deadly weapon or kidnapping] is a common object: having unlawful sexual intercourse, though with different accompanying circumstances." Id. The Court arrived at this conclusion despite the fact that the first degree rape statute could yield greater or lesser degrees of punishment depending upon which underlying circumstances were proved. Id. Clearly, this

is a far more liberal construction of the second prong of the “alternative means” test than would be necessary in the present case. Unlike rape in the first degree, there are no statutory alternative means of committing rape of a child in the first degree or incest in the first degree. Both are complete only when sexual intercourse is achieved by two persons of the age disparity or blood relationship provided for in the respective statutes. As with the first degree rape statute at issue in Whitney, the common evil sought to be avoided in the statutes that formed the basis for counts one and four is unlawful sexual intercourse, regardless of which method of sexual intercourse applies. Therefore, since the second prong of the “alternative means” test was satisfied in Whitney, there can be no question that it was satisfied here.

In order to determine whether the different actions are consistent with-and not repugnant to-each other pursuant to the third prong of the test, the Court must determine whether proof of commission of the crime by one means necessarily disproves commission of the crime by another means. Id.; see *also* State v. Orsborn, 28 Wn.App. 111, 117, 626 P.2d 980 (Div. 1, 1980). Needless to say, sexual intercourse committed by penetration of the victim's anus does nothing to disprove sexual intercourse committed by forcing the victim to perform fellatio on the assailant, and vice versa. Consequently, the third prong is also satisfied.

Finally, since both of the above-described methods of sexual intercourse can take place within the same transaction, the fourth prong of the “alternative means” test suggests that no special unanimity instruction was needed in this case. Whitney, 44 Wn.App. at 24-25. Again, this concept is bolstered by Whitney in its conclusion that use of a deadly weapon and kidnapping could occur within the same transaction. Id. Given the above analysis, it is clearly proper to consider the present case as an “alternative means” rather than a “multiple acts” case as to both counts one and four.

The sole remaining question for this Court to consider, in view of the above, is whether substantial evidence supports each alternative means of sexual intercourse described to the jury in this matter relative to the offenses charged in counts one and four. In consulting the verbatim report of proceedings, it is not difficult to ascertain where the jury found the basis to believe that Appellant committed the crimes, since the only evidence that related to them came from P.B.'s testimony. See RP 145-187. Appellant made no effort to distinguish between either of the alternative suggested means of sexual intercourse, or to offer any competing factual scenario that might have made the existence of one of the alternatives more or less likely than the other. It follows that the strength of the evidence offered to support sexual intercourse by way of fellatio between Appellant and P.B. is equal to the strength of the

evidence supporting Appellant's insertion of a finger into P.B.'s rectum. In light of that, and of the jury's verdict, it must therefore be concluded that substantial evidence supported both of the alternatives mentioned.

5. The actions alleged by the State were proved to have taken place within the charging period.

Appellant claims that there was testimony indicating that one or more of the criminal acts “may have occurred outside of the charging period.” Brief of Appellant, p. 25. It is also claimed that the State did not establish when the family lived at the Appleside address in Clarkston, which is where P.B. testified about being sexually abused. See RP 151, 159. In fact, a closer review of the record makes it evident that all of the acts for which Appellant was convicted fell within the time periods specified in the to-convict instructions, including the actions perpetrated against P.B..

As a preliminary matter, it should be noted that the jury's factual findings must be given great deference. “The standard for appellate review of a jury's finding is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” State v. Jeffries, 105 Wn.2d 398, 407, 717 P.2d 722 (1986) (citations omitted). “When the sufficiency of the

evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Id. In light of this standard, it must be determined whether, in a light most favorable to the State, the jury could have reasonably drawn the inference that all incidents charged took place within the charging period.

Appellant claims that P.B. testified that the acts occurred between the time that he was five and seven years old. This is a drastic distortion of P.B.'s testimony. The relevant testimony was as follows:

Q. [State's attorney] Do you remember the first time that [Appellant] made you suck his penis?

A. [P.B.] I think I was five or six.

Q. Five or six? When was—how old were you the last time?

A. Eight.

Q. Eight years old?

A. Wait; seven.

Q. Seven?

A. A little bit, or seven.

Q. How close was the last time, to the day that you stopped living with the man?

A. Hum, it was November.

Q. November? That would have been—do you remember how many years ago that November was?

A. A year—wait. Two years.

Q. Two years ago?

A. Uh-huh.

Q. So it was November two years ago was the last time

you had to do that?

A. Yes.

RP 158-159. P.B. testified on August 29, 2006 that the last time he was sexually abused by Appellant was November of 2004. He also testified that his date of birth is June 4, 1996. RP 146. Therefore, as the record clearly establishes, the sexual abuse ended when P.B. was eight years old, not seven. P.B., as a young child, clearly struggled in differentiating events and setting out any distinctions between times that sexual abuse incidents took place.<sup>3</sup> However, he was able to state that it took place between the time when he was five or six (the charging period begins on P.B.'s 6<sup>th</sup> birthday, so the term "five or six" is actually quite accurate), and the time that Appellant was arrested, which was independently confirmed to have taken place in November of 2004. See, e.g., RP 229. Moreover, as the above illustrates, P.B. was more adept at relating events to circumstances that were present in his life at the time than he was at clearly stating what his age was at those times.<sup>4</sup> Nevertheless, what P.B. was able to offer allowed the jury to develop a clear understanding of the time frame in which the abuse took place, and find beyond a reasonable doubt that Appellant committed the acts between June 4, 2002 and November

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<sup>3</sup>See the discussion concerning "alternative means" versus "multiple acts", *Supra*, for the differing review of cases in which specific factual distinctions exist between events.

<sup>4</sup>The jury was offered an explanation for this phenomenon in children by Karen Winston, the State's expert on forensic interviews of child victims of sexual assault. See RP 377-380.

11, 2004. In drawing all reasonable inferences to be gathered from the testimony in favor of the State, it is self-evident that this jury conclusion should not be disturbed.

Appellant also claims that the State failed to establish exactly when he and his family resided at the Appleside address where P.B. testified that the abuse took place. This is simply incorrect. Detective Tom White, the primary law enforcement officer involved in the investigation, provided testimony that confirmed that the family resided at the Appleside Boulevard address during the time period of June 2002 and November 2004:

Q. [State's attorney] So, you indicated that you were familiar with the kids, you were familiar with the defendant. Ah, do you know where they were living between June 4, 2002 and November 11, 2004?

A. [Detective White] Yes, they were living on Appleside Boulevard in a trailer, in Clarkston, Washington, which is in Asotin County.

Q. How do you know they were living there?

A. I checked several sources to confirm this. I checked our—our computer records at the sheriff's office, which could indicate, whenever there had been a call made from that residence, whether it's for them making a complaint or something, ah, maybe complaining about something, or anytime that somebody is called in, a computer would log where that person lives.

RP 122. Detective White went on to testify that the Department of Social and Health Services records could also confirm generally that the family had resided in Asotin County continuously throughout that time period. Id. Again, drawing all reasonable inferences to be gathered from this in favor of the State, the jury's conclusion is clearly

supported and should not be disturbed.

In summary, although Appellant has inferred that either the finger insertion or the oral sex may have taken place outside of the period charged, he ignores the standard by which any such second-guessing must be scrutinized. Because the jury found beyond a reasonable doubt that the incidents took place within the charging period specified in the to-convict instructions, Appellant does not get the benefit of inferences drawn from any supposed factual ambiguities—the State does.

6. Appellant has not properly preserved any issue for appeal with respect to his right to speedy trial; moreover, no violation of the applicable 90 day time for trial took place.

Appellant asserts that his right to a speedy trial was violated and that the matter should, therefore, be reversed and remanded for dismissal with prejudice. In so stating, Appellant points to the Superior Court Rules (Criminal) as well as to a number of cases. Appellant fails, however, to address the threshold issue of whether this matter can be argued for the first time on appeal, since no such objection was made at the trial level. Because the issue cannot be raised for the first time on appeal, Appellant's arguments are moot.

In order to legitimately ask for dismissal on the grounds of an alleged violation of Appellant's right to a speedy trial, Appellant must not only object at the trial level, but must do so within a specified time.

“Washington courts have established an outer time limit for objections on speedy trial grounds: a known speedy trial violation must be objected to before the speedy trial period expires to avoid violation of the rule or it is deemed waived.” State v. Malone, 72 Wn. App 429, 433, 864 P.2d 990 (Div. 1, 1994); *citing* State v. Becerra, 66 Wn.App. 202, 831 P.2d 781(Div. 3, 1992). At no time did Appellant make any such objection, let alone before the expiration of the applicable time period.

Incidentally, Appellant has failed to fully inform himself as to the applicability of the time for trial rule with regard to one situated as he was while awaiting trial in this matter. Appellant was serving a sentence of 102 months in prison based on a conviction in October of 2005 when he was charged with the offenses in this matter. See RP 4 & 6. Washington law is clear that “An individual who is serving a sentence on an earlier conviction is not ‘unable to obtain pretrial release’ under CrR 3.3 because of the pendency of current criminal charges.” State v. Nelson, 26 Wn.App. 612, 616, 613 P.2d 1204 (Div. 2, 1980) (*citing* State v. O’Neil, 14 Wn.App. 175, 540 P.2d 478 (Div. 2, 1975). “The purpose of that rule is to give persons taken from freedom...precedence on the criminal docket over persons released on bail or otherwise legally at large.” State v. Keith, 86 Wn.2d 229, 232, 543 P.2d 235 (1976). As such, Appellant “is entitled only to be tried within 90 days from the date of the preliminary appearance.”

Nelson, 26 Wn.App at 616. In light of the accurate time for trial period of 90 days, Appellant's arguments would fall apart even if the objection had been properly preserved for appeal and/or he was able to convince this Court to find ineffective assistance of trial counsel.<sup>5</sup>

7. Even if a violation of Appellant's right to a speedy trial were found to have occurred, Appellant has shown no actual prejudice from his counsel's failure to act in accordance with CrR 3.3, and therefore cannot prevail under a theory of ineffective assistance of counsel.

Appellant has gone a step further in arguing ineffective assistance of counsel because of his attorney's failure to move for dismissal of the case at trial for want of compliance with the speedy trial rule. Assuming for the moment that Appellant was inexcusably beyond the expiration of his time for trial as of August 29, 2006—and that defense counsel was ineffective in failing to protect Appellant's right to a speedy trial—there still exists no basis on which to order reversal of the conviction and dismissal as Appellant suggests.

In order to obtain the relief Appellant requests on the grounds of ineffective assistance of counsel, "The defendant must satisfy two elements...First, the defendant must show that counsel's performance was deficient by showing that counsel's conduct fell below an

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<sup>5</sup> In response to Appellant's complaint that he was not given a trial date within fifteen days of arraignment, it should be noted that he filed an affidavit of prejudice to disqualify the sitting judge less than two weeks after he was arraigned, leaving no judge to accomplish this feat.

objective standard of reasonableness.” Malone, 72 Wn.App. at 437-438; *citing* Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052 (1984). If Appellant can successfully persuade the Court as to the first element, Appellant must still satisfy the second before any appellate relief is appropriate:

[T]he defendant must show that counsel’s deficient performance resulted in prejudice by showing that there is a reasonable probability that, but for counsel’s unprofessional errors, the outcome of the proceeding would have been different.

Malone, 72 Wn.App at 438. Appellant concludes that, had counsel’s conduct been objectively reasonable, he would have moved to dismiss on the day of trial rather than subjecting his client to the jeopardy of being convicted of a crime outside of the time period provided in CrR 3.3. As the applicable case law makes clear, there is a glaring flaw in this logic.

In Malone, defendant was brought to trial after the time for trial in his case had expired. Id. at 431-434. His attorney failed in her duty under former CrR 3.3(f)(1) [now CrR 3.3(d)(3)] to object to the trial date being outside the acceptable term within the allotted ten (10) days. Id. at 433. The defendant’s attorney also failed in her duty to object to the trial before the expiration of the speedy trial term (see above). Id. The first objection to the trial date came at the pre-trial hearing, after the time for trial had elapsed. Id. at 432. The trial court’s decision to deny defendant’s motion to dismiss for ineffective

assistance of counsel was affirmed by the Court of Appeals, which stated as follows:

We hold that, as part of protecting a client's speedy trial rights, defense counsel has an affirmative duty to investigate those easily ascertainable facts that are relevant to setting the trial date within the speedy trial period. If an untimely speedy trial objection is made because of the failure to discover such easily ascertainable facts, it will be deemed waived.

Id. at 435. In so stating, the Court determined that the ineffective assistance occurred when counsel failed, within the speedy trial time, to object to the trial date. Based on that analysis, the decision went on to explicitly reject the argument that Appellant is making in this matter:

Malone has failed to prove actual prejudice from counsel's inadvertent waiver of the right to object to the speedy trial violation. A timely objection would not have changed the result. Instead of dismissing the charges because of the speedy trial violation, the court would have merely reset the trial date within the speedy trial period. Thus, the trial court correctly determined that Malone was not denied effective assistance of counsel.

Id. at 438. Appellant has made no showing of any actual prejudice resulting from the trial taking place on August 29, 2006 as opposed to being held on or before April 24, 2006, which Appellant contends was the expiration date. Therefore, he cannot prevail on a claim of ineffective assistance of counsel.

It bears mentioning in addition to the above that the record clearly supports the notion that Appellant's trial counsel provided a

competent defense. While he did move the trial court for a continuance, his purpose in doing so was to consult an expert witness and prepare competent testimony designed to indirectly challenge the credibility of the State's primary witnesses. This was done in order to offer some semblance of a defense in lieu of putting Appellant—a violent felon who had a prior conviction for torturing his children—on the stand to testify. Such a strategic decision is hardly indicative of ineffective assistance of counsel.

8. Appellant received timely and proper notice of the State's intent to seek an exceptional sentence.

Despite Appellant's claim that he was not notified that the State would seek an exceptional sentence in the event of a conviction, the case file clearly states otherwise. On September 21, 2006, the State filed a declaration of Michael G. Sanders which stated, under penalty of perjury, that a letter had been composed and sent to defense counsel on November 30, 2005 notifying him that the State would seek an exceptional sentence after trial. CP 167-168. At the time of sentencing, defense counsel claimed not to have been given notice before trial of the State's intent to seek an exceptional sentence, whereupon the State responded by referring to the declaration and offering to produce the letter and former defense counsel's response, indicating that the notice had been handed to Appellant. RP Vol. 17

8-9, 17-18. Defense counsel, despite being given an opportunity to respond, did not offer any further argument. Notice was given almost a full year before the matter went to trial, and the case file as well as the record of proceedings confirm it; as such, any claim by Appellant to the contrary is frivolous.

9. Grounds for an exceptional sentence could be determined by a judge at sentencing under RCW 9.94A.712.

As discussed in the State's Sentencing Memorandum, the case law clearly supports judicial findings of any statutory aggravating factors in matters sentenced under RCW 9.94A.712. The fact of a legislative change that allowed for a procedure to seek exceptional sentences in non-RCW 9.94A.712 matters (otherwise known as the "Blakely fix") was discussed at sentencing. RP Vol. 17 8-11, 16-17; See also Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, (2004). However, the sentencing court here decided that the case law bearing on exceptional sentences, ordered after aggravating factors other than "free crimes" were found by the judge in imposing indeterminate sentences, was still valid. RP Vol. 17 29-30; see also CP 178-212; State v. Borboa, 157 Wn.2d 108, 135 P.3d 469 (2006); State v. Clarke, 156 Wn.2d 880, 890-893, 134 P.3d 188 (2006).

Even if one could argue that the language of the "Blakely fix" could be interpreted to preempt the State from seeking judicial

findings to support exceptional sentences in RCW 9.94A.712 matters, the Legislature made clear that this interpretation would not be consistent with its intent. In the testimony supporting the fix before the Legislature during the 2005 Regular Session, the following argument was heard:

This limited procedural fix addresses the small number of very serious cases effected by the Blakely decision. The Blakely decision had a minor impact on Washington, so a targeted statutory fix is all that is required.

WA S.B. Rep., S.B. 5477 (2005 Reg. Sess.). Clearly, the Legislature never intended to strip the power of a sentencing judge to impose an exceptional sentence in matters that were not affected by Blakely. Therefore, it would be improper to discard the logic behind the Supreme Court's decisions in Borboa and Clarke.

10. Even if the trial court improperly found other statutory aggravating factors, the fact that the exceptional sentence imposed would have been the same even if only "free crimes" were considered makes any such impropriety harmless error.

Appellant correctly notes that the sentencing judge, in any case, can make a determination of "free crimes" as an aggravating circumstance and impose an exceptional sentence on that basis. The only argument raised by Appellant that would apply to the "free crimes" aggravating factor herein dealt with the general issue of notice. As discussed above, sufficient notice was provided and

evidence of that notice can be found in the verbatim report as well as in the clerk's papers. Therefore, if it can be shown that the sentencing court would have imposed the same exceptional sentence based on free crimes alone, all of Appellant's arguments as to the other aggravating circumstances are moot.

The judgment and sentence in this matter contained an attachment labeled "Findings of Fact and Conclusions of Law for an Exceptional Sentence." CP 221. The judicial findings included the following:

Phillip J. Bobenhouse's criminal history, combined with multiple other current offenses, results in an offender score of 20 for purposes of sentencing in Counts One, Two and Three. The result is that there are eleven (11) points in Phillip J. Bobenhouse's score that would go unpunished if the minimum sentence were imposed within the highest sentence range provided for the offenses described in Counts One, Two and Three.

Id. This finding alone was sufficient for the court to impose life, with the exceptional minimum sentence of 600 months in counts one, two, and three, concurrent:

Any one of the above findings, standing on its own and irrespective of any other finding, is sufficient to support the exceptional minimum sentence imposed in Paragraph 4.5 of the Judgment and Sentence in the above-captioned cause.

Id. at 222. The sentencing court explicitly stated its finding that Appellant's "free crimes" alone were enough basis to impose the 600 month sentence referenced in paragraph 4.5 of the judgment and

sentence. See CP 216.

RCW 9.94A.585 governs appellate review of exceptional sentences. As applied, the statute resolves into a three-part analysis:

(1) whether the reasons given by the sentencing judge are supported by evidence in the record, under the clearly erroneous standard of review; (2) whether the reasons justify a departure from the standard range, under de novo review, as a matter of law; or (3) whether the sentence is clearly too excessive or too lenient, under the abuse of discretion standard of review.

State v. Ferguson, 142 Wn.2d 631, 646, 15 P.3d 1271 (2001). The sentencing court explicitly based the sentence on "free crimes," irrespective of any other finding. This finding was based on certified copies of Appellant's previous judgment and sentences which were attached to the State's sentencing memorandum, as well as on the calculation of Appellant's offender score resulting from other current offenses. CP 190, 200. As a result, Appellant's score was calculated as twenty (20), whereas the sentencing worksheet stops counting at nine (9). Clearly, evidence in the record supported a finding of free crimes.

A score that is more than twice the maximum amount contemplated by the sentencing grid justifies departure as a matter of law. Moreover, in consulting the sentencing data in this matter, it should be noted that Appellant had an offender score of eight (8) just from his criminal history before being convicted of the present charges. The addition of twelve (12) points by virtue of the other

current offenses that accompanied counts one, two and three, respectively, clearly warrants an exceptional sentence under the “free crimes” doctrine. Also for this reason, it cannot seriously be argued that sentencing substantially above the standard range in this matter amounted to an abuse of the sentencing judge’s discretion.<sup>6</sup>

State v. Brundage, 126 Wn.App. 55, 107 P.3d 742 (Div. 2, 2005) dealt with a scenario that is almost identical to the one presented here. Prior to the Supreme Court decisions in Borboa and Clarke, there was a split of authority on the issue of whether Blakely applied to matters sentenced under RCW 9.94A.712. Division Two held in Brundage that Blakely did apply, and in so doing ruled that the trial court’s factual determinations of other, non-“free crimes” aggravating factors were inappropriate without jury findings. Id. at 68. However, “[The sentencing] court explicitly noted that it would ‘impose the exact same sentence even if only one of the grounds listed ... were [sic] valid.’” Id. at 68. Since one of those grounds was “free crimes,” the Court engaged in the three-part analysis given above and determined that all of the prongs had been satisfied in favor of affirming the sentence imposed. Id. at 69. “Accordingly, the trial court’s imposition of an exceptional sentence was justified under the

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<sup>6</sup>Similarly, it is not an abuse of the sentencing judge’s discretion to have imposed a minimum of 600 months in light of the fact that all 20 of Appellant’s points derive from the atrocities committed by him against his family on different occasions.

'free crimes' doctrine." Id. The same result is supported here as well.

11. No two offenses for which Appellant was convicted can be considered "same criminal conduct" for offender scoring purposes.

Appellant argues that incest and rape of a child, if charged out of a single act, should be considered "same criminal conduct" for sentencing purposes. He supports this argument by citing to a case wherein child molestation and rape of a child were considered to be same criminal conduct. See Brief of Appellant, pp. 44-45; see also State v. Dolen, 83 Wn.App 361, 921 P.2d 590 (Div. 2, 1996). Appellant's reliance on Dolen is misplaced.

In order for two crimes to involve the same criminal conduct, it must be shown that the crimes involved the same criminal intent, same time and place, and same victim. State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The State does not dispute that the incest counts charged herein each corresponded to a single act of rape charged elsewhere, or that Appellant's objective criminal intent was the same for both incest and rape. However, same criminal conduct is not applicable unless it can be said that the victim of each offense is the same. State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). While that may be the case in child molestation cases where a child rape conviction results from the same act, the Washington Supreme Court has explicitly stated otherwise when

presented with the argument that incest and child rape should not be punished separately:

**In examining the legislative history of the rape and incest statutes we see no such evidence. *Rather, we find only support for our conclusion that the Legislature intended to punish incest and rape as separate offenses, even though committed by a single act. As the Court of Appeals noted, the differing purposes served by the incest and rape statutes, as well as their location in different chapters of the criminal code, are evidence of the Legislature's intent to punish them as separate offenses.***

State v. Calle, 125 Wn.2d 769, 888 P.2d 155 (1995). The crime of incest exists, inter alia, to prevent genetic mutation. See Id. at 781. For that reason, it can be committed by two consenting adults just the same as it can be committed in the manner carried out by Appellant against his children. Therefore, incest is properly regarded as a crime against society rather than as a crime against an individual. Since the victims were not the same in each count of rape of a child vis-à-vis its corresponding incest charge, the offenses were properly treated as separate criminal conduct for sentencing.

12. Appellant did not object to a no-contact order with the foster parents at sentencing; further, there is no statutory requirement that a community placement condition be crime related.

Errors claimed by a defendant for the first time on appeal are generally not considered. State v. Bullock, 71 Wn.2d 886, 894, 431

P.2d 195 (1967). RAP 2.5 contains limited exceptions to this rule, but Appellant fails to argue as to how any of those exceptions could be considered applicable. Therefore, this Court has been offered no basis upon which to disturb the no-contact order provisions listed in the judgment and sentence.

It should be noted, in addition, that the authority cited to by Appellant in support of this argument actually states the opposite of what Appellant appears to indicate. The portion of the decision just preceding the quote used by Appellant states as follows: "There is no statutory requirement that a special community placement condition imposed under [former] RCW 9.94A.120(8)(c) be crime-related."

## V. CONCLUSION

For the foregoing reasons, the Respondent, State of Washington, respectfully requests that this Court affirm the jury verdicts as well as the sentences imposed for all offenses against Appellant, Phillip J. Bobenhouse.

Dated this 31<sup>st</sup> day of August, 2007.

Respectfully submitted,



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