

83617-5

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

STATE OF WASHINGTON,  
Respondent,

v.

TYRONE D. FORD,  
Appellant.

NO. 37089-1-II

STATEMENT OF  
ADDITIONAL GROUNDS  
FOR REVIEW

(Pursuant to RAP 10.10)

I, TYRONE D. FORD, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits. A majority of the facts relevant to these additional grounds are set forth in my attorney's opening brief at 5-13 and the rest are set forth in the additional grounds below. For this Court's convenience, the multiple volumes of verbatim are referenced herein the same as my attorney's opening brief.

ADDITIONAL GROUND ONE

THE STATE'S AMENDMENT OF THE INFORMATION VIOLATED MR. FORD'S RIGHT TO DUE PROCESS AND RIGHT TO A JURY TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 21, & 22 OF OUR STATE CONSTITUTION.

In State v. Schaffer, 120 Wn.2d 616, 845 P.2d 281 (1993), our Supreme Court explained the standard for evaluating the state's amendment of an information:

CrR 2.1(e) allows amendments [of informations] which do not prejudice a defendant's 'substantial rights.'

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Because CrR 2.1(e) necessarily operates within the confines of article I, section 22, the possibility of amendment will vary in each case. For example, when a jury is involved and the amendment occurs late in the state's case, impermissible prejudice could become likely.

Schaffer, 120 Wn.2d at 621 (internal citations omitted).

Here, the initial information filed against Mr. Ford was, in relevant part, as follows:

COUNT 01 - RAPE OF A CHILD IN THE SECOND DEGREE - 9A.44.076  
That he, TYRONE DENTYROLL FORD, in the County of Clark, State of Washington, between September 1, 2006 and September 15, 2006, did have sexual intercourse with L.A.K., who was at least twelve years old but less than fourteen years old and not married to the defendant and the defendant was at least thirty-six months older than the victim; contrary to Revised Code of Washington 9A.44.076.

See CP 1. To support the second degree rape of a child charge the information correctly alleged that L.A.K. was at least twelve years old but less than fourteen, but because L.A.K. was born on September 10, 1992, (2RP 58; 3ARP 118; 3ARP 131), the time period charged (between September 1, 2006 and September 15, 2006) clearly included a 6 day period where L.A.K. was fourteen years old.

Thus, the original information named second degree rape of a child as the crime alleged in count 1, but almost half of the time frame alleged in the underlying allegations necessarily precluded the second degree rape of a child crime and only supported a third degree rape of a child charge. See RCW 9A.44.079(1): "A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old . . ."

While these two crimes can be separated by only a single day in time (depending on the child's birthday), the differences in punishment are worlds apart. First, third degree rape of a child is only a class C felony with a statutory maximum sentence of five years and, given the three offender score points Mr. Ford was sentenced with<sup>1</sup>, he faced a standard range sentence of 26-34 months. CP 50-51.

In contrast, second degree rape of a child is a class A felony. With the three offender score points, Mr. Ford faced an indeterminate sentence of a 124-136 minimum term and a maximum term of LIFE. CP 45, 47, 50; RCW 9.94A.712.

As for the timing of the amendment, it was not pretrial or even the day of trial, or even after a witness or two. The state waited all the way until halfway through defense counsel's cross examination of the state's final witness-L.A.K. herself. Even more compelling is the substance of the amendments to the information that the state made.

On Count I the state changed the time frame the rape was alleged to occur in from between September 1, 2006 and September 15, 2006 back to between August 9, 2006 and September 9, 2006. This was a clear effort to not only greatly extend the timeframe alleged, but to allege facts that only supported the second degree rape of a child. The prosecutor's explanation and subsequent objection by defense counsel were as follows:

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1. The three offender score points come from his convictions on each respective rape charge, when looking at the other one.

MR. HARVEY: -- Amended Information. And I guess that would probably be the -- perhaps was the thing Mr. --

THE COURT: Same charges. What's amended?

MR. HARVEY: The dates. If you noticed, Your Honor --

THE COURT: Oh, okay.

MR. HARVEY: I'll give you a brief explanation. Mr. Ladouceur and I, I think, came across this with a little less detail, but -- but that was pretty much meted out in our interview, that the -- when the information originally came in for charging, the understanding was in the -- in the narrative of the report that it was on her birthday. Her birthday was the 15th, and in a part of the narrative, of September, so that's why it was charged accordingly.

In this matter, the testimony was that, in fact, her birthday is the 10th of September, 1992, and therefore the filing by the State as to Count One, and most importantly conforms to the proof that the Court heard, which was she said that after the 8th of August, but sometime close to the 8th, and what we basically did was just put it right up against her birth date, with about a month open.

But I think it conforms to the proof.

Also, she gave us a span of 16 and 17 on the September dates, so we amended accordingly on that as to the second count.

I'll defer to counsel at this time.

MR. LADOUCEUR: Well, we'd register an objection to the filing of an Amended Information. This case has been active for months, and the date that's always been alleged in Count One was dates at a time in September, and then I think, as Mr. Harvey stated, at an interview, [L.A.K.] was unsure as to when that particular count or the activity referenced in that account occurred at all.

So, you know, it's put us in a difficult position preparing for trial based upon the information or that the dates alleged in the original information.

So, you know, we would object to a last-minute, you know, changing of the Information because, you know, now the alleged victim seems to remember when it happened. Before, she didn't.

3ARP 176-77.

"Cases involving amendment of the charging date in an information have held that the date is usually not a material element of the crime. Therefore amendment of the date is a matter of form rather than substance, and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant." State v. DeBolt, 61 Wn.App. 58, 61-62, 808 P.2d 794 (1991)(citations omitted).

Here, because the facts of this case circle around L.A.K.'s fourteenth birthday and the difference between second degree and third degree rape of a child is whether L.A.K. was 13 or 14 at the time of the first incident, the "dates" the offense was alleged to be committed between most definitely constitute a material element of the crime listed in Count I.

As stated in Schaffer, supra, "[i]t is for the trial court to judge each case on its facts, and reversal is required only upon a showing of abuse of discretion. Id. at 622 (citing State v. James, 108 Wn.2d 483, 490, 739 P.2d 699 (1987); State v. Wilson, 56 Wn.App. 63, 65, 782 P.2d 224 (1989) review denied, 114 Wn.2d 1010 (1990)). A trial court abuses its discretion when it acts on untenable grounds or its ruling is manifestly unreasonable. In re Detention of Broten, 130 Wn.App. 326, 336, 122 P.3d 942 (2005) (citing State v. Barnes, 85 Wn.App. 638, 669, 932 P.2d 669, review denied, 133 Wn.2d 1021 (1997)).

Here, the trial court allowed the state to amend the dates previously alleged with the most cursory of rulings:

THE COURT: Okay. The State is permitted to amend to make it conform with the evidence so far, so I will permit the amendment.

3ARP 177. While the defendant bears the burden of showing prejudice from a mid-trial amendment to an information, in evaluating prejudice, the court must determine if the defendant was misled or surprised. State v. Brown, 74 Wn.2d 799, 801, 447 P.2d 82 (1968).

Although defense counsel's "objection" could have been framed in much more detailed and specific terms, he did explain that it put the defense in a "difficult position". 3ARP 177. In response, the Court seemed to grant the state's request without any thought or consideration at all. Additionally, there are a couple of cases concerning a defendant's due process rights in relation to a crime alleged over a time span in which the offense and/or punishment changes.

First, in Stat v. Aho, 137 Wn.2d 736, 975 P.2d 512 (1999), the child molestation charge was alleged to occur between January 1987 and December 31, 1992 for "L" and between January 1987 and August 1995 for "M". The jury was not asked to identify when the acts giving rise to the child molestation convictions occurred. Thus, it was possible that Aho was convicted for an act occurring before the active date of the child molestation statute he was charged with--July 1988.

The Court held that Aho's child molestation convictions "cannot be upheld on the basis that as to conduct before July 1988 he actually committed indecent liberties. Under Const. article I, §22, a defendant has the right to be tried only for offenses charged." Aho, 137 Wn.2d at 744.

A similar ruling came in State v. Hartzell, 108 Wn.App. 934, 33 P.3d 1096 (2001). There, the Court held "[w]hen the sentence for a crime is increased during the period within which the crime was allegedly committed, and the evidence presented at trial indicates the crime was committed before the increase went into effect, the lesser sentence must be imposed." Hartzell, 108 Wn.App. at 945 (emphasis original) (citing State v. Parker, 132 Wn.2d 182, 191-92, 937 P.2d 525 (1997) (Where jury not asked to determine when offenses committed, and statute spanned charging period, application of standard range to offenses committed at end of charging period was erroneous)).

Although these cases deal with crime and ultimate sentence increases during the charging period, Mr. Ford asserts that the same law would apply to a crime and ultimate sentence decrease during the charging period-- either way, the lesser crime and sentence must be imposed. accord, Hartzell, supra.

If this case had gone to the jury on the original information and they were not asked to determine specifically when the offense alleged in Count I was committed, due process would mandate that Mr. Ford be sentenced for third degree rape of a child, not second degree. This was the information defense counsel was operating off of from the time the original information was filed until the middle of his cross examination of the State's final witness, and therein lies the extreme prejudice the amendment caused.

Amending the charging period to preclude a guilty finding on third degree rape of a child in Count I during defense counsel's cross examination of the state's final witness severely impacted Mr. Ford's ability to prepare his defense. His trial strategy and plea negotiations with the state would likely have been different had he known he was definitely facing only second degree rape of a child on Count I. Mr. Ford and his attorney knew that almost half of the initial charging period on Count I precluded a guilty finding on the second degree charge and they also knew that L.A.K. had not stated a specific date for her first allegations to the police. 2RP 71. For the prosecutor to essentially claim that he had to wait until cross examination of his final witness to figure out that L.A.K.'s fourteenth birthday was on September 10, 2006 rather than September 15, 2006 is simply ludicrous.

As shown above, two of the state's witnesses testified that L.A.K.'s birthday was September 10, 1992, and they testified to this on direct examination. 3ARP 58; 3ARP 118. The prosecutor was basically asking the trial court to believe that he was so inept that he did not know the actual birthdate of L.A.K. even though he had charged second degree rape of a child in Count I, (based on L.A.K. being over 12 years old but less than 14) and third degree rape of a child in Count II, (based on L.A.K. being over 14 but less than 16), and even though the charging periods in each count were only separated by a single day in the original information.

Given the circumstances of this case and the testimony as played out at trial, it is much more plausible that the prosecutor intentionally misled Mr. Ford and his counsel into believing they had the defense of claiming the charging period in Count I included 6 days when L.A.K. was fourteen and, thus, precluded a guilty finding on second degree rape of a child. This theory is solidified into a fact by the prosecutor's response to defense counsel's renewed objection to the amendment:

MR. HARVEY: If I may, Your Honor. Your Honor, the State -- as far as the amending of the Information as indicated, from actually the -- the questioning, it wasn't a surprise to counsel regarding the dates. Those things actually came out during the course of the interview with [L.A.K.] back in May of -- of this year.

So the -- the -- the bottom line was with sworn testimony, since we -- if we're -- you know, we knew -- the State was aware and had prepared an Amended Information for filing yesterday, but my concern, of course, was what -- what the proof would be and if there would have to be some kind of a third or second amended, so I wanted to hold off until I -- the court -- the jury -- the jury had heard from [L.A.K.].

3ARP 207. (emphasis added). The state knew and the state was aware, according to the prosecutor himself, back in May of 2007. There can be no doubt the delay was intentional.

Defense counsel clearly stated that "its put us in a difficult position preparing for trial based upon the information or that the dates alleged in the original information." 3ARP 177. Not only did the state omit the 6 days when L.A.K. was fourteen from the charging period, it also went backwards from September 1, 2006 to include almost all of August. 3ARP 177.

Based on the time period originally alleged, defense counsel would have necessarily confined all his investigative and trial preparation efforts to September of 2006. His cross examination of the officers involved, L.A.K.'s friend, L.A.K.'s mother, and L.A.K. herself were all based upon allegations in September. This amendment was so prejudicial and damaging that defense counsel felt the need to reiterate his objection:

MR. LADOUER: Well, Your Honor, first of all, I'd just reiterate, I'm not sure how much time we had for a record on the amendment of the Information, but, again, I just want the record to be clear of our objection to the Amended Information.

And, again, you know, the basis is, is that throughout the -- throughout the preparation of the case, we've been made aware that the charge of Rape of a Child in the (inaudible; prosecutor is hitting his paperwork against his microphone) pertained to a fairly short period in September.

And -- and then on the day of trial we're presented with (prosecutor continuing to hit paperwork against microphone) that changes the date that we conceivably have -- have changed trial preparation and questions that were asked of [L.A.K.].

So I just want to make a record of that.

3ARP 206-07. As shown above, the prosecutor brazenly responded that he knew of the problem with the dates, knew of the correct ones, but believed he could charge however he wanted to then simply amend the information later to match up with whatever the actual testimony panned out to be; regardless of any prior statements. 3ARP 207. The trial court likewise responded:

THE COURT: Thank you. As to the motion concerning the amendment, the Court is going to stand by its ruling. To be quite honest about it, I don't see anything that really changes the facts of this case. It's been known to the parties from the very beginning.

3ARP 209 (emphasis added).

Mr. Ford asserts that adding a completely different month into a time period already spanning 15 days in a child rape prosecution while at the same time removing a 6 day period which formed a complete defense to the second degree rape of a child charge did indeed "change the facts of the case". Moreover, the amendment was sprung upon Mr. Ford last minute, had a devastating effect upon Mr. Ford's trial strategy, plea negotiations, and his defense as a whole.

This amendment was intentionally held off until the last minute by the state, severely prejudiced Mr. Ford, and he therefore contends the trial court's decision allowing the amendment rested on untenable grounds and/or was manifestly unreasonable, constituting an abuse of discretion and requiring a reversal.

#### ADDITIONAL GROUND TWO

THE EXPERT-LIKE STATEMENTS PRESENTED DURING VOIR DIRE VIOLATED MR. FORD'S RIGHT TO AN IMPARTIAL JURY TRIAL UNDER THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 21 OF OUR STATE CONSTITUTION.

In Mach v. Stewart, 137 F.3d 630 (9th Cir. 1997), the Court explained the underlying standards for a jury panel in relation to a defendant's right to a jury trial:

The Sixth Amendment right to a jury trial "guarantees to the criminally accused a fair trial by a panel of impartial 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961). "Even if 'only one juror is unduly biased or prejudiced,' the defendant is denied his constitutional right to an impartial jury." United States v. Eubanks, 591 F.2d 513, 517 (9th Cir. 1979); see also, United States v. Allsup, 566 F.2d 68, 71 (9th Cir. 1977). Due Process requires that the defendant be tried by a jury capable and willing

to decide the case solely on the evidence before it.  
Smith v. Phillips, 455 U.S. 209, 217, 102 S.Ct. 940,  
946, 71 L.Ed.2d 78 (1982).

Mach, 137 F.3d at 633 (internal quotation marks original).

Mach was a defendant charged with sexual conduct with a minor under 14 years of age. The victim was an eight-year old girl who claimed that while she was at Mach's home visiting his daughter, he had performed an act of oral sex on her. The Ninth Circuit explained the facts adduced during voir dire as follows:

The first prospective juror to be questioned during voir dire was Ms. Bodkin, a social worker with the State of Arizona Child Protective Services. Bodkin stated that she would have a difficult time being impartial given her line of work, and that sexual assault had been confirmed in every case in which one of her clients reported such an assault. The court continued to question Bodkin on this subject before the entire venire panel. The Judge's questions elicited at least three more statements from Bodkin that she had never, in three years in her position, become aware of a case in which a child had lied about being sexually assaulted. The court warned Bodkin and the venire panel as a whole that "the reason we have trials is to determine whether or not a person is guilty of the charges made against him, and you do that by seeing what the state has to give you by way of evidence and you apply that to whatever you find to be the facts. You listen to the arguments of counsel." The judge went on to ask Bodkin whether she thought she could do that, to which she responded that she would try, and that she "probably" could. (Rt Tab B at 23-27)

Later the court questioned the panel regarding psychology experience:

THE COURT: Are any of you-are any of you in psychology or have you ever been in psychology? I mean psychology or have you ever been in psychology? I mean psychologist or clinical psychology or psychology? Anybody here have any backround in psychology?

. . .

MS. BODKIN: I've taken psychology courses and worked extensively with psychology and psychiatrists.

THE COURT: Have you had any courses in child psychology?

MS BODKIN: Yes.

THE COURT: Thank you, Miss Bodkin.

Transcript of Proceedings, Trial Day One, at 30.

The court struck three jurors for cause-jurors who indicated that they had been victims of, or close to victims of, a sexual crime. Mach then moved for a mistrial, arguing that the entire panel had been tainted by the exchange between the court and venireperson Bodkin. The court denied the motion, but struck Bodkin for cause. Mach renewed his motion for mistrial, again arguing that the problem was less Bodkin herself and more the effect her statement had on the other panel members, but again the court denied the motion.

Mach, at 631-32 (internal quotation marks original) (brackets added). The Ninth Circuit ultimately determined that:

Given the nature of Bodkin's statements, the certainty with which they were repeated; we presume that at least one juror was tainted and entered into jury deliberations with the conviction that children simply never lie about being sexually abused. This bias violated Mach's right to an impartial jury.

Id. at 633 (footnote omitted).

Strikingly similarly, but even more compelling, here there were two jurors that spoke directly upon the veracity of children claiming sexual abuse, with one going even further:

MR. HARVEY: Okay. Ms. Wiggs.

MS. WIGGS: Yes.

MR. HARVEY: You indicated you had been a prior victim as well?

MS. WIGGS: Yes.

MR. HARVEY: And I'm assuming, of course, that had something to do with it. Was that the sole reason you think that would affect your ability to be fair and impartial?

MS. WIGGS: Absolutely.

MR. HARVEY: No other reason?

MS. WIGGS: And my daughter was also a victim (inaudible). If the children were to be put on the stand and answer that it happened, I -- I honestly don't believe children are capable of lying about that.

MR. LADOUCEUR: [Speaking to Ms. Siciliana] Okay. And if at any point -- I mean the -- no one's trying to put you on the spot or anything. If at any point you want to talk about these things privately, we can certainly accomodate you. Okay?

MS. SICILIANA: Okay.

MR. LADOUCEUR: You said slightly biased. I mean, do you -- Ms. Wiggs had indicated -- and (inaudible) certainly appreciate, you know, you telling us, because that's exactly the type of information we want to know at this point. Ms. Wiggs indicated that she doesn't believe that children are capable of lying about that. How would you square that with your statement of, might be slightly biased?

MS. SICILIANA: I completely agree with her.

MR. LADOUCEUR: Okay. All right. All right. So you don't believe that children are capable of lying about that type of accusation. Is that what?

MS. SICILIANA: Yeah. Yeah.

MR. LADOUCEUR: Okay.

MS. SICILIANA: I'm saying that's true.

MR. LADOUCEUR: All right. All right. And when you say children, are you talking about really young kids? Is there some sort of a -- I mean, what about, like, adults. Do you think adults would be capable of lying about an allegation of rape, for example?

MS. SICILIANA: I think that -- I mean, I think that adults are more capable of lying about it. But I think that just from being around other survivors and being one myself, I think that the most important thing you can do to support survivors is to believe them. . . .

MR. LADOUCEUR: . . . So in terms of agreeing that -- you know, that -- Ms. Wiggs' statement that you don't believe children can be capable of lying about that and wanting to support them when they come forth with an allegation, given that those are the charges in the charges in the case, do you really think that you can be fair and -- to my client, Tyrone, in this type of case?

MR. LADOUCEUR: Okay. I'm getting the sense that -- I mean, if there's -- if a 14-year-old child testifies in the courtroom that somebody -- that my -- that Tyrone had sex with her, you're going to be inclined to believe her, based upon your agreement with the statement that children are incapable of lying?

MS. SICILIANA: Yeah, yeah. . . .

MR. LADOUCEUR: Well, Ms. Wiggs and Ms. Siciliana were kind of -- drew a fairly bright line in the sense that, you know, based upon their experiences they just don't believe that kids in this context are capable of lying. . . .

MR. LADOUCEUR: Okay. And, Mr. Irvin, you had indicated, again, you know, I think you -- the language was that your experience could cloud your ability to be fair, and you might be biased. Would you go so far as perhaps Ms. Wiggs and Ms. Siciliana in the sense that (inaudible) believe that children could be capable of lying about something like that?

MR. IRVIN: Children in the context of ten years and younger, I would say yes.

MR. LADOUCEUR: Okay. Over ten years older might be a different situation as far as you're concerned?

MR. IRVIN: Right. I think that's probably gray (inaudible) in absolute as far say to -- to the age of 14 or 15 (inaudible).

8/27/07 RP 40-41; 48-53. Clearly Ms. Wiggs' and Ms. Siciliana's statements that children are incapable of lying were repeated over and over and over. Even worse, Ms. Siciliana unequivocally stated that "the most important thing you can do to support survivors is to believe them".

8/27/07 RP 49.

When it came time to begin striking jurors for cause,  
the following discussion took place:

MR. LADOUCEUR: Number one is Wiggs. And I put quotes  
around her comment, she does not believe --

. . .

THE COURT: . . . I'm sorry. Ms. Wiggs, Number 23 --

. . .

MR. LADOUCEUR: She's -- I just can't think of a more  
clear example. She stated, without any sort of coaching  
or prompting from questioning, that she does not believe  
children are capable of lying about that and would  
believe anyone who gave that kind of testimony.

. . .

THE COURT: Well, I'm going to excuse her, Counselor.  
I think she did say she'd be fair and impartial but  
her other statements really concern me about her  
fairness to the Defendant. Okay.

MR. LADOUCEUR: The next one is Ms. Siciliana.

THE COURT: Number 6.

MR. LADOUCEUR: Six.

THE COURT: Say no more. I agree with you on that one.  
I listened to her talk and I believe that her own  
history puts her in a position where she can't be fair.  
Especially when she starts talking about -- well, she  
had a different phrase for it. Supporting --

MR. LADOUCEUR: Survivors.

THE COURT: -- Survivors. Yes, survivors. And supporting  
survivors. I don't think that that lends itself to a fair  
and impartial trial.

8/27/07 RP 101-02. Clearly the court felt Ms. Wiggs'  
statement was prejudicial, but even more compelling, he  
explicitly stated that Ms. Siciliana's statements about  
supporting survivors would not lend "itself to a fair and  
impartial trial." Unfortunately, despite having numerous  
tools at its disposal, including individual voir dire with

the rest of the jury panel to determine the influential effect of these statements , the court simply struck Ms. Wiggs and Ms. Siciliana for cause.

In U.S. v. Broadwell, 870 F.2d 594 (11th Cir. 1989), the defendant "argued that one juror's response to a question during voir dire made in front of other jurors was highly prejudicial requiring the district court to dismiss the entire jury panel." Id. at 606. Unlike Mr. Ford's case, the trial court in Broadwell took subsequent steps to defeat the prejudice caused by these statements. As explained by the Circuit Court when denying Mr. Broadwell's claims, the district court judge:

undertook various measures in response to the remark to insure no prejudice would result to the defendants. The court asked whether any panel members were influenced by the remark. The court questioned further any jurors who responded affirmatively outside the presence of other jurors. Every prospective juror who indicated influence was removed for cause.

Id. at 606 (emphasis added). Here, not a single one of these "various measures" was taken.

In light of the court's failure to assess the damaging effect the highly prejudicial remarks had on any prospective jurors, Mr. Ford contends that Mach is the controlling authority applicable here. Thus, "[t]he error in this case arguably rises to the level of a structural error . . . . the jury's exposure during voir dire to [several] intrinsically prejudicial statement[s] made [several] times by [two prospective jurors and reiterated repeatedly by counsel], occurred before the trial had begun, resulted in the swearing

in of a tainted jury, and severely infected the process from the very beginning." Id. at 633.

Despite the "structural" nature of this error, the Ninth Circuit continued, stating:

Nonetheless, because this error requires reversal under the harmless-error standard as well, we need not decide whether it constitutes structural error. . . . Highly significant is the nature of the information and its connection to the case. See Lawson v. Borg, 60 F.3d 608, 612-613 (9th Cir. 1995) (noting that "reversible error commonly occurs where there is a direct and rational connection between the extrinsic material and a prejudicial jury conclusion, and where the misconduct relates directly to a material aspect of the case"); Dickson v. Sullivan, 849 F.2d 403, 407 (9th Cir. 1988) (finding prejudice when extrinsic information was "both directly related to a material issue in the case and highly inflammatory"). The result of the trial in this case was principally dependant on whether the jury chose to believe the child or the defendant. There can be no doubt that Bodkin's statements had to have a tremendous impact on the jury's verdict. The extrinsic evidence was highly inflammatory and directly connected to Mach's guilt. Bodkin repeatedly stated that in her experience as a social worker, children never lied about sexual assault. The bulk of the prosecution's case consisted of a child's testimony that Mach had sexually assaulted her. We thus find Bodkin's statements to have substantially affected or influenced the verdict and therefore reverse the conviction.

Id. at 634 (internal quotation marks original, footnote omitted). Applying the same analysis here leads to the same ultimate conclusion.

This case was the epitomy of a "credibility" contest. The complaining witness, L.A.K., did not make any allegations until months after the time-frame she said the incidents had occurred in. 3ARP 36, 39, 44. Consequently, there was no way for anyone to gather any physical evidence to either corroborate or discredit her allegations. 8/27/07 RP 154; 3BRP 360-361; 378.

The first incident was ultimately alleged, through an "amended" information, to take place between August 9, 2006 and September 9, 2006; a timeframe that anyone would find nearly impossible to provide an alibi for. Due to the state's last minute amendment to the information alleging the new dates above, the trial court's ruling allowing the amendment, and defense counsel's failure to request a continuance when the court granted the state's request to amend, all Mr. Ford could do was take the stand and proclaim his innocence. 3BRP 286.

As for the second incident, (described as a "violent" rape), L.A.K. testified that afterwards, she went back to her house where a friend had stayed the night. 3ARP 154-155. for reasons not found within the record, this friend of L.A.K.'s (Ms. Tori Hennefin) was not called to testify by the state or defense counsel. Thus, the record is devoid of any information from the one person who could have provided firsthand corroborating or discrediting evidence about L.A.K.'s physical, mental, and/or emotional state directly after the allegedly "violent" rape.

In addition to his protestation of innocence on the second count, (3BRP 286-287), Mr. Ford also raised an alibi defense through his live-in girlfriend Ms. Lisa Castro.

She testified that during the timeframe the second incident was alleged to occur, 1) she never had to travel overnight for her job; 2) she never spent the night at her parents house; and 3) she never spent the night away from home for any reason at all. 3 ARP 241.

Additionally, Ms. Castro testified that she would have heard two people falling to the floor, 3BRP 243, that she never heard any comotion of people falling to the floor, 3BRP 244, that she would have heard someone crying out saying "no, no", 3BRP 244, and finally, that she never heard a female voice crying out in the living room. 3BRP 245.

The prosecution's whole case hinged on the jury believing L.A.K.'s testimony and disbelieving Ms. Castro and Mr. Ford's testimony. Thus, credibility was the crux of this whole case, for the state as well as the defense. Neither Mr. Ford nor L.A.K. were impeached with any prior crimes of dishonesty or any prior bad acts, so their credibility should have been about on equal footing, with Mr. Ford having a slight edge because of Ms. Castro's corroborating testimony. The highly inflammatory statements made by the potential jurors and reiterated repeatedly by counsel during voir dire shattered any semblance of a "fair and impartial jury" for Mr. Ford.

Even more compelling than the statements in Mach, the potential jurors statements here that children are incapable of lying about sexual abuse coupled with Ms. Siciliana's heart wrenching plea that "the most important thing you can do to support survivors is to believe them" directly connected to Mr. Ford's guilt, was highly inflamatory, and changed the whole jury panel's outlook on the case.

"Survivors". Ms. Wiggs and her daughter and Ms. Siciliana were "survivors". It was only natural for the jury panel to immediately connect that to L.A.K. - a survivor who was

incapable of lying and who needed that jury panel to do the most important thing they could--believe her.

There should be no doubt that at least one juror was tremendously impacted by these statements and pleas. Thus, if this Court determines that this error is not "structural" requiring automatic reversal, Mr. Ford contends that this error simply cannot be considered "harmless". Cf. State v. Shouse, 119 Wn.App. 793, 799, 83 P.3d 453 (2004) (describing the harmless error standard applied on direct appeal as an "exacting standard - beyond a reasonable doubt.").

#### ADDITIONAL GROUND THREE

MR. FORD'S FIRST TRIAL ATTORNEY RENDERED INEFFECTIVE ASSISTANCE IN VIOLATION OF HIS RIGHT TO COUNSEL UNDER THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION, AND ARTICLE I, SECTION 22 OF OUR STATE CONSTITUTION.

"Under the sixth amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings." In re Personal Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004) (citing Strickland v. Washington, 466 U.S. 668, 684-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

"To successfully challenge the effective assistance of counsel, [Mr. Ford] must satisfy a two-part test. [MR. Ford] must show that '(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced [Mr. Ford], i.e., there is a reasonable

probability that, except for counsel's unprofessional errors, the result of the proceedings would have been different.'" Davis, 152 Wn.2d at 672-73 (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

- a. Failing to Request a Continuance When the Trial Court Granted the State's Motion to Amend the Information.

As shown in Additional Ground One supra, the state requested, and the trial court granted, an end-of-trial amendment to the information. Trial counsel "objected", complaining that "it's put us in a difficult position preparing for trial . . .", 3ARP177, and that "we conceivably [would] have--have changed trial preparation and questions that were asked of [L.A.K.]." 3ARP 206. Despite these objections and obvious detrimental impact to Mr. Ford's case, his counsel Mr. Ladouceur failed to request a continuance.

"The typical remedy for a defendant who is misled or surprised by the amendment of the information is to move for a continuance to secure time to prepare a defense to the amended information. State v. Laureano, 101 Wn.2d 745, 762, 682 P.2d 889 (1984) (citing State v. LaPierre, 71 Wn.2d 385, 388, 428 P.2d 579 (1967)).

The amendment (with regard to count I), changed the time period the rape was alleged to occur in, from between September 1, 2006 and September 15, 2006, to between August 9, 2006 and September 9, 2006. Given the fact that L.A.K. turned 14 on September 10, 2006, Mr. Ford's first defense to the charge was that he could only be punished for third degree rape of a child because second degree necessitated

that L.A.K. be over 12 years old but under 14. See RCW 9A.44.076.

The late removal of the above-described defense by the state's end-of-trial amendment affected everything from Mr. Ladouceur's ability and even his desire to fully explore other defenses, to his failure to aggressively pursue plea negotiations, to his basic trial preparation, strategy, and cross examination of all the state's witnesses. Under these circumstances no reasonable attorney would have failed to request a continuance.

It was clear that Mr. Ladouceur was misled by the state. At the least, he was surprised by the amendment. It has been clearly established law going back to at least 1967<sup>2</sup> that counsel's proper course of action was to request a continuance so that he could assess the amendment, interview any new witnesses who may have information about the new timeframes, reinterview the state's witnesses regarding the new timeframes, revamp his trial strategy, and possibly even aggressively pursue plea negotiations. Thus, his failure to request a continuance constitutes deficient performance. Cf. Stokes v. Peyton, 437 F.2d 131 (4th Cir. 1970) (trial counsel's failure to move for a continuance so that he could investigate, locate witnesses, and prepare for trial amounted to ineffective assistance of counsel).

As for prejudice, the very fact that counsel objected<sup>3</sup>, later renewed that objection<sup>4</sup>, and supported them both with

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2. LaPierre, 71 Wn.2d at 388.

3. 3ARP 177.

4. 3ARP 206-07.

claims that his trial preparation and cross examinations were affected shows that counsel himself believed the amendment was extremely prejudicial. however, due to his lack of knowledge about this specific area of law, or possibly due to some other reason unknown to Mr. Ford, Mr. Ladouceur failed to request a continuance. Thus, because the court allowed the amendment, counsel's own statements evidence the prejudice Mr. Ford suffered from his attorney's failure to request a continuance.

Having satisfied both prongs of the Strickland standard, Mr. Ford respectfully requests this Honorable Court to find that his counsel's prejudicial deficient performance in failing to request a continuance upon the state's amendment of the information near the end of trial requires a new trial with a new attorney appointed to represent him.

b. Counsel Failed to Conduct Proper Voir Dire.

As shown in Additional Ground Two supra, counsel not only allowed two different jurors to taint the jury pool with their inflammatory and highly prejudicial statements that children are "incapable" of lying about sexual abuse, he actually engaged the second potential juror Ms. Siciliana in the discussion which brought forth her statement that "the most important thing you can do to support survivors is to believe them." 8/27/07 RP 49.

This was so prejudicial that when counsel requested Ms. Siciliana struck for cause, the court's response was: "Say no more. I agree with you on that one." 8/27/07 RP 102.

Counsel had the clear cut option of speaking with Ms. Wiggs and Ms. Siciliana outside the presence of the rest of the panel. Barring that, even after the inflammatory and prejudicial statements were made in front of the rest of the panel, counsel could have at least asked whether any of the panel members were influenced by the statements. Accord Broadwell, supra. If any of the panel members admitted to some influence, he then could have further questioned those jurors outside the presence of the rest of the panel. Broadwell at 606. None of that was done or even requested.

In Government of Virgin Islands v. Weatherway, 20 F.3d 572, (3rd Cir. 1994), the court decided "whether a non-frivolous claim of trial counsel's handling of juror misconduct demonstrates ineffectiveness of counsel." Id. at 579. The Court noted:

we have emphasized the importance of questioning jurors whenever the integrity of their deliberations is jeopardized. We recently held that a district court's failure to evaluate the nature of the jury misconduct or the existence of prejudice required a new trial. United States v. Resko, 3 F.3d 684 (3rd Cir. 1993).

Weatherway, 20 F.3d at 578. The Court further noted that:

under the ABA standards, trial counsel's inaction here would indicate that representation was deficient unless the district court determines he decided to forego voir dire because he thought the jury was favorable to his client . . .

Id. at 579 (emphasis original).

As for prejudice, the Court stated:

A finding of prejudice is also supported by our holding in Resko. Prejudice should not be presumed; but when juror misconduct is coupled with the trial court's failure to hold a voir dire to determine the

outcome of the misconduct on the jury function, proof of actual prejudice is excused and a new trial is warranted. [Resko] 3 F.3d at 695.

Weatherway, at 580.

While the Weatherway case dealt with a newspaper article containing allegedly made inculpatory statements by the defendant, and the timing was when the jury was already in deliberations, Mr. Ford asserts the same legal analysis the Court applied (outlined above), likewise applies here.

The statements made in front of the jury panel were about as bad as it gets in a case such as Mr. Ford's. While the two potential jurors who made the statements and pleas for support were stricken for cause, none of the other jurors were questioned to evaluate whether or not those statements had any influential effect upon them. Counsel's inaction here simply cannot be considered "trial strategy and tactics" because the nature of the statements in a clear cut credibility case could only have a detrimental effect upon any prospective jurors.

As for prejudice, just as in Weatherway and Resko, actual prejudice should be excused and a new trial should be ordered.

#### ADDITIONAL GROUND FOUR

TAKEN TOGETHER, THE NUMEROUS ERRORS IN THIS CASE VIOLATED MR. FORD'S RIGHT TO DUE PROCESS AND RIGHT TO A FAIR TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 3 & 21 OF OUR STATE CONSTITUTION.

The cumulative error doctrine mandates reversal when the cumulative effect of non reversible errors materially affects the outcome of a trial. State v. Newbern, 95 Wn.App.

277, 297, 975 P.2d 1041 (1999) (citing State v. Johnson, 90 Wn.App. 54, 74, 950 P.2d 981 (1998) (citing State v. Russel, 125 Wn.2d 24, 93, 882 P.2d 747 (1994))).

Here, Mr. Ford contends that if none of the errors he has raised herein require reversal on their own, taken together, the extremely prejudicial errors coupled with his counsel's prejudicial deficient performance violated his right to due process and right to a fair trial.

As shown above, the state waited until defense counsel's cross examination of the state's final witness to move to amend the information. The amendment changed the dates that count one was alleged to be committed between, removed Mr. Ford's first defense that the dates did not support the crime charged, and added such a large period prior to that originally alleged that the prejudice was simply too great for Mr. Ford to overcome.

On top of that, during voir dire two prospective jurors made such inflammatory and prejudicial statements that there is no doubt at least one juror was unduly prejudiced and influenced. Compounding this error, none of the jury panel was even questioned on the prejudicial impact the statements made.

In addition to both these claims, counsel failed to request a continuance even though he felt so strongly about the amendment being improper that he objected, then renewed that objection explaining how injurious the amendment was to his defense of Mr. Ford. Even worse, counsel actually elicited one of the prejudicial and inflammatory statements from a

prospective juror, kept repeating both inflammatory statements then, amazingly, did not question the jury panel to determine if the statements had the type of prejudicial impact that required additional jurors to be struck for cause.

This case was all about credibility, and just about every unfair occurrence that could have impermissibly shifted the jury's belief's happened here. counsel not only let it happen, but during the voir dire, counsel kept repeating the prejudicial statements, actually becoming part of the problem.

In light of all this, Mr. Ford respectfully contends that these errors, taken together, deprived him of his right to due process and right to a fair trial, and require his case to be remanded back to the superior court for a new trial.

Respectfully Submitted this 6 day of August, 2008.

Tyrone Ford

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CERTIFICATE OF SERVICE BY MAIL

I, TYRONE D. FORD, do hereby declare under the penalty of perjury pursuant to the Laws of the State of Washington, that on the date below, I deposited a true and correct copy of the attached "STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW" in the internal legal mail system of the MONROE CORRECTIONAL COMPLEX - WSR - UNIT, and made arrangements for postage to be pre-paid, and the document to be placed in the U.S. mail addressed to:

Lisa E. Tabbut  
P.O. Box 1396  
Longview, WA 98632

and to:

The Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402-4454

Dated this 6 day of August, 2008.

FILED  
COURT OF APPEALS  
DIVISION II  
08 AUG - 8 PM 12:38  
STATE OF WASHINGTON  
BY 

Tyrone Ford

Tyrone D. Ford