

the client's legal position may be destroyed. In *extreme instances*, indicating this should never happen or happens rarely. Additionally, he should have found R.C.W. 66.44.270 (3) that gives parental right to allow a minor to consume alcohol anywhere except at any premise licensed under chapter R.C.W. 66.24, and would have argued this point. He should have questioned her mother about allowing her to consume alcohol at the defendant's house during the summer BBQ's. The Deputy Prosecuting Attorney was concerned this would come up. RP29.30. If it had been testified that the complainants mother-herself-smoked marijuana and allowed her daughter to drink, it would have dramatically affected their case. You cannot call this trial tactic. If no reason is or can be given for tactic, label "tactic" will not prevent it from being used as evidence of ineffective assistance of counsel *Miller v. Anderson* 255.F.3d 455, 456 (7th Cir. 2001). Testimony given allowed the jury to hear testimony on a charge that they should never have heard. This charge had a Sexual Motivation enhancement attached to it; the jury should never have heard this, This is prejudicial to the defendant. The court failed to give instruction and the defense counsel failed to ask for a jury instruction to disregard testimony about this charge. Evidentiary error in a criminal trial requires of the conviction if there is a reasonable possibility the error affected the outcome of the trial. *State v. Bourgeois* 133 Wn.2d 389 (1997), *State v. Fankhouser* 133 Wn.App. 689, 138 P.3d 140 (2006). Washington courts have long recognized that the right to effective assistance includes a "reasonable investigation" by defense counsel, *Strickland v. Washington* 466 U.S. 668, 684, 691 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); *In re Pers. Restraint of Brett* 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

Additional Grounds 2

Defendant received Ineffective Assistance of Counsel by counsel at bench by not making a Motion of Severance. CrR 4.3 Joinder of Offenses and Defendants, Washington Court Rules, State (2009) indicates offenses should be joined if they are of the **same** or **similar** character, even if not part of a single scheme or plan. These counts are **not** same or similar. Question of whether two offenses are properly joined is a question of law subject to full appellate review. *State v. Bryant* 89 Wn.App. 857, 864, 950 P.2d 1004 (1998); *State v. Hentz* 32 Wn.App 186, 189. Questions of a law are reviewed de novo. *State v.*

McCormick 117 Wn.2d 141, 143, 812 P.2d 483 (1991), cert. Denied, 502 U.S. 1111, 112 S.Ct. 1215, 117 L.Ed. 2d 453 (1992). It is possible that although an original joinder of offenses or defendants is proper, the joinder may, in the circumstances, be so prejudicial as to be unfair, in which case it is within the discretion of the trial court, to direct separate trials. *Bayless v. U.S.* 381 F.2d. 67, 72 (1967). Even if joinder is legally permissible, the trial court should not join offenses if prosecution of all charges in a single trial would prejudice the defendant. *United States v. Peoples* 748 F.2d. 934, 936 (4th Cir. 1984), cert. Denied, 471 U.S. 1067, 105 S.Ct. 2143, 85 L.Ed.2d 500 (1985). The joinder of these offenses was definitely prejudicial. It appears that if the counsel at bench had made a motion for severance the trial court may have granted it. The Prosecution even conceded the marijuana usage was not a precursor to the alleged sexual abuse. RP54.

In *Bryant* at 864, the court said if joinder was not proper but offenses were consolidating in one trial, the convictions must be reversed unless the error is harmless. *State v. Wilson*, 71 Wn.App. 880, 885, 863 P.2d. 116 (1993), rev'd in part on other grounds, 125 Wn.2d. 212, 883 P.2d. 320 (1994). The case at bench was prejudiced by not being separated because the alleged drug delivery made it more likely the alleged sexual abuse had taken place. This is clearly not harmless error.

Additional Grounds 3

Defendant received Ineffective Assistance of Counsel by the trial counsel by not making a motion for judgement of acquittal. Washington Practice; Criminal Practice and Procedure V.13 (2004) §4317 page 246-9; A motion for judgement of acquittal is customarily made again at the end of the trial. Here trial counsel did not do this.

Additional Grounds 4

Defendant received Ineffective Assistance of Counsel by counsel at bench by not requesting a lesser-included offense instruction. A defendant is entitled to a lesser-included offense instruction when

each element of the lesser offense is a necessary element of the greater offense and the evidence supports an inference that the lesser offense was committed. *State v. Wilson* 41 Wn.App. 397, 704 P.2d 1217 (1985); *State v. Hutchins* 73 Wn.App. 211, 219, 868 P.2d 196 (1994); *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978). The Nevada courts have said that Instruction on lesser-included offense is mandatory without request if there is evidence, which would absolve the defendant from guilt of the greater offense but would support a finding of guilt of the lesser offense. *Mendez-Rosas v. State* 147 P.3d 1101 (Nev 2006). The defendant admitted to touching the complainant, just not touching for sexual gratification. RP 359-60, 378. The defendant admitted to smoking marijuana, just not delivering it to the complainant. RP 352. In all of the counts at bench there is a lesser offense that could have been included. Failure of the trial counsel to ask for this instruction is not harmless error. The trial court was found to have erred by not instructing the jury that fourth degree assault is a lesser-included offense to second-degree child molestation. *State v. Stevens* 158 Wn.2d 304, 143 P.3d 817 (2006). Error that may increase defendant's sentence is prejudicial for purposes of ineffective assistance of counsel claim. *U.S. v. Palomba* 31 F.3d 1456, 1458 (9th Cir. 1994).

Additional Grounds 5

The defendant received Ineffective Assistance of Counsel by counsel at bench by not presenting a theory of the defendant (and of his family) that could have been introduced properly through evidence. The defendant is entitled to proceed on disparate defense theories. *Mendez-Rosas v. State* 147 P.3d 1101 (Nev 2006). The testimony that should have been given was very relevant to the testimony given by the complainant's mother concerning the complainant's self-inflicted cutting. RP 74-75. The Court did not allow defendant's theory – RP 378.

Additional Grounds 6

In *U.S. v. Palomba*, 31 F.3d 1456, 1458 (9th Cir. 1994) the court said the defense counsel rendered ineffective assistance of counsel by failing to move to dismiss...and then charged approximately three

months later in superseding indictment...where counts were filed more than 30days after arrest in violation of STA (Speedy Trial Act), and no plausible tactical decision could explain counsel's failure to move to dismiss potentially prejudicial untimely charge. Case at bench had two superseding indictments RP9. Signs of an over zealous Prosecuting Attorney.

Additional Grounds 7

With what appears to be incompetence of the counsel at bench by not providing any defense theories, simply relying on "he did not do it" caused prejudice to the defendant. If no reason is or can be given for tactic, label "tactic" will not prevent it from being used as evidence of ineffective assistance of counsel. *Miller v. Anderson* 255 F.3d 455, 456 (7th Cir. 2001). There cannot be a reason why the defense counsel would not submit a defense theory other than incompetence. Representation is deficient if it fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Rodriguez* 121 Wn.App. 180, 184, 87 P.3d 1201 (2004).

Additional Grounds 8

Defendant was deprived his rights to present impeachment evidence. The court excluded any testimony that involved whom the complainant had smoked marijuana with. RP 160. A court may violate confrontation clause if it prevents defense from placing facts before jury from which bias or prejudice of witness may be inferred. *State v. Pickens* 27 Wa.App. 97, 615 P.2d 537 (1980). When Mary Hunnicutt (Liddle) testified that she was not aware that the complainant smoked marijuana, RP 401-3, the defense counsel should have then presented evidence that not only did she know the complainant was smoking marijuana but had smoke with her, and impeached her testimony. The Prosecution was so concerned there would be testimony that the mother knew about and gave the complainant marijuana, he wanted to conceal

it. RP 29-30. The Nevada courts have said that evidence must be disclosed if it provides grounds for the defense to impeach the credibility of the state's witness or to bolster the defense case. *O'Neill v. State* 153 P.3d 38 (Nev 2007). Suppression of this testimony made it more likely that the complainant's mother was not aware of her smoking, and more likely the defendant was allegedly doing this in the shadows, which then made the sexual abuse more likely. A criminal defendant's right to compulsory process under U.S. Const. Amend VI and Const. Art. I, § 22 includes the right to present a defense by presenting testimony shown to be material and relevant to the issues at trial. *State v. Roberts* 80 Wn.App. 342, 908 P.2d 892 (1996). Clearly whether the complainant's mother was aware of and approved of her smoking marijuana is relevant; this goes to show bias and gives impeachment evidence. The record shows there were no secrets in the family. RP 351, 394, 400. An erroneous exclusion of evidence in a criminal trial is not harmless unless it is trivial, formal, or academic. *State v. Ray* 116 Wn.2d 531 (1991). The suppression of this testimony clearly prejudiced the defendant. When a case is based on a person's testimony only, it is important to impeach any statement that is improper. A criminal defendant is afforded wide latitude to explore the motive, bias, and credibility of the state's key witnesses. *State v. Fankhouser* 133 Wn.App. 689, 138 P.3d 140 (2006). *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002) reads: "However, the more essential the witness is to the prosecution's case, the more latitude the defense should be given to explore fundamental elements such as motive, bias, credibility, or foundational matters." See *State v. Dickenson*, 48 Wn.App. 457, 466, 740 P.2d 312 (1987). Error in the exclusion of evidence in a criminal trial is prejudicial and not harmless if there is a reasonable possibility that the excluded evidence might have affected the jury's verdict. *State v. Martinez* 149 P.3d 108 (N.M. 2006).

The sixth Amendments confrontation clause requires that an accused be permitted to cross-examine a witness for bias. The rules of evidence do also. Bias includes that which exists at the time of trial, for the very purpose of impeachment is to provide information that the jury can use, during deliberations, to test the witness's accuracy while the witness was testifying. *State v. Dolan* 118 Wn.App. 323, 327-28, 73 P.3d 1011 (2003). A careful reading of the law indicates that no foundation is needed to impeach a witness's testimony with a prior statement as extrinsic evidence of bias. Prior case law conflated two separate concepts: impeachment by evidence of bias and impeachment by prior inconsistent statements. In *Harmon*, *Infra*, our Supreme Court held that regardless of whether testimony was offered

“for the purpose of impeachment or for the purpose of showing bias or prejudice of the witness,” the witness should be asked about the former statements. Citing *State v. Harmon* 21 Wn.2d 581, 590, 152 P.2d 314 (1944). *State v. Spencer* 111 Wn.App. 401, 409, 45 P.3d 209.

It is well settled in Washington the evidence of drug use is admissible to impeach the credibility of a witness if there is a showing that the witness was using or was influenced by the drugs at the time of the occurrence which is the subject of the testimony. *State v. Hall*, 46 Wn.App. 689, 692, 732 P.2d 524, review denied, 108 Wn.2d 1007 (1987); *State v. Smith*, 103 Wash. 267, 269, 174 P.9 (1918); See also David J. Oliveir:, Amotation, use of drugs as Affecting competency or credibility of witness, 65 A.L.R. 3d 705 § 6 [b] [1975].

Additional Grounds 9

Defendant was deprived a fair trial by the Deputy Prosecuting Attorney by him not disclosing testimony of the complainant. The complainant testified the defendant’s son, Carl Jr., interrupted the alleged incident in Long Beach, WA. RP 212. The duty of disclosure extends to impeachment evidence as well as to substantive evidence. The state must disclose any information, which a defendant might use to impeach the state’s witness. *Bagley* 473 U.S. 676; *Napue v. Illinois* 360 U.S. 274 3 L.Ed 2d 1217, 79 S. Ct. 1173 (1969); *Giglio v. U.S.* 40 US 150, 154, 31 L.Ed.2d 104, 92 S.Ct. 763 (1972). CrR 4.7 (a) (I) requires written or recorded statements and the substance of any oral statements of such witness be disclosed. Defense was not aware of this testimony until she testified. Defense counsel also failed to object to this testimony as hearsay and to call Carl Jr. to the stand to provide rebuttal testimony. By failing to call Carl Jr., the counsel at bench allowed the jury to infer that any testimony Carl Jr. would have provided was unfavorable to the defense; *State v. Gregory* 158 Wn.2d 759, 845, 147 P.3d 1201 (2006); *State v. David* 118 Wn.App 61, 66, 74 P.3d 686 (2003), and was prejudicial to the defendant. The testimony of an

eyewitness that supported defendant's theory of the case could have influenced a reasonable juror. *State v. Ray* 116 Wn.2d 531, 543, 806 P.2d 1220 (1991).

The defendant does **not** have to show that it is more likely than not that disclosure of the withheld evidence would have changed the outcome of the trial. *Kyles v. Whitley* 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed.2d 490, 492 (1995). *Kyles* at 493-94, reiterates and reaffirms the long standing principle that the defendant need not show that the prosecution acted in bad faith, and need not show that the individual prosecutor handling the defendants case was even aware of the existence of the undisclosed evidence. Once *Brady or Bagley* violation of due process is found, there is no need for further harmless error review, because such error cannot ever be harmless. *Kyles* at 493.

Additional Grounds 10

The Deputy Prosecuting Attorney made prejudicial comments about the defendant during his closing argument. He said the defendant is "floundering on where is he going, what - - what is the nature of a fifteen -year marriage, who am I?" "Smoking pot. Floundering. Kind of a walking wounded." RP445. "...but he wants to still be seen as somebody that somebody wants, and is excited about it." RP446. Mr. Farr is alluding that the defendant is unhappy in his marriage, both sexually and in life in general. He went on to refer to the defendant as a "messed up guy." RP447

This alone is so flagrant and ill intended that no curative instruction could have obviated the prejudice engendered by the misconduct. A prosecutor who asks the accused a question that implies the existence of a prejudicial fact must be prepared to prove the fact. *U.S. v. Silverton* 737 F.2d 864, 868 (10th Cir. 1984). Beyond his statement Mr. Farr proved nothing, nor inquired further; he was in essence giving unsubstantiated testimony.

Mr. Farr asks about turning on a web-cam to ensure the complainant was alone. RP296-7. However, exhibit 6 which is the internet chat log, only shows that request one time which was not made by the defendant but by his son. Again, signs of an over zealous prosecutor. Not only were the statements made by the Deputy Prosecuting Attorney inflammatory, the trial counsel was ineffective for not making an objection to the statement. If defense counsel does not object at trial to prosecutorial misconduct, the

Supreme Court may nevertheless recognize such misconduct if plainly erroneous. *State v. Wakisaka* 78 P.3d 317 (HI 2003).

The Deputy Prosecution Attorney misled the jury in his closing statement. He said “if you touch a child under the age of sixteen on a sexual place, it’s an intentional touch. It’s done for the purpose of gratifying either one of the persons sexually”. RP412. This is an incorrect statement. See *State v. Veliz*, *infra. State v. Powell*, *infra. State v. Stevens*, *infra.*

The Constitutional right to trial by a fair and impartial jury requires that the jury determine guilt or innocence based solely on properly admitted evidence at trial. When a jury has been misled by inadmissible evidence or argument, it is no longer impartial. Prosecutorial misconduct that misleads a jury to decide innocence or guilt on the basis of prejudice may warrant reversal of a conviction. *People v. Walters* 148 P.3d 331, 332 (CO. 2006). The Prosecuting attorney’s prejudicial statements are numerous, Examples are, RP209, “A kind of extra thrill.” When it appears a prosecutor or a witness for the State is deliberately trying to deprive the defendant of a fair trial, the court should assume that he succeeded in his purpose and grant a new trial. *Sate v. Weber* 99 Wn.2d 158, 164, 659 P.2d 1102 (1983). Mr. Farr made statements during his closing arguments that were prejudicial to the defendant. He said the complainant had no motive to lie. RP 431. He said she had nothing to gain. RP 432. He said her story is a believable type of crime. RP434 the statements are vouching type statements. In the testimony shows motive to lie. Her absent father is spending more time with her RP 136-7. A closing argument by the State, which is prejudicial to a defendant denies the defendant a fair trial, the possibility that the harm could be remedied by a curative instruction, is speculative at best. *State v. Powell* 62 WnApp. 914, 816 P.2d 96 (1991).

Additional Grounds 11

The state did not show any touching between the complainant and defendant was for the purpose of sexual gratification. Offenses of child molestation or indecent liberties require showing of sexual gratification

because without that showing the touching may be inadvertent. *State v. T.E.H.* 91 Wa.App. 908, 960 P.2d 441 (1998). Where child molestation defendant touched child over child's clothing, state was required to prove that defendant touched for purposes of sexual gratification, regardless of whether area touched was characterized as intimate or sexual part. *State v. Veliz* 76 Wa.App. 775, 888 P.2d 189 (1995). **In those cases in which the evidence shows touching through clothing**, or touching of intimate parts of the body other than the primary erogenous area, **the courts have required some additional evidence of sexual gratification.** *State v. Powell* 62 Wn.App. 914, 917, 816 P.2d 96 (1991).

In order to prove "sexual contact," **the state must establish the defendant acted with a purpose of sexual gratification.** *State v. Stevens* 158 Wn.2d 304, 143 P.3d 817 (2006). R.C.W. 94.44.010 (2) defines sexual contact as any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party. In the case at bench the record does not show any contact between the complainant and defendant was used by either party for sexual gratification.

In *Powell* at 917 citing *State v. Johnson* 96wn.2d 926, 639 P.2d 1332 (1982), the court said that evidence an unrelated male with no care-taking function wiped a 5-year-old girl's genitals with a washcloth might be insufficient to prove he acted for purposes of sexual gratification had that act not been followed by his having perform fellatio on him. In *Johnson* the defendant touched the victim on the genitals without clothes on and the court still said that that was not enough to prove sexual gratification. In the case at bench there was no touching under the clothes. The state relied on the passion of the jury. The State has the burden of supplying such proof, but its burden is one of production rather than one of persuasion. *State v. Flowers* 99 Wn.App. 57, 991 P.2d 1206 (2000). While sexual gratification is not an element of second-degree child molestation, the State must prove a defendant acted for the purpose of sexual gratification. Intent is relevant to the crime of second-degree child molestation because it is necessary to prove the element of sexual contact. *State v. Stevens* 158 Wn.2d 304, 309-10, 143 P.3d 817 (2006). In the case at bench, how did the defendant use the alleged touching to gratify himself? It is never shown in record.

In *Powell* at 918 there are similar accusations of touching in a vehicle over the clothing. "His touching her thighs, which occurred in his truck, is also susceptible of innocent explanation. She was clothed on each occasion and the touch was on the outside of her clothes. No threats, bribes, or requests

not to tell were made”. “*Mr. Powell* testified he was affectionate with the children and if she said he touched her it was possible he hugged and touched her. He denied ever touching her under her skirt or touching her for sexual gratification. No rational trier of fact could find this essential element beyond reasonable doubt”.

The state must prove that defendant acted with the intent of gratifying his sexual desires. If defendant’s touching was accidental or done for some purpose other than sexual gratification, he did not commit second-degree child molestation. *State v. Stevens* 127 Wn.App. 29, 274, 110 P.3d 1179 (2005). Defendant asserts he never touched the complainant for reasons of sexual gratification. RP 359-60, 378. The Prosecuting Attorney went on to mis-state this. PD412.

Additional Grounds 12

In *State v. Sena*, 168 P.3d 1101 (N.M. 2007) the court pointed to www.csom.org/pubs/glossary.pdf for help with “grooming.” They say it has three components.

1. “Sexualization,” Where the offender starts off under the guise of “normal behavior” and non-sexual physical contact but becomes increasingly more sexual and intrusive.
2. “Justification,” where the offender tells the child that the touching isn’t really sexual, perhaps that it is hygienic or educational, and
3. “Cooperation,” where the offender persuades the child not to tell by threatening some type of Harm or bad consequences.

In the case at bench there is not any of these components in the record. If the defendant was not grooming he must have been outright flagrant about the inappropriate touching, but again the record does not support this. The complainant’s mother said that she never suspected anything inappropriate was happening. RP 95, 106-07. Mary Hunnicutt (Liddle) is a **certified chaperone** (by the state) for sex offenders as she was married to one during 2003-2006. As a certified chaperone she was taught what type of signs to look for in situations like this alleged one. Had the jury known this fact they may have opined differently, since she testified that she did not see anything suspicious. This also brings up important testimony not introduced

by the defense counsel, more ineffective assistance of counsel. The law allows cross-examination of a witness into matters that will affect credibility by showing bias, ill will, interest, or corruption. *State v. russell* 125 Wn.2d 24, 92, 882 P.2d 747 (1994); *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965); *State v. Roberts*, 25 Wn.App. 830, 834, 611 P.2d 1297 (1980). Error in the exclusion of evidence in a criminal trial is prejudicial and not harmless if there is a reasonable possibility that the excluded evidence might have affected the jury's verdict. *State v. Martinez* 149 P.3d 108, 109 (N.M. 2006). Evidentiary error in a criminal trial requires reversal of the conviction if there is a reasonable possibility the error affected the outcome of the trial. *State v. Fankhouser* 133 Wn.App. 689, 138 P.3d 140 (2006). *State v. Bourgeois* 133 Wn.2d 389 (1997). This lack of testimony definitely affected the outcome of the trial.

Additional Grounds 13

R.C.W. 69.50.406 (2) and R.C.W. 69.50.401 are void for vagueness. When the common man thinks about delivery, they instantly think of a drug dealer, one that sells drugs, not someone that simple smokes or uses. To be consistent with due process, a penal statute or ordinance must contain ascertainable standards of guilt, so that men of reasonable understanding are not required to guess at the meaning of the enactment. *Bellevue v. Miller* 85 Wn.2d 539, 543, 536 P.2d 603 (1975), *Seattle v. Drew*, 70 Wn.2d 405, 408, 423 P.2d 522, 25 A.L.R. 3d 827 (1967). A Statute is void for vagueness under the Fourteenth Amendment if it is framed in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application. *State v. White* 97 Wn.2d 92, 98, 640 P.2d 1061 (1982), *Papachristou v. Jacksonville*, 405 U.S. 156, 31 L.Ed.2d 110, 92 S.Ct. 839 (1972); *Coates v. Cincinnati*, 402 U.S. 611, 29 L.Ed.2d 214, 91 S.Ct. 1686 (1971); *Winters v. New York*, 333 U.S. 509, 92 L.Ed. 840, 68 S.Ct. 665 (1948). A common person does not think they are delivering something just because they are smoking with others. The defendant admitted to smoking marijuana, RP 352, but denies distributing or selling it. Common men definitely differ as to the meaning of these statutes.

The courts must be careful to preserve the distinction and not to turn every possession of a minimal amount of a controlled substance into a possession with intent to deliver without substantial

evidence as to the possessor's intent above and beyond the possession itself. *State v. Brown* 68 Wn.App 480, 485, 843 P.2d 1098 (1993). Although the court is referring to a different statute, it has a very close meaning to the charge here. Do we want to turn every recreational pot smoker into a drug dealer? When does a smoker become a deliverer? When specific intent is element of offense, fact that defendant reasonably believes he is not violating any law would be defense. *U.S. v. Buehler* 793 F.Supp. 971 (E.D.Wash 1992).

In *State v. Hagler*, 74 Wn.App. 232, 872 P.2d 85 (1994) the court said to prove an intent to deliver a controlled substance, possession of a controlled substance must be couple with substantial corroborating evidence suggestive of a sale of the substance. Again, although they are referring to possession with intent to deliver, they keep coming back to substantial corroborating evidence to prove sale. The more severe penalties for delivery demonstrate that the Legislature has distinguished between a drug seller and a drug possessor/user. We would erase, or at least blur, this legislative distinction if we treated the drug buyer identically with the drug seller. Most persons who possess drugs have purchased the drugs. It makes no sense to punish them far more severely if they are apprehended at the moment of purchase rather than at the later time of possession. *State v. Morris* 77 Wn.App. 948, 952, 896 P.2d 81. If a person does not have intent to sell, when does that person become a drug dealer?

In all of the cases researched, one common element of them is the fact that the Police were involved, either directly or with a confidential informant, a buy/sell bust.

State v. Jones 93 Wa.App. 166 (1998)

State v. Lopez 79 Wa.App. 755 (1995)

State v. Johnson 59 Wa.App. 867 (1990)

State v. Wren 115 Wa.App. 922 (2003)

State v. McNeal 98 Wa.App. 585 (1999)

State v. Todd 101 Wn.App. 945, 953, 6 P.3d 86 (2000).

It would appear that to properly try a case of delivery, it would require some research by law enforcement and substantial proof of delivery. Otherwise law enforcement would not have to build a case over months or years. Here, there is one person saying they received marijuana from the defendant.

The Idaho courts have said that once a defendant is found guilty of one of the enumerated drug offenses, including delivery, the state is required to prove the amount of the controlled substance, but not knowledge of the amount. *State v. Barraza-Martinez* 84 P.3d 560 (ID.App. 2003) R.C.W. 69.50.405: Bar to prosecution reads: If a violation of this chapter is a violation of a federal law or the law of another state, a conviction or acquittal under federal law or the law of another state for the same act is a bar to prosecution in this state. It appears count 07 in the case at bench would require an acquittal under Idaho law, as the state did not show a quantity.

Additional Grounds 14

The testimony of the states witnesses; Mary Liddle, Don Gilbert, and Richard Liddle was merely cumulative and should not have been allowed. The South Carolina Supreme Court concluded “Improper corroboration testimony that this is merely cumulative to the victim’s testimony cannot be harmless. *Sanchez v. State* 351 S.C. 270, 569 S.E.2d 363 (2002).

Additional Grounds 15

The court should not have allowed any testimony about the journal. *State v. Ramirez*, 46 Wn.App. 223, 230-31, 730 P.2d 98 (1986) indicated, “The principal elements of the excited utterance exception are a startling event and a spontaneous declaration caused by that event. ER 803 (a) (2); *Beck v. Dye*, 200 Wash. 1, 9-10, 92 P.2d 1113, 127 A.L.R. 1022 (1939). The crucial question is whether the statement was made while the declarant was still under the influence of the event to the extent that his statement could not be

the result of fabrication, intervening actions, or the exercise of choice or judgement. *Ohnson v. Ohls*, 76 Wn.2d 398, 457 P.2d 194 (1969).”

The complainant could not remember when she made the alleged entry in the journal. RP 238-9. She also says she does not remember what made her write this entry. How do we know she did not write about a fantasy? If she would have written this immediately after one of the alleged touching, she should have been able to remember when and which touching it was.

A defense theory could have been discussed if the court had not sustained an objection by the prosecutor. RP378.

The prosecuting attorney improperly shifted the burden of proof to the defendant. RP432 He went on to say the incidents can be verified. RP438. He said the buying of the concert ticket was confirmed. RP441. But the complainant said she paid for the ticket. RP 207-8

Additional Grounds 16

Look at all of the inconsistent statements. Exhibit 5 on the first page in the complainants own writing, she wrote “ It started when I was about 13 years old. (late 2004/early 2005).” During trial she says nothing happened in the sixth grade. RP232. However she also claims the touching started when she was eleven- during a summer barbecue in summer 2003.

In exhibit 5 page 5 she wrote she “wanted to die.” On page 8 she wrote “How horrible he made me feel.” At RP 213 she says she’s a little afraid, then she says she’s not afraid. RP237. If defendant was such a horrible person, why would complainant always seek out defendant? RP279 Complainant claims defendant gave her pot just about every time they were together. RP203. She also claims her mother could

tell when she was high. RP 298-9. But mother claims she was unaware. RP402-3. Complainant also claims mother knew and approved of the alleged smoking and trusted the defendant. RP 282. Why would she have to lie to mother about going to get some with defendant? RP236.

Complainant says touching never occurred in front of other people. RP192, 257. However at one point she claims two women saw it happen. RP 182.

When witness testified he had seen complainant stoned at defendant's house. RP 26-9. Would the fact of who allowed her to get that way be important and relevant testimony? Especially if it was someone other than the defendant. Complainant claims defendant brought over a bottle of wine to the complainant's house while mother was home and defendant spilt it in mother's bedroom while sitting on bed touching the complainant inappropriately. RP 259. Where was the mother? Lack of defense counsel to dive into this deeper is ineffective. The complainant can not remember dates to put in the journal or to tell the detective. RP 220, but remembers just fine for trial?

Additional Grounds 17

The state incorrectly used the incident from Long Beach, WA and Portland, OR. The law allows for prior misconduct, not post misconduct. The charges the defendant was convicted of happened before the alleged Long Beach incident, the State should not have been allowed to use it.

All of these cases have Lustful Disposition or prior bad acts. But all of the alleged acts were prior to charges convicted of.

State v. Bouchard, 31 Wa.App 381, 639 P.2d 761

State v. Guzman, 119 Wa.App. 176, 79 P.3d 990

State v. DeVinceutis 150 Wa.2d 150, 74 P.3d 119

State v. Baker 89 Wa.App. 726, 950 P.2d 486

Additional Grounds 18

It is the duty of the counsel to call to the court's attention, either during trial or in a motion for a new trial, any error upon which appellate review may be predicated, in order to afford the court an opportunity to correct it. *Seattle v. Harclao* 56 Wn.2d 596 (1960). More failure of the trial counsel at bench. The culmination of errors by the defense counsel cannot be harmless. A deficient performance of defense counsel constitutes reversible error if there is a reasonable probability that it affected the result of the trial. *State v. Thomas* 109 Wn.2d 222, 743 P.2d 816 (1987).

The record does not show whether or not the defendant waived his rights or was even asked about the conflict of interest with the defense counsel and the complainant's mother.

Additional Grounds 19

When the complainant testified that "My Aunt Judy said that she doesn't want to know anything so she can be a good wife", the defense counsel should have inquired more about this. He should have questioned the defendant's wife as to this statement. By not asking this of the defendant's wife the jury was able to believe, without rebuttal testimony, this was a factual statements. More ineffective assistance of counsel. How could she know that? There was not any communication after the reporting between the families. RP 83-4.

Because of the cumulative effect of all the errors, preserved and not preserved, denied the defendant his constitutional right to a fair trial the court may exercise their discretion under RAP 2.5 (a) (3) to review all of defendant claims. *State v. Alexander* 64 Wn.App. 147, 150, 822 P.2d 1250 (1992); *State v. Perrett* 86 Wn.App. 312, 322, 936 P.2d 426 (1997) citing *State v. Coe* 101 Wn.2d 772, 789, 684 P.2d 668

(1984). An accumulation of non-reversible errors may deny a defendant a fair trial. *State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); *State v. Perrett* 86 Wn.App. 312, 322, 936 P.2d 426 (1997).

Additional Grounds 20

The final test is whether the facts found and the reasonable inference from them have proved the nonexistence of any reasonable hypothesis of innocence. The court confirmed that circumstantial evidence proving the Corpus Delicti must be consistent with guilt and inconsistent with a hypothesis of innocence. *State v. Aten* 130 Wn.2d 640, 660, 927 P.2d 210 (1996). Even though the defendant had the opportunity to do so, the mere opportunity to commit a criminal act, standing alone provides no proof that the defendant committed the criminal act. *State v. Ray* 130 Wn.2d 673, 681, 926 P.2d 904 (1996). To be sufficient, all the circumstances taken together must exclude to a moral certainty every hypothesis but the single one of guilty. Citing *Kinna v. State* 84 Nev 642, 646, 447 P.2d 32, 34 (1968); *State v. Buchanan* 69 P.3d 694, 705 (NV 2003).

DECLARATION OF SERVICE

COURT OF APPEALS
DIVISION II

09 MAR 10 PM 1:05

I, Carl Williams, certify that I deposited today in the
internal mail system of McNeil Island Corrections Center a properly stamped and

addressed envelope directed to:

Mr. David Ponzaga
Clerk of the Court
Washington Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4450

Steven W Thayer PS.
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Kimberly R. Farr
Deputy Prosecuting Attorney
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Containing the following document(s):

Statement of Additional Grounds

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Submitted this 6 day of March, 2009, at McNeil Island

Corrections Center, Steilacoom, Washington.

By Carl Williams
(Signature)

Carl Williams 312782 D4162
(Name, DOC # and Cell)
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