

No. 63040-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

In re Personal Restraint Petition of
MANSOUR HEIDARI,
Petitioner.

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. SUPPLEMENTAL ISSUE PRESENTED.

Where insufficient evidence supports the conviction for child molestation in the second degree, may this Court direct entry of judgment for the lesser offense of attempted child molestation in the second degree based on the fact that the jury necessarily found all the elements of that crime.¹

B. STATEMENT OF THE CASE.

The petitioner, Mansour Heidari, was charged with five acts of sexual abuse against his niece. Appendix B. Counts I and III charged the defendant with rape of a child in the first degree, Counts II and IV charged him with child molestation in the first degree, and Count V charged him with child molestation in the third degree.

A jury convicted the defendant of Counts I and V as charged, convicted the defendant of the lesser degree crime of child molestation in the second degree in Count IV, and acquitted the defendant of Counts II and III. Appendix C. He received a

¹ In the State's Supplemental Response to Personal Restraint Petition filed on September 10, 2009, the State conceded that the Judgment and Sentence reflected an incorrect seriousness level for Count I. Resentencing will be necessary with a corrected seriousness level. The State will not address this issue further in this brief.

standard range sentence of 162 months of total confinement.

Appendix A. He appealed. This Court affirmed the convictions.

Appendix D. The state supreme court denied review, and mandate

issued on December 9, 2005. Heidari filed a previous personal

restraint petition in this Court, alleging prosecutorial misconduct.

That petition was dismissed on April 20, 2007. Appendix E.

The victim of these crimes, B.Z., was born on March 29, 1986. 3RP 324.² B.Z.'s family immigrated to the United States from Iran when she was four years old. 3RP 325. In addition to her immediate family, B.Z. had several other extended family members who lived nearby and with whom she spent a great deal of time.

B.Z.'s uncle, Mansour Heidari, and his wife, Ladan, lived in the Seattle area near B.Z.'s family, and throughout the years she would visit the Heidari home regularly. 3RP 285-88, 331. B.Z. was very close to the family, and considered Heidari her "favorite uncle." 3RP 288, 308.

When B.Z. was in the fourth grade, the defendant began to sexually abuse her. The first incident that B.Z. testified about

² The Verbatim Report of Proceedings from the trial will be referenced herein as follows: 1RP refers to October 3 and 7, 2002; 2RP refers to October 8, 2002; 3RP refers to October 9 and 10, 2002; 4RP refers to October 14, 2002; 5RP refers to October 15 and November 22, 2002.

happened during this time period. 3RP 332-33. B.Z. testified that she was in Heidari's bedroom playing with her aunt's makeup. 3RP 335. Heidari came up behind B.Z. and touched her on her shoulder and then touched her breasts over her shirt. 3RP 335-39. Heidari then picked B.Z. up and placed her on his lap. 3RP 335, 339. B.Z. testified that she felt a bump under her when she was on Heidari's lap. 3RP 339. This incident formed the basis of Count II and the jury acquitted Heidari of child molestation in the first degree. 5RP 628.

When B.Z. was in the fifth grade, another act of sexual abuse occurred. 3RP 340. B.Z. was alone with Heidari at his house. 3RP 341. B.Z. was playing video games, when Heidari told her to "come upstairs" so he could "show [her] something." 3RP 340. B.Z. followed Heidari to an upstairs room in which her other uncle, Mohsen, was living. 3RP 341. Once in the upstairs room, Heidari showed B.Z. a pornographic movie about a "blond girl in a gym room." 3RP 343-44.

After viewing the video, Heidari said to B.Z., in Persian, "This is what you are supposed to do." 3RP 344-45. Heidari pulled down his pants and underwear, and also disrobed B.Z. 3RP 345. He then anally raped her by inserting his penis in her "behind."

3RP 345-46. B.Z. testified that this was painful, and that after it was over she wiped herself. 3RP 346-48. After this incident, Heidari told her to wear skirts or dresses when she came over. 3RP 348. This incident formed the basis for the charge in Count I, and the jury convicted Heidari as charged of rape of a child in the first degree. 5RP 627.

B.Z. testified about abuse she suffered at Heidari's hands when she was in the sixth grade. B.Z. testified that while at a family gathering at Heidari's home, Heidari was showing children in the family a new BMW. 3RP 349. He took B.Z. for a "test drive," and drove her to a secluded parking lot. 3RP 351. Once in the parking lot, B.Z. testified that Heidari got into the same seat as her, that he had his penis out, and that he anally raped her while they were in the car. 3RP 352-53. This incident formed the basis for the charge in Count III, and the jury acquitted Heidari of rape of a child in the first degree. See 5RP 628.

B.Z. testified that on another occasion also when she was in the sixth grade, she was again at Heidari's home when he abused her. 3RP 354. B.Z. was in Heidari's bedroom playing with her aunt's makeup when Heidari emerged from the bathroom wearing a robe. 3RP 357-58. Heidari sat down on the edge of the bed and

told B.Z. to “come over here,” and pulled her leg toward him. 3RP 358. Heidari then pulled his robe away and exposed his penis to her. 3RP 358. B.Z. testified that his penis was erect and described the appearance of a circumcised penis. 3RP 359-60. Heidari put his hand on B.Z.’s head and tried to push her down toward his penis. 3RP 360-61. B.Z. moved her head to the side and ultimately ran out of the bedroom. 3RP 361. This incident served as the basis for the charge in Count IV. The trial court ruled there was insufficient evidence that B.Z. was less than twelve years old at the time of the crime, and thus submitted only an instruction on the lesser included offense of child molestation in the second degree. Appendix D, at 3. The jury found Heidari guilty of child molestation in the second degree. 5RP 629-30.

B.Z. testified that Heidari did not abuse her during the seventh or eighth grades. 3RP 333. She observed that she was not at his home as much during this time period because there was tension between her own parents and Heidari’s family. 3RP 370-72.

When B.Z. was in the ninth grade, her grandmother was visiting the family from Iran. 3RP 362. The grandmother was staying in Heidari’s home, and B.Z. and her sister spent the night

there with their grandmother. 3RP 362-63. B.Z. was sleeping on the floor in the living room of the house, alone. 3RP 363. Late at night, Heidari came home from working a construction job and woke B.Z. up by shaking her and saying "wake up, wake up." 3RP 364. Heidari had placed his hand on her back and then moved his hand from her back to her breasts. 3RP 365.

B.Z. told Heidari she was sleeping and to leave her alone. She looked up and saw that Heidari had his penis out. 3RP 365. He grabbed B.Z.'s hand and made her touch his penis, and she quickly moved her hand away. 3RP 365. Heidari told her to get up and go to the kitchen, but B.Z. said no, and again told him she was sleeping. 3RP 365. This incident served as the basis for the charge in Count V and the jury found Heidari guilty as charged of child molestation in the third degree. 5RP 630.

At the time the abuse was happening, B.Z. did not tell anyone about it. However, several months after the last incident, B.Z. decided to tell her cousin about Heidari's abuse. 3RP 366. When visiting this cousin, B.Z. told her that she had been sexually abused by Heidari. 2RP 227-28. B.Z. cried when she told her cousin about the abuse, and asked her not to tell anyone else. 2RP 228-29.

A few months later, B.Z. was again visiting relatives and was watching a movie with her aunt Hamideh about a woman who had been sexually abused. 2RP 238-40. B.Z. became upset, and later that day, told her aunt about the sexual abuse she had suffered at the hands of Heidari. 2RP 242-43; 3RP 375.

Some time later, Hamideh told B.Z.'s mother about the abuse. 2RP 244. B.Z.'s mother confronted B.Z. about the allegations, and B.Z. repeated her disclosure of the abuse to her mother. 2RP 263. B.Z.'s mother helped B.Z. obtain counseling and the police were called, initiating this criminal case. 2RP 264-65.

Heidari did not testify at trial. Through cross examination of State witnesses, and presentation of a few factual witnesses who disputed some of the details described by B.Z. as to Heidari's opportunities to abuse her, Heidari's attorneys argued that B.Z. fabricated these allegations. 3RP 384-428; 4RP 524-33. The defense also presented the testimony of witnesses who claimed that B.Z. was never alone in Heidari's house with Heidari. 4RP 527-30, 552.

C. SUPPLEMENTAL ARGUMENT.

BECAUSE INSUFFICIENT EVIDENCE SUPPORTS HIS CONVICTION FOR THE COMPLETED CRIME OF CHILD MOLESTATION IN THE SECOND DEGREE, BUT WHERE THE FACTS FOUND CREDIBLE BY THE JURY ESTABLISH ATTEMPTED CHILD MOLESTATION IN THE SECOND DEGREE, THE PROPER REMEDY IS REMAND FOR ENTRY OF JUDGMENT AS TO THE ATTEMPTED CRIME.

Heidari contends that the evidence was insufficient to support his conviction for Count IV, child molestation in the second degree. This claim is not time-barred because it falls within the exception to the time bar provided by RCW 10.73.100(4) for claims that the evidence was insufficient to support the conviction.

In reviewing a challenge to the sufficiency of the evidence, the appellate court must view the evidence in the light most favorable to the State, and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence, and all reasonable inferences must be drawn in favor of the State. State v. Paine, 69 Wn. App. 873, 850 P.2d 1369 (1993).

Child molestation in the second degree is committed when a person has sexual contact with a child who is at least twelve but

less than fourteen years old. RCW 9A.44.086. Sexual contact is defined as "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire." RCW 9A.44.010(2). Contact is "intimate" if a person of common intelligence would know that the parts touched were intimate. State v. Jackson, 145 Wn. App. 814, 187 P.3d 321 (2008) (concluding that ejaculation constitutes sexual contact).

Heidari contends that there was no substantial evidence of sexual contact because B.Z. testified that she successfully avoided putting her mouth on Heidari's penis. In regard to Count IV, B.Z. testified that, with his penis erect and exposed, Heidari put his hand on her head and tried to push her face toward his penis. RP 10/9/02 360-61. She moved her head to the side and ultimately ran out of the bedroom. RP 10/9/02 361.

The conduct proven at trial does not establish the completed crime of child molestation in the second degree. The victim was clear that her mouth did not touch Heidari's penis. There is no indication that any other part of her body touched Heidari's penis. Heidari touched the victim's head in an attempt to force her to perform fellatio, but the head is not an intimate part of the body even under these circumstances. The evidence established the

crime of attempted child molestation in the second degree, not the completed crime.

RCW 10.61.003 and 10.61.006 provide that a criminal defendant may be convicted at trial on the charged offense, a lesser degree of the charged offense, an attempt to commit the charged offense, or an offense that is necessarily included within the charged offense. These statutes codify the common law rule that a jury can find the defendant guilty of a lesser offense necessarily included in the offense charged. State v. Berlin, 133 Wn.2d 541, 544-45, 947 P.2d 700 (1997). Properly applied, they satisfy the constitutional notice requirement. State v. Porter, 150 Wn.2d 732, 736, 82 P.3d 234 (2004). Thus, a defendant charged with a crime receives sufficient notice that he may also be convicted of a lesser degree, an attempt or a lesser included offense. State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979).

The appellate court may "reverse, affirm, or modify the decision being reviewed and take any other action as the merits of the case and interest of justice may require." RAP 12.2. When an appellate court reverses a conviction, it may direct the trial court to enter judgment on a lesser offense charged when the lesser offense was necessarily proven at trial. State v. Garcia, 146 Wn.

App. 821, 193 P.3d 181 (2008), review denied, 166 Wn.2d 1009 (2009). This remedy may be employed when the greater offense is reversed for insufficient evidence. State v. Bucknell, 144 Wn. App. 524, 530, 183 P.3d 1078 (2008).

In Washington, the appellate court's ability to reverse a conviction and remand for entry of judgment on a lesser crime is more than 100 years old. In State v. Watson, 2 Wash. 504, 27 P. 226 (1891), the state supreme court reversed the defendant's conviction for assault with intent to commit murder based on a charging deficiency and remanded for sentencing as to simple assault. Similarly, in State v. Freidrich, 4 Wash. 204, 224, 29 P. 1055 (1892), the court reversed the defendant's conviction for murder in the first degree based on insufficient evidence of premeditation, and remanded for entry of judgment of murder in the second degree. This remedy has been applied in numerous appellate cases since. State v. Miles, 77 Wn.2d 593, 464 P.2d 723 (1970) (second degree assault reversed for insufficiency and remanded for entry of judgment for third degree assault); Garcia, supra, 146 Wn. App. at 829-30 (third degree assault reversed for insufficiency and remanded for entry of judgment for fourth degree assault); Bucknell, supra, 144 Wn. App. at 520 (second degree

rape reversed for insufficiency and remanded for entry of judgment for third degree rape); State v. Scherz, 107 Wn. App. 427, 437, 27 P.3d 252 (2001) (first degree robbery reversed for insufficiency and remanded for entry of judgment for second degree robbery); State v. Maganai, 83 Wn. App. 735, 740, 923 P.2d 718 (1996) (attempted first degree rape reversed for insufficiency and remanded for entry of judgment for attempted second degree rape); State v. Atterton, 81 Wn. App. 470, 473, 915 P.2d 535 (1996) (first degree theft reversed based on improper aggregation and remanded for entry of judgment for second degree theft); State v. Robbins, 68 Wn. App. 873, 877, 846 P.2d 585 (1993) (trial court properly arrested judgment for possession with intent to deliver based on insufficiency and entered judgment for possession); State v. Gilbert, 68 Wn. App. 379, 388, 842 P.2d 1029 (1993) (first degree burglary reversed for insufficiency and remanded for entry of judgment for residential burglary); State v. Cobelli, 56 Wn. App. 921, 925-26, 788 P.2d 1081 (1989) (possession with intent to deliver reversed for insufficiency and remanded for entry of judgment for possession); State v. Brown, 50 Wn. App. 873, 878-79, 751 P.2d 331 (1988) (first degree criminal trespass reversed for insufficiency and remanded for entry of judgment for

second degree criminal trespass); State v. Kovac, 50 Wn. App. 117, 121, 747 P.2d 484 (1987) (possession with intent to deliver reversed for insufficiency and remanded for entry of judgment for possession); State v. Thompson, 35 Wn. App. 766, 772, 669 P.2d 1270 (1983) (first degree escape reversed for insufficiency and remanded for entry of judgment for escape in the second degree); State v. Liles, 11 Wn. App. 166, 173, 521 P.2d 973 (1974) (possession with intent to deliver reversed for insufficiency and remanded for entry of judgment for possession).

In State v. Green, 94 Wn.2d at 234, the state supreme court stated that "in general, a remand for simple resentencing on a 'lesser included offense' is only permissible when the jury has been explicitly instructed thereon." As this Court noted in State v. Gilbert, that statement was dictum unsupported by any citation to authority. Gilbert, 68 Wn. App. at 384-85.

The limitation suggested in Green is not logical. Pursuant to the Washington Pattern Jury Instructions, when a lesser degree or lesser included or attempt is submitted to the jury as an alternative,

the jury is instructed to consider the greater crime first and fill in the verdict if they unanimously agree that the defendant is guilty. WPIC 155.00. If the jury reaches unanimous agreement that the defendant is guilty of the greater crime, the lesser crime is never considered. The lesser crime is only considered if the jury acquits the defendant of the greater crime or cannot reach a unanimous verdict. Thus, the fact that a lesser crime instruction was given is meaningless when the jury has reached a verdict on the greater crime. There is no reason to think that the jury ever considered the lesser crime in its deliberations.

Moreover, the limitation suggested in Green is unworkable and inequitable because it could not be applied to convictions obtained through bench trials or in juvenile court, in which there are no jury instructions.³ In addition, it would be inequitable in that it would not apply in those cases where the defense properly

³ Miles, 77 Wn.2d at 594, Garcia, 146 Wn. App. at 822, Gilbert, 68 Wn. App. at 381, Cobelli, 56 Wn. App. at 921, were bench trials.

requested the lesser instruction. This Court was correct in rejecting the limitation suggested in Green in Gilbert.⁴

The ability of appellate courts to remand for entry of a lesser included offense necessarily proven has been discussed and noted with approval by the United States Supreme Court. In Rutledge v. United States, 517 U.S. 292, 116 S. Ct. 1241, 134 L. Ed. 2d 419 (1996), the Court found that the defendant's conviction for both conspiracy to distribute a controlled substance and continuing criminal enterprise (CCE) violated double jeopardy because conspiracy was a lesser included offense of CCE. In responding to the Government's argument that it was necessary to allow multiple convictions to provide a "backup" conviction should the defendant

⁴ Other jurisdictions have approved of appellate courts remanding for entry of judgment on a lesser offense necessarily proved at trial, regardless of whether the jury was instructed on the lesser offense. United State v. Hunt, 129 F.3d 739, 744-46 (5th Cir. 1997); United States v. Lamartina, 584 F.2d 764, 766-67 (6th Cir. 1978); United States v. Cobb, 558 F.2d 486, 489 (8th Cir. 1977); United States v. Melton, 491 F.2d 45, 57-58 (D.C. Cir. 1973); People v. Patterson, 532 P.2d 342, 345 (Colo. 1975); State v. Line, 214 P.3d 613, 629-30 (Hawaii 2009); State v. Shields, 722 So.2d 584, 587 (Miss. 1998); In re York, 756 N.E.2d 191, 197-99 (Ohio. App. 2001). See also Shellenberger and Strazella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 Marq.L.Rev. 1, 183-89 (1995) (stating "appropriate modification also conserves resources and prevents what is essentially an unjustified bonus retrial opportunity for a defendant already found --and by definition legitimately found--to have committed all the elements of the LIO.").

prevail on appeal, the Court noted "federal appellate courts appear to have uniformly concluded that they may direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense." 517 U.S. at 306. The Court additionally noted that "this Court has noted the use of such a practice with approval," citing Morris v. Mathews, 475 U.S. 237, 246-47, 106 S. Ct. 1032, 1037-38, 89 L. Ed. 2d 187 (1986). In that case, the defendant initially pled guilty to aggravated robbery. Id. at 240. After pleading guilty, the defendant admitted to killing his robbery accomplice. Id. at 241. The coroner had previously concluded that the accomplice committed suicide. Id. The defendant was then convicted of aggravated felony murder based on aggravated robbery. Id. at 242. He claimed the aggravated murder conviction was a double jeopardy violation. Id. On appeal, recognizing that the aggravated murder conviction violated double jeopardy, the state court modified the conviction of aggravated murder to murder. Id. at 243. The U.S. Supreme Court held that reduction of the conviction from

aggravated murder to murder was a proper remedy for the double jeopardy violation. Id. at 246.⁵ In light of Rutledge and Morris, Heidari's claim that double jeopardy is violated by remand for entry of judgment on a lesser included offense should be rejected.

In sum, it is well-established in Washington that where the verdict returned establishes that the State necessarily proved a lesser degree, this Court may remand for entry of judgment on the lesser offense where it is clear that the trier of fact found sufficient evidence to support that crime. Because an attempt is the functional equivalent of a lesser degree pursuant to RCW 10.61.003, this Court may also remand for entry of judgment for an attempt to commit the charged crime where it is clear the trier of fact found sufficient evidence to support that crime. An attempt is committed when the defendant takes a substantial step toward commission of the crime with the intent to commit the crime. RCW 9A.28.020(1). By finding the defendant guilty of the completed crime, the jury necessarily found that Heidari acted with the intent

⁵ The Court remanded for a determination of whether the defendant had shown a reasonable probability that he would not have been convicted of the non-jeopardy barred offense absent the presence of the jeopardy-barred offense. 517 U.S. at 246-47.

to commit the crime and took a substantial step toward its commission when he grabbed B.Z.'s head and tried to force it toward his erect and exposed penis. Because the evidence is insufficient to support Heidari's conviction for child molestation in the second degree but sufficient to support conviction for attempted child molestation in the second degree, this court should remand for entry of judgment for attempted child molestation in the second degree as to Count IV.

D. CONCLUSION.

This petition should be granted and remanded for entry of judgment for attempted child molestation in the second degree as to Count IV and resentencing.

DATED this 1st day of March, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
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APPENDIX A

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KING COUNTY
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SEATTLE, WA.

HIV

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
	)	Plaintiff,
)	
	)	No. 01-1-10919-3 SEA
)	
Vs.	)	JUDGMENT AND SENTENCE
	)	FELONY
MANSOUR HEIDARI)	
)	
	)	Defendant,

I. HEARING

I.1 The defendant, the defendant's lawyer, GABRIEL BANFI, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: Besta Zadeegan + her mother and father

II. FINDINGS

There being no reason why judgment should not be pronounced, the court finds:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 10/15/2002 by jury verdict of:

Count No.: I Crime: RAPE OF A CHILD IN THE FIRST DEGREE-DOMESTIC VIOLENCE
 RCW 9A.44.073 Crime Code: 01065
 Date of Crime: 03/29/1995-03/28/1999 Incident No. _____

Count No.: IV Crime: CHILD MOLESTATION IN THE SECOND DEGREE-DOMESTIC VIOLENCE
 RCW 9A.44.083 Crime Code: 01073
 Date of Crime: 03/29/1995-03/28/1998 Incident No. _____

Count No.: V Crime: CHILD MOLESTATION IN THE THIRD DEGREE-DOMESTIC VIOLENCE
 RCW 9A.44.089 Crime Code: 01075
 Date of Crime: 03/29/2000-03/29/2001 Incident No. _____

Count No.: _____ Crime: _____
 RCW _____ Crime Code: _____
 Date of Crime: _____ Incident No. _____

[] Additional current offenses are attached in Appendix A

DEC 11 2002

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DEC 13 2002

SPECIAL VERDICT or FINDING(S):

- (a) While armed with a **firearm** in count(s) _____ RCW 9.94A.510(3).
- (b) While armed with a **deadly weapon** other than a firearm in count(s) _____ RCW 9.94A.510(4).
- (c) With a **sexual motivation** in count(s) _____ RCW 9.94A.835.
- (d) A V.U.C.S.A offense committed in a **protected zone** in count(s) _____ RCW 69.50.435.
- (e) **Vehicular homicide** Violent traffic offense DUI Reckless Disregard.
- (f) **Vehicular homicide** by DUI with _____ prior conviction(s) for offense(s) defined in RCW 41.61.5055, RCW 9.94A.510(7).
- (g) **Non-parental kidnapping** or unlawful imprisonment with a minor victim. RCW 9A.44.130.
- (h) **Domestic violence offense** as defined in RCW 10.99.020 for count(s) _____.
- (i) Current offenses **encompassing the same criminal conduct** in this cause are count(s) _____ RCW 9.94A.589(1)(a).

2.2 OTHER CURRENT CONVICTION(S): Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

2.3 CRIMINAL HISTORY: Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):
 Criminal history is attached in Appendix B.
 One point added for offense(s) committed while under community placement for count(s) _____

2.4 SENTENCING DATA:

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	6	XII	162 TO 216		162 TO 216 MONTHS	LIFE AND/OR \$50,000
Count IV	6	X	98 TO 130		98 TO 130 MONTHS	LIFE AND/OR \$50,000
Count V	6	V	41 TO 54		41 TO 54 MONTHS	5 YRS AND/OR \$10,000
Count						

Additional current offense sentencing data is attached in Appendix C.

2.5 EXCEPTIONAL SENTENCE (RCW 9.94A.535):

Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) _____. Findings of Fact and Conclusions of Law are attached in Appendix D. The State did did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and Appendix A.

The Court DISMISSES Count(s) _____

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
- Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(2), sets forth those circumstances in attached Appendix E.
- Restitution to be determined at future restitution hearing on (Date) _____ at _____ m.
- Date to be set.

~~GI 1~~ Defendant waives presence at future restitution hearing(s).

- Restitution is not ordered.
- Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of \$500.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a) \$ _____, Court costs; Court costs are waived; (RCW 9.94A.030, 10.01.160)
- (b) \$100 DNA collection fee; DNA fee waived (RCW 43.43.754)(crimes committed after 7/1/02);
- (c) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs;
 Recoupment is waived (RCW 9.94A.030);
- (d) \$ _____, Fine; \$1,000, Fine for VUCSA; \$2,000, Fine for subsequent VUCSA;
 VUCSA fine waived (RCW 69.50.430);
- (e) \$ _____, King County Interlocal Drug Fund; Drug Fund payment is waived;
(RCW 9.94A.030)
- (f) \$ _____, State Crime Laboratory Fee; Laboratory fee waived (RCW 43.43.690);
- (g) \$ _____, Incarceration costs; Incarceration costs waived (RCW 9.94A.760(2));
- (h) \$ _____, Other costs for: _____

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 500. plus any restitution. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: Not less than \$ _____ per month; On a schedule established by the defendant's Community Corrections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. The Defendant shall remain under the Court's jurisdiction and the supervision of the Department of Corrections for up to ten years from the date of sentence or release from confinement to assure payment of financial obligations.

- Court Clerk's trust fees are waived.
- Interest is waived except with respect to restitution.

4.4 CONFINEMENT OVER ONE YEAR: Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: [] immediately; [] (Date): _____ by _____ .m.

162 months/days on count I; 41 months/days on count IV; _____ months/day on count _____
98 months/days on count IV; _____ months/days on count _____; _____ months/day on count _____

The above terms for counts I, IV, V are ~~concurrent~~ consecutive.

The above terms shall run concurrent/consecutive with cause No.(s) _____

The above terms shall run consecutive to any previously imposed sentence not referred to in this order.

[] In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special WEAPON finding(s) in section 2.1: _____

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98)

[] The enhancement term(s) for any special WEAPON findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The TOTAL of all terms imposed in this cause is _____ months.

Credit is given for 35 days served [] days as determined by the King County Jail, solely for confinement under this cause number pursuant to RCW 9.94A.505(6).

4.5 NO CONTACT: For the maximum term of life years, defendant shall have no contact with Beeta Zadegar

4.6 DNA TESTING. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in APPENDIX G.

HIV TESTING: For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in APPENDIX G.

4.7 (a) [] COMMUNITY PLACEMENT pursuant to RCW 9.94A.700, for qualifying crimes committed before 7-1-2000, is ordered for _____ months or for the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer. [24 months for any serious violent offense, vehicular homicide, vehicular assault, or sex offense prior to 6-6-96; 12 months for any assault 2°, assault of a child 2°, felony violation of RCW 69.50/52, any crime against person defined in RCW 9.94A.411 not otherwise described above.] APPENDIX H for Community Placement conditions is attached and incorporated herein.

(b) [] COMMUNITY CUSTODY pursuant to RCW 9.94.710 for any SEX OFFENSE committed after 6-5-96 but before 7-1-2000, is ordered for a period of 36 months or for the period of earned early release awarded under RCW 9.94A.728, whichever is longer. APPENDIX H for Community Custody Conditions and APPENDIX J for sex offender registration is attached and incorporated herein.

- (c) **COMMUNITY CUSTODY** - pursuant to RCW 9.94A.715 for qualifying crimes committed after 6-30-2000 is ordered for the following established range:
- Sex Offense, RCW 9.94A.030(38) - 36 to 48 months—when not sentenced under RCW 9.94A.712
 - Serious Violent Offense, RCW 9.94A.030(37) - 24 to 48 months
 - Violent Offense, RCW 9.94A.030(45) - 18 to 36 months
 - Crime Against Person, RCW 9.94A.411 - 9 to 18 months
 - Felony Violation of RCW 69.50/52 - 9 to 12 months
- or for the entire period of earned early release awarded under RCW 9.94A.728, whichever is longer.
 Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant to RCW 9.94A.737.
- APPENDIX H for Community Custody conditions is attached and incorporated herein.
 APPENDIX J for sex offender registration is attached and incorporated herein.

4.8 **WORK ETHIC CAMP:** The court finds that the defendant is eligible for work ethic camp, is likely to qualify under RCW 9.94A.690 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the defendant shall be released to community custody for any remaining time of total confinement. The defendant shall comply with all mandatory statutory requirements of community custody set forth in RCW 9.94A.700. Appendix H for Community Custody Conditions is attached and incorporated herein.

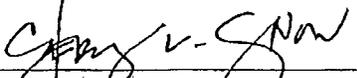
4.9 **ARMED CRIME COMPLIANCE, RCW 9.94A.475, 480.** The State's plea/sentencing agreement is attached as follows:

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: 11/22/02


 JUDGE
 Print Name: ASTORF

Presented by:


 Deputy Prosecuting Attorney, WSBA# 86751
 Print Name: Cheryl Snow

Approved as to form:


 Attorney for Defendant, WSBA # 17810
 Print Name: Gregory J. Ruff

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)	
)	
Plaintiff,	)	No. 01-1-10919-3 SEA
)	
vs.	)	APPENDIX G
	)	ORDER FOR BIOLOGICAL TESTING
MONSOUR HEIDARI	)	AND COUNSELING
)	
Defendant,)	
)	

(1) DNA IDENTIFICATION (RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

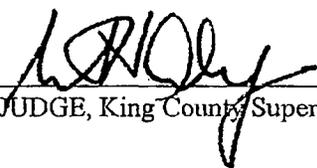
(2) HIV TESTING AND COUNSELING (RCW 70.24.340):

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 296-4848 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: 11/22/02



JUDGE, King County Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,)
Plaintiff,) No. 01-1-10919-3 SEA
vs.) APPENDIX J
MANSOUR HEIDARI) JUDGMENT AND SENTENCE
Defendant,) SEX OFFENDER NOTICE OF
REGISTRATION REQUIREMENTS

SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200. Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW where the victim is a minor and you are not the minor's parent), you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within 30 days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within 30 days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving, register with the sheriff within 24 hours of moving and you must give written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move, work, carry on a vocation, or attend school out of Washington State, you must send written notice within 10 days of establishing residence, or after beginning to work, carry on a vocation, or attend school in th new state, to the county sheriff with whom you last registered in Washington State.

If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier.

Even if you lack a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody or within 48 hours, excluding weekends and holidays, after ceasing to have a fixed residence. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report in person to the sheriff of the county where you registered on a weekly basis. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The county sheriff may require the person to list the locations where the person has stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

I have read and understand these registration requirements.

Heidari 11/22/02
Defendant Date

Cheryl Snow
Deputy Prosecuting Attorney
Cheryl Snow # 26757

[Signature]
Judge
Defense Attorney #17210

COURT CLERK'S RULES
REGLAS DE LA SECRETARÍA DEL TRIBUNAL

The following are Rules of the Court Clerk concerning your monetary obligations (e.g., restitution, court costs) as ordered by the Court.

A continuación encontrará Ud. las Reglas de la Secretaría del tribunal referentes a sus obligaciones monetarias (por ejemplo, reparaciones, costas judiciales), tal como lo ordenó el/la juez.

1. **Mailing Address:** King County Superior Court Clerk
516 Third Avenue, Room E-609
Dirección para envíos por correo: Seattle, WA 98104

2. **Payment Identification:** Make sure that your name and the King County Superior Court case number are written on your payment.

Identificación del pago: Ud. debe escribir su nombre y el número del caso del Tribunal superior del condado de King en el pago.

3. **Acceptable Forms of Payment:** Money order, cashier's check or certified check. (NO PERSONAL CHECKS)

Formas del pago aceptables: Giró postal {"money order"}, cheque de caja {"cashier's check"} o cheque certificado. (NO SE ACEPTAN CHEQUES PERSONALES)

4. **Trust Account Service Fee:** King County Code 4.76 requires that a fee of \$5.00 on all trust payments (restitution) of \$25.01 or more be paid. The fee will be deducted from your payment.

Tasa de servicio para cuentas fiduciarias: El Código 4.6 del condado de King requiere que se pague una tasa de \$5.00 por todos los pagos recibidos en una cuanta fiduciaria de \$25.01 o más. La tasa se descontará de sus pagos

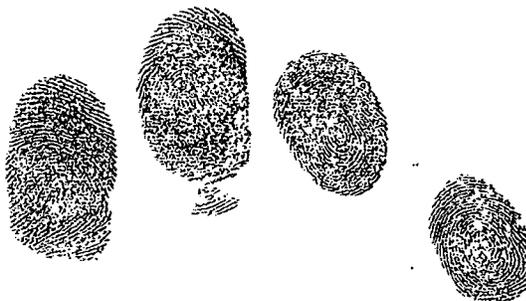
5. **Return Receipts:** If you want the Clerk to return a receipt to you, please include a self-addressed, stamped envelope with your payment.

Envío de recibo: Si Ud. quiere que la Secretaría le envíe un recibo, tenga a bien incluir junto con su pago un sobre que lleve su dirección y franqueo.

6. **Copies of Balance Sheets:** If you need to have a balance sheet showing the total amount that you have paid and the remaining balance due, a fee of \$2.00 is assessed. Please include a self-addressed, stamped envelope. You may write to the address above or go to the office in person.

Copias de los estados de cuenta: Si Ud. necesita tener un estado de cuenta que muestre la suma total que Ud. ha pagado y la que todavía debe, se impone una tasa de \$2.00. Tenga bien incluir junto con su pago un sobre que lleve su dirección y franqueo. Puede escribir a la dirección susodicha o ir a la oficina personalmente.

FINGERPRINTS



BEST AVAILABLE IMAGE POSSIBLE

RIGHT HAND
FINGERPRINTS OF:

DEFENDANT'S SIGNATURE:
DEFENDANT'S ADDRESS:

Haydari

DOC

MONSOUR HEIDARI

DATED: NOV 22 2002

ATTESTED BY: BARBARA MINER,
SUPERIOR COURT CLERK

BY: *Victoria J. Anderson*
DEPUTY CLERK

[Signature]
JUDGE, KING COUNTY SUPERIOR COURT
ROBERT H. ALSDORF

CERTIFICATE

OFFENDER IDENTIFICATION

I, _____,
CLERK OF THIS COURT, CERTIFY THAT
THE ABOVE IS A TRUE COPY OF THE
JUDGEMENT AND SENTENCE IN THIS
ACTION ON RECORD IN MY OFFICE.
DATED: _____

S.I.D. NO. WA20567832
DOB: NOVEMBER 24, 1953
SEX: M
RACE: W

CLERK

BY: _____
DEPUTY CLERK

APPENDIX B

FILED
KING COUNTY, WASHINGTON
MAY - 3 2002
SUPERIOR COURT CLERK
CRIMINAL PRESIDING

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON,)	
)	
Plaintiff,	)	No. 01-1-10919-3 SEA
)	
v.)	
	)	AMENDED INFORMATION
MANSOUR HEIDARI)	
)	
)	
Defendant.)	

COUNT I

I, Norm Maleng, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse MANSOUR HEIDARI of the crime of **Rape of a Child in the First Degree - Domestic Violence**, committed as follows:

That the defendant MANSOUR HEIDARI in King County, Washington, during a period of time intervening between March 29, 1995, through March 28, 1998, being at least 24 months older than Beeta Zadeگان had sexual intercourse with Beeta Zadeگان, who was less than 12 years old and was not married to the defendant;

Contrary to RCW 9A.44.073, and against the peace and dignity of the State of Washington.

COUNT II

And I, Norm Maleng, Prosecuting Attorney aforesaid further do accuse MANSOUR HEIDARI of the crime of **Child Molestation in the First Degree - Domestic Violence**, a crime of the same or similar character and based on the same conduct as another crime charged herein, which crimes were part of a common scheme or plan and which crimes were so closely connected in respect to time, place and

Norm Maleng
Prosecuting Attorney
W 554 King County Courthouse
Seattle, Washington 98104-2312
(206) 296-9000

1 occasion that it would be difficult to separate proof of one charge
2 from proof of the other, committed as follows:

3 That the defendant MANSOUR HEIDARI in King County, Washington,
4 during a period of time intervening between March 29, 1995, through
5 March 28, 1998, being at least 36 months older than Beeta Zadegan
6 had sexual contact for the purpose of sexual gratification with
7 Beeta Zadegan, who was less than 12 years old and was not married
8 to the defendant;

9 Contrary to RCW 9A.44.083, and against the peace and dignity
10 of the State of Washington.

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COUNT III

28 And I, Norm Maleng, Prosecuting Attorney aforesaid further do
29 accuse MANSOUR HEIDARI of the crime of **Rape of a Child in the First**
30 **Degree - Domestic Violence**, a crime of the same or similar
31 character and based on the same conduct as another crime charged
32 herein, which crimes were part of a common scheme or plan and which
33 crimes were so closely connected in respect to time, place and
34 occasion that it would be difficult to separate proof of one charge
35 from proof of the other, committed as follows:

36 That the defendant MANSOUR HEIDARI in King County, Washington
37 during a period of time intervening between March 29, 1995 through
38 March 28, 1998, being at least 24 months older than Beeta Zadegan,
39 had sexual intercourse with Beeta Zadegan, who was less than 12
40 years old and was not married to the defendant;

41 Contrary to RCW 9A.44.073, and against the peace and dignity
42 of the State of Washington.

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COUNT IV

61 And I, Norm Maleng, Prosecuting Attorney aforesaid further do
62 accuse MANSOUR HEIDARI of the crime of **Child Molestation in the**
63 **First Degree - Domestic Violence**, a crime of the same or similar
64 character and based on the same conduct as another crime charged
65 herein, which crimes were part of a common scheme or plan and which
66 crimes were so closely connected in respect to time, place and
67 occasion that it would be difficult to separate proof of one charge
68 from proof of the other, committed as follows:

69 That the defendant MANSOUR HEIDARI in King County, Washington
70 during a period of time intervening between March 29, 1995 through
71 March 28, 1995, being at least 36 months older than Beeta Zadegan,
72 had sexual contact for the purpose of sexual gratification with
73 Beeta Zadegan, who was less than 12 years old and was not married
74 to the defendant;

75 Contrary to RCW 9A.44.083, and against the peace and dignity
76 of the State of Washington.

Norm Maleng
Prosecuting Attorney
W 554 King County Courthouse
Seattle, Washington 98104-2312
(206) 296-9000

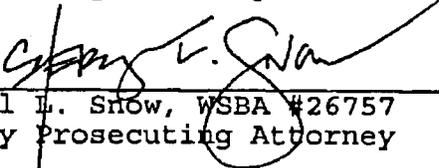
COUNT V

1
2 And I, Norm Maleng, Prosecuting Attorney aforesaid further do
3 accuse MANSOUR HEIDARI of the crime of Child Molestation in the
4 Third Degree - Domestic Violence, a crime of the same or similar
5 character and based on the same conduct as another crime charged
6 herein, which crimes were part of a common scheme or plan and which
7 crimes were so closely connected in respect to time, place and
8 occasion that it would be difficult to separate proof of one charge
9 from proof of the other, committed as follows:

10 That the defendant MANSOUR HEIDARI in King County, Washington
11 during a period of time intervening between March 29, 2000 through
12 March 29, 2001, being at least 48 months older than Beeta Zadegan,
13 had sexual contact for the purpose of sexual gratification with
14 Beeta Zadegan, who was 14 or 15 years old and was not married to
15 the defendant;

16 Contrary to RCW 9A.44.089, and against the peace and dignity
17 of the State of Washington.

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NORM MALENG
Prosecuting Attorney

By: 
Cheryl L. Snow, WSBA #26757
Deputy Prosecuting Attorney

Norm Maleng
Prosecuting Attorney
W 554 King County Courthouse
Seattle, Washington 98104-2312
(206) 296-9000

APPENDIX C

FILED
KING COUNTY, WASHINGTON

OCT 16 2002

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY
BY VICTORIA ERICKSEN
SUPERIOR COURT CLERK
DEPUTY

STATE OF WASHINGTON)

Plaintiff,)

vs.)

MANSOUR HEIDARI)

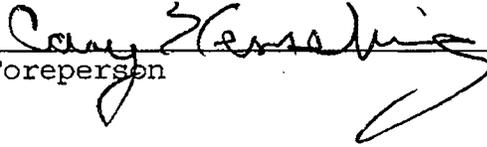
Defendant.)

No. 01-1-10919-3 SEA

VERDICT FORM A

We, the jury, find the defendant MANSOUR HEIDARI

Guilty (write in not guilty or guilty) of the crime
of Rape of a Child in the First Degree as charged in Count I.


Foreperson

FILED
KING COUNTY, WASHINGTON

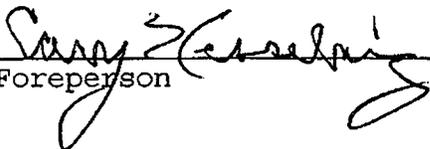
OCT 16 2002

SUPERIOR COURT CLERK
BY VICTORIA ERICKSEN
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)	
	)	No. 01-1-10919-3 SEA
Plaintiff,)	
	)	VERDICT FORM B
vs.)	
)	
MANSOUR HEIDARI)	
)	
Defendant.)	

We, the jury, find the defendant Mansour Heidari
Not Guilty (write in not guilty or guilty) of the crime
of Child Molestation in the First Degree as charged in Count II.



Foreperson

FILED
KING COUNTY, WASHINGTON

OCT 16 2002

SUPERIOR COURT CLERK
VICTORIA ERICKSEN
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)

Plaintiff,)

vs.)

MANSOUR HEIDARI)

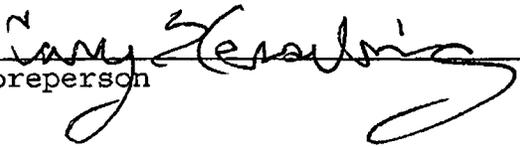
Defendant.)

No. 01-1-10919-3 SEA

VERDICT FORM C

We, the jury, find the defendant MANSOUR HEIDARI

Not Guilty (write in not guilty or guilty) of the crime
of Rape of Child in the Second Degree as charged in Count III.


Foreperson

OCT 16 2002

SUPERIOR COURT CLERK
BY VICTORIA ERICKSEN
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)
)
 Plaintiff,) No. 01-1-10919-3 SEA
)
 vs.) VERDICT FORM D
)
)
 MANSOUR HEIDARI)
)
 Defendant.)

We, the jury, find the defendant MANSOUR HEIDARI
Guilty (write in not guilty or guilty) of the crime
of Child Molestation in the Second Degree as charged in Count IV.

Sam Steadley
Foreperson

FILED
KING COUNTY, WASHINGTON

OCT 16 2002

SUPERIOR COURT CLERK
BY VICTORIA ERICKSEN
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)
)
Plaintiff,) No. 01-1-10919-3 SEA
)
vs.) VERDICT FORM E
)
)
MANSOUR HEIDARI)
)
Defendant.)

We, the jury, find the defendant MANSOUR HEIDARI
Guilty (write in not guilty or guilty) of the crime
of Child Molestation in the Third Degree as charged in Count V.

Cary Kessling
Foreperson

APPENDIX D

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
	)	No. 51539-0-1
Respondent,)	
v.	)	MANDATE
)	
MANSOUR HEIDARI,	)	King County
)	
Appellant.	)	Superior Court No. 01-1-10919-3 SEA

FILED
 2005 DEC 14 PM 2:43
 KING COUNTY
 SUPERIOR COURT CLERK
 SEATTLE, WA.

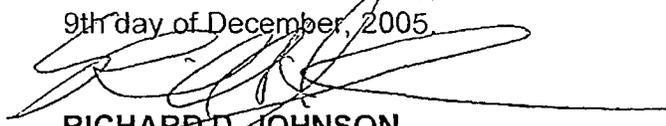
THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on January 18, 2005, became the decision terminating review of this court in the above entitled case on December 9, 2005. An order denying a petition for review was entered in the Supreme Court on October 5, 2005. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to a Commissioner's ruling dated November 2, 2005, costs in the amount of \$4,390.25 are awarded against judgment debtor Mansour Heidari in favor of judgment creditor Washington Office of Public Defense, Indigent Defense Fund and costs in the amount of \$104.11 are awarded against judgment debtor Mansour Heidari in favor of judgment creditor the King County Prosecutor's Office.

- c: David B. Koch, NBK
- Catherine M. McDowall, KC
- Jennifer K. Ryan Gilman
- Hon. Robert H. Alsdorf
- Indeterminate Sentencing Review Board

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 9th day of December, 2005.



RICHARD D. JOHNSON
 Court Administrator/Clerk of the Court of Appeals,
 State of Washington, Division I.



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 51539-0-1
)	
Respondent,	)	DIVISION ONE
)	
v.	)	UNPUBLISHED OPINION
)	
MANSOUR HEIDARI,)	
	)	FILED: January 18, 2005
Appellant.)	

APPELWICK, J. – Mansour Heidari was convicted of one count of rape of a child in the first degree, one count of child molestation in the second degree, and one count of child molestation in the third degree for sexually abusing his niece, Z.B., over a period of several years. He asserts on appeal that the trial court erred (1) when it admitted testimony from witnesses under the fact of complaint doctrine; (2) by excluding surrebuttal testimony; (3) by providing the jury with a lesser degree instruction; and (4) by permitting prosecutorial misconduct. We affirm.

FACTS

In 2001, several months after turning fifteen years old, B.Z. confided in her cousin, S.N., while visiting her at her home in Vancouver, Canada, that she had

been sexually abused. A few months later, B.Z. also confided in S.N.'s mother, H.D.K. H.D.K. informed B.Z.'s mother. B.Z. later related the incidents of abuse to her mother. B.Z.'s mother promptly sought help for her daughter and notified the police. Based on the allegations against him, Heidari was charged with two counts of rape of a child in the first degree, two counts of child molestation in the first degree, and one count of child molestation in the third degree.

B.Z. alleged that Heidari first sexually abused her when she nine or ten years old and in the fourth grade.¹ Heidari next sexually abused her when she was in the fifth grade, an incident that formed the basis for Count I, rape of a child in the first degree. B.Z. also testified about two incidents of sexual abuse when she was in the sixth grade. Those incidents form the basis for Count III and Count IV. Count V is based on an incident of sexual abuse that occurred when B.Z. was in the ninth grade, two to three months before B.Z.'s disclosure of abuse to her cousin, and five to six months before her disclosure to her aunt and mother.

Prior to trial, the state moved to allow fact of complaint testimony from S.N., H.D.K., and B.Z.'s mother. Following Heidari's initial objection, the trial court did not allow the testimony. Later, however, the trial court allowed fact of complaint testimony from all three witnesses.

Count I, rape of a child in the first degree, was alleged to have occurred in the bedroom of Heidari's brother, Mohsen Zadegan, (Mohsen) in Heidari's home.

¹ This incident was charged as Count II, child molestation in the first degree. The jury acquitted Heidari of this charge.

During Heidari's case-in-chief, Heidari's wife testified that Mohsen's door was always locked and that Mohsen had the key. In rebuttal, B.Z.'s father, Mohamed Zadegan, testified that there was no lock on Mohsen's door. Defense counsel requested surrebuttal to call Mohsen to testify that his door did have a lock and that he did not allow anyone into his room. The trial court denied the request, telling defense counsel that Mohsen should have been called during its case-in-chief.

B.Z. testified that the incidents of abuse upon which Counts III and IV were based occurred when she was in the sixth grade. B.Z. could not recall when in the sixth grade the incidents occurred, and thus did not recall if she was eleven or twelve years old at the time.² Observing that RCW 9A.44.083, child molestation in the first degree, requires that the victim be less than twelve years old, the trial court ruled that as a matter of law there was insufficient evidence for the jury to find that B.Z. was less than twelve years old at the time of the offense. The trial court therefore submitted to the jury only an instruction on the lesser offense of child molestation in the second degree. The trial court also deviated from the WPIC jury instructions by omitting the "at least twelve" language from the instructions provided to the jury.

Prior to the verdict, Heidari filed a motion for mistrial, which the trial court denied. The trial court also denied Heidari's post-verdict motion for a new trial.

Heidari appeals.

² Heidari assigns error to both Counts III and IV, but in the body of his brief argues only regarding Count IV. It is clear that the jury instructions on both deviated from the pattern instructions in omitting the "at least twelve" language, so we address both Counts III and IV here.

I. Testimony by S.N., H.D.K, and B.Z.'s Mother

Heidari assigns error to the trial court's admission of testimony from three witnesses under the fact of complaint doctrine.

The admissibility of evidence is a matter placed within the sound discretion of the trial court, and should be reversed only upon a showing of manifest abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). "Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

B.Z. alleged that Heidari first sexually abused her when she was nine or ten years old, and that the abuse continued until around March 29, 2001, the time of her fifteenth birthday. She testified that, while visiting her cousin, S.N., in Vancouver in May or June 2001, about two or three months after the last incident of abuse, she disclosed to S.N. that she had been sexually abused. She also confided in S.N.'s mother, H.D.K., on her next visit to Vancouver a few months later. H.D.K. later told B.Z.'s mother. When B.Z.'s mother confronted B.Z. about the allegations, B.Z. told her, also, that she had been sexually abused.

Prior to trial, the State filed a motion to allow S.N., H.D.K., and B.Z.'s mother to testify as to B.Z.'s disclosures of abuse to them. Notwithstanding Heidari's objections, the court ultimately allowed testimony under the fact of complaint doctrine, stating:

Many of the cases, not all of them, but many of the cases in which the issue of fact of complaint and hue and cry are raised, are cases in which there is a charge of a single attack, a sexual assault, a

rape. In those situations, the discussion of hue and cry and the use of the phrase timely complaint do make sense fairly obviously. But, in a case where there is an allegation of a pattern of sexual abuse to a child, a complaint might not occur until the period of substantial time has passed.

Some of the case law does seem to address the question of a timely complaint being what is a reasonable time to respond. And in this case, as in other cases of childhood sexual abuse, the question of what is a reasonable, timely response or complaint period for an alleged victim of child abuse is very much a factual issue that a jury can and should consider.

The jury can and should consider whether or not this complaining witness acted in a timely fashion, acted in a reasonable fashion, or perhaps made a tardy complaint, just tied into some sort of family dispute. And allowing evidence in this case of the apparent timing of the complaint may, in fact, not be harmful to the defense, it may be helpful, because what we have here, what is alleged in fact to be a pattern of some years, a number of years earlier, and only in recent time is there some allegation of misconduct by Mr. Heidari.

So, at this point I am not going to prohibit testimony from either the complaining witness or other witnesses as to the fact of complaint. This does not permit, of course, any of the witnesses who supposedly heard such a complaint to testify about the contents of the complaint or the identity of the alleged perpetrator.

Since the thirteenth century, the hue and cry rule has required victims of rape and other violent crimes to immediately report the crime to authorities following its commission. See Christine Kenmore, Note, The Admissibility of Extrajudicial Rape Complaints, 64 B.U.L. Rev. 199, 204-05 (1984). In State v. Murley, the court explained the rationale behind the hue and cry rule:

This doctrine rests on the ground that a female naturally complains promptly of offensive sex liberties upon her person and that, on trial, an offended female complainant's omission of any showing as to when she first complained raises the inference that, since there is no showing that she complained timely, it is more likely that she did not complain at all, and therefore that it is more likely that the liberties upon her person, if any, were not offensive and that

consequently her present charge is fabricated. Thus, formerly, to overcome the inference, it became essential to the state's case-in-chief to prove affirmatively that she made timely hue and cry. 3 Wigmore, op. cit., § 1042; 4 Wigmore, op. cit., § 1134 et seq.; [additional citations omitted].

Modernly, the inference [of consent and later fabrication of charges] affects the woman's credibility generally, and the truth of her present complaint specifically, and consequently, we permit the state to show in its case-in-chief when the woman first made a complaint consistent with the charge.

State v. Murley, 35 Wn.2d 233, 237, 212 P.2d 801 (1949). Following the development of the hearsay rule in the 1800s, under which prior out-of-court statements made by a victim to prove the truth of the matter asserted are inadmissible in court, the hue and cry rule evolved into an exception to hearsay, variously called the "fresh complaint," or the fact of complaint, doctrine. 64 B.U.L. Rev. at 205-06. Washington courts have relied upon the fact of complaint doctrine since the nineteenth century to support the admission of out-of-court disclosures of abuse made by victims of alleged sexual offenses. State v. Hunter, 18 Wn. 670, 672, 52 P. 247 (1898); State v. Griffin, 43 Wn. 591, 595, 86 P. 951 (1906); State v. Myrberg, 56 Wn. 384, 387, 105 P. 622 (1909); State v. Beaudin, 76 Wn. 306, 307, 136 P. 137 (1913); State v. Gay, 82 Wn. 423, 426, 144 P. 711 (1914); State v. Aldrick, 97 Wn. 593, 595, 166 P. 1130 (1917); State v. Dixon, 143 Wn. 262, 265, 255 P. 109 (1927); State v. Smith, 3 Wn.2d 543, 550, 101 P.2d 298 (1940).

Whereas the hue and cry rule permitted into evidence details from a declarant's prior disclosure of a crime, the fact of complaint doctrine allows "only

such evidence as will establish whether or not a complaint was made timely.”

Murley, 35 Wn.2d at 237. Thus, under the fact of complaint doctrine,

the prosecution in a forcible rape case may present evidence of the fact of the victim’s complaint in its case in chief. The details and particulars of the complaint are not admissible. The evidence is not hearsay because it is introduced for the purpose of bolstering the victim’s credibility and is not substantive evidence of the crime.

State v. Bray, 23 Wn. App. 117, 121, 594 P.2d 1363 (1979) citing State v. Ragan, 22 Wn. App., 591, 593 P.2d 815 (1979).

Heidari argued at trial, and argues here on appeal, that because B.Z.’s disclosures to S.N., H.D.K., and her mother were not timely made, they are not admissible under the fact of complaint doctrine. Heidari also asserts that the admission of testimony by S.N., H.D.K and B.Z.’s mother was inadmissible under the fact of complaint doctrine because it prejudiced him and included substantive information.

S.N., H.D.K. and B.Z.’s mother testified to the fact that B.Z. was “really upset,” “crying,” and “shaking” at the time she disclosed to them that she had been abused. This is nonsubstantive testimony. Rather, it describes emotional state of the victim which goes to her credibility while making the report. Even if these details regarding B.Z.’s demeanor at the time of her disclosures were inadmissible under the fact of complaint doctrine, they were admissible under ER 801(d)(1). Under ER 801(d)(1), a statement is not hearsay if “[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is ... (ii) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of

recent fabrication or improper influence or motive.” B.Z. testified at trial, and testimony from S.N., H.D.K., and B.Z.’s mother was intended to rebut any inference of fabrication. Accordingly, the testimony from S.N., H.D.K., and B.Z.’s mother was admissible.

II. Surebuttal testimony

Heidari asserts that the trial court abused its discretion when it excluded his surrebuttal testimony.

A trial court’s refusal to admit surrebuttal evidence is reviewed under a manifest abuse of discretion standard. State v. Luvene, 127 Wn.2d 690, 709-10, 903 P.2d 960 (1995). “Testimony which is merely cumulative or confirmatory or which is merely a contradiction by a party who has already so testified does not justify surrebuttal as of right.” Luvene, 127 Wn.2d at 710 (citations omitted).

Count I, Rape of a Child in the First Degree, was alleged to have occurred in the bedroom of Heidari’s brother, Mohsen, in Heidari’s home. During Heidari’s case-in-chief, Heidari’s wife testified that Mohsen’s door was always locked and that Mohsen had the key. In rebuttal, B.Z.’s father, Mohamed Zadegan, testified that there was no lock on Mohsen’s door. Defense counsel requested surrebuttal to call Mohsen to testify that his door did have a lock and that he did not allow anyone into his room. The trial court denied the request, telling defense counsel that Mohsen should have been called during its case-in-chief.

At trial, defense counsel raised the issue of whether or not the door to Mohsen’s room had a lock; it thus was not a new issue raised by the state on rebuttal. Heidari had an opportunity to elicit testimony from Mohsen during his

case-in-chief, regarding if there was a lock on the door to Mohsen's room but failed to do so. Moreover, Mohsen's testimony would have been cumulative with Heidari's wife's testimony that the door to Mohsen's room had a lock. Heidari cites no authority to show that the trial court abused its discretion in refusing Mohsen's surrebuttal testimony. The trial court did not abuse its discretion when it disallowed Mohsen's testimony.

III. Instruction on Lesser Degree Offense

Heidari assigns error to the trial court's jury instruction on the lesser degree offense of child molestation in the second degree.

A challenged jury instruction is reviewed de novo and evaluated in the context of the instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Jury instructions must be supported by substantial evidence. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). Jury instructions are sufficient if they (1) permit each party to argue his or her theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law. State v. Pesta, 87 Wn. App. 515, 524, 942 P.2d 1013 (1997).

Counts III and IV, two of the state's charges against Heidari, were child rape in the first degree and child molestation in the first degree, respectively.³ B.Z. testified that the incidents upon which Counts III and IV were based occurred when she was in the sixth grade. B.Z. did not recall whether she was

³ Count III was based on an allegation that Heidari anally raped B.Z. in his new BMW in a secluded parking lot. Count IV is based on an allegation that Heidari attempted to push B.Z.'s head toward his penis.

eleven or twelve years old at the time of the incidents of abuse on which Counts III and IV were based. RCW 9A.44.083, child molestation in the first degree, requires that the victim be less than twelve years old. RCW 9A.44.086, child molestation in the second degree, requires that the victim be between twelve and fourteen years old.

Because it was not possible to conclude beyond a reasonable doubt that B.Z. was less than twelve, the trial court ruled that, as a matter of law, there was insufficient evidence to enable the jury to find that B.Z. was less than twelve years old at the time of the offense. Having concluded that Heidari therefore could not be convicted of first degree child molestation, the trial court submitted to the jury only an instruction on the lesser offense of child molestation in the second degree.

Relying upon Fernandez-Medina, Heidari argues that a lesser degree instruction was improper because the state could not prove that the lesser degree offense occurred to the exclusion of the charged offense. Heidari's reliance on Fernandez-Medina is misplaced. In that case, the defendant asserted on appeal that the trial court had erred because it had refused to provide the jury with an instruction on a lesser degree offense as well as an instruction on the charged, higher degree offense.⁴ Fernandez-Medina, 141 Wn.2d at 452.

⁴ Fernandez-Medina states the test for whether a trial court may instruct a jury on a lesser degree offense: a trial court may instruct a jury on a lesser degree offense if (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense";

Fernandez-Medina also reiterated that under RCW 10.61.003, a defendant may be convicted of the charged crime or of any lesser degree of the crime charged. RCW 10.61.003; Fernandez-Medina, 141 Wn.2d at 453. “[W]hen an offense has been proved against [a defendant], and there exists a reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lowest.” RCW 10.58.020. The trial court properly determined that the evidence supported only the fact that B.Z. was not yet fourteen at the time of the incidents of sexual abuse on which Counts III and IV were based. Therefore, as a matter of law, the elements of first degree child molestation could not be proven. Only the lesser degree offense remained capable of proof. Instructions on first degree child molestation to the jury were not appropriate. The court did not err in providing the jury with an instruction on the lower degree.

IV. Language of Jury Instruction

Heidari also asserts that the trial court erred when it deviated from the language in the WPIC jury instructions for child molestation in the second degree in its instructions to the jury. The WPIC provides:

To convict the defendant of the crime of child molestation in the *second degree*, each of the following elements of the crime must be proved beyond a reasonable doubt:

-
- (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and
(3) there is evidence that the defendant committed only the inferior offense.
Fernandez-Medina, 141 Wn.2d at 454 (citations omitted)

- (1) That on or about the ____ day of _____, 19____, the defendant had sexual contact with _____;
- (2) That _____ was at least twelve years old but less than fourteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That the defendant was at least thirty-six months older than _____; and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Heidari contends that the court was obligated to adhere verbatim to the language found in the WPIC instructions for second degree child molestation. Heidari does not cite, nor have we found, any authority mandating that the trial court follow the WPIC instructions verbatim.

B.Z.'s testimony indicated that she was either eleven or twelve years old and in the sixth grade at the time of one incident of sexual abuse by Heidari. After concluding that as a matter of law the jury could not convict Heidari of child molestation in the first degree, as charged, the trial court gave a jury instruction on the lesser degree offense, child molestation in the second degree. However, because the state was unable to prove that B.Z. was over the age of twelve, the lower age range for victims under RCW 9A.44.086, child molestation in the second degree, the trial court omitted WPIC 44.23's "at least twelve" language from the jury instructions. Heidari argues that because the victim's age is an

essential element of the crime, the trial court should have dismissed the charges as unproven.

The fact that B.Z. was younger than the lower age specified in the second degree child molestation statute does not mean that Heidari did not commit sexual molestation. State v. Smith, 122 Wn. App. 294, 296, 93 P.3d 206, 206 (2004); see also State v. Dodd, 53 Wn. App. 178, 181, 765 P.2d 1337 (1989). As the state asserts, the “sole purpose” of the “at least twelve” language of the statute is to “differentiate the lower degrees from the higher degrees of child molestation.” The omission of “at least twelve” language did not add to Heidari’s burden in any way; nor did it excuse the state from proving beyond a reasonable doubt that Heidari, by his conduct, met the essential elements of child molestation in the second degree and child rape in the second degree. The omission was merely consistent with removal of the charge of child molestation in the first degree, which would have remained if the evidence supported an age of the victim of less than twelve years.

It was not possible to ascertain with certainty whether B.Z. had reached the age of twelve years at the time Heidari abused her, so no instruction on the charged higher degree offense was provided to the jury. It was clear that B.Z. was under the upper age limit of fourteen for victims establishing second degree offenses. Because there was a reasonable doubt whether B.Z. had attained the age of twelve, the trial court properly provided the jury with an instruction on the lesser degree offense omitting the “at least twelve” language contained in RCW 9A.44.085. Read as a whole, the jury instructions properly informed the jury of

the applicable law, were not misleading, and allowed both parties to argue their theory of the case. The trial court did not abuse its discretion when it omitted the "at least twelve" language from the WPIC instructions in the instructions it provided the jury.

V. Motion for a New Trial

Heidari also assigns error to the trial court's failure to declare a mistrial based on improper remarks by the prosecutor during closing.

To prevail on a claim of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). The defendant bears the burden of establishing misconduct, and that the conduct was prejudicial. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). A new trial is not required unless there is a substantial likelihood that the improper argument affected the verdict. See Finch, 137 Wn.2d at 839.

During closing, the prosecutor made the following statements:

I have never had a case where somebody can't bring in character witnesses to testify on their behalf because you don't do these kinds of acts in front of other people, and you don't tell other people about what you did. You pick on a child. You pick on somebody who is not going to know how to handle the situation. You went for your moment or opportunity you get them alone, and you commit your crime.

...

[B.Z.] has no motive to lie. And in regards to that, I want to go back to a couple of arguments regarding this case. It is a credibility call. Plain and simple, your job in this case is to decide if you believe [B.Z.], because in our state, based upon our law, if you believe her, that is enough to support conviction of this man.

...

I want to tell you, there has never been a case where a child is removed from the home, no matter how bad their body is bruised, no matter how bad they have been sexually abused.

Portions of the prosecutor's comments during closing did reflect her own personal experience and were thus improper. In order for this court to reverse Heidari's conviction, however, he must also show that the remarks were prejudicial to him. To establish prejudice, Heidari must demonstrate there is a substantial likelihood the misconduct affected the jury's verdict. Finch, 137 Wn.2d at 839. Heidari fails to show such prejudice. The trial court sustained Heidari's objections to the prosecutor's statements, instructed the prosecutor to refrain from testifying about her own experience, and instructed the jury to disregard the prosecutor's personal opinions. The trial court also gave curative instructions to the jury, foreclosing any possible prejudice. Also, the trial court had advised the jury prior to trial that they would not be permitted to take notes during closing, and, just prior to closing arguments, instructed the jury to "[d]isregard any remark, statement or argument that is not supported by the evidence or by the law as stated by the court." Moreover, it was highly improbable that the prosecutor's comments affected the verdict. The trial court stated at sentencing that "the evidence was very, very strong." As the trial court articulated in addressing its denial of Heidari's motion for a new trial,

I do not agree with the defense that this is a marginal case. There was substantial evidence that was presented in this case; there was substantial circumstantial corroboration of the ... State's case, in terms of the nature of the alleged victim's testimony; and for

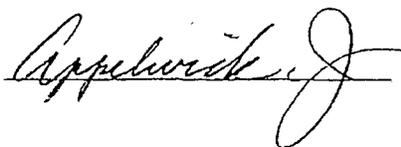
example, her lack of exaggeration at times when[h]ad she perhaps made up some of the testimony, it would be likely to be the kind of testimony that she would exaggerate.

The trial court did not err in denying Heidari a new trial because he has not shown that he was prejudiced by the prosecutor's comments during closing.

VI. Cumulative Error

Heidari also argues that the individual errors he alleges are cumulative and require reversal of his conviction under the cumulative error doctrine. The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Where errors have little or no effect on the outcome at trial, the doctrine is inapplicable. See Greiff, 141 Wn.2d at 929. Even if there were errors, they had no effect on the outcome of Heidari's trial. Thus, the doctrine does not apply here.

Affirmed.



WE CONCUR:



APPENDIX E

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle
98101-4170

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CASE #: 59086-3-1
Personal Restraint Petition of Mansour Heidari

Counsel:

Enclosed please find a copy of the Order Dismissing Personal Restraint Petition entered by this court in the above case today.

Pursuant to RAP 16.14(c), "the decision is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in Rule 13.5(a), (b) and (c)."

This court's file in the above matter has been closed.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

law

enclosure

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

IN THE MATTER OF THE)	
PERSONAL RESTRAINT	)	No. 59086-3-1
OF:)	
	)	ORDER OF DISMISSAL
MANSOUR HEIDARI,)	
)	
Petitioner.)	

Mansour Heidari has filed a personal restraint petition alleging that the prosecutor committed misconduct during closing argument and that Heidari received ineffective assistance of appellate counsel because counsel failed to challenge certain prosecutorial misconduct.¹ To prevail here, Heidari must show that he is unlawfully restrained.² To establish unlawful restraint, he must show either (1) actual and substantial prejudice arising from constitutional error, or (2) nonconstitutional error that inherently results in a "complete miscarriage of justice."³ If Heidari had no prior or alternative means of obtaining state judicial review, he must show only that he is restrained and that the restraint is unlawful.⁴ In order to prevail in a personal restraint petition, a petitioner must set out the

¹ On April 5, 2007 Heidari filed a motion to continue time for filing reply. The motion is granted, and the reply accepted.

² See In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994); RAP 16.4.

³ In re Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990); In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

⁴ In re Pers. Restraint of Garcia, 106 Wn. App. 625, 629, 24 P.3d 1091, 33 P.3d 750 (2001).

facts underlying the challenge and the evidence available to support the factual allegations.⁵ Bare assertions and conclusory allegations are insufficient to gain consideration of a personal restraint petition.⁶

Heidari was convicted of one count of first degree rape of a child - domestic violence, one count of second degree child molestation – domestic violence, and one count of third degree child molestation – domestic violence. He raises issues of prosecutorial misconduct and ineffective assistance of counsel.

A defendant alleging prosecutorial misconduct must show a substantial likelihood that the misconduct affected the verdict. In the Matter of the Pers. Restraint Petition of Pirtle, 136 Wn.2d 467, 481-82, 965 P.2d 593 (1998). If the defendant did not object to the comments at trial, the issue of prosecutorial misconduct is waived unless the misconduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

⁵ In re Rice, 118 Wn.2d 876, 885-86, 828 P.2d 1086 (1992).

⁶ Rice, 118 Wn.2d at 886.

On direct appeal, Heidari argued that the prosecutor committed misconduct by stating her own opinion of the facts during closing argument. The court concluded that the prosecutor did make improper comments, but that those comments were not prejudicial because the evidence against Heidari was very strong. In this personal restraint petition, Heidari attempts to raise this issue again, basing it on federal rather than state law. But "[a] claim rejected on its merits on direct appeal will not be reconsidered in a subsequent personal restraint petition unless the petitioner shows that the ends of justice would be served thereby."⁷ Heidari's proffered distinction between the claim based on state law raised on direct appeal and the claim based on federal law he attempts to raise in this petition only presents a revision of the issue already decided on appeal. "Simply 'revising' a previously rejected legal argument ... neither creates a 'new' claim nor constitutes good cause to reconsider the original claim."⁸ "Thus, for example, 'a claim of involuntary confession predicated on alleged psychological coercion does not raise a different 'ground' than does one predicated on physical coercion'."⁹ Because Heidari raised the personal opinion argument on direct appeal, and the court rejected it, he cannot raise it again in this personal restraint petition.

Heidari also argues that the prosecutor committed misconduct during closing by commenting on Heidari's failure to produce surrebuttal testimony from his brother-in-law regarding whether his bedroom door had a lock. This bedroom

⁷ In re Jeffries, 114 Wn.2d 485, 487, 789 P.2d 731 (1990), citing In re Taylor, 105 Wn.2d 683, 687, 717 P.2d 755 (1986).

⁸ Jeffries, 114 Wn.2d at 488.

⁹ Jeffries, 114 Wn.2d at 488.

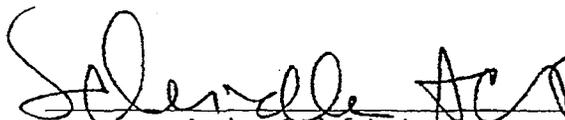
was the scene of one of the crimes. The prosecutor commented that the defense failed to produce the brother-in-law's testimony regarding whether the bedroom door had a lock after he had already argued during a motion to present the testimony that the trial court should not allow the evidence in surrebuttal.

Heidari asserts that the prosecutor's comments left the jury with a false impression and was a flagrant and ill-intentioned violation of his right to a fair trial. But as the trial court stated in denying the motion to present the surrebuttal evidence, the defense was aware of this issue during its case in chief. Defense counsel called another witness to testify regarding the existence of a lock on the door. And any prejudice could have been cured by a jury instruction. Further, Heidari does not claim that the surrebuttal evidence would have addressed the question of whether the lock, if there was one, was locked or unlocked at the time of the crime, so it would have had limited relevance. Given the other strong evidence against Heidari, this incident of alleged misconduct did not prejudice the defense. And because the prosecutorial misconduct issue fails, Heidari's claim of ineffective assistance of counsel is inapposite.

Accordingly, Heidari has not stated grounds upon which relief can be granted by way of a personal restraint petition. Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this 30th day of April, 2007.


Acting Chief Judge

2007 APR 30 PM 3:25

FILED
COURT OF APPEALS DIV. 1
STATE OF WASHINGTON

CERTIFICATION OF SERVICE

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Mansour Heidari, at the following address: DOC# 847716, Monroe Corrections Center, P.O. Box 888, Monroe, WA 98272 , the petitioner, containing a copy of the State's Response to Personal Restraint Petition in In re Personal Restraint of Heidari, No. 63040-7-I, in the Court of Appeals of the State of Washington.

I certify under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.

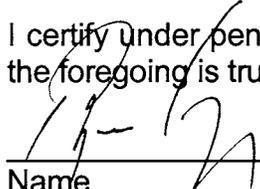
U Brame
Name
Done in Seattle, Washington

5/18/09
Date

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Respondent's Supplemental Brief in IN RE PERSONAL RESTRAINT PETITION OF HEIDARI, Cause No. 63040-7-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name

Done in Seattle, Washington

03/01/10

Date