Supreme Court No. 89747-6
Court of Appeals No. 42787-7-II

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

STATE OF WASHINGTON,

Plaintiff-Appellee,

v.

JAMES ALAN OLIVER,

Defendant-Appellant.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

A. IDENTITY OF PETITIONER

James Oliver, through his attorney David Zuckerman, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

On October 8, 2013, division two of the Court of Appeals affirmed Mr. Oliver's conviction in an unpublished opinion. Ex. A. The Court denied Mr. Oliver's motion for reconsideration on December 9, 2013. Ex. B.

C. ISSUES PRESENTED FOR REVIEW

1. Is the evidence sufficient to support a unanimous jury verdict when the testimony provides no basis to differentiate one act from another?

2. The trial court permitted defense evidence that the alleged victim was motivated to move from the home of her father, Mr. Oliver, to the home of her mother. The court, however, excluded the reason that the alleged victim would have believed that only a serious allegation against her father could accomplish that goal. Did the trial court violate Oliver's constitutional rights to present a defense and to establish a witness's bias and motivation?

D. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

On July 11, 2011, the State filed an Amended Information charging Mr. Oliver with one count of Rape of a Child in the First Degree

and one count of Child Molestation in the First Degree regarding his daughter, D.O. The State also charged one count of Attempted Child Molestation in the First Degree regarding Oliver's daughter, D.M. CP 49-51.

On August 31, 2012, the jury returned guilty verdicts regarding the two counts involving D.O. RP 580. The jury did not reach a verdict on the charge involving D.M.

Mr. Oliver was sentenced on October 14, 2012, to an indeterminate term of 129 months to life. CP 265-279. On November 10, 2012, Mr. Oliver timely filed his Notice of Appeal. CP 289.

2. FACTS

On September 5, 2009, then nine-year-old D.O. told her older half-sister, D.M., that their father, James Oliver, had been touching D.O. RP 330. This led to an investigation which ultimately culminated in the trial that is the subject of this appeal.

By way of background, James Oliver was, for a time, married to Jeannie Whitworth.[1] Jeannie brought to the marriage two children: D.M. (a girl) and T.M. (a boy). RP 118. James and Jeannie had two children together: E.O. and D.O. RP 127-129. Jeannie left James for a then-friend of James's named Glenn Whitworth, and they married. RP 265. As Jeannie knew, Glenn had a prior conviction for a sex offense against a child. *See* RP 133. Because Glenn was prohibited from contact with

[1] Previously Jeannie Whitworth.

children, James had primary custody of all four of Jeannie's children. (*See* RP 89-95 and CP 113-142 for the defense position on this issue, including offers of proof). Jeannie had weekend visitation, but only on the condition that Glenn stayed elsewhere when the children were present. RP 264.

James's parents, Bonnie and Maynard Oliver, allowed him and the children to live with them in Bonney Lake, Washington. RP 241-242. In D.M.'s and T.M.'s teen years, they bounced from one residence to another, including a time when permission was granted for D.M. to live with her mother and Glenn. RP 135, 264. By the time D.O. told D.M. that her dad, James, had touched her, D.M. was not living in Bonnie and Maynard's Oliver's house, and Tyler was living there sporadically. RP 272.

At trial, D.O. testified that James Oliver touched "my chest and vagina." RP 248, 250. She also maintained that her brother, T.M., touched her vagina. RP 249-250.

D.O. claimed that James used his hand, that it occurred several times in both her room and in James's bed, that she was wearing pajamas, and that he would feel around her breasts and her vaginal area. She said it began when she was about five years old and it stopped when she told somebody. RP 250-254. She also testified that on more than five occasions James put his finger inside her vagina and that it hurt. RP 255-256. She said it always happened at night. RP 257. She added that James told her not to tell anybody because then she wouldn't be able to see him again. RP 258, 261.

During cross-examination D.O. admitted to inconsistencies in her testimony. She had previously stated that the abuse did not begin until she was six or seven years old but at trial she said she was five. RP 266. She previously stated that the touching by James was always in her room, but at trial she said it also happened downstairs. RP 265.

D.O. admitted that during her years in Bonnie and Maynard's house she wanted to live with her mother. RP 264.

Prior to trial, the defense sought to admit evidence of Glenn Whitworth's conviction and the ensuing restrictions on his access to children. That would explain why D.O. could not fulfill her desire to live with her mother. CP 113-142. It would also raise an inference that D.O. knew it would take an accusation against James of greater magnitude than Mr. Whitworth's sex offender status to move her into her mother's home. *See* CP 121-122. (*See also*, defense oral argument at RP 88-95.) The court granted the State's motion in limine to exclude such evidence. RP 95.

James Oliver testified and denied all the allegations. RP 492-96, 505-06. He testified at length about the depth of his interaction he and his parents had with the children and their activities. RP 481-83. He professed his love for the children, with a particular focus on D.O. and E.O., as they were the two who were constant residents of his household. RP 481, 487-88. He also testified about D.O.'s expressed desire to live with her mother, Jeannie Whitworth, and he documented her persistence towards achieving that move. RP 517. James discussed T.M.'s anger issues, his tendency

towards violent displays, and his history of deviant behavior related to D.O. RP 474-81.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE COURT OF APPEALS DECISION IN THIS CASE REGARDING SUFFICIENCY OF THE EVIDENCE CONFLICTS WITH DECISIONS OF THIS COURT AND WITH OTHER COURT OF APPEALS DECISIONS

A criminal conviction meets the requirements of due process only if there is sufficient evidence to permit a reasonable person to find the State has proved every element of the charged offense beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 325, 99 S.Ct. 2781, 2792, 61 L.Ed.2d 560, *reh'g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979). *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980).

The constitutional right to a jury trial requires the jury to be unanimous as to the specific act the defendant committed for each crime. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). "When the evidence indicates that several distinct acts have been committed, but defendant is charged with only one count of criminal conduct, jury unanimity must be protected." *Petrich*, 101 Wn.2d at 572.

> The State may, in its discretion, elect the act upon which it will rely for conviction. Alternatively, if the jury is instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt, a unanimous verdict on one criminal act will be assured.

Id. In this case, the prosecutor took the latter approach.

> Implicit in the *Petrich* court's conclusion that either an election or a unanimity instruction will protect the defendant's right to a unanimous verdict is an assumption that there is some evidence presented permitting either the prosecutor or jury to make a meaningful election between the numerous acts to which the victim testifies.

State v. Brown, 55 Wn. App. 738, 747, 780 P.2d 880, 885 (1989), *review denied*, 114 Wn.2d 1014, 791 P.2d 897 (1990).

> We believe the proper balance is struck by requiring, at a minimum, three things. First, the alleged victim must describe the kind of act or acts with sufficient specificity to allow the trier of fact to determine what offense, if any, has been committed. Second, the alleged victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged by the prosecution. Third, the alleged victim must be able to describe the general time period in which the acts occurred. The trier of fact must determine whether the testimony of the alleged victim is credible on these basic points.

State v. Hayes, 81 Wn. App. 425, 438, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996).

Recently, in *State v. Edwards*, 171 Wn. App. 379, 294 P.3d 708 (2012), the Court of Appeals applied the above standards and found the evidence insufficient on one of the counts. In *Edwards*, the child witness testified regarding count II to 10 to 15 acts of child molestation. *Id.* at 401. As here, the prosecutor made no election, but the jury was instructed that it must unanimously agree on which act was proved beyond a reasonable doubt. *Id.* at 402. The court noted that such instructions are adequate "so long as the evidence clearly delineates specific and distinct incidents of sexual abuse during the charging periods." *Id.* at 401. Because no

testimony identified a single act which was distinct from the others, the evidence was insufficient to support a unanimous verdict.

Likewise, in this case, no evidence clearly delineated a specific act of either rape or molestation. D.O. could not pin down any single incident that differed from all others in either time, place, or manner. D.O.'s testimony before the jury is at RP 235-273. She describes both the molestations and the rapes to have occurred many times over a period of about four years. She could not even estimate how many times it happened. RP 252. It is true that not all the acts were identical. Sometimes, according to D.O., it would happen downstairs and sometimes upstairs; sometimes he would touch just her chest, sometimes just her vagina, and sometimes both, and sometimes he would put his finger inside her vagina. But, according to D.O., each of these variations occurred multiple times. RP 252-56.

The State may argue that one of the rape allegations was unique because D.O. appeared to describe in her live testimony only one incident in which there was some bleeding afterwards. *See* RP 256-57. But D.O. told medical examiner Cheryl Hannah-Truscott that the bleeding happened more than once. *See* RP 294. This testimony came in as substantive evidence under the child hearsay rule and the hearsay exception for statements made for the purpose of diagnosis and treatment. RP 52.

Therefore, Mr. Oliver's right to due process under the Fourteenth Amendment was violated and the convictions must be reversed. *See Jackson*, 443 U.S. at 325.

This issue was not raised in the trial court, but a claim of sufficiency of the evidence may be raised for the first time on appeal. *See* RAP 2.5(a)(3); *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983).

The State may argue that this issue was not properly raised in the Court of Appeals. The claim was raised adequately, if not eloquently, in the defendant's statement of additional grounds for review at pp. 18-19.

> This being so; we cannot all stand here today; . . .and be able to say; all 12 jurors: (1) elected an act not peppered with doubt; because the State failed to elect which act they were relying upon to prove the crimes; and (2) that James Oliver today was convicted by a jury where all 12 jurors were even able to use an incident as in (a), (one), when its impossible for such a unanimous 12/12 single act – without such, we cant tell if 6 jurors choose an act one month – and 6 chose 3 other acts from a week prior to the bleeding alleged – since no one knows – no one can say Mr. Olivers constitutionally found guilty – as in, how can you instruct a jury to pick any of the more than "5" acts alleged even to begin with – if there were never any times – dates – and "incidents" alleged per act – for a jury too pick? D.O. does not do this more than 5 times – therefore; how could the jury ever convict someone; if they couldnt ever have a way too unanimously find an act thats divided up by a mere allegement; "it" happened more than 5 times – which time? (emphasis in original; misspellings in original).

It is true that Mr. Oliver disclaimed at one point that he was making "an insufficiency argument." *Id.* But it is clear from the context that he was referring to the more common type of insufficiency, that is,

that no rational juror could find any of the allegations to be proved beyond a reasonable doubt. He properly acknowledged that such a claim would not succeed because "credibility is for the trier of fact." *Id.* at 19. On the other hand, he did argue that the evidence could not support a unanimous verdict because the evidence did not provide any basis to distinguish one incident from another. Such a claim does not require this Court to disbelieve D.O., but merely to acknowledge that she was unable to distinguish one incident from another.

The Court of Appeals opinion did not address the sufficiency issue. After that opinion issued, undersigned counsel entered an appearance and filed a motion for reconsideration solely on the sufficiency issue. After calling for a response from the State, the Court of Appeals denied the motion for reconsideration without explanation.

2. THE EXCLUSION OF GLENN WHITWORTH'S HISTORY AS A SEX OFFENDER VIOLATED OLIVER'S CONSTITUTIONAL RIGHTS TO PRESENT A DEFENSE AND TO SHOW THE BIAS OF THE COMPLAINING WITNESS

This issue presents a significant question of law under the Constitution of the United States. *See* RAP 13.4(b)(3).

As discussed above in section D(2), the defense theory was that D.O. made up her allegations against James Oliver because she hoped that would enable her to live with her mother. The defense was hamstrung, however, because it was not allowed to bring up the reason that D.O. would have believed it necessary to make very serious allegations against her father. The reason was that her mother lived with a sex offender who

was prohibited from contact with children. D.O. could have believed that only a more serious allegation against her father could outweigh the prohibition against living with her mother and Glenn Whitworth. The trial court's exclusion of this evidence violated Oliver's Sixth Amendment right to present evidence of a witness's bias and motivation.

"Bias" is a general term incorporating various factors that can cause a witness to fabricate or slant her testimony, such as prejudice, self-interest, or ulterior motives. *See Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); 5A Karl B. Tegland, Washington Practice: Evidence Law and Practice, §§ 607.7 through 607.11 at 320-33 (4th Ed. 1999). "Proof of bias is almost always relevant because the jury, as finder of fact and weigher of credibility, has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony." *United States v. Abel*, 469 U.S. 45, 52, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984).

The right of a criminal defendant to cross-examine witnesses against him as to their bias against the defendant is guaranteed by the Sixth Amendment to the United States Constitution. *Davis*, 415 U.S. at 315-316. "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.* at 316-17. *See also, State v. Spencer*, 111 Wn. App. 401, 45 P.3d 209 (2002), *review denied*, 148 Wn.2d 1009, 62 P.3d 889 (2003); *State v. Roberts*, 25 Wn. App. 830, 611 P.2d 1297 (1980); *State v. Wilder*, 4 Wn. App. 850, 854, 486 P.2d 319, *review denied*, 79 Wn.2d

1008 (1971) ("It is fundamental that a defendant charged with the commission of a crime should be given great latitude in the cross-examination of prosecuting witnesses to show motive or credibility."); 5A Tegland § 607.7 at 320 ("the defendant enjoys nearly an absolute right to demonstrate bias on the part of the prosecution witnesses").

Evidence which is inadmissible on other grounds may nevertheless be admissible for the purpose of showing bias. *Abel*, 469 U.S. at 55 (although specific instances of conduct inadmissible under ER 608(b) for purpose of showing "character for untruthfulness," admissible to show bias); *United States v. James*, 609 F.2d 36, 46-47 (2d Cir. 1979), *cert. denied*, 445 U.S. 905, 100 S.Ct. 1082, 63 L.Ed.2d 321 (1980); 5A Tegland § 607.10 at 331 ("When acts of misconduct or criminal convictions are offered to show bias (as opposed to a general tendency towards untruthfulness), the restrictions in Rules 608 and 609 are inapplicable.")

Here, the defense was permitted only half a cup. It could show that D.O. was motivated to move to her mother's house, but it could not show why she would think such serious allegations against her father would be necessary to achieve her goal. This violated Oliver's Sixth Amendment rights.

The exclusion of the Whitworth evidence also violated Oliver's federal constitutional right to present a defense. This right stems from both the due process clause of the Fourteenth Amendment, *see Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), and from the compulsory process clause of the Sixth Amendment, *see*

Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967).

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms, the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Id. at 19.

An alleged violation of the right to present a defense is reviewed de novo. *State v. Jones*, 168 Wn.2d 713, 720, 230 P.3d 576 (2010).

"A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions," such as procedural and evidentiary rules. *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998). But those rules must give way if they "infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006) (internal quotation marks omitted).

Evidence that a defendant seeks to introduce "must be of at least minimal relevance." *Id.* at 622. There is no constitutional right to present irrelevant evidence. *State v. Gregory*, 158 Wn.2d 759, 786, 147 P.3d 1201 (2006). "[If] relevant, the burden is on the State to show the evidence is so prejudicial as to disrupt the fairness of the fact-finding process at trial."

State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002). The State's interest in excluding prejudicial evidence must also "be balanced against the defendant's need for the information sought," and relevant information can be withheld only "if the State's interest outweighs the defendant's need." *Id.* "[T]he integrity of the truthfinding process and [a] defendant's right to a fair trial" are important considerations. *State v. Hudlow*, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). If the evidence has high probative value "it appears no state interest can be compelling enough to preclude its introduction consistent with the Sixth Amendment and Const. Art. 1, § 22." *Id.* at 16.

In *State v. Jones*, supra, the defendant's niece accused him of rape. The defense sought to present evidence that he and his niece were at a drug induced sex party and that the sex was, thus, consensual. The trial court excluded the evidence as irrelevant. The Supreme Court stated, "this was not marginally relevant evidence," but rather "of extremely high probative value [constituting] Jones's entire defense." *Jones*, 168 Wn.2d at 721. The Court elaborated:

> Jones's evidence, if believed, would prove consent and would provide a defense to the charge of second degree rape. Since no State interest can possibly be compelling enough to preclude the introduction of evidence of high probative value, the trial court violated the Sixth Amendment when it barred such evidence . . . These were essential facts of high probative value whose exclusion effectively barred Jones from presenting his defense. The trial court prevented him from presenting a meaningful defense. This violates the Sixth Amendment.

Id.

Similarly, in the present case, Oliver offered evidence that was relevant and would have provided a necessary ingredient for a complete defense. Without the evidence of Glenn Whitworth's status as a sex offender, Oliver could only partially defend the State's case against him. Therefore, Oliver's right to present a defense was violated.

F. CONCLUSION

The Court should accept review and reverse the Court of Appeals.

DATED this 31st day of December, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email and United States Mail, postage prepaid, one copy of the foregoing Petition for Review on the following:

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William Brenc

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JAMES A. OLIVER, Appellant.	No. 42787-7-II UNPUBLISHED OPINION

PENOYAR, J. – James A. Oliver appeals his convictions of first degree child rape and first degree child molestation, arguing that (1) the trial court's exclusion of evidence regarding a proposed witness's sex offender status deprived him of his constitutional right to present a defense, and (2) the trial court's erroneous admission of child hearsay testimony allowed the State to present cumulative evidence. Oliver makes several additional claims of error in a pro se statement of additional grounds (SAG). Because the sex offender evidence was irrelevant and the child hearsay evidence was admissible, and because Oliver did not object to that hearsay evidence as cumulative during trial, we uphold the trial court's evidentiary rulings. We reject Oliver's additional claims of error and affirm his convictions.

FACTS

Oliver married Jeannie Whitworth in 1996. Whitworth brought two children to the marriage: a daughter, D.M. (born in 1992), and a son, T.M. (born in 1993). Oliver and Whitworth had two daughters of their own: E.O. (born in 1997), and D.O. (born in 1999).

Ex. A

In 2002, Whitworth moved out of the house and the four children remained with Oliver. Oliver and the children then moved to his parents' home in Bonney Lake. After Oliver and Whitworth divorced in 2003, Whitworth had visitation with the children for three weekends a month and two weeks in the summer.

The Bonney Lake home has three bedrooms upstairs and a large room downstairs. D.M. slept in her own room upstairs, and E.O. and D.O. shared another upstairs bedroom. Their grandparents slept in the third upstairs bedroom, while T.M. and Oliver slept downstairs. When D.M. moved out in 2007 or 2008, E.O. moved into her old bedroom and D.O. had a room to herself. After leaving to live with his mother, T.M. returned to the Bonney Lake house in 2009, about three years later. He left after a few months in June 2009.

In September 2009, D.M. called her mother in tears and reported that Oliver had exposed himself to her when she was younger and that he had abused D.O. After talking to D.M., Whitworth asked nine-year-old D.O. whether Oliver had ever touched her, and the child curled up on the couch and started crying. During a subsequent interview with Patricia Mahaulu-Stephens at the Child Advocacy Center at Mary Bridge Hospital, D.O. made detailed allegations of abuse inflicted by Oliver in her bedroom. She alleged generally that T.M. had touched her in the same way.

The State charged Oliver by amended information with one count of first degree child rape and one count of first degree child molestation against D.O., and one count of attempted first degree child molestation against D.M. The trial began with a child hearsay hearing in which the court ruled that D.O.'s statements to D.M. and Mahaulu-Stephens would be admissible at trial. The court then addressed the State's motion in limine to exclude any reference to the sex

offender status of D.O.'s stepfather, Glenn Whitworth. The trial court granted the motion after concluding that Glenn Whitworth's sex offender status was irrelevant.

Jeannie Whitworth testified as cited above and admitted, on cross examination, that D.O. had wanted to live with her. During Mahaulu-Stephens's testimony, the State played the recording of her forensic interview with D.O. Mahaulu-Stephens did not testify separately about D.O.'s allegations. D.O. then testified that Oliver had touched her chest and vagina, and that his fingers had penetrated her vagina. She also said that T.M. had touched her vagina. D.O. said Oliver's touching sometimes hurt and that she once bled into the toilet afterward. She was not sure how many times Oliver had touched her, but she said it started when she was about five years old. D.O. admitted that she had wanted to live with her mother when she was living in Bonney Lake.

Nurse practitioner Cheryl Hanna-Truscott then testified that during her medical examination of D.O., the child told her that Oliver and T.M. had touched her inappropriately. She said that D.O. complained of bleeding from her vagina and of lower abdominal pain. D.O. had not yet gone through puberty, and Hanna-Truscott opined that penetrating trauma could explain D.O.'s "barely adequate amount of hymenal tissue" as well as her bleeding. 3 Report of Proceedings (RP) at 305.

D.M. testified that D.O. had told her about Oliver's touching and about the bleeding. D.M. added that Oliver had asked her to touch his penis and had made her shower with him.

Oliver's parents testified that D.O. had always wanted to live with her mother. Oliver then testified that T.M. had an explosive temper and had hurt all of his sisters, including D.O. He added that T.M. had slept upstairs after returning to the Bonney Lake house in 2009. Oliver denied any sexual contact with either D.O. or D.M. and reiterated that D.O. had wanted to live with her mother.

Oliver's attorney asserted during closing argument that D.O. was afraid of T.M., that T.M.'s abuse of D.O. was undisputed, and that D.O. had wanted to live with her mother. He speculated that T.M. might be responsible for D.O.'s bleeding, and he pointed to several suggestive questions as well as several inconsistencies in D.O.'s allegations against Oliver during the forensic interview.

The jury found Oliver guilty of the two counts involving D.O. but could not reach a verdict on the count involving D.M. The trial court dismissed that count and sentenced Oliver to concurrent sentences of 129 months and 72 months.

ANALYSIS

I. RIGHT TO PRESENT DEFENSE

Oliver argues initially that the trial court erred by granting the State's motion in limine to exclude references to Glen Whitworth's sex offender history and that this error violated his constitutional right to present a defense.

We review a trial court's ruling on a motion in limine or the admission of evidence to determine whether it was manifestly unreasonable or based on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). We review de novo the claim that a trial court's evidentiary ruling violated a defendant's Sixth Amendment right to present a defense. *State v. Jones*, 168 Wn.2d 713, 719, 230 P.3d 576 (2010).

Oliver argued below that Glenn Whitworth's status as a sex offender was "highly relevant" because D.O. knew it would take an allegation of greater magnitude than Glenn Whitworth's prior conviction to entice the parties into allowing her to live with her mother. Clerk's Papers at 122. When the State argued that this evidence would be more prejudicial than relevant and would confuse the jury with irrelevant evidence of an uninvolved person's sex offender history, the court asked defense counsel to again explain the relevance. Counsel responded as follows:

> [I]t's clear that at least [D.M.] and possibly [T.M.] have spent time living with her mother and Glenn Whitworth despite his status as a sex offender. So [D.O.] sees that as a living example of what may be possible and she sees the stepbrother and sister coming and going in terms of living with, actually living with Glenn Whitworth and Jeannie Whitworth. So she knows, you know, that it's possible, she just hasn't quite figured out how to get there yet.
>
> . . . .
>
> I would anticipate potentially just merely getting in that evidence that he's there, he's a sex offender and presenting in the end the argument that that's the big hurdle for her and why her lies get further exaggerated to the point of naming her own father.

2 RP at 93-94. The court excluded the evidence as irrelevant.

ER 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 401, evidence is relevant if it has any tendency to make the existence of a material fact more or less probable. *State v. Lord*, 161 Wn.2d 276, 294, 165 P.3d 1251 (2007). We see no material fact that the proferred evidence would have made more or less probable. The connection between Glenn Whitworth's sex offender status and D.O.'s motive to lie about Oliver was tenuous at best, and we hold that the trial court's decision to exclude the sex offender evidence was not manifestly unreasonable.

Oliver maintains, however, that the trial court's ruling barred him from presenting a complete defense because it precluded him from introducing to the jury the specific obstacle that D.O. had to overcome in order to live with her mother: a sex offender named Glenn Whitworth. The proposed evidence "would have shown the jury that D.O. knew the reason she couldn't live with her mother was because her mother's husband was a convicted sex offender." Brief of Appellant at 19.

A defendant has a right to present only relevant evidence, with no constitutional right to present irrelevant evidence. *Jones*, 168 Wn.2d at 720. The evidence regarding Glenn Whitworth's sex offender status was irrelevant. Moreover, because several witnesses testified that D.O. wanted to live with her mother, her motive to lie about her allegations was established. The trial court's ruling did not deprive Oliver of his constitutional right to present a defense. *See Jones*, 168 Wn.2d at 721 (finding constitutional violation where trial court excluded evidence that constituted defendant's entire defense).

II. EVIDENCE OF CHILD HEARSAY

Oliver also argues that by permitting D.O., D.M., and Hanna-Truscott to testify about D.O.'s allegations in addition to playing the recording of D.O.'s forensic interview, the trial court erroneously admitted cumulative hearsay testimony. As stated, we review the trial court's admission of evidence to determine whether that admission was manifestly unreasonable or supported by untenable grounds. *Powell*, 126 Wn.2d at 258.

The trial court admitted D.O.'s allegations under the child hearsay statute, RCW 9A.44.120. This statute provides that statements made by a child under the age of ten that describe any act or attempted act of sexual contact performed with or on the child by another is admissible in evidence if:

> (1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and
> (2) The child either: (a) Testifies at the proceedings; or (b) Is unavailable as a witness; PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120. To assess the reliability of child hearsay statements, Washington courts apply the nine *Ryan* factors. *State v. Woods*, 154 Wn.2d 613, 623, 114 P.3d 1174 (2005) (citing *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984)).

During the child hearsay hearing, Oliver challenged the admissibility of D.O.'s allegations on the basis of the *Ryan* factors, questioning in particular their reliability, spontaneity, and veracity. He objected at trial to the admission of her forensic interview on the same grounds. Oliver does not address these objections or any of the *Ryan* factors in arguing on appeal that the trial court erroneously admitted hearsay evidence. Consequently, he does not demonstrate that the trial court's decision to admit the child hearsay evidence under RCW 9A.44.120 was manifestly unreasonable.

We also note that Oliver never objected to any of this evidence on the basis that it was cumulative. *See* ER 403 (relevant evidence may be excluded if needlessly cumulative). Having failed to complain about the cumulative nature of the State's evidence during trial, Oliver has waived the right to make this complaint on appeal. *See State v. Boast*, 87 Wn.2d 447, 451, 553 P.2d 1322 (1976) (party may assign error in an appellate court only on the specific ground of the evidentiary objection made at trial). We conclude that the trial court properly admitted the evidence regarding D.O.'s allegations against Oliver.

III. SAG

Oliver complains in his pro se statement that the trial court improperly instructed the jury on unanimity because it did not require the State to specify the particular act supporting each charge. Rather, the court instructed the jury that because the State had alleged that Oliver had raped and molested D.O. on multiple occasions, it had to be unanimous in finding that one particular act had been proved beyond a reasonable doubt to convict him of either crime.

In cases in which the evidence indicates that several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal conduct, the constitutional requirement of jury unanimity is assured by either: (1) requiring the State to elect the act on which it will rely for conviction; or (2) instructing the jury that all 12 jurors must agree that the same criminal act has been proved beyond a reasonable doubt. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Failure to follow one of these options violates a defendant's state constitutional right to a unanimous jury verdict and his federal constitutional right to a jury trial. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

Because the State chose not to elect the act on which it was relying for conviction, the trial court correctly instructed the jury that it had to be unanimous that one particular act of rape and one particular act of molestation had been proved beyond a reasonable doubt to convict Oliver of each offense. These instructions were based on identical instructions proposed by defense counsel and the State. Consequently, Oliver's claim of error fails, as does his claim of ineffective assistance of counsel. *See State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990) (to prove ineffective assistance, defendant must show that counsel's performance was deficient and that the deficient performance was prejudicial).

Doesn't address SAG.

Oliver also argues that he received ineffective assistance of counsel because his attorney failed to introduce the results of his polygraph test and failed to conduct an inquiry into an accidental encounter Oliver had with a juror during a pretrial break.

Defense counsel attached the polygraph results to a sentencing memorandum in which he argued that even though the results were inadmissible during trial, they supported a mitigated sentence. Polygraph test results are inadmissible as evidence in a criminal proceeding absent a stipulation from both parties. *State v. Rupe*, 101 Wn.2d 664, 690, 683 P.2d 571 (1984). There is no evidence of any such stipulation in the record, and counsel was not deficient in failing to request admission of the polygraph evidence.

With regard to the juror contact, defense counsel informed the court shortly before trial that Oliver had had a brief encounter in the elevator with a juror:

> Mr. Oliver came in during the break and he said he . . . hopped in an elevator and . . . Juror Number 2 was in there. He didn't recognize her and she said, I'm not supposed to be in here with you, or something to that effect. And being relatively grove green, he kind of freaked out about it, and said why and she said I'm a juror. And he came straight up here and told me what happened. I told [the prosecutor] what happened and I told him not to worry about it.

2 RP at 112. The prosecutor did not have any objection or require any inquiry of Juror 2, and the trial court did not pursue the matter. The record does not support Oliver's current claim that the encounter resulted in the juror's actual bias, and we need not address the issue further. *See* RCW 4.44.170(2) (actual bias is the existence of a state of mind on the juror's part in reference to the action or a party that satisfies the court that the juror cannot try the issue impartially and without prejudice to the substantial rights of the challenging party).

Finally, Oliver argues that he is entitled to a new trial because of cumulative error. Having rejected each claim of error he has raised, we find no basis to grant relief due to cumulative error.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Johanson, A.C.J.

Bjorgen, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

v.

JAMES A. OLIVER,
Appellant.

No. 42787-7-II

ORDER DENYING MOTION
FOR RECONSIDERATION

APPELLANT moves for reconsideration of the Court's **October 8, 2013** opinion. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Penoyar, Bjorgen, Johanson

DATED this 9th day of December, 2013.

FOR THE COURT:

Johanson, A.C.J.
ACTING CHIEF JUDGE

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