COA No. 42787-7-II

Court of Appeals, Division II
Washington State

FILED
COURT OF APPEALS
DIVISION II
2012 NOV 15 PM 1:51
STATE OF WASHINGTON
BY ______ DEPUTY

State of Washington,
Respondent

v.

James Oliver,
Defendant

Defendants Pro Se Supplemental Brief
Per RAP 10.10
Per RAP 1.2 (a)

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01. The trial court committed reversible error when it failed to instruct the jury that it must be unanimous on which act constituted the crimes of 1° Rape of a child, per Count One, and 1° Child Molestation, per Count Two, where the State presented and argued that more than one act could constitute the crimes and where a rational juror could have reasonable doubt as to one of the incidents alleged and the State did not elect which act it was relying upon to prove the crime.	

02. The trial court caused automatic reversible constitutional error when it allowed the State of Washington to use multiple acts alleged for Counts One 1° Rape of a Child and for Counts Two 1° Child Molestation; where jurors due to lack of proper unanimity were able to use the same acts twice in order to convict Oliver on in violation of the Double Jeopardy Clause of the Washington State Constitution and the Federal Constitution.

03. Mr. Oliver was denied effective assistance of counsel as is guaranteed by Wash. Const. art 1 §9 and 22 and the U.S.C.A. Sixth and Fourteenth when his trial attorney failed to introduce a lie detector test prior to trial, or at trial, and failure to uphold jury unanimity, and remove a juror that met Oliver at trial.

04. The above errors amount too enough prejudice to render Olivers trial unfair and these all combined trigger cumulative error in violation of Olivers U.S.C.A. Fith and Fourteenth and Wash. Const. Art. 1 § 3, and 22, rights.

E. Conclusion / Relief Sought

A. Assignments of Error:

01. The trial erred in not instructing the jury that it must be unanimous on which act constituted the crime of First Degree Rape of a Child in Count One where the State presented and argued that more than one act could constitute the crime and where a rational juror could have reasonable doubt as to one of the incidents alleged and the State did not elect which act it was relying upon to prove the crime.

02. The trial court erred in not instructing the jury that it must be unanimous on which act constituted the crime of First Degree Child Molestation in Count Two where the State presented and argued that more than one act could constitute the crime and where a rational juror could have reasonable

doubt as to one of the incidents alleged and the State did not elect which act it was relying upon to prove the crime.

03. The trial court erred when it allowed Oliver to be convicted on, Count One First Degree Rape of a Child, where jurors due to lack of proper unanimity were able to use the same acts twice in order to convict on, violating the State and Federal Double Jeopardy Clause.

04. The trial court erred when it allowed Oliver to be convicted on, Count Two First Degree Child Molestation, where jurors due to lack of proper unanimity were able to use the same acts twice in order to convict on, violating the State and Federal Double Jeopardy Clause.

05. The trial court erred by failing to uphold defense attorney jury instruction to convict on Count One First Degree Rape of a Child where such to convict jury instruction properly upheld unanimity and whereby the trial court rejecting such caused Oliver prejudice and forced ineffective assistance of counsel.

06. The trial court erred by failing to uphold defense attorney jury instruction to convict on Count Two First Degree Child Molestation where such to convict jury instruction properly upheld unanimity and whereby the trial court rejecting such caused Oliver prejudice and forced ineffective assistance of counsel.

07. The trial attorney for Oliver caused ineffective assistance of counsel by failing to introduce the lie dector test that cleared Oliver of what the alleged victim said per Counts One and Two prior to trial or at trial, creating reasonable doubt Oliver did these crimes.

08. The trial counsel for Oliver caused ineffective assistance of counsel when it failed to hold a proper inquiry into a conflict of intrest with the trial juror Oliver "freaked out" on when these two met in the Superior Courts elevator.

09. The trial counsel caused ineffective assistance when it created the conflict of intrest between client and attorney by not removing the jury Oliver was forced into having deliberate on the alleged crimes (First Degree Rape of a Child / First Degree Child Molestation) or remove at least the juror that he freaked out on in the Superior Courts elevator during the Oliver trial.

10. The trial errors amount too enough prejudice against Oliver to render his trial completely unfair and prejudicial enough to trigger cumulative error and reversal; violating Olivers U.S.C.A. Fith and Fourteenth and Wash. Const. Art. 1 §3 and §22 rights.

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B. Issues pertaining to assignments of error:

01. Whether the trial court erred in not instructing the jury that it must be unanimous on which act constituted the crimes of First Degree Rape of a Child per Count One, and First Degree Child Molestation per Count Two, where the State presented and argued that more than one act could constitute the crimes and where a rational juror could have reasonable doubt as to one of the incidents alleged and the State did not elect which act it was relying upon to prove the crimes? (Assignment of Errors 01, 02 and 05, 06).

02. Whether the trial court caused automatic reversalable error when it allowed the State of Washington to use multiple acts alleged for Counts One, 1° Rape of a Child, and for Count Two, 1° Child Molestation, where jurors due to lack of proper unanimity were able to use the same acts twice in order to convict Oliver on, in violation of the Double Jeopardy Clause of the Washington

State Constitution and the Federal Constitution?
(Assignments of Errors No. 03, 04).

03. Whether Mr. Oliver was denied effective assistance of counsel as guaranteed by Wash. Const. Art. 1 § 9 and 22 and the United States Constitutional Amendments Sixth and Fourteenth when his trial attorney failed to introduce a lie detector test prior to trial, or at trial, and failure to uphold unanimity and failure to remove a juror that met Oliver at trial?
(Assignments of Errors No. 7, 8 and 9).

04. Whether the above errors amount too enough prejudice to render Olivers trial unfair and these all combined trigger cumulative error in violation of Olivers United States Constitutional Amendment Fith and Fourteenth Rights and his Washington Constitution Art. 1 § 3 and 22 Rights?
(Assignment of Error 10).

C. Statement of the case:

Mr. Oliver incorporates the procedural facts and the Statement of the case thats found under his appellate attorneys brief for the purpose of avoiding needless duplication.

Mr. Olivers Pro Se Supplemental Brief will contain the proper adequate facts through correct cites to his trial record; but also respectfully requests this honorable court to incorporate the entire trial record, clerks papers, any and all jury instructions and or Motions by all parties as well as but not limited too; any and all trial related material that this honorable court of appeals may need to incorporate in order to adequately be able to decide the issues raised herein; including the Superior Court Rules and Rules of Appellate Proceedure, please.

D. Argument:

The trial court committed reversible error when it failed to instruct the jury that it must be unanimous on which act constituted the crimes of 1° Rape of a Child and 1° Child Molestation per Counts One and Two, where the State presented and argued that more than one act could constitute the crimes and where a rational juror could have reasonable doubt as to one of the incidents alleged and the State

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did not elect which act
it was relying upon to
prove the crimes.

When one crime is charged and the State presents evidence of more than one act that could constitute the crime, constitutional error occurs if the State does not elect which act it is relying upon or the court does not instruct the jury that it must be unanimous as to which act has been proven beyond a reasonable doubt. State v. Kitchen, 110 Wn. 2d 403, 411, 756 P.2d 105 (1991) (citing State v. Gitchel, 41 Wn. App. 820, 822, 706 P.2d 1091, review denied, 105 Wn. 2d 1003 (1985)).

"The right to a unanimous verdict is derived from the fundamental constitutional right to a trial by jury; it may be raised for the first time on appeal." State v. Gooden, 51 Wn. App. 615, 617, 754 P.2d 1000, review denied, 111 Wn. 2d 1012 (1988). "(T)he error is not harmless if a rational trier of fact could have a reasonable doubt as to whether each incident established the crime beyond a reasonable doubt". State v. Loehner, 42 Wn. App. 408, 411-12, 711 P.2d 337 (1985) (Scholfield, A.C.J., concurring), review denied, 105 Wn. 2d 1003 (1986); Kitchen, 110 Wn. 2d at 411; see also State v. Handyside; 42 Wn. App. 412, 416, 711 P.2d 379 (1985).

> This approach presumes that the error was prejudicial and allows for the presumption to be overcome only if no rational juror could have reasonable doubt as to any one of the incidents alleged. See State v. Burri, 87 Wn.2d 175, 181, 550 P.2d 507 (1976).

Kitchen, 110 Wn.2d at 411.

In this present case, Mr. Olivers prosecutor introduced and than argued that more than one act could prove the crimes of Count One 1° Rape of a Child and then Count Two 1° Child Molestation through direct and circumstantial evidence and huge amounts of hearsay allowed in throughout the States witnesses. RP4-589.

However, this issue before you today; deals directly with the evidence related directly too the prejudice caused by a rational juror able to have reasonable doubt to the above prosecutors testimonies; direct and circumstantial evidence; Whereas even though unanimity was alleged verbally and instructed - it was a faulty verbal and written prosecution instruction on unanimous-ly convicting Mr. Oliver because even though the clear and present constitutional reversible error was shining bright for the Court and State to see;

the State failed to elect "which act" it was relying upon out of the multiple acts alleged-

Since it is impossible from the record to conclude that all the jurors agreed on the "same act" to support the convictions here at issues pertaining to assingments of error No. 1 and 2; and since a rational juror could have concluded there was sufficient evidence of one incident, so that juror used that act - but yet another juror picked a reasonable doubt act - or a mixture of this blended un-unanimous constitutional error election; and since the State failed to elect which multiple act it was relying on for each conviction and no proper unanimity instruction was given; reversal and dismissal is mandated for Mr. Olivers Convictions per Counts One, 1° Rape of a Child and Counts Two, 1° Child Molestation.

The State of Washington brings on an Expert Witness named Cheryl Hanna-Truscott RP [redacted] 273-313 and she is a ARNP. Ms. Hanna Truscott is asked numerous questions in regards to the alleged child victim D.O. (per Counts One and Two, 1° Rape of a Child, 1° Child Molestation); as she personally physically examined D.O., RP 288; and the State submitts her medical evaluation as Plaintiffs Exhibit No. 3:

The State: in relevant and pertinent part: " Just for the purpose of the record, I need you to describe

briefly what plaintiffs Exhibit No. 3 is.

Ms. Hanna Truscott:

Its a copy of the medical evaluation of Drew Oliver and included in these are some nursing notes from the RN and my extensive report following the evaluation.

RP288.

The defense orginally objected to the introduction of the medical evaluation through defense's "Defendants Motion in Limine, pp. 2, CP109; in relevant and pertinant part: § 3. Motion to exclude anogenital exam (including videocolposcope) testimony of ARNP Cheryl Hanna-Truscott.

Among Ms. Hanna-Truscott's conclusion is the following:

5. The patients anogential examination reveals blunted crescentric hymen. This hymenal appearance could be residual from healed penetrating trauma or a variant of normal.

In short, the examination was negative. Nothing can be concluded about the proximate cause of the hymen's condition. Testimony only invites the jury to speculate as to the criminal charges / allegations being the medical cause of the condition, when in fact that is not the case. D.O.'s hymen could have naturally

developed that way; as the same ARNP testifies too RP 273-313. In other words; it may never have been injured at all to even begin with - and all the more reason the State needs to elect which "Finger in the vagina" act its needing in order to convict Mr. Oliver because "the act," hearing it from this State expert witness carries reasonable doubt. RP 250-4, 109, RP 26-7,

The prejudice here above is hieghtened, due to the alleged D.O. victim claiming that the fathers fingering at one time caused blood apparently - to come out of her vagina, RP 79-80, 271, 270, 269, 296, but also; reasonable doubt exists here; because she told this same Ms. Hanna-Truscott she was starting her period, RP 330, and its likely a juror very reasonably did not elect the ARNP medical evaluation's testimony or what D.O. told Ms Hanna-Truscott. RP 273-313, 330.

Furthering no election on unanimity; is some pretty incredible violent assualting and raping and even child molesting too D.O.; by her own brother, Tylor Montgomery who amazingly - was never charged; RP 584, 501-6 according to the Lead Detective for the State RP 182-98 and also the brother would watch pornographic internet movies with his sister D.O.; and Tylor Montgomery had a severe sexual diviant disorder over such porn; to the point his step father Mr.

Oliver (the mother Jeannie Whitworth of D.O. and Tylor Montgomery married Glen Whitworth a Level 3 Sex Offender and Mr. Oliver won custudy after She left him for the sex offender; severly cutting off her parenting and was only allowed to see her kids on every other weekend as it was court ordered Glen Whitworth could not be around Children) was forced to put him through severe stress anger management and sexual deviency classes. RP 501-6, 367-380, 235-62, 466-517.

Also election of "the act" was needed, as D.O. reported to this same medical expert; that her brother Tylor - touches her the same way her father Mr. Oliver does - meaning reasonable doubt Mr. Olivers fingers caused the alleged hymen damage - RP 220 also was more then likely *why the State never filed or pressed charges against Tylor Montgomery because Mr. Olivers attorney could have obtained such testimony or other medical / CPS or the like intel; and used it too impeach D.O. or the fact D.O. told several other of the States witnesses her Dad, Mr. Oliver, not Tylor, RP 250, was the only one that inserted her vagina by way of his finger RP 219-228, 531-36, 288-9.

But - because obvious testimeny exists D.O. said her Dad Mr. Oliver and brother Tylor

both touched her alike - several juror's could have rejected Mr. Oliver caused this "bleeding" or alleged fingering damage that the State leans on to convict Mr. Oliver during closing - even after the ARNP Ms. Hanna Truscotts stating the hymen could have in fact - grown that way.

The fact was brought to light that D.O. had a gymnastic's bar in the basement; that also Mr. Oliver placed her in gymnastics due to her wishes to move in this direction; an Olympic medalist tought this class; She also (D.O.) besides a bar grinding her crotch hymen area - was on the balancing beam RP262-69 an area that can cause grinding - damage to a hymen - as the ARNP said - its a small, tiny tissued area - RP 273-9 it wont take much to rip or tear if your a new Student in gymnastics - She also was placed in a dance class RP 381 - 399.

There are also several I dont recall, I dont remembers and the questionable like, RP 250-5, RP 249, requiring proper election, and at trial, the prosecutors allowed to use overhead projection; thats very very large - and projecters jury instruction number 10 and 15 alongside footnotes, combines these two for the 1° Rape of a Child and confuse's the jury even more so on unanimty and how their to find Mr. Oliver guilty:

Instructions 10 and 15

* The evidence in this case indicates multiple instances of sexual abuse against D.O..

* Only one perticular act of each crime, Rape of a Child in the First Degree, and Child Molestation in the First Degree, need be proven beyond a reasonable doubt.

* You do not need to unanimously agree that multiple acts occurred; only one.

(See Exhibit One - Appendix). (Front and back).

The above is incorrect legally - to the contrary - without the State electing which act - the State should have instructed they all must agree all alleged acts constitute the crime so you donot have to pick any of the acts unanimously - whats the difference?

Since there is reasonable doubt "on its face -" how can this prosecuter get away with "saying" all alleged acts prove the crime charged - just unanimously pick one of the acts - you cant do that! Why would a defendant bother to go to trial? This isn't a licking a childs private parts, then an anal rape then 10 days later a penis to vagina rape - its a finger only - "more than 5 times?" "Yes." RP255-6

So to be more clear - the appellants proven (as is required on Direct Appeal), beyond a reasonable doubt - several of the more than 5 finger 1° Child rapes alleged are shadowed by a reasonable doubt - a rational juror easily could have intertained.

[1] This being so; we cannot all stand here today; (especially being Mr. James Oliver passed lie detector tests from the defense and state; and st asked if he in fact did insert his fingers or penis into his own child D.O.; and passed - when asked if he rubs his own daughters vagina - cleared - passed, innocent man in prison pass) 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 noone knows - noone can say Mr. Olivers constitutionally found guilty - as in, how can you instruct a jury to pick any of the more than "5"

[1] Please see Exhibit Two, Appendix, James Olivers Lie Detector Test.

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?

This isnt a "credibility is for the trier of fact" argument either- nor is this an insufficency argument not even close- its very plain- and absulutely clear-

There isnt a unanimous verdict- Because you cannot instruct a jury to select an incident when theres reasonable doubt floating around your jurys mind- you absulutely must instruct what act you are relying upon- after all- you had 5 too allegedly choose from- why didnt the State of Washington choose "their" act? Because as we cannot tell what juror chose what- neither was the States case (ever) streng enough to stand up and claim such existed; that is- elect this act only- "here" is where we've proved guilt. Disregard the reasonable doubt acts.

It is completely beyond madness - to return a Reply; ignoring the absulute constitutionally grounded In re Winship, Kitchen, and Burri; and let a man be convicted without even electing an act for a jury to be unanimous on; subject a person under the severe restraints of a registered sex offender, (for life), face down a Community Custody Board, End of Sentence Review Committe; and then the Indeterminate Sentencing Review Board; who's parole decision(s) about keeping you in prison another 5 years is next to neal or rejected when appealed under a PRP - and the reason you'd deny sexual treatment; the allegations - is because youve cleared lie ~~dector~~ detector tests; and knew you were never, ever - found guilty unanimously, even if you did jump through the DOC sexual treatment hoops - you'd still have a chance of being denied parole because your amazingly passing God Fobid - lie detector tests showing you never ran your fingers in your own kid, nor rubbed her vagina, so the DOC board makes you out to be monster able to trick lie detectors over sex acts and lock you up for life, under a sexual violent predator petition - how is it; after passing lie detector tests, multiple reasonable doubt stories; you still end up in prison for possibly life as Mr. Olivers prison terms 129 to Life? I just proved how - these days; the State of Washington isnt using unanimous "elected acts"

which in any sex crime - it especially should be.
[2] See Jury Instructions 17 and 18 in the Appendix under Exhibit One, Kitchen, 110 Wn. 2d at 411, our Washington State Constitutional Articles 1 §3, §9, §22 and United States Constitutional Amendments 5, 6, 9 14 are herein breached and violated on its face and prejudiced caused is 129 to Life imprisonment; for needless duplication; this argument is the same for Count Two as well.

02. The trial court caused automatic reversible constitutional error when it allowed the State of Washington to use multiple acts alleged for Counts One 1° Rape of a child and for Counts Two 1° Child Molestation where jurors due to lack of proper unanimity were able to use the same acts twice in order to convict Oliver on; in violation of The Double Jeopardy Clause of The United States Constitution and The Washington State Constitution.

2 An erroneous instruction which may have effected (the outcome) a criminal defendants right to a fair trial may be considered for the first time on appeal. State v. Fesser, 23 Wn. App. 422, 423-24, 595 P.2d 955 (1979).

This Double Jeopardy violation is very simple and very basic.

As described in Issue One - the State argued and presented multiple acts for the conviction's on both Count One, 1° Rape of a Child and Count Two 1° Child Molestion. (Please Issue One and the RP therein).

United States Constitutional Amendment 5 prohibits double jeopardy - there are several areas of the prohibition, but were focused on being able to use multiple acts twice - and with no proper unanimity instruction, its litterally impossible to tell how many jurors used or were even forced to use acts twice as several acts that are alleged, (See Issue One in full for support on the Record (for needless duplication) of multiple acts alleged, reasonable doubt and faulty unamity)), carried reasonable doubt so a rational jurer couldnt use them, and had to use acts twice - the State failed to elect which act they were relying upon and failed to instruct the jury to disregard any other act(s) especially the ones carrying a reasonable doubt.

Another clear and obvious form of double jeopardy presented hear by the State; is you cant have the criminal act of Count One, 1° Rape of a Child, without also at the same time, Committing Counts Two 1° Child Molestation, as D.O. the alleged child victim states Mr. Oliver rubbed on her vagina, (1° Child Molestation) again; no date, no area, no time, no election - so a rational jurer could easily use the

rubbing the vagina as the start of the alleged (RP240-60) Counts One 1° Rape of a Child where Mr. Olivers finger was alleged to insert inside D.O.'s vagina - and as it enters it must rub the vagina (1° Child Molestation Count Two); so you simply cannot (RP250) commit 1° Rape of a Child in this instant case; without also imediately committing 1° Child Molestation - Without proper unanimity instructed, dates, times, (RP256) places - a rational juror easily could have concluded you may not have one crime of 1° Rape of a Child, finger insertion - without the rubbing of the vagina alleged - there really wouldnt be an argument if Mr. Oliver were only charged with a "single act" of rubbing his daughters vagina with a "single act" alleged by Drew Oliver - double jeopardy and unanimity *wouldnt matter - the jury wouldnt be confused - you either did it, or you did not - which is why the States to elect and instruct "too disregard all others" - if you have 5 acts alleged - why not just use *one incident? Or prove every element of the crime(s) as the State
3 should - or they "shift the burden of proof" onto the defendant; automatically causing reversal. How can you defend against multiple acts alleged - if the State cant elect which act its relying upon in order to
23 of 41 prove upon a plausible remand for retrial; so you could raise double jeopardy against "that" elected act? It bars the defendant from raising double
3 jeopardy - certainly no superior court judge will allow
In re Winship, 397 U.S. 358, 25 L.Ed. 2d 368, 90 S.Ct. 1068 (1970).

a defendant to raise a double jeopardy claim without ordering the defendant to explain "what act" or "elect" what act he/she is reffering too prior to ruling-

You cant just demand the judge use "any" of the acts alleged and just find one; and tell the judge he/she has a clear mind feel free to "guess" apparently- what youd "think" a jury of 12 used to unanimously convict; even though there's a reasonable doubt the judge may be wrong-

Youd "have" to be able to submitt the elected act- in order to prove double jeopardy. And as today- the State cannot elect which act the jury decided on in order to crush this double jeopardy violation issue- the State blew that right when it "failed to elect" which act it was relying upon to convict Mr. Oliver.

Thus- the State violated Mr. Olivers Due Process rights as well, U.S.C.A. Fourteenth and Wash. Const. Art 1§22,9.

The Federal Double Jeopardy Clause extends to the States through the Fourteenth U.S.C.A.; and thus violated also Mr. Olivers Washington State Constitutional Article 1 §9 and 22 rights, (also forbids him to raise a D.J. Claim); Reversal and Dismissal is appropriate- the prejudice this fatal error by the State cause Oliver to be under restraint of 129 too Life imprisonment. U.S. v. King, 200 F.3d, 1207, 1212-13 (9th Cir. 1999) (hindering ability to plead double jeopardy in subsequent prosecution). See, Benton v. Maryland, 395 U.S. 784, 794 (1969); Greene v. Massey, 437 U.S.

19, 24 (1978); Ex parte Lange, 85 U.S. (18 Wall.) 163, 168-69 (1873); Ohio v. Johnson, 467 U.S. 493, 498-99 (1984).

(To be a bit more clear - the violation caused Mr. Oliver also to not be able to raise a double jeopardy claim that could bar a retrial upon any remand on appeal - because he cannot constitutionally prove what incident the jury used in order to convict him per Counts One and Two, 1° Rape of a Child and 1° Child Molestation RP 1-599, respectively). (Assignments of Error No. 3 and 4).

03 Mr Oliver was denied effective assistance of counsel as is guaranteed by our Washington Const. Art. 1 § 9 and 22 rights and our U.S.C.A. Sixth and Fourteenth rights when his trial counsel failed to introduce a defense exhibit of a lie detector prior to trial or at trial, and for failure to uphold jury unanimity, and for also failing to remove a juror that met Oliver at trial in the Superior Courts elevator. (Assignments of Errors 7, 8 and 9).

Mr. Oliver was denied effective assistance of counsel as guaranteed by the U.S.C.A. Fith, Sixth and Fourteenth and the Wash. Const. Art. 1 § 9 and 22 respectively; and such denial caused major prejudice resulting in a Conviction for 1° Rape of a Child and 1° Child Molestation and a 129 month to natural Life imprisonment; should DOC deem him a Sexual Violent Predator when the 129 months is up and Mr. Oliver introduces the lie detector (Exhibit Two, Appendix) test proving he did not committ the above crimes; and some DOC board ends up thinking he can pass lie detector tests when it comes to questioning Mr. Oliver if he will allegedly offend again; or the questions of does "fingering childs vaginas get you excited - or rubbing childs vagina's" - in other words.

So essentially - lets begin with his trial attorney finding it "strategic" to wait untill all places, the sentencing hearing (RP591-99) to introduce the lie dectector test; as if it mattered; "as if" his "Known" attorney for near 20 years at trial did not "already" knew Mr. Oliver would be facing a Life sentence if convicted because a parole boards more than likely hang him when he refutes sexual diviant treatment or as described above - and this clearly being the case; (RCW 9.94A.712, changed over too RCW 9.94A.507, Indeterminate Sentencing Review Board, Wa. DOC Policy (ESRC) and .420 Hearing by the Community Custudy Board; and

the RCW 9.95's that pertain to Mr. Oliver that are governing the ISRB as their rules and regulations and its authority; and Washington DOC Policy 320.110 Attachment 1)); even if there is a Superior Court Rule (ER Rule) or RCW prohibiting his trial attorney to in fact submitt such -(none the record RP 1-600 can prove or show)- than being Mr. Olivers fate is a 129-Life prison term- who cares about a mere objection by the State or trial court because you did submitt such? Your clients facing Life imprisonment - its 100% ineffective of assistance to not introduce such an incredible defense tactical tool that frees your client on the spot by abling a rational jurors mind too raise a reasonable doubt exists- im not feeling good about convicting Mr. Oliver; so no- not guilty. So what if the trials declared a mistrial over blabbing such an awesome piece of freeing an innocent man evidence exists? The state was able to introduce "10 TONS" of RP273-313, ARNP Medical Expert (moot prejudicial blab) over a childs hymen that was normal - (See Issue One in full for record via needless duplication) so it was never ruled on as inadmissible evidence; at least not in Mr. Olivers record sent by the appellate court for appeal ~~purposese~~ purposes - so Mr Oliver certainly raise's that as a complete failure of counsel, and for the $40,000 some grand he paid his trial attorney for trial, outwieghs any ruling against such

even had the trial court ruled against it - both prongs are met under Strickland v. Washington, 466 U.S. 668, 687-688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The Sixth U.S.C.A. right to counsel is the right to effective assistance of counsel. See McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970). The right to effective assistance applies to both ($40K) retained and appointed counsel. Cuyler v. Sullivan, 446 U.S. 335, 344-45 (1980). (Emphasis added ($40K).

As this honorable courts more than aware, but for Mr. Oliver and public at large is available to see - In Strickland v. Washington above, the United States Supreme Court establishes a two-prong test to evaluate ineffective assistance claims: "(T) he purpose

> of the effective assistance guarantee of the Sixth Amendment is--- to ensure that criminal defendants receive a fair trial." Id. at 689. Ruling also: judge the reasonableness of counsels conduct. A convicted defendant making a claim of ineffective assistance must identify "the acts" or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must

(28 of 41) then determine whether in light of all the circumstances, the identified acts or omissions were outside the wide range

range of professionally competent assistance. In making that determination, the court should keep in mind that counsels function, as elaborated in the prevailing norms, is to make the a d v e r s a r i a l testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the excercise of reasonable professional judgment. Id at 690.

What ultimately crystallized from Strickland, is a defendants denied effective assistance of trial counsel when his or her attorneys conduct: ☐ (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome of the trial would be different but for the attorneys conduct. State v. Benn, 120 Wn. 2d 631, 663, 845, P. 2d 289 (citing Strickland v. Washington, supra.).

There is no excuse absulutely at all; to ignore and not present a lie detector test that clears your client - be it "accidently" placing it on the overhead projector - or "accidently" handing it to the alleged

victim and have them read it aloud - its as equivalent as having an eye witness say that they heard them lie about what theyre testifying too - if that dont work for the defense; you just state to the jury you swear under oath your client passed a lie detector test proving innocent of penetrating his daughters vagina; and proving innocent of rubbing her vagina as well - at best; youd get a mere objection - besides - the State always usually says the defendant lies or committed the crimes or usually the States favorite as in this case - "why would Drew Oliver lie about this? Kid(s) dont l i e..." well -

apparently - this one did.

And James Oliver - did not.

(Exhibit Two, Appendix - RP 250-60)(RP 524-61).

* Failure to uphold unanimity:

4 Mr. Olivers attorney caused ineffective assistance of counsel by failing to uphold jury unanimity. For needless duplication, Mr. Oliver simply cites to all record and law used in Issue One; and also raises that Mr. Olivers [redacted] counsel understood the unanimity process via the attorneys jury instruction he tried submitting which was right - the court rejected such - regardless - the defendants attorney knew how to argue the courts unanimity as discussed

4 (and the trial court)

in Issue One, and by failing to do so (ARNP ect.) caused prejudice in the form of his client facing 10.9 years to Life imprisonment due to a non-unanimous verdict; an automatic life sentence of community custody RCW 9.94A.507 ISRB; should he ever be released; and having the prejudicial effects of having to register as a sex offender for the rest of his life; which if deemed a level 3 sex offender - he may as well just stay in prison, because thats all that status is - a prison outside of prison - which is good - some sex offenders most assuredly and moreso - need that level - but it doesnt change the fact his attorney already knew about it prior to going to trial, all the more to go outta your way on making sure what your jury understands and how to convict and not convict, the trial court caused the same ineffective assistance of counsel by rejecting defense unanimity instructions per Counts One + Two 1° R. of Child 1° Ch. Molestation.
* There never was a defense to this case; RP 1-599.

Mr. Olivers attorney had always assured him that the lie detector test would be submitted and blow the alleged child victims testimony out of the water by way of impeaching D.O. - but no such thing happened; creating a conflict of intrest between attorney client as Mr. Oliver

paid a substantial amount of money based on this ficticious strategic defense theory.

Without being able to do so - it was impossible from for Mr. Oliver to win at trial, there was no way even if his stepson Tylor Montgomery hadnt pled the 5th U.S.C.A. and admitted he'd done what D.O. alleged - it did not change the fact she had no intent-ion on recanting whatsoever at trial, ner her older sister D.M. - jury unanimity is never upheld the way it should be at trial as to a defense attorney's stand point; and the experience this particular trial attorney had, he knew very well the trial court and State werent about to (ever - ever) actually elect the act that theyre reylying upon to prove the crime - they never do - in 11 years ive seen 2 cases actually where its been done - other than that - this watered down version of unanimity unfortunately is all that will ever be; regardless of any incident carry-ing a reasonable doubt on its face. For the trial attorney to reject the States plea based on never having a defense to begin with - when Mr. Oliver could have taken the alternative - and used the lie detector test to sway the State and court into a plausible SOSSA deal; would have certainly been more effective than mere butting heads at trial with a wrath filled child alleging her older brother

(RP500-08 Child Porn cont.)
forces her to watch porn and rapes her - and so does her father; and Grandfather beats on her (Issue One in full). How exactly was this trial tacktic? Had the defense attorney had a plan-"to win"- its absulutely not apparent by this RP 1-599 trial court record, clerks papers, or Motions in Limine - I mean - once the trial judge ruled on Motions in Limine; and found out there gonna use a woman medical expert claiming absulutely nothing - at that tempo - and with a female judge - female alleged victims - never submitting a lie detector test untill the sentencing hearing - (?) what trial tacktic was this attorney leaning on besides $ 40,000 some grand - none. Ineffective assistance is met here. This attorney should have led Mr. Oliver into the 5 year plea bargin the State offered.

* <u>Ineffective assistance of the same trial counsel but on Direct Appeal</u>: RP 1-80.

5 All this same attorney at trial did; was merely submitt an already 150" exact premade Motion in Limine based on already argued and ruled on RP 77 paper thin arguments. Mr. Oliver requests another Direct Appeal if applicable. See Defendants Motion in Limine and Pretrial Memorandums, combined - there the exact same Motions submitted to the lower superior courts. On top of that, this Court of Appeals was

5 RP 1-80

fining Mr. Olivers attorney financially over late filing fee charges; eventually the filing dead line became so late he merely plastered together a cover sheet and put the Pretrial Memorandum & Motion in Limine together in Direct Appeal format and sent in as James Olivers only shot at freedom - RP 1-77 through 218 - and charged Mr. Oliver thousands more dollars. You'd think the "prevailing norm" would be to pay another local sound minded attorney some of those thousands to become an expert ineffective assistance appeal exhibit proving such exists.

* Mr Olivers attorney failed to remove a juror No. 2 when Mr. Oliver and the female juror had words in the Superior Court elevator the day after Voir Dire; heading into Opening Statements. RP 112.

Mr. Oliver ran into jury juror No. 2 where the two had words with one another in the Superior Courts elevator heading into trial for opening statements.

His atorney caused a conflict of intrest when he failed to remove the aquainted juror accordingly after his client was so shook up over the conversation; counsel referred the encounter with juror No. 2 as a biased juror:

The Court: Thank you. Please be seated. The jurors are ready.

Mr. Hester: Yes, I need to make a quick record of a juror encounter. Mr. Oliver came in during the break and he said that he hopped in an elevator and who he believed from yesterday was Juror No. 2 was in there. He didnt recognize her and she said, Im 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 Im a juror. And he came straight up here and "told me" what happened. (I) told Mr. Lewis (prosecuter) what happened and (I) told him not to worry about it... (Emphasis added).

The Court: And I (a)ssume the State has no objection nor requires (any) inquiry of Juror No. 2?

Mr. Lewis: No. No, Your Honor. Thank You.

The Court: All right. Thank you for the information.
I appreciate it.
END- Jury Enters. (Emphasis added, mine).

The Ninth Circut has suggested that any showing of actual juror bias requires a new trial and the court need not determine the effect of such "freaked out" bias on the verdict because, under such circumstances, the error cannot be harmless. See Dyer v. Calderon, 151 F.3d 970, 973 n. 2 (9th Cir. 1998). (Emphasis added, mine, ("freaked out").

In Dyer v. Calderon; the Ninth Circut Court of Appeals, explains that the judge must undergo an investigation of relevant facts before merely waiving off a defendants constitutional 14th U.S.C.A. Due Process rights, or their U.S.C.A. Sixth rights or their Wash. Const. Art. 1 § 22 rights to a fair trial- because besides having a lie detector test your cleared of stating you never fingered your kid or rubbed her vagina- having some female juror you freaked out on in an elevator thats now bias- is now going to convict you all the more. As if- alternate jurors werent readily standing by- because they were.

The *presence of a biased juror introduces a structural (fair trial) defect not subject to harmless error analysis. Fields v. Brown, 431 F.3d 1186 (9th Cir. 2005).

Where a biased juror is impaneled, prejudice under Strickland was presumed in counsels failure to move to strike juror for cause and a new trial was required. Hughes v. U.S., 258 F.3d 453 (6th Cir.). Juror bias and implied juror bias or even the possibility - of a bias juror, especially caused by the defendant - is grounds for reversal, when RP112 the trial court abuses its discretion and fails to hold (any) inquiry into the facts of what really happened - and because the trial failed completely and we now will never no what occurred - and the trial court had the chance prior too the trial even begining to make a mere 10, 20 min. inquiry into questioning Mr. Oliver - the juror No. 2 - reversal is mandated; and the trial court abused its discretion, counsel caused ineffective assistance, yet again.

Where in the world or law - does it say to let a female juror, in a 9 year old and 5 year old 1° rapes and 1° Childmolestaion acts case; stay on your jury panel after your Client just said to get rid of her, because you freaked out on her? Nowhere.

The prejudice caused was a biased juror RP112 floating around the other jurors - because noone can take the time to protect an Americans right at Mr Olivers expense - he was found guilty due to a biased juror telling everyone how he flipped out in the elevator, or looked crazy, said crazy things

to her not knowing who she was at first thinking she was a heckler or someone hating him, a person who read about the trial hating on him - we'll never know; because noone cared enough to investigate it at all properly - the State doesnt have the authority to waive a defendants right to have an inquiry conducted when a juror freak out moment happens - and certainly - no one, defense counsel, the state - noone has the authority to talk about anything "off record" without being in the pressence of the defendant so he or she can "personally" make the call on whether to object to this "alleged" RP112 prosecuter/defense waiver of an American's Constitutional rights at a trial where Life - <u>death</u> - is your top end plausible sentence in prison-ment.

A defendant cannot "waive a right" if there never aware a right exists for them in the first place. <u>See</u> <u>U.S. v. McFarland</u>, 34 F.3d 1508, 1513 (9th Cir. 1994) (defendant did not waive objection to substitution of alternate juror after deliberations begun because the defendant did not personally and expressly waive the right to object). See also <u>Otis v. [redacted] Stevenson</u>, Carson school district No. 303, 61, Wash. App. 747, 812 P.2d; <u>Martini v. State of Washington</u>, No. 28894-0-II Wash. App 2004). Reversal and Dismissal of Counts 1 and 2 are mandated.

04. The above errors amount too enough prejudice to render Mr. Olivers trial unfair and these appeal issues all combined trigger cumulative error in violation of Mr. Olivers U.S.C.A. Fith and Fourteenth and Wash. Const. Art. 1§3 and §22 rights.

Every criminal defendant has the constitutional due process right to a fair trial. State v. Davenport, 100 Wn. 2d 757, 762, 675 P.2d 1213 (1984); U.S.C.A. 5 and 14; Wash. Const. Art. 1 §3 and §22.

Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that the trial errors, even though individually not plausibly reversible error; cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn. 2d 772, 788-89 684 P.2d 668 (1984); State v. Johnson, 90 [illegible] Wn. App. 54, 74, 950 P.2d 981 (1998).

Even where some errors are not properly preserved for appeal, the court retains the discretion to examine them if their cumulative effect denies the defendant a fair trial. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992) RAP 1.2(a).

The errors during Mr. Olivers trial were not limited and thus require reversal. The evidence against Mr. Oliver was weak. With counsels

inexcusable failures to object as described herein this brief in its entirety and actions that have been proven to fall beyond the professional prevailing norm; via all issues herein; the courts abuse of discretion cited too herein, failure to uphold unanimity, on both sides - there is a reasonable probability Mr. Oliver's jury may have acquitted him, and this Court should conclude the cumulative effect of the trial errors was to deny Mr. Oliver a fair trial.

The United States Supreme Court has clearly established that the combined effect of multiple trial court errors violate the U.S.C.A. Fourteenth Due Process Clause rights where it renders the resulting criminal trial fundamentally unfair. Chambers v. Mississippi; 410 U.S. 284, 298 (1973) (combined effect of individual errors denied a trial in accord with traditional and fundamental standards of due process and deprived Chambers a fair trial.

The Cumulative effect of multiple errors can violate due process even where no single error arises to the level of a constitutional violation or would independently warrant reversal. Chambers, 410 U.S. at 290 n.3. Where the combined effect of individually harmless errors renders a criminal defense far less persuasive than it might otherwise have been, the resulting conviction violates due process. See Chambers U.S. @ 294. Remand and Retrial are mandated, respectively.

E. Conclusion:

For the above foregoing reasons stated herein, this honorable court of appeals should grant relief to Mr. Oliver in these plausible available forms:

1) Dismissal of charges with prejudice, or without.

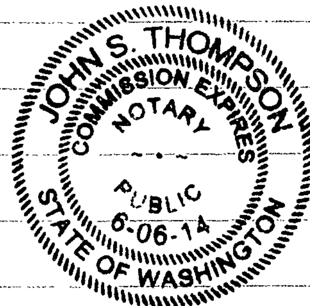
2) Remand with instruction for a new trial.

3) Grant Oral Arguments and Further Briefing on any and all needed issues for clarity purposes.

Respectfully Submitted,

James Oliver
James Oliver

John S. Thompson
Notary
11/14/2012



James Oliver Cedar Hall
W.C.C.
Shelton, WA. 98584

State v. James Oliver, No. 42787-7-II

APPENDIX / EXHIBITS

State v. Oliver, No. 42787-7-II

EXHIBIT ONE

Jury Instructions

Front and back -

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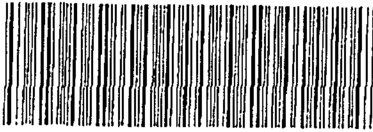

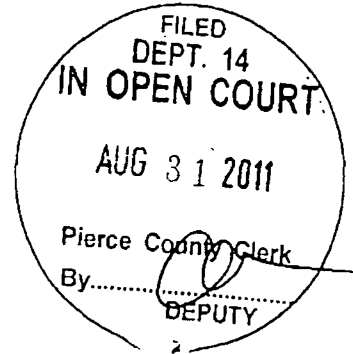

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JAMES ALAN OLIVER Defendant.	CAUSE NO. 09-1-05834-4

COURT'S INSTRUCTIONS TO THE JURY

DATED this 30 day of August, 2011.

JUDGE

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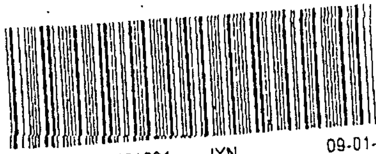
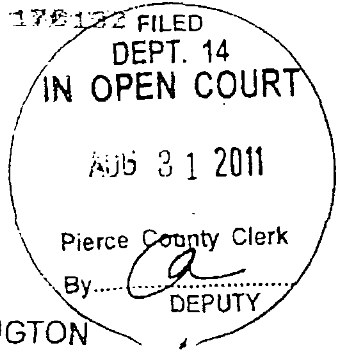
15183 9/1/2011 170132





IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff, vs. OLIVER, JAMES ALAN Defendant.	NO. 09-1-05834-4 JURY QUESTION

QUESTION: WHAT DO WE DO IF WE CAN'T COME TO A CONCLUSION ON ONE OF THE COUNTS

AUG 31 2011
DATE

[signature]
PRESIDING JUROR

RESPONSE:

DATED: ____________

JUDGE SUSAN K. SERKO

INSTRUCTION NO. 17

The State alleges that the defendant committed acts of Rape of a Child in the First Degree against D.O. on multiple occasions. To convict the defendant of Rape of a Child in the First Degree, one particular act of Rape of a Child in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Rape of a Child in the First Degree.

INSTRUCTION NO. 18

The State alleges that the defendant committed acts of Child Molestation in the First Degree against D.O. on multiple occasions. To convict the defendant of Child Molestation in the First Degree, one particular act of Child Molestation in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of Child Molestation in the First Degree.

- Count I: Rape of a Child in the First Degree = Sexual Intercourse between defendant and D.O.
- Count II: Child Molestation in the First Degree = Sexual Contact between defendant and D.O.
- Count III: Attempted Child Molestation in the First Degree = Substantial Step towards Sexual Contact with D.M.

Instructions 10 & 15

- The evidence in this case indicates multiple instances of sexual abuse against D.O.
- Only one particular act of each crime, Rape of a Child in the First Degree, and Child Molestation in the First Degree, need be proven beyond a reasonable doubt.
- You do not need to unanimously agree that multiple acts occurred; only one.

Testimony of Witnesses

- Cheryl Hanna-Truscott, ARNP
  - Drew was premenarche;
  - Barely adequate hymeneal tissue;
  - Edge of hymeneal tissue was blunted;
  - Genital examination consistent with D.O.'s disclosure of penetration and bleeding;
  - Overall assessment caused concern regarding sexual abuse of D.O.

Testimony of Witnesses

- Jeannie Whitworth
- Detective Robert Kocher
- Patricia Mahaulu-Stephens

Testimony of Witnesses

- D.O.
  - Testified that the defendant touched her breasts and vagina with his hand.
  - That on some occasions, the defendant's finger would penetrate her vagina.
- D.M.
  - That defendant got into bed with her naked and asked her to touch his penis.
  - That defendant would shower with her.

15183 9/1/2011 170129

101

Direct vs. Circumstantial Evidence Instruction #4

- Direct Evidence = Actual observations
- Circumstantial Evidence = What facts you, as jurors, can infer from your own common sense and experiences.
- The law does not afford more weight to one type of evidence over the other.

INSTRUCTION NO. 14

To convict the defendant of the crime of Attempted Child Molestation in the First Degree as charged in Count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between the dates of April 7th, 1992, and April 6th, 2004, the defendant did an act that was a substantial step toward the commission of Child Molestation in the First Degree against D.M.;

(2) That the act was done with the intent to commit Child Molestation in the First Degree against D.M.; and

(3) That the act 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.

15183 9/1/2011 178164

INSTRUCTION NO. 13

A person commits the crime of Attempted Child Molestation in the First Degree when, with intent to commit that crime, he or she does any act which is a substantial step toward the commission of that crime.

INSTRUCTION NO. 6

To convict the defendant of the crime of rape of a child in the first degree as charged in Count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between the dates of January 1, 2002, and September 8, 2009, the defendant had sexual intercourse with D.O.;

(2) That D.O. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant and was not in a state registered domestic partnership with the defendant;

(3) That D.O. was at least twenty-four months younger than the defendant; and

(4) That this act 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.

INSTRUCTION NO. 5

A person commits the crime of rape of a child in the first degree when that person has sexual intercourse with a child who is less than twelve years old and who is not married to the person and is not in a state registered domestic partnership with the person; and who is at least twenty-four months younger than the person.

INSTRUCTION NO. 11

To convict the defendant of the crime of child molestation in the first degree as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between the dates of January 1, 2002, and September 8, 2009, the defendant had sexual contact with D.O.;

(2) That D.O. was less than twelve years old at the time of the sexual contact and was not married to the defendant and not in a state registered domestic partnership with the defendant;

(3) That D.O. was at least thirty-six months younger than the defendant; and

(4) That this act 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.

INSTRUCTION NO. 12

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.

State v. James Oliver, No. 42787-7-11

EXHIBIT TWO

Lie Detector Test of Mr. Oliver
(Front and back-)

WASHINGTON POLYGRAPH SERVICE
H.L. "BUD" KILLIAN
8101-HIDDEN VALLEY DR
LACEY, WA 98503

Lance Hester
Attorney at Law
1008- So Yakima
Tacoma, WA

November 2,2010

RE: James A. Oliver

Direct Issue Polygraph Examination

No Deception Indicated

A Backster direct issue polygraph examination was administered to JAMES A. OLIVER on November 2,2010 regarding whether or not he touched his daughter Drew's vagina.

A Five Channel Lafayette polygraph instrument was used to conduct this examination and was in good working order.

All questions were reviewed ahead of time to insure a common meaning.

The attorney furnished the charging papers for review.

Based on the physiological responses produced by this subject on (3)

Exhibit

WASHINGTON POLYGRAPH SERVICE
H.L. "BUD" KILLIAN
8101-HIDDEN VALLEY DR
LACEY, WA 98503

three polygraph charts and a numerical evaluation of those charts, in the opinion of this examiner NO DECEPTION WAS INDICATED when he answered NO to the following relevant questions:

33- Have you ever touched your daughter Drew's vagina ?

35- Regarding Drew- did you touch her vagina ?

It is my professional opinion based solely on the reactions on the polygraph charts, James was answering truthfully to the above questions.

The polygraph charts are available for review by the police examiner.

Sincerely,

H.L."Bud" Killian

State v. Oliver, No 42787-7-II

EXHIBIT THREE

FILED
IN COUNTY CLERK'S OFFICE
A.M. AUG 18 2011 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
BY DEPUTY

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JAMES ALAN OLIVER, Defendant.	CAUSE NO. 09-1-05834-4 PLAINTIFF'S MOTIONS IN LIMINE

COMES NOW the Plaintiff, State of Washington, by and through Pierce County Prosecuting Attorney Mark E. Lindquist, by and through his Deputy, Tim Lewis, and respectfully moves this Court to grant the following motions in limine regarding trial in this matter.

FACTS

The State has charged the defendant in this matter in count one with Rape of a Child in the First Degree against D.O. (DOB 9/20/1999); in count two with Child Molestation in the First Degree against D.O.; and in count three with Attempted Child Molestation in the First Degree against D.M. (DOB 4/7/1992). The State has alleged that counts one and two occurred between September 20, 1999, and September 8, 2009. The State has alleged that count three occurred between April 7, 1992, and April 6, 2004, when D.M. was approximately five years of age. D.O. is the biological daughter of the defendant. D.M. is the former step-daughter of the defendant.

During initial disclosures and her forensic interview, D.O. stated the defendant touched intimate parts of her body on numerous occasions, and on at least one occasion penetrated her

ORIGINAL

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930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

vagina with his fingers. During these same disclosures and subsequent interviews, D.O. further stated that she had also been touched inappropriately by her older brother, Tyler Montgomery. D.O. has indicated that her recollection is that she was touched by her brother on only one such occasion, and that the touching differed from that perpetrated by the defendant. D.O. and D.M. have also both maintained, consistent with statements of other witnesses interviewed in preparation of this trial, that they have never been touched in any manner by their mother's current husband, Glenn Whitworth, and that D.O. did not have any contact with Mr. Whitworth until after her disclosure of the defendant's abuse. Glenn Whitworth was convicted of Rape of a Child in the Third Degree on May 7, 1996, after pleading guilty to having sexual intercourse with a fifteen year old girl when he was twenty-four years of age.

MOTIONS

I. **The State respectfully moves this Court for an order in limine precluding reference to or testimony regarding the prior conviction of Glenn Whitworth, his status as a convicted sex offender, or his prior status as a registered sex offender.**

II. **The State respectfully moves this Court for an order in limine precluding reference to or testimony regarding allegations by D.O. regarding her brother, Tyler Montgomery.**

III. **The State respectfully moves this Court for an order in limine permitting the State to redact portions of the forensic child interview, subject to admission, referring to or regarding Glenn Whitworth or Tyler Montgomery.**

IV. **The State respectfully moves this Court for an order in limine precluding examination of Tyler Montgomery as a witness intended or likely to elicit invocation of his Fifth Amendment right against self-incrimination.**

ANALYSIS

When a defendant seeks to introduce evidence connecting another person to a crime, or implying that another person may have committed a crime, the proponent must lay a proper

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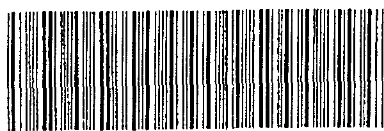
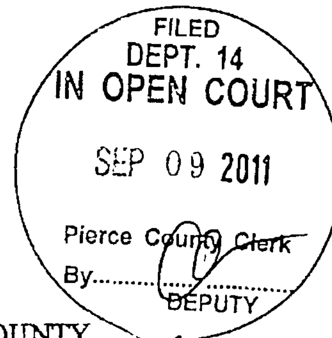
State v. Oliver, No. 42787-7-II

EXHIBIT FOUR


09-1-05834-4 37099324 ORDSMWO 09-12-11



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. JAMES ALAN OLIVER, Defendant. DOB: 07/01/70 SID #: WA16826355	CAUSE NO. 09-1-05834-4 MOTION AND ORDER FOR DISMISSAL WITHOUT PREJUDICE <u>AS TO COUNT III ONLY</u>

MOTION

Comes now the plaintiff, herein, by its attorney, MARK LINDQUIST, Prosecuting Attorney for Pierce County, and moves the court for an order dismissing Count III of the second amended Information without prejudice in the above entitled action, on the grounds and for the reason that the victim and her family have expressed significant reservations regarding the rigors of undergoing a second trial in this matter having so recently completed the first trial. The mother of the victims is concerned about the emotional toll this process and the first trial has taken on her children and does not believe they could endure a second trial at this time. For this reason, the State respectfully moves this Court for an order of dismissal without prejudice, as to Count III of the seconded amended Information only, in this matter at this time.

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930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

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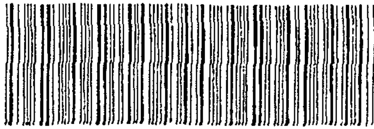


FILED
IN COUNTY CLERK'S OFFICE
A.M. AUG 31 2011 P.M.
PIERCE COUNTY, WASHINGTON
KEVIN STOCK, County Clerk
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON, Plaintiff,	No. 09-1-05834-4
vs.	
JAMES ALAN OLIVER, Defendant.	VERDICT FORM C Count III

We, the jury, find the defendant, James A. Oliver ______________________
(*Write in "not guilty" or "guilty"*)

of the crime of Attempted Child Molestation in the First Degree as charged in Count III.

DATE: ______________

____
Presiding Juror

09-1-05834-4

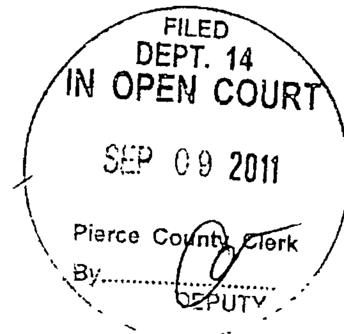
ORDER

The above entitled matter having come on regularly for hearing on motion of MARK LINDQUIST, Prosecuting Attorney, and the Court being fully advised in the premises, it is hereby;

ORDERED that Count III of the second amended Information only, of the above entitled action be and same is hereby dismissed without prejudice. The guilty verdicts previously accepted by the Court as to Counts I and II remain in full force and effect, and the defendant is to remain in custody until sentencing pursuant to Counts I and II of the second amended Information.

DATED the 9th day of September, 2011.

JUDGE



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Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

09-1-05834-4

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DATED: this 9th day of September, 2011
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MARK LINDQUIST
Pierce County Prosecuting Attorney
by: [signature]
TIMOTHY LEWIS
Deputy Prosecuting Attorney
WSB#: 33767

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930 Tacoma Avenue S. Room 946
Tacoma, Washington 98402-2171
Telephone: (253) 798-7400

IN THE Div. Appeals COURT FOR WASHINGTON II
IN AND FOR Washington COUNTY Pierce County

State of Washington Plaintiff v. James Oliver Defendant.	:	No. COA. No. 42787-7-II DECLARATION OF SERVICE BY MAILING Defendants Pro Se Brief RAP 10.10

I James Oliver, the Defendant, in the above entited cause, do hereby declare that I have served the following documents;

Pro Se Supplemental Brief and Appendix

FILED
COURT OF APPEALS
DIVISION II
2012 NOV 15 PM 1:
STATE OF WASHINGTON
BY
DEPUTY

PARTIES SERVED:

CLERK OF THE COURT
COA Div. II
950 Broadway # 300
MS/TB-06
Tacoma, WA. 98402-4454

PLAINTIFF / PROSECUTOR
Mark Lindquist / prosecutor
Office of Prosecuting Atty.
930 Tacoma Ave. S. Room 946
Tacom, WA. 98402-2171

That I deposited in with the Unit Officer's Station, by processing as Legal Mail, with First Class Postage at: Washington Correction Center PO Box 900 * Shelton WA. 98584 / Ed. BLDG.

Dated this November day of 13, ~~200~~ 2012

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

[signature] / James Oliver
(Signature)