

62162-9

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Form 23

**FORM STATEMENT OF ADDITIONAL
GROUND FOR REVIEW**

STATE OF WASHINGTON)
)
 Respondent,)
)
 v.)
)
 BRYON KOELLER)
)
)
 Appellant.)

No. 62162-9-1

**STATEMENT OF ADDITIONAL
GROUND FOR REVIEW**

2009 AUG 10 11:10:53
 STATE OF WASHINGTON
 APPELLATION

I, Bryon Koeller, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Statement of Additional Grounds

Bryon Koeller #31873
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Additional Ground One

PROSECUTOR MISCONDUCT- VOUCHING.

The prosecutor, Colleen Kenimond, vouched for the State's witness Kyla Williams answering the Question "Have you ever made any other allegations of sexual abuse against anyone else?" Ms. Kenimond misled the Jury vouching for Kyla Williams by stating "She didn't make them" (R.P. Page 296, Line 17).

The Trial Court allowed further inquiry toward Kyla Williams accusing her stepfather of sexual abuse, but the damage was done by the prosecutor's lent credibility that once vouched for, made the Jury validate anything that Kyla Williams testifying to, not have to be weighed by them as true.

This vouching by a trusted Officer of the Court prevent the Jury from being able to balance testimony. The later impeachment of Elizabeth Williams when she said she never brought a boyfriend to the Koeller home, and my stepson Zachary Bryon Koeller said, She not only brought a boyfriend to the house but Zachary witnessed her having sex in the same room as V.M., and the male companion was "uncle" Patrick Matranga (R.P. Page 328, Lines 3-14) was further vouched by the prosecutor and down played.

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Prosecutor Colleen Kenimond did not act up to the professional standards required by lawyers when she discredited Zachary Koeller's testimony. She asked him "You love Bryon Koeller; don't you?" and when he answered "yes I do", she emphasized to the Jury and said "you'd do anything for him? (R.P. page 330, lines 16-19). This Forced the defense attorney Darrin Hall to have to reiterate that Zachary was under oath and that he was telling the truth which Zachary Koeller affirmed "yes I am" (R.P. pages 330, line 25, page 331, lines 1-4).

Vouching consist of placing the prestige of the Government behind a witness through personal assurances of the witness's veracity, or suggesting that information not presented to the Jury supports the witness's testimony. United States V. Necoechea, 986 F.2d 1273, 1276 (9th Cir. 1983).

Vouching of this sort in the present case, is dangerous precisely because a Jury "may be inclined to give weight to the prosecutor's opinion in assessing the credibility of the witnesses, instead of making the independent judgement of credibility to which the defendant is entitled". United States V. Mckoy, 771 F.2d 1207, 1211 (9th Cir. 1985); United States V. Young, 470 U.S. 1, 18-19, 84 L. Ed. 2d 1, 105 S. Ct. 1038 (1985).

A prosecutor has no business telling the Jury his/her individual impressions of the evidence. United States V. Kerr, 981 F.2d 1050, 1053 (9th Cir. 1992).

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Answering for a witness that she never did that was impermissible vouching on the grandest scale as it turned out that she did accuse someone else of rape of a child in the past that was also unfounded as no conviction was returned.

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Additional Ground Number Two

INEFFECTIVE ASSISTANCE OF COUNSEL – FAILURE TO OBTAIN AN EXPERT WITNESS ON CHILD TESTIMONY.

The United States Supreme Court emphasized the inherent problems with the reliability of child witness testimony when the struck down a Louisiana statute imposing the death penalty in child rape cases:

The problem of unreliable, induced, and even imagined child testimony means there is a "special risk of wrongful execution" in some child rape cases. *Atkins, supra*, at 321, 122 S. Ct. 2242, 153 L. Ed. 2d 335. See also Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 5-17. This undermines, at least to some degree, the meaningful contribution of the death penalty to legitimate goals of punishment.

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Studies conclude that children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement. See Ceci & Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 *Cornell L. Rev.* 33, 47 (2000) (there is "strong evidence that children, especially young children, are suggestible to a significant degree--even on abuse-related questions"); Gross, Jacoby, Matheson, Montgomery, & Patil, *Exonerations in the United States 1989 Through 2003*, 95 *J. Crim. L. & C.* 523, 539 (2005) (discussing allegations of abuse at the Little Rascals Day Care Center); see also Quas, Davis, Goodman, & Myers, *Repeated Questions, Deception, and Children's True and False Reports of Body Touch*, 12 *Child Maltreatment* 60, 61-66 (2007) (finding that 4- to 7-year-olds "were able to maintain [a] lie about body touch fairly effectively when asked repeated, direct questions during a mock forensic interview").

Similar criticisms pertain to other cases involving child witnesses; but child rape cases present heightened concerns because the central narrative and account of the crime often

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comes from the child herself. She and the accused are, in most instances, the only ones present when the crime was committed. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 60, 107 S. Ct. 989, (1987). Cf. Goodman, *Testifying in Criminal Court*, at 118. And the question in a capital case is not just the fact of the crime, including, say, proof of rape as distinct from abuse short of rape, but details bearing upon brutality in its commission. These matters are subject to fabrication or exaggeration, or both. See Ceci and Friedman, *supra*; Quas, *supra*. Although capital punishment does bring retribution, and the legislature here has chosen to use it for this end, its judgment must be weighed, in deciding the constitutional question, against the special risks of unreliable testimony with respect to this crime.

In the present case, I was aware of the unreliability of child witness testimony, based on my first hand experience of being falsely accused of committing the crime of rape of a child. I confronted my trial counsel, Mr. Darrin Hall, with the need to obtain the services of an expert witness to explain the problems inherent in such testimony (Affidavit In Support of Motion For New Trial, Page 5, Lines 3-12, 06/25/08), as so clearly outlined by the United States Supreme Court. I was told that no attempt had been made or would be made to obtain such expert assistance, as the Public Defender's Office did not have a sufficient budget to pay for this expert (Affidavit In Support of Motion For New Trial, Page 5, Lines 13-16, 06/25/08).

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The failure to even attempt to obtain such an expert, in light of the significant issues presented with respect to the reliability of such testimony, as outlined by the United States Supreme Court in Kennedy, constitutes ineffective assistance of counsel, and resulted in “irregularity in the proceedings of the court.... By which the defendant was prevented from having a fair trial” CrR 7.5 (a)(5) and means that “substantial justice has not been done”. CrR 7.5 (a)(8). Reversal is necessary since the failure of trial counsel to obtain an expert led directly to the jury not having a sufficient opportunity to be fully informed about inherent unreliability of the child witness testimony; this, in turn, prejudiced me and resulted in the denial of a fair trial.

Expert testimony is necessary and must be helpful to the trier of fact. *Philippides v. Bernard*, 151 Wn.2d 376, 393 (2004), citing *State v. Allery*, 101 Wn.2d 591, 596 (1984).

Expert opinion is helpful to the trier of fact when it concerns matters beyond the common knowledge of the average layperson and does not mislead the jury. *State v. Farr-Lenzini*, 93 Wn. App. 453, 461 (1999).

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In State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn. 2d 1006 (1978) counsel's failure to adequately acquaint himself with the facts of the case by interviewing witnesses, failure to subpoena witnesses, and failure to inform the court of the substance of the witnesses testimony on the defense's motion for a continuance and for a new trial were found to be omissions that no reasonably competent counsel would have committed. Jury, 19 Wn. App. At 264.

In the present case the failure to even attempt to obtain an expert on child witness testimony meant that I was deprived of an opportunity to fully argue the theory of my defense.

As indicated by the Supreme Court, such testimony is inherently unreliable, and this lack of reliability is something which requires that the jury be give sufficient information to properly evaluate the testimony. The number of expert opinions and articles relied upon by the Supreme Court to support their reasoning is clear evidence of the complexity of the issues; the Justices could be considered experts on this topic, yet even they rely upon independent expert treatises to explain the problems with child witness testimony. Surely a lay jury would need at least as much expert guidance in evaluating the testimony.

The preponderance of prejudice was met due to the defense's lack of an expert many times when both children testified, especially when defense counsel was unable to pin down who told V.M. to say I committed rape. An expert would have proved that he was coached and the similar words exactly mirroring the first accusation were not his own.

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(R.P. page 3, lines 6-19, 05/15/08, Argument RE: testimony of VCM).

If there are additional grounds, a brief summary is attached to this statement.

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Additional Ground Number Three

THE TRIAL COURT ERRED IN FINDING D.K.'S TESTIMONY THAT SHE HAD BEEN ABUSED BY ME WHEN SHE WAS 4 YEARS OLD WAS ADMISSIBLE AS EVIDENCE OF A COMMON SCHEME OR PLAN.

In support of the appellate Counsel's ground number six, I would like for the court to further consider that the allegation against my daughter, at my Navy Article 32 hearing, was dismissed due to there was not evidence "to prove beyond a reasonable doubt" that anything occurred.

The Trial Court abused its' discretion when it did not exclude this evidence. The Trial Court did not conduct a meticulous balancing of probative value and prejudicial effect, nor that the prior act occurred. In doubtful cases, the evidence should be excluded. *State V. Baker*, 89 Wn.App. 726, 732, 950 P.2d 486 (1997).

The mere allegation that a prior crime or bad act occurred does not open the door for a carte blanche evidentiary ruling for the State. In the context of a criminal rape trial, the act of rape itself cannot be part of the "Common Plan" allowing evidence of other crimes or bad acts, otherwise the Courts would merley be stating that because an individual raped before they raped again. This is "propensity" reasoning that Washington rules of evidence 404(b) prohibits. *State V. Dewey*, 93 Wn. App. 50 (1998).

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In the State's opening statement this evidence should have been excluded (R.P. page 45, lines 13-17, 05/13/08). Because it was not, the Trial Court err prejudiced me because there is a reasonable probability that the trial outcome would have been different had the err not occurred. State V. Benn, 161 Wn. 2d 256,266 n.4 (2007).

The State's expert, Commander Michael Strunc said his examination of D.K. was "normal" (R.P. page 261, lines 12-18) regarding her not being sexually abused. Commander Strunc further opined as an established "expert" of the Court (R.P. page 258, lines 5-11) that "intercourse or something could of happened, most of those exams are normal. And the reason is time and healing. Tissues in young children are accessible, stretchable and they also easily healed and repaired. So most exams are normal for those reasons even in those cases." this severely prejudiced the Jury, and misstated any evidence. The err caused the Jury to validate past abuse when none occurred.

The past case of rape of a child tilted the scales against the defendant and prejudice was harmful beyond repair. As in State V. Montague, 31 Wn.App 692 (1982). I would not have been convicted without reference to the past rape accusation that was dismissed.

Unfair prejudice exists when evidence is likely to stimulate an emotional rather than a rational response. State V. Powell, 126 Wn.2d 244, 264, 893 P.2d 615 (1995). When evidence is unduly prejudicial, "the minute peg of relevancy is said to be obscured by dirty linen hung upon on it." State V. Turner, 29 Wn.App. 282, 289, 627 P.2d 1324 (1981).

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Additional Ground Number Four

INEFFECTIVE ASSISTANCE OF COUNSEL – REFUSAL TO ALERT COURT TO “SLEEPING JURORS” WHEN ASKED TO BY DEFENDANT. (JUROR MISCONDUCT)

During crucial testimony at trial, jurors slept. This was brought to the attention of attorney Darrin Hall who did nothing to remedy the situation when asked to notify the Trial Court of the problem (motion for new trial, 06/25/08, Affidavit page 7, lines 14-18).

Article I, § 21 of the Washington Constitution provides that “[t]he right of Trial by Jury shall remain inviolate.” The right of trial by Jury means a trial by an unbiased and unprejudiced Jury, free of disqualifying Juror misconduct. *Robinson V. Safeway Stores, INC.*, 113 Wn.2d 154, 159, 776 P.2d 676 (1989).

Trial Counsel’s failure to address in a competent manner that jurors were sleeping denied me of a fair and impartial trial. Trial Counsel and the Court had a duty to address this problem during the trial; if addressed it is reasonably probable that a mistrial would of resulted, which means that the outcome was ultimately materially impacted by this misconduct.

A sleeping Juror who misses an essential portion of a trial cannot fairly consider the case during deliberations. This denies the accused his right to a fair trial. *United States V.*

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Hendrix, 549 f.2d 1225, 1229 (9th Cir.), cert. denied, 434 U.S. 818, 98 S. Ct. 58, 54 L.Ed. 2d 74 (1977). Such a Juror is also unfit to serve.

In Washington state, the determination of whether a Juror is fit to serve is governed by statute:

It **shall** be the duty of a judge to excuse from further jury service any juror, who in the opinion of the judge, has manifested unfitness as a juror by reason of bias, prejudice, indifference, **inattention** or any physical or mental defect or by reason of conduct or practices incompatible with proper and efficient jury service.

(emphasis added) RCW 2.36.110. CrR 6.5 requires the judge to seat an alternate juror when another juror is unfit to serve. CrR 6.5 provides in part: “[i]f at any time before submission of the case to the jury a juror is found unable to perform the duties the court **shall** order the juror discharged.” *id.* (emphasis added.) “RCW 2.36110 and CrR 6.5 place a continuous obligation on the trial court to excuse any juror who is unfit and unable to perform the duties of a juror.” *State v. Jorden*, 103 Wn. App. 221, 226-27, 11 P.3d 866, rev. denied, 143 Wn.2d 1015, 22 P.3d 803 (2001).

Review of the standard of proof used by the judge in determining whether or not to dismiss a juror under RCW 2.36.110 is a question of law reviewed de novo. *State v. Elmore*, 121 Wn. App. 758, 767-68, 123 P.3d 72 (2005). (error to dismiss a juror unless judge is certain that the juror misconduct is not related to his or her evaluation of the evidence). The determination of whether or not to dismiss a juror is reviewed for an abuse of discretion. *Id.*

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A trial court abuses her discretion by refusing to excuse a juror who is sound asleep during cross examination of the state's primary forensic expert. *State v. Jorden*, 103 Wn. App. At 226, 230; *Accord, Elmore*, 155 Wn.2d at 761.

In *Jorden*, the Court of Appeals citing to RCW 2.36.110 and CrR 6.5 held that the judge's removal of a juror for sleeping was not an abuse of discretion because "the record establishes that the juror engaged in misconduct." *Jorden*, 103 Wn. App. At 229-230. The record in *Jorden* included the prosecutor's and the judge's observations of the juror sleeping during several days of testimony in the first degree murder trial. *Jorden*, 103 Wn. App. At 229.

Even though the juror in *Jorden* was observed sleeping more than the juror in the instant case, the Court, citing to *United States v. Barrett*, 703 F.2d 1076 (9th Cir. 1983), a case decided on constitutional grounds, recognized that "[m]ost importantly, the allegation [of sleeping during testimony], if true, prejudiced barrett's right to a fair trial; he was convicted by a jury that included one member who had not heard all the evidence." *Jorden*, 123 Wn. App. At 228.

In *Barrett*, *supra*, the trial judge (1) refused to dismiss a juror who asked to be removed because he slept during part of the trial; and (2) without further investigation, the trial court took judicial notice of the fact that "there was no juror asleep during trial". *Barrett*, 703 F.2d at 1083. The Ninth Circuit held that the trial court abused its discretion by failing to investigate the admission and reversed and remanded for an evidentiary hearing

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to determine if Barrett's due process right to a fair trial were prejudiced. Barrett, 703 F.2d at 1083, citing, Hendrix, 549 F.2d at 1229.

In United States v. Monreal-Miranda, 103 Fed. App. 83 (9th Cir. 2004), after being informed that several jurors were sleeping, the district court, outside the presence of other jurors, directly questioned the juror who was sleeping and dismissed the juror who admitted to sleeping. The other juror denied sleeping and was not dismissed. The Court on review held that the judge conducted an adequate investigation and did not abuse her discretion in dismissing one juror and retaining another. Montreal-miranda, 103 Fed. App. At 85.

Defense Counsel Darrin Hall prejudiced me by not making the Court aware as his duty requires and therefore was ineffective. Reversal and remand for new trial are proper remedy.

Date: 5 AUG 2009

Signature: 

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**THE COURT OF APPEALS
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON

Plaintiff,

vs.

BRYON KOELLER

Defendant

) **Case No.: No.62162-9-I**
)
)
)
) **Affidavit of Service by Mail**
)
)
)
)
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I, being first duly sworn on oath, state that I am at least 18 years of age and that on 5TH day of August, 2009, I served the following papers:

Statement of Additional grounds,

upon the Island County Prosecutor, 7th and Main, Post Office Box 5000, Coupeville, Washington 98239, by placing same in the United States Mail at the Coyote Ridge Correction Center, in the city of Connell, state of Washington.

Dated: August 5th, 2009.

Signed: 

2009 AUG 10 AM 10:51
CLERK OF COURT
SUPERIOR COURT
STATE OF WASHINGTON
SEATTLE

Bryon Koeller # 318732
Coyote Ridge Correction Center
P.O. Box 769, Unit B, CellA15
Connell, Wasington 99326

August 5th, 2009

Richard D. Johnson, Court Clerk
Washington State Court Of Appeals
Division One
600 University Street
Seattle, Washington 98101-1176

Dear Court Clerk,

Please find and file the enclosed Statement of Additional
Grounds to be considered with my appeal (C.O.A. No. 62162-9-I).

At the time of this being placed in the mail I am also
serving the Island County Prosecutor, proof of service also is
enclosed.

Thank you for your patience and help in my filing, and the
final extension that made it possible for me to complete this.

Respectfully submitted,



Bryon Koeller

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