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NO. 63306-11

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

STATE OF WASHINGTON,

REC'D

Respondent,

v.

OCT 09 2009

King County Prosecutor
Appellate Unit

REX CRUSE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine Shaffer, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Three of appellant's four convictions violate double jeopardy.

Issues Pertaining to Assignment of Error

1. Appellant was convicted on two counts of rape of a child and two counts of child molestation. Inadequate jury instructions exposed him to multiple punishments for one offense. Must three of the four convictions be vacated?

2. To the extent defense counsel contributed to the double jeopardy violations, was appellant denied his constitutional right to effective representation?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Rex Cruse with four criminal offenses: (count 1) rape of a child in the first degree, (count 2) rape of a child in the first degree, (count 3) child molestation in the first degree, and (count 4) child molestation in the first degree. The State alleged that all four acts occurred between August 1, 2005 and October 2, 2007. CP 6-7.

A jury convicted Cruse on all four charges. CP 80-81. The Honorable Catherine Shaffer imposed standard range sentences

totaling 100 months, and Cruse timely filed his Notice of Appeal. CP 136, 142-153.

2. Substantive Facts

In August 2005, Sarah Gumke and her husband, Mark Gumke, Jr., moved their family from California to Washington. 4RP 93. The Gumkes have two children – K.G., born September 2, 2002, and B.G., born December 27, 2003. 4RP 84. Sarah and Mark grew up in Washington, and initially the family stayed with Mark's parents.¹ 4RP 83-84, 94.

Sarah Gumke and Joanna Cruse have been best friends since they were 12 years old. 4RP² 87. Rex Cruse is Joanna's father. 4RP 88. Sarah Gumke knew Rex well from spending time at the Cruse home when she was younger. 4RP 88. Sarah's father passed away when she was 16, and Sarah considered Rex a respected authority figure in her life. 4RP 88.

¹ Many of the individuals involved in this case share the same last name. To avoid confusion, this brief will refer to individuals by first name.

² This brief refers to the verbatim report of proceedings as follows: 1RP – December 1, 2008; 2RP – December 2, 2008; 3RP – December 8, 2008; 4RP – December 10, 2008; 5RP – December 11, 2008; 6RP – December 15, 2008; 7RP – January 30, 2009; 8RP – April 10, 2009.

The Gumkes ran into financial problems and were forced to move out of Brian's parent's home. Sarah shared this information with Joanna. At the time, Joanna was living in her father's Kenmore home and she asked him if the Gumke family could move in with them. 4RP 94-96; 5RP 155-156. Initially, Rex was hesitant, but he said yes. The situation was supposed to be temporary, perhaps a few weeks, but it became long term. 4RP 94-95.

The Gumkes were having marriage problems, and Brian moved out in February 2006. Sarah and the children, however, remained in the Cruse home. 4RP 95-96. There was no formal rental agreement; Sarah simply helped around the house. 4RP 98-99. The living situation worked well for everyone. 4RP 100-101. In November 2006, however, Joanna moved out of her father's house and into an apartment in Lynnwood. 4RP 102; 5RP 157.

One evening, when Sarah was watching a "racy scene" on television, K.G. walked in and said, "That's like the private show that is in Poppa's room." 4RP 110; 5RP 2-3. "Poppa Rex" is K.G.'s name for Rex. 3RP 23; 6RP 44. Sarah "kind of freaked out," grabbed the children, and drove to Joanna's apartment. 4RP 112, 114. On the way, she asked K.G. to explain what she had meant by "the private show," and K.G. said, "Just the private show where

Poppa put the lotion on his bottom and went like this.” 4RP 112; 5RP 3. According to Sarah, K.G. then made a hand motion simulating a man masturbating. 4RP 112-113; 5RP 3.

Sarah told Joanna what happened, and Joanna called her father. Rex indicated that he had no idea what K.G. was referring to and was baffled by her statement. 4RP 114-115; 5RP 3-4, 158. After additional conversation between Joanna and her father, however, Rex reminded Joanna that on one occasion he fell asleep in his bedroom while watching a television show with the children. When he awoke, the original show was over and the children were watching a pornographic program. Rex immediately changed the channel, and K.G. protested that she had been watching it. 5RP 159-160. Rex had shared this event with Joanna and Sarah when it occurred. 5RP 60-61, 159.

Rex also told Joanna that K.G. and B.G. had once entered his room quickly and unannounced, catching him in the act of masturbation just as he was ejaculating. 5RP 160, 168. After her conversation with her father, Joanna shared this information with Sarah.³ 5RP 5, 160.

³ While Joanna testified that she told Sarah about the masturbation incident, Sarah testified that Joanna merely indicated

Sarah took the children back to Rex's house. 5RP 5. She and Rex sat down to discuss the situation and Sarah was reassured by what he told her. She believed K.G.'s comments were the product of innocent circumstances. 5RP 6-7. Rex indicated he would be more careful to lock his bedroom door, and Sarah spoke to K.G. about respecting Rex's privacy and knocking before entering. 5RP 7-8.

In December 2006, Rex moved to a new house in Kenmore and continued to allow Sarah and the children to live in his home, along with two of Rex's teenage sons and an older daughter. 4RP 87-88, 102. As before, everyone was happy in the house and, despite the blending of two families, it was "a great atmosphere." 4RP 109-110.

At some point, Joanna moved to Moses Lake, and in September 2007, Sarah took the children to visit her. 5RP 10-11, 161. They arrived back home late afternoon or early evening on September 30. 5RP 12. Sarah asked Rex to watch the children while she made a quick trip to the video store. 5RP 13. When she

that her father wondered whether the children may have walked in while he was masturbating. 5RP 5.

returned to the house, she entered through a downstairs door. 5RP 14; State's exhibit 8.

As Sarah walked toward a staircase, she overheard K.G., who was upstairs with Rex. According to Sarah, K.G. said, "I told my daddy that you played with me." 5RP 14-16. Rex responded, "You told your daddy what?" K.G. then repeated what she said, and Rex replied, "You're not supposed to tell your daddy that. That's private. That's secret. That's between you and me, [K.G.]. What did you tell you're dad? K.G. then said, "I don't know. I don't remember." 5RP 16. Rex continued, "No [K.G.], that's secret. That's private. You are not supposed to tell mommy or dad. What did you tell your dad." K.G. repeated that she did not remember. 5RP 17.

At that point, Sarah entered the room. Rex and the children had been in the hot tub. According to Sarah, the children were naked and Rex was wearing only a towel. 5RP 13, 17. Sarah asked what the conversation was regarding and Rex turned pale. 5RP 18. Sarah took the kids out of the room and she and Rex talked. 5RP 18-19.

Sarah asked Rex what kind of a secret he could have with K.G. Rex explained that on more than one occasion, while he was

giving K.G. a leg massage, K.G. said that her mom told her she should not touch her own private areas. According to Rex, K.G. told him it was okay if he rubbed her private parts. Rex responded that he could not do that, but she was free to touch herself if she wanted. 5RP 19-20.

Sarah chastised Rex for having this type of conversation with her daughter. 5RP 20. She felt that Rex was defensive and nervous and decided to have K.G. examined by a doctor. 5RP 20-21. She asked K.G. about the "secret," but K.G. kept saying she did not know and could not remember. 5RP 28.

Sarah had K.G. examined by K.G.'s primary care physician, Dr. Barbara Mendrey. 4RP 15-16; 5RP 27. Dr. Mendrey asked K.G. if Rex had touched her privates. The first time she was asked, K.G. said "yes." The second time she was asked, she said "no." 4RP 20. A physical examination revealed that K.G.'s genital area was normal. 4RP 21. Because K.G. initially said she had been touched, however, CPS was notified. 4RP 22, 28.

According to Sarah, sometime after K.G.'s visit with Dr. Mendrey, K.G. asked, "we're not going to live with Poppa anymore, are we?" When Sarah responded that they were not, K.G. said Rex had been mean to her and put his fingers in her privates. K.G. then

indicated this was the secret. 5RP 32-33. She also told her mother and her father that she had watched pornography and Rex “peed white stuff all over her.” 5RP 42, 111.

A child interview specialist employed by the King County Prosecutor’s Office interviewed K.G. 4RP 61, 81. During that interview, K.G. indicated that Rex had touched her “privates” more than one time. Exhibit 3; exhibit 4, at 23.⁴ She said that Rex had licked her privates, including her chest, when she was four years old. Exhibit 4, at 24-33, 54-56. She also claimed that Rex put his penis inside her privates and that this happened both the same day he licked her and on a different day. Exhibit 4, at 25-26, 33-38, 48-49. In addition, she said Rex put lotion on his penis and had her rub him and that she put her mouth on his penis. Exhibit 4, at 33-34, 40, 45-49. When asked if anything came out of Rex’s penis, K.G. said “white pee,” which got on her stomach. Exhibit 4, at 42-44. K.G. also talked about watching a “private show” on television in Rex’s bedroom, where a boy and girl got out of a pool, were naked, and “doing the privates.” Exhibit 4, at 51-54.

⁴ Exhibit 3 is a DVD of the interview. Exhibit 4 is a transcript of the interview.

K.G. was also interviewed and examined by Dr. Naomi Sugar, a pediatrics physician and Medical Director for the Harborview Center for Sexual Assault and Traumatic Stress. 3RP 2-5. She told Dr. Sugar that Rex “sticks his penis in my privates” and licked her privates. 2RP 24-25. She also described watching a video with a boy and girl and indicated that Rex told her not to tell anyone. 2RP 25. Dr. Sugar found no indication of physical trauma to K.G.’s vagina and explained that often when children say someone stuck a penis in their privates, they mean rubbing rather than actual intercourse. 2RP 29-30. Although Dr. Sugar found the circumstances “highly concerning” for abuse, she conceded that one possibility from the absence of physical trauma is that there was no sexual contact. 2RP 32, 36-37.

K.G. testified at trial. She once again claimed that Rex made her lick his penis, and used his hands, penis, and mouth to touch her private parts. 5RP 86-88. She said this happened more than one time, and sometimes on different days, but was unable to distinguish different episodes with any specificity. 5RP 87-88. She described the “private shows” in Rex’s bedroom, talked about the white pee, and indicated that Rex told her not to tell anyone. 5RP 89-93.

A police detective testified that when Rex was arrested, he was carrying a passport and \$1,500.00. 5RP 130. Officers found various creams, lotions, and lubricants in Rex's bedroom. 5RP 133-136. They also recovered DVDs containing sexually explicit material. One DVD contained a scene involving a swimming pool. 5RP 136-137.

The defense called Joel and Joanna Cruse. Joel, Rex's son, testified that he was 15 years old when the Gumkes moved in. 5RP 140-141. He testified that K.G. and M.G. were rarely in his father's bedroom and he never once saw his father naked around K.G., touching her inappropriately, or watching adult films with her. 5RP 148-149. Joanna provided testimony on her relationship with the Gumkes and events leading up to K.G.'s allegations. 5RP 152-164. Moreover, to impeach Sarah Gumke, she testified that when Sarah first called her about the conversation she overheard between K.G. and Rex on September 30, 2007, instead of relating that K.G. said "I told my daddy that you played with me," Sarah indicated that K.G. said, "I told my daddy . . . about how I touched myself." 5RP 14-16, 168-169.

Rex testified in his own defense. 6RP 5. He indicated it was rare for the children to be in his bedroom. Most of the time they

were already in their beds when he got home from work. And when he went into his room and closed the door, it was well known that he was “checking out” for the rest of the night. 6RP 21-22.

As for the kids’ exposure to inappropriate conduct, one evening Sarah needed to tend to some tasks and asked Rex – who was already on his bed watching HBO – if the kids could stay with him for a while. 6RP 22. The show Rex was watching was appropriate for children, but he fell asleep and when he awoke, a new show depicted two naked adults simulating sex. Rex immediately changed the channel and told the kids the show was “a private movie for adults.” 6RP 23. Rex took the kids out of his room and immediately reported to Sarah and Joanna what had occurred. Sarah chuckled and was not concerned. 6RP 23-24.

Regarding the masturbation incident, one weekend Rex began to masturbate in the privacy of his bedroom. 6RP 24. Both children charged into the room without warning at the moment Rex was ejaculating. 6RP 24. He covered up as quickly as he could and was not sure how much the children witnessed. They did not say anything about it, so he assumed the children did not see anything untoward and did not mention it to Sarah. 6RP 25, 66. Moreover, he locked his door thereafter. 6RP 65.

Rex testified that on September 30, 2007, after Sarah and the kids returned from visiting Joanna, K.G. complained that her legs hurt. Rex had rubbed K.G.'s legs in the past, and Sarah responded to K.G.'s complaint by indicating that Rex could rub her feet and legs, which he did. 6RP 27-28. Sarah said she was going out to rent a movie. Before leaving, she got the children in their bathing suits so that they could go in the hot tub with Rex. 6RP 28-29. After about 15 minutes, they got out of the hot tub. 6RP 29. All three still had their suits on, and Rex took the children to the laundry room to dry them off. 6RP 30-31. Out of nowhere, K.G. said, "I told my daddy what we talked about." 6RP 31. When Rex asked her what she told her dad, K.G. said, "about when I touch myself." 6RP 31. Rex responded, "you asked me to keep that private." 6RP 31. Just as K.G. was about to speak again, Sarah walked in and confronted Rex about the conversation. 6RP 31.

Rex testified that after Sarah took the kids to their room, he and Sarah talked. 6RP 32. Rex provided the context for what Sarah heard. On one occasion, while Rex was rubbing K.G.'s legs, K.G. asked him to rub higher. He responded that was not appropriate, and K.G. began talking about how her mother got mad

when K.G. touched herself.⁵ When Rex indicated that K.G.'s mom probably meant she should not touch herself in public, K.G. repeated that her mom gets angry if she touches herself or talks about it. Rex then said they could keep that conversation private between the two of them. 6RP 33, 70.

Rex denied any inappropriate physical contact between himself and K.G. 6RP 36-37.

As to the circumstances of his arrest, Rex owns and operates a mechanical contracting company that does plumbing and pipe fitting. 6RP 5. The cash he was carrying the day of his arrest was payment for a service call. 6RP 37-38. Moreover, his company does work for Boeing. To obtain a security badge while on their premises, Boeing requires a birth certificate or passport. The passport Rex was carrying, which was expired, was for this purpose. 6RP 38, 75-76.

⁵ K.G. had a habit of touching herself. 6RP 25, 68-69. Although Sarah testified at trial she was unaware K.G. did this, she also testified that she told K.G. she could touch herself in her own room. 5RP 8, 50-51. Moreover, notes from K.G.'s doctor indicate that Sarah had discussed K.G.'s masturbation with the doctor. 5RP 57-58.

3. Jury Instructions

None of the "to convict" instructions for the four charges contained distinguishing information concerning the time of the crime or a specific act. Instructions 8 and 11 addressed the rape charges and required the State to prove:

- (1) That during a period of time intervening between August 1, 2005, and October 2, 2007, the defendant had sexual intercourse with K.G.; and
- (2) that K.G. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant; and
- (3) that K.G. was at least twenty-four months younger than the defendant; and
- (4) that this act occurred in the State of Washington.

CP 68, 71.

Instructions 14 and 16 addressed the molestation charges and required the State to prove:

- (1) That during a period of time intervening between August 1, 2005 and October 2, 2007, the defendant had sexual contact with K.G.; and
- (2) That K.G. was less than twelve years old at the time of the sexual contact and was not married to the defendant; and
- (3) That K.G. was at least thirty-six months younger than the defendant; and

(4) That this act occurred in the State of Washington.

CP 74, 76.

Nowhere do any of these instructions, or any other instructions, indicate the jury's verdict for each count must be based on an act "separate and distinct" from every other count. CP 58-79. Nor did the verdict form impose this requirement. See CP 80-81.

Following the jury's guilty verdicts, Judge Shaffer indicated that she had discovered two appellate decisions – State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2009) and State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007) – both of which indicate the failure to give a "separate and distinct act" instruction in cases involving multiple charges of sexual abuse violates double jeopardy. The court asked for briefing on the issue. 7RP 2-4.

Defense counsel argued that the omission in Cruse's case was indistinguishable from that in Berg and Borsheim. CP 124-127, 131. The State, however, argued that despite the omission, jurors would have surmised from the instructions that were given that each count must be based on a separate act. Supp. CP ____ (sub no. 55, State's Memorandum, at 1-7). Referring to this Court's

decisions in Berg and Borsheim, the State argued that “both fundamentally seem to misunderstand” prior precedent on the issue. Id. at 6. Judge Shaffer ruled for the State. 8RP 3-4.

C. ARGUMENT

INADEQUATE JURY INSTRUCTIONS VIOLATED CRUSE’S
RIGHT TO BE FREE FROM DOUBLE JEOPARDY
BECAUSE THEY EXPOSED HIM TO MULTIPLE
PUNISHMENTS FOR THE SAME OFFENSE.

The trial court was required to clearly instruct the jury that it could not convict Cruse more than once on the basis of a single act. The instructions given failed to do so and subjected Cruse to double jeopardy. Three of Cruse’s four convictions must be vacated.

"The right to be free from double jeopardy . . . is the constitutional guarantee protecting a defendant against multiple punishments for the same offense." State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007); Wash. Const. art. I, § 9; U.S. Const. amend. V. A defendant's right to be free from double jeopardy is violated if instructions do not make it manifestly apparent to the jury that the State is not seeking to impose multiple punishments for the same offense. State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2008).

Although Cruse's attorney did not object to the instructions, this issue can be raised for the first time on appeal because it involves a manifest error of constitutional magnitude. Berg, 147 Wn. App. at 931; see also State v. Ellis, 71 Wn. App. 400, 404, 859 P.2d 632 (1993) (similar claim considered despite lack of objection).

This Court reviews challenges to jury instructions de novo, within the context of the instructions as a whole. Berg, 147 Wn. App. at 931. "Jury instructions must more than adequately convey the law. They must make the relevant legal standard manifestly apparent to the average juror." Borsheim, 140 Wn. App. at 366 (citation and internal quotation marks omitted). The jury instructions in Cruse's case do not satisfy this standard.

Borsheim and Berg control the outcome here. In Borsheim, this Court held that where multiple counts of sexual abuse are alleged to have occurred within the same charging period, an instruction that the jury must find "separate and distinct" acts for convictions on each count is required. Borsheim, 140 Wn. App. at 367-368. In the absence of such an instruction, a defendant is exposed to multiple punishments for the same offense in violation of his right to be free from double jeopardy. Id. at 364, 366-67. The Borsheim court vacated three of the defendant's four child rape convictions for this

instructional omission. Id. at 371. More recently, this Court in Berg followed Borsheim in vacating a child molestation conviction based on the same omission. Berg, 147 Wn. App. at 937, 944.

Cruse's case is the same as Borsheim and Berg in dispositive respects. As in those cases, multiple crimes were alleged to have occurred within the same charging period. Borsheim, 140 Wn. App. at 367; Berg, 147 Wn. App. at 934. The single "to convict" instruction in Borsheim and the multiple "to convict" instructions in Berg did not specify each count was based on an act separate and distinct from that charged in another count, thereby exposing each defendant to multiple punishments for the same crime, based on the same act. Borsheim 140 Wn. App. at 367; Berg, 147 Wn. App. at 935. Similarly, the instructions in Cruse's case are missing this critical language.

Berg and Borsheim distinguished State v. Ellis, which rejected an argument that jury instructions allowed jurors to use the same underlying act to convict the defendant on more than one count. Berg, 147 Wn. App. at 933 (citing State v. Ellis, 71 Wn. App. 400, 859 P.2d 632 (1993)). Ellis was distinguishable because the trial court in that case gave separate "to convict" instructions for each count, the instruction for one of two identically charged counts explicitly stated

that the act underlying that count had to have occurred "on a day other than [the other count]," *and* the two other identically charged counts alleged that the charged act occurred during a different time period. Berg, 147 Wn. App. at 933-936 (quoting Ellis, 71 Wn. App. at 401-02).

Although the court provided a separate "to convict" instruction for each count in Cruse's case, this was also true in Berg. Berg, 147 Wn. App. at 934. The more salient fact is that these instructions did not indicate each count had to involve a different act and, as just noted, all four charged counts involved the identical time period. In contrast to Ellis, it was therefore critical that jurors be instructed they must base their verdicts on "separate and distinct acts for each count."

Cruse's jury did receive unanimity instructions. But this did not cure the problem. The instruction pertaining to the rape charges provides:

The State alleges that the defendant committed acts of rape of a child in the first degree on multiple occasions. To convict the defendant on any count . . . one particular act . . . must be proved beyond a reasonable doubt for that count, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the alleged acts of rape of a child in the first degree.

CP 72. Jurors received an identical instruction, except for its identification of the charged crime, for the two molestation charges.

CP 77.

The trial court in Borsheim gave the following unanimity instruction:

There are allegations that the Defendant committed acts of rape of child on multiple occasions. To convict the Defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

Borsheim, 140 Wn. App. at 364 (emphasis in original).

Although this unanimity instruction adequately informed jurors that they had to be unanimous on the act that formed the basis for any given count, the instruction failed to protect against double jeopardy. Id. at 367, 369. In Ellis, the trial court gave a unanimity instruction stating "you must unanimously agree that at least one particular act has been proved beyond a reasonable doubt for each count." Ellis, 71 Wn. App. at 406. The Borsheim unanimity instruction did not "convey the need to base each charged count on a 'separate and distinct' underlying event" because it did not contain

the "for each count" language used in Ellis. Borsheim 140 Wn. App. at 367.

A unanimity instruction in Berg – similar to those that Cruse's jury received – likewise failed to protect the defendant from double jeopardy despite using more specific language:

The State alleges that the defendant committed acts of child molestation in the third degree on multiple occasions. To convict the defendant on any count of child molestation in the third degree, one particular act of child molestation in the third degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved beyond a reasonable doubt. You need not unanimously agree that the defendant committed all the acts of child molestation in the third degree.

Berg, 147 Wn. App. at 934-935 (emphasis added).

The State in Berg argued this unanimity instruction adequately protected Berg from double jeopardy because it contained the "on any count" language. Id. at 936. This Court rejected the State's argument because, unlike in Ellis, Berg's "to convict" instructions did not contain language distinguishing the counts. Id. at 16-17. Cruse's "to convict" instructions likewise fail to distinguish the counts and his convictions are not saved by the unanimity instructions.

In Borsheim and Berg the jury also was instructed, "A separate crime is charged in each count. You must decide each count

separately. Your verdict on one count should not control your verdict on any other count." Borsheim 140 Wn. App. at 364; Berg, 147 Wn. App. at 935. Cruse's jury received a similar instruction. See CP 66. This instruction, even read with the jury instructions as a whole, is still insufficient to guard against double jeopardy because it fails to adequately inform the jury that each crime requires proof of a different act. Borsheim 140 Wn. App. at 367; Berg, 147 Wn. App. at 935-936.

Two of the State's arguments, made below, should be rejected. First, the State argued that jurors would have known they were required to base each conviction on a separate act, in part, because the trial deputy informed jurors "what acts the different counts could be based on." Supp. CP ____ (sub no. 55, State's Memorandum, at 2, 5; 6RP 90-92; State's exhibits 1 and 2 (used during closing). Notably, however, at no time did the prosecutor indicate that each count had to be based on a separate act. In any event, even if she had, a prosecutor's argument is insufficient to remedy an instructional problem.

In Berg, the State contended the defendant was adequately protected from double jeopardy because the prosecution presented evidence of separate acts to support both charges and told jurors

during closing that they had to agree on two particular acts. Berg, 147 Wn. App. at 935. This Court rejected the argument because the double jeopardy violation resulted from omitted language in the instructions, not the State's proof or the prosecutor's arguments. Id. Evidence or argument presented at trial cannot remedy a double jeopardy violation caused by deficient instructions. Id. Furthermore, "[t]he jury should not have to obtain its instruction on the law from arguments of counsel." Id. (quoting State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995)). "Rather, it is the judge's 'province alone to instruct the jury on relevant legal standards.'" Id. at 935-936 (quoting State v. Clausing, 147 Wn.2d 620, 628, 56 P.3d 550 (2002)); see also State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008) ("election" in closing insufficient to cure double jeopardy violation because jurors are told to rely on evidence and court's instructions rather than counsel's arguments).

Below, the State also argued defense counsel invited the double jeopardy violation by failing to request instructions with the necessary language, an argument Judge Shaffer did not reach. CP 19-55; Supp. CP ____ (sub no. 55, State's Memorandum, at 7-10); 8RP 4-5. But the invited error doctrine applies when a party requests an instruction and then argues on appeal that the instruction should

not have been given. State v. Medina, 112 Wn. App. 40, 47 n.11, 48 P.3d 1005, review denied, 147 Wn.2d 1025 (2002). That is not the case here. Moreover, “[t]o be invited, the error must be the result of an affirmative, knowing, and voluntary act.” State v. Lucero, 140 Wn. App. 782, 786, 167 P.3d 1188 (2007) (citing In re Call, 144 Wn.2d 315, 328, 28 P.3d 709 (2001)). Here, we have a failure to act – a failure to object to the absence of “separate and distinct” language anywhere in the instructions provided to the jury. See 5RP 175-181; 6RP 81 (defense counsel does not object to proposed packet).

Moreover, if this Court finds that defense counsel somehow invited the error, counsel was ineffective. Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944 (1993).

Competent counsel conducts research and stays abreast of current happenings in the law. Bush v. O'Connor, 58 Wn. App.

138, 148, 791 P.2d 915 (1990) (“an attorney unquestionably has a duty to investigate the applicable law”); State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302 (reasonable attorney conduct includes a duty to investigate the facts and law), review denied, 90 Wn.2d 1006 (1978); see also Strickland, 466 U.S. at 690-91 (“counsel has a duty to make reasonable investigations”).

It is ineffective to propose an instruction – even a pattern instruction – where counsel had reason to know the instruction was incorrect. State v. Kylo, ___ Wn. 2d ___, ___ P.3d ___ (No. 81164-4, Slip op. filed September 3, 2009, at 8-13) (counsel deficient for proposing WPIC where proper research would have indicated pattern instruction flawed). Borsheim was decided in 2007. Indeed, the deputy prosecutor already knew about Borsheim when Judge Shaffer first mentioned it following the jury’s verdicts. 7RP 4 (“I’m familiar with the Borsheim case.”). Defense counsel also should have been familiar with the decision. To the extent he contributed to the deficient instructions, he eased the State’s ability to obtain multiple convictions and subjected his client to double jeopardy. This was ineffective.

In the end, the instructions permitted jurors to base all four convictions on a single act. To convict Cruse of rape, jurors had to

find “sexual intercourse,” which includes “any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.” CP 69. To convict Cruse of molestation, jurors simply had to find “sexual contact,” which means “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.” CP 75.

Jurors could have used any single act of sexual contact involving the sex organs to satisfy both rape counts *and* both molestation counts because any act of “sexual intercourse” was also an act of “sexual contact.” And Cruse gets the benefit of any doubt in this regard. Kier, 164 Wn.2d at 814 (rule of lenity requires interpretation in defendant’s favor of ambiguous jury verdicts involving double jeopardy violations); State v. DeRyke, 110 Wn. App. 815, 824, 41 P.3d 1225 (2002), aff’d, 149 Wn.2d 906, 73 P.3d 1000 (2003) (same).

The double jeopardy error in Cruse’s case is identical in all dispositive respects to the errors in Borsheim and Berg. The remedy is to vacate three of his four convictions. Borsheim, 140 Wn. App. at 371; Berg, 147 Wn. App. at 935.

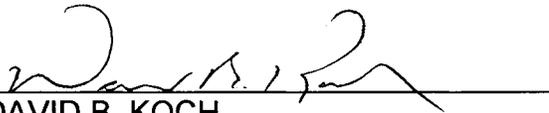
D. CONCLUSION

This Court should vacate three of Cruse's convictions, leaving a single conviction for rape of a child in the first degree.

DATED this 9th day of October 2009.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.

A handwritten signature in black ink, appearing to read "David B. Koch", is written over a horizontal line.

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Attorneys for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63306-1-I
)	
REX CRUSE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF OCTOBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] REX CRUSE
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COURT OF APPEALS DIVISION
STATE OF WASHINGTON
2009 OCT - 9 PM 4:03**

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF OCTOBER, 2009.

x Patrick Mayovsky