

63306-6

63306-6

NO. 63306-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

REX CRUSE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	2
1. SUBSTANTIVE FACTS	2
2. PROCEDURAL FACTS AND TRIAL	9
C. <u>ARGUMENT</u>	11
1. THE COURT SHOULD REJECT CRUSE'S DOUBLE JEOPARDY CHALLENGE TO HIS CONVICTIONS	11
a. Relevant Facts	12
b. Cruse's Double Jeopardy Claim Is Barred By The Doctrine Of Invited Error	17
c. Cruse Has Failed To Show That He Received Ineffective Assistance Of Counsel	20
i. It Is Not Reasonably Probable That The Jury Would Have Acquitted Cruse Of Any Counts Had The "To Convict" Instructions Included The "Separate And Distinct" Language	21
ii. Cruse Did Not Receive Deficient Representation	24
d. Cruse Has Not Established That His Multiple Convictions Violate Double Jeopardy	29

2. CRUSE IS NOT ENTITLED TO VACATION OF
BOTH CHILD MOLESTATION CONVICTIONS..... 31

D. CONCLUSION 34

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 21

Washington State:

City of Seattle v. Patu, 147 Wn.2d 717,
58 P.3d 273 (2002)..... 17

In re Personal Restraint of Benn, 134 Wn.2d 868,
952 P.2d 116 (1998)..... 24

State v. Allen, 57 Wn. App. 134,
787 P.2d 566 (1990)..... 23

State v. Berg, 147 Wn. App. 923,
198 P.3d 529 (2008)..... 16, 19, 28-30, 33

State v. Borsheim, 140 Wn. App. 357,
165 P.3d 417 (2007)..... 16, 26-30, 33

State v. Bradley, 96 Wn. App. 678,
980 P.2d 235 (1999), aff'd,
141 Wn.2d 731, 10 P.3d 358 (2000)..... 18

State v. Calle, 125 Wn.2d 769,
888 P.2d 155 (1995)..... 32

State v. Camarillo, 54 Wn. App. 821,
776 P.2d 176 (1989)..... 23

State v. Camarillo, 115 Wn.2d 60,
794 P.2d 850 (1990)..... 22

State v. Ellis, 71 Wn. App. 400,
859 P.2d 632 (1993)..... 11, 25-30

<u>State v. French</u> , 157 Wn.2d 593, 141 P.3d 54 (2006).....	32, 33
<u>State v. Hayes</u> , 81 Wn. App. 425, 914 P.2d 788 (1996).....	27
<u>State v. Heaven</u> , 127 Wn. App. 156, 110 P.3d 835 (2005).....	19
<u>State v. Henderson</u> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	17
<u>State v. Jones</u> , 71 Wn. App. 798, 863 P.2d 85 (1993).....	32, 33
<u>State v. Kyllo</u> , 166 Wn.2d 856, 215 P.3d 177 (2009).....	21
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	21, 24
<u>State v. Miller</u> , 40 Wn. App. 483, 698 P.2d 1123 (1985).....	18
<u>State v. Pittman</u> , 134 Wn. App. 376, 166 P.3d 720 (2006).....	30
<u>State v. Studd</u> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	17
<u>State v. Varga</u> , 151 Wn.2d 179, 86 P.3d 139 (2004).....	24
 <u>Other Jurisdictions:</u>	
<u>State v. Burch</u> , 740 S.W.2d 293 (Mo. Ct. App. 1987)	30
<u>State v. Salazar</u> , 139 N.M. 603, 136 P.3d 1013 (N.M. Ct. App. 2006)	31

A. ISSUES PRESENTED

1. Whether the invited error doctrine bars defendant Rex Cruse from claiming that the jury instructions violated double jeopardy, given that his proposed instructions contained the same alleged flaws that he complains of on appeal.

2. Whether Cruse has not shown that he received ineffective assistance of counsel with respect to the jury instructions proposed by his attorney.

a. Whether Cruse has not shown a reasonable probability that the jury would have acquitted him on some counts had the court specifically instructed the jury to base each conviction on a separate and distinct act.

b. Whether Cruse has failed to show that his attorney performed deficiently in light of the other instructions given and the contested issues in the case.

3. Whether Cruse has not shown that the jury convicted him twice of the same crime based upon a single act.

4. Assuming Cruse is entitled to relief, whether the court should vacate only one child molestation conviction and one rape of a child conviction.

B. STATEMENT OF THE CASE

Over a period of two years, Cruse raped and molested K.G., who was between three and five years old.¹ A jury convicted him of two counts of first-degree rape of a child and two counts of first-degree child molestation.

1. SUBSTANTIVE FACTS

Sarah and Brian G. met as teenagers in Kenmore, married in 2001, and had two children: daughter K.G., born in September of 2002, and a son, born in December of 2003. 4RP 83-85; 5RP 98-99. In August of 2005, after living in California, the G. family returned to Washington and needed a place to stay. 4RP 85, 93-94; 5RP 99-100.

Joanna Cruse, Sarah's best friend, arranged to have the G. family live at the house of her father, defendant Rex Cruse. 4RP 87-96; 5RP 103-04. At the time, Cruse was in his mid-50s and lived there with his two sons and Joanna. 4RP 96-97; 5RP 104-05, 126. Sarah helped around the house in exchange for having a place to live. 4RP 99.

¹ To protect the victim's privacy, the State refers to her by her initials. Because her last name is uncommon, the State also refers to her family members using an initial for the last name.

Sarah and Brian's marriage was troubled, and in early 2006, Brian moved out of Cruse's house. 4RP 95-96; 5RP 105. Joanna also moved out of the house, leaving Sarah and her children living there with Cruse and his two sons. 4RP 96-97, 102.

Cruse acted as a grandfather to K.G. and her younger brother. 4RP 100; 5RP 105-06. He took K.G. out to dinner, shopping for toys and watched movies with her. 4RP 100. Cruse did not engage in these same activities with K.G.'s brother. Id.

A short time before K.G. turned four years old, an incident occurred that caused Sarah some concern. 4RP 110; 5RP 3-4. Sarah was watching a "racy scene" on television when K.G. entered the room and commented, "That's like the private show in Poppa's [Cruse's] room." 4RP 110; 5RP 2-3. Sarah "freaked out" and took both children to Joanna's house. 4RP 113-14. As Sarah inquired further, K.G. explained, "Just the private show where Poppa put the lotion on his bottom and went like this," and made a hand gesture of a male masturbating. 4RP 112; 5RP 3.

After Sarah told Joanna what K.G. had said, Joanna called Cruse on the telephone. 4RP 115; 5RP 3, 159. Joanna reported to Sarah that Cruse did not know where K.G. had gotten her information, but thought that she may have walked in on him while he

was masturbating. 4RP 115.² Joanna noted that her father was hard of hearing and may not have realized that K.G. had walked in on him. 5RP 5.

Sarah returned to Cruse's house with the children. 5RP 5. She confronted Cruse, who apologized and reiterated his explanation that K.G. may have walked in on him when he was masturbating. 5RP 7. Following this incident, Sarah talked with K.G., explaining that no one was allowed to touch her private area other than herself. 5RP 8.

In December of 2006, Cruse, his sons, Sarah and her two children moved into a new home. 4RP 102. In lieu of rent, Sarah agreed to pay for the furniture. 4RP 103; 6RP 102.

On September 30, 2007, Sarah left the house to rent a movie, leaving her children with Cruse in a hot tub. 5RP 12-13. She was gone a short time and returned through a door that led directly to her bedroom. 5RP 13-14. When she entered the main area of the house, Sarah overheard K.G. in the bathroom upstairs, stating, "I told my daddy that you play with me." 5RP 13-15. Cruse responded, "You're not supposed to tell your daddy that. That's private. That's

² At trial, Joanna Cruse was called as a defense witness and testified that during this conversation, her father told her that K.G. and her brother had entered his room while he was masturbating and may have seen him ejaculate. 5RP 160.

secret. That's between you and me, [K.G.]. What did you tell your dad?" 5RP 16. After K.G. replied that she did not remember what she told her father, Cruse repeated, "That's secret. That's private. You are not supposed to tell mommy or dad. What did you tell your dad?" 5RP 17. K.G. again responded that she did not remember. 5RP 17.

Sarah approached and saw K.G. sitting naked on top of the dryer, K.G.'s younger brother standing nearby, and Cruse naked and in the process of wrapping a towel around his waist. 5RP 17. When Sarah asked what their conversation was about, Cruse turned pale and replied, "It's a conversation K.G. and I were having." 5RP 18. Sarah grabbed her two children, and put them in their bedroom. 5RP 18.

Sarah then confronted Cruse about what secret he had with K.G. 5RP 19. Cruse claimed that he had discussed masturbation with K.G., and that she had told him that her mother said it was icky and gross. 5RP 19. Cruse stated that he occasionally massaged K.G.'s legs when she complained of growing pains and that there were a couple times when K.G. asked him to rub her private areas. 5RP 19. According to Cruse, he responded that he could not do that, but that she could masturbate on her own. 5RP 20.

Sarah left Cruse's house with her children and drove to her brother's house, where they spent the night. 5RP 20-23. She asked K.G. what the secret was, but K.G. responded that she did not remember. 5RP 28.

The next day, Sarah took K.G. to see Dr. Barbara Mendrey, K.G.'s primary care physician. 4RP 15; 5RP 27-28. Sarah reported what Cruse had stated concerning his conversation with K.G. about masturbation. 4RP 17-18. When Dr. Mendrey then asked K.G. whether Cruse had rubbed her private parts, she became quiet and said yes. 4RP 20. Sometime later, Dr. Mendrey asked the same question again, and K.G. responded no. 4RP 20. The doctor examined K.G.'s genital area, and it appeared normal. 4RP 21. The doctor then contacted Child Protective Services. 4RP 22.

After a few days, Sarah called her ex-husband Brian G., who was in California, to report what she had heard. 5RP 36-37, 106. Brian then called Cruse and confronted him about the conversation. 5RP 106-07. Cruse again claimed that K.G. had complained about a pain in her legs, that he began rubbing them, and that she then asked him to rub her private parts. 5RP 108. Cruse claimed that he told K.G. that he could not do it, but she could do it if she wanted to. 5RP 108.

A week later, Sarah was driving around looking for a new residence when K.G. asked whether they were going to live with Cruse. 5RP 32, 35. When Sarah responded that they were not, K.G. replied, "It's okay, mom. He wasn't nice to me. He was mean. He put his fingers in my privates." 5RP 32-33. Sarah then called the detective assigned to the case and reported what K.G. had said. 5RP 34-35, 120-22.

On October 16, 2007, child interview specialist Carolyn Webster interviewed K.G. 4RP 34, 61. The interview was digitally recorded. 4RP 62-64; Ex. 3 and 4. During the interview, K.G. reported that when she was four years old, Cruse had touched and licked "her privates" and her chest. Ex. 4 at 23-25, 54-56. She also recounted that he "put his penis in her privates." Id. at 25. She described how Cruse put lotion on his penis and then asked her to rub it. Id. at 33-34, 40. He asked her whether she wanted to watch him "squirt." Id. at 43. He made her rub his penis more than once. Id. at 43-44. One time, Cruse also instructed her to place her mouth on his penis, and she complied. Id. at 45.

Cruse also rubbed her private using his penis. Id. at 36, 48. She stated that it felt good but she did not want him to do it. Id. When asked if anything came out of Cruse's penis, K.G. described

"white pee" that landed on her legs. Id. at 42. K.G. also stated that she had watched a "private show" with Cruse where a "boy and girl" got out of a pool and "was doing the privates." Id. at 51-52. Cruse told her not to tell anyone about what they did. Id. at 39, 58.

The next day, Dr. Naomi Sugar, the medical director at Harborview Center for Sexual Assault and Traumatic Stress, examined K.G. 3RP 5, 17-22. During that examination, K.G. again disclosed that Cruse had raped and molested her. 3RP 24-25. While the results of K.G.'s physical examination were normal, Dr. Sugar explained that genital contact and rubbing would not cause any scarring or physical trauma. 3RP 29-30. Based upon Dr. Sugar's experience, when a child reports that the adult's penis went into her private area, the child is frequently describing the act of rubbing the penis on the lip of the vagina. 3RP 30. Dr. Sugar observed that the child would have reported that the contact hurt if tissue had been torn. 3RP 30.

K.G. later told her mother and father that she watched pornographic shows with Cruse and that she saw him pee "white stuff." 5RP 42, 111.

On October 24, 2007, the police arrested Cruse. He had a large amount of cash and a passport in his possession. 5RP 129-30.

During a search of his home, the police found DVDs containing sexually explicit material and various lubricants. 5RP 132-37. As K.G. had described, a scene in one of the DVDs involved a swimming pool. RP 137.

K.G. testified at trial that Cruse made her lick his penis and that he touched her private parts with his hands and mouth. 5RP 83-87. She testified that it happened more than once and always in Cruse's room. 5RP 88-89. She repeated that she saw "white pee" come out of Cruse's penis and some of the substance got on her. 5RP 89. She further stated that she watched pornographic shows on the television in Cruse's bedroom. 5RP 92-93. She confirmed that Cruse had told her not to tell anyone. 5RP 93.

2. PROCEDURAL FACTS AND TRIAL

On October 26, 2007, the State charged Cruse with two counts of first-degree rape of a child and one count of first-degree child molestation. CP 1-2. The State subsequently amended the information to add a second count of first-degree child molestation

and to allege a charging period for all crimes of August 1, 2005 through October 2, 2007. CP 6-7.

In December of 2008, the case proceeded to jury trial before the Honorable Catherine Schaffer. 1RP 2.

Cruse testified at trial and denied that he ever touched or molested K.G. 6RP 36. He claimed that one time he was watching television in his bedroom with K.G. and her brother, he fell asleep, and when he awoke, he discovered that they were watching a soft-core pornographic show. 6RP 22-23, 53-54. He testified that on another occasion, he was in his bedroom masturbating when the children suddenly entered and might have seen him ejaculate. 6RP 24-25. He claimed that K.G. had asked him to rub her private area, and he responded she could do it herself, but he could not. 6RP 33, 66-68.

The jury convicted Cruse as charged on all four counts. CP 80-81. The court imposed indeterminate sentences consisting of a maximum term of life and a standard range minimum term. CP 136. This appeal follows.

C. ARGUMENT

1. THE COURT SHOULD REJECT CRUSE'S DOUBLE JEOPARDY CHALLENGE TO HIS CONVICTIONS.

On appeal, Cruse claims that his right to be free from double jeopardy was violated because the jury instructions did not expressly state that each count had to be based upon a separate and distinct act. He asks this Court to vacate his two convictions for child molestation and one rape of a child conviction.

Cruse's challenge should be denied. Under the doctrine of invited error, his claim is barred because he proposed jury instructions with the same flaw that he now complains of. While Cruse attempts to raise the same issue under an ineffective assistance of counsel claim, he has not shown how he suffered prejudice. Given the evidence and arguments in the case, there is no reasonable probability that the jury's verdict would have been different had the court included the "separate and distinct" language in the "to convict" instructions. In addition, Cruse has not shown that his attorney's performance was deficient; the defense-proposed instructions were very similar to those upheld against a double jeopardy challenge in State v. Ellis, 71 Wn. App. 400, 859 P.2d 632 (1993).

Finally, should this Court determine that Cruse can raise the double jeopardy issue and that his claim has merit, Cruse's relief is not vacation of three of the four convictions, as he requests. Rape of a child and child molestation are separate crimes and can be charged and punished separately, even when based upon the same act. Accordingly, the proper remedy is to vacate one rape of a child conviction and one child molestation conviction.

a. Relevant Facts

Cruse submitted proposed jury instructions. CP 19-55. His "to convict" instructions did not include the "separate and distinct" language that he now argues was necessary. Instead, his proposed instruction for the first-degree child rape counts provided:

To convict the defendant of the crime of Rape of a Child in the First Degree..., each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during the period of time intervening between August 1, 2005 through October 2, 2007, the defendant being at least 24 months older than K.G., had sexual intercourse with K.G.;

(2) That K.G. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(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 45-46. Similarly, his "to convict" instruction for the first-degree child molestation counts provided:

To convict the defendant of the crime of Child Molestation in the First Degree..., each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during the period of time intervening between August 1, 2005 through October 2, 2007, the defendant being at least 36 months older than K.G., had sexual contact for the purposes of sexual gratification, with K.G., was not married to the defendant.

(2) That K.G. was less than twelve years old at the time of the sexual contact;

(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 49-50.

The State also proposed "to convict" instructions without the "separate and distinct" language. Supp. CP ____ (Sub. No. 37F).

During a break in the trial, the judge reviewed the court's proposed instructions with the attorneys. 5RP 175-82. With respect to each "to convict" instruction, the court asked whether the

defense had an exception or objection to the instruction. 5RP 178-81. Each time, defense counsel responded negatively. 5RP 178-81. The next day, after testimony was concluded, the court again asked defense counsel if he had any exceptions or objections to the instructions, and he responded that he had no objections. 6RP 81.

The court gave "to convict" instructions virtually identical to those proposed by the defense and the State, with some corrections to the wording of the elements. The "to convict" instructions for the rape of a child counts provided:

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

- (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 and 71.

With respect to the two child molestation counts, the court instructed the jury:

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

(1) That during the period of time intervening between August 1, 2005 through 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 and 76.

The court further instructed the jury that:

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.

CP 39, 66.

The court also gave a unanimity instruction on the rape of a child counts that stated:

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 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.

CP 72. The court gave an identical unanimity instruction with respect to the two counts of child molestation. CP 77.

On the day scheduled for sentencing, the trial judge indicated that she had recently reviewed the opinion in State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008), a decision issued shortly after the jury's verdict. 7RP 2-3. In Berg, this Court, citing State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007), held that where the State alleges multiple counts of the identical crime with the same charging period, the court should instruct the jury to base each conviction upon a "separate and distinct" act in order to avoid a double jeopardy violation. 147 Wn. App. at 932. The trial judge postponed sentencing and requested that the parties brief the double jeopardy issue. 7RP 4.

Cruse's counsel subsequently argued that Cruse's double jeopardy rights had been violated because the jury instructions failed to specify that the jury must base the individual counts on separate and distinct acts. CP 124-27. The State argued that

Cruse invited the error, and that the jury instructions adequately advised the jury that identical conduct could only support one conviction. CP 157-63.

The trial court rejected the double jeopardy claim, finding that, "it's my belief that our instructions read as a whole... told the jury clearly that each count pertained to a separate act and that they could only convict on each count if they found a separate act was proved beyond a reasonable doubt." 8RP 3. The court did not address the invited error argument. 8RP 4-5.

b. Cruse's Double Jeopardy Claim Is Barred By The Doctrine Of Invited Error.

Under the doctrine of invited error, a party may not request an instruction and later complain on appeal that the requested instruction was given. City of Seattle v. Patu, 147 Wn.2d 717, 721, 58 P.3d 273 (2002); State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). The invited error doctrine bars a party from raising an alleged error even if it is of constitutional magnitude. Patu, 147 Wn.2d at 720; State v. Henderson, 114 Wn.2d 867, 871, 792 P.2d 514 (1990). The doctrine applies when the trial court's instruction contains the same error as the defendant's proposed

instruction, even though the court does not instruct the jury with the exact defense-proposed instruction. State v. Bradley, 96 Wn. App. 678, 681-82, 980 P.2d 235 (1999), aff'd, 141 Wn.2d 731, 10 P.3d 358 (2000); State v. Miller, 40 Wn. App. 483, 486, 698 P.2d 1123 (1985).

On appeal, Cruse claims that the "to convict" instructions should have specified that the jury had to find a "separate and distinct" act for a conviction on each count. However, Cruse's proposed "to convict" instructions did not include the "separate and distinct" language. The only difference between Cruse's proposed instructions and those given by the trial court is a slight re-wording of some of the elements. Both sets of instructions contain the error that Cruse now complains of on appeal. The trial court repeatedly reviewed the proposed jury instructions with counsel, and Cruse never modified his proposed instructions. Accordingly, under the invited error doctrine, he is barred from raising a double jeopardy challenge based upon the absence of "separate and distinct" language in the jury instructions.

In his opening brief, Cruse anticipates this argument and claims that the invited error doctrine does not apply because he simply failed to object to the instructions. Opening Brief of

Appellant at 24. However, Cruse did more than not object; he proposed instructions containing the same alleged error. The invited error doctrine applies under such circumstances. As Cruse notes, he can still attempt to challenge the instructions, but only through a claim of ineffective assistance of counsel, addressed below.

To hold that the invited error doctrine does not apply under these circumstances would provide defense counsel with a strong disincentive to propose jury instructions with the "separate and distinct" language. This Court has held that a defendant may raise the double jeopardy issue for the first time on appeal and that any error is not subject to harmless error analysis. Berg, 147 Wn. App. at 931 and 937. When the instructions are flawed, the defendant's remedy is vacation of all but one of the identical convictions. Id. at 937. The State cannot retry the defendant on the vacated convictions without running afoul of double jeopardy. State v. Heaven, 127 Wn. App. 156, 110 P.3d 835 (2005). Without the doctrine of invited error, a defendant stands to benefit from his counsel's failure to propose "to convict" instructions with the "separate and distinct" language. Under this Court's recent decisions, without this language, a defendant is virtually guaranteed

to have all but one of his identical convictions vacated with prejudice. With the language in the instruction, he risks conviction on all counts and those convictions would survive a double jeopardy challenge on appeal. Consistent with well-settled law, this Court should hold that Cruse invited the error.

c. Cruse Has Failed To Show That He Received Ineffective Assistance Of Counsel.

Cruse argues that he received ineffective assistance of counsel because his attorney failed to propose "separate and distinct" language for all four "to convict" instructions. This Court should reject this argument because Cruse has not shown that it is reasonably probable that the jury's verdict would have been different had he proposed, and the court included, the "separate and distinct" language in the "to convict" instructions.

To prevail on a claim of ineffective assistance of counsel, Cruse must show that "(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances, and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's

unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either element of the test is not satisfied, the inquiry ends. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Here, Cruse has not satisfied either part of this test.

- i. It Is Not Reasonably Probable That The Jury Would Have Acquitted Cruse Of Any Counts Had The "To Convict" Instructions Included The "Separate And Distinct" Language.

The burden is on Cruse to establish a reasonable probability that the jury's verdict would have been different if the "to convict" instructions had included the "separate and distinct" language. Specifically, he must show a reasonable probability that the jury would not have convicted him on all four counts. Given that the evidence supporting all of the counts was the same, that Cruse's defense to the charges was the same, that the ultimate issue was K.G.'s credibility, and that the jury obviously concluded that K.G. was credible, he cannot show such a probability.

Here, the evidence established that Cruse repeatedly sexually abused K.G. over a period of time. K.G. testified that the abuse happened more than once, and she described various acts of rape and molestation. 5RP 83-89; Ex. 4 at 23-45. Cruse's defense was one of general denial – he testified that he never raped or molested K.G. 6RP 36. He argued that she was a happy, cheerful child until her mother overheard the conversation in the bathroom, moved out of the house and took her to the doctor. 6RP 109-12. He argued that the claims of molestation and rape were because K.G. "has given the answers that she thinks the adults want to hear." 6RP 112.

The jury clearly found that K.G. was credible. Given the evidence and the defense, it is not reasonably probable that the jury would have acquitted Cruse on the other counts had the trial court expressly advised them that each count had to be based upon separate and distinct conduct.

Employing similar logic, the appellate courts have upheld sex offense convictions when the trial court has erroneously failed to give a unanimity instruction. For example, in State v. Camarillo, 115 Wn.2d 60, 65, 794 P.2d 850 (1990), the defendant was charged with one count of indecent liberties with an eleven-year-old

boy based upon multiple acts occurring over a one-year period.

Finding the trial court's failure to give a unanimity instruction

harmless, the Supreme Court observed that "[t]he uncontroverted

evidence upon which the jury could reach its verdict reveals no

factual difference between the incidents." 115 Wn.2d at 69. The

court cited with approval the Court of Appeals' analysis of the

harmless error issue:

Here, besides Camarillo's bare denial of the allegations, there is no direct, contravening evidence concerning the occurrence of the alleged incidents. The jury, in order to render the verdict it did, must have chosen to believe S. Because proof of the substantially similar incidents relied upon a single witness' detailed, uncontroverted testimony, and because Camarillo offered no evidence upon which the jury could discriminate between the incidents, a rational juror believing one of the incidents actually occurred would necessarily believe that the others occurred as well.

115 Wn.2d at 70 (quoting State v. Camarillo, 54 Wn. App. 821, 828,

776 P.2d 176 (1989)); see also State v. Allen, 57 Wn. App. 134,

787 P.2d 566 (1990) (holding instructional error harmless where

given the evidence and defense, no rational basis for a juror to

distinguish among the different acts).

Here, the jury found K.G. credible and there was no rational

basis to distinguish between the various acts of rape and

molestation that she described. There was no basis for the jury to have found that Cruse committed some, but not all, of the acts of rape and molestation. Because Cruse has not shown that it was reasonably probable that he would have been acquitted of some of the charges had the court specifically advised the jury to base their verdicts on "separate and distinct" conduct, this Court should deny his claim of ineffective assistance of counsel.

ii. Cruse Did Not Receive Deficient Representation.

With respect to deficient performance, the court must begin with "a strong presumption counsel's representation was effective," and must base its determination on the entire record below. McFarland, 127 Wn.2d at 335. "[T]his presumption will only be overcome by a clear showing of incompetence." State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). The failure to anticipate developments in the law does not constitute ineffective assistance. In re Personal Restraint of Benn, 134 Wn.2d 868, 939, 952 P.2d 116 (1998).

At the time of Cruse's trial, while existing caselaw strongly encouraged the use of "separate and distinct" language in the

"to convict" instructions, it did not clearly indicate that such language was essential in order to avoid a double jeopardy violation. Cruse's experienced trial counsel cannot be considered deficient for failing to propose such language in light of the other instructions that he proposed and the actual issues in the case.

Here, Cruse proposed and the trial court instructed the jury that a separate crime was charged in each count. CP 39, 66. In this instruction, the court advised the jury that it must decide each count separately and that its verdict on one count should not control its verdict on any other count. CP 66. In addition, Cruse proposed and the trial court instructed the jury with unanimity instructions providing that to convict Cruse on any count of rape or molestation, "one particular act" of rape or molestation had to be proven. CP 47, 51, 72 and 77. For a double jeopardy violation to occur, the jury would have had to believe that, despite these instructions, they could rely upon "one particular act" in convicting Cruse twice of the same crime.

The Court of Appeals has previously recognized that these instructions adequately communicate to the jury the need to rely upon a separate and distinct act when identical charges are at issue. In State v. Ellis, 71 Wn. App. 400, 859 P.2d 632 (1993), the

defendant was charged with, among other things, two counts of first-degree rape of a child. The rape charges had overlapping, though not identical, dates. On appeal, Ellis complained that the jury might have relied upon a single rape for both counts because "it was not told that each of those counts required a different act." Id. at 406. The Court of Appeals had little trouble rejecting this argument. It resolved the issue in one paragraph as follows:

It is our view that the ordinary juror would understand that when two counts charged the very same type of crime, each count requires proof of a different act. Additionally, the trial court affirmatively instructed, in instruction 4, that a separate crime is charged in each count and, in instruction 5, that the jury was required to unanimously agree that at least one particular act had been proved for each count.

Id.

Subsequently, in Borsheim, this Court held that the jury instructions in that case violated double jeopardy by failing to make manifestly apparent to the jurors that they must base the four separate convictions upon different underlying acts. 140 Wn. App. at 370. The court distinguished Ellis by noting various differences in the jury instructions. Id. at 368-70. "Most significantly," the court observed that the trial court in Ellis gave separate "to convict" instructions for each count, while the trial court in Borsheim gave

just one instruction for all four counts. Id. at 368. The court also noted that the unanimity instruction in Ellis alluded to the requirement that each charged count required a different act, while the instruction in Borsheim did not. Id. at 369.³

The defense-proposed instructions in this case were more similar to those in Ellis than to the instructions in Borsheim. The defense proposed four separate "to convict" instructions, a "separate crime" instruction, and unanimity instructions. Defense counsel undoubtedly agreed with the Ellis court's observation that an ordinary juror would understand that when two counts charged the very same type of crime, each count requires proof of a different act.

Defense counsel was aware that there were allegations of multiple acts of rape and molestation. The defense in this case to the four counts was "all or nothing." There was no suggestion that Cruse might have committed some, but not all, of the crimes. The case rose or fell on the jury's assessment of the evidence and the

³ The Borsheim court cited State v. Hayes, 81 Wn. App. 425, 431, 914 P.2d 788 (1996), as establishing the requirement that the court instruct the jury to find "separate and distinct acts" for each count in order to avoid a double jeopardy violation. However, the discussion in Hayes on this issue was not in response to a double jeopardy challenge, but a sufficiency of the evidence issue. 81 Wn. App. at 430-31.

witnesses' credibility. Under these circumstances, and considering the instructions proposed as a whole, defense counsel did not perform deficiently.

After the trial in this case, this Court decided State v. Berg, a case that went further than Borsheim in mandating the "separate and distinct" language. In Berg, many of the differences in jury instructions that the Borsheim court cited when distinguishing Ellis were not present. The trial court in Berg gave separate "to convict" instructions and a unanimity instruction similar to that given in Ellis. 147 Wn. App. at 934-35. Yet the Berg court found Ellis distinguishable because "the 'to convict' instructions in Ellis contained language distinguishing the counts." 147 Wn. App. at 936. In fact, the only difference in the "to convict" instructions is that the dates in the Berg "to convict" instructions were identical, while in Ellis, the dates for the two rape counts overlapped but were not identical. Compare Berg, 147 Wn. App. at 934 with Ellis, 71 Wn. App. at 401-02.⁴ This fact was not of particular importance

⁴ Attempting to distinguish Ellis, the Berg court also cited to the fact that the "to convict" instruction for count II in Ellis included the language "on a day other than count 1." Berg, 147 Wn. App. at 936 n. 29. However, in Ellis the defendant did not claim that double jeopardy was violated by his two child molestation convictions (counts I and II). Instead, his double jeopardy challenge was to his two rape convictions (counts III and IV), and the "to convict" instructions for those counts did not contain the language that Berg cited as significant. Ellis, 71 Wn. App. at 406.

to the court in Ellis; when setting forth its reasoning in rejecting the double jeopardy claim, the court did not even mention the fact that the dates were not identical. 71 Wn. App. at 406.

Berg represents a further extension of the reasoning in Borsheim, and defense counsel cannot be faulted for failing to anticipate it. Cruse has not satisfied his burden of establishing that he received deficient representation from his attorney.

d. Cruse Has Not Established That His Multiple Convictions Violate Double Jeopardy.

Should this Court conclude that Cruse did not invite the error, he can challenge the jury instructions directly, rather than through a claim of ineffective assistance of counsel. Nonetheless, the Court should deny his double jeopardy claim because the jury instructions, read as a whole and in a commonsense manner, made it manifestly clear to the jury that they had to rely upon separate acts to support convictions on identically charged crimes. The State respectfully submits that this Court's recent decisions in Berg and Borsheim overstate the likelihood of a double jeopardy violation and understate the impact of the other jury instructions.

In reviewing a challenge to jury instructions, the court reads the instructions in a straightforward, commonsense manner. State v. Pittman, 134 Wn. App. 376, 382, 166 P.3d 720 (2006). As noted above, the trial court instructed that a separate crime was charged in each count. CP 66. The court advised the jury that it must decide each count separately and that its verdict on one count should not control its verdict on any other count. Id. In addition, the trial court instructed the jury that to convict Cruse on any count of rape or molestation, "one particular act" of rape or molestation had to be proven. CP 72 and 77. In light of these instructions, a juror would understand that when two counts charged the very same type of crime, each count requires proof of a different act. Ellis, 71 Wn. App. at 406.

In Borsheim and to a greater extent in Berg, this Court failed to consider the impact of the jury instructions as a whole and how a commonsense juror would understand them. Courts in other jurisdictions have rejected similar challenges to "to convict" instructions, frequently noting that the jury was instructed that a separate crime was charged in each count. See State v. Burch, 740 S.W.2d 293, 295-96 (Mo. Ct. App. 1987) (concluding that the double jeopardy challenge to identical jury instructions for two

counts of sodomy was "specious"); State v. Salazar, 139 N.M. 603, 610-11, 136 P.3d 1013 (N.M. Ct. App. 2006) (rejecting double jeopardy challenge to nine identical jury instructions for nine counts of criminal sexual penetration).

For a double jeopardy violation to occur here, the jury would have had to believe that they could rely upon the same "one particular act" to convict Cruse twice of the same crime. Such a reading of the instructions is nonsensical. The Court should reject Cruse's double jeopardy challenge.

2. CRUSE IS NOT ENTITLED TO VACATION OF BOTH CHILD MOLESTATION CONVICTIONS.

Cruse, claiming that the jury could have based all four convictions upon the same act, argues that he is entitled to vacation of his two child molestation convictions and one rape of a child conviction. However, assuming that he is entitled to relief, his remedy is vacation of one rape conviction and *one* child molestation conviction.

A defendant's conduct may violate more than one criminal statute, and double jeopardy is only implicated when the court exceeds its legislative authority by imposing multiple punishments

where multiple punishments are not authorized. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995). In order to determine whether multiple punishments are authorized, the court uses the "same evidence" test, which asks if the crimes are the same in law and in fact. Id. at 777-78. If each offense includes an element not included in the other, then the offenses are not the same in law under this test. Id. at 777.

Applying this test, the Washington Supreme Court has held that convictions for first-degree rape of a child and first-degree child molestation, even if based upon the same act, do not implicate double jeopardy. In State v. French, 157 Wn.2d 593, 610, 141 P.3d 54 (2006), the court, after examining the elements of the two crimes, concluded that they were not the same in law, and that convictions for first-degree rape of a child and first-degree child molestation did not violate double jeopardy. "The two crimes are separate and can be charged and punished separately." 157 Wn.2d at 611; see also State v. Jones, 71 Wn. App. 798, 824-26, 863 P.2d 85 (1993) (holding that convictions for

first-degree rape of a child and first-degree child molestation did not violate double jeopardy even when the crimes occurred during the same incident). Cruse does not discuss or distinguish French or Jones.

In contrast, the convictions at issue in Borsheim and Berg were based upon the same crime. In Borsheim, the defendant was charged with and convicted of four counts of first-degree rape of a child. 140 Wn. App. at 363. In Berg, the defendant was charged with one count of third-degree rape of a child and two counts of third-degree child molestation. 147 Wn. App. at 926. As a remedy for the double jeopardy violation, the court vacated one child molestation count. Id. at 937.

Accordingly, Cruse is not entitled to vacation of both child molestation convictions. Should this Court determine that he is entitled to relief, the proper remedy is to vacate one rape of a child conviction and one child molestation conviction.

D. CONCLUSION

For all the foregoing reasons, Cruse's convictions should be affirmed.

DATED this 11th day of December, 2009.

Respectfully submitted,

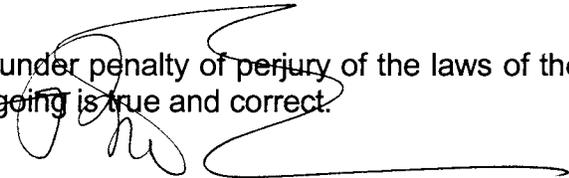
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. REX CRUSE, Cause No. 63306-6-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

12-11-2009

Date

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