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66826-9

NO. 66826-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

GERALD WAYNE WILSON,

Appellant.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JAY WHITE

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Should this Court agree that when the evidence is viewed in the light most favorable to the State as required on appellate review, a rational trier of fact could have found the defendant guilty of two counts of rape of a child?

2. Should this Court reject the defendant's claim that his conviction should be reversed because of alleged prosecutorial misconduct?

3. Should this Court reject the defendant's ineffective assistance of counsel claim because it is simply an attempt to circumvent the waiver provisions regarding his trial counsel's failure to object to the alleged misconduct in issue 2 above, and to an alleged evidentiary error?

4. Four years after being sexually assaulted, the victim, AD, told her boyfriend that she had been abused. Should this Court throw out the immediacy requirement of the "fact of complaint" doctrine because it is antiquated, sexist, and is not based on a logically valid premise?

5. Should this Court agree that the defendant's failure to prove multiple trial court errors and substantial prejudice bars him from prevailing in a claim under the "cumulative error" doctrine?

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS**

The defendant was charged with three counts of rape of a child as follows:

Count I: First Degree Rape of a Child  
June 3, 2002 through June 2, 2003  
AD less than 12 years of age.

Count II: Second Degree Rape of a Child  
June 3, 2003 through June 2, 2005  
AD 12 years of age or greater and less than 14 years of age.

Count III: Third Degree Rape of a Child  
June 3, 2005 through October 31, 2006  
AD 14 years of age or greater and less than 16 years of age.

CP 1. A jury found the defendant guilty on counts I and II, and not guilty on count III. CP 87-89. The defendant received a standard range minimum term sentence of 145 months. CP 120-30.

**2. SUBSTANTIVE FACTS**

AD was born on June 3, 1991, the daughter of alcoholic and drug addicted parents, Ron Batacan and Angela Draper. 5RP 48; 7RP 63-65. AD was 19-years-old at the time of trial. 7RP 70.

From birth, AD had no relationship with her mother, and an unstable living situation with her father. 7RP 64, 70. Her father

spent time in jail, away on various jobs or was gone at other times for unknown reasons. 7RP 64. When he was gone, AD would stay with her grandmother, Remey Batacan, and her grandfather. 7RP 64. By the time AD was three-years-old, she was living with her grandparents full-time. 5RP 48. Living with her grandparents, AD was a happy and thriving child. 5RP 54.

Subsequently, AD's grandfather suffered a stroke and needed a great deal of care. 6RP 53. It became difficult for Remey<sup>1</sup> to provide care for her husband and raise a child at the same time. 5RP 55; 7RP 73. During this same time period, AD's aunt and uncle, Cecile Batacan Wilson and the defendant, Gerald Wilson, were childless and had been trying to have a child for many years. 5RP 54-56. Thus, when AD was eight-years-old, a family decision was made that AD would go live with the Wilsons in their Covington home. 5RP 54-56; 6RP 19.

AD already had a great relationship with Cecile as Cecile always spoiled her. 7RP 74. But when AD first moved in with the Wilsons, she felt a bit weird because she had no relationship with the defendant--he was a "stranger" to her. 7RP 76.

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<sup>1</sup> Because many of the persons referred to herein share the same last name, first names will be used where appropriate.

The defendant, a Boeing employee, and Cecile, a nurse, arranged their work schedules so that Cecile would get AD off to school and then work later, while the defendant would get home from work early and pick AD up from school. 6RP 76-79; 7RP 92. This meant that AD and the defendant were home alone together for a good part of every day that Cecile worked.

AD testified that initially it was a very loving household, but that before her fifth grade year, the relationship between the defendant and her became inappropriate. 7RP 113. While AD could not remember the first instance of sexual abuse, she testified that the defendant considered the two of them to be in a relationship, with him calling her babe and honey and having sexual intercourse and oral sex with her repeatedly over many years. 7RP 113-17.

AD described that at first the sexual intercourse hurt and that she asked the defendant if they could stop until she was older. 7RP 129-30. She said sometimes the defendant used K-Y jelly, had her drink kahlua, and offered her wine in an attempt to help with the pain. 7RP 129-30. Still, there were times when the defendant would try to have sex with AD but had to stop because it was just too painful for her. 7RP 135.

AD described how it soon became just a normal part of her life--the inappropriate relationship with the defendant. 7RP 119. AD described how the defendant would come into the bathroom while she was showering just to talk with her. 7RP 131. He explained to AD about sex, he talked to her about his concern that AD might become pregnant, and he even bought her a pregnancy test. 7RP 123, 125, 127. Over the years, the two had sexual encounters all over the house, although most incidents occurred in AD's bedroom. 7RP 123, 125, 127. AD remembered that she actually became upset when she found out the defendant was taking Viagra because AD couldn't understand why he needed to use it. 7RP 131. During this time period, the defendant also started working out, he dyed his hair, and he had a number of freckles removed from his body. 7RP 140.

The defendant did not coerce or threaten AD to obtain what he wanted. 7RP 141. Rather, it seemed as if the defendant considered their relationship to be perfectly natural, even worrying how he was going to tell Cecile that he wanted to be with AD instead of her. 7RP 141. Despite the sexual abuse, AD described the defendant and Cecile as being great parents. 7RP 141.

When AD was twelve-years-old, Cecile became pregnant. 8RP 79. When the defendant told AD, he cried and told her that he was sorry. 7RP 141. Initially AD was thrilled with the idea that Cecile was pregnant, but when she thought about it, she actually found herself being upset with the defendant for cheating on her. 7RP 142. The defendant apologized and told AD that he had sex with Cecile only because she was always complaining that he didn't touch her anymore and he just wanted to shut her up. 7RP 142.

During Cecile's pregnancy AD became jealous, believing that she was going to be replaced and that Cecile would spoil the baby, not her. 7RP 144, 146. But when Brianna was born on October 4, 2003, AD fell in love with her new baby cousin. 7RP 146; 8RP 79. When Cecile went back to work, AD spent a great deal of time playing with and taking care of Brianna as she grew up. 7RP 147.

During the time AD lived with the Wilsons, Cecile was the stricter one in terms of homework, chores and grades, but the defendant became obsessively controlling regarding her life. 7RP 94. The defendant would react angrily about the clothes AD wanted to wear, she was not allowed to have any boy as a friend, and in the entire time she lived with the Wilsons she never left the

home alone and was never allowed to have a sleepover at someone else's house. 7RP 92, 94, 98, 100, 149. When AD asked if she could play on the basketball team, the defendant said no, that she would just skip practice and screw guys instead. 7RP 152. AD was not allowed to go to school dances, football games, wear makeup, "nothing." 7RP 153, 158. At one point, the defendant got so controlling that he removed AD's bedroom door and began secretly listening and recording her phone calls. 7RP 153, 155.

While in the eighth grade and first part of her freshman year, there was a great deal of fighting going on in the house between Cecile and the defendant, much of it about AD. 8RP 54-55. The relationship between AD and the defendant also deteriorated substantially. 7RP 129, 152. The defendant would call AD a whore and tell her that she was going to end up on the streets like her father. 6RP 155; 7RP 152, 158. The defendant's behavior ultimately led AD to move out, but AD still did not tell anyone that the defendant had been sexually abusing her for years. 7RP 129.

AD moved out in November of her freshman year (2005), although it was not exactly planned. 5RP 59; 7RP 153, 160-61. She was 14-years-old at the time. 5RP 143. AD was planning to spend the weekend with her aunt and uncle, Cresencia and Robert

Jones. 7RP 160. However, once there, and over a lot of crying, it was decided that AD would live with the Joneses and their three children. 5RP 59, 61; 7RP 161. Later, when Cecile questioned AD about why she moved out, AD told Cecile that she moved out because the defendant was too controlling and that he needed to see a counselor. 6RP 157.

Despite the abuse she was leaving behind, AD was "absolutely bummed" about leaving Cecile and Brianna. 7RP 167. She testified that the transition of moving in with the Joneses, leaving all her friends, her school and her old neighborhood, was "a real low point in my life." 7RP 167-68. In fact, AD was so depressed, she actually thought about moving back with the Wilsons. 7RP 168. To help, AD and Cecile planned dates to spend time together. 7RP 169.

Initially after moving in with the Joneses, AD's grades suffered, but as she settled in, life and her grades improved. 5RP 67-70; 7RP 172. While there were certainly house rules, chores and a curfew, AD found a life she had never experienced before. 5RP 65, 67-68; 7RP 170-72. AD recalled that when Robert asked her why she never had her friends come over to the house, she "was like, I can have friends come over?" 7RP 172. Along with

being allowed to date for the first time, AD joined the ASB leadership group, played volleyball, fast-pitch softball and went to dances--including her senior prom. 7RP 172-75. This was not to say that life was perfect; AD experimented with marijuana once and alcohol once, getting caught and confessing both times. 7RP 175-76, 178-80. Other than that though, AD never got in any trouble at school or had issues with drugs or alcohol. 5RP 71, 73, 149; 7RP 175, 180-81.

AD's first real boyfriend was Patrick Jackson, a person she dated during her junior year of high school. 7RP 174. On one particular night close to Thanksgiving, Patrick was over at the house because the two were planning to go snowboarding the next day. 7RP 181-82, 190. It was this evening that AD first disclosed to anyone that she had been sexually abused.<sup>2</sup> 7RP 182. AD testified that "I was bawling my eyes out to him." 7RP 182. Patrick ended up staying until 4:00 a.m., well beyond the rules of the house, which caused Robert to angrily kick Patrick out. 7RP 182.

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<sup>2</sup> Patrick testified that he thought the disclosure occurred sometime that summer. 5RP 36. He said that when AD told him she had been sexually abused, she was "terrified, scared" and "crying," and that he encouraged her to tell the Joneses. 5RP 36.

Despite telling Patrick, AD still wasn't ready to tell anyone else. 7RP 185. At this point in her life, she had not spoken to the defendant in years and he was out of her life. 7RP 185. What tipped the scales was when her "little sister" Jessica, Cresencia's daughter, came home and AD asked where she had been. 7RP 186. Jessica told AD she had been over at the Wilsons' playing with Brianna. 7RP 186. AD thought to herself, "what am I doing? That's my little sister and she's going over there." 7RP 186.

AD then disclosed to Cresencia, briefly telling her what had happened but saying that she had to go as she did not want to talk about it right then. 7RP 185, 189. AD believed it was the next day or the day after that she, Cresencia and Robert had a discussion about the abuse. 7RP 190-91. Together, they decided to wait until after the holidays to do anything because they did not want to ruin Cecile's Christmas. 5RP 151-52; 7RP 192. After the holidays, Cresencia and Robert told Cecile about the abuse and contacted the police. 5RP 79.

When Cecile was informed that the defendant had been abusing AD, she did not deny it or cry, but remained stoic. 5RP 154. She stayed with the Joneses for several days. 5RP 155; 6RP 167-68, 170-71.

Cecile testified that the defendant was always very protective of AD, "strict" and "controlling." 6RP 86, 103. This was especially true, Cecile testified, when it came to AD having boys as friends. 6RP 99-100. Cecile found the defendant's behavior "very odd," and because of the defendant's over-protectiveness, Cecile would on occasion secretly take AD out to hang out with her friends. 6RP 94, 128. At the same time, Cecile testified that the defendant and AD were each other's "playmate," that the defendant would take AD out for ice cream, to McDonalds and they would play video games together for hours. 6RP 126.

Cecile also testified that AD was very "huggy" and "kissy" with the defendant, but she testified that AD was this way with everyone. 6RP 138. However, in an earlier statement Cecile said that "it is really weird how she sits on his lap and [he] is protective over her, like he always wants her at his side." 6RP 138. Cecile admitted that at one point she confronted the defendant, telling him that "[i]f you are fucking with my niece or touching her, I'm the last bitch you want to fuck with." 6RP 140. Cecile also asked AD if anything was going on--but AD denied it. 6RP 139. Cecile also remembered that at one point while AD lived with them, AD told her

that she wished the two of them could go live together and leave the defendant. 6RP 144.

Cecile testified that after AD moved out of the house the defendant demanded that all of AD's pictures be taken off the walls. 6RP 162. AD and the defendant's relationship was "nonexistent," according to Cecile, and he hated to even hear her name. 6RP 163-64.

While testifying, Cecile downplayed many of the facts that were introduced by the State, claiming, for example, that AD sitting on the defendant's lap was a family thing and that the defendant working out, dying his hair, and having freckles removed were all benign acts done for other reasons. 6RP 130-31, 205. Cecile admitted that she was currently trying to reconnect with the defendant. 6RP 222.

The defendant's trial attorney introduced a photograph through Cecile purportedly showing the defendant's penis with a large blood vessel that Cecile claimed you could not miss. 6RP 211. While no evidence was presented that AD was shown this photograph, she was asked if she recalled anything unique about the defendant's body or penis. She did not. 7RP 139. No

evidence was introduced that AD had ever seen a man's penis other than the defendant's.

After AD moved out of the Wilsons' house, the defendant never spoke to or saw AD again except for a single occasion. 7RP 193. The defendant did not attend AD's graduation and stopped going to family functions. 5RP 64; 7RP 193. In testifying on his own behalf, the defendant claimed he did not contact AD because she "needed her space." 8RP 116, 133. When confronted by the fact that he claimed AD was like a daughter to him and it had been five years since he contacted her, the defendant responded, "[t]here was no reason for me to go there," and "I felt like there were some hard feelings there." 8RP 133. When asked if he ever tried to rectify his relationship with a girl he considered his daughter, the defendant responded, "Um, I did not, and she didn't either." 8RP 133. In regards to having AD's photos taken off the walls, the defendant claimed he had this done so he could put up photos of Brianna. 8RP 134-35.

The one contact after AD moved out arose when the police became involved. Detective Allen Kelley had AD call the defendant on the phone. 7RP 193. With Detective Kelley listening, AD called the defendant and told him that she was confused by what had

happened to her when she was living at his house. 6RP 21, 33-34; 7RP 227. The defendant responded that he had no idea what she was talking about. 7RP 227. AD responded back, "are you kidding me? You raped me." 6RP 34; 7RP 227. The defendant merely responded "I don't know what you're talking about, I have to take Brianna to school so goodbye, and that was it." 7RP 194, 227; 6RP 34. The defendant did not tell his wife, Cecile, about the phone call. 6RP 164.

Additional facts are included in the sections they pertain.

### C. ARGUMENT

#### 1. **VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THIS COURT MUST CONCLUDE THAT A REASONABLE JURY COULD HAVE FOUND THAT THE DEFENDANT RAPED AD ON TWO OCCASIONS.**

The defendant contends that no rational jury could have found him guilty of raping AD, even when the evidence is viewed in the light most favorable to the State. He bases his argument on a claim that the evidence was too "generic." The defendant's argument lacks merit as it ignores the standard of review on appeal and ignores critical facts adduced at trial.

The case at bar is a multiple-acts case. A multiple-acts case is one where the State alleges several acts, any one of which could constitute the crime charged. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). The defendant was charged with three counts of rape of a child for acts committed against AD. CP 1-5. The charging periods for each count did not overlap. Instead, the charging periods were consecutive based on AD's age at the time of the alleged acts. Count I encompassed the time period from June 3, 2002 through June 2, 2003, when AD would have been 11 years old. Count II encompassed the time period from June 3, 2003 through June 2, 2005, when AD would have been 12 and 13 years old. Count III encompassed the time period from June 3, 2005 through October 31, 2006, when AD would have been 13 and 14 years old. CP 1-5. The defendant was convicted of counts I and II. CP 88-89. The jury found the defendant not guilty of count III. CP 87. As will be discussed below, it was alleged that multiple acts of rape occurred during each charging period.

In analyzing the defendant's claim, it should be noted that in a multiple-acts case, for each count the State must either elect the particular criminal act on which it will rely for conviction, or the trial court must instruct the jury that all members must agree that the

State proved the same underlying criminal act beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). This ensures jury unanimity as to which act or incident constituted the crime. Kitchen, 110 Wn.2d at 411.

The State did not, nor could it based on the evidence, elect in this case. Instead, the trial court instructed the jury as follows:

The State alleges that the defendant committed acts of Rape of a Child on multiple occasions. To convict the defendant on any count of Rape of a Child, one particular act or Rape of a Child must be proved beyond a reasonable doubt, and you must unanimously agree at [sic] to which act has been proved for each count. You need not unanimously agree that the defendant committed all the acts of Rape of a Child.

CP 98. This unanimity or "Petrich" instruction is found at 11WAPRAC WPIC 4.25. By so instructing the jury, the court complied with the requirements of Petrich and Kitchen.

In cases where multiple acts of sexual abuse are alleged to have occurred within the same charging period, the evidence is sufficient if three prerequisites are met. First, the victim must describe the kind of act or acts with sufficient specificity to allow the trier of fact to determine what offense, if any, was committed. State v. Hayes, 81 Wn. App. 425, 438, 914 P.2d 788, rev. denied, 130 Wn.2d 1013 (1996). Second, the victim must describe the number

of acts committed with sufficient certainty to support each of the counts alleged by the prosecution. Id. Third, the victim must be able to describe the general time period in which the acts occurred. Id. It is the trier of fact who must determine whether the testimony of the alleged victim is credible on these basic points. Id.

In reviewing the trier of facts determination, evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, it permits a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. Hayes, 81 Wn. App. at 430 (citing State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). A reviewing court will draw all reasonable inferences from the evidence in favor of the State and interpret the evidence most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn from it. Salinas, 119 Wn.2d at 201.

The standard of review on appeal does not change simply because a case is a multiple-acts case. See Hayes, at 425 (this Court reviewing the evidentiary sufficiency of a four-count multiple-acts child rape case). In fact, this Court has specifically rejected

the argument that the standard of review in a multiple-acts child sex case is somehow different. See State v. Newman, 63 Wn. App. 841, 851, 822 P.2d 308, rev. denied, 119 Wn.2d 1002 (1992) (court reviews a five-count statutory rape case).

Here, the defendant contends there was insufficient evidence to support his convictions. This is incorrect.

First, the defendant contends that AD described four incidents, only one of which constitutes a crime. This argument fails. It is true that AD testified about four specific events that she recalled, but these four events were not the evidence used to support the crimes charged.

To prove rape of child in the first degree as charged in count I, the State was required to prove that the defendant had sexual intercourse with AD when she was less than twelve years old, not married to the defendant and he was at least twenty-four months older than her. CP 1; CP 102; RCW 9A.44.073. To prove rape of child in the second degree as charged in count II, the State was required to prove that the defendant had sexual intercourse with AD when she was at least twelve years old but less than fourteen years old, not married to the defendant and he was at

least thirty-six months older than her. CP 1-2; CP 104; RCW 9A.44.076.

In pertinent part, "sexual intercourse" is defined by statute as having "its ordinary meaning and occurs upon any penetration, however slight, and...also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another..." RCW 9A.44.010(1).

AD testified that she recalled one occasion when the defendant asked her to perform oral sex on him, with a promise by the defendant that he would not ejaculate in her mouth. 7RP 122. Despite his promise, the defendant ejaculated in AD's mouth, causing her to throw up the popcorn she had recently eaten. 7RP 22.

AD described three other events that occurred during the time she lived under the defendant's roof, including a time when he painted a dog on her breast (7RP 124-25); a time when AD was straddling the defendant's lap and the defendant told her that he would have ejaculated if she continued (7RP 125-26); and a time when the defendant and AD were in her bedroom--naked or partially clothed--and Cecile came home early and interrupted them (7RP 119-21; 8RP 27-28).

The defendant is correct that in none of the later three incidents/events did AD testify to facts constituting a rape. This is because in none of the three incidents did AD describe an act of sexual intercourse. Where the defendant errs is in his assertion that the State made an "election," that these three incidents constituted the evidence supporting the charged crimes. The State did no such thing. Neither in the charging document, the jury instructions, or in closing argument, did the prosecutor elect--or attempt to elect--that these acts formed the basis of the charged crimes; that the State intended to rely on particular acts to support each count. See State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008) (an election must be clear from the charging documents, jury instructions or closing arguments). Thus, this portion of the defendant's argument fails.

The defendant also asserts that besides the first incident described above--to which AD was not able to provide a date--AD did not describe acts committed against her that constitute rape. This ignores the evidence and standard of review on appeal.

At one point AD was asked about the physical contact that occurred between her and the defendant. She responded that starting before she entered the fifth grade, the two engaged in

"[e]very sexual activity." 7RP 114. When asked to be more specific, AD answered, "[i]ntercourse, oral, touching, being naked, I mean, an inappropriate relationship." 7RP 114. AD also testified that she could not give a specific date or remember the first time it occurred. 7RP 116.

If this were the extent of the testimony as the defendant seems to assume, he is correct, there would be insufficient evidence of what specific acts occurred and when. However, this was not the extent of AD's testimony. AD was asked specifically if the defendant had "sexual intercourse" with her when she was in the fifth grade--she responded that he did. 7RP 128-29.<sup>3</sup> She testified that the defendant had "sexual intercourse" with her when she was in the sixth grade. 7RP 128-29.<sup>4</sup> She specifically recalled having her first period on the first day of her sixth grade year, in September of 2000 when she would have been nine years old. 7RP 127-28. The defendant then discussed the possibility of pregnancy and bought AD a pregnancy test. 7RP 127. AD also testified that the defendant had "sexual intercourse" with her when

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<sup>3</sup> AD was in the 5<sup>th</sup> grade in the 2001-2002 school year, making her 10 years old. 8RP 11.

<sup>4</sup> AD was in the 6<sup>th</sup> grade in the 2002-2003 school year, making her 11 years old. 8RP 11.

she was in the 7<sup>th</sup> grade<sup>5</sup> and the 8<sup>th</sup> grade<sup>6</sup>. 7RP 128-29. AD could not say whether or not the defendant had "sexual intercourse" with her in the summer after her 8<sup>th</sup> grade year. 8RP 58. She moved out of the defendant's house in November of her freshman year, 2005. 6RP 153. The time periods listed above clearly cover the time periods for counts I and II, providing sufficient evidence for conviction.<sup>7</sup> The evidence listed above also described the acts sufficient for a jury to find what act was committed during each time period--sexual intercourse. The evidence was not definitive as to the time period for count III--thus explaining the acquittal on count III.

The defendant may disagree that there was sufficient evidence supporting each charge, but his arguments are better made to a jury, not a reviewing court. AD's inability to provide specific dates as to when she was abused does not shield the defendant from suffering the consequences of his actions. As this

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<sup>5</sup> AD was in the 7<sup>th</sup> grade in the 2003-2004 school year, making her 12 years old. 8RP 11.

<sup>6</sup> AD was in the 8<sup>th</sup> grade in the 2004-2005 school year, making her 13 years old. 8RP 11.

<sup>7</sup> Later, AD was asked, "just to be clear, was there sexual intercourse or oral sex when you were in fifth grade?" 8RP 57. AD confirmed the accuracy of her previous testimony. Id. She provided separate confirmations for her previous testimony regarding the sixth grade, seventh grade, and eighth grade. 8RP 57-58.

Court has stated, “[w]hen a child has an inability to recall the time of sexual contact with the defendant, the defendant should not escape prosecution, whether there were multiple events or only a single event.” State v. Cozza, 71 Wn. App. 252, 257, 858 P.2d 270 (1993). AD's testimony provided the necessary evidence for conviction.

**2. THE DEFENDANT HAS FAILED TO SHOW THAT HE IS ENTITLED TO A NEW TRIAL BASED UPON A CLAIM OF MISCONDUCT.**

The defendant contends that the prosecutor committed such flagrant and egregious misconduct in closing argument that his conviction must be reversed, and that his failure to raise an objection below must be excused. This claim is without merit. The defendant claims the prosecutor committed misconduct in three ways, misstating the evidence, misstating the law, and asking inappropriate questions of a rebuttal witness. The record does not support all of the defendant's claims, and he can show neither prejudice nor why he should be excused from having failed to object below.

The law governing claims of misconduct is well-settled. When a defendant alleges that the prosecutor's arguments

prejudiced his right to a fair trial, he bears the heavy burden of establishing both *the impropriety of the prosecutor's arguments* and that *there was a "substantial likelihood" that the challenged comments affected the verdict*. State v. Warren, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); State v. Reed, 102 Wn.2d 140, 145, 685 P.2d 699 (1984). The prejudicial effect of alleged improper comments is not determined by looking at the comments in isolation but by placing the remarks in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). Absent a proper objection and a request for a curative instruction, the defense waives the issue of misconduct unless the comment was so flagrant or ill-intentioned that an instruction could not have cured the prejudice. State v. Anderson, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009).

**a. Facts Not In Evidence.**

AD testified about a number of incidents and things she remembered when she lived with the defendant, one of which was an incident where she and the defendant were up in AD's bedroom in a compromising position when Cecile came home unexpectedly.

See 7RP 119-21, 217-19; 8RP 27-28. AD recalled that she was not fully clothed as she and the defendant were "doing what we do." 7RP 119-20. When the two heard Cecile downstairs, the defendant ran into the bathroom and jumped in the shower while AD quickly put her clothes on. 7RP 120. When asked "what did you mean by, 'you were doing what you do,'" AD answered, "I can't remember sexually exactly what happened at that time." Id. AD did recount that the two were on her bed, but when asked "do you remember your positions on the bed," AD responded, "not at all." 7RP 121. AD testified that she could not recall if the two were actually having sexual intercourse. 8RP 21.

In closing, when the prosecutor was recounting the various things AD remembered, including that the defendant used Viagra, K-Y Jelly, that he once drew a dog on her breast, the prosecutor added "she remembers when her Aunt Cecile came home and she was shaking because the defendant *was on top of her*, naked, and they heard the door." 8RP 199-200.

As the defendant argues, it is true that AD never testified the defendant was actually on top of her. However, this minor misstatement of the evidence--not objected to--could not have played any part in the jury's verdict. As with the defendant's Petrich

argument discussed in section 1 above, the defendant continues to argue that the State elected to base one of the charges on this incident in the bedroom. This is not the case. Nowhere in the charging document, nowhere in the jury instructions and nowhere in closing argument did the prosecutor argue that this incident in the bedroom was the basis the State was relying on for a conviction on any of the counts. Just as with the drawing of the dog on her breast, neither incident constitutes rape of a child, neither incident was relied upon for the basis of a conviction and the one misstatement by the prosecutor could not possibly have affected the verdict. This is especially true where the jury was instructed that:

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial...The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations and the exhibits.

CP 91.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important; however, for you to remember that ***the lawyers' statements are not evidence...You must disregard any remark, statement, or argument that is not supported by the evidence*** or the law in my instructions.

CP 93 (emphasis added). Jurors are presumed to follow the court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).<sup>8</sup>

**b. Alleged Misstatement Of The Law.**

The defendant claims the prosecutor misstated the law in the following passage:

Now, you will look in your instructions there, in the Petrich instruction, as we call it, which is the instruction that tells you you have to agree on a count of rape for you to be able to find the person guilty. Well, you don't have to agree he raped her ten times when she's in the fifth grade. ***You don't have to be unanimous that, "Yes, this defendant raped her before she was twelve." "This defendant raped her before she was thirteen." And, "This defendant raped her between thirteen and fourteen."*** You have to unanimously agree that, yes, that rape occurred. That's what you have to agree on.

8RP 198-99 (emphasized language is the portion cited by the defendant, the additional language is added to put the passage in context). The defendant did not raise an objection below.

When a defendant alleges that a prosecutor's argument prejudiced his right to a fair trial, he bears the heavy burden of

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<sup>8</sup> The defendant also cannot show that his failure to object should be excused. A simple curative instruction would have cured the misstatement of fact. Further, the defendant fails to prove the prosecutor acted flagrantly and intentionally--as opposed to simply being mistaken as to the testimony.

establishing the impropriety of the comments. Reed, 102 Wn.2d at 145. Prejudicial error does not occur until such time as it is "**clear and unmistakable**" that counsel has committed misconduct. State v. Sargent, 40 Wn. App. 340, 344, 698 P.2d 598, rev. denied, 111 Wn.2d 641 (1985).

While it is not abundantly clear the specific point the prosecutor was attempting to make by the limited passage quoted above, it is also not clear and unmistakable that the prosecutor misstated the law and committed misconduct.

The case at bar is a multiple-acts case. Thus, as discussed in section C 1 above, for each count, the jury had to be unanimous on which act or incident it was going to rely to find the defendant of each count. See Kitchen, 110 Wn.2d at 411. In addition to being a multiple-acts case, this was a multiple counts case without overlapping charging periods like many child abuse cases. Thus, the jury was required to rely on a different act from a different time period to support each charge.<sup>9</sup>

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<sup>9</sup> The trial court added the following emphasized language to the "to convict" instruction for count I: "[t]hat on or about a time intervening between June 3, 2002 and June 2, 2003, *on an occasion separate and distinct from count II and III*, the defendant had sexual intercourse with AD." CP 102. The court added corresponding language to the "to convict" instructions for counts II and III. CP 104, 106.

In sum, the jury had to be unanimous as to a single act to convict the defendant on count I, and they had to be unanimous as to a single different act to convict the defendant on count II. It appears the prosecutor was attempting to explain the interplay between a multiple acts case and a multiple counts case. For example, the prosecutor told the jury that they did not have to be unanimous that the defendant "raped her ten times." 8RP 198. This is an accurate statement. To support convictions on counts I and II, the jury was required to be unanimous as to only two separate and distinct acts.

At the same time, the prosecutor stated, "Now, you will look in your instructions there, in the Petrich instruction, as we call it, which is the instruction that tells you ***you have to agree on a count of rape*** for you to be able to find the person guilty." 8RP 198 (emphasis added). This sentence is nonsensical and likely was a misstatement. The jury--as the instruction states--must agree on an "act," not a "count." It is likely the prosecutor misspoke as it is unlikely she meant to tell the jurors that they needed to choose between counts.

In any event, the defendant did not object to the prosecutor's misstatements. The absence of an objection indicates that the

comment, at the time it was made, did not strike the defendant or his attorney as being prejudicial or of particular consequence.

State v. Klok, 99 Wn. App. 81, 85, 992 P.2d 1039 (2000) (citing State v. Swan, 114 Wn.2d 613, 790 P.2d 610 (1990), cert. denied, 513 U.S. 985 (1994)).

The absence of an objection should not be excused here. If the prosecutor's very brief misstatements were contrary to the law, the defendant cannot show how a simple objection and request for a curative instruction would not have cured the problem. For example, the defendant could have stated, "objection your honor, misstates the law." The court could easily have sustained the objection and either reinstructed the jury on the law or referred the jury to the specific written instructions pertaining to the issue.<sup>10</sup> There can be no argument that this would not have cured the problem and thus, the failure to object waives the claim of misconduct.<sup>11</sup>

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<sup>10</sup> See Warren, 165 Wn.2d at 24-28 (the prosecutor's complete misstatement of the law regarding the burden of proof was corrected by the court after objection).

<sup>11</sup> This case is not akin to the Davenport case relied upon by the defendant. In Davenport, the prosecutor sought and obtained a conviction based upon a theory of accomplice liability when that legal theory was never legally before the jury. See State v. Davenport, 100 Wn.2d 757, 761, 675 P.2d 1213 (1984).

**c. Alleged Misconduct Based On Questioning.**

The State called Cresencia Jones as a rebuttal witness. The purpose for calling Cresencia was to rebut and impeach much of the testimony of the defendant's wife, Cecile Wilson, a witness who clearly was attempting to support him.<sup>12</sup>

For example, Cecile downplayed the fact that the defendant disapproved of AD having any boys as friends, but she was impeached with a prior statement wherein she had previously stated that he would have a "freaking fit" when it came to AD and boys. 6RP 96, 98-100. Cecile also testified that she never suspected the defendant of having an affair, never suspected that anything abnormal was going on at home, never suspected that the defendant was abusing AD, and that she never told Cresencia any of these things. 6RP 129-30, 131, 137. To show Cecile's bias and rebut and impeach her testimony, the following questions were asked of Cresencia in rebuttal:

Q: Did your sister talk to you about the fact that she felt that something was going on between Gerry and AD?

A: Yes, she did.

Mr. Warner: Objection.

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<sup>12</sup> Cecile admitted during testimony that she was "reconnecting" with the defendant and that she was "focusing" on him. 6RP 222.

The Court: The objection is sustained. Jury will disregard any speculation about that.

Mr. Warner: Move to strike, your Honor.

The Court: It is stricken. I believe I properly instructed jury accordingly.

Ms. Weston: I'm asking -- not for speculation, I'm asking her if her sister told her.

The Court: I allowed some latitude, but I think we are beyond rebuttal.

Ms. Weston: And your Honor, if I just may, this is a statement that her sister --

The Court: No, I don't want to hear argument. Let's proceed to any other areas you wish to raise.

Ms. Weston: Okay.

8RP 158. Later, the following questions were asked:

Q: Okay, did your sister ever indicate that she would come home early from work?

A: Yes.

Q: Okay. Did she [Cecile] indicate having a particular time she came home early that something wasn't right?

A: Yes.

Mr. Warner: Objection, your Honor.

The Court: Objection sustained.

Mr. Warner: Collateral, move to strike.

The Court: The answer is stricken.

Ms. Weston: Okay.

8RP 159-60.

The defendant cites to the above questions and claims that prosecutor committed misconduct by asking questions designed to elicit "hearsay evidence." Def. br. at 39. The defendant is mistaken.

First, the questions asked were not intended to elicit hearsay evidence. Hearsay is an out-of-court statement presented "to prove the truth of the matter asserted." ER 801(c). The State was not attempting to prove the truth of Cecile's statements, just that she made the statements in order to impeach her testimony and show her bias. For example, Cecile denied that she ever suspected the defendant of sexually abusing AD and denied telling Cresencia this. Asking Cresencia if Cecile made such statements to her is perfectly permissible rebuttal designed to impeach Cecile's testimony. It is not to prove the truth of the content of Cecile's statement.<sup>13</sup>

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<sup>13</sup> This appears to have been readily apparent to the trial court and to the defendant's trial attorney. Neither of defense counsel's objections was based on a claim the questions called for hearsay. In sustaining the objections, neither of the court's rulings was based on the improper admission of hearsay.

Second, the scope of cross-examination and rebuttal is left to the sound discretion of the trial court. State v. Young, 89 Wn.2d 613, 628, 574 P.2d 1171 (1978); ER 611. A trial court's ruling is given great deference and will not be overturned absent a finding that the court abused its discretion. State v. Pirtle, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), cert. denied, 518 U.S. 1026 (1996). The trial court here certainly had the authority to limit the scope of the rebuttal testimony and did so here. That does not make the questions of the prosecutor misconduct. The court just as easily and properly could have overruled the defendant's two objections. Thus, the defendant cannot show that the asking of the questions was misconduct. In any event, the two questions objected to were sustained and the answers stricken. Besides relying on pure speculation, the defendant cannot show prejudice.

### **3. THE DEFENDANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS WITHOUT MERIT.**

The defendant claims that his trial counsel, longtime criminal defense attorney Richard Warner,<sup>14</sup> was constitutionally ineffective.

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<sup>14</sup> A criminal defense attorney for over 18 years, Warner specializes in sex offense cases. See [www.mywsba.org](http://www.mywsba.org); [www.jimnewtonlaw.com](http://www.jimnewtonlaw.com).

Specifically, the defendant claims Warner was constitutionally ineffective for failing to object to the alleged misconduct discussed in section 2 above, and failing to object to allegedly improperly admitted lay opinion testimony. This claim is without merit. This claim is simply a thinly veiled attempt to avoid the waiver--failure to object--provisions associated with the misconduct claim and what amounts to a pure evidentiary issue.<sup>15</sup> However, even if he could demonstrate that no reasonably competent attorney would have failed to object to the alleged misconduct and alleged evidentiary error, the defendant cannot show prejudice.

**a. Standard Of Review.**

Any ineffective assistance of counsel analysis begins with the strong presumption that counsel's representation was effective and competent. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). For a defendant to overcome this presumption, he must prove by a preponderance (1) that his trial counsel's performance was so deficient that it fell outside the wide range of

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<sup>15</sup> See, e.g., State v. Curtiss, 161 Wn. App. 673, 702, 250 P.3d 496 (2011) ("Curtiss attempts to circumvent preservation requirements to some of her challenges in this appeal by claiming that her trial counsel was ineffective for failing to object to the errors she now raises.").

objectively reasonable behavior based on consideration of all the circumstances of the case; and (2) that this deficient performance prejudiced him, i.e., that there is a reasonable probability that but for counsel's objectively unreasonable representation, the results of trial would have been different. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). If the defendant fails to prove either prong of this test, the inquiry must end. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

As relevant here, legitimate trial tactics cannot form the basis of an ineffective assistance of counsel claim. Hendrickson, 129 Wn.2d at 77-78. It is simply insufficient to argue that because a trial tactic failed to sway the jury, the decision was not legitimate. Curtiss, 161 Wn. App. at 703 (citing State v. Grier, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011)).

Additionally, a defense counsel's failure to object constitutes ineffective assistance only where (1) the failure to object could not have been a legitimate strategic decision, (2) an objection, if made, likely would have been sustained, and (3) the jury verdict would have been different had the evidence not been admitted. In re

Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). In other words, "[w]hether and when to object is a classic example of a trial tactic, and failure to object constitutes ineffective assistance of counsel only in egregious circumstances where the evidence is central to the State's case. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

**b. A Defendant May Not Bootstrap A Waived Issue By Claiming Ineffective Assistance Of Counsel.**

An error that does not directly implicate a constitutional right shall not be transformed into an error of constitutional magnitude simply by claiming ineffective assistance of counsel. "So long as a defendant is represented by counsel whose performance is not constitutionally ineffective...we discern no inequity in requiring him to bear the risk of attorney error that results in a procedural default." Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d (1986). To hold otherwise would, "undercut the State's ability to enforce its procedural rules." Carrier, 477 U.S. at 491 (where counsel failed to recognize a factual or legal basis for an alleged error at trial, or failed to raise the claim despite recognizing it, and where counsel is otherwise competent, review will be denied).

In State v. Davis, 60 Wn. App. 813, 808 P.2d 167 (1991), aff'd, 119 Wn.2d 657 (1992), the defendant argued that an instructional error, which was not objected to by his trial counsel and therefore could not be raised for the first time on appeal, could be raised under an ineffective assistance of counsel claim. This Court rejected Davis's argument, stating:

We note that Davis raises ineffective assistance of counsel only in support of his claim that the trial court erred in giving an aggressor instruction. Independent claims of ineffective assistance of counsel are of constitutional magnitude and, by their nature, may be reviewed for the first time on appeal. However, instructional errors that do not directly implicate a constitutional right may not be transformed into error of constitutional magnitude by claiming that they resulted from ineffective assistance of counsel.

Davis, 60 Wn. App. at 822-23.<sup>16</sup>

In the case at bar, the defendant claims that trial counsel was ineffective for failing to object to the alleged misconduct discussed in section 2 above and to allegedly improperly admitted lay opinion testimony. This is simply an attempt to avoid the waiver

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<sup>16</sup> See also In re Stenson, 142 Wn.2d 710, 733-34, 16 P.3d 1 (2001) (a reviewing court will not "second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every colorable claim"; nothing in the constitution requires such a rigorous standard); City of Tacoma v. Durham, 95 Wn. App. 876, 882, 978 P.2d 514 (1999) ("just as an appellate lawyer is not considered ineffective for failing to raise every conceivable non-frivolous claim of error, a trial lawyer cannot be faulted for failing to make a record of every such allegation").

provisions associated with his misconduct and evidentiary claims.<sup>17</sup>

But the defendant should not be able to raise a waived issue merely by recasting the issue under the rubric of an ineffective assistance of counsel claim. There is nothing in the record here that suggests such egregious error by trial counsel that the waiver provisions of his misconduct and evidentiary claims should be ignored. An attorney cannot be said to be incompetent if, in the exercise of his professional talents and knowledge, he fails to object to every item of evidence to which an objection might successfully be interposed. State v. Mode, 57 Wn.2d 829, 360 P.2d 159 (1961).

**c. The Failure To Object To Alleged Lay Opinion Testimony.**

Loretta Bliss, Maria Faustina, Kari Kartes, Darlene McCullough, and Robert Jones each testified about their observations of the interaction between the defendant and AD at various family functions.

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<sup>17</sup> The law requiring an objection to alleged misconduct is cited in section 2 above. The failure to object to alleged improper opinion evidence also bars appellate review. RAP 2.5, State v. Warren, 134 Wn. App. 44, 56, 138 P.3d 1081 (2006), aff'd at, 165 Wn.2d 17 (2008); State v. Wicke, 91 Wn.2d 638, 642-43, 591 P.2d 452 (1079).

Loretta Bliss described witnessing AD sitting on the defendant's lap at one family get-together when AD was already 12 or 13 years old. 7RP 25-26. The two were watching television together and Bliss wondered why AD wasn't sitting on the couch where there was plenty of room. 7RP 27. She said she thought it was odd and that she had never seen AD sit on any other family member's lap. 7RP 26.

Maria Faustina testified that at family functions, the defendant would interact with AD more than anyone else, wherever AD was, the defendant was there. 7RP 40, 42. One Thanksgiving she observed 12-year-old AD sitting on the defendant's lap on a love seat. 7RP 43. Unsolicited, she added, "it was really -- so awkward, just felt so uncomfortable." 7RP 43.

Kari Kartes testified that they "appeared to be kind of a couple to me...they just seemed very close and not like a daughter/dad situation. It just seemed like, you know, like, he was treating her more like a girlfriend." 5RP 163. Kartes based her statement on "just watching them together and how they interacted." 5RP 162-63.

Darlene McCulloch testified that she observed the two of them sitting on a basket together and added that "I looked at them,

and I just kind of got a chill because they just looked like a family to me, instead of father and son, or father and daughter." 5RP 172. Asked if she could provide more detail about what she observed, McCulloch responded, "[n]ot really, it was just like a sixth sense or something, like, they were a unit, and that they were just, you know, there was just a sense of intimacy with them." 5RP 172.

When Robert Jones was asked how AD and the defendant interacted, he testified, "well, it is a little bit hard to explain. I just thought that there was a period of time where I looked at that relationship, you know, and...I wondered. It just seemed strange. And it just seemed like it wasn't something -- you know, it just didn't seem normal to me." 5RP 141-42.

On appeal, the defendant admits that the observations of the witnesses concerning the interactions between the defendant and AD were relevant and admissible. Def. br. at 44. However, he claims that in characterizing their observations, Robert Jones, Darlene McCullough and Kari Kartes provided improper lay opinion testimony and that counsel's failure to object constitutes ineffective assistance of counsel. The defendant is incorrect.

The admission of evidence lies within the sound discretion of the trial court. State v. Norlin, 134 Wn.2d 570, 576, 951 P.2d 1131

(1998). A decision to allow certain evidence will not be reversed absent a showing of abuse of discretion, a standard met only when this court concludes that no reasonable person would have taken the position adopted by the trial court. State v. Robtoy, 98 Wn.2d 30, 42, 653 P.2d 284 (1982).

A witness is allowed to render an opinion when the opinion is rationally based on the perception of the witness and helpful to a clear understanding of the witness' testimony or determination of a fact in issue. ER 701; State v. Halstien, 122 Wn.2d 109, 857 P.2d 270 (1993); State v. Ferguson, 100 Wn.2d 131, 667 P.2d 68 (1983); Warren, supra. This is especially true, our Supreme Court stated, when the opinion is expressed in terms that make it clear that the testimony is a lay opinion based upon perceptions. Halstien, at 128; Ferguson, at 141.

Here, each witness attempted to describe their observations of the interaction between AD and the defendant. To the extent the witnesses used conclusory language in an attempt to describe their observations, it was clear from their testimony that it was based on their direct observations. The defendant cannot say that this was definitively improper opinion testimony. As such, he cannot prove that no reasonable attorney would have failed to object, and that if he

had lodged an objection, no reasonable judge would have failed to sustain the objection. Therefore, this is one reason why the defendant cannot prevail in his ineffective assistance claim based on a failure to object.

Additionally, the defendant's failure to object was clearly tactical. First, he had a defense witness prepared to testify--AD's grandmother, Remey Batacan. Remey told the jury that in her family, and within her culture, it was commonplace for family members to be affectionate with one another and for relatives to sit on each other's laps. 8RP 74. Further, the defense, in closing, proceeded to mock the State's case in this regard, including telling the jury that "I think it was Bob's mother that even came in and said I have a sixth sense that it was wrong. That's evidence?" 8RP 210-11. Clearly counsel was tactically prepared to deal with the evidence in question in the manner he felt best helped his case.

Finally, to prevail in a claim of ineffective assistance of counsel, the defendant must prove that the failure to object prejudiced him. It is not enough to provide conclusory statements in this regard, or to surmise that the trial "might" have been different. To prevail on appeal, the defendant must prove that there is a reasonable probability that but for counsel's objectively

unreasonable representation, the results of trial would have been different. Strickland, 466 U.S. at 689; Thomas, 109 Wn.2d at 225-26.

Here, the testimony in question was limited and it was readily apparent that it was based on observations. The defense was prepared to, and did, combat the evidence. The defendant simply cannot show that but for counsel's failure to object, there is a reasonable probability the outcome of trial would have been different.<sup>18</sup>

**4. THE TRIAL COURT'S DECISION TO ADMIT FACT OF COMPLAINT EVIDENCE SHOULD BE UPHELD.**

The defendant claims that the trial court erred in admitting evidence under the "fact of complaint" doctrine. Specifically, the defendant argues that the trial court should not have allowed AD to testify that she first disclosed the abuse to her boyfriend, Patrick Jackson, because the disclosure was not made in a timely manner. This argument should be rejected for two reasons. First, the timeliness requirement of the "fact of complaint" doctrine should be eliminated because it is incorrect, harmful and based on an antiquated

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<sup>18</sup> For an analysis of the defendant's burden to prove prejudice in regards to the failure to object to the alleged misconduct, see section 2 above.

sexist belief that a rape victim's disclosure is only relevant--i.e., only credible, if the rape victim discloses immediately after being raped. Second, while the State concedes that if this Court continues to adhere to the timeliness requirement of the fact of complaint doctrine, the trial court abused its discretion in admitting the testimony, the admission of the evidence was harmless.

**a. The Fact Of Complaint Doctrine.**

The "fact of complaint" doctrine stems from the feudal "hue and cry" doctrine, and allows the admission of "hearsay"<sup>19</sup> that a sexual assault victim complained after being assaulted. State v. Murley, 35 Wn.2d 233, 237, 212 P.2d 801 (1949); State v. Hunter, 18 Wn. 670, 672-73, 52 P. 247 (1898). Washington courts have long held that the fact that the victim reported a sexual assault is admissible because it bears upon the victim's credibility. See, e.g., Murley, 35 Wn.2d at 237; Hunter, 18 Wn. at 672-73; State v.

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<sup>19</sup> Although the case law refers to the "fact of complaint" doctrine as a hearsay exception, evidence admitted under this doctrine is not actually hearsay. See ER 801(c) ("hearsay" defined as a statement offered to prove the truth of the matter asserted). As the name implies, "fact of complaint" evidence is not offered to prove the truth of the complaint. Indeed, the doctrine expressly prohibits the admission of any details regarding the complaint. Rather, "fact of complaint" evidence is admitted to prove only that a complaint was made. See State v. Pugh, 167 Wn.2d 825, 842, 225 P.3d 892 (2009) ("The fact that a complaint was made was considered to be original evidence, not hearsay.").

Alexander, 64 Wn. App. 147, 151-52, 822 P.2d 1250 (1992). The parameters of such testimony were described as follows by the court in 1940:

We think the rule in this and the majority of states is well established that, in cases of this kind, the prosecuting witness may testify that she made complaint after the assault, and where, to whom and under what circumstances, but she may not detail the story that she told in making such complaint; and the person to whom she made complaint may also testify that she complained, and may state the time, place, and circumstances under which the complaint was made, but not what she said concerning the circumstances and details of the assault.

State v. Smith, 3 Wn.2d 543, 550, 101 P.2d 298 (1940) (citing Hunter, supra, and State v. Griffin, 43 Wn. 591, 86 P. 951 (1906)).

These doctrines have traditionally required that the complaint be made virtually immediately after the sexual assault has occurred in order for testimony regarding the fact of the complaint to be admissible. See, e.g., Griffin, 43 Wn. at 598 (holding that "evidence of the complaint should be excluded whenever from delay or otherwise it ceases to have corroborative force"); Alexander, 64 Wn. App. at 151 (noting that "this narrow exception allows only evidence establishing that a complaint was timely made"). But the underlying rationale for this requirement is both antiquated and offensive, i.e., that a woman who really has

been raped would certainly raise her "hue and cry" immediately, and the failure to do so suggests that a rape did not occur:

If the witness be of good fame; if she presently discovered the offense, and made search for the offender; if the party accused fled for it; these and the like are concurring circumstances which give greater probability to her evidence. But on the other side, if she be of evil fame, and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to be committed, was where it was possible she might have been heard, and she made no outcry; these and the like circumstances carry a strong, but not conclusive, presumption that her testimony is false or feigned.

Griffin, 43 Wn. at 597-98 (quoting William Blackstone, 4 Commentaries, 213); see also Murley, 35 Wn.2d at 237 (noting that the "hue and cry" doctrine "rests on the ground that a female naturally complains promptly of offensive sex liberties upon her person," and thus, the failure to complain promptly supports an inference that the allegations are fabricated).

On the other hand, Washington courts have recognized that expert testimony regarding the fact that child sexual abuse victims often delay reporting their abuse may be properly admitted for the jury's consideration. State v. Graham, 59 Wn. App. 418, 422-25, 798 P.2d 314 (1990). Such evidence is admissible because it is helpful to the jury in assessing the victim's credibility -- the same

reason, incidentally, for admitting "fact of complaint" evidence. Id. at 425.

Accordingly, if expert testimony is admissible to explain that child sexual abuse victims often delay in reporting their abuse because such testimony bears on credibility, it makes little sense to perpetuate an antiquated rule that factual testimony regarding the circumstances of the victim's disclosure is relevant and admissible *only* if the victim's report is made immediately after the alleged sexual assault. Indeed, it is difficult to imagine a child sexual abuse case where evidence regarding the circumstances of the victim's disclosure would *not* be relevant to the issue of the victim's credibility--for either the prosecution or the defense. In short, the timing of a disclosure, where immediate or at a later date, is *always* relevant.<sup>20</sup>

Thus, it is not surprising that other jurisdictions have recognized this conundrum and rejected the timeliness requirement for "fact of complaint" evidence, especially in child sexual abuse cases. For example, in Woodard v. Commonwealth, 19 Va. App.

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<sup>20</sup> This is true with any crime, the timing and motive to report a crime is always relevant to both the prosecution and defense. In fact, in general practice, in non-sex cases, the fact of disclosure almost always is admitted without objection by either party.

24, 27-28, 448 S.E.2d 328 (1994), the 13-year-old victim did not report that the defendant had raped her until several months after the rape. Despite the delay, the trial court admitted evidence of the circumstances of her disclosures under Virginia's "recent complaint" rule. Woodard, 19 Va. App. at 26.

On appeal, the Virginia appellate court observed that the traditional "hue and cry" rule is "now discredited," and that evidence of the victim's complaint should be excluded for lack of timeliness only if the delay "*is unexplained or inconsistent with the occurrence of the offense.*"<sup>21</sup> Id. at 27 (emphasis in original). The court further noted that the issue of timeliness is addressed to the sound discretion of the trial court, and thereafter, is a matter for the jury to consider. Id. Moreover, in holding that evidence of the victim's complaint was properly admitted in spite of the delay, the court observed:

The victim's delay was not "unexplained" or "inconsistent with the occurrence of the offense." To the contrary, her delay is explained by and completely consistent with the all too common circumstances surrounding sexual assault on minors -- fear of disbelief by others and threat of further harm from the assailant. The decision whether to admit or suppress evidence of the fact of the victim's complaint of

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<sup>21</sup> Of course, in such a situation, the defense would likely seek to introduce the evidence and cross examine the victim concerning the disclosure.

Woodard's assault was a matter committed to the discretion of the trial judge, and upon its admission, the timeliness of the complaint became a matter for the jury to consider in weighing the evidence.

Id. at 28. See also State v. P.H., 179 N.J. 378, 393, 840 A.2d 808 (2004) (noting that "fresh complaint guidelines had to be applied flexibly to children who allegedly have been sexually abused in light of the reluctance of children to report a sexual assault and their limited understanding of what was done to them"); Commonwealth v. King, 445 Mass. 217, 242, 834 N.E.2d 1175 (2005) (observing that "the promptness requirement places the imprimatur of the court on the misimpression that most 'real' victims raise an immediate 'hue and cry'").

In sum, the antiquated and sexist aspects of the "fact of complaint" doctrine – the notion that a true rape victim would raise a "hue and cry" immediately – should not serve to bar the admission of otherwise relevant evidence. Rather, the far better approach is to abolish the immediacy requirement, as other jurisdictions have done, and address the admission of this evidence to the sound discretion of the trial court. This approach acknowledges the inescapable fact that the circumstances surrounding a sexual assault victim's disclosure is relevant

evidence, whether that disclosure is timely or not. This case is no exception.

Prior case law will not be followed if it is incorrect and harmful. In re Stranger Creek, 77 Wn.2d 649, 466 P.2d 508 (1970). A rule that is based on an antiquated and sexist belief that is not based on fact or reality is clearly wrong. And to keep relevant evidence from juries in sex cases based on such a rule is harmful, as these cases should be based on all relevant and admissible evidence.

**b. Abuse Of Discretion And Harmless Error.**

A decision to admit evidence lies within the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

The State concedes that if this Court adheres to the "immediately" component of the "fact of complaint" doctrine, that the trial court abused its discretion here. However, the erroneous admission of evidence may be harmless. The test for determining

whether erroneously admitted evidence requires reversal is whether, within reasonable probabilities, the trial's outcome would have been materially affected if the error had not occurred. State v. Braham, 67 Wn. App. 930, 939, 841 P.2d 785 (1992). In other words, the improper admission of evidence is harmless if the evidence is of minor significance in reference to the evidence as a whole. State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997).

Here, the defendant cannot prove that the fact of complaint evidence admitted was so prejudicial that reversal of his conviction is required. First, by law, the admission of evidence under the fact of complaint doctrine is quite limited. Under the doctrine, the victim/witness is allowed to testify that she made a complaint to someone of the assault. State v. Ferguson, 100 Wn.2d 131, 135, 667 P.2d 68 (1983). Evidence of the details of the complaint, including the identity of the offender and the nature of the assault, is not admissible under the doctrine. Ferguson, 100 Wn.2d at 135-36. The only evidence admissible under the doctrine is the fact

that a complaint was made, where and when the complaint was made and under what circumstances the complaint was made.

State v. Smith, 3 Wn.2d 543, 550, 101 P.2d 298 (1940).

Here, the admissible evidence consisted of AD making a complaint to her boyfriend, Patrick Jackson, some four years after AD last had contact with the defendant, and at the same time that AD got in trouble with Robert Jones for violating curfew. 5RP 35-36, 38; 7RP 181-83. The evidence cut both ways in this case-- with the defense able to argue fabrication due to Patrick and AD's testimony not being consistent (Patrick thought the disclosure occurred in the summer months, AD near Thanksgiving) and with AD disclosing only when she got into trouble at home, while the prosecution could argue after so long a period of time, AD had no motive to lie. In short, with the limited evidence admissible under the doctrine and the evidence being relevant to both parties, the defendant cannot show that there is a reasonable probability that the admission of the evidence affected the verdict.

**5. THE DEFENDANT'S CUMULATIVE ERROR CLAIM SHOULD BE REJECTED.**

The defendant contends that the cumulative effect of the errors alleged warrants a new trial, even if they do not justify a reversal individually. This claim should be rejected.

An accumulation of errors that do not individually require reversal may still deny a defendant a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). It is axiomatic, however, that to seek reversal pursuant to the "accumulated error" doctrine, the defendant must establish the presence of multiple trial errors and that the accumulated prejudice affected the verdict. Reversals due to cumulative error are justified only in rather extraordinary circumstances.<sup>22</sup> Here, as explained in the sections above, no error occurred that warrants a new trial, either individually or cumulatively.

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<sup>22</sup> See, e.g., State v. Perrett, 86 Wn. App. 312, 323, 936 P.2d 426 (police officer's comment on defendant's post-arrest silence, testimony regarding prior confiscations of defendant's guns, and trial court's exclusion of key witness's conviction for crime of dishonesty cumulatively warranted a new trial), rev denied, 133 Wn.2d 1019 (1997); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (prosecutor's remarks regarding personal belief in defendant's guilt, coupled with two instructional errors of constitutional magnitude, warranted a new trial).

D. CONCLUSION

For the reasons cited above, this Court should affirm the defendant's conviction.

DATED this 16 day of December, 2011.

Respectfully submitted,

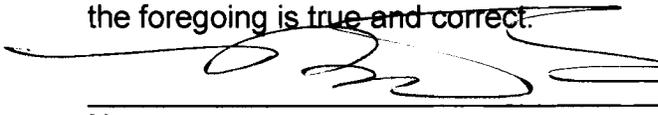
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lenell Nussbaum, the attorney for the appellant, at 2003 Western Avenue, Suite 330, Seattle WA 98121, containing a copy of the Brief of Respondent, in STATE V. WILSON, Cause No. 66826-9-1, 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.



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Name  
Done in Seattle, Washington

12-16-11  
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