

NO. 73580-2-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re Personal Restraint Petition of
BRIAN T. STARK,
Petitioner.

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State of Washington

STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

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A. AUTHORITY FOR RESTRAINT OF PETITIONER

The petitioner, Brian Stark, was convicted of multiple felonies for sex acts he perpetrated against his young stepdaughter, CW, over the span of nearly a decade. He is being restrained pursuant to a 180-month minimum-term sentence under King County Superior Court cause number 09-1-05650-8 KNT.

B. ISSUES PRESENTED

To obtain relief on a claim brought by way of a personal restraint petition, Stark must establish that there existed a constitutional error from which he suffered actual prejudice, or nonconstitutional error that inherently resulted in a complete miscarriage of justice. In re Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). To this end, Stark claims he can meet this high standard in raising the following issues:

1. Stark asserts that his trial counsel was constitutionally ineffective for failing to interview and call as a witness his nephew, Jeffery Stark, who would purportedly have testified (he is deceased) that he did not ride bikes with CW on some summer day when he was fourteen or fifteen years old.

2. Stark asserts that a "Petrich" or "unanimity" jury instruction, that he urged the court to give, constitutes an improper judicial comment on the evidence.

3. Stark asserts, and the State agrees, that count I, a charge of attempted first-degree child molestation, was filed after

the statute of limitations had run, and thus, the count must be vacated and Stark resentenced.

4. Stark asserts that his term of community custody on one count is too long, and that many of the sentencing conditions imposed by the trial court are improper. Because Stark must be resentenced and these issues may be resolved and/or not exist upon resentencing, the State will not address them further.

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On October 27, 2010, a jury found Stark guilty of the following charges: Attempted First-Degree Child Molestation (count 1), First-Degree Child Molestation (count 2), Incest (count 3), and Third-Degree Child Molestation (count 4). Petitioner's Exhibit 7. On December 17, 2010, Stark received a 180-month minimum-term indeterminate sentence. Petitioner's Exhibit 8.

Stark filed a direct appeal under Court of Appeals number 66766-1-I. On January 14, 2013, this Court affirmed Stark's conviction. Petitioner's Exhibit 9. After the Supreme Court denied review, on March 7, 2014, this Court issued a mandate terminating review. Petitioner's Exhibit 11 and 12.

2. SUBSTANTIVE FACTS

CW, a high school senior, was just 17 years old at the time of trial. RP 194, 196. For most of her young life, CW was

subjected to being sexually abused by her stepfather, the petitioner, Brian Stark. At the time of trial, CW lived with her grandparents, Nancy and Rick Weiss, because CW's own mother, Danelle Stark, did not believe that Stark¹ was sexually abusing her daughter, and thus, Danelle had not had any contact with CW for over two years. RP 195, 695.

Danelle became pregnant with CW when she was just 19 years old. RP 643. CW's biological father was not a part of her life. RP 252.

CW met Stark when she was five years old and Danelle and CW were living with CW's grandparents in Renton. RP 200-01. After only a single month of dating, Danelle moved herself and CW into Stark's home. RP 201, 645. Shortly thereafter, the three of them moved to the Benson Hill Apartments in Renton where they resided for approximately one year. RP 201-02.

CW testified that at first Stark was really nice, he would buy her things, take her and her mother out all the time and he was just fun to be around. RP 209. However, there was one incident that

¹ First names will be used for many of the witnesses to avoid confusion due to shared last names. No disrespect is intended. The petitioner will be referred to as Stark or Brian Stark.

occurred at the Benson Hill Apartments that was not fun for CW.
RP 211.

One day, when CW was six years old, she stayed home from school pretending to be sick. RP 211. It was just her and Stark at home because Danelle had to work. RP 211. At one point, CW went into Stark's bedroom to ask about breakfast. RP 211. CW testified that she did not remember exactly how the events transpired but she remembers that she ended up on the bed, that Stark made her take off her underwear and made her spread her legs for him. RP 210-11. Asked what specifically Stark did then, CW says she could not remember for sure, but "I think he just looked." RP 213.² CW did not tell anyone what had occurred because she was scared, and because Stark had told her that Danelle would be mad at her. RP 214-15. This act constituted the charged conduct for count 1. RP 877.

After approximately a year at the Benson Hill Apartments, the family moved to Spanaway for three years until CW was nine or ten years old. RP 204. While Stark sexually abused CW multiple times in Spanaway, being outside King County, the acts were not charged. RP 215-17, 849-51. Instead, evidence of the sexual

² A decade later, when CW finally disclosed the abuse, she said that Stark had touched her between the legs. RP 601.

abuse that occurred in Spanaway was admitted at trial for the limited purpose of showing Stark's lustful disposition for CW; and the jury was so instructed. RP 37-38; Appendix 1 (Jury Instruction # 6).

CW testified that usually Stark would take her into his room, put her on the bed, cover her eyes with a blanket, spread her legs and touch her. RP 217. CW believed Stark used his finger but she wasn't sure. RP 217, 212. She was not sure if Stark ever stuck his penis inside her, although she testified that there would be a warm liquid on her legs after Stark was done. RP 220-21. After one such occasion, CW testified, her vagina hurt so bad that it caused her to limp. RP 220-21. By this point in time CW was so "brainwashed" by Stark, and so fearful, that she did not tell anyone that she was regularly being sexually assaulted. RP 216.

At age nine or ten, the family moved into CW's grandparents' home for a few months while a house they were having built in Maple Valley was completed. RP 204-06. No sexual abuse occurred at the grandparents' house because, as CW put it, there were too many people around. RP 222, 230.

In January of 2004, the family moved into their new Maple Valley home. RP 206, 648. CW was ten years old at the time. RP

206. This is the location and time period where the other three charged acts of sexual assault occurred. RP 877-79.

While the abuse began anew once the family moved into the Maple Valley home, the abuse was less frequent than it had been before. RP 230. CW testified extensively about three specific acts of sexual abuse that occurred at the Maple Valley home, with the prosecutor electing each act as the evidence supporting counts 2, 3 and 4. RP 877-79.

One incident occurred just after the family moved into their Maple Valley home in January of 2004. RP 241, 648. There were still a number of houses under construction in the neighborhood and one day, while CW and her cousin, Jeffery Stark, were riding bikes, Stark sent Jeffery back to the house. RP 241-43. Stark then took CW inside one of the half-completed homes using the ruse that he wanted to show her the inside of the house. RP 241-43. Once inside, Stark pulled CW's pants down and rubbed her vagina with his finger. RP 242, 244.

A second incident occurred while CW was lying on her bed watching TV. RP 213. Stark came into her room, made her take off her pants and underwear and he then licked her vagina.

RP 231. CW was 11 or 12 years old when this incident occurred.

RP 232.

A third incident occurred when CW was 14 years old and just about to enter the 9th grade. RP 235. CW was sitting on the couch watching a movie when Stark approached her, pinned her down and tried to take CW's pants off. RP 234. Although CW tried to fight Stark off, Stark was able to get CW's pants and underwear off and then he tried to stick his penis inside her. RP 234. Failing in his attempts, and with CW crying and yelling, Stark gave up, threw CW's clothes at her and told her to go take a shower. RP 234-38.

CW did not go this entire time without seeking help. When CW was seven or eight years old, she did seek help from her mother, but to no avail. RP 222. Danelle and CW were driving in the car when CW told Danelle that Stark had been touching her. RP 223. CW added, however, that she wasn't sure if he really was touching her or if it was just a dream. RP 223. Asked why she told her mother that it was possibly a dream, CW testified that she was afraid, she feared that Danelle would be mad at her and that she

would lose her brother³ and her family – all things Stark told her would happen if she disclosed the abuse. RP 223-24.

Danelle's reaction to her daughter's disclosure was to chide CW, telling her that it was a serious accusation and if CW wasn't sure about it, she did not know what she was supposed to do about it. RP 225.

In December of 2007, CW made another attempt to tell someone that she was being sexually abused by Stark; she told her cousin, Ashley Hughes. RP 255, 257, 478-82. Although CW asked Ashley not to tell anyone, Ashley told her mother, Lori Neilson, who is Nancy Weiss' sister -- CW's grandmother. RP 258, 482, 500, 529, 532. CW then disclosed the abuse to Lori and Nancy. RP 532-33. The next thing CW knew, she was getting off of cheer practice and her mother was waiting for her – angry. RP 260-61.

CW was then taken to her grandparents' home where she remained for the next three days. RP 262-63. Danelle did not ask her any questions about what Stark had been doing to her. RP

³ At this point, Danelle and Stark had had a child together, a son, approximately seven years younger than CW. RP 200, 642, 646.

261. In fact, over those three days, Danelle never contacted or spoke with CW. RP 262-63.⁴

After those three days, Danelle came and got CW and took her back home. RP 263-64. CW testified that Danelle was being really nice to her, and that when Stark saw her (CW), he gave her a hug. RP 264. Asked if she ever again tried to tell her mother about the abuse, CW said no and explained, why would she try again when her mother did nothing the other times she tried to tell her she was being sexually abused. RP 265.

During this time period, CW developed bulimia and a self-cutting problem. RP 265-66. CW testified that she just felt "so numb," that cutting herself reminded her that she still had feelings. RP 265-66.

CW's best friend during this time period was a classmate, KJ. RP 254. CW spent a great deal of time hanging out over at KJ's house (rarely did they go to CW's house), including having many sleepovers at KJ's house. RP 76, 254.

On New Year's Eve of 2008, the two girls were in KJ's bedroom when KJ showed CW a web site called Post-a-Secret

⁴ Lori testified that she did not call the police because she thought Nancy would. RP 544. Nancy testified that she never called the police either. RP 448. "Looking back," she testified, "you just don't know what to do." RP 448. Nancy did say that Danelle agreed never to let CW be alone with Stark again. RP 448.

where you could anonymously post a secret about yourself.

RP 79-82, 255, 273. Proclaiming that she wanted to post a secret, CW began to write out on a piece of paper what she was going to post. RP 255, 269. On the piece of paper CW wrote "He's molested and raped me since I was 6. Just don't try to save me. My mom won't listen anyways." RP 85; Appendix 2.⁵

Although CW did not want to show KJ what she had written, at KJ's urging, she finally did. RP 83-84. CW then started crying and told KJ that it was Stark who had been sexually abusing her. RP 85. CW pleaded with KJ not to tell anyone. RP 86, 273-74.

About a week later, unable to bear the burden of carrying CW's secret, KJ showed her mother, Robin Jordan, the piece of paper. RP 87, 130. Robin testified that she was stunned and did not know exactly what to do. RP 131. After a few weeks, Robin met with CW whereupon CW, in tears, disclosed to Robin that she had been sexually abused by Stark since she was a young child. RP 90-91, 132-35.

Initially, Robin or KJ did not do anything with the information they possessed. Robin and KJ both testified that they waited to

⁵ The paper also contained the scratched-out lines, "I don't deserve what he did," "I had trust" and "He's molested and." Appendix 2. These were CW's initial attempts at composing the secret she intended to post. RP 111.

disclose what CW had told them in part because they struggled with figuring out what do to and who to tell. RP 113, 136-39. They finally decided to tell someone because nobody else seemed to be doing anything to help CW. RP 105. As a result, on April 16, 2009, Robin and KJ went to the school counselor, Mike Hansen, and told him what CW had disclosed to them. RP 103, 140-41, 157. With Robin and KJ still in his office, Hansen pulled CW from class and brought her back to his office. RP 141. When CW saw Robin and KJ, she burst into tears. RP 92-93, 142, 286. CW then confessed to Hansen that Stark had been sexually abusing her since the age of six. RP 160, 167, 286.

As a mandatory reporter, Hansen notified CPS and the police. RP 155, 160-61, 166. That same day, a sheriff's deputy met with CW and she again disclosed that Stark had been sexually abusing her. RP 172-88, 286-87.

Just a week prior to Robin and KJ's disclosure to Hansen, another incident had happened at home with CW. It was Easter weekend 2009 and CW was going to be spending the weekend at her grandparents' home because Stark and Danelle both had to work. RP 276-77. CW was asleep in bed Saturday morning when she was awakened by the feel of someone pulling the covers off of

her – it was Stark. RP 277. In her words, she “freaked out,” thinking that the abuse was going to start all over again. RP 277-78.

The next day, with the extended family gathered to celebrate Easter, CW asked her cousin Ashley if she could speak to her privately. RP 279, 451, 486. Bawling her eyes out, CW told Ashley that Stark had brushed the covers off of her, rubbing her down. RP 279, 451, 486. CW told Ashley, “I can’t let this happen to me again.” RP 488. Lori Neilson and Nancy Weiss then talked with CW and she disclosed the abuse to them. RP 280-81, 547-50.

When Danelle arrived at the house after work to pick up CW, Nancy told Danelle about CW’s disclosure. RP 452. Instead of being concerned that her daughter may be a sexual assault victim, Danelle flew into a rage, disbelieving CW without even talking to her, and screaming and yelling at her own mother, claiming that this was what Nancy always wanted. RP 452-53, 468. Danelle then took CW home to pack up some of her belongings whereupon she drove CW back over to Nancy’s house, dropped her off and where CW has remained ever since. RP 282-83.

Since being dumped off at her grandmother’s house, CW has had no contact with her mother with the exception of a single

phone call. RP 295. By the time of trial, CW had been undergoing therapy for abuse of about a year and a half. RP 292.

Danelle testified for the defense. RP 641. Danelle claimed that CW used to call Stark "dad," that they were "pals" who got along really well -- a "normal father-daughter relationship." RP 657. She admitted that Stark would give CW backrubs in CW's bedroom but that when she would walk by the room, Stark would simply be lying on top of the covers rubbing CW's back or massaging her shoulders and the covers might have been pulled down to CW's waist. RP 654. "My dad rubbed my back a million times; it didn't seem out of normal," she testified. RP 654. Danelle also claimed that Stark had *never* been alone with CW at the Benson Apartments, and that if CW had been sick, she would not have stayed home, she would have been taken over to her parents' house. RP 656.

Danelle admitted that when CW was young CW had told her that Stark had been touching her -- prefaced with CW's statement about it possibly having been a dream. RP 665-67. Danelle testified that when CW made this disclosure, she did not believe her. RP 665-67. Danelle blamed CW's "disclosure" on CW's grandfather, claiming that he had been talking to CW about

inappropriate touching. RP 665. Danelle testified that she did not tell Stark about CW's disclosure because she did not want to hurt his feelings. RP 667.

Danelle confessed that when she first learned of CW's subsequent disclosure in December of 2007, she did not even ask CW what happened before leaving CW at CW's grandparents' house for three days. RP 671-72. Danelle then went home and told Stark about the disclosure to which, Danelle testified, Stark started crying and asked how it was possible that CW could say that he would ever do anything like that to her. RP 673.

Three days later Danelle finally spoke with her daughter, although instead of asking what had happened to her, Danelle simply asked her whether this was just "another story." RP 676. CW told Danelle that it was the truth, Stark had been molesting her, but Danelle would not believe it. RP 676, 679. Danelle testified that CW had "no credibility" with her. RP 676, 723-24.

Then, instead of trying to figure out how to deal with the situation, Danelle repeatedly questioned CW about whether she wanted to come home or not. RP 677-78. Wanting to be with her mother and her brother, but afraid of what was going to happen, CW was hesitant. RP 677-80. Danelle told CW that Stark was not

mad at her, that he loved her, and that she would not get into any trouble. RP 678. CW ultimately agreed to come back home. RP 677-80.

After Danelle agreed with CW's grandmother not to allow CW to be home alone with Stark, Danelle took CW home. RP 681. When asked why, if she did not believe anything was happening, Danelle responded, "I don't know." RP 728.

Danelle testified that when she and CW arrived home, Stark and CW hugged and cried for five minutes, Stark told CW that he loved her, and the matter was never spoken about again. RP 682. She claimed that CW never shied away from Stark or tried to avoid being alone with him. RP 683.

In regards to Easter of 2009 when Danelle arrived at her parents' home to pick up CW after yet another disclosure of abuse, Danelle admitted that she "overreacted," screamed at her parents, and told CW that she was going to have to face Stark because "this ends now." RP 693-94, 741-42. She testified that she then took CW home but claimed that she could not remember whether CW and Stark addressed the situation. RP 694. In any event, Danelle had CW pack her things and then she dropped her off at CW's grandparents' house. RP 694-95.

Stark testified and said that initially his relationship with CW was good. RP 758, 765. He professed that he was never alone with her, never babysat her, never took care of her and never remembers her staying home sick. RP 758, 765. He admitted to giving CW backrubs but said that he only did so because CW asked him to. RP 777-80. Stark claimed that he never gave CW a backrub when Danelle was not home. RP 777-80. While admitting that when the family moved to Maple Valley he did go inside some of the unfinished homes with the kids, he said that he never went into one of the houses alone with CW. RP 780-82.

Stark asserted that he had never been told about CW's first disclosure to Danelle. RP 789. When he learned of CW's subsequent disclosure made in December of 2007, Stark testified that when CW came home she fell into his arms crying and they hugged. RP 788. He never said anything to CW about the allegations because he knew that inside CW was sorry for what she had done. RP 788-89. He said that there were no conflicts between the two of them prior to the 2007 disclosure. RP 823-24. Still, according to Stark, he tried not to be alone with CW and was afraid to discipline her out of fear that she would make false allegations against him again. RP 795.

In regards to Easter weekend of 2009, Stark claimed that he remembered that on the Saturday morning he went in to wake CW up and that he simply nudged her on her shoulder but that he did not pull back the covers. RP 802, 805. He claimed that he did not learn of CW's Easter weekend disclosure until after Robin Jordan and KJ went to the school counselor days later, at which point he said he was "very disheartened." RP 807-08.

Additional facts are included in the sections below they pertain.

D. ARGUMENT

1. STARK'S CLAIM THAT HIS TRIAL COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO INTERVIEW OR CALL AS A "WITNESS" HIS NEPHEW, JEFFERY STARK (NOW DECEASED), HAS NO MERIT

Shortly after Stark was sentenced, Stark's wife, Danelle, provided the trial court with a letter that she purported was written by Stark's nephew, Jeffery Stark (who is now deceased), and that she purported helped prove that Stark was innocent. Stark now claims that his trial counsel was constitutionally ineffective for failing to interview or call Jeffery Stark as a witness. This claim has no merit. Even if the letter provided by his wife actually is a letter

written by Jeffery Stark, and even if the facts contained in the letter are true, Jeffery Stark appears to have had no relevant information and would likely not have even been allowed to testify.

a. The Relevant Facts

Trial occurred in October of 2010. Stark was sentenced in December of 2010. CW was 17 years old at the time of trial. RP 195.

One of the acts of sexual assault CW testified about occurred when she was 10 years old and the family had just moved into the Maple Valley home that they had built for themselves. RP 206-07, 231, 241. This would have been in January of 2004. RP 207, 648, 768. When they moved into their home, other houses in the neighborhood were still under construction. RP 241, 660.

CW testified that it was a winter's day and starting to get dark outside when she and Jeffery were riding bikes. RP 242. CW testified that Jeffery was 13 years old at the time. RP 242. At some point, Stark asked Jeffery to go on back to the house. RP 243. CW testified that Stark then took her into one of the partially constructed homes where he sexually assaulted her. RP 241-46.

Danelle Stark *never* believed that her husband sexually abused CW. RP 665-67, 676, 679, 723-24, 742. She did not believe CW when she made her disclosures or at any other time. Id.

Shortly after her husband was sentenced, Danelle provided the trial judge, Stark's trial counsel, and the prosecutor, with a letter that she purported was mailed to her and written by Jeffery Stark, Stark's nephew, and that the letter helped prove that her husband was innocent. Appendix 3; Petitioner's Exhibit 14. The letter is handwritten, undated, unsworn, is not notarized, no envelope was provided along with the letter, and no person claims to have witnessed the letter being written or sent. Id. Jeffery is now deceased. Petitioner's Exhibit 14. The letter reads as follows:

To whom it may concern,

Approximately when I was 14 or 15 I stayed the night with my uncle Brian and he bought me a baseball mit [sic] made by Nike at Target and that night we watched TV and I slept on the couch and the next day I played with my cousins outside, right out front. What I remember is Brian mowing the lawn and then I went home. The allegations that [CW] made are false because we never went on a bike ride and Brian never told me to go home. There was no home unbuilt that we went to and that is the truth. I will testify under oath that the allegations are false that I was not there and he never said that to me.

Appendix .⁶

b. Stark Fails To Make A Prima Facie Showing Of Actual Prejudice

Where a petitioner fails to make a *prima facie* showing of actual prejudice for alleged constitutional errors; or, a fundamental defect resulting in a complete miscarriage of justice for alleged nonconstitutional errors, a reviewing court must dismiss the petition. In re Yates, 177 Wn.2d 1, 17-18, 296 P.3d 872 (2013). A reference hearing will not even be ordered unless a petitioner can make the required *prima facie* showing, the merits of the contentions cannot be determined solely on the record, and it appears the factual claims can be determined at a hearing. Id.; RAP 16.11(b).

To establish a *prima facie* showing, a petitioner must offer “the facts underlying the claim of unlawful restraint and the evidence available to support the factual allegations.” Id., at 18. “Bald assertions and conclusory allegations” are insufficient. Id., (citing In re Lewis, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992)). For “matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to

⁶ The letter is signed but the signature is illegible.

establish the facts that entitle him to relief.” Id. If the “evidence is based on knowledge in the possession of others,” the petitioner may either “present their affidavits” or present evidence to corroborate what the petitioner believes they will reveal if subpoenaed. Id. The corroboration must be more than mere speculation or conjecture. Id.

Here, Stark claims actual prejudice based on a claim of ineffective assistance of counsel. Specifically, Stark claims his trial counsel was constitutionally ineffective, and he was suffered actual prejudice, because his trial counsel did not interview or call as a witness his nephew, Jeffery Stark.

To prevail in a claim of ineffective assistance of counsel, a defendant must show (1) that “counsel’s representation fell below an objective standard of reasonableness” and (2) that “the deficient performance prejudiced the defense.” Strickland v. Washington, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). At to step one, to establish deficient performance, a defendant must overcome the “strong presumption that counsel’s conduct” was reasonable. Yates, at 36 (citing Strickland, 466 U.S. at 689). A reviewing court will evaluate counsel’s conduct by its reasonableness at the time the conduct was undertaken. Id. As to

step two, to establish prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id.

Constitutionally adequate assistance of counsel does require that counsel conduct “a reasonable investigation” so that counsel can make informed decisions about how best to represent the client. In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). The duty to investigate, however, “does not necessarily require that every conceivable witness be interviewed.” In re Davis, 152 Wn.2d 647, 739, 101 P.3d 1 (2004). At a minimum, a defendant seeking relief under a “failure to investigate” theory must show a reasonable likelihood that the investigation would have produced useful information not already known to defendant’s trial counsel. Id. Moreover, even if a defendant can show that exculpatory evidence unknown to trial counsel would have been uncovered by further investigation or interview, the court must still consider whether counsel’s deficient performance prejudiced his client. Id.

While there are a plethora of challenges that could be raised regarding Stark’s “evidence,” the handwritten letter purportedly written by Stark’s deceased nephew and provided to the court by

Stark's wife, the most obvious flaw in Stark's claim is that the letter provides no evidence relevant to his case.

CW testified that she was sexually assaulted by Stark in January of 2004, just after the family moved into their Maple Valley home. RP 206-07, 241-42.⁷ CW testified that she was 10 years old at the time. RP 231.⁸ Jeffery was either 12 or 13 years old at the time CW testified she was sexually assaulted by Stark.⁹

In contrast, Jeffery's letter refers to a time period that would have been two to three years later. Specifically, according to Jeffery's letter, he was 14 or 15 years old at the time of the events he is referring to in his letter. In other words, Jeffery's letter and CW's testimony refer to completely different periods of time.

This is further demonstrated by the fact that Jeffery appears to be referring to a completely different season of the year. CW testified that it was a January winter's day and it was already getting dark outside when the incident occurred. RP 206-07, 241-42. In contrast, Jeffery's letter describes how they went to a Target

⁷ In testifying, Danelle and Stark both confirmed that the family moved into their Maple Valley home in January of 2004. RP 648, 768.

⁸ CW was born August 17, 1993. RP 195. Thus, her testimony as to her age upon moving into the Maple Valley home was accurate.

⁹ Danelle testified that Jeffery was either two or three years older than CW. RP 661. CW testified that she believed Jeffery was 13 years old at the time. RP 242.

store and Stark bought him a baseball mitt. Afterward, Jeffery's letter indicates that Stark was outside mowing the lawn while he was outside playing with his "little cousins." This hardly describes actions that generally occur in the dead of winter.

Moreover, the events that CW described occurring on the day that she was sexually assaulted do not match at all with what is described in Jeffery's letter. Along with claiming they went to a Target store and Stark bought Jeffery a baseball mitt, Jeffery's letter asserts that he spent the night, slept on the couch, and that they watched television that evening. CW did not testify that a single one of these things occurred on the day she says she was sexually assaulted by Stark.

In short, there is nothing in Jeffery's letter tying the event he describes in his letter to the event CW testified about. In fact, assuming that the facts in Jeffery's letter are true, the facts contained in the letter do not contradict, impeach or call into question any of CW's testimony. In other words, Jeffery's possible "testimony" would have been irrelevant and inadmissible. See ER 401, 402 and 403. As a result, Stark cannot show actual prejudice from counsel's decision not to interview or call Jeffery Stark as a witness.

Additionally, Stark cannot show that counsel's failure to interview Jeffery Stark fell below an objective standard of reasonable performance. First, Stark's trial counsel – in a sworn declaration, states that his memory is that there was "some external barrier" to him interviewing Jeffery but he cannot recall specifically what it was. Petitioner's Exhibit 16. In contrast, Stark asks this Court to presume that there was no barrier existed based on Stark's wife and his sister-in-law's belief that there was none. This is pure speculation and as such, it is insufficient.

More directly, Jeffery was never a witness who could testify that Stark did not sexually abuse CW. At the very most, Jeffery could have testified about an innocuous event, something that occurred or did not occur six years prior and that there would have been no reason for him to remember because it would have been completely inconsequential to him. Specifically, taken in the light most favorable to Stark (and in contrast to Jeffery's letter), Jeffery could have testified that he had no memory of riding bikes with CW when he was only 12 or 13 years old – an event that would have, at the time of trial, occurred six years prior.

The trial court record is clear; Stark's trial counsel conducted recorded interviews of all the State's main witnesses. It is also

clear that counsel's trial tactic was to impeach CW with the inconsistencies in the dozen plus statements and disclosures she made prior to trial. The single fact that counsel did not interview a clearly collateral witness cannot be said to be unreasonable at the time; that it rose to the level of being unconstitutionally ineffective. Stark has failed in his burden to prove actual prejudice and unreasonable performance. See Harrington v. Richter, 562 U.S. 86, 111-12, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) ("The likelihood of a different result must be substantial, not just conceivable.") (citing Strickland, 466 U.S. at 693).

2. THE "PETRICH" OR "UNANIMITY" INSTRUCTION GIVEN BY THE COURT WAS NOT A COMMENT ON THE EVIDENCE

In situations wherein for any single count charged, the State presents evidence of more than one distinct criminal act that could support the charge, there is a danger that a conviction may not be based on a unanimous jury finding that the defendant committed any particular single criminal act. State v. Kitchen, 110 Wn.2d 403, 411, 756 P.2d 105 (1988). Where such a situation exists--where there are multiple acts that could support the charge, to ensure jury unanimity, (1) the State must "elect" a single act upon which it will

rely for conviction, or (2) the jury must be instructed that all jurors must agree as to what act or acts were proved beyond a reasonable doubt. State v. Petrich, 101 Wn.2d 566, 569, 683 P.2d 173 (1984), overruled in part on other grounds by Kitchen, supra. Such an instruction is commonly referred to as a “unanimity” or “Petrich” instruction. State v. Huckins, 66 Wn. App. 213, 836 P.2d 230 (1992), rev. denied, 120 Wn.2d 1020 (1993).

Here, the court gave the following unanimity jury instruction:

Evidence has been produced suggesting that the defendant committed acts of Child Molestation in the First Degree and Incest in the First Degree on multiple occasions. A separate crime is charged in each count. To convict the defendant on the count of Child Molestation in the First Degree, one particular act of molestation must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. To convict the defendant of the count of Incest in the First Degree, one particular act of sexual intercourse must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of child molestation or incest.

Appendix 1 (Jury Instruction 22).¹⁰

¹⁰ In reality, the trial court was not required to give a unanimity instruction. In closing argument, in no uncertain terms, the prosecutor made a clear election and told the jury which specific act pertained to each count -- a single act for each count. When this occurs, no unanimity instruction is necessary. See RP 877-79, 894-95; and State v. Thompson, 169 Wn. App. 436, 474-75, 290 P.3d 996 (2012) (“[b]ecause [in closing argument] the State clearly identified the act upon which the sexual motivation allegation was based,” “no unanimity instruction was necessary”), rev. denied, 176 Wn.2d 1023 (2013); In re Delgado,

Stark claims that this instruction clearly conveyed to the jury that Judge Andrea Darvas personally believed that he was guilty of child molestation and incest and/or that he had committed acts of molestation and incest on multiple occasions. Therefore, Stark claims, because Judge Darvas impermissibly expressed her personal beliefs to the jury, his convictions must be reversed. This claim should be rejected. Read as a whole and in a commonsense manner as required, the jury instructions properly conveyed to the jurors that it was their duty alone to weigh the evidence, to determine if the State had met its burden to prove each charge beyond a reasonable doubt, and that the jurors had to be unanimous as to a single act for each count. It is only by adopting a strained interpretation of a limited portion of the instructions, an interpretation that his trial counsel, the trial judge, and Stark's appellate counsel on direct review did not share, that Stark can make this argument.¹¹

160 Wn. App. 898, 902, 251 P.3d 899 (2011) (charged with two counts of child rape, the prosecutor "clearly elected ... the criminal acts associated with the two counts during its closing arguments").

¹¹ Stark's trial counsel did not raise a "comment on the evidence" objection to the instruction. See RP 849-54, 868-69. In fact, while the prosecutor stated that he did not believe a unanimity instruction should even be given, Stark's trial counsel specifically stated that he had no objection to the proposed instruction. RP 851, 853-54, 869. On direct appeal, while Stark's appellate counsel did raise issues pertaining to the jury instructions, he too apparently did not view the instruction as a comment on the evidence as he did not raise this issue.

Under article IV, section 16 of the Washington State Constitution, a judge is prohibited from commenting on the evidence presented at trial.¹² This prohibition is intended to prevent a trial judge from influencing a jury by interjecting his or her personal opinion about the evidence. State v. Lampshire, 74 Wn.2d 888, 892, 447 P.2d 727 (1968). To constitute a comment on the evidence, it must readily appear that the court's attitude toward the merits of the case have been conveyed to the jury. State v. Cerny, 78 Wn.2d 845, 856, 480 P.2d 199 (1971) (citing State v. Brown, 31 Wn.2d 475, 197 P.2d 590 (1948)). The touchstone of error is whether the personal feelings of the trial judge as to the truth-value of the testimony of a witness or the validity of the case, have actually been communicated to the jury. State v. Lane, 125 Wn.2d 825, 838-39, 889 P.2d 929 (1995). Whether certain words amount to an impermissible comment on the evidence is determined by looking at the particular circumstances of the case as a whole. State v. Knapp, 14 Wn. App. 101, 113, 540 P.2d 898 (citing State v. Jacobsen, 78 Wn.2d 491, 477 P.2d 1 (1970)), rev. denied, 86 Wn.2d 1005 (1975).

¹² "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." Const. art. IV, § 16.

Here, along with the unanimity instruction cited above, the court also explained the law to the jury regarding the impropriety of a judge commenting on the evidence. The court provided the jury with the following directives:

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. ***If it appeared to you that I have indicated my personal opinion in any way, either during the trial or in giving these instructions, you must disregard that apparent comment entirely.***

Appendix 1 (Jury Instruction 1) (emphasis added).

The court further instructed that:

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. . . You must apply the law from my instructions to the facts. . . Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

Appendix 1 (Jury Instruction 1).

Similarly, the court told the jurors that they were the “sole judges of the credibility of each witness,” that they must “consider the evidence impartially,” and that Stark was “presumed innocent” unless they found that this presumption “had been overcome by the evidence beyond a reasonable doubt.” Appendix 1 (Jury Instructions 1, 2 and 5).

When it comes to jury instructions, the instructions must be read as a whole and in a straightforward and commonsense manner. State v. Pittman, 134 Wn. App. 376, 383, 166 P.3d 720 (2006), abrogated on other grounds by State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011). A court will not assume a strained reading of an instruction. State v. Moultrie, 143 Wn. App. 387, 394, 177 P.3d 776, rev. denied, 164 Wn.2d 1035 (2008). Rather, instructions are sufficient if they are readily understood and not misleading to the ordinary mind. State v. Meneses, 169 Wn.2d 586, 592, 238 P.3d 495 (2010).

Any jury instruction that limits or directs a jury on how to treat certain evidence must in some manner identify that evidence. For example, when a defendant's prior convictions are admitted into evidence for impeachment purposes, jurors are instructed that "[y]ou may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give to the defendant's testimony, and for no other purpose." WPIC 5.05. This is not a judicial statement that the defendant has a prior conviction, or that the judge believes the defendant has a prior conviction. At trial, the defendant may deny that he has a prior conviction, and the instructions, when read as a whole and in

a commonsense manner, tell the jurors that they must determine whether there is credible evidence showing that the defendant has a prior conviction and that they can consider that evidence for only a limited purpose.

Similarly, when a statement of a co-defendant is admitted into evidence, jurors are instructed that “[y]ou may consider a statement made out of court by one defendant as evidence against that defendant, but not as evidence against another defendant.”

WPIC 6.42. Such an instruction does not convey to the jurors that the judge believes the co-defendant actually made the out of court statements.¹³

Here, although a different choice of words could have been used in Instruction 22, read in a commonsense manner and in conjunction with all of the other instructions, Instruction 22 simply refers to what type of evidence the instruction pertained, i.e., evidence of other acts of molestation or incest, and how the jurors could consider that evidence. The instruction was not an expression of whether Judge Darvas believed Stark was guilty or

¹³ There is a generic WPIC limiting instruction that can be used for a variety of evidentiary situations. The instruction provides as follows: Certain evidence has been admitted in this case for only a limited purpose. This [evidence consists of and] may be considered by you only for the purpose of [_____]. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation. WPIC 5.30.

that he had committed any criminal act; the instructions made clear that was for the jury to decide.

While Stark seeks to focus on just a few words in a single instruction and wants those words viewed in isolation, the fallacy of his argument is clear upon the answering of a single question: Where jurors are instructed that (1) the judge is prohibited from commenting on the evidence, (2) the judge did not intentionally do so, and (3) if there was something that was said that might appear to be an expression of the judge's opinion, the jurors must disregard it,¹⁴ would a reasonable juror reading Instruction 22 in a commonsense manner and as a whole really believe that Judge Darvas was expressing her personal opinion that Stark molested CW. Or, would a reasonable juror reading the instructions in a commonsense manner and as a whole believe that instruction 22 merely directed the jurors to certain evidence that was admitted -- not telling the jurors that the evidence was true or that Judge Darvas believed the evidence was true, and instructing the jurors on what they could do with that evidence.

A petitioner bears of burden of proving his claim. In re Davis, 152 Wn.2d at 671-725. Asking the court to assume jurors

¹⁴ Jurors are presumed to follow instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

adopted a strained interpretation of the instructions, an interpretation that would be in conflict with the court's instruction that judges do not comment on the evidence, is insufficient to garner relief. See e.g., State v. Ciskie, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988) (finding no error where the trial court instructed the jury that the law does not permit the judge to comment on the evidence and that if it appears that the judge did so, the comment must be disregarded).

In addition, Stark may not simply rely on speculation to prove prejudice. In order to prevail in a personal restraint petition, Stark is required to satisfy the actual and substantial prejudice standard required to prevail via a collateral attack. In re Stockwell, 179 Wn.2d 588, 602-03, 316 P.3d 1007 (2014). The jury heard extensive testimony from CW, the other State's witnesses, Stark and his wife. The prosecutor and Stark's counsel focused on the evidence presented in arguing credibility, just as the jury instructions informed the jurors was their duty. Stark asks this Court to adopt his strained interpretation of the instructions and then presume the jury was actually influenced by the few words in the instruction. This is insufficient to prove *actual* prejudice.

And finally, if there were any error here, it was invited. The invited error doctrine prohibits a party from setting up an error at trial and then challenging that error on appeal. In re Coggin, 182 Wn.2d 115, 119, 340 P.3d 810 (2014); State v. Carson, 179 Wn. App. 961, 973, 320 P.3d 185 (2014), aff'd, ___ P.3d ___, 2015 WL 5455671 (2015). While Stark did not propose the challenged instruction, he did more than simply fail to object, he affirmatively indicated it was a proper instruction for the court to give. RP 849-54, 868-69. See State v. Winings, 126 Wn. App. 75, 89, 107 P.3d 141 (2005) (under the invited error doctrine, even where constitutional rights are involved, the court is precluded from reviewing jury instructions when the defendant has proposed an instruction or agreed to the language of the instruction given by the court), accord, In re the Detention of Gaff, 90 Wn. App. 834, 845, 954 P.2d 943 (1998).¹⁵

¹⁵ As with all the issues raised by Stark, in an attempt to avoid waiver claims and his burden to prove prejudice via a personal restraint petition, Stark makes an all-encompassing generic claim that his trial counsel and his appellate counsel on direct appeal were both constitutionally ineffective for either failing to object before the trial court to every issue raised or for failing to raise the issues in his direct appeal. Stark's claim is not persuasive.

First, it is insufficient to simply posit that when an attorney fails to raise a claim on appeal or fails to object at trial, he is necessarily constitutionally ineffective. Bare allegations of this type, unsupported by persuasive reasoning or authority cannot sustain a defendant's burden. State v. Brune, 45 Wn. App. 354, 363, 725 P.2d 454 (1986), rev. denied, 110 Wn.2d 1002 (1988), accord, In re Rosier, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986) (Naked castings into the

3. COUNT 1 OF THE AMENDED INFORMATION WAS FILED AFTER THE STATUTE OF LIMITATIONS HAD RUN

The State concedes that count 1 of the amended information charging *attempted* first-degree child molestation was filed after the statute of limitations had run. Thus, count 1 must be vacated and Stark resentenced.

On August 24, 2009, Stark was charged by Information with two counts. Petitioner's Exhibit 1. In count 1, Stark was charged with first-degree child molestation for acts committed between August 17, 2000 and August 16, 2006. In count 2, Stark was

constitutional sea are not sufficient to command judicial consideration); State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) (declining review of constitutional issue unsupported by reasoned argument).

Second, a defendant's burden on appeal is not so easily met, otherwise there would exist no waiver provisions or a different burden of proof for PRP's. As the Supreme Court has stated, "[s]urmounting Strickland's high bar is never an easy task." Padilla v. Kentucky, 559 U.S. 356, 371, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010). There is a strong presumption that counsel's representation was effective. State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). After all, a "defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second guess lawyers' decisions with the benefit of hindsight." State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978).

Every trial and appellate attorney must make difficult decisions regarding the allocation of resources, the tactics taken and paths pursued. But to prevail in a claim of ineffective assistance of counsel, a defendant must establish that his lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances. State v. Visitation, 55 Wn. App. 166, 173, 776 P.2d 986 (1989). Here, this would require that Stark show that no reasonable attorney would have failed to raise the issues he now seeks to raise or failed to object to before the trial court. But here, for example, considering the strained interpretation of the jury instruction that Stark asks this Court to adopt, it cannot be said that counsel was constitutionally ineffective for failing to raise this same issue before the trial court or on direct appeal.

charged with third-degree child molestation for acts committed between August 17, 2000 and August 31, 2007.

On October 7, 2010, an Amended Information was filed. Petitioner's Exhibit 2. Along with adding two additional counts, as pertinent here, count 1 was amended to charge *attempted* first-degree child molestation for acts committed between August 17, 1999 and December 31, 2000, in violation of RCW 9A.28.020 and RCW 9A.44.083.

RCW 9A.04.080 provides the requisite time period in which a prosecution must be commenced, i.e., the statute of limitations. At the time Stark committed the acts constituting count 1, RCW 9A.04.080 provided that all other felony offenses not specifically designated otherwise must not be prosecuted more than three years after the commission of the crime charged. Former RCW 9A.04.080(1)(h) (1998). Subsection (1)(c) provided an exception for "violations" of certain enumerated criminal statutes, including violations of "RCW...9A.44.083," the first-degree child molestation statute. Under subsection (1)(c), a prosecution was required to commence not "more than three years after the victim's eighteenth birthday or more than seven years after their [the crimes] commission, whichever is later." Id. However, subsection (1)(c)

contains no language indicating that this exception applies to anticipatory offenses pursuant to the criminal attempt statute, RCW 9A.28.020.¹⁶

The violation dates listed in count 1 end on December 31, 2000. Thus, a charge of attempted first-degree child molestation had to commence by December 31, 2003, the three-year limit set by former RCW 9A.04.040(1)(h). The original Information was not filed until August 24, 2009, and the attempted first-degree child molestation charge was not filed until November 7, 2010. Because no exception to the three-year statute of limitation period appears applicable, count 1 must be vacated.¹⁷ Because vacation of count 1 reduces Stark's offender score from a 9 to a 6, and his

¹⁶ Any argument that the statutory exception includes anticipatory offenses despite the absence of explicit language to such effect seems foreclosed by existing case law where similar arguments were made and rejected. State v. N.S., 98 Wn. App. 910, 991 P.2d 133 (2000) (Court dismisses conviction of *attempted* third-degree rape where charge was submitted to the jury as a lesser-included offense to third-degree rape but the statute of limitations had run on the lesser crime); State v. Freeman, 124 Wn. App. 413, 101 P.3d 878 (2004) (DNA sample must be provided upon conviction for harassment. Court holds that the plain language of statute does not include requirement that DNA sample be provided upon conviction for *attempted* harassment); State v. Hale, 65 Wn. App. 752, 829 P.2d 802 (1992) (Court holds statute requiring mandatory minimum sentence for first-degree murder does not apply to *attempted* first-degree murder).

¹⁷ In addition, the statute of limitations had run before any later-enacted statutory exception could have applied to Stark's case.

highest standard range from 149-198 months to 98-130 months, Stark must be resentenced.

4. SENTENCING ISSUES

Stark raises a number of issues regarding the length of his term of community custody on one count, and the propriety of the conditions attached to his term of community custody. Because Stark must be resentenced, absent a request by this Court, the State will not address these issues. Stark's trial counsel, the trial court and the sentencing prosecutor will now be alerted to the issues raised herein. The parties should address these issues before the trial court at resentencing. In a sense, the issues are not ripe for review because it is unknown if the conditions will be imposed upon resentencing. In any event, Stark fails to address how it is that he can raise these issues via a personal restraint petition where he must show that there exists a constitutional error from which he suffered actual prejudice, or nonconstitutional error that inherently resulted in a complete miscarriage of justice.

In re Cook, 114 Wn.2d at 813.

E. **CONCLUSION**

For the reasons cited above, Stark's convictions should be affirmed with the exception that count 1 must be vacated and the case remanded for resentencing.

DATED this 28 day of October, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
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APPENDIX 1

FILED

OCT 28 PM 12:08

KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

ORIGINAL

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

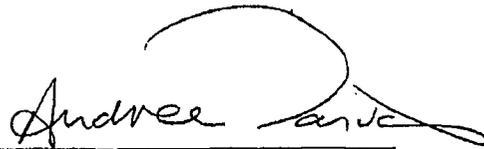
BRIAN T. STARK,

Defendant.

NO. 09-1-05650-8 KNT

COURT'S INSTRUCTIONS TO THE JURY

Dated this 26th day of October, 2010.



Judge Andrea Darvas

No. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors

that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

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. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not

consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

No. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

No. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

No. 4

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.

No. 5

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

No. 6

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of allegations of sexual misconduct occurring outside of King County in Spanaway, Washington, and may be considered by you only for the purpose of determining whether the defendant demonstrated a lustful disposition towards C.W. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

No. 7

A person commits the crime of child molestation in the first degree when the person has sexual contact with a child who is less than twelve years old, who is not married to the person and not in a state registered domestic partnership with the person, and who is at least thirty-six months younger than the person.

No. 8

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

No. 9

Married means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in court for legal separation or for dissolution of the marriage.

No. 10

A "state registered domestic partner" means a person who is in a domestic partnership registered with the Washington secretary of state.

No. 11

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

(1) That during a period of time intervening between January 1, 2004, and August 16, 2005, on an occasion separate and distinct from Count III, the defendant had sexual contact with C.W.;

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

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

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

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count II.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count II.

No. 12

A person commits the crime of child molestation in the third degree when the person has sexual contact with a child who is at least fourteen years old but less than sixteen years old, who is not married to and not in a state registered domestic partnership with him or her, and who is at least forty-eight months younger than the person.

No. 13

To convict the defendant of the crime of Child Molestation in the Third Degree, as charged in Count IV, 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 17, 2007, through September 30, 2007, the defendant had sexual contact with C.W.;

(2) That C.W. was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to the defendant and was not in a state registered domestic partnership with the defendant;

(3) That C.W. was at least forty-eight months younger than the defendant; and

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

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count IV.

On the other hand, if, after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count IV.

No. 14

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

No. 15

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

No. 16

A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.

No. 17

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

(1) That during a period of time intervening between August 17, 1999, through December 31, 2000, the defendant did an act that was a substantial step toward the commission of Child Molestation in the First Degree;

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

(3) That the act occurred in King County, Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count I.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count I.

No. 18

A person commits the crime of incest in the first degree when he or she engages in sexual intercourse with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.

No. 19

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight or any penetration of the vagina or anus however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

No. 20

Descendant means any child or grandchild of the defendant. A descendant also includes any stepchild or adopted child of the defendant who is under eighteen years of age.

No. 21

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

(1) That during a period of time intervening between August 17, 2003, through August 17, 2006, on an occasion separate and distinct from Count II, the defendant engaged in sexual intercourse with C.W.;

(2) That C.W. was related to the defendant as a descendant;

(3) That at the time the defendant knew the person with whom he was having sexual intercourse was so related to him; and

(4) That any of these acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty as to Count III.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty as to Count III.

No. 22

Evidence has been produced suggesting that the defendant committed acts of Child Molestation in the First Degree and Incest in the First Degree on multiple occasions. A separate crime is charged in each count. To convict the defendant on the count of Child Molestation in the First Degree, one particular act of molestation must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. To convict the defendant on the count of Incest in the First Degree, one particular act of sexual intercourse must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of child molestation or incest.

No. 23

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions and four verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form(s) to express your decision. The presiding juror must sign the verdict form(s) and notify the bailiff. The bailiff will bring you into court to declare your verdict.

APPENDIX 2

He's molested and raped
me since I was 6.
Just don't try to save
me. My mom wouldn't listen

ANNYAS.



~~He's molested and~~

- Steppone 12/31/08

Z

I had trust

~~I don't deserve
what he did.~~

APPENDIX 3

To whom it may concern,

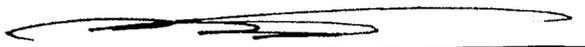
Approximately when I was 14 or 15 I stayed the night with my uncle Brian and he bought me a baseball mit made by Nike at Target and that night we watched ~~TV~~ I slept on the couch and the next day I played with my little cousins outside, right out front, what I remember is Brian mowing the lawn and then I went home. The allegations that Caitlin made are false because we never went on a bike ride and Brian never told me to go home. There was no home unbuilt that we went to and that is the truth I will testify under oath that the allegations are false that I was ^{not} there and he ^{never} said anything to me.

J. J. Esler

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the petitioner, Neil Fox, at nf@neilfoxlaw.com, containing a copy of the State's Response to Personal Restraint Petition, in IN RE PERSONAL RESTRAINT OF STARK, Cause No. 73580-2-1, 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.



Name
Done in Seattle, Washington

10-29-15
Date