

NO. 31242-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHNATHON DANIEL ROSWELL,

Appellant.



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

The Honorable Jay B. Roof, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The state failed to prove all of the essential elements of child molestation in the third degree: to wit that the defendant did not reasonably believe the complainant to be at least sixteen years old based on her own declarations.

2. The state failed to prove all of the essential elements of child molestation in the third degree: to wit that the defendant had sexual contact with the complainant.

3. Appellant was denied his right to a fair trial when the trial judge made a comment on the evidence by responding to a jury note with instruction that expanded the definition of sexual contact and affirmed the jury's legal inquiry.

4. The prosecutor committed prejudicial misconduct by directly violating an order in limine suppressing highly prejudicial evidence.

5. The prosecutor committed prejudicial misconduct by directly informing the jury that the defense case was based on the defense attorney's personal desire to convince them of facts not presented in evidence which was designed to appeal to their passions and prejudices.

6. The prosecutor committed prejudicial misconduct by shifting the burden of proof to the defense during her closing and rebuttal arguments.

7. Appellant was denied his right to jury unanimity because the court failed to provide a unanimity instruction and the state relied on two weak acts to support a single charge.

Issues Presented on Appeal

1. Did the state fail to prove all of the essential elements of child molestation in the third degree: to wit that the defendant did not reasonably believe the complainant to be at least sixteen years old based on her own declarations?

2. Did the state fail to prove all of the essential elements of child molestation in the third degree: to wit that the defendant had sexual contact with the complainant?

3. Was Appellant denied his right to a fair trial when the trial judge made a comment on the evidence by responding to a jury note with instruction that expanded the definition of sexual contact and affirmed the jury's legal inquiry?

4. Did the prosecutor commit prejudicial misconduct by directly violating an order in limine suppressing highly prejudicial evidence?

5. Did the prosecutor commit prejudicial misconduct by directly informing the jury that the defense case was based on the defense attorney's personal desire to convince them of facts not presented in evidence which

was designed to appeal to their passions and prejudices?

6. Did the prosecutor commit prejudicial misconduct by shifting the burden of proof to the defense during her closing and rebuttal arguments?

7. Was Appellant denied his right to jury unanimity because the court failed to provide a unanimity instruction and the state relied on two weak acts to support a single charge?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Jason Roswell was charged with two counts of child molestation in the third degree. CP 1-8. One of the charges was dismissed for insufficient evidence. RP 240, 255. Mr. Roswell was found guilty of the remaining count of child molestation in the third degree. CP 31-39. This timely appeal follows. CP 40-41.

2. SUBSTANTIVE FACTS

a. Trial Testimony

Ashlie Mathes and Jessica Coster spent many summer evenings during 2003 sneaking out of their parents home to drink and skinning dip at a neighboring swimming pool and hot attached to the Arbor Terrace Apartments. RP 126-128, 132, 143, 161. Jessica and Ashlie went to the pool for a week before meeting Jason at the pool one evening with their mutual

friend Anthony. RP 126-127, 284, 288. Ashlie sometimes made specific plans to meet Jason at the pool. RP 128. Officer Truong who responded to a noise complaint one night in August, heard one of the girls tell officer Kaeka that she was 16 years old. RP 19, 228. Ashlie denied this and instead testified that she said she was 14 almost 15 years old. RP 155.

Shortly after Jason met the girls, Ashlie told Jason she was 16 years old and that Jessica was 14. RP 289-90. Later Jessica told Jason that Ashlie was not 16 and that she was 13. Neither Ashlie nor Jessica ever told Jason that Ashlie was younger than 16. RP 291. Jason was not sure of Ashlie's exact age, but believed that she was at least 16 years old. RP 309. Ashlie admitted that she initiated kissing Jason on the mouth once the night before the police arrived. RP 132. Ashlie told Jessica that she liked Jason and thought that he was cute. RP 177-178. During her testimony, Ashlie denied that she liked Jason but admitted that she repeatedly made plans to meet Jason at the pool. RP 128.

The night before the police arrived, Ashlie drank 8-9 beers, kissed Jason on the mouth and took off her bathing suit, something she alone decided to do. RP 132-33. Ashlie did not have any other interactions with Jason that night and Jason did not participate in the drinking and did not bring the beer. RP 132, 142. According to Ashlie, even though she drank 8-9 beers, she

testified that she was not drunk, but just “buzzed”. RP 143.

The next night, August 5, 2003, Ashlie and Jessica went to the pool and hung out. Jason came later and then Anthony showed up a bit later with a gallon jug of rum that had a few inches of alcohol left in it and a bottle of Gatorade. RP 134-135. Ashlie got completely drunk and took off her bathing suit and kissed Jason in the hot tub. As a joke Jason hid Ashlie’s bathing suit and then retrieved it for her. RP 135-136. Ashlie is not sure but she believed that Jason squished her breasts together to make them “talk” in the water. RP 137. The police arrived shortly thereafter. RP 138.

Officer Kaeka testified that it was very dark out when he arrived, but somehow he could see through the trees and bushes and observe Jason, Ashlie and Jessica in the hot tub. Kaeka testified first that he stood and watched Jason squeeze Ashlie’s breasts for several seconds, even though Ashlie had her back to Kaeka. RP 203. When asked during cross examination if she remembered telling the police that she was 16 years old, Ashlie said she could not remember. RP 155, 200-202. Kaeka told the jury that he could see that no one had any clothes on even though he could not see into the hot tub to determine if Jason, Jessica and Ashlie had their bottoms on. RP 201. Kaeka later admitted that he could not determine who had bottoms on when he arrived at the hot tub. RP 202.

Jessica was sitting right next to Jason and Ashlie when Kaeka arrived. She saw Jason put his hand on Ashlie's shoulder but she never saw him touch Ashlie's breasts. RP 173-174. Ashlie was drunk and wobbly when the police arrived. RP 135, 166. Jason was adamant that he did not touch Ashlie's breasts but held her shoulders to prevent her from falling on him and to get her out of the way as the police had told them to get out of the hot tub. RP 279, 300, 306. Jason had his swim trunks on when the police arrived. RP 305. Jason told the police he was 18 years old, even though he had just turned 19 the month before. RP 310.

b. Violation Motion in Impermissible
Shifting Burden of Proof

The trial court expressly prohibited the prosecutor from making any rebuttal argument related to the prosecutor's perceived belief that the defense was responsible for producing a witness named Anthony. RP 405. In direct violation of this ruling the prosecutor argued during rebuttal as follows:

MS. FORBES: . . . Talking about Anthony, the Defense presented in this case right here Anthony is important to the Defense. Anthony is not important to the State. The State has no obligation to produce any evidence in relationship to this defense. It is the Defendant's burden. Mr. Kelly gets up here and says he shouldn't have to bring Anthony in here. The State could have just done it. He has no evidence that the State even had any information about Anthony or how to get evidence or information about Anthony. The testimony about

Anthony came from the Defendant. He's the one with the information about it. He's the one who knows the guy, who hangs out with the guy. The question to ask yourself is, why did he choose, when it's his burden of proof, to not find Anthony and call him to testify in this particular case, when it's his burden? And you would think that Anthony would be a very, very, very crucial witness to the Defense, when your defense is, She told me she was 16 years old, and you tell -- and when you testify that Anthony is sitting right there next to you, when she says this.

MR. KELLY: Your Honor, I'll object to the crossing of the line with regard to the ruling on this line --

THE COURT: Sustained.

RP 504 After the trial court sustained the objection, the prosecutor continued to violate the trial court's order.

MS. FORBES: The fact of the matter is that when you're looking at this burden of proof, that the Defendant has the burden, and he's the one who should be producing the witnesses in relationship to that particular issue.

406 . The defense objected and the court again sustained the objection but did not give a curative instruction.

c. Prosecutorial Misconduct-Appealing to Passions and Prejudices of Jury

Later during rebuttal argument the prosecutor impermissibly appealed to the passions and prejudices of the jury and argued that defense counsel wanted a result rather than relying on the evidence presented at trial.

We ask you to do a lot, when you come into this courtroom. We've never asked you to abandon your common sense outside the courtroom door. We ask you to look very carefully at the evidence and not let sympathies or biases or prejudices affect you. Mr. Kelly did his very best to try to introduce sympathies and biases and prejudices into your consideration when he went on and on about the different world that these kids live in, how horrible it is that a 19-year-old can't frolic naked with 13- and 14-year-olds naked in a public place any more. Darn it, what a terrible place it is we live. He wants you to feel bad for this Defendant. He wants you to look at these girls like they're a couple of whores and they got what they deserved “.

RP 408-09. Defense counsel objected and again the court sustained the objection without providing a curative instruction. Id.

d. Comment on Evidence

During jury deliberations, the jury sent out note inquiring if a French kiss was sufficient to establish sexual contact. RP 415; CP 28-29. Defense argued that a French kiss was not sexual contact, citing State v. R.P., 122 Wn.2d 735, 862 P.2d 127(1993). After consulting with counsel, the judge provided a detailed jury note which provided:

You have been provided with all of the instructions and exhibits in this case. Neither party argued that a French kiss is sexual contact. Sexual or other intimate parts includes but is not limited to genitals, breasts, buttocks, lower abdomen, and hips and also includes the touching may be done over clothing.

CP 29; RP 424.

C. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT ALL OF THE ESSENTIAL ELEMENTS OF CHILD MOLESTATION IN THE THIRD DEGREE.

Jason was charged with child molestation in the third degree for allegedly having sexual contact with Ashlie. CP 1-8. The state presented evidence that Jason may have inadvertently or intentionally touched Ashlie's breasts and that Ashlie initiated a French kiss once or twice. There was insufficient evidence of either of these acts to establish beyond a reasonable doubt Jason's conviction for child molestation in the third degree.

When reviewing a challenge to the sufficiency of the evidence, the Court considers the evidence in the light most favorable to the prosecution, whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). All reasonable inferences are from the evidence are drawn in the prosecution's favor. *State v. Joy*, 121 Wn.2d 333, 339, 851 P.2d 654 (1993); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The Court defers to the trier of fact to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess

the credibility of the witnesses. *State v. Boot*, 89 Wn.App. 780, 791, 950 P.2d 964, *review denied*, 135 Wash.2d 1015, 960 P.2d 939 (1998).

To convict Jason the State was required to prove he violated RCW 9A.44.089, which provides:

(1) A person is guilty of child molestation in the third degree when the person has, or knowingly causes another person under the age of eighteen to have, sexual contact with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.

Sexual contact is defined as:

any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.010(2); CP18-27 (Jury Instruction #5).

At trial, Ashlie testified that she kissed Jason twice open mouth but that she did not like him as more than friend. Jason testified that he never initiated a kiss. Ashlie testified that Jason squeezed her breasts to make them talk. Jason and Jessica testified that this did not happen. RP 173, 297. Jason touched Ashlie's shoulders to prevent her from falling. RP 308. This is consistent with what Jessica saw: Jason holding Ashlie's shoulders. RP 173.

Intentional direct contact with breasts is "sexual contact" as a matter for law. *In re Welfare of Adams*, 24 Wn.App. 517, 519, 601 P.2d 995 (1979).

Here, however, if there was direct contact with Ashlie's breasts, it was inadvertent. Moreover, based on the testimony, there was no evidence from which the jury could find that the touching under the circumstances here was unintentional. Moreover, the shoulders and mouth are not an "other intimate part" that falls within the definition of sexual contact. *Id.* And a French kiss alone may not necessarily be considered sexual contact. *State v. R.P.*, 122 Wn. 2d at 735.

a. Inadvertent Contact With Breasts

In *State v. Powell* 62 Wn.App. 914, 816 P.2d 86 (1991), the defendant hugged a girl around the chest, and when he helped her off of his lap he placed his hand on her "front" and bottom on her under panties under her skirt. *Powell* at 916. On another occasion while the child was alone with Powell in his truck, he touched both of her thighs outside of her clothing. *Id.* The Court held the evidence to be insufficient to establish touching for the purpose of gratifying sexual desire where there was an innocent explanation for the touching--it was the result of playing and tickling the children.

Powell is on point. In *Powell*, the court of appeals reversed finding both touchings equivocal. *Powell* at 917-18, 816 P.2d 86. The court noted that the child did not remember how Powell touched her, and both incidents were susceptible to an innocent explanation. According to the child's testimony,

Powell touched her bottom while lifting her off his lap, and the only evidence he touched her genital area consisted solely of her testimony that he touched her under panties "in the front part." Id. The court also noted that the child was clothed on each occasion, the touching was outside of her clothing and no threats, bribes, or requests not to tell were made.

In Jason's case as in *Powell*, 916, 816 P.2d 86, there was a reasonable and innocent explanation for the touching of the breasts: it was inadvertent and occurred as Jason was trying to prevent the drunk, Ashlie from falling on him. RP 308. Additionally, Ashlie's testimony was directly contradicted by both Jason and her friend Jessica who was sitting just a few feet from them. RP 173, 297. This evidence, as in *Powell*, was sufficient for a jury to find that Jason engaged in sexual contact with Ashlie.

b. French Kiss is Not a Sexual Act With a Persons Intimate Parts.

Under RCW 9A.44.010(2) "sexual contact" requires the touching of a "sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party". In Jason's case, the jury was instructed that it could consider both the French kiss and the touching of the breast as sexual contact. CP 18-27, 29; RP 424. Evidence of kissing is generally insufficient as

a matter of law to prove sexual contact with an "other intimate part". *State v. R.P.* 122 Wn.2d 735, 862 P.2d 127 (1993) (per curiam).

In *R.P.*, the court held that evidence of the defendant kissing Y.B. on the cheek and the neck was insufficient as a matter of law to prove sexual contact. In that case, R.P. picked up, hugged, and kissed his classmate after track practice, placing a "hickey" on her neck. *Powell*, 122 Wn.2d at 736. R.P. was charged and convicted of two counts of indecent liberties for two separate occasions. For the incident that occurred after track practice, he argued that there was insufficient evidence that he engaged in sexual contact. The Supreme Court agreed and reversed his conviction. *Id.*

In *Adams* This Court held that "the statute is directed to protecting the parts of the body in close proximity to the primary erogenous areas which a reasonable person could deem private with respect to salacious touching by another." *Adams*, 24 Wn. App. at 519-21. To determine whether contact is intimate within the meaning of the statute, we ask whether the conduct is of such a nature "that a person of common intelligence could fairly be expected to know that under the circumstances the parts touched were intimate and therefore, the touching was improper." *Adams*, 24 Wn.App. at 521, 601 P.2d 995.

In Jason's case, the evidence shows that Ashlie kissed Jason open -

mouth once or twice and that Jason may or may not have touched Ashlie's breasts. Jason touched Ashlie's arms, shoulders and stomach to prevent her from falling. RP 397. There are two proof problems. First it is impossible to determine which act the jury relied on and there was only equivocal evidence of Jason touching Ashlie's breasts; and second if the jury was unanimous regarding the French kiss, there is insufficient evidence that the mouth is an "other intimate part" within the meaning of the statute and the reported cases on "sexual contact." If the mouth is an "intimate part" within the meaning of the statute, there is likely a great deal of criminal activity that occurs daily in the normal course of events among members of the society in which we live. In Jason's case, the kissing may have been inappropriate under the circumstances presented, but there was insufficient evidence to show that the kissing or grazing of Ashlie's breasts violated the charged crime, third degree child molestation.

b. Defense: Reasonable Belief Older than Sixteen.

Ashlie told Jason she was sixteen years old. RP 289. Officer Truong heard one of the girls tell officer Kaeka that she was sixteen years old. RP 235. During trial Ashlie testified that she could not remember telling the police that she was sixteen and the fact that she was very drunk was not the reason she could not remember. RP 155. Jessica never spoke with Jason about her age

after their initial meeting. RP 130. Based on Ashlie's statement to Jason, Jason reasonably believed that Ashlie was sixteen. RP 300.

RCW 9A.44.030 provides a defense to child molestation in the third degree where the defendant reasonably believes the complainant is at least sixteen years old based on the complainant's declarations of her age. Id.

(2) In any prosecution under this chapter in which the offense or degree of the offense depends on the victim's age, it is no defense that the perpetrator did not know the victim's age, or that the perpetrator believed the victim to be older, as the case may be: PROVIDED, That it is a defense which the defendant must prove by a preponderance of the evidence that at the time of the offense the defendant reasonably believed the alleged victim to be the age identified in subsection (3) of this section based upon declarations as to age by the alleged victim.

(3) The defense afforded by subsection (2) of this section requires that for the following defendants, the reasonable belief be as indicated:

...

(g) For a defendant charged with child molestation in the third degree, that the victim was at least sixteen, or was less than thirty-six months younger than the defendant;

RCW 9A.44.030.

The standard of proof is by a preponderance of evidence. Id. The jury was instructed that "[p]reponderance of evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably

true than not true”. CP 18-27. It is well established that, that the defendant has the burden of establishing an affirmative defense. However, to satisfy this affirmative defense, it is sufficient that the defendant “simply [] produc[es] [] evidence creating a reasonable doubt as to the general question of guilt of the crime charged.” *State v. Petit*, 88 Wn.2d 267, 558 P.2d 796 (1977) (Justice Utter, dissenting), citing, *State v. Bromley*, 72 Wn.2d 150, 432 P.2d 568 (1967).

Jason met this burden of proof and the state failed to disprove this defense beyond a reasonable doubt. For this reason and for the state’s failure to prove all of the essential elements of the crime of child molestation in the third degree, the conviction must be reversed and dismissed with prejudice for insufficient evidence.

2. THE TRIAL JUDGE MADE AN IMPERMISSIBLE COMMENT ON THE EVIDENCE IN VIOLATION OF APPELLANT’S RIGHT TO A FAIR TRIAL

The judge’s providing a detailed response to a jury question about whether French kissing was “sexual contact” was an impermissible judicial comment on the evidence in violation of article IV, section 16 of the Washington Constitution. The judge’s response provided:

You have been provided with all of the instructions and exhibits in this case. Neither party argued that a French kiss is sexual contact. Sexual or other intimate parts includes **but is not limited to** genitals, breasts, buttocks, lower abdomen, and hips and also includes the touching may be done over clothing.

(Emphasis added) CP 29; RP 424.

The state constitution provides: “Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.” Wash. Const. art. IV, § 16. This provision “prohibits a judge from conveying to the jury his or her personal attitudes toward the merits of the case.” *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). The purpose of this provision “is to prevent the jury from being unduly influenced by the court’s opinion regarding the credibility, weight, or sufficiency of the evidence.” *State v. Sivins*, 138 Wn.App. 52, 58, 155 P.3d 982 (2007) (citing *State v. Eisner*, 95 Wn.2d 458, 462, 626 P.2d 10 (1981)). Furthermore: “[a] statement by the court constitutes a comment on the evidence if the court’s attitude toward the merits of the case or the court’s evaluation relative to the disputed issue is inferable from the statement.” *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). In determining whether a statement by the court amounts to a comment on the evidence, a reviewing court looks to the facts and

circumstances of the case. *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970).

The mere implication of a judge's feelings about a case is sufficient to constitute an impermissible comment on the evidence. *State v. Jackman*, 156 Wn2d 736, 744, 132 P.3d 136 (2006). In reversing a conviction for statutory rape, the Supreme Court reiterated the long standing prohibition against judicial comments on the evidence:

Every lawyer who has ever tried a case, and every judge who has ever presided at trial, knows that jurors are inclined to regard lawyers engaged in trial as partisans, and are quick to attend an interruption by the judge, to which they may attach an importance and a meaning in no way intended. It is the working of human nature of which all men who have had any experience in the trial of cases may take notice. Between the contrary winds of advocacy, a juror would not be a man if he did not, in some of the distractions of mind which attend a hard fought and doubtful case, grasp the words and manner of the judge as a guide to lead him out of his perplexity. On the other hand, a presiding judge has no way to measure the effect of his interpretation. The very fact that he takes a witness away from the attorney for examination may, in the tense atmosphere of the trial, lead to great prejudice.

State v. Eisner, 95 Wn.2d at 462, quoting, *State v. Jackson*, 83 Wash. 514, 523-24, 145 P 470 (1915).

In the following cases, the Courts have reversed convictions for impermissible judicial comment on the evidence. In *Jackman*, 156 Wn.2d at

742-744, the inclusion of the victims' birth dates in "to convict" jury instructions, where crimes required victims to be minors, was an impermissible comment on the evidence. In *State v. Levy*, 156 Wn.2d 709, 716, 718-23, 1132 P.3d 1076 (2006), the jury instructions defining "building" as the apartment at issue and "deadly weapon" as a crowbar were impermissible comments on the evidence. In *Lane*, 125 Wn.2d at 835-839 the judge's comment regarding the reason for the early release of a prosecution witness from jail was an impermissible comment on the evidence.

In *Eisner*, 95 Wn.2d at 460-463, the judge's questioning of prosecution witness, which elicited elements of the charged crime, was an impermissible comment on the evidence. In *State v. Lampshire*, 74 Wn.2d 888, 891-893, 447 P.2d 727 (1968) the judge's comment when ruling on objection made by the prosecution during direct examination of the defendant was an impermissible comment on the evidence. In *Risley v. Moberg*, 69 Wn.2d 560, 561-565, 419 P.2d 151 (1966) the judge's questioning of personal injury plaintiff's physician regarding the cause of her injuries was an impermissible comment on the evidence.

In Jason's case, as in the cases cited herein, the judge by providing a detailed response to the jury, directly informed them that in addition to the jury instructions already received the definition of sexual contact was not limited to

the body areas listed, and invited the jury to consider the French kissing as sexual contact, even though “French kissing” was not defined elsewhere to mean sexual contact. The judge in essence, without a legal reference in statutory or a case law defined sexual contact to include “French kissing”, thus conveying the judge's opinion that French kissing could be considered sexual contact. This was an impermissible comment on the evidence in violation of the stated purpose of article IV, section 16 which “is to prevent the jury from being unduly influenced by the court's opinion regarding the credibility, weight, or sufficiency of the evidence.” *Sivins*, 138 Wn. App. at 58, citing *Eisner*, 95 Wn.2d at 462.

In Jason's case as in *Jackman, supra* and *Levy, supra* the jury instructions went to the heart of the state's case: the need to establish sexual contact. The state's evidence that Jason touched Ashlie's breasts was refuted by Jessica and Jason. The judge by sending back the additional instruction, in sanctioned the jury's belief that a French kiss could be kiss sexual contact when “French kiss” was not defined as sexual contact. The simple act of providing detailed note to the jury after deliberations had begun sent a message to the jury that they were on to something so important that it warranted a lengthy response. This was a direct telegraphing the judge's attitude toward the merits of the jury's inquiry and of the case. As such it

directly violated article IV, section 16. For this reason, the conviction should be reversed and the matter remanded for a new trial.

3. FAILURE TO REQUIRE JURY
UNANIMITY VIOLATED APPELLANT'S
DUE PROCEEDS RIGHTS.

In Jason's case, since there was insufficient evidence as to the touching of the breasts on which the charge was based, or that a French kiss is sexual contact to support the conviction for child molestation in the third degree. Because the jury could have relied on either of these alleged acts to support the element of sexual contact and because the evidence of touching breasts was weak and refuted and because a French kiss may not be sexual contact, the failure to provide a unanimity instruction deprived Jason of his constitutional right to jury unanimity. *State v. Kitchen*, 110 Wash.2d 403, 756 P.2d 105 (1988).

"In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed. [(citation omitted)] When the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act."

Kitchen, 110 Wash.2d at 409, 756 P.2d 105 (____), citing *State v. Petrich*, 101 Wash.2d 566, 572, 683 P.2d 173 (1984); *State v. Workman*, 66 Wash.

292, 294-95, 119 P. 751 (1911)).

In *State v. Coleman*, 159 Wn.2d 509, 150 P.3d 1126 (2007), the Supreme Court reversed a conviction for child molestation where the state relied on disputed multiple acts to support a single conviction. The Supreme Court held that in such cases, prejudice is presumed. *Coleman*, 159 Wn.2d at 515. Reversal is always required in multiple acts cases where there is a risk of a lack of unanimity on all the elements. *Id.*

In Jason's case, as in *Coleman*, there was a risk of lack of unanimity because the trial court did not instruct the jury that it must unanimously agree on a specified criminal act in order to convict and the state did not tell the jury which act of two acts to rely on to convict. The prosecutor argued that Jason's alleged touching of Ashlie's breast was sexual contact and the prosecutor also argued that there was generic "sexual contact" and "open-mouth kissing". RP 311-65 Although the prosecutor did not specifically argue in closing that the French Kiss was sexual contact, her entire argument and case included the acts of kissing as sexual contact and was presented in sufficient degree to prompt the jury to make a formal inquiry regarding whether French kissing was sexual contact.

Under these facts the failure to provide a unanimity instruction deprived Jason of his right to jury unanimity because the jury informed the

court that it was considering the French kissing as well as the alleged breast touching as sexual contact. Because French kissing is not per se, sexual contact, nor necessarily part of the erogenous zone per *Adams, supra, R.P., supra*, it is impossible to guarantee that the entire jury relied exclusively on the alleged breast contact to reach its verdict. The failure to provide a unanimity instruction permitted the jury make a finding of guilt without jury unanimity. For this reason, reversal and remand for a new trial is required.

The failure to provide a unanimity instruction was not harmless error. *Coleman*, 150 Wn.2d at 514-515. Where the evidence presented a trial is controverted as in Jason's case, prejudice is presumed. *Coleman*, 150 Wn.2d at 514-515, *citing, State v. Camarillo*, 115 Wash.2d 60, 794 P.2d 850 (1990). For this reason reversal and remand for a new trial is required.

4. THE PROSECUTOR SHIFTED THE BURDEN OF PROOF AND COMMITTED PREJUDICIAL MISCONDUCT BY VIOLATING AN ORDER IN LIMINE PRECLUDING REBUTTAL ARGUMENT ABOUT A PERCEIVED MISSING WITNESS AND BY APPEALING TO THE PASSIONS AND PREJUDICES OF THE JURY.

a. Prosecutor Violated Court's Order and Shifted Burden of Proof.

In Jason's case, the prosecutor in rebuttal closing argument, directly in violation of an order in limine improperly shifted the burden of proof to the

defense. She did this by informing the jury that Jason had the burden of proof to produce Anthony, a “Very, very, very crucial witness”. RP 504. After the defense objected and the court sustained the objection, the prosecutor ignored the court’s ruling and again told the jury that the defendant has the burden of proof to produce Anthony. RP 505. Jason testified that the first night he met Ashlie and Jessica, Ashlie and Jessica had been with Jason’s friend Anthony. Anthony, Jessica and Ashlie had invited Jason to join them. RP 287-288. Anthony was also the person who brought the rum the night the police came. RP 295-296. This was prejudicial misconduct.

Prosecutors are quasi-judicial officers of the court, charged with the duty of insuring that an accused receives a fair trial. *State v. Coles*, 28 Wn.App. 563, 573, 625 P.2d 713, *review denied*, 95 WN.2d 1024 (1981); *State v. Huson*, 73 WN.2d 660, 663, 440 P.2d 192 (1968), *cert. denied*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969). In order to establish prosecutorial misconduct, a defendant must show that the prosecutor's conduct was improper and prejudiced his right to a fair trial. *State v. Dhaliwal*, 150 WN.2d 559, 578, 79 P.3d 432 (2003). Prejudice is established where “ ‘there is a substantial likelihood the instances of misconduct affected the jury's verdict.’ ” *Dhaliwal*, 150 WN.2d at 578, 79 P.3d 432 (quoting *State v. Pirtle*, 127 Wash.2d 628, 672, 904 P.2d 245 (1995), *cert. denied*, 518 U.S.

1026, 116 S.Ct. 2568, 135 L.Ed.2d 1084 (1996)). The Courts consider the cumulative effect of misconduct to determine prejudice. *Id.*

In *State v. Stith*, 71 Wn. App. 14, 856 P.2d 415 (1993), the Court reiterated that in closing argument, a prosecutor may not ignore an order in limine and argue evidence that has been suppressed. *Stith*, 71 Wn. App. at 21-23, citing, *State v. Stover*, 67 Wn. App. 228, 230, 232, 834 P.2d 671 (1992), *review denied*, 120 Wash.2d 1025, 847 P.2d 480 (1993). In *Stith* the Court reversed the trial court because of the prosecutor violated a motion in limine suppressing *Stith*'s prior criminal acts by telling the jury that Mr. *Stith* was out dealing again. *Stith*, 71 Wn. App. at 21-22.

The second comment concerning "incredible safeguards" and the court's prior determination of probable cause not only constituted "testimony" as to facts not in evidence but also indicated to the jury that, if there were any question of the defendant's guilt, the defendant would not even be in court. This was tantamount to arguing that guilt had already been determined. Clearly, both comments were flagrantly improper.

Id.

In Jason's case, the prosecutor violated the court's order suppressing reference to Anthony in rebuttal when she argued that Jason was required to present evidence of Anthony and was responsible for failing to do so. This argument both violated an order and impermissibly shifted the burden of proof the defense similar to the improper argument in *Stith* which required

reversal.

While it is true that Jason was required to present some evidence to support his defense of reasonable belief that Ashlie was sixteen years old, that defense was only applicable to Ashlie's direct declarations, and not related to Anthony. Jason did not need Anthony to present some evidence that Ashlie said she was sixteen years old because both he and officer Truong heard Ashlie make that declaration. As such, the prosecutor's burden shifting was not related to the defense of reasonable belief in the complainant's age.

In *Boehning*, the prosecutor committed prejudicial misconduct by referring to suppressed evidence of other similar dismissed charges of rape. *Boehning*, 127 Wn. App. at 519. The prosecutor's repeated references to the dismissed rape counts and suggestions that that the complainant's prior statements supported those charges were misconduct and "impermissibly asked the jury to infer that Boehning was guilty of crimes that had been dismissed and were not supported by trial testimony. *Boehning*, 127 Wn. App. at 522.

Both *Boehning* and *Stith* make clear that the type of misconduct in these cases and in Jason's case, aimed at inducing the jury to convict based on highly prejudicial evidence of similar prior misconduct which requires reversal and remand for a new trial.

a. Prosecutor Appealed to Passions and Prejudice of Jury.

In Jason's case, the prosecutor also appealed to the passions and prejudices of the jury by arguing as follows:

Mr. Kelly did his very best to try to introduce sympathies and biases and prejudices into your consideration when he went on and on about the different world that these kids live in, how horrible it is that a 19-year-old can't frolic naked with 13- and 14-year-olds naked in a public place any more. Darn it, what a terrible place it is we live. **He wants you to feel bad for this Defendant. He wants you to look at these girls like they're a couple of whores and they got what they deserved** “.

RP 406. (Emphasis added) In Jason's case as in *Stith*, the prosecutor's final words to the jury informed them that:

MS. FORBES: The fact of the matter is that when you're looking at this burden of proof, that the Defendant has the burden, and he's the one who should be producing the witnesses in relationship to that particular issue.

406.

In sum, the prosecutor told the jury that Jason and not the state had the burden of proof and that the defense attorney had an agenda and implied that the jury should not be persuaded by the defense which was socially and morally unacceptable. This was flagrant and ill-intentioned misconduct which could not be cured with an instruction. When a remark is so “flagrant and ill

intentioned” that it cannot be cured with a curative instruction, the failure to challenge the remark is unnecessary. *State v. Boehning*, 127 Wn. App. 511, 528, 111 P.3d 899 (2005).

In *Stith*, as in Jason’s case, even though the defense objected many times to the improper arguments, and notwithstanding the presumption that juries follow the court’s direction, it was impossible for the Court in *Stith* to find that the prosecutor’s remarks did not result in prejudice. “Prosecutorial misconduct can be so prejudicial that it *cannot* be cured by objection and/or instruction.” *Stith*, 71 Wn. App. at 23, citing, *State v. Guizzotti*, 60 Wn. App. 289, 296, 803 P.2d 808, *review denied*, 116 Wn.2d 1026, 812 P.2d 102 (1991).

In *Stith*, the prosecutor’s comments “clearly reflect the prosecutor’s personal assurances to the jury as to the defendant’s guilt.” . . . “Such comments strike at the very heart of a defendant’s right to a fair trial before an impartial jury. Once made, such remarks cannot be cured.” *Stith*, 71 Wn. App. at 23; *State v. Belgarde*, 110 Wn.2d 504, 508, 755 P.2d 174 (1988), *aff’d*, 119 Wash.2d 711, 837 P.2d 599 (1992). (wherein the Supreme Court overturned a conviction for prosecutorial misconduct, the “remarks were flagrant, highly prejudicial and introduced ‘facts’ not in evidence.”).

Stith, supra is on point and controls the outcome of Jason’s case. In

Stith, as in Jason's case, the prosecutor violated a motion in limine and argued about Anthony and shifted the burden of proof to the defense. The prosecutor compounded the misconduct by appealing to the passions and prejudices by telling the jury that the defense attorney had created an agenda.

The Courts consider the cumulative effect of misconduct to determine prejudice. State v. Boehning, 127 Wn. App. at 528. Cumulatively, the prosecutor's misconduct was prejudicial and no jury instruction could cure the prejudice. When a remark is so "flagrant and ill intentioned" that it cannot be cured with a curative instruction, the failure to challenge the remark is unnecessary. State v. Boehning, 127 Wn. App. at 528. In Jason's case, "[t]he mandatory remedy is a mistrial." *Stith*, 71 Wn. App, at 23.

D. CONCLUSION

Jason respectfully requests this Court reverse his conviction for child molestation in the third degree based on denial of multiple due process rights.

DATED this 31st day of January 2010.

Respectfully submitted,

LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Kitsap County Prosecutor's Office 614 Division St, MS-35 Port Orchard, WA 98366-4692 and Jonathon D. Roswell DOC# 863601 Twin Rivers Corrections Center PO Box 777 Monroe, WA 98272-0777 a true copy of the document to which this certificate is affixed, on February 1, 2010. Service was made by depositing in the mails of the United States of America, properly stamped and addressed.

Signature

A handwritten signature in black ink, consisting of several loops and flourishes, located in the lower right quadrant of the page.