

NO. 31242-5

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

STATE OF WASHINGTON,

Respondent,

v.

JOHNATHON ROSWELL,

Appellant.

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STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 03-1-01047-1

BRIEF OF RESPONDENT

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DATED May 10, 2010, Port Orchard, WA [Signature]  
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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the evidence was sufficient for the jury to conclude that Roswell had sexual contact with 14-year-old AM where the officer testified that he saw Roswell squeeze and grope AM's breasts while Roswell and AM were naked in the hot tub?

2. Whether no unanimity instruction was required where the groping of AM's breasts and the French kissing between AM and Roswell were a continuing course of conduct and in any event, the State "elected" the groping of AM's breast as the act charged, and the jury was specifically instructed of this fact?

3. Whether even if a unanimity instruction were required, the evidence was sufficient to show both that Roswell groped 14-year-old AM's breasts and was sufficient for the jury to find that the French kissing was sexual contact?

2. Whether the evidence was sufficient for the jury to conclude that Roswell failed to establish by the preponderance of the evidence that he had a reasonable belief that AM was of legal age?

3. Whether the trial court permissibly gave the jury a legally proper definition of sexual contact?

4. Whether the prosecutor's closing argument was entirely proper

where the prosecutor did not violate the court's ruling nor impermissibly shift the burden of proof by responding to the defense argument that the State failed to call a witness that supposedly would have supported the defense and where the prosecutor did not improperly appeal to bias and prejudice by responding to defense arguments suggesting that the defendant's molestation of 14-year-old AM was her own fault?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Johnathon Roswell was charged by information filed in Kitsap County Superior Court with one count each of third-degree child molestation against 14-year-old AM and 13-year-old JC. CP 1.

At the close of the State's case, the court granted Roswell's motion to dismiss Count II, pertaining to JC. 2RP 255.

The jury found Roswell guilty of Count I, pertaining to AM. CP 30.

### **B. FACTS**

AM was fourteen years old when she met Johnathon Roswell at the swimming pool at Arbor Terrace Apartments in July 2003. 1RP 125-26. AM had just finished eighth grade at Cedar Heights Junior High. 1RP 129. He introduced himself to her as "Tigger." 1RP 125. AM and her friend JC would jump the fence to swim there. 1RP 127.

They first went there about a week before they met Roswell. 1RP 127. They went swimming there almost every night. 1RP 127. They would swim and use the hot tub and listen to music. After they met, it was usually AM, JC and Roswell. 1RP 128.

Sometimes they made plans to meet, on other occasions, Roswell just showed up. 1RP 128. The day she met Roswell, he just showed up at the pool and they started talking. 1RP 129. Roswell was not there with anyone who knew him. 1RP 129. AM specifically told Roswell she was 14 years old the day they met. 1RP 130. She also told him that JC was 13. 1RP 130. Roswell told her that he was 15. 1RP 130. She believed him. 1RP 130.

They never went anywhere in a car together. 1RP 131. AM was not old enough to drive, and did believe Roswell was, either. 1RP 131. They never discussed their ages after the first day, and AM never lied to Roswell about her age or JC's age. 1RP 131, 139.

There was no romantic interaction between AM and Roswell until August 4. 1RP 132. AM, JC, Roswell and another guy were there, and they drank some beer. 1RP 132. AM kissed Roswell. 1RP 132. It was a French kiss. 1RP 133. She was not sure if she was clothed when they kissed. 1RP 133. She had quite a few beers and at some point took her clothes off. 1RP 133. Nothing else happened besides the kiss. 1RP 134.

The next evening, AM and JC arrived at the pool between 10:30 and 11:00 p.m. 1RP 134. Roswell showed up later. 1RP 134. Then a person named Brandon came, but he left after an hour or two. 1RP 134. Brandon left a gallon bottle with about two to three inches of alcohol in it. 1RP 135. AM, JC, and Roswell drank it. 1RP 135. AM became very intoxicated. 1RP 136. AM took off her bathing suit. 1RP 136. Roswell took it and hid it. 1RP 136.

They were in the hot tub and when the police arrived, Roswell gave it back to her. 1RP 136. AM believed that Roswell had shorts on when they were in the hot tub, but she could not be certain. 1RP 136-37. While they were in the hot tub, she French kissed Roswell again. 1RP 137. He also touched her breasts. 1RP 137. She was not wearing anything. 1RP 137. Roswell was “squishing” them together and “making them talk.” 1RP 137. The police showed up just after he did that. 1RP 138.

AM told Officer Kaeka that she was 14 and would be 15 in September. 1RP 155. Roswell was not present when she told Kaeka her age. 1RP 156. AM did not hear that Roswell was over 18 until after the police came. 1RP 157.

JC turned 13 in July 2003, and started eighth grade at Cedar Heights Junior High the following fall. 1RP 159. JC and AM had been best friends

since the beginning of the previous school year. 1RP 160. JC met Roswell at the Arbor Terrace pool in July. 1RP 161. He introduced himself as “Tigger.” 1RP 161.

JC did not tell Roswell her age when they met, but did tell him she was 13 about a week later. 1RP 161. She also told him that AM was 14. 1RP 162.

Roswell was usually there when they went to the pool. 1RP 162. The first time they drank was a few days before they got caught. 1RP 162. JC had one and half beers and was “buzzed.” 1RP 163. She did not see any physical interaction between AM and Roswell that night. 1RP 163. She first saw them kiss either the first night they drank or the second. 1RP 163. It was a French kiss. 1RP 164. JC did not see any other physical contact between AM and Roswell at that time. 1RP 164. JC did not have any physical contact with Roswell. 1RP 164.

The night the police came the alcohol was mixed with Gatorade. 1RP 165. JC was drunk. 1RP 165. She was a little wobbly. 1RP 166. Roswell and AM were also drinking. 1RP 166. After they had been drinking, AM decided to take her top off, and JC agreed, so they began swimming topless. 1RP 166. JC eventually put hers back on. 1RP 167.

A bit later, Roswell untied JC’s top. 1RP 168. She tried to hold it on

by crossing her arms across her chest, but he pulled it off. 1RP 168. JC swam away and Roswell pulled her bathing suit bottoms off as well. 1RP 169. Roswell put their suits in the hot tub. 1RP 170. She thought it was funny at the time. 1RP 170.

JC did not tell Kaeka about the bathing suit incident because she did not think it was very important. 1RP 171. After swimming a bit more they went to the hot tub. 1RP 172. Neither JC nor AM were wearing anything. 1RP 172. Roswell joined them shortly after. 1RP 172. After getting into the hot tub, Roswell took his trunks off. 1RP 173. JC saw Roswell put his hand on AM's shoulder. 1RP 173. She was not particularly paying attention to them, however. 1RP 173. She was mostly leaning back on the steps of the tub, looking at the sky. 1RP 173. She did not see anything else they were doing. 1RP 174.

Port Orchard Police Officer David Kaeka responded in the early morning hours of August 6, 2003, to a complaint of loud noise at the Arbor Terrace apartments. 1RP 193. Officer Truong joined him as back up. 1RP 193. They approached the area from where the noise was coming from different directions. 1RP 193. The noise was coming from the pool enclosure. 1RP 194. Kaeka came down the hill overlooking the hot tub. 1RP 195. The underwater lights were on in the hot tub. 1RP 200. They provided enough light to see what was going on in the tub. 1RP 200. They

were the only lights in the area, leaving the rest of the scene in darkness. 1RP 200.

Kaeka saw three people. 1RP 201. Even when he was driving in it was plain they did not have clothes on. 1RP 201. He approached on foot and from the bottom of the stairs leading to the pool area, he could see one male and two females. 1RP 201. None had tops on. 1RP 201. Kaeka went to the gate, but they did not notice him immediately. 1RP 202.

Roswell and AM were facing each other and Roswell had his hands on AM's breasts. 1RP 202. JC was sitting on the steps. 1RP 203. Kaeka shined his flashlight on Roswell, who slid his hands from her breasts down her sides and back. 1RP 204. AM backed away from Roswell when she realized Kaeka was there. 1RP 204. Roswell was naked. 1RP 204.

Kaeka told them to get out of the tub. 1RP 204. AM asked Roswell for her suit, and he gave it to her. 1RP 204. She put it on and got out. 1RP 204. Truong was still on the other side of the pool. 1RP 205. Kaeka asked them how old they were, and AM said she was 14, and JC said she was 13. 1RP 205. At no time did AM misrepresent her age. 1RP 207. Roswell told Kaeka he was 18, which was not true. 1RP 211. He was 19. 1RP 211.

When Officer Minh Truong approached he saw three people in the hot tub. 2RP 225. None of them had tops on. 2RP 225. Then he heard Kaeka

address them, and they started putting their suits on. 2RP 226. He heard Kaeka ask their ages. 2RP 226. Truong was 47 feet away at the time. 2RP 227. Roswell said he was 18. 2RP 227. Truong believed he heard one of the girls say 14 and 16. 2RP 228. He could have misheard because of the distance and the sound of the radio. 2RP 228. Kaeka would have been in a better position to have heard what they said. 2RP 228. They had their backs toward Truong. 2RP 230. He heard one female say “14,” and then he heard “16,” so he assumed one of the girls was 16 and the other was 14. 2RP 230. But it was an assumption that he made. 2RP 230. It was “very possible” that he could have heard the word “15.” 2RP 230. He never talked to the girls himself. 2RP 239.

Roswell testified that he went to the pool and his friend Anthony, who was 20 or 21, was there with AM and JC. 2RP 288-89. Roswell asserted that Anthony introduced them. 2RP 289. He stated that he asked the girls their ages the first night. 2RP 289. There was “really no answer at first.” 2RP 289.

According to Roswell, AM and Anthony both later said they were 16 and 14. 2RP 290. They did not identify who was 16 and who was 14 “at first.” 2RP 290. He saw them at the pool four or five times a week for the next two or three weeks. 2RP 291.

Several days after meeting the girls, Roswell had a conversation with JC, who told him that she was 13. 2RP 291. Roswell asked her if AM was 16, and JC told him that AM was not. 2RP 291. He never asked AM for clarification: “No. With me, you get one chance to tell the truth, then – that’s it.” 2RP 292.

The night before he was arrested, Roswell went to the pool and was hanging out with the girls. 2RP 292. Later four guys joined them with some beer. 2RP 292. They girls had some beer. 2RP 292. Roswell had less than half a beer. 2RP 292. Roswell gave the other half of his beer to JC. 2RP 293. AM “was all over the place drinking everybody’s beer.” 2RP 293. She had at least four. 2RP 293. The two girls seemed intoxicated: they were “running around being stupid,” and “their breath smelled nasty.” 2RP 293.

Roswell stated that after she had been drinking AM kept hanging around him and hanging on him. 2RP 294. He told her he was not really interested. 2RP 294. He just wanted company to swim. 2RP 294. AM always asked him if she could kiss him before she did. 2RP 294. He probably should have said no. 2RP 294.

The night he was arrested he had agreed to meet the girls at the pool around 11:00 p.m. 2RP 295. They were swimming when his friend Anthony arrived. 2RP 295. After about five minutes, Anthony left. 2RP 295.

Anthony returned half an hour later with a half gallon bottle of rum with two or three inches of rum left, and a bottle of Gatorade. 2RP 295. Roswell told him he could not drink much because he had to work in the morning. 2RP 295. He had one or two shots. 2RP 295. The other three drank the rest. 2RP 296. He was not sure how much because he threw the rest away and cleaned up the area when the police arrived. 2RP 296. Anthony left when most of the alcohol was gone. 2RP 296.

The girls were skinny-dipping when Roswell arrived that night. 2RP 296. They put their suits on before they came and talked to him. 2RP 296. They did it again at some point during the evening, and then again about minutes before the police came. 2RP 297.

The last time he took the suits and “hid them” or “put them away.” 2RP 297. After they took off their suits, he was “horsing around” with them. 2RP 297. AM kissed him once or twice during the evening. 2RP 297. He did not touch JC, but did touch AM’s arms, shoulders and stomach. 2RP 297. Roswell denied ever touching her breasts, but admitted that he liked making weird voices. 2RP 298.

According to Roswell, he pushed her away when the police arrived because of the bright light. 2RP 298. AM was right in front of him when the police arrived, and JC was off to the side. 2RP 298. It “could have been”

that his hands were on AM's breasts when the police arrived. 2RP 299. If he did, he did not mean it to be sexual. 2RP 299. He was not sure if he touched her breasts, but if he did it was to "get her out of the way." 2RP 300. Roswell thought AM was 16. 2RP 300. He was not sure about JC, who had said she was 13, but her friend said she was 14. 2RP 300.

On cross-examination Roswell stated that he had talked to AM twice about their ages. 2RP 301. Once on the first day they met, and again five or six days later. 2RP 301-02. He did not ask JC how old AM really was when JC said she was not 16. 2RP 302. He explained that he was not "going to pressure someone." 2RP 302. Roswell acknowledged that he was unsure of AM's age: he did "know if she was older or younger." 2RP 303. He admitted that did nothing to find out her true age. 2RP 303.

Then Roswell claimed that he "asked plenty of times." 2RP 303. He then stated that he had actually he only talked to AM twice about age. 2RP 304. He never talked to AM about her age after talking to JC, or did anything else to find it out. 2RP 304. He asserted that he never kissed AM, she kissed him. 2RP 304. He did concede that once or twice it was a French kiss, that she did not force him to kiss her, and that he participated in the kissing. 2RP 304. He claimed that he had his trunks on when the police arrived, but that he had been naked earlier. 2RP 305. They had kissed right before the police showed up. 2RP 306.

Roswell did not see the police officer before he shined his light on them. 2RP 306. He had his hands on her shoulder or a little lower before the light came on. 2RP 307. He had his hands on her shoulders to keep her from falling on him. 2RP 308. She was standing up and he was seated. 2RP 308.

Roswell admitted that he had doubts about AM's real age. 2RP 310. He stated that he knew quite a few 13 and 14 year olds because he babysat for them. 2RP 312. He did not know Anthony's last name. 2RP 312.

Roswell knew Crystal Bumanglag, who was 17. 2RP 317. Roswell admitted he might have told Bumanglag that he had met "two younger chicks that wanted" him. 2RP 317-18. Bumanglag warned him to be careful not to get in trouble with the girls. 2RP 319. He responded that he had "told everyone" that he was not going to do anything with them. 2RP 319.

In rebuttal, Kaeka testified that Roswell did not appear to be pushing AM away when Kaeka first saw them. 2RP 323. There was no outward motion to his arms. 2RP 323. Kaeka watched them for 30 or 40 seconds before he turned his light on. 2RP 324. Roswell's hands were on AM's breasts the entire time. 2RP 324. They were groping and squeezing. 2RP 324. He did not appear to be trying to hold her up. 2RP 324. Roswell was naked when he got out of the tub. 2RP 324.

### III. ARGUMENT

**A. THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO CONCLUDE THAT ROSWELL HAD SEXUAL CONTACT WITH 14-YEAR-OLD AM WHERE THE OFFICER TESTIFIED THAT HE SAW ROSWELL SQUEEZE AND GROPE AM'S BREASTS WHILE ROSWELL AND AM WERE NAKED IN THE HOT TUB.**

Roswell argues that the evidence was insufficient to show that Roswell had sexual contact with 14-year-old AM. This claim is without merit because the evidence showed that Roswell squeezed and groped her breasts while they were both naked in a hot tub.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v.*

*Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

To establish that Roswell committed third-degree child molestation, the State had to prove:

- (1) That on or about [August 6, 2003], the defendant had sexual contact with [AM];
- (2) That [AM] 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;
- (3) That [AM] was at least forty-eight months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

WPIC 44.25. The second through fourth elements are not contested.

***1. The evidence was sufficient to show that Roswell intentionally groped AM's naked breasts.***

Roswell argues that the evidence was insufficient because inadvertent contact with breasts does not constitute "sexual contact." Brief of Appellant

at 11 (*citing State v. Powell*, 62 Wn. App. 914, 816 P.2d 86 (1991), *review denied*, 118 Wn.2d 1013 (1992)). First, *Powell* has no application here, where the touching was directly on the bare skin of a primary erogenous zone:<sup>1</sup>

However, in those cases in which the evidence shows *touching through clothing, or touching of intimate parts of the body other than the primary erogenous areas*, the courts have required some additional evidence of sexual gratification

*Powell*, 62 Wn. App. at 917.

Moreover, Roswell's argument misapplies the standard of review. It is premised on acceptance of his testimony that the touching was inadvertent. That testimony was contradicted by AM, who testified that he squeezed her breasts to "make them talk" and that of Officer Kaeka, who testified that Roswell was squeezing and groping AM's breasts for 30 or 40 seconds, and who rejected the notion that AM appeared to be falling or that Roswell was holding her up or pushing her away at the time. 2RP 323-24. The evidence was more than sufficient to show sexual contact, and this claim should be rejected.

***2. No unanimity instruction was required, and even if one were, the evidence was sufficient as to each act.***

Roswell also argues that the State presented evidence of two distinct acts of sexual contact: the groping of AM's breasts and the French kissing

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<sup>1</sup> Female breasts fall within this definition. *In re Adams*, 24 Wn. App. 517, 601 P.2d 995 (1979).

that occurred between them. He alleges that French kissing is insufficient to establish sexual contact, and that it is impossible to determine which act the jury relied on. This argument fails for multiple reasons.

**a. The groping of AM’s breasts and the French kissing between AM and Roswell were a continuing course of conduct.**

Where the State presents evidence of several distinct acts, any one of which could be the basis of a criminal charge, the trial court must ensure that the jury reaches a unanimous verdict on one particular incident. *State v. Handran*, 113 Wn.2d 11, 17, 775 P.2d 453 (1989) (citing *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984)). However, this rule applies only where the State presents evidence of “several distinct acts” and does not apply where the evidence indicates a “continuing course of conduct.” *Handran*, 113 Wn.2d at 17 (citing *Petrich*, at 571). To determine whether criminal conduct constitutes one continuing act, the facts must be evaluated in a commonsense manner. *Handran*, 113 Wn.2d at 17, citing *Petrich*, at 571, 683 P.2d 173. The Court considers the time elapsed between the criminal acts and whether the different acts involved the same parties, the same location, and the same ultimate purpose. *State v. Love*, 80 Wn. App. 357, 361, 908 P.2d 395 (1996).

For example, where the evidence involves conduct at different times and places, then the evidence tends to show “several distinct acts.” *Handran*,

113 Wn.2d at 17 (citing *State v. Workman*, 66 Wash. 292, 294-95, 119 P. 751 (1911); *Petrich*, 101 Wn.2d at 571). On the other hand, the evidence tends to show one continuing act if the criminal conduct occurred in one place during a short period of time between the same aggressor and victim. *Handran*, 113 Wn.2d at 17.

Other cases have held that actions occurring over periods of time similar to the one in the present case constitute a “course of conduct” negating the need for a *Petrich* instruction. See *State v. Crane*, 116 Wn.2d 315, 804 P.2d 10 (1991) (no *Petrich* instruction required because assaults over a two hour period constituted “continuous conduct”); *State v. Craven*, 69 Wn. App. 581, 849 P.2d 681 (1993) (repeated assaults on a child during a three week period constituted a continuing course of conduct, not requiring juror unanimity); *State v. Fiallo-Lopez*, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995) (drug sales in two different locations in a city constituted a continuing course of conduct); *State v. Marko*, 107 Wn. App. 215, 221, 27 P.3d 228 (2001) (Intimidation of witnesses case in which defendant’s statements to two victims over a 90-minute period constituted one continuous stream of conduct).

In the present case, a common sense evaluation of the facts shows that the child molestation charge was based on one continuing course of conduct.

The events took place over the course of a few hours,<sup>2</sup> at the same location, involved the same defendant and victim, and were for the same ultimate purpose. The kissing and the groping were clearly a continuing course of conduct and as such no election or instruction was required.

**b. The State “elected” the groping of AM’s breast as the act charged, and the jury was specifically instructed of this fact.**

Even if this were deemed a multiple acts case, however, no error occurred. *Petrich* and its progeny provide that in such cases, the jury must *either* be instructed on the need for unanimity *or* the State must elect the act upon which it is relying. Here, the State clearly elected to rely upon Roswell’s groping of AM’s breasts.

There is little case law on what constitutes and “election” for purposes of the *Petrich* rule. It appears, however, that the State’s closing argument may be considered in this regard.

In *State v. King*, 75 Wn. App. 899, 902, 878 P.2d 466 (1994), the Court stated that “the State must tell the jury which act to rely on in its deliberations.” In that case, the State told the court it would elect an act in closing, but then argued both acts. As a result, *Petrich* error was found. *See also State v. Bobenhouse*, 166 Wn.2d 881, 894, 214 P.3d 907 (2009)

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<sup>2</sup> There was also testimony that Roswell kissed AM the previous night. However, that act would have been outside the charged period. CP 6.

(“Comparing the State’s closing argument with John’s testimony makes it inconclusive as to whether Bobenhouse was being charged based on one act or multiple acts of child rape.”); *State v. Coleman*, 159 Wn.2d 509, 515, 150 P.3d 1126 (2007) (State’s closing argument failed to exclude second act from consideration).

Here, however, the State relied solely and repeatedly on the groping of AM’s breasts as the charged act. In its initial argument, the very first time she discussed the elements of the offense, the prosecutor told the jurors, “if you believe and have an abiding belief that this Defendant *put his hands on the breasts of [AM]*” they should find Roswell guilty. 2RP 361. She went on to argue that “the real issue ... is whether or not what happened was sexual contact and whether or not that contact occurred,” and then discussed testimony of Roswell, AM and Officer Kaeka regarding the touching of AM’s breasts. 2RP 363-64. She amplified this argument: “Touching the breasts of an individual, caressing them, groping them, whatever you would, is sexual contact. And you know that’s sexual contact.” 2RP 365. In discussing the defining instruction she argued that *breasts* are a sexual part of the body. 2RP 366. She also related sexual gratification to breasts: “But if you believe a 19-year-old boy looking at a 14- and 13-year-old girl naked and touching her breasts is not for sexual gratification, then you should acquit.” 2RP 367. She made the question for the jury very clear:

Do you have an abiding belief that he touched her breasts, and do you have an abiding belief that he did it to sexually gratify himself? If the answer to that is yes, then you have to find the defendant guilty.

2RP 368. There were several more references to the guilty act and all pertained to the touching of AM's breasts. 2RP 373, 377.

Roswell also framed the issue in the same manner. He asked the jury, "has the State proven beyond a reasonable doubt that there was any touching of the breasts?" 2RP 381.

In rebuttal, the prosecutor again referred only to the touching of AM's breasts. 2RP 400, 404. Her final comment regarding the act charged again discussed only the groping of AM's breasts.

The sexual contact is clear. He touched her breasts. Defense counsel wants to minimize the fact that he may have made them talk and squeezed them together as just playfulness. They're breasts. They're sexual, intimate parts of your body. He wasn't doing this with his hand. He was doing this with her breasts. And furthermore, when Officer Kaeka arrived, he was doing more than that with them. He was groping them and running his hand down her back.

2RP 407. The State clearly elected the groping of AM's breasts as the act upon which it relied for conviction.

Moreover, even were there the slightest ambiguity in the election, the trial court's response to the jury's question regarding kissing would have erased it:

Neither party argued that a French kiss was sexual touching. CP 29. Because the State clearly elected the touching of AM's breasts as the charged act, no *Petrich* instruction was necessary. As discussed above, the evidence was more than sufficient to support this act.<sup>3</sup>

**c. The evidence was sufficient for the jury to find that the French kissing was sexual contact.**

Even if *Petrich* applied here, any error would be harmless because the evidence would have been sufficient as to both acts. “[I]n multiple acts cases the standard of review for harmless error is whether a ‘rational trier of fact could find that each incident was proved beyond a reasonable doubt.’” *State v. Camarillo*, 115 Wn.2d 60, 64, 794 P.2d 850 (1990) (quoting *State v. Gitchel*, 41 Wn. App. 820, 823, 706 P.2d 1091, review denied, 105 Wn.2d 1003 (1985)).

As noted above, Roswell relies on an inaccurate view of the record. More importantly, however, Roswell also relies upon the legal misperception

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<sup>3</sup> It must be noted that Roswell relies in part on a misconception of the record. He asserts that the “the jury was instructed that it could consider both the French kiss and the touching of the breast as sexual contact.” Brief of Appellant at 12. The record shows no such thing. Roswell cites to the jury instructions, CP 18-27, which contain no reference to breasts or kissing. He also refers to the response to the jury's inquiry regarding whether a French kiss was a sexual act. CP 29. Far from informing the jury that it could consider a kiss to be a sexual act, after noting that neither party had argued that a kiss was a sexual act, it went on to instruct the jury:

Sexual or other intimate parts includes but is not limited to the genitals, breasts, buttocks, lower abdomen and hips, and also includes the parts of the body in close proximity to the breasts, lower abdomen and hips.

CP 29. Finally, Roswell cites to RP 424, which was merely the discussion, outside of the

that “[e]vidence of kissing is generally insufficient as a matter of law to prove sexual contact with an ‘other intimate part.’” Brief of Appellant at 12-13 (quoting *State v. R.P.*, 122 Wn.2d 735, 862 P.2d 127 (1993)).

In *RP*, the Supreme Court reversed an indecent liberties conviction in an extremely brief per curiam opinion. Its entire holding is as follows:

R.P. was charged and convicted in juvenile court on two counts of indecent liberties arising from two separate incidents involving a female junior high school classmate. His petition for review relates only to the first count, and argues that there was insufficient evidence that R.P. engaged in sexual contact. This count arose from an incident on or about March 26, 1991, in which R.P. allegedly picked up, hugged and kissed his classmate after track practice. During the course of events, he eventually placed what is commonly referred to as a “hickey” or “passion mark” on her right neck area.

We affirm the Court of Appeals decision, 67 Wn. App. 663, 838 P.2d 701, in all respects but one. After examining the record and the facts of this case, we find that there was insufficient evidence of sexual contact to sustain count 1 (indecent liberties). We reverse R.P.’s conviction on that count.

*R.P.*, 122 Wn.2d at 736.

This Court, however, has rejected the broad rule that Roswell would derive from *R.P.*:

In a two paragraph per curiam opinion, the court held, without elaboration, that there was insufficient evidence to convict the respondent, a junior high school student, of sexual contact where he picked up a classmate after a track practice and

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jury’s presence, of the language that would be contained in the document found at CP 29.

hugged her, kissed her, and placed a hickey on her neck. It is unclear what aspect of the evidence the court found to be insufficient, but the definition of sexual contact requires both touching of intimate parts and that the touching be for purposes of sexual gratification.

*State v. Coleman*, 151 Wn. App. 614, ¶ 28, 214 P.3d 158 (2009). Notably nothing in *R.P.* suggests that the biting of the girls neck was a sexual act. It could have just as easily have been bullying.

In *Coleman*, a French-kissing case, this Court went on to hold that such kissing *could* be sexual contact for the purposes of the child molestation statute:

A jury could reasonably infer that kissing with tongues constitutes contact with intimate parts for purposes of sexual gratification, particularly where, as here, kissing was one component of abuse that also included mutual masturbation and oral sex. The evidence was sufficient.

*Coleman*, 151 Wn. App. at ¶ 30.

Likewise, here, a commonsense view of the evidence indicates that the French kissing between AM and Roswell was sexual contact. There was evidence that AM was attracted to Roswell.<sup>4</sup> Roswell and AM had spent the evening frolicking naked in a pool and hot tub. There was evidence that prior kissing had occurred. And of course, there was the evidence that Roswell had groped and squeezed AM's breasts and run his hands down her back. The

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<sup>4</sup> By definition sexual contact includes acts that are for the purpose of the sexual gratification of *either* party. RCW 9A.44.010(2).

jury would be well within its rights to have concluded that the French kiss was sexual contact.

Roswell also quotes *In re Adams*, 24 Wn. App. 517, 520, 601 P.2d 995 (1979), which observed:

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.

From this quote, Roswell concludes that there is insufficient evidence that the mouth is an “other intimate part,” opining that “if the mouth is an “intimate part” within the meaning of the statute, there is a great deal of criminal activity that occurs daily in the normal course of events.” Brief of Appellant at 14.

Roswell’s conclusion is absurd. Plainly there is a difference between a buss on the cheek or even on the mouth and the insertion of one’s tongue into another’s mouth. The latter is clearly an intimate and sexual act. Even then, contrary to Roswell’s suggestion, it is only criminal if done without consent or with a person below the lawful age of consent. The evidence was more than sufficient to show sexual contact. This claim should be rejected.

**B. THE EVIDENCE WAS SUFFICIENT FOR THE JURY TO CONCLUDE THAT ROSWELL FAILED TO ESTABLISH BY THE PREPONDERANCE OF THE EVIDENCE THAT HE HAD A REASONABLE BELIEF THAT AM WAS OF LEGAL AGE.**

Roswell next claims that that he should have been acquitted based upon the affirmative defense that he reasonably believed AM was 16. Roswell misstates both the standard of proof at trial and the standard of review on appeal. Applying the proper standards, AM's testimony that she told Roswell she was 14 was a sufficient basis for the jury to reject the defense.

When applying an affirmative defense, the Supreme Court applies a two-tiered test to evaluate whether the State or a defendant has the ultimate burden of persuasion. *State v. Lively*, 130 Wn.2d 1, 10, 921 P.2d 1035 (1996). First, the court must determine whether the defense is an element of the crime or whether the defense negates an element of the crime. *Lively*, 130 Wn.2d at 10. Under the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution, the State must prove every element of an offense beyond a reasonable doubt. *Lively*, 130 Wn.2d at 11. If a statute indicates an intent to include absence of a defense as an element of the offense, or the defense negates one or more elements of the offense, the State has a constitutional burden to prove the absence of the defense beyond a

reasonable doubt. *Lively*, 130 Wn.2d at 11.

RCW 9A.44.030 provides in pertinent part:

(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;

(Emphasis supplied).

Clearly the Legislature did not intend that the absence of the defense be an element of the defense. To the contrary, it explicitly placed the burden of proving the defense on the defendant.

Nor does the defense negate an element of the offense. The elements of third-degree child molestation are set forth in WPIC 44.25:

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

(1) That on or about \_\_\_\_\_, the defendant had sexual contact with \_\_\_\_\_;

(2) That \_\_\_\_\_ 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;

(3) That \_\_\_\_\_ was at least forty-eight months younger than the defendant; and

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

Whether the defendant had a reasonable belief that the victim was of legal age plainly does not negate any of these elements. Under *Lively*, Roswell clearly bore the burden of proof on the defense of reasonable belief.

*Lively* also sets forth the proper standard of review where the defendant bears the burden of proof for proving a defense:

The appropriate standard of review in such cases is whether, considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the evidence.

*Lively*, 130 Wn.2d at 17.

Here, both girls testified that they told Roswell that AM was less than 16 years old. AM testified that she specifically told him she was 14. While Roswell testified to the contrary, he also acknowledged that JC had told him that AM was not 16. As discussed with regard to the previous point, questions of credibility and the weighing of disputed evidence are for the jury. *See also Lively*, 130 Wn.2d at 18 (“Despite this considerable evidence of entrapment, however, a review of all of the evidence presented in the light most favorable to the State leads us to conclude that a rational trier of fact

could have found that the Defendant failed to prove entrapment by a preponderance of the evidence.”).

Roswell’s reliance, Brief of Appellant at 16, on *State v. Petit*, 88 Wn.2d 267, 274, 558 P.2d 796 (1977) (Utter, J., dissenting), for a contrary standard of proof is misplaced. First, as he notes, the cited passage was from the dissent in that case. Moreover, Justice Utter’s dissent was based on his conclusion that under *State v. Bromley*, 72 Wn.2d 150, 432 P.2d 568 (1967), merely producing evidence that creates a reasonable doubt as to guilt is sufficient to establish an affirmative defense. The Court in *Lively* explicitly rejected such an interpretation of *Bromley*, however:

This court observed more recently that duress is an affirmative defense and that affirmative defenses normally “must be proved [by the defendant] by a preponderance of the evidence.” *State v. Riker*, 123 Wn.2d 351, 367, 869 P.2d 43 (1994). Calling the *Bromley* decision perplexing and confusing, the court concluded that the only logical reading of *Bromley* is to require the defendant to prove the affirmative defense of duress by a preponderance of the evidence. *Id.* at 368-69. The *Riker* decision placed the ultimate burden of persuasion on the defendant claiming duress and determined that the appropriate quantum of proof required is a preponderance of the evidence.

*Lively*, 130 Wn.2d at 12. Because the evidence, viewed in the light most favorable to the State, was sufficient for the jury to conclude that Roswell failed to prove the defense, this claim should be rejected.

**C. THE TRIAL COURT DID NOT COMMENT ON THE EVIDENCE BY GIVING THE JURY A LEGALLY PROPER DEFINITION OF SEXUAL CONTACT.**

Roswell next claims that the judge's response to the jury's inquiry about French kissing was an improper comment on the evidence. This claim is without merit because the judge's instruction was a correct statement of the law and did not discuss the facts of the case.

During deliberations, the jury inquired whether a French kiss was a sexual act. CP 29. After much discussion with the parties, the trial court gave the following instruction:

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

CP 29.

Article IV, § 16 of the Washington constitution prohibits judges from commenting on the evidence. It states:

Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.

This provision is violated when a judge's statement or instruction conveys the judge's personal opinion about the evidence or 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)). The trial court comments on the evidence if it expresses its attitude toward the merits of the case or its evaluation relative to a disputed issue. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995). However, the comment violates the constitution only if those attitudes are "reasonably inferable from the nature or manner of the court's statements." *State v. Elmore*, 139 Wn.2d 250, 276, 985 P.2d 289 (1999). A jury instruction is not an impermissible comment on the evidence when sufficient evidence supports it and the instruction is an accurate statement of the law. *State v. Hughes*, 106 Wn.2d 176, 193, 721 P.2d 902 (1986); *State v. Ciskie* 110 Wn.2d 263, 282-283, 751 P.2d 1165 (1988).

Here the judge's statements were in response to a specific question from the jury. Superior Court Criminal Rule 6.15(f) provides that "[a]ny additional instruction upon any point of law shall be given in writing." CrR 6.15(f)(1). This portion of the rule necessarily assumes that additional instructions on the law can be given during deliberation. *State v. Becklin*, 163 Wn.2d 519, ¶ 21, 182 P.3d 944 (2008). Whether to give further instructions in response to a request from a deliberating jury is within the discretion of the trial court. *Id.* Merely giving additional instruction on the law does not

constitute a comment on the evidence. Thus, in *State v. Tili*, 139 Wn.2d 107, 126, 985 P.2d 365 (1999), the Supreme Court concluded that informing the jury that an object may include a finger was a correct statement of the law and not an impermissible comment on the evidence. Here, the bulk of the court's instruction was a legally correct definition of sexual contact.

The first sentence of this instruction is clearly not a comment on the evidence.

The second is not a comment on the evidence but on the argument, which plainly is not evidence. Moreover, to be an improper comment on the evidence the judge's statement must resolve a disputed issue of fact that should have been left for the jury. *Becker*, 132 Wn.2d at 65. This comment did not purport to resolve whether a French kiss was sexual contact and even if it did, the only implication to be derived from it would have been that French kissing was *not* sexual contact. Even if the comment were improper it would thus have been harmless. *Lane*, 125 Wn.2d at 839-40 (comment on the evidence is harmless where "it is apparent that remark could not have influenced the jury").

The remainder of the instruction is an accurate statement of the law that in no way comments on the evidence. *See In re Adams*, 24 Wn. App. 517, 520, 601 P.2d 995 (1979); *State v. Harstad*, 153 Wn. App. 10, ¶¶ 15-16,

218 P.3d 624 (2009). While a court need not instruct a jury using language from case law, it is not prohibited from doing so if the language is a correct statement of the law. *State v. Williams*, 28 Wn. App. 209, 212, 622 P.2d 885, review denied, 95 Wn.2d 1024 (1981).

Although Roswell criticizes the instruction, he fails to provide any authority that it is an incorrect statement of the law. Instead he relies on cases that uniformly involved the court specifically informing the jury that one of the elements of the offense had been established. The instruction here clearly did not do that, and any evidentiary comment that could remotely be derived from it would clearly have inhaled in Roswell's favor. This claim should be rejected.

**D. THE PROSECUTOR'S CLOSING ARGUMENT WAS ENTIRELY PROPER.**

Roswell next claims that the prosecutor violated the trial court's pre-trial ruling, improperly shifted the burden of proof to the defense and improperly sought to evoke bias and sympathy from the jury. This claim is without merit. First, although Roswell's objection was sustained, a review of the record shows that there was no violation of the earlier ruling. Next, because Roswell bore the burden of proof to establish the defense that he reasonably believed AM was of lawful age, the prosecutor properly pointed out that Roswell bore that burden. Finally, it was Roswell who appealed to

the bias and sympathy of the jury, which the prosecutor merely pointed out. No prosecutorial error occurred.

The Sixth Amendment to the United States Constitution guarantees a defendant a fair trial but not a trial free from error. *State v. Fisher*, 165 Wn.2d 727, ¶ 35, 202 P.3d 937 (2009). The burden rests on the defendant to show the prosecuting attorney's conduct was both improper and prejudicial. *Fisher*, 165 Wn.2d at ¶ 35. Once proved, prosecutorial error is grounds for reversal where there is a substantial likelihood the improper conduct affected the jury *Fisher*, 165 Wn.2d at ¶ 35. Defense counsel's failure to object to the error at trial constitutes waiver on appeal unless it amounts to misconduct “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice” incurable by a jury instruction. *Fisher*, 165 Wn.2d at ¶ 35.

In the context of closing arguments, the prosecuting attorney has “wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *Fisher*, 165 Wn.2d at ¶ 36. The appellate court reviews allegedly improper comments in the context of the entire argument. *Fisher*, 165 Wn.2d at ¶ 36. If defense counsel failed to request a curative instruction, the court is not required to reverse. *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

***1. The prosecutor did not violate the court's ruling nor impermissibly shift the burden of proof by responding to the defense argument that the State failed to call a witness that supposedly would have supported the defense.***

Roswell testified that a friend of his, Anthony, introduced him to the girls.<sup>5</sup> 2RP 289. Roswell also asserted that Anthony told him AM was 16. 2RP 290. In closing, the prosecutor pointed out that Roswell bore the burden of proof with regard to the defense. 2RP 371. In so doing she specifically pointed out that Roswell had no burden to disprove the crime, but did have to prove the defense. *Id.* As discussed above, this is a true statement of the law. These statements were directly followed by the observation that Roswell's claim that Anthony told him AM was 16 was not corroborated. 2RP 372. She then questioned why the jury had not heard from Anthony:

Anthony, a person who he knows that habits of, who he talks about him leaving like he usually does, who he knows approximately where Anthony lives, where's Anthony? Don't you think that that's something that reasonably you would expect to see or hear from? We don't know what Anthony would say. We don't know if Anthony would say he heard that or didn't hear it. We don't have any information whatsoever, because he didn't bring Anthony in here to testify; Anthony, who was his friend, who he knew and saw frequently and he hung out with and he testified to that. There's no corroboration and it's his burden of proof to bring it.

2RP 372. Notably there was no objection to this argument. That is no doubt

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<sup>5</sup> AM did not mention Anthony. AM testified that Roswell was alone the night they met. 1RP 128. She testified that Brandon brought the alcohol to the pool. 1RP 132, 134. JC testified that she thought Anthony brought the alcohol. 1RP 176. JC did not testify that Anthony was

because it was squarely within the trial court's ruling that the State could argue the matter in its initial closing argument, so that the defense could respond to it. 2RP 357.

Contrary to the impression Roswell gives in his brief, the trial court also permitted the State to respond in rebuttal if the defense addressed the issue:

MS. FORBES: May I respond to the Defendant's argument on rebuttal?

THE COURT: Well, not to the extent that you're saying where is he, why wasn't he called.

MS. FORBES: Right. I would raise that in my direct. But then *I'm assuming the Defense is going to make an argument. I'm assuming the Court's not prohibiting me from responding to those arguments on rebuttal.*

THE COURT: *I'm not precluding you from raising those arguments on rebuttal.* If you're going to do it, you need to do it initially so the Defense is in a position to argue.

2RP 357 (emphasis supplied).

In his closing, Roswell responded that he had no burden produce Anthony:

Anthony. Who – where is Anthony? The Defense hasn't brought in Anthony. Does the defense have an obligation to bring in Anthony? No.

2RP 391. He then went on to suggest that it was the State's responsibility to have produced him:

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with Roswell the night they met, however.

One would imagine that the State of Washington would have the resources to go find Anthony, if the State of Washington wanted Anthony to testify. So please don't be fooled by the State's telling you that this is my obligation, Mr. Roswell's obligation, to bring this Anthony fellow into court. It's not. The State could have done the same thing. It's a non-issue.

2RP 392.

As explicitly permitted by the ruling quoted above, the State directly responded to the defense argument:

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's 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 tell – and when you testify that Anthony was sitting right there next to you, when she says this.

2RP 405. At this point, defense counsel objected:

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

THE COURT: Sustained.

2RP 405-06.<sup>6</sup> In view of the ruling quoted above, it is not at all clear what the basis of the objection was, or why it was sustained.

Finally, contrary to Roswell's contention, the prosecutor did not continue to make the argument even after the objection was sustained. The pre-trial ruling specifically concerned comments on Anthony's absence. The prosecutor only briefly repeated that Roswell had the burden of proof for the affirmative defense, which was not objected to.

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.

2RP 406.

Roswell compares this argument to cases in which the State commented in closing on evidence that had been suppressed. Brief of Appellant at 26. His argument is inapt. Here, the prosecutor was not discussing any evidence that had been *suppressed*. She was discussing, fully in compliance with the court's prior ruling, the inferences to be drawn from the defendant's failure to corroborate his defense.

Nor did that argument impermissibly shift the burden of proof. As discussed above, as a matter of law, Roswell already bore the burden of

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<sup>6</sup> Contrary to Roswell's assertion, he did not object "many times" to the prosecutor's argument. *See* Brief of Appellant, at 28. To the contrary this, and a second objection, 2RP 408, which will be addressed *infra*, were the only two objections raised.

proving his reasonable belief defense.<sup>7</sup> Requiring a defendant to prove a defense that does not disprove an element of the offense does not improperly shift the burden of proof. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.2d 1190 (2004). It follows that argument holding him to that burden was also proper.

***2. The prosecutor did not improperly appeal to bias and prejudice by responding to defense arguments suggesting that the defendant's molestation of 14-year-old AM was her own fault.***

Roswell began his closing argument by essentially suggesting that he was the innocent victim of the machinations of 14-year-old AM:

[Y]oung people today are living in a very scary world. It's not the world we grew up in. It's not the world I grew up in. We have a heightened sense of protecting our children because of the things we hear about and things we read. We today raise our young children in a different world. We raise them in a world where a young man, 19 years old, hangs out at a swimming pool, meets a couple of girls. Everyone gets to drinking. The girls peel off their clothes, run around. One of the girls is attracted to him. She's naked. She tells him she's 16, and she starts kissing him. And then it happens again the next night. And she says, Are you going to be back tomorrow? Sure. He comes back tomorrow. Someone else shows up with alcohol, girls peeling off their clothes again, and he's charged with a crime. He is sitting here. He came into this courtroom charged with two counts of child molestation for that. That's the world our young kids live in today. That's not the world we grew up in.

2RP 379-80. Notably, the vast majority of this introductory paragraph has nothing at all to do with any element of or defense to the charges. Instead, it

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<sup>7</sup> Roswell conceded this burden in his closing argument. 2RP 382.

vilifies the victim for having bad judgment. But bad judgment is not uncommon in young teenagers, and precisely why consent is not a defense to the crime charged. Roswell was simply trying to paint the victim as “bad” and to evoke sympathy for himself.

He continued this theory as he went on. For example he suggested that AM’s behavior was not a relevant consideration:

[AM], nice young lady, perhaps a bit wayward, but that’s a judgment, and that’s not something I’m going to ask you to consider.

2RP 384. He nevertheless immediately went on with a litany of her misbehavior that was “not an issue”:

It’s not an issue in this case what you think of the way she lives her life. It’s not. It’s not an issue that she’s sneaking out of her house at night, hooking up with her girlfriend, jumping the fence, trespassing, drinking with guys. It’s not an issue.

2RP 385.

Roswell again implied that AM was at fault for the crime, and claimed that this somehow was tied to her credibility:

She’s biased. She liked Mr. Roswell, she told you that. She kissed him. She liked him. She wanted to be around him. She made sure that he came back the next night. Are you coming back? We’ll be here. Saw him every night, taking off her clothes in front of him, kissing him without any provocation, a couple times, maybe a few times, maybe open-mouth kissed. She liked Mr. Roswell. It’s not a sin. It happens.

2RP 385-86.

In response to this argument, the prosecutor very briefly addressed the tone of Roswell's argument, specifically referring to the opening paragraph of the defense argument:

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 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 two girls like they're a couple of whores and they got what they deserved –

2RP

This argument was clearly in response to the defense arguments. A prosecutor's remarks in rebuttal, even if they would otherwise be improper, are not misconduct if they are "invited, provoked, or occasioned" by defense counsel's closing argument, so long as the remarks do not go beyond a fair reply and are not unfairly prejudicial. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). This claim should be rejected.

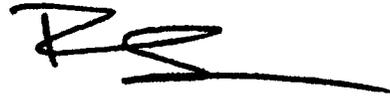
**IV. CONCLUSION**

For the foregoing reasons, Roswell's conviction and sentence should be affirmed.

DATED May 10, 2010.

Respectfully submitted,

RUSSELL D. HAUGE  
Prosecuting Attorney

A handwritten signature in black ink, appearing to be 'R D Hauge', written over a horizontal line.

RANDALL AVERY SUTTON  
WSBA No. 27858  
Deputy Prosecuting Attorney