

COA # 34572-2-II
Thurston Co. Superior Ct. # 03-1-02154-1

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent

v.

BRADLEY CURTIS,

Appellant.

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APPELLANT'S BRIEF

DATED this 25th day of September, 2006.

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ASSIGNMENT OF ERRORS

- A. Whether juries must be correctly advised of that it can be a hung jury?
- B.. Whether extrinsic evidence of the jury foreperson's molestation was Improper?
- C. Whether cumulative error in this case demands reversal?.

Issues Related To Cumulative Error

1. Whether expert opinion testimony of child complainant's "molestation without symptoms" was inadmissible opinion testimony?
2. Whether it was error to admit nonexistent "pornographic" CD the complainant's father supposedly destroyed?
3. Whether the exclusion of the child complainant's reports of abuse against her father during the same period of alleged misconduct against defendant denied Mr. Curtis due process and was fundamentally unfair.
4. Whether the admission of out-of-court statements by codefendant violated Petitioner's right to confrontation especially in view of the fact that codefendant did not testify?

I. STATEMENT OF FACTS

Brad Curtis was charged by information with one count of rape of a child in the first degree or, in the alternative, with child molestation in the first degree, contrary to RCW 9A.44.073, 9A.44.083. The misconduct was alleged to have occurred between June 2003 and July 13, 2003. CP 3.¹

The minor child, C.W., reported that Brad Curtis and his wife, Nicole Willyard, touched her inappropriately (C.W. was Nicole's 10 - year old daughter). Lawrence Daly, a defense forensic investigator, testified that he interviewed C.W. before

¹ Before the defense motion to vacate was filed (based on declarations from jurors), a direct appeal had been filed under COA #32308-7-II. Division II affirmed the judgment and sentence on 04/25/06 by unpublished opinion. Brad Curtis sought discretionary review of that decision 05/25/06. Department #1 of the Supreme Court will consider that petition 01/30/07 (Wash. Supreme Cr. #78762-0). The references to *Clerk Papers* in this brief that are prior to 05/02/05 (i.e. filing of *Motion to Vacate*) are the same as the references to *Clerk's Paper* in the first appeal (COA #32308-7-II). References to the *Verbatim Report of Proceedings* are the same *Report of Proceedings* as in the first appeal.

trial and that C.W. acknowledged that she did not know whether some of her reports were just a dream. RP Vol. II,² 304.³

Dr. William Oley, a state's expert, examined C.W. and found her to be normal. Dr. Yolande Duralde, another state's expert, never examined C.W. but testified that "only about five percent of kids who actually have specific physical findings that – for penetrative trauma, which is what we're looking for, the majority of children don't have findings either because what happened didn't leave any marks." RP Vol. II - 199, 202-203.

City of Lacey PD Officer Shannon Barnes testified that Mr. Curtis basically confessed to child molestation when he responded to an ambiguous question: "I asked him why I should believe him over a ten year old girl?" and "He (Curtis) said you shouldn't." RP Vol. II, 236. However, there was no "confession" since Mr. Curtis continued to adamantly deny any sexual misconduct." RP Vol. II, 236.⁴ Detective David Miller, Lacey

² RP Vol. II refers to trial transcripts from 07/21/04; RP Vol. I refers to trial transcripts from 07/20/04.

³ Q. And did you say, "Okay, Do you know if it was a dream or not?" And did she say, I can't – I don't know. It could have been"? A. That's what she said. RP Vol. II, 304.

⁴ Q. And after he said that did he continue to deny personally having done anything to C.W.?; Ans. Right. RP Vol II,236-237.

PD, who was present during Curtis' police interview, highlighted the "confession" with his reaction "I was like wow, he did it." RP Vol. II, 5.⁵

The jury found Mr. Curtis guilty of the alternative crime - child molestation in the first degree. CP 82; 07/23/04 RP 3-8. On 09/24/04 the court sentenced Brad Curtis to a standard range sentence of 63 months based on an offender score of -1-. CP 140-152; 09/24/04 RP 18, 21-22.

During jury deliberations the jury forewoman, Linda Poutre, shared her thoughts and experiences as a molestation victim with the rest of the jury. 2nd Index CP, 05/02/05 CP, 3 - 17, 11.⁶ At least three other jurors remembered Ms. Poutre's

⁵ RP Vol. II, 4-5: Q. And then after he made his denial do you recall Detective Barnes asking him a question about how she should reacted to that? A. Yes sir. Detective Barnes said, "Why should I believe you over a ten-year - old girl?" Q. And what was Mr. Curtis's response to that? A. He stated "You shouldn't". Q. Okay, now, when you heard that, what was your reaction to hearing him say that? Mr. Mestel: Objection, your Honor. The Court: I will allow it. His reaction, if any..... (Det. Miller) A. I was like, wow, he did it.

As can be seen by the above exchange, the defense immediately objected to the irrelevant, prejudicial and inadmissible opinion testimony.

⁶ The undated *Clerk's Papers Index* was mailed to undersigned counsel on or about 06/13/06. The documents are not numbered. The exhibits attached to the defense 05/02/05 *Motion and*

molestation reports. 2nd Index CP, 05/02/05 CP, 3 -17, 12-14. On 07/23/04 at 10:35 am the jury indicated by note "We are a hung jury. What are our instructions now?" 2nd Index CP, 10/24/05 CP, 81-91, 89. The note was signed by Linda Poutrie, presiding juror. Two minutes later the court advised the jurors "Please continue to deliberate." The jury foreperson explained the situation as follows:

The jury in this case deliberated intensely for two full days when we got the case. We wrote many large post-em notes from our jury notes and otherwise intensely considered the case. The jury could not reach a decision and were absolutely "hung" on the charges. We notified the court that the jury was unable to reach a verdict. The court then notified the jury that being "hung" was unacceptable.

See - 09/26/05 Declaration of Linda Poutrie, jury foreperson: 2nd Index CP, 10/24/05 CP, 81-91, 90-91.

Thus, the jury foreperson and other jurors believed they could not be a hung jury – i.e. that they had to reach some verdict. She and other jurors believed that the jury had to reach a

Memorandum to Vacate Judgment and/or Grant New Trial included juror declarations: Ex. #1 - 03/22/05 Declaration of Lisa Poutre; Ex. #2 - 03/12/05 Declaration of Julie A. Crabbe; Ex.#3 - 03/20/05 Declaration of Bradley Moody; and Ex.#4 - 03/20/05 Declaration of Cathy J. Leroy. Other declarations related to discussion of Ms. Poutrie's sexual molestation include Ex. #5 - 03/16/05 Declaration of Janice Towle; Ex.#6 - 03/13/05 Declaration of Linda Lee Curtis; and Ex.#7 - 03/13/05 Declaration of James Michael Curtis.

verdict and that not reaching a verdict was unacceptable. Thus, the jury misunderstood the law – i.e. whether or not they were allowed to be a hung jury.

The defense moved to vacate the judgment because the jury considered information and materials outside the trial and because they misunderstood the law.

The defense motion to vacate was denied in two sets of *Findings and Conclusions* dated 05/05/06 (attached as Appendices #1 & #2).

A direct appeal was pending when the defense moved to vacate the judgment based on the jurors' declarations. The first appeal affirmed the judgment and sentence on 04/25/06 by unpublished decision. Mr. Curtis then filed a petition for discretionary review. The issues raised in that petition involve the admission of improper expert opinion testimony as to molestation without symptoms, improper opinion testimony of guilt, a destroyed "pornographic" CD supposedly recovered by the victim's father, exclusion of evidence of other reports of sexual abuse against the victim's biological father (a key

witness), and admission of out-of-court statements by the codefendant (among others).

II. ARGUMENT

A. **Juries Must Be Correctly Advised Of Its Duty And Not Be Placed In A Position Where They Are Forced To Reach A Verdict Due To A Misunderstanding Of Their Role & Ability To Be A Hung Jury.**

A criminal defendant is entitled to trial by a fair and impartial jury. U.S. CONST. amend. VI, XIV; WASH. CONST., art. I, §§3, 21, 22; Duncan v. Louisiana, 391 U.S. 145, 177, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). As stated in McDowell v. Calderon, 130 F.3d 833, 836 (9th Cir. 1997):

A jury cannot fulfill its central role in our criminal justice system if it does not follow the law. It is not an unguided missile free according to its own muse to do as it pleases. To accomplish its constitutionally-mandated purpose, a jury must be properly instructed as to the relevant law and as to its function in the fact-finding process, and it must assiduously follow these instructions.

The jury's misunderstanding of its role can raise important questions regarding the administration of justice. As far back as 1946 the United States Supreme Court expressed concern over the failure of trial judges to specifically answer questions by the jury in "concrete terms." Specifically, in Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1946), Justice

Frankfurter held that “discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria.” Bollenbach, at 612. In Bollenbach the petitioner was convicted of conspiring to violate the National Stolen Property Act. There was no question that the securities had been stolen in Minneapolis and were transported to New York and that Bollenbach helped to dispose of them in New York.

The jury reported to the court that they were ‘hopelessly deadlocked.’ Interchanges occurred between the court and jury and between the court and counsel. One of the jurors asked “Can any act of conspiracy be performed after the crime is committed?” The trial judge made some unresponsive comments but failed to answer the question. The jury then later asked “If the defendant were aware that bonds which he aided in disposing of were stolen does that knowledge make him guilty on the second count?” The judge instructed the jury: “Of course if it occurred afterwards it would not make him guilty, but in that connection I say to you that if the possession was shortly after the bonds were stolen, after the theft, it is sufficient to justify the

conclusion by you jurors of knowledge by the possessor that the property was stolen.” Bollenbach, at 609.

The United States Supreme Court, in Bollenbach, gave the following prescription for jury confusion: “[w]hen a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy.” Bollenbach, at 607.

The point is that the jurors' uncorrected confusion regarding the law may lead to verdicts outside of the protection of the Eighth Amendment. Such juror confusion has led to reversal in death penalty cases. In Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Supreme Court held that the constitution requires "the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record". The jury confusion in Lockett led to reversal.

As the Seventh Circuit has observed, Bollenbach places on the trial judge “a duty to respond to the jury's request with sufficient specificity to clarify the jury's problem.” Davis v. Greer, 675 F.2d 141, 145 (7th Cir.1982). This duty exists, among other reasons, because “ ‘[i]n a trial by jury . . . , the judge is not a

mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law.” Bollenbach, at 612.

Cases since Bollenbach emphasize the importance of juror understanding in reaching verdicts. For example, in United States v. Gordon, 844 F.2d 1397, 1401-02 (9th Cir.1988), defendants were convicted of conspiracy, obstruction of justice, and perjury. Count I charged two conspiracies and the appellate court found that there was a distinct possibility of a nonunanimous jury verdict. The appellate court found that some jurors could have voted to convict the two defendants on Count I believing the appellants guilty of conspiracy to obstruct justice but innocent of conspiracy to defraud (or vice versa). The court also found that, when there is such a genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the defendant committed different acts, the trial judge is obligated to give curative instructions or submit special interrogatories to ensure a unanimous verdict. Gordon, at 1401.

Other federal circuits reach the same result on juror misunderstanding of the law. In United States v. Walker, 575

F.2d 209, 213 (9th Cir.1978), defendant was prosecuted for theft of a boat (the *Sea Wind*) within a special maritime/territorial jurisdiction of the United States.

After the jury had begun its deliberations, it sent two questions to the court. The first inquiry was as follows:

“Our interpretation of Count I is that the defendant had to have the intent to steal and purloin the *Sea Wind* before leaving the Palmyra area. If we were to determine that the intent occurred at a later time on the trip to Hawaii, would that necessitate a not guilty verdict on Count I?”

The court responded:

”The offense defined in count I must be committed ‘within the special maritime and territorial jurisdiction of the United States.’ This term is defined in 18 U.S.C. 7 which reads in part, insofar as it is pertinent here: ‘The term special maritime and territorial jurisdiction of the United States includes the high seas, any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State.’ The Court has taken judicial notice that the island of Palmyra is within the special maritime and territorial jurisdiction of the United States. And, for the purpose of this definition, with respect to the jurisdiction of the State of Hawaii, the boundaries of Hawaii extend three miles seaward from the land.”

Walker, at 213.

The questions posed by the jury showed it was uncertain whether a conviction would be proper if the defendant formed the criminal intent to steal the craft some time during the 1,000-mile voyage from the island of Palmyra to Hawaii. The appellate court held that the trial court's response allowed the jury find

Walker guilty if he formed the intent to steal in the Palmyra area or at any other place and time Walker was in the special maritime/territorial jurisdiction of the United States. Since the grand jury indicted Walker for stealing the boat at Palmyra, the supplemental instruction was erroneous and the case reversed (as to Count I).

Similarly, the trial court's duty to clarify jury misunderstanding as to the law is seen in United States v. Bolden, 514 F.2d 1301, 1308-09 (D.C.Cir.1975). In Bolden, defendants were convicted of felony-murder and robbery and one defendant was convicted of carrying a dangerous weapon without a license.

The jury asked several questions of the court: "If it is determined that a robbery was in fact committed, does this necessarily imply previous intent to commit a robbery? "Is an accidental killing during the commission of a robbery necessarily felony murder? "Given the hypothesis that the guard accidentally pulled the trigger during the struggle, and given that there was intent to commit robbery, can this be felony murder?" The trial court refused to do anything more than reread the statute and the

standard instruction, despite requests from the jury. The appellate court noted that the trial court's rereading of instructions could well have left the jury with the incorrect impression that coincidence was sufficient to convict. Bolden, at 1308. The trial court's lack of response was not harmless error, "particularly where a difficult legal issue such as intent, which is not precisely defined by the statute, is the subject of the jury's inquiry, the trial court should carefully inform the jury of the law, and not allow the troubled jury to rely on a layman's interpretation of a superficially simple but actually complex statute." Bolden, at 1309.

Another example can be found in United States v. Petersen, 513 F.2d 1133, 1136 (9th Cir.1975). Petersen involved a prosecution for conspiracy to dispose of U.S. property without authority. During deliberations the jury sent out a note which stated that they had not reached any verdicts but "we feel that we can soon arrive at a verdict upon verification of this question . . . is ignorance of the law any excuse?" The judge wrote the word "no" after the question and over the objection of defense counsel sent it in to the jury. The judge received another communication from the jury asking: "Is this your answer to the above question:

Is ignorance of the law any excuse? . . . or if not, please explain the above 'No.' ” The judge wrote across the note “ignorance of the law is not an excuse.” The appellate court found that the defendant was entitled to have the jury told directly and unequivocally that “unless you find beyond a reasonable doubt that the law has been violated as charged, **you should not hesitate for any reason to return a verdict of not guilty**”. (emphasis added). Petersen, at 1136.

Use of the phrase “violated as charged” was susceptible to misinterpretation, without reference to quantum of proof, and rendered the trial court’s instruction improper and reversible error. Id. In sum, the giving of a cursory supplemental instruction in the face of jury confusion was insufficient.

In Powell v. United States, 347 F.2d 156, 157-58 (9th Cir.1965), the appellant was convicted of transporting a girl from Texas to Phoenix, Arizona, for purposes of prostitution. The jury was confused as to the time the intent was formed by the defendant and the court made no effort to discover the nature of the jury's misunderstanding. The court’s response to the jury's

inquiry by merely rereading a facially correct instruction was inadequate. The Powell court stated:

The ultimate question is ‘whether the charge taken as a whole was such as to confuse or leave an erroneous impression in the minds of the jurors.’ (cites omitted). As we have noted, the jury's inquiry showed the initial charge left the jury confused. A rereading of a portion of that charge which was not clearly responsive to the jury's inquiry could scarcely have clarified the matter in the jurors' minds. Clear error occurred, requiring reversal.

Powell, at 159.

Thus, the test for supplemental instruction to clarify jury confusion in the Ninth Circuit has been stated as follows: “The ultimate question is ‘whether the charge taken as a whole was such as to confuse or leave an erroneous impression in the minds of the jurors.’” Powell, at 158-159. Alternatively phrased: “when a jury indicates confusion about an important legal issue, it is not sufficient for the court to rely on more general statements in its prior charge.” United States v. Nunez, 889 F.2d 1564, 1568 (6th Cir. 1989).

In this case, the trial started on 07/19/04. On 07/23/04 the jury had been “deliberat(ing) intensely for two full days” (according to the declaration of jury foreperson, Linda Poutrie). It is clear that the trial court’s instruction to the jury to continue deliberations left “an erroneous impression in the minds of the jurors.” According to the jury foreperson the jury was “absolutely ‘hung’ on the charges.” The trial court advised the

jury to “...continue to deliberate” without end despite its deadlock. The juror’s misunderstanding as to whether they could be “hung” is best summarized by the jury foreperson, Ms. Poutrie:

After the jury was told that it could not be a hung jury, we went back into deliberations (after already spending two intensive and exhausting days in deliberations). Since the jury was not allowed to be hung, we decided that the only way to settle the case was to agree to a lesser charge rather than not agree on any charge. In sum, I and other jurors agreed on the lesser charge only so we would not be a hung jury. I and others believed it was the only way to end the case. (emphasis added).

See 09/26/05 Declaration of Linda Poutrie, jury foreperson: 2nd Index CP, 10/24/05 CP, 81-91, 90-01.

Ms. Poutrie described a situation where she was a captive juror and coerced into a verdict. The instruction (or lack of instruction) given by the trial court forced at least one juror (and other jurors according to Ms. Poutrie) to change her/their verdict(s) from “not proven beyond a reasonable doubt” to “guilty” of a lesser charge. Such a result cannot stand. Justice demands reversal and remand for a fair trial.

B. Extrinsic Evidence Of The Jury Foreperson’s Molestation Also Led To An Invalid Conviction.

It is misconduct for a jury to consider extrinsic evidence; if it does, that may be a basis for a new trial. State v. Balisok,

123 Wn.2d 114, 118, 866 P.2d 631 (1994). " 'Novel or extrinsic evidence is defined as information that is outside all the evidence admitted at trial, either orally or by document.' " Id. (quoting Richards v. Overlake Hosp. Med. Ctr., 59 Wn.App. 266, 270, 796 P.2d 737 (1990)). This type of "evidence is improper because it is not subject to objection, cross examination, explanation or rebuttal." Id.

A relatively recent case on the use of extrinsic evidence by jurors in deliberations is State v. Pete, 152 Wn.2d 546, 98 P.3d 803 (2004). In Pete the accused was convicted of second degree robbery. Defendant moved for new trial after the jury received two documents that were not admitted into evidence. The Washington Supreme Court reversed and found that the two statements were improperly sent to the jury room. The prosecutor argued that both statements pointed to Longtimesleeping (codefendant) as the person who assaulted Olivares-Bahena (victim), not defendant (Pete) (therefore the statements were not inculpatory). The Supreme Court disagreed. The officer's report that went to the jury stated that defendant Pete told the officer that "he only took some beer." The statement was considered inculpatory because it indicated that defendant

Pete participated in the taking of property from Olivares-Bahena while Olivares-Bahena was being assaulted by Longtimesleeping. In addition, the two unadmitted statements were found to be harmful to defendant Pete in the sense that they were contradictory and could suggest to a jury that Pete was a liar who could not be believed.

The Washington Supreme Court in Pete clearly stated the rationale against extrinsic evidence to the jury: "This type of evidence is improper because it is not subject to objection, cross examination, explanation or rebuttal." Pete, 152 Wn.2d at 552.⁷

⁷ FRCrP 33 provides for new trials in federal criminal cases. The 9th Circuit Court of Appeals has stated that "A defendant is entitled to a new trial when the jury obtains or uses evidence that has not been introduced during trial if there is 'a reasonable possibility that the extrinsic material *could* have affected the verdict.'" Dickson v. Sullivan, 849 F.2d 403, 405 (9th Cir.1988) (quoting United States v. Vasquez, 597 F.2d 192, 193 (9th Cir.1979)). The prosecution bears the burden of proving that extrinsic evidence did not contribute to the verdict beyond a reasonable doubt. Id. at 405-06. In Dickson, the 9th Circuit developed a five factor approach to determine whether the prosecution met this burden. Those factors are: 1) whether the material was actually received, and if so, how; 2) the length of time it was available to the jury; 3) the extent to which the jury discussed and considered it; 4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and 5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict. Id. at 406. The fifth factor included consideration of the nature of the extrinsic evidence. (cite

Consideration of a jury person's experience on an issue at trial is improper extrinsic evidence. In Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 776 P.2d 676 (1989), the plaintiff in a personal injury action was from California. There had been questions during voir dire regarding prejudice against Californians. The jury foreman did not respond to the questions. During deliberations, the jury foreman brought up his past experience as a defendant in a "meritless" lawsuit brought by a Californian. He shared his animosity toward California plaintiffs with the jury. The trial court found juror misconduct entitling the plaintiff to a new trial. The Supreme Court ultimately affirmed the order granting a new trial. Robinson, 113 Wn.2d at 160.

In a criminal context, there is the case of State v. Briggs, 55 Wn.App. 44, 60, 776 P.2d 1347 (1989), a rape case. In Briggs

omitted). In Jeffries v. Wood 114 F.3d 1484, 1491-92 (9th Cir.1997), the 9th Circuit expanded upon the *Dickson* factors, and introduced several other factors on the impact of the jury's use of extrinsic evidence including: whether the extraneous information was otherwise admissible or merely cumulative of other evidence adduced at trial; whether a curative instruction was given or some other step taken to ameliorate the prejudice; the trial context and whether the statement was insufficiently prejudicial given the issues and evidence in the case. Jeffries, at 1491-92. The defense asserts that the same burden and test applies in this court.

defense counsel asked if there was "anyone in the panel who ha(d) any past experience, study or contact with stuttering or speech problems in general?" (stuttering was the basis of the identification of Briggs as the assailant). Briggs, at 47. A juryman did not volunteer any information on the subject. After conviction the defense attorney learned that the juryman shared information in deliberations about his own stuttering and that stuttering only occurred in certain circumstances and was controllable. Briggs, at 47.

A new trial was ordered on appeal because the juror used the information during jury deliberations. Briggs, at 54. The appellate court found that the use of undisclosed and highly specialized extraneous evidence during deliberations resulted in actual prejudice to Briggs because Briggs could not challenge the use of a juror's experience during deliberation. Briggs, at 54.

In this case, the jury forewoman, Lisa Poutre, acknowledges that "during the course of jury deliberations I told my fellow jurors that I had been sexually molested when I was a child." *See* 03/22/05 Declaration of Lisa Poutre - 2nd Index CP, 05/02/05 CP, 3 -17, 11. At least three other jurors remembered Ms. Poutre discussing the subject of her own molestation.

03/22/05 Declaration of Lisa Poutre - 2nd Index CP, 05/02/05 CP, 3-17, 12-14. Ms. Poutre met with Jim and Linda Curtis (Defendant's mother and father) after the jury verdict and candidly related that "...she didn't think her past would influence her decision, but that in the end it did." See 03/13/05 Declarations of Linda & Jim Curtis - 2nd Index CP, 05/02/05 CP, 3 -17, 16-17.

This is exactly the kind of evidence that Briggs and other cases on extrinsic evidence prohibit because "it is not subject to objection, cross examination, explanation or rebuttal." Accordingly, this court should vacate the judgment and sentence and remand the matter for a fair trial without extrinsic evidence going to the jury.

C. Cumulative Error Demands Reversal.

There are not only jury issues in this case. There is also an issue as to whether the appellate court should reverse Mr. Curtis' conviction because of cumulative error. The doctrine is implemented as follows:

The application of [the cumulative error] doctrine is limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citing State

v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963)).

There are a number of trial errors in this case that, in cumulation with the jury issues, demand reversal.

As previously noted, Brad Curtis appealed a number of issues which were denied by an unpublished decision dated 04/25/06. Those issues are now before the Supreme Court. They are briefly argued below as part of the cumulative error asserted.

1. Expert Opinion Testimony Of “Molestation Without Symptoms” Was Inadmissible.

Two state witnesses, Dr. Jolanda Duralde and Detective David Miller, expressed inadmissible opinions at trial. With respect to Dr. Duralde, her testimony was based on a medical exam showing an absence of physical symptoms of sexual abuse. Dr. Duralde’s testimony must be viewed along side the testimony of Dr. William Oley, which immediately preceded Dr. Duralde’s testimony.

In direct testimony Dr. Oley, a family practice physician, testified that he examined C.W on 07/22/03, for possible sexual abuse. RP Vol. II, 189-190. He found no evidence of sexual assault. The purpose of his testimony can be found in the last question to Dr. Oley in direct examination:

Q. So let me give you some specifics here. If it were a situation where a child of ten years of age had experienced a slight penetration of her vagina by an adult penis and then was given a medical exam one to two weeks later, can you state to a degree of reasonable medical certainty that it would not be unusual for there to be no injury at that time.

A. It would not be unusual. (emphasis added).

RP Vol. II, 193.

This was clearly an opinion of molestation without symptoms. To highlight and reinforce the theme of "molestation without symptoms" the State called Dr. Duralde who never examined C.W. Dr. Duralde testified that she was the medical director at the child abuse intervention department at Mary Bridge Hospital (Tacoma, WA), that she spoke to Dr. Oley about his exam of C.W., and that the physical exam was normal. The prosecutor asked Dr. Duralde the same question he asked Dr. Oley:

Q. Now, Doctor, with regard to your own training and experience, if a female child is subjected to penetration, slight penetration by an adult penis of her vagina and there is a medical exam that takes place one to two weeks after that, is it unusual or would it be unusual for there to be the absence of any discernible injury even though that had taken place?

A. No.

Q. And is that an opinion that's generally accepted in the medical field?

A. That's a very accepted opinion. Of most of the children that we see it's only about five percent of kids who actually have specific physical findings that--- for penetrative trauma, which is what we're looking for. The majority of children don't have findings either because what happened didn't

leave any marks, you know, the touching wasn't a full penetration or whatever, or because if there were even slight marks at the time you're usually seeing the child a little bit later and the tissue heals very quickly. So that, you know, seeing a child a week to two later, even if there were sort of superficial abrasions, those would have been healed.

RP Vol. II, 200-201.

Opinion testimony of "molestation without symptoms" has been rejected by Washington courts. While Dr. Duralde did not directly testify about C.W.'s credibility, both Dr. Duralde and Dr. Oley expressed the opinion that the absence of physical symptoms showed molestation. This was improper expert opinion testimony.

In addition, Dr. Duralde and Dr. Oley offered opinions on the ultimate issue of molestation "based solely on the expert's perception of the witness' truthfulness". In essence, Duralde and Oley accepted C.W.'s report as truth, although there was no physical/medical evidence supporting C.W.'s claims. Such opinion testimony was unfairly prejudicial and inadmissible because it took an ultimate issue of fact from the jury. State v. Alexander, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992) (case of child rape where Division I held, inter alia, that (i) a counselor's testimony that the nine-year-old victim's description of abuse

was "very clear" and that it remained consistent throughout their counseling sessions exceeded the scope of evidence permitted under the "fact of the complaint doctrine" by impermissibly bolstering the victim's credibility; and (ii) that the testimony of the victim's mother and counselor impermissibly raised an inference that the victim identified defendant as the abuser. *See also State v. Black*, 109 Wn.2d 336, 348-49, 745 P.2d 12 (1987) ("rape trauma syndrome" was a treatment model not evidence of rape); *State v. Fitzgerald*, 39 Wn.App. 652, 694 P.2d 1117 (1985) (statutory rape case where error to allow testimony of state's pediatrician that she believed children had been molested based on her interviews with the children; such testimony invaded the jury's responsibility to make credibility determinations); *State v. Carlson*, 80 Wn.App. 116, 906 P.2d 999 (1995) (defendant's conviction for child molestation reversed where doctor's opinion testimony was based on the child victim's statements rather than on doctor's physical findings).

The instant case is like *State v. Dunn*, 125 Wn.App. 582, 105 P.3d 1022 (2005). Mr. Dunn was convicted of three counts of first degree child rape and one count of first degree child molestation. The only evidence that the victim (C.M.) was

sexually abused was her own testimony and her hearsay statements to her parents, Sergeant Garcia, and Mr. Kramer. The defendant denied the abuse. There was no physical evidence or independent witness to the charged events. Mr. Dunn also denied that he had the opportunity to commit the crimes – i.e. he testified that he was never alone with C.M. The case “was...a credibility contest--her word against his, as well as family-member-witness against family-member-witness.” Dunn, at 593.

The trial court in Dunn admitted the opinion of a physician's assistant that the child had probably been sexually abused despite the absence of any physical signs of abuse. The physician's assistant based his opinion on a theory that if the child relates events within a given level of specificity then the child has probably been abused. The Dunn court found that the “no symptoms/probable abuse” theory did not satisfy the *Frye* test,⁸ usurped the function of the jury, and violated constitutional considerations of due process. Dunn, at 591-593.

The evidence in Mr. Curtis’ case is much like that in Dunn. The only evidence that C.W. was sexually abused was her own testimony and her statements to her father. Like Dunn, Mr.

⁸ Frye v. United States, 293 F. 1013, 1014 (D.C.Cir.1923).

Curtis denied the abuse. There was no physical evidence or independent witness to the charged events. Like Dunn, the doctors in Brad Curtis' case opined that C.W. probably was sexually abused despite the absence of any physical signs of abuse. Such opinion testimony was offered with medical certainty and with a shroud of reliability that does not exist. This case should be reversed with directions to hold a fair trial without such opinion.

A similar outcome was reached in State v. Kirkman, 126 Wn.App. 97, 107 P.3d 133 (2005). In Kirkman, defendant was prosecuted for child rape where a physician and a detective made favorable comments in testimony on the victim's credibility. The victim was eight years old and claimed that defendant sexually assaulted her. Defendant denied the accusation. Defense witnesses testified that they did not witness any sexual activity on defendant's part because defendant was asleep. There was no other evidence of guilt. The court reversed because the testimony of the physician and detective was improper. In sum, experts cannot and should not be allowed to express opinions of defendant's guilt, victim believability or sexual abuse in the absence of physical symptoms. As expressly stated in Carlson:

Although the State did not offer Dr. Feldman's opinion to prove E's credibility, it did offer the opinion to prove he had been sexually abused... Dr. Feldman's opinion was not admissible as the opinion of a lay witness... Similarly, Dr. Feldman's opinion was not admissible as the opinion of an expert witness.

Carlson, at 123-124.

The other area of impermissible opinion evidence is found in the testimony of Detective Miller regarding his own state of mind. Detective Miller testified that Brad Curtis was asked the question "Why should I believe you over a ten-year old girl" (this was an unrecorded interview). He testified that Brad Curtis' response was "You shouldn't". Detective Miller was then asked his reaction to Curtis' answer to which he responded "...wow, he did it." RP Vol. II, 4-5. Miller's frame of mind and opinion of guilt was totally irrelevant and prejudicial especially since Brad Curtis denied any sexual misconduct or making admissions to Detectives Miller and Barnes. RP 07/20/04, 319-320; see State v. Dolan, 118 Wn.App. 323, 329, 73 P.3d 1011 (2003) (opinion expressed by a police officer may influence the fact finder and thus deny the defendant an impartial and fair trial.)

The Washington Supreme Court has held that no witness, lay or expert, may "testify to his opinion as to the guilt of a defendant, whether by direct statement or inference." State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such testimony has been characterized as unfairly prejudicial because it "invad[es] the exclusive province of the finder of fact." Id. In Black, for example, a rape counselor testified that, in her opinion, R.J. suffered from rape trauma syndrome, and that "[t]here is a specific profile for rape victims and R.J. fits in." The Washington Supreme Court cited to the Minnesota Supreme Court which observed that: "[p]ermitting a person in the role of an expert to suggest that because the complainant exhibits some of the symptoms of rape trauma syndrome, the complainant was therefore raped, unfairly prejudices the [defendant] by creating an aura of special reliability and trustworthiness." Black, at 348.

Not only did Drs. Oley and Duralde give an opinion of "molestation without symptoms" and a profile the victim supposedly fit, but an investigating officer was allowed to testify "wow, he did it." Medical experts opining on victim-profile-fits and officers opining on defendant's guilt can hardly be erased by

defense objections or a court instruction to disregard the testimony. The elephant still remains in the court room.

The defense believes that Detective Miller's opinion that Mr. Curtis "confessed" is analogous to commenting on post-arrest silence - a curative instruction does not work. As noted in State v. Curtis, 110 Wn.App. 6, 37 P.3d 1274 (2002) (an assault case where the state called the jury's attention to defendant's exercise of his Fifth Amendment right to remain silent):

That aside, eliciting such testimony puts the defense in a difficult position. Counsel must gamble on whether to object and ask for a curative instruction--a course of action which frequently does more harm than good--or to leave the comment alone.

State v. Perrett, 86 Wn.App. 312, 322, 936 P.2d 426 (1997).

Other courts, including the Ninth Circuit, have expressed doubt about the effectiveness of curative instructions in cases with comments on post-arrest silence. *See, e.g., United States v. Prescott*, 581 F.2d 1343, 1352 (9th Cir.1978) (by itself, even a prompt and forceful instruction is insufficient to vitiate the use of post-arrest silence).

In this case the defense had no choice, it had to object and ask to strike the testimony. The defense thereby emphasized the officer's opinion of guilt. The instruction to strike was no more

remedial than an instruction to disregard comments on a defendant's post-arrest silence.

In sum, the "molestation without symptoms" opinion testimony of Drs. Oley and Duralde was inadmissible under *Frye*, usurped the jury's function, and violated Mr. Curtis' right to a fair trial. The officer's opinion of guilt also invaded the province of the jury. The inadmissible opinion testimony, couple with the jury problems, cumulated in error which prevented Mr. Curtis from receiving a fair trial. The appellate court should correct this situation with a fair trial.

2. It was Error to Admit Evidence Of A Nonexistent "Pornographic" CD The Victim's Father Supposedly Destroyed.

The trial court in this case admitted testimony from the victim's father that C.W. complained that Brad Curtis showed her "pornographic" CDs. RP Vol. I, 35. The victim, on the other hand, denied ever reporting that Bradley Curtis showed her any pornographic CDs. RP Vol. I, 253. Despite C.W.'s denial, the "pornographic" CD evidence was allowed as evidence against Brad Curtis apparently as "lustful disposition" toward C.W.

Evidence about pornographic materials may be admissible under ER 404(b) to show lustful disposition toward

the same victim. This is the rule of State v. Kilgore, 147 Wn.2d 288, 295, 53 P.3d 974 (2002)⁹ where the court stated, in pertinent part, "...all of the evidence summarized in its offer of proof was admissible because it showed Kilgore's lustful disposition toward the victims of the charged crimes."

However, in Kilgore the victim testified that the defendant showed her pornographic material. In this case the alleged victim did not testify that Brad Curtis showed her pornographic CD/DVDs. The pornographic CD described by the victim's father could not be relevant or reflect on Curtis' "lustful disposition" toward C.W. because Curtis never showed it to her.

In sum, evidence that the defendant showed the complainant pornographic videotapes or other pornographic material may be admissible "as evidence of a pattern or course of conduct engaged in by the defendant to exploit the complainant's trust, and also as evidence of the defendant's motive or intent to engage the complainant in a sexual relationship." E.g.

⁹ Jurisdictions like Missouri reject the admission of evidence of "lustful disposition" for use as propensity evidence in sex cases because of prejudice. *See People v. Sabin*, 463 Mich. 43, 60-61, 614 N.W.2d 888 (2000).

Commonwealth v. Holloway, 44 Mass. App. Ct. 469, 476, 691 N.E.2d 985 (1998). However, this exception has limits. For example, in Commonwealth v. Jaundoo, 64 Mass.App.Ct. 56, 831 N.E.2d 365 (2005), the trial court abused its discretion in a trial for sex offenses by admitting a substantial quantity of pornographic materials, permitting explicit discussion of materials, and permitting the jury to view the materials. The court found that much of the pornographic material was unrelated to the alleged crime and created prejudicial error.

The same is true in Brad Curtis' case. He was forced to defend against a non-existent "pornographic" CD that Don Willyard destroyed and could not describe. Admission of such irrelevant, prejudicial evidence which purportedly triggered the report of abuse to police is repugnant to the notion of a fair trial. It was error and the appellate court should reverse this case for a fair trial.

3. Exclusion Of C.W.'s Reports Of Abuse Against Her Father During The Same Period Of Alleged Misconduct Denied Mr. Curtis Due Process And Was Fundamentally Unfair.

The prosecutor moved pretrial to exclude reports of abuse C.W. made to Virginia Harmon (great aunt). More particularly,

C.W. reported that her father, Don Willyard, showered and slept with her. RP 07/19/04, 5. The defense moved pretrial to admit these statements explaining that jurors might conclude “that the only way C.W. would be able to recount information concerning sexual improprieties would be if my client did this to her.” RP 07/19/04, 9. The trial court ruled “I have to be frank with you. I would never allow this. Mr. Willyard is not on trial. . .” RP 07/19/04, 9.

Don Willyard was one of two key witnesses against Brad Curtis (the other was Willyard’s daughter, C.W.). Don Willyard, was allowed to testify about the circumstances triggering C.W.’s reports of abuse (i.e abuse by C.W.’s mother and boyfriend, Brad Curtis). C.W. testified about abuse by her mother and Brad Curtis in 2001 and 2003. However, C.W.’s great aunt (Virginia Harmon) was barred from testifying about C.W.’s other reports of abuse during the same period of time (i.e. abuse by her father, Don Willyard, in 2001). Allowing C.W.’s reports of abuse by her mother and her boyfriend, Brad Curtis, in 2001- 2003 but excluding C.W.’s reports of her father’s reported abuse was unreasonable.

C.W. made a claim of abuse on 07/19/03 – 07/20/03 which reportedly occurred weeks prior to her report. In surprise testimony, she described a 2001 incident in a house in Dayton, WA. RP Vol. I, 35, 37, 93. C.W. lived with her great aunt, Virginia Harmon from March – August, 2001 when she made yet another report that she showered and slept with her father. RP Vol II, 288, 329. C.W. also testified that she loved her father and did not want to leave him. RP 07/14/04, 143. The defense was entitled to show that C.W. made complaints of sexual abuse against her father, Don Willyard, and sought to protect him. Such cross-examination reflected directly on her bias and motive to lie.

Recently, the United States Supreme Court held that an evidence rule that precludes a defendant from introducing evidence of third-party guilt violates defendant's constitutional rights. That case involved an 86-year old woman who was raped, robbed and murdered. Defendant was convicted and sentenced to death. The government had strong forensic evidence – i.e. fingerprints, fibers, mixed DNA evidence. The defendant attempted to introduce several witnesses who placed a third party suspect in the area of the assault the morning of the attack.

Witnesses were offered to show that the third party suspect either stated that defendant was innocent or admitted to the crime. The trial court excluded evidence of a third party suspect because it “merely cast a bare suspicion” as to some other’s guilt. Holmes v. South Carolina, 547 U.S. ___, 126 S.Ct. 1727, 1728, 164 L.Ed.2d 503 (2006).

The U.S. Supreme Court found otherwise: “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” Holmes v. South Carolina, 547 U.S. ___, 126 S.Ct. 1727, 1735, 164 L.Ed.2d 503 (2006).

The evidence in this case is substantially weaker than the evidence in Holmes. This case can be reduced to a credibility contest between C.W. and Brad Curtis (both testified). C.W.’s motive to lie was strong (stay with natural father in Montana versus an undesirable return to Seattle). Brad Curtis was prevented from presenting evidence of a third party suspect and the bias of the complainant.

In essence, Brad Curtis was denied “a meaningful opportunity to present a complete defense” which is found in the Due Process Clause of the Fourteenth Amendment and the Compulsory Process and Confrontation clauses of the Sixth Amendment, U.S. Constitution.

Brad Curtis was also denied a complete defense in another important way. The defense was precluded from offering evidence of C.W.’s sexual knowledge and precociousness. In State v. Carver, 37 Wn.App. 122, 124,678, P.2d 842, *review denied*, 101 Wn.2d 1019 (1984), the defendant was convicted of statutory rape and indecent liberties. The Court of Appeals held that the rape shield statute did not preclude admission of evidence of sexual abuse of victims by their grandfather and a friend, that such evidence was admissible as relevant to rebut the inference that victims would not know about sexual acts unless they experienced them with defendant; and that defendant should have been allowed to recall the victim to cross-examine her as to her prior statement to investigating authorities that she had been abused by her grandfather.

In this case, the trial court excluded C.W.’s reports of sexual abuse by her father without reason or explanation (“I

would never allow this. Mr. Willyard is not on trial.”) It was certainly important in determining the credibility of C.W. and her father, Don Willyard. Did C.W. lie about sex abuse by her natural father? If C.W. did not lie about sexual abuse by her father to her great aunt, then was she protecting Don Willyard to stay with him? These were critical points for the defense and the jury in assessing C.W.’s credibility.

Finally, C.W.’s reports of sexual abuse by her father was offered to impeach her and Don Willyard. It was relevant if: (1) it tended to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action. ER 401, 607; *see State v. Roberts*, 25 Wn.App. 830, 836, 611 P.2d 1297 (1980) (defendant entitled to show parental influence on adolescent); *State v. Aponte*, 249 Conn. 735, 752, 738 A.2d 117, 127-28 (1999) (defendant entitled to show prosecutor's influence on young child). In this case, C.W.’s report of sexual abuse by her father showed bias for him and his influence over her. It should have been allowed.

The Sixth Amendment (U.S. Constitution) guarantees the right to confrontation and the accused must be permitted to

cross-examine a witness for bias. Olden v. Kentucky, 488 U.S. 227, 109 S.Ct. 480, 102 L.Ed.2d 513 (1988); Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). The rules of evidence incorporate this guarantee. United States v. Abel, 469 U.S. 45, 105 S.Ct. 465, 83 L.Ed.2d 450 (1984). Bias can arise from a variety of circumstances, including civil proceedings between the victim and the defendant. State v. Boesseau, 168 Wash. 669, 671, 13 P.2d 53 (1932); State v. Eaid, 55 Wash. 302, 307-08, 104 P. 275 (1909); State v. Constantine, 48 Wash. 218, 220, 93 P. 317 (1908); State v. Guizzotti, 60 Wn.App. 289, 292-94, 803 P.2d 808, *review denied*, 116 Wn.2d 1026, 812 P.2d 102 (1991). The appellate courts have clearly held that proof of bias includes any impeachment, which exists at the time of trial that provides information that the jury can use, during deliberations, to test the witness' accuracy while the witness was testifying.

As argued above, the credibility of C.W. and her father, Don Willyard, was central to the case. If C.W. lied about sex abuse by her natural father for whatever reason, then it is reasonable to infer that C.W. fabricated against her mother and her boyfriend to live with her father. It was the defense theory that C.W. was protecting her father to stay with him and that her

report of sex abuse against her mother and her mother's boyfriend, Brad Curtis, would keep her in Montana. Her reports of sexual abuse by her father to her great aunt showed her capacity to lie and manipulate or tell the truth and protect her father – i.e. she either told a lie about the abuse by her father to her great aunt or lied about the abuse to protect her father. In either case, the testimony should have been allowed to show her dishonesty and/or bias.

4. The Admission Of Out-Of-Court Statements By Codefendant Violated Defendant's Right To Cross-Examination.

In Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the U. S. Supreme Court held that the 6th Amendment Confrontation Clause barred admission of a tape recorded statement from defendant's wife to police. Crawford, 124 S.Ct. at 1374. Under Crawford, "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law ... as would an approach that exempted such statements from Confrontation Clause scrutiny altogether." Crawford, 124 S.Ct. at 1374. If testimonial hearsay evidence is at issue, the Confrontation Clause requires witness unavailability

and a prior opportunity for cross-examination. Crawford, 124 S.Ct. at 1374.

In this case, the complainant's father, Don Willyard, spent much of his testimony detailing what Nicole Willyard said out of court. Nicole never testified and the defense objected to the hearsay and inability to confront Nicole. RP Vol. I, 25, 24-33, 67-68, 71-73, (Don Willyard testifying regarding Nicole's statements about outstanding warrants and agreement to transfer custody); RP Vol. I, 91 (C.W. testified to Nicole's purported statements to her during the alleged incidents of misconduct); RP Vol. I, 211, 217 (Officer David Miller's testimony regarding Don's and Nicole's statements about custody). Nicole Willyard was a codefendant awaiting her own trial. Despite defense counsel's objection to Nicole's out-of-court statements as hearsay and his inability to confront, the trial court admitted Nicole's purported statements without any legal reasoning. RP Vol. I, 25 ("I'll overrule the objection. You may continue"); RP 07/19/04, 6-7. ("...I'll allow everything about the custody situation...").

What Nicole Willyard said outside of court was clearly hearsay and violated Crawford. Brad Curtis had a right to confront

witnesses against him. He was denied the right to cross-examine Nicole Willyard who, in essence, testified through Don Willyard, C.W. and Officer David Miller. The area of inquiry was critical – i.e. whether Nicole Willyard agreed to a transfer of C.W.’s custody to Don Willyard. The prosecutor talked extensively in closing about Nicole’s reported request for and agreement to transfer of custody. Nicole’s out-of-court statements were used to explain Don Willyard’s apparent misrepresentations in his custody modification papers – i.e. that the children only lived with Don and Nicole Willyard for the past five years (they lived with other family members), that the children lived in Bridger, Montana (they lived in Washington), and that the parties agreed to transfer custody (Nicole opposed it). RP Vol. I, 52, 53; RP Vol. II, 372, 374. The defense argued that there was no agreed transfer of custody but could not confront the hearsay admitted. RP Vol. II, 410, 423-424 (the best the defense could do was argue that “She didn’t sign the papers, and now this is payback.”).

The context in which the alleged abuse was reported (as part of a custody play by Don Willyard, not an agreed change of custody) was critical to Don Willyard’s credibility and honesty. The government buttressed its case by allowing the purported hearsay by

Nicole Willyard. This was grossly unfair since the case came down to the credibility of C.W., Don Willyard and Brad Curtis. These errors, along with the others cumulated in an unfair trial.

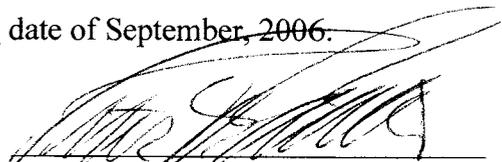
5. Conclusion As To Cumulative Error.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when errors combine to produce a fundamentally unfair trial. *In re Lord*, 123 Wn.2d 296, 332, 868 P.2d 835, cert. denied, 513 U.S. 849 (1994). The errors in this case were not harmless and cumulated in an unfair trial. A new trial is warranted.

III. CONCLUSION

For the reasons stated above, Bradley Curtis respectfully asks the court to reverse his *Judgment & Sentence* and allow him a new, fair trial.

DATED this 25th date of September, 2006.


PETE CONNICK - #12560
Attorney for Appellant

Appendix #1

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 SUPERIOR COURT
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**IN THE SUPERIOR COURT OF WASHINGTON
 IN AND FOR THURSTON COUNTY**

STATE OF WASHINGTON,
 Plaintiff,

vs.

BRADLEY J. CURTIS,
 Defendant.

NO. 03-1-02154-1

**FINDINGS OF FACT AND CONCLUSIONS
 OF LAW RE DEFENSE MOTION FOR NEW
 TRIAL**

13 THIS MATTER having come on before the above-entitled Court on October 17, 2005, pursuant to
 14 the Defendant's motion for a new trial based on alleged juror misconduct, the Plaintiff, State of Washington,
 15 represented by James C. Powers, Deputy Prosecuting Attorney, and the Defendant Bradley J. Curtis
 16 represented by his attorney, Peter T. Connick, and the Court having considered the declarations submitted
 17 on behalf of the defendant while disregarding any portion of said declarations not based upon personal
 18 knowledge, the arguments and written memoranda of the parties, and the records in the above cause, hereby
 19 enters the following:
 20

21 **FINDINGS OF FACT**

22 1. Prior to the selection of a jury in this case, prospective juror Linda Poutre filled out a
 23 juror questionnaire in which she stated that she had been sexually molested as a child. She was then
 24 available, in the judge's chambers, for questioning on the record by both sides with regard to her answers
 25 on the questionnaire. There was no challenge for cause or peremptory challenge of this juror by either
 26

**FINDINGS OF FACT AND CONCLUSIONS OF LAW RE
 DEFENSE MOTION FOR NEW TRIAL - 1**

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 Thurston County Prosecuting Attorney
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 Olympia, WA 98502
 (360) 766-4540 Fax (360) 754-3338

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side, nor was there any request for additional peremptory challenges. This juror was ultimately accepted by both parties to hear this case.

2. During deliberations, Ms. Poutre was chosen to be the Presiding Juror. She told other jurors that she had been sexually molested as a child. However, she did not provide any additional information to other jurors regarding her prior experiences, nor did she have any further discussion with other jurors concerning those experiences, *nor did any other jurors state that Ms. Poutre's disclosure influenced their deliberations or verdict.*

3. In separate declarations, each of the defendant's parents claimed that Ms. Poutre had told them that her prior molestation impacted her decision in the case.

Based on the above Findings of Fact, the Court hereby enters the following:

CONCLUSIONS OF LAW

- 1. The burden is on the defendant to prove an allegation of juror misconduct.
- 2. The mental processes by which a juror reaches a verdict, the intentions and beliefs of the juror, the motives of the juror in arriving at a verdict, the effect the evidence may have had upon the juror, or the weight the juror may have given to particular evidence are all matters which inhere in the verdict, and which are therefore inadmissible to impeach the verdict. Therefore, the assertion by the parents of the defendant that Ms. Poutre's prior molestation impacted her decision as a juror in some way cannot be considered as a basis for a claim of juror misconduct.
- 3. Information extrinsic to the evidence in the case, which is communicated by one juror to the others during deliberations, can only constitute juror misconduct if it imparts some kind of specialized knowledge, rather than a simple reference to a juror's personal life experience, and it affects a material issue in the case.

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4. Ms. Poutre's mere reference during jury deliberations to the fact that she had been sexually molested as a child, a matter which she had fully revealed to both parties in the case prior to her selection as a juror, did not constitute the communication of extrinsic information amounting to juror misconduct.

5. The defendant's motion for a new trial based upon an allegation of juror misconduct is denied.

DATED this 5th day of ^{MAY} April, 2006.


HONORABLE JUDGE RICHARD A. STROPHY

PRESENTED BY:

APPROVED AS TO FORM AND NOTICE OF PRESENTATION WAIVED:


JAMES C. POWERS/WSBA#12791
DEPUTY PROSECUTING ATTORNEY

Approved by P.T.C. Per Telecon w/ Court's J/A + OPA Powers
PETER T. CONNICK/WSBA #12560
ATTORNEY FOR DEFENDANT

Appendix #2

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.

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BETTY J. SOULE, CLERK

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7 **IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY**

NO. 03-1-02154-1

8 STATE OF WASHINGTON,

Plaintiff,

9 vs.

FINDINGS OF FACT AND CONCLUSIONS
OF LAW RE SUPPLEMENTAL DEFENSE
MOTION FOR NEW TRIAL

10 BRADLEY J. CURTIS,

11 Defendant.
12

13 THIS MATTER having come on before the above-entitled Court on October 17, 2005, pursuant to
14 the Defendant's motion for a new trial, and the Defendant having filed a supplemental basis for the motion
15 alleging that the court had coerced a deadlocked jury into reaching a verdict, the Plaintiff, State of
16 Washington, represented by James C. Powers, Deputy Prosecuting Attorney, and the Defendant Bradley J.
17 Curtis represented by his attorney, Peter T. Connick, and the Court requested additional briefing by the
18 parties on the Defendant's supplemental motion, and thereafter the Court having considered the arguments
19 and written memoranda of the parties, and the records in the above cause, including the court's instructions
20 to the jury, the notes back and forth between the presiding juror and the trial judge, and the colloquy between
21 the judge and the presiding juror regarding the jury's ability to reach a verdict, hereby enters the following:
22

23 **FINDINGS OF FACT**

24
25 1. On the second day of jury deliberations in this case, at 10:35 a.m., a jury note was
26 submitted to the trial judge which stated, "We are a hung jury. What are our instructions now?"

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE
SUPPLEMENTAL DEFENSE MOTION FOR NEW TRIAL - 1

EDWARD G. HOLM
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S C A N N E D

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3. There must be extraordinary and striking circumstances present to justify a mistrial.

While a truly deadlocked jury can constitute such extraordinary and striking circumstances, a court must exercise care in determining that such is truly the situation.

4. The later claims of the presiding juror, Linda Poutre, concerning the mental processes by which the jury arrived at a verdict, inhere in the verdict and cannot be considered.

5. Even if those claims of the presiding juror could be considered, they are at odds with the objective facts in the record, and therefore are not credible.

6. The trial court responsibly and appropriately exercised its discretion in communicating with the presiding juror in this case. There is no evidence of any intervention by the court which was in any way coercive or inappropriate.

7. There was no irregularity or error regarding the way in which the trial court instructed the jury or dealt with its ability to reach a verdict.

For the above-stated reasons and those further outlined in my 2/22/06 letter opinion,
5. The defendant's motion for a new trial, based upon the allegation that the trial court coerced the jury to reach a verdict, is denied.

DATED this 5th day of ^{MAY} April, 2006.

Richard A. Strophy
HONORABLE JUDGE RICHARD A. STROPHY

PRESENTED BY:

APPROVED AS TO FORM AND NOTICE OF PRESENTATION WAIVED:

James C. Powers
JAMES C. POWERS/WSBA#12791
DEPUTY PROSECUTING ATTORNEY

Approved Per Telecon by PTC w/ Court's J/A + JPA Powers
PETER T. CONNICK/WSBA #12560
ATTORNEY FOR DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE SUPPLEMENTAL DEFENSE MOTION FOR NEW TRIAL - 3

EDWARD G. HOLM
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SCANNED

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DIVISION II

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STATE OF WASHINGTON
BY  CLERK

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

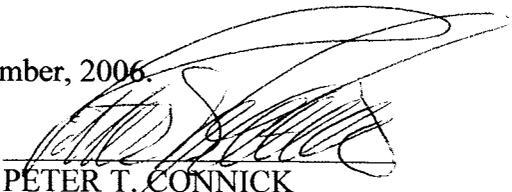
STATE OF WASHINGTON,)	
)	NO. 34572-2-II
Respondent,)	
)	DECLARATION OF
)	SERVICE
BRADLEY CURTIS,)	
)	(Appellant's Brief)
)	
Appellant.)	

PETE CONNICK, Attorney, being first duly sworn upon oath, deposes and states as follows:

On the 25th day of September, 2006, the undersigned sent to the attorney of record for Plaintiff, State of Washington, a copy of *Appellant's Brief* by depositing the same in the U.S. mail, postage prepaid, from Seattle, WA a copy to Thurston County Prosecuting Attorney and Appellant Bradley Curtis.

I swear under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 25th September, 2006.


PETER T. CONNICK
WSBA # 12560
Attorney for Appellant

DECLARATOIN OF SERVICE
PAGE 1 OF 1

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