

NO. 34572-2-II

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

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STATE OF WASHINGTON,

Respondent,

v.

BRADLEY J. CURTIS,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COUNTY  
CAUSE NO. 03-1-02154-1

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HONORABLE CHRISTINE POMEROY and  
HONORABLE RICHARD A. STROPHY, Judges

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RESPONDENT'S BRIEF

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A. STATEMENT OF THE ISSUES

1. Whether the statement by a juror during deliberations that she had been sexually molested as a child constituted extrinsic evidence.

2. Whether the thought processes by which Juror Linda Poutre arrived at a verdict inhered in the verdict and therefore cannot be considered as a basis for a new trial.

3. Whether the trial court properly instructed the jury regarding its deliberations, whether a misunderstanding a juror may have had in the course of reaching a verdict inheres in the verdict, and whether the court reasonably exercised its discretion in finding that the post-trial declaration of the Presiding Juror lacked credibility.

4. Whether this appellate court should exercise its discretion under RAP 2.5(c)(2) regarding the law of the case and refuse to consider the defendant's claim of cumulative error.

B. STATEMENT OF THE CASE

In Thurston County Superior Court Cause No. 03-1-02154-1, defendant Bradley Curtis was charged with one count of rape of a child in the first degree or, in the alternative, child molestation in the first degree. The jury trial in this cause began on July 19, 2004 before the Honorable Judge Christine Pomeroy. One of the jurors, Linda

Poutre, revealed in her jury questionnaire that she had been sexually abused as a child. This juror was neither the subject of a challenge for cause nor for a peremptory challenge. 9-24-04 Hearing RP 9, 25. (References to the record of proceedings refers to verbatim transcripts which were filed for purposes of the direct appeal of the trial in this case in Court of Appeals Cause No. 32308-7-II.) Juror Linda Poutre ultimately became the presiding juror in this trial.

Closing arguments were presented in the trial on July 22, 2004. Clerk's Minutes at CP 120. Prior to those arguments, the jury was instructed by the court. Among the instructions given was Instruction No. 2, which stated:

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

CP 128. See also the Court's Instructions to the Jury at CP 61-76 in Court of Appeals Cause No. 32308-7-II, the direct appeal from the trial of this cause.

At 12:58 that afternoon, the jury retired to deliberate. Clerk's Minutes at CP 120. The jury chose to continue deliberating into the evening. Jury Note at CP 124.

At approximately 6:40 p.m., the jury sent the court a note which stated:

Request all interview transcripts. Request police reports. Where are Exhibit 1 & 2? (Request them if possible)

CP 125. The note was signed by Linda Poutre as presiding juror. CP 125. Exhibits I and 2 had not been admitted into evidence. The court consulted with counsel and then responded to the jury note as follows:

I will answer your requests in the following manner: Please re-read your instructions.

CP 125. This response was made at 6:55 that evening. CP 125. The jury continued to deliberate until 9:05 p.m., at which point the

court released the jurors for the evening and ordered that they return at 10:00 the next morning. Clerk's Minutes at CP 121.

On July 23, 2004, at 10:35 in the morning, and so shortly after resuming deliberations, the jury sent another note to the court. Clerk's Minutes at CP 121. That note read as follows:

Judge Pomeroy:  
We are a hung jury. What are our instructions now?

CP 126. The note was again signed by Linda Poutre as presiding juror. CP 126. Again, the court consulted with both counsel, and then responded to the jury in the following manner:

Please continue to deliberate.  
Judge Pomeroy  
10:37 a.m.

CP 126. The court informed counsel that if the jury had not reached a verdict by 11:30 that morning, the jurors would be brought into the courtroom and the judge would read the pertinent jury instruction. Clerk's Minutes at CP 121.

At 11:42 that morning, the jury was assembled into the courtroom. The court inquired whether

there was a reasonable probability of reaching a verdict within a reasonable time. Presiding Juror Linda Poutre responded in the affirmative. Therefore, the jury was returned to the jury room to continue deliberations. Clerk's Minutes at CP 121.

THE COURT: Good morning, ladies and gentlemen.

You have been called back into the courtroom to discuss the subject of the reasonable probability of reaching a verdict.

First a word of caution.

Because you have already commenced your deliberations, it is important that you do not make any remark which may adversely affect the rights of either party in which may disclose opinions of the members of the jury.

I'm going to ask the presiding juror if there is a reasonable probability that the jury will reach an agreement within a reasonable time.

The presiding juror is directed to answer either "yes" or "no" to any question I ask and not to say anything else. Do not disclose any information nor indicate the status of your deliberations. Do you understand that?

MS. FOREWOMAN: Yes.

THE COURT: Ms. Presiding Juror, is there a reasonable probability of the jury reaching an agreement within a reasonable time?

MS. FOREWOMAN: Yes, Your Honor.

THE COURT: Okay. With that, I ask that you return to the jury room -- Roy, get them menus -- and that you continue your deliberations.

7-23-04 Verdict RP 3-4 in Court of Appeals Cause No. 32308-7-II.

At 1:10 p.m. that day, the court was informed that the jury had a verdict. Clerk's Minutes at CP 121. The jury assembled in the courtroom at 1:20 p.m. to declare the verdict. The defendant was found guilty of the alternate offense of child molestation in the first degree. Clerk's Minutes at CP 121.

A sentence hearing took place on September 24, 2004. At that time, defense counsel confirmed that Ms. Poutre had disclosed her own sex abuse prior to the jury selection, and so indicated that the defense would not be seeking a new trial based on Poutre's abuse affecting her verdict in this matter. 9-24-04 Hearing RP 9, 25. The court imposed a maximum term of life in prison and a minimum term of 63 months.

A direct appeal was filed thereafter in Court of Appeals Cause No. 32308-7-II. On April 25, 2006, the Court of Appeals rendered a decision in this matter by unpublished opinion. State v.

Curtis, 2006 Wash. App. LEXIS 792. The defendant's conviction was affirmed. A petition for discretionary review was then filed in the Washington Supreme Court under Cause No. 78762-0. Consideration of that Petition is still pending.

In the meantime, on May 2, 2005, the defendant filed a motion for a new trial in the Thurston County Superior Court. CP 3-17. The defendant claimed two bases for this motion. First, the defendant asserted that Presiding Juror Linda Poutre had allowed her own experience as a victim to influence her decision in this case. In support of this claim, the defendant submitted a declaration from each of the defendant's parents, in which the parents stated that they had heard Poutre admit her own experiences had influenced her judgment. CP 16-17.

Second, the defendant claimed jury misconduct, arguing that the jury in this case had considered extrinsic evidence in reaching a verdict. In support of this claim, the defendant submitted a declaration in which Linda Poutre

stated she had told fellow jurors that she had been sexually molested as a child. He also submitted declarations from three other jurors stating that Poutre had told the jury she had been sexually molested as a child. No juror stated that Poutre had said anything additional about her own experiences. In addition, no juror claimed that Poutre's victimization had been considered in the deliberations leading to a verdict in this case. CP 11-14.

On September 28, 2004, the defendant filed a Supplement to Defense Motion for New Trial, and then on October 24, 2005, the defendant filed a Supplemental Motion and Memorandum on Deadlocked Juries. In these materials, the defendant asserted a third basis for his request for a new trial. He claimed that a verdict was reached in this case, as opposed to a hung jury, because jurors were convinced that failing to reach a verdict was not an available option. In support of this claim, the defendant filed a second declaration from Linda Poutre, in which she

claimed that the jury had been informed by the court that being a "hung" jury was unacceptable, and that the jury then agreed on the alternative charge believing it was the only way to end the case. CP 78-91.

All three of the claims made by the defendant were heard and considered by the Honorable Judge Richard A. Strophy. The court entered an oral decision on October 17, 2005, denying the first two claims for a new trial. 10-17-05 RP 24-33. The court's findings of fact and conclusions of law were then entered in written form on May 5, 2006. CP 168-170.

On the third, supplemental claim for a new trial, the court entered a letter opinion on February 23, 2006, denying the request for a new trial. CP 144-145. The defendant then filed a Notice of Appeal on March 21, 2006, seeking to appeal from Judge Strophy's denial of a new trial, and specifying the February, 2006, letter opinion. CP 146.

The Court of Appeals responded on April 3,

2006, stating that the Notice of Appeal was premature because the Superior Court's letter opinion was not a final order. As noted above, on 5-5-06 written Findings of Fact and Conclusions of Law were entered as to the defendant's first two claims for a new trial, denying the defendant's request. CP 168-170. On that same date, written Findings of Fact and Conclusions of Law re Supplemental Defense Motion for New Trial were filed, addressing the defendant's third claim, and denying a new trial on that basis as well. CP 171-173. On the basis of these Orders of the court, the appeal proceeded forward.

### C. ARGUMENT

1. The statement by Juror Linda Poutre that she had been sexually molested as a child did not constitute extrinsic evidence nor did it affect a material issue in this case.

As noted above, the trial court entered Findings of Fact and Conclusions of Law, wherein the court concluded that Linda Poutre's mere statement to other jurors that she had been sexually molested as a child, a matter which she had fully revealed to both parties prior to jury

selection, did not constitute the communication of extrinsic evidence amounting to juror misconduct. CP 168-170. On appeal, the defendant contends that the trial court erred in reaching this conclusion. However, the defendant has not assigned error to any of the factual findings reached by the court and so those are verities on appeal. State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

Ms. Poutre made the single statement that she had been sexually molested as a child during deliberations. In Appellant's Brief, it is claimed that Poutre "shared her thoughts and experiences as a molestation victim with the rest of the jury". Appellant's Brief at 3. However, that is not an accurate statement. Neither Ms. Poutre nor any other juror ever made such a claim. CP 11-14. As the court found, Poutre 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 juror

claim that Ms. Poutre's disclosure influenced their deliberations or verdict. Finding of Fact No. 2 at CP 169.

Deciding whether juror misconduct occurred and whether it affected the verdict are matters for the discretion of the trial court, and the trial court's decision will not be reversed on appeal unless the court abused its discretion. Breckenridge v. Valley General Hospital, 150 Wn.2d 197, 203, 75 P.3d 944 (2003). A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. Id. at 203-204. A strong, affirmative showing of misconduct is required in order to overcome the policy favoring stable and certain verdicts and the secret, frank, and free discussion of the evidence by the jury. Id. at 203.

It is jury misconduct for jurors to inject extrinsic evidence into the jury deliberations. Breckenridge, 150 Wn.2d at 199 n.3. Extrinsic evidence is that which is outside the record of

the trial and affects a material issue in the case. Fritsch v. J.J. Newberry's Inc., 43 Wn. App. 904, 907, 720 P.2d 845 (1986). However, jurors are permitted to rely on their personal life experiences to evaluate the evidence presented at trial during deliberations. Breckenridge, 150 Wn.2d at 199 n.3. Thus, the issue becomes whether a juror's comment constituted personal life experience, which is proper, or extrinsic evidence, which is improper. The test is whether the comment imparts the kind of specialized knowledge that is provided by experts at trial, in which case it qualifies as extrinsic evidence. Breckenridge, 150 Wn.2d at 199 n.3.

In Breckenridge, supra, which was a medical malpractice action, the trial court had granted the patient's motion for a new trial on the basis of alleged juror misconduct. One of the jurors had argued during deliberations that emergency room doctors would generally have behaved in the same manner as the doctor whose actions were the

subject of the lawsuit. The juror referred to visits his wife had made to hospital emergency rooms with symptoms similar to those experienced by the patient in the lawsuit, and based on the treatment his wife had received, argued that the doctor in this lawsuit had provided the requisite level of care. Breckenridge, 150 Wn.2d at 202.

The State Supreme Court held in Breckenridge that the juror's statements did not constitute extrinsic evidence, but rather personal life experiences which inhered in the verdict and which should not have been considered in regard to a motion for a new trial. The trial court's granting of a new trial was therefore reversed. Breckenridge, 150 Wn.2d at 204-205.

In the present case, the fact that Ms. Poutre had been a victim of sexual abuse did not impart to other jurors any specialized information of a sort that is provided by experts at a trial. There is no suggestion in this case that she even attempted to relate her experiences as a victim with the facts of this case in her communication

with other jurors. Furthermore, there is no showing that this statement affected any material issue in this case. If this statement constituted "evidence", what was it evidence of? The only conclusion another juror could possibly derive from the fact that Linda Poutre had been sexually molested as a child is that such things unfortunately do happen sometimes, which would hardly be news to any juror. Thus, there was no injection of extrinsic evidence in this case.

Cases cited by the defendant on appeal are consistent with the approach argued here. In State v. Briggs, 55 Wn. App. 44, 776 P.2d 1347 (1989), one of Briggs' principal defenses at trial was the fact that each victim had failed to note any stuttering on the part of the assailant, while Briggs had such a problem. One of the jurors hid the fact that he had a similar speech problem when asked about that during voir dire. Then, during jury deliberations, that juror not only brought up his own experiences as a stutterer, but also used that experience as a basis for asserting

information and opinions concerning how Briggs could have committed the crimes without the victims detecting his speech problem, thereby going to the heart of the defense theory of the case. It was this application of expertise that was found to be improper extrinsic evidence. Briggs, 55 Wn. App. at 47-49.

In State v. Pete, 152 Wn.2d 546, 550-551, 98 P.3d 803 (2004), documents which had never been admitted into evidence were inadvertently sent back to the jury room for the jury's use in deliberations. One document was a police report concerning statements by Pete during transport to a police station. The second was a written and signed statement by Pete. This evidence clearly affected a material issue in the case and so was found to be improper extrinsic evidence.

The case of Robinson v. Safeway Stores, Inc., 113 Wn.2d 154, 776 P.2d 676 (1989), is simply inapplicable. In that case, a juror was specifically asked during voir dire whether he had any prejudice against California residents, given

that the plaintiff and her witnesses were from California. The juror denied that he had any such prejudice. Then, during jury deliberations, that same juror revealed that he had previously been sued by a California resident, remained highly resentful of this, and made repeated statements demonstrating his prejudice against California residents. The trial court ordered a new trial based on the fact that the juror had been dishonest during the voir dire process. Robinson, 113 Wn.2d at 156-157. The State Supreme Court affirmed that the juror misconduct in this case was the juror's dishonesty during voir dire, and that a new trial was justified for that reason. Robinson, 113 Wn.2d at 159-160.

In the present case, as noted previously, Ms. Poutre was fully forthcoming concerning her own abuse during the voir dire process, and therefore Robinson v, Safeway Stores, Inc., supra, has no significance with regard to the issues in this case.

2. The references in the declarations of James and Linda Curtis to Juror Linda Poutre's

thought processes in deciding a verdict addressed matters which inhered in that verdict, and therefore could not be considered as a basis for a new trial.

In claiming juror misconduct due to extrinsic evidence, the defendant argues on appeal that juror Linda Poutre was improperly influenced by her own experience of having been victimized as a child. This claim is based on declarations by the defendant's parents that they heard Poutre state that her molestation as a child influenced her decision as a juror. There was no indication of what sort of influence Poutre was referring to. CP 16-17.

In regard to this claim, the trial court concluded as follows:

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.

Conclusion of Law No. 2 at CP 169. On appeal, the defendant claims that the trial court erred in reaching this conclusion.

It has already been noted that a juror can rely on her personal life experiences in evaluating the evidence in the case. Breckenridge, 150 Wn.2d at 199 n.3. There is nothing in the declaration of either Jim or Linda Curtis that indicates Poutre did anything beyond such reliance.

It is also the case that a juror's thought processes in deciding a verdict inhere in that verdict and cannot be considered in a motion for a new trial.

The mental processes by which individual jurors reach their respective conclusions, their motives in arriving at their verdicts, the effect the evidence may have had upon the jurors or the weight particular jurors may have given to particular evidence, or the juror's intentions or beliefs, are all factors inhering in the jury's processes in arriving at its verdict, and, therefore, inhere in the verdict itself, and averments concerning them are inadmissible to impeach the verdict.

Cox v. Charles Wright Academy, Inc., 70 Wn.2d

173, 177, 422 P.2d 515 (1967). See also State v. Jackman, 113 Wn.2d 772, 777-778, 783 P.2d 580 (1989).

For example, in State v. Standifer, 48 Wn. App. 121, 737 P.2d 1308 (1987), Standifer was convicted of rape. He then moved for a new trial based on the statement of a juror after the trial that she had maintained a reasonable doubt as to the defendant's guilt, but had buckled under peer pressure and had voted in support of a guilty verdict for that reason. The trial court granted the motion for a new trial. However, the Court of Appeals ruled that these assertions of the juror inhered in the verdict and should not have been considered by the trial court, and so the granting of a new trial was reversed. Standifer, 48 Wn. App. at 127-129.

In the present case, the trial court correctly concluded that the thought process by which Linda Poutre reached a verdict, and the considerations which influenced her judgment, inhered in the verdict. Therefore, such thought

processes could not be considered in support of the defendant's motion for a new trial.

3. There was no irregularity or error in the way the trial court instructed the jury or dealt with its ability to reach a verdict, any misunderstanding a juror may have had in the course of that juror's thought processes leading to the verdict must inhere in the verdict, and the court reasonably found that Ms. Poutre's declaration regarding the thought processes of the jurors which led to the verdict lacked credibility.

A third basis raised by the defendant in support of his motion for a new trial was that the trial court had incorrectly advised the jury with regard to it being deadlocked, thereby causing jurors to mistakenly believe they were required to reach a unanimous verdict. The trial court entered written Findings of Fact and Conclusions of Law with regard to this claim. The court concluded that there had not been any irregularity or error in the way the trial court instructed the jury or dealt with its ability to reach a verdict. Conclusion of Law No. 7 at CP 173.

On appeal, the defendant contends that this conclusion of the court was in error. However,

the defendant has not assigned error to any of the court's Findings of Fact, and so those are verities on appeal. State v. Levy, 156 Wn.2d at 733.

A trial judge is allowed broad discretion in deciding whether the circumstances justify a discharge of the jury. State v. Jones, 97 Wn.2d 159, 163, 641 P.2d 708 (1982). In exercising that discretion, the judge should consider the length of time the jury has been deliberating in the light of the length of the trial and the volume and complexity of the evidence. Id. at 164.

Here, the trial had lasted four days and included the testimony of fourteen witnesses. Clerk's Minutes at CP 114-121. At the point the jury notified the court it was a "hung" jury, the jury had been deliberating one afternoon and evening for a total of about eight hours. The jury note had emerged after about an additional half-hour of deliberations on the second day. Clerk's Minutes at CP 120-121. The court did not

abuse its discretion in choosing to instruct the jury to keep deliberating.

Nor was that simple instruction, "Please continue to deliberate", coercive in any way. Superior Court Criminal Rule 6.15 requires as follows:

After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

CrR 6.15(f)(2). Here, the court had already given the jury Instruction No. 2, which had told the jurors that "you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict". CP 128. See also CP 61-76 in Court of Appeals Cause No. 32308-7-II, the direct appeal from the trial of this cause. In the light of that instruction, the court's directive to continue deliberating did not suggest in any way that the jury was required to reach agreement.

The court then waited only one additional hour before calling the jury into the courtroom. Clerk's Minutes at CP 121. The court asked if there was a reasonable probability of the jury reaching an agreement within a reasonable time. 7-23-04 Verdict RP 4. This question certainly did not suggest that jurors were required to reach an agreement. In fact, it indicated just the opposite. The jury was only sent back to the jury room because the presiding juror, Linda Poutre, confirmed that there was such a reasonable probability.

In State v. Hunsaker, 74 Wn. App. 209, 873 P.2d 546 (1994), the Court of Appeals made the following determination with regard to events that occurred during the jury's deliberations:

Here, the trial judge responded to two communications from the jury, neither of which raises a substantial possibility that the judge was improperly influencing the verdict. He merely dismissed the jury for an early lunch and then directed it to continue to deliberate. One and a half hours after directing the jury to continue, he called it into the courtroom and, in the presence of counsel, asked whether there was a possibility of reaching a verdict. There was no suggestion of coercion of a verdict

on his part. Therefore, there was no error on the part of the trial court.

Hunsaker, 74 Wn. App. at 211. In the present case as well, the court acted properly in addressing the jury's indication that it was deadlocked.

None of the cases cited by the defendant on appeal lead to a different conclusion. Most are distinguishable on the basis that the court in those cases provided the jury with an erroneous instruction on the applicable law.

In Bollenbach v. United States, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1946), Bollenbach was charged with conspiracy to transport securities in interstate commerce knowing that they were stolen. The jury sent the court a note indicating confusion over the elements of this offense. The court provided a further instruction that possession of the stolen property shortly after the theft raised a presumption that the possessor was the thief who had transported the stolen property in interstate commerce. The Supreme Court found that this was

an inaccurate statement of the law, and so had misled the jury. Bollenbach, 326 U.S. at 609-611.

In United States v. Gordon, 844 F.2d 1397 (9<sup>th</sup> Cir. 1988), a single conspiracy was charged, but there was evidence of two conspiracies. The jury was not instructed it had to be unanimous as to which conspiracy it found proved, nor did the prosecution elect one of the conspiracies as the basis for the charge, nor was there a special interrogatory for the jury to clarify which conspiracy was the basis for conviction. Therefore, the jury instructions failed to protect the defendant's right to jury unanimity. Gordon, 844 F.2d at 1401-1402.

In United States v. Walker, 575 F.2d 209 (9<sup>th</sup> Cir. 1978), Walker was charged with stealing a boat at Palmyra island. He had then sailed the boat to Hawaii. During deliberations, the jury asked whether it would necessitate a not guilty verdict if the jury determined that Walker had developed the intent to steal after the boat left

Palmyra. The United States Court of Appeals ruled that the trial court's response incorrectly implied that the defendant would be guilty if he formed the intent to steal anywhere in the maritime or territorial jurisdiction of the United States, and therefore was error. Walker, 575 F.2d at 213-214.

In United States v. Petersen, 513 F.2d 1133 (9<sup>th</sup> Cir. 1975), Petersen was charged with conspiracy to dispose of property of the United States without legal authority. The defense was that he had relied upon the apparent authority of a co-defendant. During deliberations, the jury inquired whether ignorance of the law could be an excuse. The trial court responded that it could not be an excuse. The Court of Appeals held that, in the context of this particular charge, that instruction was erroneous. Petersen, 513 F.2d at 1135.

The trial court in Petersen had also instructed the jury before deliberations that the defendant should be convicted if the jury found

that the law had been violated as charged. The Court of Appeals ruled that this instruction was error because it did not specify proof beyond a reasonable doubt. Petersen, 513 F.2d at 1136.

In the present case, there has not been any showing that the trial court erroneously instructed the jury on the law. Therefore, the above-described cases cited by the defendant do not support his motion for a new trial.

In several other cases cited by the defendant, the trial court failed to fully instruct the jury on the applicable law.

In United States v. Nunez, 889 F.2d 1564 (6<sup>th</sup> Cir. 1989), a co-defendant named Rodriguez was charged with conspiracy to possess cocaine with the intent to deliver. During deliberations, the jury asked whether Rodriguez could be convicted of conspiracy solely on the basis of having formed an agreement with a government agent acting undercover. The applicable law was that such an agreement would not constitute a criminal conspiracy, but that point of law had not been

addressed in any jury instruction. The trial court refused to respond directly to this question and instead simply re-read one of the original instructions. The Court of Appeals found that this failure to instruct on a pertinent point of law was error. Nunez, 889 F.2d at 1567-1569.

In United States v. Bolden, 514 F.2d 1301 (D.C. Cir, 1975), Bolden was convicted for felony murder in the course of a robbery. It would not have been felony murder if the decision to commit a robbery had been made after the killing as an afterthought. During deliberations, the jury expressed confusion on this point to the court by asking if the commission of a robbery necessarily implied that there was a prior intent to commit that robbery. The original instructions did not specifically address this issue. However, the trial court chose not to address this question with an additional instruction. The Court of Appeals found that the trial court should have instructed the jury that for felony murder, the

intent to rob must have been formed before the homicide, and the fact that a robbery occurred would not necessarily settle the issue of whether there was such a prior intent. Bolden, 514 F.2d at 1307-1309.

In the present case, there has been no showing of a failure by the trial court to instruct on the applicable law. The court had instructed that each juror should decide the case for himself or herself, and that no juror should change his or her honest belief as to the weight or effect of the evidence solely because of the opinions of fellow jurors or for the mere purpose of returning a verdict. CP 128; CP 61-76 in Court of Appeals Cause No. 32308-7-II. When the jury indicated a deadlock, there was no indication of confusion with regard to the points of law addressed in the above instruction. The jury simply inquired, "We are a hung jury. What are our instructions now?" CP 126. The court responded to the question asked, and properly did not choose to go beyond that question.

In Powell v. United States, 347 F.2d 156 (9<sup>th</sup> Cir. 1965), Powell was charged with transporting a girl across state borders for the purpose of prostitution. The prosecution was required to prove that Powell had the alleged purpose before the end of the journey and it must have been a dominant motive for the trip. During deliberations, the jury inquired whether Powell had the necessary purpose for conviction if he had that purpose after arriving at his destination. The trial court did not directly respond to this question, but instead instructed that Powell's intent for the transport could be found on the basis of conduct within a reasonable time before or after the transport. The Court of Appeals ruled that the lack of a proper response to the question asked, and the nature of the unresponsive instruction given, combined to have potentially misled the jury, and so was error. Powell, 347 F.2d at 157-158.

In the present case, the jury essentially asked the court what it should do having reached

a point of deadlock. The court responded directly to that question, instructing the jury to continue deliberating. Any further instruction concerning what would happen if the jury could not ultimately come to an agreement would have run afoul of CrR 6.15.

After jury deliberations have begun, the court shall not instruct the jury in such a way as to suggest the need for agreement, the consequences of no agreement, or the length of time a jury will be required to deliberate.

CrR 6.15(f)(2) (emphasis added).

Finally, the defendant cites to Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). However, in that case, the Supreme Court held that Ohio's death penalty statute was unconstitutionally narrow in that it did not permit a jury in a death penalty proceeding to consider the full range of relevant mitigating factors. Lockett, 438 U.S. at 605. That decision has no relevance to the issues on appeal in the present case.

While the defendant claims that there was error committed by the trial court in addressing

the indication of a deadlocked jury, in fact the substance of his claim does not identify any such error. Rather, the true nature of his claim, relying upon the declaration of Linda Poutre, is that the jurors misunderstood the court's instructions and felt compelled to reach a verdict despite being "absolutely" hung. CP 79-80. As the trial court concluded, that claim concerned the mental processes by which the jury arrived at its verdict, those mental processes inhered in the verdict, and so could not be considered as a basis for a new trial. Conclusion of Law No. 4 at CP 173.

As previously discussed in this Brief of Respondent, the individual or collective thought processes leading to a verdict inhere in the verdict. Therefore, any averment that is offered concerning those mental processes is inadmissible to impeach the verdict. State v. Rooth, 129 Wn. App. 761, 771-772, 121 P.3d 755 (2005). Furthermore, any evidence that a juror misunderstood or failed to follow the court's

instructions inheres in the verdict and may not be considered. Ayers v. Johnson & Johnson Baby Prods. Co., 117 Wn.2d 747, 769, 818 P.2d 1337 (1991); Rooth, 129 Wn. App. at 772. Thus, the claims made by Linda Poutre concerning the deliberations of the jury cannot be considered as the basis for a new trial.

The trial court also concluded that, even if Poutre's declaration regarding the thought processes of the jurors could be considered in regard to a motion for a new trial, her declaration was contrary to the objective facts in the record and therefore was not credible. Conclusion of Law No. 5 at CP 173. Credibility determinations are within the discretion of the trial court. In re Personal Restraint of Davis, 152 Wn.2d 647, 682-683, 101 P.3d 1 (2004). The trial court's determination that Poutre was not credible was reasonable in the light of the record of this case.

First, Linda Poutre claimed that at the point the judge directed the jury to keep

deliberating, the jury had already spent "two intensive and exhausting days in deliberations". CP 79. This claim is repeated in Appellant's Brief. However, it is not accurate. The jury had deliberated the day before from approximately 1 p.m. to 9 p.m., a total of 8 hours. The jury had then returned at 10 a.m. the next morning to resume deliberations, and had only spent a half-hour at most in further session before reporting that the jury was "hung". Clerk's Minutes at CP 120-121.

Second, Ms. Poutre claimed that the judge notified the jury that being "hung" was unacceptable. CP 79. However, that also was inaccurate. The court never gave such a notification, but rather simply directed the jury to keep deliberating.

Third, Ms. Poutre claimed in her declaration that the jury was "absolutely 'hung'". Yet, when the court brought the jury into the courtroom and asked if there was a reasonable probability the jury could reach a verdict within a reasonable

time, it was Ms. Poutre who answered in the affirmative. 7-23-04 Verdict RP 3-4.

Fourth, Ms. Poutre's description of the sequence of events during the jury's deliberations failed to make any reference to the fact that the jury was called into the courtroom and questioned by the court. In her declaration, it was as if this never happened. The court could reasonably infer that this step in the process was left out because it contradicted Ms. Poutre's claim.

For all these reasons, the court reasonably concluded that Ms. Poutre's declaration was not sufficiently reliable to constitute a basis for a new trial, even if her assertions could be considered in that regard.

4. The Court of Appeals should exercise its discretionary authority under RAP 2.5(c)(2) regarding the law of the case and refuse to consider the defendant's claim of cumulative error in this appeal.

The defendant seeks to address in this appeal certain claims of error pertaining to the trial of this cause. However, this is not an

appeal taken from the trial and the entry of the Judgment and Sentence in this case. There has already been a direct appeal in that regard, the Court of Appeals has rendered a decision affirming the Judgment, and the defendant has sought discretionary review in the State Supreme Court. State v. Curtis, 2006 Wash. App. LEXIS 792. Thus, this attempt to once more address trial issues is outside the scope of this appeal. RAP 2.4(a).

Furthermore, a prior appellate decision constitutes the law of this case. Sintra Inc. v. City of Seattle, 131 Wn.2d 640, 652, 935 P.2d 555 (1997). Under the law of the case doctrine, once there is an appellate holding enunciating a principle of law, that holding will generally be followed in subsequent stages of litigation in the same case. Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005).

The Court of Appeals does have discretionary authority to review a prior appellate court decision under RAP 2.5(c)(2), which states as

follows:

*Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

This court rule embodies two separate exceptions to the law of the case doctrine. The first is where there has been an intervening change in controlling precedent between the time of the appellate court's first decision and the later review. The second is where the prior decision is clearly erroneous and that erroneous decision would work a manifest injustice to one of the parties. Roberson, 156 Wn.2d at 42; State v. Worl, 129 Wn.2d 416, 424-425, 918 P.2d 905 (1996).

The defendant has not cited in this appeal any change of controlling precedent since the decision of the Court of Appeals affirming the defendant's conviction in this case. Furthermore, the defendant has not even sought to show how the appellate court's prior decision in

this case was clearly erroneous. In fact, other than a perfunctory acknowledgment that there has been a prior decision in this case, the defendant has proceeded to argue the matter as if no such decision had been rendered. In effect, the defendant has simply sought another opportunity for a second bite at the apple. Therefore, the Court of Appeals should exercise its discretion under RAP 2.5(c)(2), and refuse to consider this claim of "cumulative error".

Finally, should the court choose to consider these further claims of the defendant, there is no basis shown for the court to rule any differently than it did previously.

The defendant argues that Dr. Oley and Dr. Duralde rendered impermissible opinion testimony that the victim had been sexually abused when each doctor explained that it would not be unusual for a child who had been sexually abused to not have any discernible injury. Trial RP 193, 200-202. However, under ER 702, an expert witness can testify as to specialized knowledge

that will assist the trier of fact to understand the evidence or to determine a fact in issue. Referring to Dr. Duralde's expression of this medical opinion in its decision, since no claim of error had been made regarding Dr. Oley's testimony, the Court of Appeals ruled that Duralde's testimony was not an opinion as to the defendant's guilt, but was rather simply a medical explanation of what physical effects penetration could have on a child of the victim's age. State v. Curtis, 2006 Wash. App. LEXIS 792 at 8-12.

In arguing the contrary, the defendant relies on cases such as State v. Carlson, 80 Wn. App. 116, 909 P.2d 999 (1995) and State v. Kirkman, 126 Wn. App. 97, 107 P.3d 133 (2005), claiming that the medical opinions expressed in the present case were much the same as the improper opinions rendered in those cases. However, the Court of Appeals specifically ruled in this case that Dr. Duralde's testimony was distinguishable from that rendered in Carlson and

Kirkman, and the same would necessarily be true as to Dr. Oley's testimony. Curtis, 2006 Wash. App. LEXIS 792 at 10-12.

Detective Miller testified that the defendant was asked why he should be believed over a ten-year-old girl, and the defendant responded that he shouldn't. Then Miller was asked what his reaction was to that statement, and Miller answered, "I was like, wow, he did it." Trial RP 259. The defense objected and moved to strike. The court sustained the objection and ordered the jury to disregard Miller's answer. Trial RP 259-260. The defendant argues that this was error that no instruction by the court could cure.

However, the appellate court ruled that no reasonable juror would have been influenced by Miller's response, especially in the light of the other evidence and the court's instruction to the jury to disregard his statement. Curtis, 2006 Wash. App. LEXIS 792 at 18. The court noted that the statement added nothing substantive to the

evidence, and that the jurors could derive their own inferences from the totality of the evidence, whereas Miller had acknowledged he knew very little about the case and was simply observing the interview. Therefore, Miller's response would not have had a special aura of reliability. Curtis, 2006 Wash. App. LEXIS 792 at 17-21. Furthermore, under these circumstances, the court's curative instruction was sufficient to enable the jury to make its own assessment of the defendant's statements, and so not be unduly prejudiced by Miller's response. Curtis, 2006 Wash. App. LEXIS 792 at 22-23.

At trial, the victim's father testified that a "porno" CD had fallen out of a pile of CDs, and as he reached to quickly pick it up, the victim had said something to him. The father, Donald Willyard, was then asked what the victim had said. There was a hearsay objection. The prosecutor responded that he was only offering the statement to show what led Willyard to ask further questions of the victim. It was allowed

on that basis. The victim responded, "She said it's okay. It's okay, Dad. Brad has shown me these before." Willyard went on to testify that this statement of the victim prompted him to question his daughter about how that had happened, which led to her disclosures of improper touching. Trial RP 36-37. Thus, the statement was not offered for the truth of the matter asserted, but rather to show the sequence of events which led to the victim's disclosure to her father at that time.

The defendant contends that the evidence of the "porno" CD was allowed as evidence of the defendant's lustful disposition toward the victim. However, as the summary of the testimony above shows, that is entirely incorrect. Therefore, the defendant's subsequent argument about how this was not proper evidence of such lustful disposition is beside the point and irrelevant.

In the original appeal from the trial, the defendant had argued that admission of this

evidence had been prejudicial. The appellate court noted that it had not been objected to on that basis, and that no manifest error had been shown violating a constitutional right, and so the claim would not be considered further. Curtis, 2006 Wash. App. LEXIS 792 at 27-29. Nothing stated in this appeal should lead the court to rule any differently.

Next, the defendant contends it was error to exclude certain testimony offered against Donald Willyard, specifically testimony from Virginia Harmon that the child victim had reported that her father had slept with her and showered with her in the past. The defendant refers to this as proposed testimony about Donald Willyard's sexual abuse of his daughter, but that characterization is obviously incorrect. No evidence was offered as to any sexual abuse of the victim by Donald Willyard, except with regard to what one might speculate based on the statements referred to above.

With regard to such testimony, defense

counsel stated the following prior to the trial:

MR. MESTEL: Your honor, as I noted in my trial memorandum, what we're concerned with is a juror concluding that the only way [C.W.] would be able to recount information concerning sexual improprieties would be if my client did this to her. If the state is not going to argue that this knowledge could only have been gained through some type of inappropriate behavior by Mr. Curtis, then I don't see the need to go into this.

THE COURT: I just - I have to be very frank with you. I would never allow this. Mr. Willyard is not on trial. I see no rules of evidence that would allow this type of introduction of testimony, and I'm going to deny it.

MR. POWERS: Well, and I'll indicate for the record that I have no intention in any event of making an argument along the lines that Mr. Mestel's concerned about. I think I've -

THE COURT: It's denied. And he, for the record, Rafe, has said he doesn't intend to argue that type of situation.

7-19-04 Hearing RP 9 (emphasis added).

Thus, defense counsel specifically stated that the defense would have no need for this evidence if the State did not argue that the defendant's actions were the only possible source for the victim's precocious sexual knowledge. The State expressed its assurance that no such

argument would be made. There has been no suggestion by the defendant in this appeal that such an argument was made. Nevertheless, the defendant now claims that the defense was erroneously precluded at trial from presenting evidence concerning the victim's precocious sexual knowledge.

Under the doctrine of invited error, a party is prohibited from setting up error at the trial and then complaining of it on appeal. State v. Pam, 101 Wn.2d 507, 511, 680 P.2d 762 (1984). That is precisely what the defendant is attempting here, and therefore this claim should not be considered.

The defendant also contends that the defense offered this alleged statement by C.W. concerning having slept with and showered with her father as impeachment against C.W. and Donald Willyard. No citation to the record is provided to support this contention. As shown above, this contention is incorrect. This evidence was not offered for that purpose. Since the defendant never sought

to impeach C.W. or her father with this evidence, it is frivolous for the defendant to now claim that the court erred by not allowing such impeachment.

Next, the defendant contends that the trial court erred in admitting testimony about certain statements by Nicole Willyard, who did not testify, arguing that this was hearsay testimony and that it violated the defendant's right of confrontation under the United States Constitution. This issue was addressed by the Court of Appeals in its opinion in this case. The appellate court noted that there was never an objection at trial to any of the statements claimed on appeal to have been erroneously admitted. The court then ruled that the defendant had failed to show any manifest error affecting a constitutional right. Curtis, 2006 Wash. App. LEXIS 792 at 31.

The defendant now claims inadmissible hearsay errors, as he did in the first appeal, but only cites one point at the trial where the

defense objected. On that occasion, the testimony concerned a request by Nicole, not a statement, and so was clearly not hearsay.

Q. And when she made this request did she also make any request of you that you keep the kids for a while while she returned to Washington and took care of some things?

MR. MESTEL: Objection, your Honor. It's hearsay, and if the court allows it, I'd like a limiting instruction that it's not offered further.

THE COURT: I'll overrule the objection. You may continue.

Trial RP 25. Further, while a hearsay objection was made at that point, defense counsel had previously indicated no objection to this testimony. 1-19-04 Hearing RP 7-8.

Prior to trial, the State had identified certain out-of-court statements and requests by Nicole Willyard that the State sought to enter into evidence at trial. Plaintiff's Reply Memorandum to Defendant's Motions in Limine at CP 18-20 in Court of Appeals Cause No. 32308-7-II, the original appeal in this case. The State had also argued why that evidence was admissible

under evidence rules regarding hearsay and under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). CP 18-20 in Court of Appeals Cause No. 32308-7-II, the original appeal in this case.

At the hearing on this matter, defense counsel noted the following concerning this evidence of Nicole's statements and requests identified by the State.

MR. MESTEL: Your Honor, if you look at page two of the plaintiff's reply, I have no problem with the paragraphs that start second or third because I think that some information is necessary for the jury to have a full, balanced picture of what was going on. . . .

1-19-04 Hearing RP 7. Defense counsel also agreed to the admissibility of testimony by the victim of things said by Nicole during the commission of the alleged crime. 1-19-04 Hearing RP 8.

In this appeal, the defendant has not shown that there was any testimony at trial concerning an out-of-court statement by Nicole Willyard beyond what defense counsel agreed to in the pre-

trial hearing on July 19, 2004. Therefore, again under the doctrine of invited error, this court should not consider the defendant's claim regarding a violation of his right of confrontation.

D. CONCLUSION

Based on the above, the State respectfully requests that this court find that there was no juror misconduct, nor was there any error committed by the court during jury deliberations. Furthermore, this court should exercise its discretion under RAP 2.5(c)(2), and refuse to consider the defendant's claim of cumulative error at the trial, or in the alternative find, as the court did in the original appeal, that no reversible error occurred, and therefore affirm the defendant's conviction in this cause.

DATED this 27th day of December, 2006.

Respectfully submitted,

  
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JAMES C. POWERS/WSBA #12791  
DEPUTY PROSECUTING ATTORNEY

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
Respondent	)	DECLARATION OF
	)	MAILING
v.	)	
	)	
BRADLEY J. CURTIS,	)	
Appellant	)	

FILED  
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STATE OF WASHINGTON  
BY 

STATE OF WASHINGTON	)	
	)	ss.
COUNTY OF THURSTON	)	

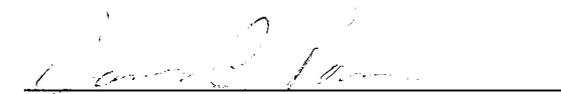
James C. Powers declares and affirms:

I am a Senior Deputy Prosecuting Attorney in the Office of Prosecuting Attorney of Thurston County; that on the 27th day of December, 2006, I caused to be mailed to appellant's attorney, PETER T. CONNICK, a copy of the Respondent's Brief, addressing said envelope as follows:

Peter T. Connick,  
Attorney at Law  
157 Yesler Way, #157  
Seattle, WA 98104

I certify (or declare) under penalty of perjury  
under the laws of the State of Washington that  
the foregoing is true and correct to the best of  
my knowledge.

DATED this 27<sup>th</sup> day of December, 2006 at Olympia,  
WA.

  
\_\_\_\_\_  
James C. Powers/WSBA #12791  
Senior Deputy Prosecuting Attorney