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DIVISION II

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**No. 36965-6-II**  
**COURT OF APPEALS OF THE STATE OF WASHINGTON**  
**DIVISION II**

STATE OF WASHINGTON  
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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**JOHN OTTO SMALANCKE,**

**Appellant/Defendant.**

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**PIERCE COUNTY SUPERIOR COURT**

**NO. 06-1-03290-1**

**THE HONORABLE FREDERICK W. FLEMING,**

**Presiding at the Trial Court.**

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**APPELLANT'S OPENING BRIEF**

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**A. ASSIGNMENTS OF ERROR**

1. The trial court committed reversible error when it instructed the jury on attempted child molestation because the evidence did not support an inference that only the crimes of attempted child molestation had been committed.

2. Mr. Smalancke's trial counsel's performance was deficient because he inexplicably accepted the State's proposed "attempted" instructions irrespective of the fact that the evidence supported no such instructions and that neither party advocated that attempted child molestation had occurred.

3. Mr. Smalancke was prejudiced by his trial counsel's deficiency in failing to object to the "attempted" instructions because, being unable to agree that Mr. Smalancke had committed the charged crimes, the jury, for no apparent reason, reached guilty verdicts on two attempted crimes where the evidence didn't support such verdicts.

4. The evidence was insufficient to convict Mr. Smalancke of the attempted child molestation of A.C.

5. The evidence was insufficient to convict Mr. Smalancke

of the attempted child molestation of A.C.

6. Based on the evidence and argument presented at trial there is no way to determine which alleged incident provided the basis for the jury's guilty verdicts concerning K.D.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court commit reversible error by instructing the jury on attempted child molestation where the factual prong of Workman was not satisfied? (Assignment of Error Number One)

2. Where Mr. Smalancke's trial counsel failed to object to the improper attempted instructions and such failure cannot be considered a legitimate tactical decision, was his performance deficient? (Assignment of Error Number 2)

3. Was Mr. Smalancke prejudiced by his trial counsel's deficient performance in failing to object to the "attempted" crimes where the jury was unable to find the State had proved the crimes charged, but convicted Mr. Smalancke on the uncharged attempted crimes on which it had been improperly instructed? (Assignment of

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Error Number Three)

4. Was the evidence of sexual contact insufficient to convict Mr. Smalancke of the attempted child molestation of A.C. where the jury was unable to agree that sexual contact was proved for the greater crimes and the facts could not have established that only the lesser crime was committed? (Assignment of Error Number Four)

5. Where the evidence can only support the greater crime and the jury is not persuaded by it, can a conviction stand for a lesser crime that is not supported by the evidence? (Assignment of Error Number Five)

6. Where the evidence is insufficiently specific and there is no way for the reviewing court to determine which alleged act the jury has convicted on, should the conviction be reversed? (Assignment of Error Number Six)

### **C. STATEMENT OF THE CASE**

#### **1. Synopsis of Mr. Smalancke's Appeal**

Mr. Smalancke was charged with four counts of molesting ten

year old K.D. and one count of molesting seven year old A.C. Both K.D. and A.C. were friends of Mr. Smalancke's ten year old granddaughter, Mikala. The claims of molestation arose when A.C.'s mother asked her if Mr. Smalancke had touched her. A.C. indicated that he had by pointing to her vagina. The police, and the parents of all of the children, quickly became involved.

Within a few days K.D. reported that Mr. Smalancke had touched both she and Mikala on numerous occasions too. The touchings allegedly happened when the children were swimming at Bally's pool and at Mikala's house. K.D. said that Mr. Smalancke had touched their butts and chests and put his hands down their pants. Mikala initially supported K.D.'s claims, but later recanted, explaining that she only said this in order to help K.D. The children were all interviewed by a representative of Pierce County Prosecutor's Office.

At trial, the children's claims had changed substantially. The testimony was vague, inconsistent, and contradictory. The State relied primarily, therefore, on prior statements made by the children to try to

prove its case.

The State's theory of the case was that Mr. Smalancke was a pedophile who had been molesting K.D. for over a year, and that his conduct was only exposed when he molested A.C. because she told. At no point did either party present evidence in support of or argue that Mr. Smalancke's conduct constituted only "attempted" molestations. The jury was, nonetheless, instructed on attempted child molestation for each count.

The jury was unable to agree on a verdict for the crimes as charged. It did, however, inexplicably find Mr. Smalancke guilty of two counts of attempted child molestation in the first degree - one count for each child.

Mr. Smalancke now appeals the court's instructions on "attempted" child molestation, the ineffective assistance of counsel, and the insufficiency of the evidence.

## **2. Procedural History**

On July 18, 2006, the defendant/appellant, John O. Smalancke

was charged by Information with five counts of child molestation in the first degree.<sup>1</sup> The alleged victim of the first four counts was K.D. In each count the State alleged that the crime occurred during the period between March 18, 2005 and March 14, 2006. CP 1-3. The alleged victim of count five was A.C. The State charged that this crime occurred on or about February 24, 2006. CP 1-3.

On July 26, 2007, a Child Hearsay/Competency Hearing was held. RP 2 20. The trial court held that K.D. and A.C. were both competent to testify. RP 3 113. The Court also ruled that the statements made by K.D. to Dominique Dennis and to Kim Brune were admissible under the child hearsay statute.<sup>2</sup> Likewise, the statements of A.C. to her mother, to Dominique Dennis, and to Kim Brune were ruled admissible. RP 3 112-113. An Order Finding Child Hearsay Statements Admissible at Trial was entered on December 5,

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1

RCW 9A.44.083

2

RCW 9A.44.140 and *State v. Ryan*, 103 Wn.2d 165,691 P.2d 197 (1984).

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2007. CP 169-171.

On July 20, 2007, Mr. Smalancke proceeded to trial by jury. RP 3 115. The jury was unable to reach a unanimous verdict on any of the five counts of first degree child molestation that were charged in the Information. On August 8, 2007, guilty verdicts were, however, reached on the lesser crimes of Attempted Child Molestation in the First Degree on counts 3 and 5. RP 7 684-695; CP 114-123. An Order Dismissing Counts 1, 2, and 4, without prejudice was filed on November 2, 2007. CP 151-153.

A sentencing hearing was held on November 2, 2007. The trial court imposed a standard range sentence of 66.75 months to life on each count, to run concurrently. RP 8 706; CP 131-145. A timely Notice of Appeal was filed on the same date. CP 124.

### **3. Factual Summary**

In 2004, Rosalee Cowart met Dawn Davis while both women were “out one night” at a nightclub. RP 3 170, RP 4 211. The two women both worked at St. Joes Hospital. They became friends. Their

friendship included dining, going dancing, and having “girls” nights out. Three other women were included in this circle of friends, including Jamie Serat. RP 3 171. On February 1, 2006, Ms. Cowart moved into the duplex next door to Dawn Davis’ in University Place. Ms. Cowart had two children, a seven year old girl (A.C.), and a nine year old boy named Austin. RP 3 169. Ms. Cowart was divorced. The children’s father resided in Colorado. RP 3 183.

Dawn Davis is John Smalancke’s daughter. Her two children include a boy, Junior, and a girl, Mikala, who are approximately the same ages as Mr. Cowart’s children. RP 4 348. While living at the duplex Mikala’s best friend was K.D. RP 4 348. After Rosalee Cowart moved into the unit next door Ms. Cowart’s daughter, A.C., became friends with Ms. Davis’ daughter, Mikala and with Mikala’s best friend, ten year old K.D.

Mr. Smalancke has two daughters: Dawn (Davis) and Ann. He has been an active father throughout both of their lives. He is sixty-five (65) years old. CP 1-3. Mr. Smalancke served in the U.S. Army

between the years of 1961 and 1983. He later owned and operated a family run janitorial business. In 2003, Mr. Smalancke became disabled. His disability includes hypertension, GERD, severe psoriatic arthritis, diabetes, hearing loss and colon cancer. He continued to receive treatment for these conditions through the veteran's administration until his incarceration. RP 6 530-533.

Mr. Smalancke was married in 1975 to Dawn's and Ann's, mother. The couple separated and later divorced around 2001. RP 6 533. During the separation period, Dawn, her two children, and Mr. Smalancke moved out of the family house and rented an apartment together in Tacoma. After about six months, Mr. Smalancke moved into his own apartment. Mr. Smalancke later moved back in with Dawn in order to provide daycare for her two children. They moved together to the University Place duplex. Later Mr. Smalancke moved solo into senior housing apartments. About a year later, Mr. Smalancke's daughter, Ann, had to relocate for her employment. Mr. Smalancke agreed to move into Ann's condo until a renter could be found. He

then returned to senior housing. During this period, Mr. Smalancke continued to provide child care for his grandchildren, usually three to four times per week until late February of 2006. RP 6 536.

Mr. Smalancke's caretaker services included everything from taking and picking the children up at school, preparing their meals, to assisting them with their various school and extracurricular activities. His relationship to his grandchildren, as well as their friends, was that of "chauffeur and caretaker." RP 6 564. He also participated in activities at the senior apartment complexes in which he resided, and attended the Kent Senior Center three to four times per week. Mr. Smalancke additionally spent as much time as he could helping and visiting his daughter Ann who worked and traveled a great deal. RP 6 570.

Dawn's bi-level loft style duplex was frequently filled with several children running up and down the stairs playing in various rooms. The children who visited the household included Mikala's best friend K.D. Over a period of two years Mr. Smalancke watched

over K.D. anywhere from thirty to fifty (30-50) times. RP 6 537. On Friday nights Mr. Smalancke usually took his grandchildren swimming at the “family night” function at Bally’s Fitness Center. K.D. came along about ten to fifteen (10-15) times. A.C. had never gone swimming with the group.

Operations Supervisor, David Senna testified at trial that the University Place Bally’s pool is three and one half (3 ½) feet deep at each end and five (5) feet at the center. RP 6 526. A lifeguard is *always* present during the family night; the lifeguard was not even permitted to leave for a break absent a replacement lifeguard. RP 6 527. On family night anywhere from five to forty (5-40) people were always swimming in the pool. RP 6 528, 571. The Bally’s swimming pool is significant in Mr. Smalancke’s case because the State argued that two or more incidents of child molestation occurred in the pool. RP 7 603.

According to Rosalee Cowart, on February 24, 2006, at between 5:30 and 6:00 p.m., Ms. Cowart asked Mr. Smalancke to watch her

two children, A.C. and Austin, while she went tanning. RP 3 174. Ms. Cowart testified that either A.C. or Mr. Smalancke told her that the following day Mr. Smalancke would take A.C. shopping with his grandchildren so his grandchildren could buy A.C. a birthday gift. RP 3 176. While she went tanning, Ms. Cowart left her children to go next door to play. Ms. Cowart's friend, Jamie Serat, came over to Ms. Cowart's apartment later to stay the night, because Ms. Cowart had a date. RP 3 174. When Ms. Cowart returned from tanning she prepared for her date. The children returned home before she left for her date. By the time Ms. Cowart returned home from her date, at about 1:00 a.m., Jamie Serat had put the children to bed. RP 3 175-176.

A.C. awoke early the next morning. She wanted to go next door to Junior and Mikala's to play. RP 3 176. A.C. continuously insisted but Ms. Cowart repeatedly told her "No." RP 3 176. Finally, Ms. Cowart asked A.C. why she wanted to go next door. A.C. explained that she wanted to see Mikala's grandpa. When asked why, A.C. responded that he was "nice and he was funny and called her funny

names or nice names.” CP 3 176. When Ms. Cowart continued to press, A.C. claimed that Mr. Smalancke had told her she was “pretty” and called her a “sexy mama.” RP 3 177. Upon hearing this, Ms. Cowart implored further, asking A.C. “[h]as he touched you or anything?” RP 3 177. A.C. indicated that Mr. Smalancke had touched her by pointing downwards toward her vagina. Furthermore, she stated, he had tried to kiss her until she told him to stop five times. RP 3 178. Ms. Cowart testified that A.C. told her that Mr. Smalancke said it was okay for him to do this to her but not to Mikala because Mikala was his granddaughter. RP 3 177.

According to Ms. Cowart her conversation with A.C. started on the stairway inside her apartment. Ms. Cowart then moved A.C. into Ms. Cowart’s bedroom to prevent anyone else from “hearing what was going on.” RP 3 179. Ms. Cowart told A.C. that what happened was very wrong. Ms. Cowart’s eyes were tearing up. She testified that she was “real upset.” RP 3 180. She sent A.C. out of the room and cried.

Jamie Serat testified that Ms. Cowart had taken A.C. into A.C.’s

room and closed the door. An hour and a half later she heard Ms. Cowart exit A.C.'s room crying. Ms. Serat described Ms. Cowart's demeanor as "hysterical." RP 4 309. Ms. Cowart went to her own room and Ms. Serat followed. Ms. Cowart told her that Mr. Smalancke had touched and kissed A.C. Because Ms. Cowart was too upset to do so Jamie Serat called Dawn. Dawn came right over. RP 4 309-410. Ms. Serat and Ms. Cowart then repeated the story to Dawn. Ms. Serat recalled that the focus was on Ms. Cowart; she didn't remember what A.C. was doing. Five or ten minutes after Dawn left, Ms. Serat heard Mr. Smalancke's car leaving the driveway. RP 4 312. About a week later Ms. Serat returned to Ms. Cowart's residence to find the place amiss with broken furniture. RP 4 312.

After Dawn left, Ms. Cowart telephoned the police as well as her ex-husband, Jared, who resides in Colorado. Jared flew up to Washington that same afternoon. RP 3 184. Three or four days later Ms. Cowart arrived home from either the gym or work. The children had been taken by Jared to his father's house. Ms. Cowart testified that

she was very upset and crying. She remembers throwing a picture frame and a lamp. She then called one of her girlfriends who came right over to calm her down. RP 3 184. Ms. Cowart also got Dawn to come over to help her. RP 3 184. Later, she received sympathy from all her friends. "They would come over, just check in on me." RP 3 205.

During cross-examination, Ms. Cowart testified that the day of the alleged incident A.C. was perfectly fine when Ms. Cowart returned from tanning. She recalled seeing A.C. eating strawberries and cream next door. RP 3 195. Ms. Cowart couldn't actually remember whether A.C. merely nodded her head or had responded verbally when she asked if Mr. Smalancke had touched her. RP 4 196. She admitted to Detective Shaviri that A.C. had not responded verbally. RP 3 197. When asked where she was touched A.C. did not respond verbally but rather pointed to the private area. To Ms. Cowart's ongoing questioning of whether the touch was outside or inside her clothing, A.C. indicated it was on top of her clothing. For a couple of weeks

following the episode A.C. repeatedly expressed concern over Mr. Smalancke's whereabouts and well-being. RP 3 206.

Ultimately, both of Ms. Cowart's children ended up moving to Colorado to live with their father rather than their mother. Austin went to Colorado in December of 2006. A.C. followed in either January or February of 2007. RP 3 183.

A.C.'s trial testimony was vague and contradictory at best. When asked why it was better to tell the truth than to lie she stated that she could not remember. RP 3 138. She had previously told Ms. Brune that the reason to tell the truth was so her parents won't get mad. "[s]ometimes she yells at me." RP 6 468. She wasn't sure how Mr. Smalancke touched her but she thought she was sitting on the couch watching television when it happened. She thought he touched her in front with his hand "real quick." over her clothes. RP 3 145-151. She wasn't sure if the way he touched her was different from how other adults touch her. RP 3 146. She didn't remember telling her mom that Mr. Smalancke had tried to kiss her. RP 3 148. She wasn't sure

if Mr. Smalancke was talking about her or someone on the television when he said “sexy mama.” RP 3 153. She did remember eating strawberries and cream while seated on the couch. RP 3 154. She didn’t remember feeling bad when she came home from Mikala’s house. RP 3 156. She did remember K.D.’s mom calling her a “little angel” for telling on Mr. Smalancke. RP 3 156. She also knew that K.D. had claimed that the same thing happened to her. RP 3 157.

Mr. Smalancke testified concerning his communications with the Cowart family. The Cowarts had been living in the duplex next door for only a few weeks in late February of 2006. Because his daughter Dawn and Rosalee Cowart were good friends and worked together, the two duplexes became more “like one big house.” RP 6 549. Rosalee and her friends as well as Rosalee’s children would often walk in and out of Dawn’s place without even knocking.

Mr. Smalancke was taking care of his grandchildren at Dawn’s home on the evening of February 24, 2006. He had picked up his grandchildren from school and prepared dinner. The two children

from next door, Austin and A.C. came over. Austin immediately went upstairs to play video games with Mr. Smalancke's grandson. Mikala had gone to a friend's house. A.C. took off her coat and said she wanted some of the strawberries and cream they had eaten the day before. RP 6 550. Mr. Smalancke prepared the strawberries and cream in a bowl, took A.C. to the dining room table, and gave her the bowl. A.C. asked if she would watch Sponge Bob Square Pants and eat on the glass coffee table in the living room instead. Since Dawn allowed this practice Mr. Smalancke agreed, although he was concerned about Dawn's white couch. RP 5 550-551. A short time later A.C. yelled "oops" and made a movement backwards. RP 6 552. Mr. Smalancke slid her back and tried to get her to stand up while he looked to see if a strawberry had been dropped on the white couch. In the process of scooting the child back Mr. Smalancke touched the top of her thighs and pushed towards her waist. RP 6 553-554. Mr. Smalancke thought nothing more about the strawberry incident. A.C. continued to eat the strawberries and watch T.V. RP 6 554.

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Mr. Smalancke denied that he had ever called A.C. a “sexy mama” or that he ever used such an expression. RP 6 556. He recalled that on a different day A.C. had asked him if she was cute to which he simply responded yes. Mr. Smalancke denied any inappropriate actions or words with A.C. or any other children under his care.

K.D.’s mother is Karla Volkman. K.D. was 10 years old when the charges against Mr. Smalancke were filed. RP 4 261. Ms. Volkman was a friend of Dawn Davis. She also knew Mr. Smalancke and viewed him favorably. Mr. Smalancke helped her out frequently by including K.D. in the care he provided for his own grandchildren. Ms. Volkman entertained no negative concerns about Mr. Smalancke. RP 4 265.

Ms. Volkman testified that she received a call from Dawn who was very upset. As a result of that phone call Ms. Volkman called K.D.’s school and told them to pull K.D. out of class and talk to her. Ms. Volkman believed her daughter had been molested by Mr. Smalancke. RP 4 271. Vice principal Dominique Dennis complied.

Ms. Dennis pulled K.D. out of class and took her to her office. This was the first allegation of child molestation in which Ms. Dennis had been involved. RP 3 289. Ms. Dennis testified that she had received a message from K.D.'s mother that Mikala's grandfather had done something to K.D.. Ms. Dennis believed this assertion to be true. RP 4 288. She was disgusted. RP 4 292. Ms. Dennis told K.D. that her mother was concerned about bad touches. She asked K.D. whether Mr. Smalancke had put his hands in her pants. K.D. nodded "yes." RP 4 293. She may have asked whether Mr. Smalancke also touched her chest. K.D. told her that Mr. Smalancke touches both Mikala and her on their butts and their chests, and that he also puts his hands down their pants, and rubs them for a few minutes. RP 4 281. These incidents all happened at Mikala's house. RP 4 281. Ms. Dennis ultimately wasn't sure that the information she obtained was given freely because her questioning was leading. RP 4 293-294. She conceded that it was difficult to hide her own emotions while interviewing K.D. RP 4 295. Following the interview, the police were

called. RP 4 267-268.

K.D. testified that when she and Mikala were best friends she would go to Mikala's house daily. Mr. Smalancke was there about three times a week. She liked him very much and called him "grandpa." RP 4 221-222. Mr. Smalancke used to take K.D., Mikala, and Junior to the pool. K.D. described the pool as having a "deep end" and a "shallow" end. RP 4 223. She remembered that Mr. Smalancke "touched" all the kids when they were swimming.

When asked where she was touched, she replied that she thinks it was her bottom part in the front. RP 4 226. It "bothered" her. RP 4 227. It lasted for ten seconds. RP 4 227. Another time while the kids were swimming Mr. Smalancke told them to move away from the deep end and go over to the shallow end, and it happened again. She didn't know how many times it happened, but she thought more than two. RP 4 228. She had learned about bad touches in school from her first grade teacher, Dominique Dennis. RP 4 277,279.

When asked by the prosecutor whether she ever had a "bad

touch feeling” while Mr. Smalancke was at Mikala’s house she replied that she didn’t think so. RP 4 231. She didn’t think anything happened either upstairs or downstairs at Mikala’s house. RP 4 233. Eventually, she recalled telling Ms. Dennis that Mikala’s grandpa puts his hands down her pants. RP 4 234. K.D. testified that she thinks that happened a couple of times, but she doesn’t know where. Later in her testimony she couldn’t remember even one time. RP 4 241.

K.D. denied that she ever said that she didn’t tell on Mr. Smalancke before because he told her that if she did she and Mikala could no longer be friends. RP 4 242. Later she testified that she may have told Ms. Dennis that Mikala and her decided not to tell because they wouldn’t be able to continue being friends. RP 4 242. K.D. testified that Mr. Smalancke had carried her up and down Mikala’s stairs when she had a sprained ankle. RP 4 249.

K.D. recalled thinking she was in trouble when Ms. Dennis pulled her out of class. Ms. Dennis asked her if Mikala’s grandpa ever touched her. RP 4 253. After speaking with Ms. Dennis, K.D. and

Mikala continued seeing each other and attending dance classes together. RP 4 253.

During cross-examination K.D. testified that she couldn't remember Mr. Smalancke ever touching her in a bad way at Mikala's house. She told the prosecutor (in her direct testimony) that it happened, though, "because, like, it happened a lot and, like, so I remembered it kind of." RP 4 253-254. She could not, however, remember where or when it happened. She denied Mr. Smalancke had ever told her not to tell anybody or that he had ever talked to her about it at all. RP 4 254.

Mr. Smalancke described the activities at Balley's pool during family nights. He testified that the children played various games, and sometimes he would join in. Other times he would talk to the lifeguard and just watch over the children. Primarily, his role was to ensure their safety and help them learn to swim. RP 6 538. In the course of his care taking duties he would naturally touch the children, but never in an inappropriate manner. RP 6 540-541.

Mr. Smalancke testified that he recalled carrying K.D. when she had a sprained ankle. K.D. would sometimes hug him and call him “grandpa.” RP 6 541. He remembered a time when K.D. was choking at the dining room table and he had to lift her up and pat her back. A couple of times he watched over her and gave her medication at her mother’s request. Between his two grandchildren and K.D., there were times when each of the children had the flu, were vomiting, and so forth.

Mr. Smalancke sometimes carried the children when they weren’t feeling well. K.D. experienced lower back pain as a result of dance and gymnastics. Mr. Smalancke recalled lightly tapping her lower back with his hands to try to relieve the pain. RP 6 542. There was a time when K.D. had made a pile of pillows on the couch at Dawn’s house. K.D. proceeded to jump up and down on top of the pile. She nearly fell onto the glass coffee table. Mr. Smalancke instinctively reached out and grabbed her, with one of his hands ending up under the top portion of the waistband of her pants. RP 6 545.

K.D. joked to Mikala that grandpa had touched her butt. RP 6 546. Mr. Smalancke denied adamantly, however, that his intentions were in any way improper.

Mikala Davis, who was ten years old in February of 2006, testified that her mom told her what was going on when grandpa left their house. She was confused. Ashley said something had happened. RP 4 321. Mikala remembered talking to K.D. about what Ashley had said. K.D. then told someone that she had been touched by grandpa too, and so had Mikala. RP 4 333. K.D. told Mikala that she said Mikala was touched too, so she would not be alone. RP 3 333-334. Mikala then told someone that she had seen K.D. being touched. She said this because K.D. was her friend and she wanted to support her. She was afraid that if K.D. was discovered to be lying, they could not be friends anymore. RP 4 334. Also, K.D. might have gotten mad at her and she didn't want to lose her friend. RP 4 335. Mikala explained that her earlier statements that implicated her grandfather were made for the purpose of helping K.D.. RP 4 335. When asked

why she would do that, Mikala replied: "Because I don't think that, like - - I don't know. Like, I got really confused and then like I didn't know if there was sides or something like that, and so then I just tried to help her." RP 4 340. In short, Mikala had not really seen her grandfather behave inappropriately towards herself or any other child. During this time she was talking mostly to A.C. about all of this, but the whole thing was making her "kind of mad." RP 4 340-341. K.D. had talked to her about this before K.D. talked to Ms. Dennis or Ms. Brune. RP 4 234.

Dawn Davis returned to Ms. Cowart's place after her father left on February 25, 2006. She testified that Ms. Cowart had already telephoned the police and her ex-husband. Ms. Davis noticed that things were broken in Ms. Cowart's apartment that had not been broken earlier that day. Ms. Davis left Mr. Cowart's to go for a drive and clear her head. She was very upset. Either that day or the following day, she telephoned Karla Volkman. RP 4 347-355.

Ms. Davis recalled that K.D. had told lies before. She suspected

K.D. of stealing a ring. Although K.D. denied it, the ring was later found at K.D.'s house. Dawn told Karla about it. RP 4 361. There were other incidents described as well where K.D. had lied. RP 4 359.

The State called Kim Brune, who is employed by the Pierce County Prosecutor's office to testify. Ms. Brune interviewed A.C. and K.D. on March 15, 2006. She interviewed Mikala a few days later. RP 5 416, 422. The interviews with A.C. and K.D. were recorded and admitted as DVD exhibits during trial. (Plaintiffs Exhibits Numbers 1 and 2).

#### **D. ARGUMENT**

##### **I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT INSTRUCTED THE JURY ON THE LESSER OFFENSES OF ATTEMPTED CHILD MOLESTATION BECAUSE THE FACTUAL PRONG OF WORKMAN WAS NOT SATISFIED.**

The State charged Mr. Smalancke with five counts of first degree child molestation. CP 1-3. The State prosecuted the case on the sole theory that Mr. Smalancke complete the crimes of molesting

A.C. and K.D.. At no point in the proceedings did the prosecutor argue that Mr. Smalancke had attempted to molest either A.C. or K.D., but rather the State argued that Mr. Smalancke had unequivocally completed the crimes. By finding Mr. Smalancke guilty of attempted first degree child molestation, Mr. Smalancke was convicted of an uncharged crime.

Article 1, § 22 of the Washington State Constitution prevents a defendant from being tried and convicted of uncharged crimes. *State v. Berlin*, 133 Wn.2d 541,544, 947 P.2d 700 (1997); *State v. Pelkey*, 109 Wn.2d 484,487,745 P.2d 854 (1987). The only exceptions are that the State may convict the defendant of an uncharged offense if the uncharged offense is an offense of an inferior degree of the crime charged or a lesser-included offense of the crime charged. RCW 10.61.006; *State v. Irizarry*, 111 Wn.2d 591,592, 763 P.2d 432 (1988).

The State did not charge Mr. Smalancke with attempted first degree child molestation, and attempted first degree child molestation

is not a crime of a lesser degree of the charged offense.<sup>3</sup> Thus, unless attempted first degree child molestation is a lesser included offense, Mr. Smalancke was convicted of an uncharged crime.

The Washington Supreme Court has set forth a two-prong test for determining whether an offense is a lesser-included offense of the crime charged. *State v. Workman*, 90 Wn.2d 443,447-48,584 P.2d 382 (1978). First, each of the elements of the lesser offense must be a necessary element of the offense charged. Second, the evidence in the case must support an inference that only the lesser offense was committed. The first inquiry is referred to as the legal prong of the *Workman* test. *State v. Berlin*, 133 Wn.2d at 546. The second inquiry is referred to as the factual prong of the *Workman* test. *State v. Berlin*, 133 Wn.2d at 546.

Here there is no dispute as to the legal prong. See *State v.*

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A defendant is entitled to an inferior degree instruction if (1) the statutes for both the charged offense and the proposed inferior degree offense “proscribe but one offense;” (2) the information charges an offense that is divided into degrees and the proposed offense is an inferior degree of the charged offense; (3) there is evidence defendant committed only the inferior offense. *State v. McJimpson*, 79 Wn.App.164,171,901 P.2d 354 (1995).

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*Gallegos*, 65 Wash.App. 230,828 P.2d 37 (1992). The factual prong of *Workman*, however, is not satisfied because the evidence did not support an inference that only the lesser crime was committed. During closing argument the prosecutor summarized the evidence presented as essentially an all or nothing proposition. To paraphrase: Either you believe the children, in which case Mr. Smalancke is guilty of child molestation, or you believe Mr. Smalancke, in which case he is not.

**MR. SHEERAN:** *A week ago today, I believe it was, I stood here and told you this is going to be relatively straight forward. This is going to be a question for you: Do we believe our children when they tell us things we don't want to hear? That's what this is about. This isn't any more complicated than that....*

*You have heard the witnesses testify, you have heard [A.C.], you have heard [K.D.] and you heard Mikala, too. This isn't very complicated. You either believe [A.C.] and [K.D.], Karla, Rosalee, Kim Brune, and Dominique Dennis, or you believe what he told you on Thursday....*

*So we are down to who do you believe? These girls, who have nothing to gain, or do you believe the defendant who has everything to lose?*

RP 7 602,604,605.

The State presented twelve witnesses, all for the purpose of proving that Mr. Smalancke committed the completed crimes charged.

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Neither the State nor the defense argued that the evidence supported a guilty finding for the crime of attempted for the simple reason that the evidence did not support such a verdict. Had the jury believed the girls' original stories, it would had to have convicted on the crimes charged in the Information. Knowing this and arguing this the State, nonetheless, made the cynical move of including attempted instructions for each count, convictions for which would yield nearly the same sentence. <sup>4</sup>

The prejudicial effect was to implicitly offer a compromise verdict to the jury. Should the jury be unpersuaded by the State's evidence, yet be uncomfortable with the idea of entirely acquitting a possible child molester, it could entertain a third option; convict Mr. Smalancke of the lesser crimes. The jury did just that. In disregarding the evidence that was actually presented the jury, therefore, engaged in a form of nullification. Consequently, Mr. Smalancke was improperly convicted of crimes that he had not been charged with and that should never have been included in the instructions because they were not

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Court's Instructions to Jury Numbers 17-25; CP 82-113.

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factually supported. Under the factual prong of *Workman*, the attempted child molestation instructions should never have been given to the jury.

**II. MR. SMALANCKE WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS COUNSEL'S FAILURE TO OBJECT TO THE ATTEMPTED CHILD MOLESTATION INSTRUCTIONS CONSTITUTED DEFICIENT PERFORMANCE AND PREJUDICED MR. SMALANCKE.**

A criminal defendant has a constitutional right to counsel and the right includes the right to effective representation. U. S. Constitution, amend. 6; Washington State Constitution, art. 1, § 22; *Strickland v. Washington*, 466 U.S. 668,687,80 L.Ed. 2d 674,104 S.Ct. 2052 (1984). To prevail in a claim of ineffective assistance of counsel, Mr. Smalancke must show that his counsel's performance was deficient and that there is a probability that the outcome would have been different but for the deficient performance. *State v. Benn*, 120 W.2d 631,663,845 P.2d 289 (1993) (citing *Strickland v. Washington*, 466 U.S. 668,687,80 L.Ed. 2d 674,104 S.Ct. 2052 (1984)). If counsel's conduct can be characterized as legitimate trial strategy or

tactics, it cannot be a basis for a claim of ineffective assistance. State v. Hendrickson, 129 Wn.2d 61,77-78,917 P.2d 563 (1996). Where, however, it impossible to characterize trial counsel's inadequate performance as a legitimate trial tactic, that performance must be found to be deficient under Strickland.

In Mr. Smalancke's case, counsel's failure to object to the "attempted" instructions cannot be considered a legitimate trial tactic. The only mention of the "attempted" crimes by either party before the jury was where defense counsel completely disavowed the idea that the facts could support any attempted crimes: "It just doesn't make sense. So the attempt, ladies and gentlemen, I would submit is the least sensical of the entire thing." RP 7 659.

Nonetheless, defense counsel accepted the State's proposed instructions in their entirety. Counsel stated: "The State is asking for the lesser of attempted child molestation, and I think they're entitled to that." RP 6 588. The only reasonable explanation for defense counsel's failure to object to the attempted instructions is that counsel simply did not understand the Workman requirements. Plainly,

counsel realized that the facts presented at trial did not support giving the attempted instructions, so one can only conclude he did not understand that both a legal *and a factual* requirement exists. Moreover, there was no advantage -- but rather a strong disadvantage -- for Mr. Smalancke to include the attempted instructions because the sentence is nearly as severe for the attempted crime.

The prejudice to Mr. Smalancke is clear. Had the jury not been given the attempted instructions he would not have been convicted, because the jury was unable to convict on the crimes charged.

### **III. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION OF ATTEMPTED CHILD MOLESTATION OF A.C.**

In a criminal sufficiency claim, the defendant admits the truth of the State's evidence and all inferences that may be reasonably drawn from the. *State v. Salinas*, 119 Wn.2d 192,201,829 P.2d 1068 (1992). Evidence is reviewed in the light most favorable to the State. *State v. Varga*, 151 Wn.2d 179,201,86 P.3d 139 (2004). Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it permits any rational trier of fact to find the essential elements

of the crime beyond a reasonable doubt. Salinas, 119 Wn.2d at 201,829 P.2d 1068 .

In a criminal matter, the State must prove every element of the crime charged. State v. Teal, 152 Wn.2d 333,337,96 P.3d 974 (2004); In re Winship, 397 U.S. 358,362-363, 90 s.Ct. 1068, 25 L.Ed.2d 368 (1979).

Under RCW 9A.28.020, “A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” In order to be found guilty of an attempt to commit a crime, the defendant must take a substantial step toward commission of that crime. A person does not take a substantial step unless his conduct is “strongly corroborative of the actor’s criminal purpose.” Mere preparation to commit a crime is not a substantial step. State v. Townsend, 147 Wn.2d 666,679,57 P.3d 255 (2002).

To prove an attempted first degree child molestation, the State must prove that the defendant attempted to have sexual contact with another person who is less than 12 years old and not married to the

defendant who is at least 36 months older than the child. RCW 9A.44.083.<sup>5</sup> “Sexual contact” is defined as “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.” (Emphasis added.) RCW 9A.44.010(2). See also *State v. Lorenz*, 152 Wash. 2d 22,93 P.3d 133 (2004).<sup>6</sup>

The State charged Mr. Smalancke with the crime of molesting A.C.. Furthermore, the State proceeded on the theory that Mr. Smalancke was a predatory pedophile engaged in an ongoing pattern of molesting children under his care. The evidence, contradictory as it was, was that Mr. Smalancke touched K.C.’s vagina. The nature of this conduct coupled with kissing and saying “sexy mama” would, if believed, necessarily constitute “sexual contact” as a matter of law. The jury, however, did not unanimously accept the conflicting

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Jury Instructions Number 9,18, and 19 comport with this definition of Attempted Child Molestation in the First Degree. CP 82-113.

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Jury Instruction Number 10 comports with this definition of “sexual contact.” CP 82-113.

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evidence as credible or persuasive as demonstrated by its failure to reach a unanimous verdict of guilt on the crime charged.

At no time was the evidence or the State's argument presented in any manner that would lead to a reasonable conclusion that Mr. Smalancke had merely attempted to engage in sexual contact with A.C. Under the definitional instructions provided to the jury, an act of touching A.C.'s vagina could not reasonably have been construed as an attempt to have sexual contact; it is sexual contact. The State's position was that either Mr. Smalancke had molested A.C. or he had not, depending on who the jury believed. Clearly, the jury did not unanimously find the State's evidence credible. The lower court record shows that the evidence was insufficient to convict Mr. Smalancke of having sexual contact with A.C.. The jury's failure to convict him of the same demonstrates that the State did not meet its burden of proof for the element of sexual contact.

The jury's verdict of guilty for the attempted molestation of A.C. is nonsensical as a matter of law, and unsupported by the evidence. It is the equivalent of considering an unlawful act of sexual

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penetration merely an “attempted” rape, or an unlawfully killing of another by stabbing that person to death only an “attempted” murder. The absurd verdict reached by the jury as to A.C. was not supported by the evidence, and therefore, must be reversed.

**IV. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE CONVICTION OF ATTEMPTED CHILD MOLESTATION OF K.D.**

**a. The evidence was insufficient to support the conviction.**

Precisely the same argument as stated above applies to the conviction concerning A.D. Had the jury believed the State’s evidence it could only have convicted of the completed crime. K.D. told Ms. Dennis that Mr. Smalancke touched her and Mikala on their chests and their butts, and “he puts his hands down out pants....and rubs us for a few minutes.” RP 4 281. Clearly the jury accepted the defense theory that the children’s words had been improperly influenced by the adults and each other because it did not find that “sexual contact” had occurred. The jury was unpersuaded by the State’s evidence as demonstrated by its inability to agree that Mr.

Smalancke had ever had “sexual contact” with K.D. The State’s evidence, if believed, could only have proved completed sexual contact, not attempted.

**b. Lack of specificity in the verdict violates Mr. Smalancke’s state constitutional right to appeal.**

The charges concerning K.D. had additional problems that are pertinent to his insufficiency challenge. The evidence in Mr. Smalancke’s case was vague and undifferentiated. Multiple counts were charged and the Information did not identify specific acts. The charging period for each count was identical. Although a general unanimity instruction was given to the jury,<sup>7</sup> the to convict instructions did not specify that unanimity was required, and no special verdict forms were provided. During closing argument the prosecutor provided a vague and cursory election of the acts it was relying on for

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The Court’s instruction Number Eight states as follows: There are allegations that the defendant committed acts of Child Molestation in the First Degree or Attempted Child Molestation in the First Degree on multiple occasions. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. (WPIC 4.25) CP 82-113.

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each count:

***Mr. Sheeran:*** *Charges I through IV involve [K.D.] The first two involve [K.D.] at the pool. Not exactly - - I mean, who they are is clear in the instructions, but the two incidents [K.D.] talked about happens two times in the pool, I and II. Counts III and IV are the living room in the Davis house and the bedroom in the Davis house, Mikala's bedroom in the Davis house.*

*RP 7 603.*

Division One of the Court of Appeals recognized that where there are multiple counts of child molestation and the Information does not identify specific acts or segregate charging periods among the counts, where no special verdict form is used, and where the State does not elect which acts it is relying upon for each count, there is no way to know which allegations the based its verdict upon. *State v. Heaven*, 127 Wn.App. 156,162, 110 P.3d 835 (2005). In this case as in *Heaven*, if this Court disregards the prosecutor's election in closing argument, the record does not otherwise show which allegations the jury relied upon in convicting Mr. Smalancke.

Under Article 1, section 22 of the Washington Constitution,

criminal defendants have a constitutional right to appeal their convictions. On appeal, the Court must reach and decide each issue raised. *State v. Jones*, 148 Wn.2d 719, 722, 62 P.3d 887 (2003).

The United States Supreme Court held in *Jackson* that a defendant has a constitutional right not to be convicted “except upon evidence that is sufficient fairly to support a conclusion that every element of the crime has been established beyond a reasonable doubt.” 443 U.S. at 313-14; *see also Green*, 94 Wn.2d at 220-21. Thus, it must necessarily follow that there must be some avenue by which the defendant can challenge the constitutional sufficiency of the evidence against him. Where it is impossible to discern the evidence upon which the jury relied in reaching a verdict, it is impossible for the defendant to challenge on appeal the sufficiency of the evidence supporting that conviction.

In the case at bar, the jury was unable to find guilt for any of the five charges of first degree child molestation. Thus, this Court cannot conclude the jury accepted K.D.’s allegations of multiple (or even a single) incident(s).

Because it is impossible to discern the evidence upon which the jury relied for the sole count upon which Mr. Smalancke was convicted of attempted child molestation, permitting the conviction to stand violates Mr. Smalancke's state constitutional right to challenge on appeal the sufficiency of the evidence underlying that conviction.

c. **Lack of specificity in the evidence violated Mr. Smalancke's state constitutional right to a unanimous jury verdict.**

In Washington, a defendant may be convicted only when a unanimous jury concludes beyond a reasonable doubt that the criminal act charged in the information has been committed. *State v. Petrich*, 101 Wn.2d 566,569,683 P.2d 173 (1984) (citing *State v. Stephens*, 93 Wn.2d 186,190,607 P.2d 304 (1980)); Const. Art. 1 § 21, <sup>8</sup> 22. <sup>9</sup>

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“The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases in any court of record, and for waiving of the jury in civil cases where the consent of the parties interested is given thereto.” Const. art. 1 § 21.

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Article e, section 22 provides, “In criminal prosecutions the accused shall have the right to . . . have a speedy public trial by an impartial jury.”

In “multiple acts” cases, where the State alleges several acts and any one of them could constitute the crime charged, the jury must be unanimous as to which particular act or incident constitutes the crime. State v. Kitchen, 110 Wn.2d 403,411,756 P.2d 105 (1988); Petrich, 101 Wn.2d at 572. To ensure jury unanimity in a multiple acts case, either the State must elect a particular act upon which is relying for each charge, or the jury must be instructed that all 12 must agree that the same underlying criminal act has been proved beyond a reasonable doubt. Petrich, 101 Wn.2d at 572. Thus, Petrich requires the prosecution prove the commission of a specific distinct criminal act underlying each charge. That requirement was met in Petrich, where the child described at least four distinct episodes at length, each incident occurring in a separate time frame and identifying place. Id. at 568,571.

Cases involving allegations of child abuse frequently involve proof problems that effect the constitutional right to a unanimous verdict. The Court of Appeals has recognized the implication for jury unanimity of this kind of evidence:

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Implicit in the *Petrich* court's conclusion that either an election or a unanimity instruction will protect the defendant's right to a unanimous verdict is an assumption that there is some evidence presented permitting either the prosecutor or jury to make a meaningful election between the numerous acts to which the victim testifies.

*Petrich* cannot be complied with where the evidence is not sufficiently specific. A unanimity instruction is confusing for a jury when there is no specific act for them to agree upon. The California court recognized this problem in *People v. Jones*, 51 Cal.3d 294, 792 P.2d 643, 270 Cal.Rptr. 611 (1990). The *Jones* court acknowledged, in a case consisting of "generic" evidence of repeated sex acts, it would be impossible for the prosecutor to elect a specific act to rely upon to prove the charge, or for the jury to unanimously agree the defendant committed the same specific act. 51 Cal.3d at 308-09. Therefore, even if the jury is given a proper unanimity instruction, a case relying upon generic testimony cannot comply with the requirements of *Petrich*.

The Washington Supreme Court has always required a unanimous verdict in criminal trials. *State v. Franco*, 96 Wn.2d 816, 831, 639 P.2d 1320 (1982) (Utter, J., dissenting). The purpose of

requiring a unanimous verdict is not only to preclude the possibility that jurors presented with multiple acts in support of a single criminal charge might actually disagree, but also to “impress on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.” *Id.* (quoting *United States v. Gipson*, 553 F.2d 453,457 (5<sup>th</sup> Cir. 1977)). To make the unanimity rule an effective means of securing such certitude, the rule “requires jurors to be in substantial agreement as to just what the defendant did as a step preliminary to determining whether the defendant is guilty of the crime charged.” *Id.* (quoting *Gipson*, 553 F.2d 453,457-58) (emphasis added).

Courts in other states recognize that evidence is insufficient where it is unconnected to individual, distinguishable criminal incidents. *See, e.g., State v. Hemphill*, 205 Ohio 3726, 2005 Ohio App. LEXIS 3429, at \*22 (Ohio Ct. App. 2005); *Miller v. Kentucky*, 77 S. W. 3d 566, 202 Ky. 134 (2002) (“Whether the issue is viewed as one of insufficient evidence, or double jeopardy, or denial of a unanimous verdict, when multiple offenses are charge in a single indictment, the Commonwealth must introduce evidence sufficient to

prove each offense and to differentiate each count from the others, and the jury must be separately instructed on each charged offense.”)

It is necessary to be careful and thoughtful in multiple acts cases, to ensure that reviewing courts know rather than merely guess they are affirming verdicts where jurors agreed unanimously on the crime committed. See Carol A. Beier, Lurching Toward the Light: Alternative Means and Multiple Acts Law in Kansas, 44 Washburn L.J. 275,321 (2005).

In Mr. Smalancke’s case, the State’s “election” during closing argument was not sufficiently meaningful. Even assuming that the jury understood that each count was to represent a “place” where the crime occurred, that is, the pool or the living room or the bedroom, and further assuming that the jury unanimously decided the location, the problem of which specific act and which specific time the jury found still exists. K.D. statements were extremely contradictory and vague. She testified that Mr. Smalancke touched her multiple times in multiple ways and in multiple places inside the duplex. There is simply no way to discern with any certainty which act the jury found constituted the

crime of which Mr. Smalancke was convicted.. Moreover, no unanimity instruction was given for the convict instructions, nor were special verdict forms provided to the jury. It is simply not possible to tell of which act Mr. Smalancke was convicted.

**d. Lack of specificity in the verdict does not adequately protect Mr. Smalancke from the risk of double jeopardy.**

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution provides: “Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” Article 1, section 9 of the Washington Constitution provides, “No person shall . . . be twice put in jeopardy for the same offense.” The State constitutional prohibition against double jeopardy offers the same scope of protection as its federal counterpart. *State v. Gocken*, 127 Wn. 2d 95, 107,896, P.2d 1267 (1995).

The double jeopardy clause protects against a second prosecution for the same offense. *North Carolina v. Pearce*, 395 U.S. 711,717,726,89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), overruled on other

grounds by *Alabama v. Smith*, 490 U.S. 794, 109 S.Ct. 2201, 104 L.Ed. 2d 865 (1989). Due process requires that criminal charges be prosecuted in a manner that provides criminal defendants with the ability to protect themselves from future double jeopardy. *Valentine*, 395 F.3d at 634. Where there is insufficient specificity in the Information or the trial record to enable a defendant to plead convictions or acquittals as a bar to future prosecutions, the constitutional right to protection from double jeopardy is implicated. *Id.*

As the Court recognized in *Heaven*, where the charges are not linked to differentiated incidents, there is resulting uncertainty as to what the trial jury actually found. 127 Wn.App. at 162. See also *Valentine*, 395 F.3d at 636. Consequently, the defendant is placed at unacceptable risk of being prosecuted multiple times for the same offense. *Heaven*, 127 Wn.App. at 162; *Valentine*, 395 F.3d at 635. Furthermore, even if future prosecution is unlikely, it is the mere possibility of future prosecution that creates the double jeopardy problem. *Valentine*, 395 F.3d at 635.

Here, there was not specific evidence presented to support the conviction of attempted child molestation. Mr. Smalancke is therefore not adequately protected from future double jeopardy and his due process rights were violated.

**E. CONCLUSION**

For all of the foregoing reasons and conclusions, Mr. Smalancke respectfully requests that this Court reverse and dismiss his convictions of attempted first degree child molestation.

RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of May, 2008.

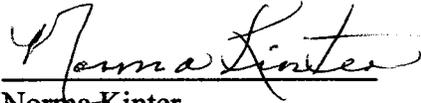


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Attorney for Appellant

## **CERTIFICATE OF SERVICE**

The undersigned certifies that on May 21, 2008, I delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, Washington 98402, and by U. S. Mail to appellant, John Otto Smalancke DOC # 309562, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, Washington 98520, true and correct copies of this Opening Brief. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on May 21, 2008.



Norma Kinter