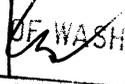


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COURT OF APPEALS
DIVISION II
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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

HOWARD O. CARR, JR., Appellant

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman
Pierce County Superior Court Cause No. 05-1-03018-8

BRIEF OF APPELLANT

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8. The defendant is entitled to relief under the cumulative error doctrine. (Assignment of Error No. 11).

C. STATEMENT OF THE CASE.

1. Procedure.

On June 17, 2005, the State filed an information against HOWARD ODELL CARR, hereinafter the defendant, charging child molestation in the first degree, counts 1-2, child rape in the first degree, counts 3 -5. CP 1-5.

Motion to Suppress Intercept

The defendant filed a motion to suppress the telephone intercept and recorded conversations. CP 14, 15-24. The motion was based in part on the defects in the application for phone intercept, including the police officers failure to provide “particularized” facts regarding the need for the intercept in this case and also the failure of the police to record the entire conversation. . CP 25-29.

On August 31, 2005, the court denied the defendant’s motion to suppress. CP 42.

The defendant filed a motion for reconsideration based on the then newly released case of State v. Sophia Johnson, 125 Wn. App. 443, 105 P.3d 85 (2005). CP 43-47. The defendant also submitted a certified statement of

counsel setting forth the Pierce County Administrator's Reports of Applications and/or Orders Authorizing Intercept of Communications" CP 59-61. These reports established that Pierce County Superior Court judges over a 7 year period had never denied an application for intercept. CP 59-61, upon denial of the motion to reconsider. Defendant unsuccessfully asked the court to certify the issue to this court. SCP³.

The Defendant's Fatally Flawed Plea

On October 23, 2006, the State submitted "the prosecutor's statement regarding amended information", wherein the prosecutor averred that "had this matter proceeded to trial, the State may have had difficulty proving that penetration occurred." CP 91. The defendant then entered guilty pleas to three counts of child molestation in the first degree. CP 91-109.

The defendant thereafter retained new counsel who made a successful motion to withdraw the guilty pleas because the defendant had been given erroneous legal advice by his counsel, the prosecutor, and the court. CP 110, 113-134, 135.

³ 8/23/2006, Motion and Certified Statement RE: Continuance of Trial

Pretrial Matters --- CrR 3.5 Hearing

After the defendant withdrew his plea, the defendant prepared for trial. On October 22, 2007, the court held a hearing pursuant to CrR 3.5⁴ to determine the admissibility of the intercept and other statements made by the defendant. RP 156.

The State called Pierce County Sheriff's Department Ray Shaviri to testify regarding an order authorizing a phone intercept that he obtained on June 16, 2005. RP I I 58; CP 15-29, 59-61. Detective Ray Shaviri was the lead detective in this case. RP X 927-28. Shaviri listened to the conversation. RP X 932-33. Detective Purviance was present as the tech officer. RP X 931. Shaviri could have scribbled down questions for MR to use during the phone intercept but he did not keep them. RP X 936.

Detective Shaviri told MR to stop talking and say good-bye when he believed the second side of the tape was about to run out. RP X 938. Detective Shaviri acknowledged that the tape ran out before the conversation was over. RP X 942. he did not know how much of the conversation had not been recorded, but he decided prior to testifying at trial that less than half a minute was not recorded. RP X 943. Shaviri had testified at a pretrial hearing: "I wasn't aware at the time of how much off the end of the

⁴ See Appendix "A"

conversation was not recorded because I'm not a technician." RP X 945. Shaviri did not know if the defendant kept talking after MR hung up. RP X 947. Shaviri did not remember what was said after the tape ran out. RP XVI 1726. Shaviri may not have worn the headphones throughout the intercept. RP XVI 1731. He acknowledged that he could have taken off the headphone during the conversation between MR and the defendant. RP XVI 1733. At an earlier hearing Shaviri testified that he could not remember the conversation at the end of the intercept because at that time "I determined I had everything that I needed." RP XVI 1733.

During the intercept Shaviri instructed MR to tell a number of lies and she did so. RP XI 1004. Because Shaviri wanted MR to elicit incriminating statements from MR, he did not care if she had to lie to get them. RP XI 1006. Shaviri coached her during the interview and told her what to say. RP XI 1005. Shaviri did not write anything in his reports about coaching MR. RP XI 1005.

Shaviri testified that he decided not to contact the defendant directly to explain the allegations. RP I 72. He applied for the order for phone intercept because MR was old enough and she was articulate. RP I 73. In addition, there was a time span between the date of the last offense and the date of reporting. RP I 73. There was no physical evidence. RP I 74. Shaviri

assumed that the defendant would not have spoken to him had he contacted the defendant. RP I 74.

However, Shaviri would not confirm that he would obtain an intercept in every case where the alleged victim was old enough, there was no physical evidence, and there had been a delay in reporting the alleged abuse. RP I 75.

The court granted the order for intercept. CP 15-29. Shaviri then went to MR's residence for the phone call. RP I 76. He was accompanied by Detective Daryl Purviance, the technician for the electronic equipment. RP I 58, 77.

Prior to the phone call, Shaviri explained to MR what to anticipate during the phone call. RP I 76. At the time of the phone intercept, they provided a written list of questions for MR to ask the defendant. RP VII 468. That list was never provided to the defendant during discovery. RP VII 468. The defense specifically asked for the written list in order to compare it to the taped intercept to determine whether the entire conversation had been recorded. RP VII 469.

Pierce County Sheriff's Department Detective Shaviri stated that if he wrote notes for MR to use during the phone intercept, he would have discarded those notes. RP VIII 484-85.

MR dialed the phone number for the defendant and he answered the phone. RP I 59. Shaviri listened to most, but not all, of the phone call. RP I 59, 62. The phone call lasted approximately 40 minutes. RP I 61. SCP, Exhibit 13.

Purviance's report stated that the last couple of seconds of the phone call had not been recorded. RP I 63. Shaviri agreed that the concluding comments of the conversation had not been recorded. RP I 78. Shaviri agreed that the best practice would have been to record the entire phone call. RP I 63-64. Detective Purviance, the intercept tech, wrote in his report that the tape ended and the conversation continued. RP XVI 1737.

Shaviri believed that he would have inserted another tape had the conversation contained "something pertinent." RP I 78. Shaviri maintained that he listened to the conversation until MR and the defendant said good-bye. RP I 79.

Purviance noted in his report that "MR said good-bye and ended the conversation about two or three seconds after the tape ended." RP I 65-66. At that point, Shaviri noted that he had "everything he needed at that time." RP I 66.

The police subsequently make a written transcript of the content of the phone call. RP I 61. SCP, Ex. 20. Transmitted Plaintiff's Ex. 20, admitted for illustrative purposes on 11/08/07.

The following day Shaviri and Detective Lund travelled to the defendant's residence in Ocean Shores. RP I 67. They knocked on the door and took the defendant into custody. RP I 67. They told the defendant why he was under arrest and took him to the Ocean Shores police station. RP I 67.

At the Ocean Shores police department, they advised the defendant of his constitutional rights. RP I 69. The defendant refused to sign the written rights form and stated that he wanted an attorney. RP I 69.

The defendant stated that he was not going to babysit any more children and that if he went to prison, he would be a dead man. RP I 70. The defendant volunteered that he had talked to MR the night before and that he told her what she wanted to hear. RP I 71. The defendant also stated that he had accidentally touched MR during play and that he had told her mother and his own wife about it. RP I 71.

During the ride back to Pierce County, the defendant made numerous statements. RP I 83 - 87. Neither Shaviri nor Lund made any notes documenting his statements. RP I 83. Neither detective could remember all of the statements made by the defendant. RP I 83-86, 97. Pierce County

Sheriff's Department Detective Hickman, a tech officer for phone intercepts, testified that when the court orders a phone intercept, he records the entire conversation. RP X 915-16, 920. In order to insure that the entire conversation is tape-recorded, the operator needs to watch the tape. RP X 921. The operator needs to be very attentive to whether or not the tape was running out. RP X 921. In addition to the operator, another police officer listens to the conversation via headphones. RP X 923. The officer might take off the headphones during the phone conversation. RP X 923.

The defendant testified at the CrR 3.5 hearing. RP V 226. He had reviewed the transcript of the phone intercept and knew that the conclusion of the conversation was missing. RP V 227-28. He was certain that at the conclusion of the conversation he said, "MR, I know I didn't molest you and I think you do, too. . . But as long as you feel better, then it's fine with me." RP V 228. He recalled the MR then grunted and then they said their good-byes. RP V 228.

Before the court admitted the intercept tape and transcript, the defense objected to the admission as violative of RCW 9.73, the Sixth Amendment, the 14th Amendment, the parallel provisions of the Washington constitution, Evidence Rule 106, as well as the court order permitting the intercept on the condition that police record the entire conversation. RP X 959.

The prosecutor argued that the court order authorizing the intercept did not require police to record the entire conversation. RP XI 1055-56. The order directed police “to intercept and record by any device or instrument the communications and/or conversations of MR and Howard Carr . . .” The order also directed: “This authority shall include the interception and recording of all communications and conversations regarding the previously described offenses and shall include person to person conversations and telephone conversations.” RP XI 1060, 1062; Exhibit 25. Shaviri understood that the order required him to record 100% of the phone intercept. RP XI 1062.

The defendant argued that the court should not admit the taped phone call because it was taken unlawfully. RP V 232-33. The defendant contended that when the police had authority to intercept and record a phone call, the police were required to record 100% of the phone call. RP V 223. The police failure to do so deprived the defendant of his constitutional rights to cross-examination and due process of law. RP V 234. The defendant noted that the police had no legitimate reason for failing to record the entire conversation except that “they had what they wanted.” RP V 234.

During argument on the CrR 3.5 hearing, the defendant renewed its motion to exclude the taped statement because not only had the police failed

to record the entire conversation but because the police had destroyed the handwritten notes regarding what MR was supposed to say during the phone intercept. RP VIII 485. The second side of the tape ended suddenly and without any “good-byes”. SCP.

The court again denied the defendant’s motion to exclude the taped statement. RP VIII 486. The noted that the portion of the conversation that the defendant knew to be missing was not out of character with his comments during the recorded portion and therefore also was cumulative. RP V 256-57. The court also held that the police failure to record the entire conversation went to weight and not admissibility. RP V 256-57.

Trial

The court entered findings of fact and conclusions of law regarding its CrR 3.5 ruling. SCP⁵.

The defendant wanted to adduce at trial evidence that Gerri Reilly, mother of MR, had obtained an order of protection against her husband during the divorce proceedings that occurred during the charged period. RP VIII 588. In that declaration, Mrs. Reilly alleged that the father was verbally and physically abusive to MR and her brother. RP VIII 588. The time period of

⁵ 2/21/08 Proposed Order/Findings, attached as Appendix “B”

the alleged abuse coincided with the time of the alleged sexual abuse by the defendant and was prior to MR's disclosure. RP VIII 588-89.

The court ruled the evidence inadmissible, reasoning:

. . . It is my experience that declarations that are filed at that level of proceeding are self-serving, inflammatory declarations, intended for one thing and one thing only and that's to obtain immediate temporary custody of a child. They have little or no relevance to this particular case. I find them to be highly unreliable and any probative value is outweighed by the prejudicial value . . RP VIII 591-92.

Detective Purviance, the intercept tech, wrote in his report that the tape ended and the conversation continued. RP XVI 1737.

During the intercept Shaviri instructed MR to tell a number of lies and she did so. RP XI 1004. Because Shaviri wanted MR to elicit incriminating statements from MR, he did not care if she had to lie to get them. RP XI 1006. Shaviri coached her during the interview and told her what to say. RP XI 1005. Shaviri did not write anything in his reports about coaching MR. RP XI 1005.

When the defendant's wife testified, the prosecutor asked her whether she and the defendant had had any conversations about the case during "the last few days." RP XVI 1697. The defendant objected to that question because it intruded upon privileged communications. RP XVI 1697. The

court sustained the objection. RP XVI 1697. During trial, the defendant made two motions for trial.

The first motion was based on Det. Shaviri's impermissible testimony that strongly implied to the jury the defendant had failed to make any statements after he was invoked his right to counsel when he was advised of his constitutional rights at the Ocean Shores police station. RP X, 990-91; RP 991-998; 1015-1029. The court denied that motion. RP XVI, 169-97, 1026-29.

The second motion was based on the prosecutor's bad faith question to the defendant's wife regarding whether she and the defendant had discussed her testimony out of court in an effort to ensure that their testimony "matched" RP 1704-1707. The court denied their motion. RP 1707

Jury Instructions:

The defendant proposed the Petrich instruction of WPIC 4.25:

There are allegations that the defendant committed acts of sexual assault with M.R. 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. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt. CP 195.

The defendant's proposed instruction would have applied to all of the charged counts. The defendant urged the court to give that instruction "because that's exactly what the evidence was." RP XVII 1855.

The trial court gave three instructions on the need for unanimity.

Instruction 11 stated:

Counts I and II are alleged to have occurred in Federal Way. Counts III, IV, and V are alleged to have occurred in Graham. CP 222.

Instruction No. 12 provided:

For purposes of count I and count II, there are allegations that the defendant committed acts of sexual touching 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 for each count. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt. CP 223.

Instruction No. 13 provided:

You have heard allegations that the defendant touched M.R. at her home in Graham while she was in her bed. These allegations are the basis for Count III.

You have heard allegations that the defendant touched M.R. at her home in Graham while she was on the couch. These allegations are the basis for Count IV.

You have heard allegations that the defendant touched M.R. at her home in Graham while she was on the defendant's lap in the spare bedroom. These allegations are the basis for Count V. CP 224.

The State asked the court to instruct the jury on the lesser crime of attempted rape of a child in the first degree for counts 3, 4, and 5. RP XVII 1825. CP 236-241. The defendant opposed the lesser included and argued that the State had failed to provide any persuasive evidence that only the lesser offense was committed. RP XVII 1828-1831. The court allowed the lesser included only as to count 5. RP XVII 1834. The court reasoned that the lesser included was appropriate for Count 5 “which is the incident in which she described pain . . . , which would indicate that there was what under the Workman test could be shown an attempt only in regards to that one particular count which I believe was the lap incident.” RP XVII 1834.

The defendant also objected to the court’s instructions nos. 24, 25, 26, 27, and 28, which addressed the lesser included offense of attempted child rape in the first degree. RP SVII – 1919-1921. The defendant argued that the state had not satisfied the factual prong of the Workman test,

“And in terms of the lesser offense being the only one committed, the authors [up-date to the WPIC – 2005] cite to State v. Porter, and they note that the Workman test requires a factual showing that is more particularized’The evidence must raise an inference that only the lesser included offense was committed to the exclusion of the charged offense.” RP XVII 1829.

The defendant also argued that MR had never asserted that the defendant attempted to penetrate her, “She didn’t say he tried and was unsuccessful. She said it was accomplished. . .” RP XVII 1831.

Closing Argument and Verdict

In closing argument, the defendant explained how he was prejudiced by the police failure to record the entire phone intercept: “They don’t know what was said at the end of the call, and the reasons that that’s so important is that it allows the State to case doubt about what Skip says he said, and who know what? Skip --- all Skip can do is tell you that this is what he said.. RP XVIII 2044-45.

The jury acquitted the defendant of counts 1-5 and convicted him only on the lesser included offense for count 5. CP 244-249; RP XX 2094-95.

The defendant argued a motion for a new trial and/or arrest judgment on December 21, 2007. RP 12/21/07 3-14; 18-21. CP 266-274. The defendant argued that the trial court had erred when it declined to instruct the jury that the Petrich instruction applied to all five counts. RP 12/21/07 3-4. The court had rejected the defendant’s proposed instruction which applied to all five counts and instead had given the State’s instruction which limited the application of Petrich to counts 1 -2. RP 12/21/07 4-5. The prosecutor had informed the court that it intended to elect specific acts for the remaining

counts. RP12/21/07 4. The jury acquitted the defendant on all counts, except for the lesser included of Count 5, attempted child rape in the first degree. RP 12/21/07 5; CP 244-249. Regarding count 5, the court had given the State's instruction: "You have heard *allegations* that the defendant touched M.R. at her home in Graham when she was on the defendant's lap in the "spare bedroom." CP 224; RP 12/27/07 6. That instruction did not elect a specific act and the jury could have convicted with less than unanimity which would be constitutional error. RP 12/21/07 7.

The court and counsel had received a letter from one of the jurors who wrote that the jury in fact had believed that they did not have to be unanimous on the lesser included for count 5 and that they had convicted the defendant because they believed that something might have happened. CP 272-73, 274.

The trial court entered findings of fact and conclusions of law re: admissibility of the defendant's statements. CP 289-291.

The court sentenced the defendant to mid-range of 63 months. CP 307-323; RP 2/22/08 60.

The defendant thereafter timely filed this appeal. CP 328.

2. Facts.

MR was born on May 5, 1990. RP VII 382. Her family consisted of her father Philip Reilly, her mother Gerri Reilly, and her younger brother Richard. Id.

After she finished kindergarten, she lived with her family at an apartment in Federal Way. RP VII 384, 384. The defendant and his wife moved into the apartment complex in July 1996. RP VII 386-87; RP XI 1205. MR then was 6 years old. RP VII 387.

The Carrs moved into the apartment in July, 1996. RP XIV 1367-13688. During the 6 -7 months that the Carrs lived at the apartment, they sometimes socialized with the Reillys. RP VII 389; RP XI 1207. The Carrs were invited to the Reilly residence for dinner on one occasion. RP VII 389; RP XI 1214.

During his contacts with the Reilly family, the defendant noticed that Philip Reilly devoted himself to his son and had little time for MR. RP XIV 1380.

The defendant sometimes watched the Reilly children when their mother brought them to the swimming pool when he was there. RP XII 1221. On rare occasions when Mrs. Reilly needed to run an errand, she would ask the defendant to watch the children. RP XII 1221; RP XIV 1372.

MR later recalled that the defendant babysat her when she lived at the Federal Way apartment. RP VII 392-93. MR claimed that the defendant sexually touched her at Federal Way apartment. RP VII 394. She said that he put his hand between her legs and touched her with his fingers. RP VII 394.

MR asserted that sometimes the defendant would lift her up and give her “airplane rides.” RP VII 395. During the airplane rides, the defendant reportedly held her in the air with both hands and simultaneously managed to insert a hand into her panties and touched her vagina. RP VII 396. MR claimed that this type of fondling occurred on numerous occasions and that she would be wearing such garments as pajamas, shirts and pants, dresses, or skirts. RP VII 455. MR sometimes asked for airplane rides. RP VII 449. Adults were present even the defendant supposedly inserted his hand inside her clothing. RP VIII 490. On at least one occasion, MR’s mother and Wanda Carr, the defendant’s wife, were present for the airplane rides. RP VIII 496. No adult ever commented on the defendant’s hand movements. RP VIII 490. No adult ever commented that the airplane rides were in any way unusual. RP VIII 490.

Gerri Reilly, MR’s mother, witnesses at least one airplane ride and she did not observe any inappropriate touching. RP VIII 623. Wanda Carr

observed an airplane ride and she did not see anything inappropriate. RP XII1224.

The defendant denied giving MR any inappropriate touches during the airplane rides and believed that only a contortionist could have performed the acts she described. RP XIV 1376.

MR also recalled that the defendant touched her between her legs while they sat together on the couch and watched a movie. RP VII 399. Meghan recalled that the defendant's hands were inside her clothing at that time. RP VII 399.

MR did not tell anyone about the touching while the family lived in Federal Way. RP VII 400. In fact MR always liked to see the defendant when he went to the Reilly residence. RP VIII 636. She was excited when he arrived. RP VIII 644.

In January 1997, the Reilly family moved to Graham in Pierce County. RP VII 401. MR on one occasion was so excited when the defendant arrived at her Graham house that she ran out of the house and threw herself at him. RP XII 1227; RP XIV 1420. The defendant stumbled backwards and nearly fell over. RP XII 1229; RP XIV 1420. He grabbed MR to prevent her from falling. RP XII 1230, 1285; RP XIV 1420. After they regained their balance, MR told the defendant that he had touched her "secret purse." RP XII 1231;

RP XIV 1420. The defendant was surprised and asked MR, “What is a secret purse?” RP XIV 1420. MR did not answer hi, but her brother Richard pointed between her legs. RP XIV 1421. The defendant told MR that if he had accidentally touched her there, it was inappropriate and that they should make sure it never happened again. RP XIV 1421. The defendant was so concerned about this incident with Meghan that he discussed it with Gerri Reilly that same day. RP XII 1234.

After this incident, the defendant wanted to quit babysitting. RP XIV 1426. The defendant’s wife did not want him to quit because they needed the money. RP XIV 1425. Gerri begged him not to quit because she had no other childcare. RP XIV 1426. The defendant had agreed to babysit only for a short period of 6 -7 weeks during the summer of 1997. RP XIII 1277. The Carrs occasionally visited the Reilleys in Graham.

When the defendant babysat, he engaged in a lot of rough housing with MR and Richard. RP VIII 530, 561-62. MR did not think the wrestling was inappropriate. RP VIII 567.

MR alleged that when she was 7 or 8 years old, she was contacted by the defendant while she slept in her bed. RP VII 416. She averred that the defendant approached the side of her bed and put his hand inside her pajama pants. RP VII 416. The defendant’s hands stayed on the outside of her body.

RP VII 418. After a short time, the defendant left the room. RP VII 418. MR denied that the defendant ever get in the bed with her. RP VIII 505.

However, when MR was interviewed by the prosecutor's employee, she stated that the p xiv 1defendant had crawled into bed with her. RP VIII 528; 534. At the time of trial MR did not remember the defendant crawling into bed with her. RP VIII 528.

MR recalled another touching incident that occurred in the early afternoon on a non-school day. RP VII 419. She sat next to the defendant while watching television. RP VII 420. She related that the defendant placed a pillow over her lap and then inserted his hands inside her underwear. RP VII 421-22. The defendant reportedly used two fingers to rub the outside of her vagina. RP VII 422. MR earlier told the prosecutor's interviewer that the defendant thumb-wrestled with Richard while he touched her vagina. RP VIII 536. She did not recall that detail at the time of trial. RP VIII 536.

MR also remembered an event that reportedly occurred during the summertime when she entered the defendant's sleeping area in the basement of the Graham house. RP VII 424. Both she and her brother went downstairs and he brother pulled the covers off the defendant, who was nude. RP VIII 519. MR stood by the door when her brother pulled the covers off. RP VIII 520. When she saw that the defendant was unclothed, MR turned around to

leave. RP VIII 519. The phone rang and her brother ran out of the room. RP VIII 519. MR walked over to the bed. RP VIII 521. She claimed that the defendant grabbed her and placed her on his lap. RP VII 424. She claimed that the defendant penetrated her. RP VII 424. She recalled wearing underpants that day and that the defendant moved the underpants to the side. RP VII 425; RP VIII 522.

MR earlier had stated to the prosecutor's interviewer that she had seen the defendant's penis on that occasion. RP VIII 585. She described his penis as being "straight up." RP VIII 585.

The defendant was nude at the time because he sleeps that way. RP VII 426. The defendant had instructed the children not to enter his sleeping area. RP XIV 1401-02. He told them to shout at him if they needed him. RP XIV 1402.

MR's parents separated when she was 10 years old. RP VII 428. They divorced and her father received custody of the children; MR wanted to live with her mother. RP VIII 641, 651, 652. MR on more than one occasion asked her mother if she could live with her. RP VIII 643; RP IX 672. MR did not like living with her father and she told her mother that. RP VIII 640.

MR did not tell her mother about the alleged abuse until she was 14 years old. RP VII 429. She told her mother when they were having a fight

about whether Mrs. Reilly had time to take MR to the mall to get a sweater before she went to work. RP VII 430; RP VIII 608. At that time MR talked to her mother about how she did not want to live with her dad and her brother. RP VIII 538; RP IX 702.

Prior to telling her mother, she had discussed her allegations with her girlfriends Latoya and Natassia. RP VII 45; RP VIII 555. MR mentioned it to Natassia after Natassia first related that she had been sexually touched. RP VII 445. MR could have told her friends that the defendant touched her at his residence in Ocean Shores. RP VII 447.

As a result of MR's statements, her parents called the police. RP VII 430; RP IX 689. During the police investigation, MR received a medical examination. RP VII 430. During the medical examination, she told the nurse, "He [the defendant] didn't put anything inside me. I'm still a virgin." RP VII 432. When she said this, she meant that the defendant had never penetrated her. RP VII 432. The nurse examiner did not observe any physical evidence consistent with sexual assault. RP IX 771. The nurse examiner could not opine with reasonable medical certainty whether any sexual abuse had occurred. RP IX 772.

MR initially denied that there had ever been any penetration by the defendant. RP VIII 524. However, when the State recalled her to the stand

immediately prior to resting, MR stated for the first time that there had been penetration of the outer folds of the labia. RP XI 1112, 1119. She was adamant that penetration of the outer folds of the labia had occurred. Id.

The police also asked MR to make a telephone call to the defendant. RP VII 433. The police told her that she did not have to participate in the phone intercept. RP VII 450. They told her that the phone intercept was just one of many options they could use in their investigation. RP VII 450. The police gave her a written list of questions for MR to ask the defendant during the phone call. RP VII 468. The police also gave her written questions to ask during the phone intercept. RP VIII 516. Police were present and listened to the phone call. RP VII 516. The defendant answered the telephone. RP VII 434. MR was not certain whether the police recorded the entire conversation. RP VII 434, 451.

When MR was interviewed by the prosecutor's interviewer, she denied that she had any name for the anatomical parts that the defendant had reportedly touched. RP VIII 531. MR was 15 years old at the time. RP VIII 531. The interviewer repeatedly asked MR if she had a name or word for her intimate parts. RP XVII 1792-93.

When MR was interviewed by the defense in May 2007 (she then was 17 years old), she stated that she did not have any name for her private place. RP VII 453.

MR recalled “good touch/bad touch” lessons at school and knew that she was supposed to tell somebody if she ever was touched inappropriately. RP VIII 509, 633. MR had received similar instructions from her family doctor. RP VIII 510, 630. She denied that her parents had ever talked to her about personal safety and her body parts. RP VIII 511. Although MR had begin to menstruate, she claimed that no one had ever talked to her about that. RP VIII 517.

MR’s mother had told Meghan that she needed to tell her parents if anyone touched her inappropriately. RP VIII 632. MR’s mother also discussed menstruation with her. RP VIII 632; RP XVI 1762. MR’s mother used correct anatomical names for private parts. RP XVI 1761. She started this practice when MR was 4 or 5 years old. RP XVI 1761.

MR claimed that the defendant told her not to tell anyone about the touching. RP VIII 513. However she could not recall when or where he told her not to tell. RP VIII 513.

Latoya Fryer-Miner, one of MRs classmates, recalled that when the girls were in 8th grade, MR stated that she had been molested at Ocean Shores by a family friend named Howard or Skip. RP XI 1166-67.

On the 4th of July 2004, MR and her family visited at the Carr residence in Ocean Shores. RP XI 1179-80. MR asked the defendant, “Do you remember when you accidentally touched me?” RP XI 1188; RP XIV 1433. The defendant replied, “I remember when you said I accidentally touched you.” RP XI 1188; RP XIV 1433.

The defendant denied that he ever touched MR’s private parts. RP XIV 1381.

The defendant was physiologically incapable of achieving an erection from the early 1990’s on. RP XIII 1273; RP XIV 1403..

When the defendant received the intercepted phone call from MR in June 2005, the defendant had been sleeping. RP XIV 1439. The telephone call awakened the defendant from his nap. RP XIV 1439. MR told the defendant that she was home all alone. RP XIV 1443. The defendant thought that MR had been crying. RP XIV 1443. She sounded distraught. RP XV 1648. The defendant was concerned that MR might try to hurt herself somehow. RP XV 1653. The defendant was concerned that MR was upset about the “secret purse” incident. RP XIV 1446. The defendant offered to

help MR any way that he could. RP XIV 1457. The defendant tried to keep MR talking during the phone call and he did not want to contradict her on any point. RP XVI 1672. He characterized his efforts during the call as an amateur attempt at crisis intervention. RP XVI 1672.

The defendant reviewed the intercept transcript prior to trial and determined that the transcript was incomplete. RP XV 1543; 1656. He noted that there were no good-byes on the transcript. RP XV 1544.

The day after the phone call, police arrested the defendant at his Ocean Shores residence. RP XIII 1267-68. They put handcuffs on the defendant, who was clad only in his bathrobe, and took him away. RP XIII 1268.

En route to Pierce County, the defendant told police that he would be a dead man. He knew from his work experience in the California correctional system that sex offenders were the lowest of the low. RP XIV 1424, 1453-54. He also had a friend who had been accused of a sexual offense. RP XIV 1424. Although his friend was acquitted at trial, he lost everything he had. RP XIV 1424.

D. ARGUMENT.

1. The trial court's order on admissibility of the telephone intercept was fatally flawed because the application for intercept failed to provide a particular statements of facts sufficient to warrant authorization by the issuing court.

RCW 9.73.130(3) requires an application for intercept authorization to record communications or conversations to include:

A particular statement of facts relied upon by the applicant to justify his belief that an authorization should be issues, including:

(f) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonable appear to be unlikely to success if tried or too dangerous to employ.

The appellate court reviews the sufficiency of the application to determine whether the facts set forth are minimally adequate to support the court's determination. State v. Johnson, 125 Wn. App. 443, 455, 105 P.3d 85 (2005), *citing* State v. Cisneros, 63 Wn. App. 724, 729, 821 P.2d 1262, *rev. denied*, 119 Wn.2d 1002 (1992).

Although police do not need to show absolute necessity to obtain an order for intercept under RCW 9.73.130(3)(f), they “try or give serous consideration to other methods and explain to to the issuing judge why those other methods are inadequate in the particular case.” Johnson, 125 Wn. App.

at 456, *citing State v. Manning*, 81 Wn. App. 714, 720, 915 P.2d 1162, *rev. denied*, 130 Wn.2d 1010 (1996). Mere boilerplate language is antithetical to this particularity requirement. *Johnson, supra, citing Manning*, 81 Wn. App. at 720.

In *Johnson, supra*, the court found that the application contained more than boilerplate language and therefore satisfied statutory requirements. The court noted that police had particularized information from an individual who was close to defendant. That individual, Correia, told police that the defendant had lied to police when she stated that she had expected the decedent (Johnson's mother) to come to her residence for lunch on the day of the murder. She told police that when her mother did not arrive and that she then went to her mother's residence and discovered her body. The defendant's did not admit that she had been at the residence earlier that day and that she had been present at the time of the murder. In addition, Correia told police that the defendant had made efforts to conceal and destroy any evidence linking her to the murder. Based on these facts, the police had particularized facts that an intercept was warranted where the investigation had established that the defendant had lied about her involvement in the murder and also that she had taken affirmative actions to conceal and destroy evidence.

In this case, the application for intercept failed to meet the particularity requirement. *There is absolutely nothing in the application that informed the issuing judge what in the particular case other methods of investigation were inadequate. There was nothing in the application that informed the issuing judge how the instant was different from a typical case with delayed reporting, no physical evidence, and an older alleged victim.* In fact⁵, the police told MR that the phone intercept was merely optional.

To the contrary, the application merely contained boilerplate language informing the issuing magistrate that the alleged victim was old enough to participate in an intercept phone call, that there was no physical evidence of the alleged sexual assault, that the events occurred in the past, and that the suspect was unlikely to speak to police. In fact, the first three reasons are factors common in the vast majority of child sexual assault cases. In addition, there is no reasoned basis for the detective's assertion that the suspect was unlikely to speak to police. The detective merely speculated that Mr. Carr, as an individual, would refuse to speak to police.

If the application in the instant case is sufficient to issue a phone intercept order, then phone intercept orders will become standard investigative practices. This is so because there was no particularized reason expressed to

persuade the issuing magistrate that the instant investigation required the intercept order.

The trial court's failure to suppress denied the defendant his constitutional rights, violated RCW 9.73, the Sixth Amendment to the U.S. Constitution, Art. I, Sec. 22 of the Wash. Const., ER 106, and also the provisions of the court order authorizing intercept.

Regarding his constitutional claims, the defendant was denied his right to meaningfully cross-examine the police about his unrecorded statement that he was not a child molester. Shaviri could not remember what was said during the unrecorded portion of the phone call. Likewise, the defendant could not confront MR about this important statement. She did not recall what was said. The effect of the police failure to record the entire conversation was to pit the defendant's credibility against that of the other witnesses.

Given that the jury convicted the defendant of the lesser included due to his statements in the tape, the jury may well have reached a different verdict had the police taped the entire conversation.

Further, the police failure to record the entire conversation denied the defendant the opportunity to place the entire conversation before the jury. ER

106⁶ expressly allows an adverse party to require the proponent to introduce any other part of a recorded statement which ought on fairness to be considered contemporaneously with it.

Shaviri testified that he did not continue typing because he had “everything he needed.” This candid testimony affirms that police were not concerned with conducting an objective investigation but rather with obtaining sufficient to convict the defendant.

Shaviri’s additional statement that had he heard anything significant in the unrecorded conversations he would have inserted another tape begs the question “how could Shaviri recapture words that already had been uttered?”

Finally, the intercept order required police to tape all of the conversation. The court did not allow the police to stop recording when they had everything they needed. Violations of the court should have resulted in suppression. E.g., State v. Lewis, 59 Wn. App. 834, 836-38, 801 P.2d 289 (1990). (Suppression required where police ignored scope of search warrant).

2. The trial court’s findings of fact and conclusions of law re: admissibility of statement do not support the trial court’s ruling on the admission of the taped statement.

Findings of fact entered by a trial court pursuant to a CrR 3.5 hearing are binding in us if they are supported by substantial evidence. Broadaway,

⁶ See Appendix C

133. Wn.2d at 129-34. Evidence is substantial if it is sufficient to persuade a fair minded, rational person of the truth of the finding, State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by Brendlin v. California, U.S. 127 S. Ct. 2400, 168 L.Ed.2d 132 (2007).

The appellate court reviews de novo whether the findings of fact support the trial court's conclusions of law. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

In the instant case, the trial court's findings of fact and conclusions of law were fatally flawed. Finding of fact no. 2 asserted that "the amount of conversation that was not capture on the audio tape was less than a minute and consisted of the closing remarks of M.R. and the defendant." This finding is not supported by substantial evidence because (1) no witness recalled how long the conversation lasted after the tape ended; and (2) because no one listened to the conversation after the tape ended, the content was unknown. The defendant was the only person with recollection of the remainder of the conversation and his account could not be verified due to the failure of police to comply with the intercept.

Likewise, finding of fact number 3 was not supported by substantial evidence. To the contrary, the police acted with bad faith. They purposefully took no action when the second tape ran out. The police had devised a ruse to

permit them to have a break to change the tape after the first tape ran out. The police failed to anticipate that the length of the conversation might require another change of tape. Further, Shaviri's candid statements that he had "everything he needed" by the time the second tape ended and also that he would have started another tape had he heard anything significant affirms that he chose not to record the final portion of the conversation. This choice violated the court's intercept order and, on the facts of the case, was made in bad faith and in disregard for the rights of the defendant.

The trial court's conclusion as to disputed facts also are not supported by the evidence. The trial court found that the defendant did not make any statements on the audio recording that were materially different than those made of the end of the audio recording. When this court listens to the audio tape, this court will conclude that the tape ended abruptly and that there was no conversation in the tape about whether the defendant was "a child molester." That the defendant made such a statement and M.R. did not contest it would have been significant information to put before a jury. Her failure to react to that statement could be argued as an acknowledgement by

silence that she knew that the defendant had not molested her. ER 801(d)(2)(ii)⁷.

Finally, the trial court's conclusion of law that the police failure to record the entire conversation did not require suppression is contrary to law. See, Lewis, supra and State v. Myers, 117 Wn.2d 332, 815 P.2d 761 (1991). Likewise, the trial court's mixed statement of fact and law that the defendant's statements were merely cumulative to statements made during the recording is not supported by the findings of fact. As argued above, the defendant's statements at the conclusion of the recording in fact were materially different from statements made during the recording. Because those statements are different in the important respect that the conversation could have been construed as a tacit acknowledgement by M.R. that the defendant was not a child molester, the unrecorded portion was not cumulative and also was critical to the defense of the case.

3. The trial court erred when it failed to properly instruct the jury regarding the unanimity requirement needed for conviction where the State had alleged multiple acts for each count.

To convict a person of a criminal charge, the jury must be unanimous that the defendant committed the criminal act." State v. Camarillo, 115 Wn.2d 60, 63, 794 P.2d 950 (1990). The State must elect the act it relies on

⁷ See Appendix "d"

for a conviction, or the court must instruct the jury that all members must agree on the same underlying act when multiple acts relate to one charge. *Id.* At 64 (citing State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984)). The failure to give a so-called Petrich instruction violates a defendant's constitutional right to a unanimous jury verdict. *Id.* at 64. And so the failure to give a unanimity instruction is so fundamental that it may be raised for the first time on appeal because it is a manifest constitutional error. State v. Kiser, 87 Wn. App. 126, 129, 940 P.2d 308 (1997). The failure to instruct the jury on the required unanimity is reversible error unless the failure is harmless. Camarillo, 115 Wn.2d at 64.

Of course, in this case, the defendant raised the issue and thereby preserved it committing first degree rape of a child, rather than distinct acts for which a unanimity instruction is required.

The purpose of jury instructions is to furnish guidance to the fact finder and to aid it in arriving at a proper verdict so far it is competent for the court to assist them. State v. Allen, 89 Wn. 2d 651, 654, 574 P.2d 1182 (1975). The chief objectives contemplated in the charge of the judge are to explain the law of the case, to point out the essentials to be proved on one side or the other, and to bring into view the relation of the particular evidence adduced

to the particular issues involved. State v. Corwin, 32 Wn. App. 493, 649 P.2d 119 (1982).

Jury instructions are reviewed as a whole to determine they properly inform the jury of the applicable law. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995).

The use of an improper instruction in a criminal case is presumed to be prejudicial. State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988). In that case, the court held that in a multiple acts case when the state fails to elect which incident it relies upon for the conviction or the trial court fails to instruct the jury that all jurors must agree that the same underlying act has been proved beyond a reasonable doubt, the error will be deemed harmless only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt. *Id.*, citing State v. Petrick, 101 Wn.2d 566, 569, 683 P.2d 173 (1984). Put another way, where the state clearly does not elect which act it is relying on to prove the crime, and the trial court does not instruct the jury that to find the defendant guilty all jurors must agree on the particular act which the defendant committed, the absence of such an instruction is not harmless if a rational jury could have a reasonable doubt about the adequacy of the evidence to prove any of the acts. State v. Handyside, 42 Wn. App. 412, 711 P.2d 379 (1985).

A defendant may be convicted only when a unanimous jury concludes that the defendant committed the criminal act charged in the information. State v. Petrich, 101 Wn.2d at 569. This unanimity requirement means that if evidence of more than one criminal act is presented, the jury must be unanimous in deciding that the same underlying criminal act has been proved beyond a reasonable doubt.

The State may, in its discretion, elect the act upon which it will rely for conviction. Alternatively, *if the jury is instructed that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt*, a unanimous verdict on one criminal act will be assured. When the State chooses not to elect, this jury instruction must be given to ensure the jury's understanding of the unanimity requirement. Petrich, 101 Wn.2d at 572.

In the instant case, the court gave the following instructions that are pertinent to this issue:

Instruction 12: For purposes of count I and count II, there are **allegations** that the defendant committed acts of sexual touching 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 provide beyond a reasonable doubt for each count. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt. (CP 223)

Instruction 12A: You have heard allegations that the defendant touched M.R. at her home in Graham while she was in her bed. These allegations are the basis for Count III. You have heard allegations that the defendant touched M.R. at her home in Graham while she was on the couch. These allegations are the basis for Count IV. **You have heard allegations that the defendant touched M.R. at her home in Graham while she was on the defendant's lap in the spare bedroom. These allegations are the basis for Count V.** (CP 224)

Instruction 28: To convict the defendant of the lesser included crime of attempted rape of a child in the first degree as alleged in count V, each of the following elements must be proved beyond a reasonable doubt: (1) That during the period **between the 1st day of February, 1996, and the 5th date of May 2000**, the defendant did an act which was a substantial step toward the commission of rape of a child in the first degree; (2) That the act was done with the intent to commit rape of a child in the first degree . . . CP 240.

Instruction 24: If you are not satisfied beyond a reasonable doubt that the defendant is guilty of rape of a child in the first degree as alleged in count V. the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilty of such lesser crime beyond a reasonable doubt. The crime of rape of a child in the first degree necessarily includes the lesser included crime of attempted rape of a child in the first degree. When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime.

Instruction 28: To convict the defendant of the lesser included crime of attempted rape of a child in the first degree as alleged in count V, each of the following elements must be proved beyond a reasonable doubt: (1) That during the period between the 1st day of February, 1996, and the 5th date of May 2000, the defendant did an act which was a substantial step toward the commission of rape of a child in the first degree; (2) That the act was done with the intent to commit rape of a child in the first degree: and (3) that the acts occurred in the State of Washington. If you find from the evidence that each of these elements has been provide beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

Read as a whole, the foregoing instructions were confusing at best. Although instruction 12A informed the jury that count V concerned allegations that the defendant touched M.R. at her home in Graham while she was on the defendant's lap in the spare bedroom, this language was not repeated in the to-convict instruction for attempted first degree child rape. To the contrary, the to-convict instruction alleged that the act occurred over a very long period of time, including a year when the Reillys lived in Federal Way. Further, M.R. had alleged that the defendant contacted her in her bed at the Graham residence, pull her nightie up and move her underpants to the side and touch her. RP VIII 505-06. M.R. had informed the prosecutor's interview Kim Brune that the first time she was penetrated by the defendant was in February or March when the defendant contacted her in her bed and put his finger(s) in her vagina. RP XVII 1799-1800. This act occurred at the Graham residence and fell within the charging period. RP 1797-1798. Thus M.R. had testified to at least two separate events involving penetration.

Compounding the confusion was the use of the word "allegations", which informed the jury that the acts had occurred more than once.

In this case, the court's instructions were ambiguous as to whether instruction 12A applied to the lesser included offense. In addition, instruction

12A failed to inform the jury that they needed to be unanimous as to the act underlying the charge. The jury acquitted Mr. Carr of counts III and IV and therefore the lack of the unanimity instruction did not adversely affect Mr. Carr.

However, instructions nos. 12 and 12A are inconsistent and the latter operated to deprive the defendant of his constitutional right to a unanimous verdict. This is so because instruction 12 informed the jury that they needed to be unanimous regarding the act that the State had proved beyond a reasonable doubt before rendering a verdict. In contrast, instruction 12a referred to *allegations* (in the plural) regarding acts that had occurred in the bed in Graham, on the couch in Graham, and in the spare bedroom in Graham. Indeed, the testimony of MR was fraught with contradiction and inconsistencies that she herself did not even clearly identify any single incidents.

The use of the word “allegations” thus (as opposed to allegation) conveyed to the jury that the State alleged that more than one incident occurred in the specified locations. The State could have and should have worded the instructions to say: “You have heard *an allegation* that . . .”. Had the State used that language, then the jury would have understood that the State alleged that only one act occurred in any of those locations. The State’s use of the plural word “allegations” versus “allegation” unequivocally conveyed that the multiple actions were attributed to the defendant at those locations.

In this context and for the reason that instruction 12a conveyed to the jury that **no** unanimity was required regarding any specific act, the jury could have (and apparently did) conclude that they could return a verdict of guilt to the lesser included without being unanimous regarding the single event that was the crime.

Moreover, nothing in the remainder of the court's instructions to the jury provided any directive to the jury that they were required to be unanimous regarding the underlying act in count 5a, the lesser included.

The defective nature of the court's instructions therefore caused the jury to convict the defendant of a lesser included offense upon instructions which did NOT require unanimity as to the charged act.

The failure to inform the jury that unanimity was required for "allegations" that occurred over a very broad period and in a place where the defendant and the alleged victims frequently were in fact denied the defendant his constitutional right to jury unanimity.

In summary, given these muddled instructions, it is not surprising that the jury convicted the defendant of the lesser included offense because (1) M.R. had testified to at least two incidents of penetration at the Graham residence; (2) both incidents occurred during the lengthy charging period; (3) the court instructed the jury that there been allegations (not an allegation) of penetration;

and (4) the court failed to give the Petrich instruction for count V, the lesser included; and (5) the jury instructions cited above were so contradictory that they mislead the jury to conclude that they could convict the defendant if they determined that :”something happened.”

4. The trial court erred when it instructed the jury on the lesser included offense of attempted first degree child rape for count 5 where there was not factual basis for that instruction.

An instruction on a lesser included offense is warranted when two conditions are met: “First, each of the elements of the lesser offense must be a necessary element of the offense charged [and] second, the evidence in the case must support an inference that the lesser crime was committed” State v. Fernandez-Medina, 141 Wn.2d 448, 454, 6 P.3d 2250 (2000), *citing* State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

The legal prong of the test is satisfied here. An attempted child rape in the first degree is a lesser included offense of the charged crime of first degree child rape because all of the elements are necessary elements of that greater offense. *E.g.*, State v. Gallegos, 65 Wn. App. 230, 234, 828 P.2d 37, rev. denied, 119 W.2d 1024, 828 P.2d 690 (1992).

The factual prong is not met. Under the factual prong, the proponent of the lesser included offense instruction must point to evidence that would support a jury finding that the defendant committed *only* the lesser included

offense and may not rely on the possibility that the jury could disbelieve the State's evidence. The absence of the factual prong precludes giving a lesser included instruction and renders a discussion of the second prong of the Workman test unnecessary. State v. Workman, 90 Wn.2d 443, 47-48, 584 P.2d 382 (1978), See State v. Fernandez-Medina, 141 Wn.2d 448, 454-55, 6 P.3d 1150 (2000); State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997).

For these reasons, the trial court erred when it instructed the jury to consider the lesser included offense of attempted child rape.

Instruction 24: If you are not satisfied beyond a reasonable doubt that the defendant is guilty of rape of a child in the first degree as alleged in count V, the defendant may be found guilty of any lesser crime, the commission of which is necessarily included in the crime charged, if the evidence is sufficient to establish the defendant's guilty of such lesser crime beyond a reasonable doubt. The crime of rape of a child in the first degree necessarily includes the lesser included crime of attempted rape of a child in the first degree. When a crime has been proven against a person and there exists a reasonable doubt as to which of two or more crimes that person is guilty, he or she shall be convicted only of the lowest crime. CP 236.

Instruction 28: To convict the defendant of the lesser included crime of attempted rape of a child in the first degree as alleged in count V, each of the following elements must be proved beyond a reasonable doubt: (1) That during the period between the 1st day of February, 1996, and the 5th date of May 2000, the defendant did an act which was a substantial step toward the commission of rape of a child in the first degree; (2) That the act was done with the intent to commit rape of a child in the first degree; and (3) that the acts occurred in the State of Washington. If you find from the evidence that each of these elements has been provide beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. On the other hand, if after weighing all the evidence you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty. CP 240.

Where the State failed to establish the factual prong for the lesser included, this court must reverse the defendant's conviction.

5. The trial court erred when it denied the defendant's motion for mistrial after the prosecutor's misconduct during cross examination of the defendant's wife attempted to intrude upon privileged communications.

The appellate court reviews allegations of prosecutorial misconduct for abuse of discretion. State v. Brett, 126 Wn.2d 136, 174, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 133 L.Ed.2d 858 (1996), *vacated on other grounds in* In the Personal Restraint of Brett, 142 Wn.2d 868, 16 P.3d 601 (2001) "The defendant bears the burden of 'establishing both the impropriety of the prosecutor's conduct and its prejudicial effect.'" Brett, 126 Wn.2d at 175 (quoting State v. Furman, 122 Wn.2d 44, 445, 858 P.2d 1092 (1993)). To prevail on this claim, the defendant must show that counsel did not act in good faith. State v. Weekly, 41 Wn.2d 727, 728, 252 P.2d 246 (1952). Improper comments will be deemed prejudicial only when there is a substantial likelihood that the misconduct affected the jury's verdict. State v. McKenzie, 157 Wn.2d 44, 52, 134 P.3d 221 (2006); State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985).

To evaluate whether counsel acted in good faith, our Supreme Court has offered the following inquiries: "Was the question based upon facts

established by the record? Was it material and relevant? Did counsel have any basis for a belief that the court would overrule an objection to it? Did counsel abide by the ruling of the court and not pursue the inquiry after the objection was sustained?" Weekley, 41 Wn.2d 728-29. .

Comment upon the exercise of a privilege has been held improper, justifying a new trial, in Sumpter v. National Grocery Co., 194 Wash. 598, 78 P.2d 1087, 116 A.L.R. 1166 (1938), and in Kiehlhoefer v. Washington Water Power Co., 49 Wash. 646, 96 P. 220 (1908). Such comment is prejudicial. State v. Tanner, 54 Wn.2d 535, 341 P.2d 869 (1959); State v. McGinty, 14 Wn.2d 71, 126 P.2d 1086 (1942); State v. Winnett, 48 Wash. 93, 92 P. 904 (1907).

In this case, the prosecutor wanted to suggest to the jury that the defendant and wife were rehearsing testimony so that there would be no discrepancies regarding the "secret purse" incident and the events immediately thereafter. The prosecutor lacked any good faith basis to assume that such collusion had occurred. Nevertheless the prosecutor put that question before the jury. When, without good faith, the government places such a suggestion to the jury, the government is impermissibly commenting on the credibility of the witnesses involved. In this case, those witnesses

happened to be the defendant and his wife, the two most important witnesses in the defense case.

6. The trial erred it denied the defendant's motion for mistrial after the lead detective commented on the defendant's invocation of his right to counsel upon arrest.

The Fifth and Fourteenth Amendments and article I, section 9 of the Washington State Constitution, protect a defendant's right against self-incrimination. State v. Easter, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996). "In the post arrest context, it is well-settled that it is a violation of due process for the State to comment upon or otherwise exploit a defendant's exercise of his right to remain silent." Romero, 113 Wn. App. At 786-87 (citing Doyle v. Ohio, 426 U.S. 610, 619, 96 S. Ct. 2240-49 L.Ed.2d 91 (1976), State v. Fricks, 91 Wn. 2d 391, 395-96, 588 P.2d 1329 (1979)). In essence, a police witness may not comment on the defendant's silence in a way that infers guilt from the defendant's refusal to answer questions. State v. Lewis, 130 Wn.2d 700, 705, 927 P.2d 235 (1996). If the State does comment on the defendant's right to remain silent, we must reverse unless the State meets its burden of proving the error harmless. Easter, 130 Wn.2d at 242.

When Detective Shaviri testified that the defendant invoked his *Miranda* rights and declined to talk to him, he directly commented on the defendant's silence. *See* Romero, 113 Wn. App. At 791. Furthermore, given

the context of the testimony, Shaviri, the prosecutor's witness, violated the defendant's constitutional right protecting him against self-incrimination.

. Such an error is harmless only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985); State v. Keene, 86 Wn. App. 589, 594, 938 P.2d 839 (1997).

In this case, M.R.'s testimony and the erroneously admitted phone intercept tape were the basis for the defendant's conviction. M.R.'s credibility was suspect as she made so many wildly inconsistent statements about the alleged sexual abuse that the jury disbelieved her and acquitted the defendant on counts I – IV. Thus, the error was not

Further, given the insufficiency of the evidence, this court must dismiss this prosecution.

7. The trial erred when it denied the defendant's motion for new trial and/or arrest of judgment where the instructional error resulted in an unreliable verdict.

The appellate courts review denials of a motion for a new trial for abuse of discretion. State v. Burke, 163 Wn.2d 204, 210, 181 P.3d 1 (2008), *citing* State v. Marks, 71 Wn.2d 295, 302, 427 P.2d 1008 (1967). Among other things, discretion is abused if it is exercised on untenable grounds or for untenable reasons, such as a misunderstanding of the underlying law that

causes non-harmless error in the trial. Braam v. State, 150 Wn.2d 689, 706, 81 P.3d 851 (2003).

8. The defendant is entitled to relief under the cumulative error doctrine.

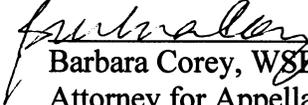
Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. State v. Grieff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000).

In the instant case, in addition to the erroneous admission of the phone intercept and the instructional error, the trial's court errors in refusing to admit impeachment evidence, permitting prosecutorial misconduct, and denying the defendant's motions for mistrial were cumulative errors. In addition, the detective's impermissible comment on the defendant's invocation of his constitutional rights also presumptively prejudiced the defendant. The net effect of these many errors was to yield a jury verdict that was unreliable and as well as to undermine confidence in that verdict.

E. CONCLUSION.

For the foregoing reasons, the defendant respectfully asks this court to dismiss this prosecution for insufficient evidence as argued in the erroneous instruction section. Alternatively, this court should reverse the defendant's conviction for attempted child rape in the first degree.

DATED this 3rd day of Sept, 2008.



Barbara Corey, WSB # 11778
Attorney for Appellant

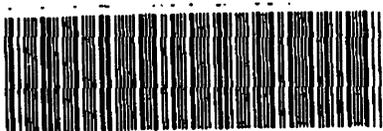
CERTIFICATE OF SERVICE:

The undersigned certifies that on this day she delivered by U.S. Mail or ABC-LMI delivery to the Appellate Unit, Room 946 County-City Building, Tacoma, Washington 98402 a true and correct copy of the document to which this certificate is attached. 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 the date below.

9-3-08 
Date Signature

APPENDIX "A"

APPENDIX “B”



05-1-03018-8 29218148 PROR 02-21-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-03018-8

vs.

HOWARD ODELL CARR,

Defendant.

STATE'S PROPOSED FINDINGS AND CONCLUSIONS FOR CrR 3.5

Attached hereto are the State's proposed findings and conclusions for CrR 3.5 and a transcript of the court's oral ruling on the admissibility of statements.

DATED this 20th day of February, 2008.

GERALD A. HORNE
Prosecuting Attorney

By: [Signature]
Grant Blinn
Deputy Prosecuting Attorney
WSB# 25570

gb

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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 05-1-03018-8

vs.

HOWARD ODELL CARR,

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
ADMISSIBILITY OF STATEMENT,
CrR 3.5

Defendant.

THIS MATTER having come on for hearing before the honorable John Hickman on the 30th day of October, 2008, and the court having ruled orally that the statements of the defendant are fully admissible, now, therefore, the court sets forth the following Findings of Fact and Conclusions of Law as to admissibility.

UNDISPUTED FACTS

I. That on June 16, 2005, pursuant to a court order, M.R. placed a telephone call to the defendant's residence at the direction of law enforcement to obtain a recorded statement from the defendant about this case. This call was initiated from M.R.'s residence. Detective Shaviri of the Pierce County Sheriff's Department was present and used headphones to listen to the conversation as it took place. Detective Purviance was also present and operated the device that was used to record the conversation.

05-1-03018-8

1 II. That the duration of the conversation exceeded the duration of the audio tape, and as a
2 result the end of the conversation between M.R. and the defendant was not recorded. The
3 amount of conversation that was not captured on audio tape was less than a minute and consisted
4 of the closing remarks of M.R. and the defendant.

5 III. The court finds that there was no bad faith by law enforcement or M.R. in the failure
6 to terminate the conversation prior to the expiration of the tape.

7 IV. That on June 17, 2005, the defendant was placed under arrest at his residence in
8 Ocean Shores by Det. Shaviri and Det. Lund. The defendant made some unsolicited statements
9 at the scene prior to having been read his Miranda warnings. Thereafter, the defendant was read
10 his Miranda warnings and invoked his right to remain silent. Thereafter, on the way to jail, the
11 defendant made several statements that were unsolicited.

12 DISPUTED FACTS

13 I. Whether the defendant made any statements after the end of the audio recording that
14 were materially different than those made prior to the end of the audio recording.

15 CONCLUSIONS AS TO DISPUTED FACTS

16 I. The court finds that the defendant did not make any statements after the end of the
17 audio recording that were materially different than those made prior to the end of the audio
18 recording. The court finds that Det. Shaviri is credible. To the extent that the defendant claims
19 to have made statements after the tape ran out that are materially different than his statements
20 made before the tape ran out, the court finds that the defendant is not credible.

21 CONCLUSIONS AS TO ADMISSIBILITY

22 The defendant's statements to M.R. on the telephone are admissible. The statements are
23 non custodial. The fact that the final portion of the conversation was not recorded should not
24
25

1 result in suppression of the conversation. The statements that the defendant claims to have made
 2 at the end of the conversation are not materially different than other statements made by the
 3 defendant prior to the end of the audio recording, and are cumulative to the statements that he
 4 made during the recording. The defendant's statements to Det. Shaviri the next day are also
 5 admissible. None of the statements are the result of "interrogation" as they were not made in
 6 response to questions or other actions by law enforcement that were likely to elicit an
 7 incriminating response.

8
 9
 10 DONE IN OPEN COURT this _____ day of February, 2008.

11 _____
 12 John Hickman, JUDGE

13 Presented by:

14 _____
 15 GRANT E. BLINN
 16 Deputy Prosecuting Attorney
 17 WSB# 25570

18 Approved as to Form:

19 _____
 20 BARBARA L. COREY
 21 Attorney for Defendant
 22 WSB# 11778

23 geb
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1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THE COUNTY OF PIERCE

3 STATE OF WASHINGTON,)
4)
Plaintiff,)
5)
vs.)
6) No. 05-1-03018-3
HOWARD CARR,)
7)
Defendant.)
8)
9)

10 VERBATIM PARTIAL TRANSCRIPT OF PROCEEDINGS

11
12 BE IT REMEMBERED that on the 30th day
13 of October, 2007, the following proceedings
were held before the Honorable JOHN R.
14 HICKMAN, Judge of the Superior Court of the
State of Washington, in and for the County
of Pierce, sitting in Department 22.
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25 Laura L. Venegas, CCR, RPR
Official Court Reporter
(253) 798-6188

1 APPEARANCES:

2 The Plaintiff was represented by
its attorney, GRANT E. BLINN;

3
4 The Defendant was represented by
his attorney, BARBARA COREY;

5
6 WHEREUPON, the following proceedings were
had, to wit:

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1 P-R-O-C-E-E-D-I-N-G-S

2 October 30, 2007

3 * * * * *

4 THE COURT: Okay. Thank you.

5 Judge Steiner had previously made a ruling on the
6 legality of this intercept warrant and in -- in a
7 previous 3.5 motion had found that this intercept
8 warrant was in compliance with 9.73.230(1) and he
9 issued a written decision regarding that on March 29th
10 of '06, and the court notes that it was different
11 defense counsel at that time.

12 The defense counsel representing Mr. Carr at that
13 time did not raise the issue of whether or not it was
14 a defective warrant or that the tape should be
15 excluded or the transcript should be excluded on the
16 basis that it was not a complete transcript or tape
17 based on the arguments that have been made here by Ms.
18 Corey. But the court, under Judge Steiner, did rule
19 that the tape would not be excluded.

20 This issue has now been raised by defense counsel
21 after Ms. Corey had heard the testimony of Officer
22 Shaviri, and she has raised the issue of whether or
23 not this transcript or tape should be admitted under
24 the theory that it is a -- or factual issue that it is
25 an incomplete transcript or tape.

1 The court in making its decision did review the
2 transcript of the tape. I read the entire transcript.
3 I also reviewed Officer Shaviri's testimony at the
4 previous hearing with my court reporter so I would
5 have an accurate rendition of what Officer Shaviri's
6 testimony was under both direct and cross-examination.

7 Officer Shaviri indicated that he did have his
8 headset on the entire time, but the tape ended before
9 the conversation ended between the parties, and the
10 tape reflects an incomplete recollection -- or
11 incomplete recording of the conversation because there
12 are no good-byes. It just simply ends.

13 This court finds that there was some portion of
14 the transcript that does not reflect the entire
15 conversation between the parties based on the fact
16 that it simply ends with no good-byes or no lead-in to
17 ending the conversation.

18 The defendant testified at this hearing that -- as
19 to what he believes was the missing portion of that
20 tape and it basically was some exculpatory statements
21 by Mr. Carr indicating that he did not do what he was
22 being accused of doing during the conversation, and
23 the court finds that his exculpatory statement is not
24 inconsistent with his position throughout the entire
25 tape where he indicated a number of times that he was

1 not responsible for what occurred and then he would
2 admit responsibility, it went back and forth, but his
3 statement at the end of the tape is certainly
4 consistent with what his position was throughout the
5 entire tape.

6 State versus Myers I find to be the most relevant
7 case that was supplied by counsel. It held that when
8 an entire conversation with a magistrate is not
9 recorded when requesting an intercept warrant, under
10 the facts of that case you simply can't meet the
11 requirements of RCW 9.73, and I think Myers is a good
12 case in that sense.

13 They did not feel that the reconstruction with
14 the number of years that had passed would be
15 sufficient to protect the defendant's rights, and it
16 does provide, I believe, some dicta or some guidelines
17 in regards to this case, but it ultimately is not the
18 same fact pattern as we have here since the underlying
19 warrant and conversation to get that warrant -- intercept
20 warrant is really not in question.

21 There's no question in this court's mind that the
22 last few seconds of this tape is missing on the
23 transcript. It would appear to me that probably 98 or
24 99 percent of the tape -- or of the conversation was
25 correctly recorded since the conversation that is

1 allegedly missing was not more than a -- probably a
2 few seconds or a few clauses, as testified by the
3 defendant.

4 I don't believe that the defendant's testimony
5 that was omitted is so out of character with the rest
6 of the statement that he did record or was, in fact,
7 recorded that it would require the exclusion of the
8 entire transcript as some form of remedy to correct
9 the fact that it did not record the closing remarks of
10 the parties.

11 Based on the testimony that the defendant did
12 give as to what was missing I find, in fact, that kind
13 of testimony could be cumulative in the sense that it
14 simply repeats a fairly consistent statement
15 throughout his testimony that at certain parts of the
16 conversation he denied that he did it or it was
17 incidental to some other conduct that was going on.

18 I again believe that any error in not including
19 that in the transcript goes to the weight, not to the
20 admissibility of what has been otherwise deemed to be
21 a valid intercept warrant.

22 I believe that if there was error it was harmless
23 and again cumulative in terms of the type of testimony
24 that was already part of this tape and consistently
25 stated by the defendant throughout the tape.

1 For those reasons I do not believe that there is
2 any case law or authority that has been given to me
3 that would require me to exclude the entire tape, and
4 again, I believe that whether or not the last two
5 seconds or three seconds of that tape are missing is
6 something that can be argued to the jury that would go
7 to the weight that they should give it versus
8 excluding the entire tape for that error and will
9 therefore deny the motion to exclude the transcript.

10 MS. COREY: I have just a couple matters, if I
11 might raise them.

12 THE COURT: Are these matters of clarification
13 or --

14 MS. COREY: One of clarification and one of
15 procedure.

16 The court ruled that the failure to record the
17 complete conversation was harmless because the court
18 believes that what my client said at the end of that
19 conversation would be cumulative, although the details
20 were different.

21 I'm not aware of any legal authority, and I
22 looked for some that would allow the court to even
23 find a harmless error -- to make a harmless error
24 analysis under this constitutional provision and the
25 application of this statute, but my next procedural

1 issue is that obviously the court can tell from what
2 it knows about this case that this intercept order is
3 huge. It is, I believe, probably the State's single
4 most important piece of evidence in this case, and the
5 propriety of the court's ruling -- which I certainly
6 respect the court greatly -- you know, is of -- I
7 believe almost dispositive in what's going to happen
8 in this case, and I would ask the court -- my client
9 is old. Obviously my client is ill.

10 I believe that it would be unfair for my client
11 to have to go to trial, have the intercept order come
12 in -- and that is the center of the case -- without
13 his comments and then somehow be convicted, go to
14 prison and then win this issue on appeal.

15 What I'm going to ask the court to do is under
16 RAP 2.3(b)(4) the court can certify this to the Court
17 of Appeals for resolution. This does present an issue
18 of first impression, and that is where the police get
19 a valid intercept order that Judge Steiner found to be
20 valid, but then they purposefully choose not to record
21 the end of the conversation which contains exculpatory
22 evidence.

23 That is an issue of first impression. The court
24 can determine that the question meets the requirements
25 for certification. Basically the court has to certify

1 that the order involves a controlling question of law
2 as to whether there is a substantial ground for a
3 difference of opinion and that immediate review of the
4 order may materially advance the ultimate determination
5 of the litigation.

6 The defense can easily meet that test. This is
7 the critical issue. You know, the whole intercept
8 order has been the subject of controversy even before
9 I came on the case.

10 You know, the victim's statements have been
11 adequately preserved. If the court is concerned about
12 that we could do a video deposition of that and
13 preserve that. But I think that my client's
14 constitutional rights really are paramount, and given
15 what I believe is the legitimacy and the merit of this
16 issue as to whether or not this error can ever be
17 harmless -- and I contend that it cannot ever be
18 harmless -- the police can basically raise a
19 controversy where none should exist about what was
20 said in the last few minutes.

21 So I'm asking the court to grant certification.
22 I know the Court of Appeals resolves these kinds of
23 questions pretty quickly. I had a case when I was a
24 prosecutor where a court had suppressed a confession
25 that we really thought was important and that went to

1 the court under a similar procedure and we had a
2 ruling within just a couple of months.

3 This is not, you know, hugely complex, but it is
4 extremely important to the outcome of this case, and I
5 think that there is -- there are meritorious arguments
6 that the defense has that the Court of Appeals should
7 resolve.

8 THE COURT: All right. Thank you, Ms. Corey, and
9 I believe firmly you are making that motion in good
10 faith, and I understand your reasons for it. I will
11 hear from Mr. Blinn.

12 MR. BLINN: Your Honor, the State is opposed to
13 the defendant's motion and would ask the court to deny
14 it. Here we are assigned out for trial. This case
15 was charged -- if my memory serves me correctly -- when
16 the alleged victim was a freshman in high school.
17 Here we are approaching halfway through her senior
18 year in high school.

19 We wait until the last minute to raise the issue,
20 and the -- no party should be allowed to wait to raise
21 the issue, see how it goes, and when it doesn't come
22 out in their favor ask for more time when the issue
23 could have been raised months ago, as is the case
24 here.

25 Now, the legislature in RCW 10.46 has expressed a

1 strong desire that prosecutions under 9A.44, which is
2 this case, involving victims who are under the age of
3 18, which again is this case, not be continued without
4 good cause.

5 10.46.085 is the statute that speaks to that, and
6 I have not quoted it verbatim, but the court I'm sure
7 is vaguely familiar with the statute and it is
8 important to move these cases through as quickly as
9 possible.

10 I guess the question in my mind is how much
11 longer should Meghan Reilly have to wait to see
12 justice? Now, justice may be an acquittal in this
13 case. We don't know. But how much longer should she
14 have to wait to get this thing off of her shoulders?
15 To get the trial behind her? To be able to continue
16 to move on with her life?

17 We are assigned out for trial. We're in the
18 middle of jury selection. The State would simply
19 request that we be allowed to proceed, pick a jury,
20 present the evidence and let the jury return a verdict
21 accordingly, and the defendant will still have
22 reserved its right to appeal this issue in the event
23 he is convicted.

24 MS. COREY: My response, Your Honor, is that
25 yeah, the case is two years old. The victim delayed

1 five years -- the alleged victim -- five years of
2 disclosing. Five years. So to talk about the age of
3 the case and to attribute it to the defense is
4 completely nonsensical.

5 In addition to that, it was continued. My client
6 was offered a plea. He took the plea. It was
7 withdrawn because of a mutual mistake about the law by
8 both the prosecutor and the defense attorney and the
9 court and again my client receiving inappropriate
10 legal advice or incorrect legal advice from those
11 parties is not something of his own making.

12 I have had the case for less than a year. It has
13 gone through -- in accordance -- in a relatively
14 timely manner for a case of this nature.

15 We were hamstrung in preparing because the victim
16 had moved to Wisconsin and we had to go interview her
17 there in May. We had agreed in the omnibus order to
18 do the 3.5 hearing at the time of trial. If counsel
19 wanted to do it earlier, counsel could have made a
20 motion.

21 You know, certainly Meghan Reilly has some
22 rights, but those aren't substantive rights in terms
23 of being able to have the case litigated so that she
24 can get over this, if that's an issue, and I would
25 note that under crime victim's compensation she gets

October 30, 2007

State vs. Carr - Decision

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1 counseling and she really hasn't taken much. She took
2 some and then she stopped, and then she took some
3 because of family problems and custody issues and
4 other types of problems.

5 This is my client's life. Given my client's age
6 and my client's health, any brief incarceration will
7 likely be fatal to him, and I think that where there
8 is a legitimate issue as to the law, it is a case of
9 first impression, and I don't think it is a case that
10 the harmless error doctrine would even apply, that
11 this court should be willing to certify the matter to
12 the Court of Appeals. They will issue a prompt ruling
13 and we can continue.

14 THE COURT: Thank you.

15 I'm certainly aware that there are certain
16 situations that come up in trials that -- where both
17 parties are caught by surprise by either a piece of
18 evidence or testimony that would require an immediate
19 ruling by the Court of Appeals in a situation.

20 However, I feel that this issue in terms of the
21 transcript potentially being incomplete or there not
22 being a full recording of what occurred was clearly
23 discoverable by both his prior counsel and this
24 counsel prior to starting this on the day of trial,
25 and I believe that it would cause significant delays

1 in the process that we've already started in picking
2 the jury, and I just will not grant the motion because
3 it can be added to whatever appellate issues he
4 believes are appropriate at the end of the trial, and
5 I do not believe it was timely made in the sense that
6 this issue could have been litigated and discovered
7 and gone to the Court of Appeals probably in -- as
8 early as March of '06, when this warrant issue first
9 came to light.

10 I will respectfully deny the motion to certify it
11 at this time and wish to proceed with motions in
12 limine and the trial.

13 MS. COREY: I would note for the record that we
14 have been making diligent efforts to contact Deputy
15 Purviance. I've talked to many officers that I know
16 in the department who are personal friends of his. I
17 have not been sitting here not doing anything.

18 Before this issue was fully mature Mr. Jordan had
19 asked just the validity of the intercept to be
20 certified to the Court of Appeals and that was denied.

21 THE COURT: Thank you for your record.

22 (END OF TRANSCRIPT.)
23
24
25

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,)
)
 Plaintiff,)
)
 vs.) No. 05-1-03018-8
)
 HOWARD CARR,)
)
 Defendant.)

REPORTER'S CERTIFICATE

STATE OF WASHINGTON)
) ss
 COUNTY OF PIERCE)

I, Laura L. Venegas, Official Reporter in the State of Washington, County of Pierce, do hereby certify that the foregoing transcript is a full, true and accurate transcript of the proceedings taken in the matter of the above-entitled cause.

Dated this 22nd day of January, 2008.

Laura L. Venegas, CCR, RPR
 Official Court Reporter

APPENDIX “C”

evidence unless a substantial right of the party is affected, and

(1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike is made, stating the specific ground of objection, if the specific ground was not apparent from the context; or

(2) *Offer of Proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.

(b) *Record of Offer and Ruling.* The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. The court may direct the making of an offer in question and answer form.

(c) *Hearing of Jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) *Errors Raised for the First Time on Review.*
[Reserved—See RAP 2.5(a).]

RULE 104. PRELIMINARY QUESTIONS

(a) *Questions of Admissibility Generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of section (b). In making its determination it is not bound by the Rules of Evidence except those with respect to privileges.

(b) *Relevancy Conditioned on Fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) *Hearing of Jury.* Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness and so requests.

(d) *Testimony by Accused.* The accused does not, by testifying upon a preliminary matter, become subject to cross examination as to other issues in the case.

(e) *Weight and Credibility.* This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

[Amended effective September 1, 1992.]

RULE 105. LIMITED ADMISSIBILITY

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the party at that time to introduce any other part, or any other writing or recorded statement, which ought in fairness to be considered contemporaneously with it.

TITLE II. JUDICIAL NOTICE

RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

(a) *Scope of Rule.* This rule governs only judicial notice of adjudicative facts.

(b) *Kinds of Facts.* A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) *When Discretionary.* A court may take judicial notice, whether requested or not.

(d) *When Mandatory.* A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) *Opportunity to Be Heard.* A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

(f) *Time of Taking Notice.* Judicial notice may be taken at any stage of the proceeding.

APPENDIX “D”

sum the court may allow. Except as otherwise provided by law, the compensation shall be paid by the parties in such proportion and at such time as the court directs, and thereafter charged in like manner as other costs.

(c) **Disclosure of Appointment.** In the exercise of its discretion, the court may authorize disclosure to the

jury of the fact that the court appointed the expert witness.

(d) **Parties' Experts of Own Selection.** Nothing in this rule limits the parties in calling expert witnesses of their own selection.

[Amended effective September 1, 1992.]

TITLE VIII. HEARSAY

RULE 801. DEFINITIONS

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) **Declarant.** A "declarant" is a person who makes a statement.

(c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements Which Are Not Hearsay.** A statement is not hearsay if—

(1) *Prior Statement by Witness.* The declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or

(2) *Admission by Party-Opponent.* The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

[Amended effective September 1, 1992.]

RULE 802. HEARSAY RULE

Hearsay is not admissible except as provided by these rules, by other court rules, or by statute.

RULE 803. HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL

(a) **Specific Exceptions.** The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

(2) *Excited Utterance.* A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

(3) *Then Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) *Statements for Purposes of Medical Diagnosis or Treatment.* Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

(5) *Recorded Recollection.* A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

(6) *Records of Regularly Conducted Activity.* [Reserved. See RCW 5.45.]

(7) *Absence of Entry in Records Kept in Accordance With RCW 5.45.* Evidence that a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of RCW 5.45, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

(8) *Public Records and Reports.* [Reserved. See RCW 5.44.040.]

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STATE OF WASHINGTON
BY *fn*
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

and

HOWARD ODELL CARR,

Appellant.

CAUSE NO. 37380-7

DECLARATION OF REBECCA
TAYLOR, LEGAL ASSISTANT

I, Rebecca Taylor, declare under penalty of perjury that the following declaration is true and correct:

That I deposited in the U.S. Mail, postage prepaid, a true and correct copy of appellant's opening brief to Howard Odell Carr, c/o of Wanda Carr, 195 N. Razor Clam Dr. SW, Ocean Shores, WA 98569

Dated this 6th day of September, 2007.

 Rebecca Taylor
REBECCA TAYLOR

CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on this date, I delivered via ABC-LMI a copy of the Declaration of Rebecca Taylor to Kathleen Proctor, Sr. Appellate Deputy, 946 CC-Building, Tacoma, WA.

 9-5-08 *K Proctor*
Date Signature

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DIVISION II

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STATE OF WASHINGTON
BY
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

and

HOWARD ODELL CARR,

Appellant.

CAUSE NO. 37380-7

AMENDED DECLARATION OF
REBECCA TAYLOR, LEGAL
ASSISTANT

I, Rebecca Taylor, declare under penalty of perjury that the following declaration is true and correct:

That I deposited in the U.S. Mail, postage prepaid, a true and correct copy of appellant's opening brief to Howard Odell Carr, c/o of Wanda Carr, 195 N. Razor Clam Dr. SW, Ocean Shores, WA 98569 and to Howard Odell Carr, DOC #899722, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98530

Dated this 10th day of September, 2007.



REBECCA TAYLOR

CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws of the State of Washington that the following is a true and correct: That on this date, I delivered via ABC-LMI a copy of the Declaration of Rebecca Taylor to Kathleen Proctor, Sr. Appellate Deputy, 946 CC-Building, Tacoma, WA.

9-10-07
Date


Signature

DECLARATION OF REBECCA TAYLOR
Page 1

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