

FILED
COURT OF APPEALS
DIVISION II

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NO. 37949-0-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

BY _____
DEPUTY

STATE OF WASHINGTON, Respondent

v.

FARON WILLIAM ROPER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN F. NICHOLS
CLARK COUNTY SUPERIOR COURT CAUSE NO. 07-1-01660-1

BRIEF OF RESPONDENT

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I. STATEMENT OF THE FACTS

The State accepts the statement of facts as set forth by the defendant. Where additional information is needed, it will be supplied in the argument section of this brief.

II. RESPONSE TO ASSIGNMENT OF ERROR NO. 1

The first assignment of error raised by the defendant is a claim that the five year old complaining witness should not have been allowed to testify because she was not competent and the defendant further claims that she did not voluntarily take an oath to testify truthfully.

The complaining witness in this case, S.H., testified at a competency and 9A.44.120 hearing. She also testified at the trial.

At the time of the competency/9A.44.120 hearing the child was asked whether or not she would be able to tell the truth concerning the incidents that occurred and she indicated that she would. (RP 9-11).

Throughout the questioning she was able to give clarifying statements and was further able to discern right from wrong and had a recall of the events that she was alleging. For example, when she was asked where the activities with the defendant took place and she indicated "only my house and his house". (RP 12, L11). Another example was how the child was

able to indicate who she talked to about this, whether she'd gone to a park, the nature of a building, and she appeared to have a very clear recollection of those events. When she was asked why she was going to talk to people she indicated because the defendant had treated her badly. (RP 13-15).

It further appears from the transcript that in many places she is nodding or shaking her head and not giving a verbal response. This occurs at the time she is being formally given the oath and occurs many times when she is discussing this matter at the hearing. For example, she is reminded to say "yes" or "no" in discussing whether or not she told her mom about this. (RP 16). In talking to the prosecutor she doesn't audibly respond but the prosecutor indicates it was an affirmative response and goes on with her questioning. (RP 14). Again, the child does so in discussion of where activities took place, where she doesn't give an audible response but has obviously nodded in agreement, because the next question is "Was that a "yes"?" (RP 12, L11-15). At the time of the 9A.44.120 hearing the child was sworn in by the court and indicates that she will be able to tell the truth. (RP 5). Giving the nature of her inaudible responses and merely nodding in agreement, this becomes obvious when she comes ready to testify in front of the jury. Thus, when the child is being sworn in before the jury, she indicates to the court that she is shy and the court says, "I know you are shy, but you promise to tell the truth,

don't you? Say, "yes"". (RP 20, L19-25). Obviously she has nodded in agreement at the previous time and the court is accepting that yes, but making sure that it appears on the record.

A witness is not competent to testify if the witness appears incapable of receiving just impressions of the facts, respecting which they are examined, or relating them truly. RCW 5.60.050(2). In State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967), the Washington Supreme Court established a five part test to determine if a young child is competent to testify. The child must demonstrate:

- 1) An understanding of the obligation to speak the truth on the witness stand;
- 2) The mental capacity at the time of the occurrence concerning which she is to testify, to receive an accurate impression of it;
- 3) A memory sufficient to retain an independent recollection of the occurrence;
- 4) The capacity to express in words her memory of the occurrence; and
- 5) The capacity to understand simple questions about it.

A trial court's competency determination is accorded great deference and will not be disturbed on appeal absence a manifest abuse of discretion. In re Dependency of A.E.P., 135 Wn.2d 208, 223, 956 P.2d

297(1998). The court abuses its discretion when its decision is manifestly unreasonable or is based on untenable reasons or grounds. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Because “the competency of a youthful witness is not easily reflected in a written record”, we must rely on the trial judge, “who sees the witness, notices the witness’s manner, and considers her capacity and intelligence”. State v. Woods, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005). The Appellate Court will examine the entire record when reviewing the nature of the trial court’s decision concerning competency. State v. Woods, 154 Wn.2d at 617.

At the end of the competency/9A.44.120 hearing the court, following the Allen factors, set forth his opinion:

THE COURT: They’re not as important. I think what they say is – okay.

Well, it’s interesting. I thought, frankly as far as her age goes, she is a very receptive witness. She under – she was very (inaudible). What I’m saying is we can actually understand her, and I think she tracked pretty well taking into consideration of her age. Now, I lost all my notes.

But as far as the first thing we have to look at is, is competency and was she able to speak the truth. Yeah. I think that was established. She was able to speak the truth. She knew the difference between the truth and lie; and, in fact, when asked various questions she was able to say, “No, that is not what happened.” So middle count – “capacity to receive an accurate impression.” She did, and was able to recite what she alleges happened.

“Memory sufficient to retain independent recollection of the occurrence.” Well, yeah, because she recited and knew what the occurrence was. “Capacity to express in words her memory of the occurrence.” Yeah, she expressed that. “Capacity to understand simple questions about the occurrence.” We didn’t get into that too much other than she was able to say that to Officer Bull and her mother. On the stand, there wasn’t inquiry about that. So I think that probably there might be reserve on that, but with the understanding that she repeated this to her mother, repeated to the officer. She has the capacity to understand simple questions about it.

-(RP 164, L5 – 165, L8)

The appellant in his brief mentions that the trial court made the determination of competency of the complaining witness, but argues that when you review the entire record of the case, including her testimony at both the 9A.44.120 hearing and at trial, “in light of the other evidence presented” that there’s an indication that the trial court abused its discretion in allowing her to testify. (Brief of Appellant, Page 15-16).

The State submits that it is extremely hard to justify that type of argument when there is such strong and overwhelming corroboration of what the child says. The corroboration came in the form of admissions and statements that he gave to a 25 year old relative of his, Christopher Dawson, and also the statements that he’d given to the police concerning his sexual involvement with the complaining witness child. In both of

those instances he is able to relate specific incidents that were quite similar to the type of activity and incidents referred to by the child when she testified. The State submits that given the overwhelming evidence and the totality of the circumstances it is difficult to see how the trial court's decision was manifestly unreasonable or was based on untenable grounds. The Appellate Courts have accorded great deference to the trial court because the trial judge is the one who has the opportunity to view the child and is aware of the dynamic in the court room. There is absolutely nothing in this record to indicate that the trial judge abused his discretion.

III. RESPONSE TO ASSIGNMENT OF ERROR NO. 2

The second assignment of error raised by the defendant is a claim that the trial court erred in allowing the 9A.44.120 statements because the State had failed to meet the requirements under the statute. The defendant goes on to maintain that an examination of the facts in the case reveal that the majority of the factors necessary dealing with time, content, and circumstance of the child's statements had little indicia of reliability to them.

Admissibility of child's statements under RCW 9A.44.120 does not depend on whether the child is competent to take the witness stand, but on whether the comments and circumstances surrounding those statements

indicate that they are reliable. State v. C.J., 148 Wn.2d 672, 685, 63 P.3d 765 (2003). The critical question is whether there is sufficient reliability existing to admit the complaining witness's statements. This determination by the trial court is reviewed for an abuse of discretion. State v. Grogan, 147 Wn. App. 511, 195 P.3d 1017 (2008). The Ryan factors are well known and are as follows:

- 1) Whether there is an apparent motive to lie;
- 2) The general character of the declarant;
- 3) Whether more than one person heard the statements;
- 4) Whether the statements were made spontaneously; and
- 5) The timing of the declaration and relationship between the declarant and the witness;
- 6) The statement contains no express assertion about past fact;
- 7) Cross-examination could not show the declarant's lack of knowledge;
- 8) The possibility of the declarant's faulty recollection is remote; and
- 9) The circumstances surrounding the statement are such that there is no reason to suppose the declarant misrepresented the defendant's involvement.

State v. Ryan, 103 Wn.2d 165, 175-176, 691 P.2d 197 (1984);

State v. Borboa, 157 Wn.2d 108, 121-122, 135 P.3d 469 (2006).

Not all of the factors must be satisfied for admissibility, but the factors must be “substantially met”. State v. Woods, 154 Wn. 2d 613, 623-624, 114 P.3d 1174 (2005).

At the end of the presentation of the 9A.44.120 hearing the court discussed his conclusions and utilized the Ryan factors when doing so:

THE COURT: ...Now, going to the Ryan factors. “An apparent motive to lie.” Well, I guess she was in trouble. I don’t know if she was in trouble. She had been yelled at before, but, okay. And there may have been something there. “The general character of the declarant.” Again, I think it’s kind of – I don’t think we have a bad reputation here. That’s a silly factor.

“Did more than one person hear the statements?” Yeah. Well, that – you’re right. The mother heard it. She was able to repeat it. Then: “The statements were made spontaneously.” There’s testimony by the mother – was that, “It came out of the blue,” so that makes kind of – because we’re talking about one issue, and out of the blue she said something else.

“Timely, the declaration and the relationship between the declarant and the witness.” Again, sounds like it was fairly close in time. “The relationship between the declarant and the witness,” the mother – okay. (Inaudible) that is supposed to cut. I’ll swift to number seven. “Cross-examination could not show.” I think Mr. Kurtz was being very careful with that. I thought he did a very good job in trying to relate to that. Yes. She may have been a little – well, excuse me, may have been a little reserved about that; but, again, she didn’t waiver from her statement that it didn’t happen.

“Possibility of the declarant faulty recollection is remote.” Don’t know. I agree with you. We don’t know. We don’t know how remote in time it was. She wasn’t able to pinpoint the times very well other than it’s happened here and there, and I live in the yellow house. We don’t know that one.

“Circumstances surrounding the statement are such that the declarant has no reason to suppose.” And I think that I disagree with the counsel on that one because all the indication is it was a good relationship, considered a very close relationship. That they – you know, they consider themselves boyfriend and girlfriend, whatever that means, so the – there is no motive to turn on her uncle. It sounds like a favorite uncle.

So with all that, I think she is competent and I think that she’s reliable so far.

-(RP 166, L4 – 167, L20)

As argued previously, the circumstances clearly demonstrate that the child, after indicating she was shy, reluctantly had discussed these matters at a pretrial hearing and also in front of the jury. Further, many of the activities that she discussed were corroborated by statements that the defendant gave to a relative and also statements that he gave to the police at a later time. As the Appellate Court noted in C.J., “the trial court is necessarily vested with considerable discretion in evaluating the indicia of reliability, including whether the evidence demonstrates that a declarant was capable of receiving just impressions of facts and of relating them

truthfully. State v. C.J., 148 Wn.2d at 686. There is nothing manifestly unreasonable in the trial court's conclusions concerning not only the competency of the child but the accuracy of the information necessary to allow it to proceed to the jury with both the child testifying and the admissibility of the 9A.44.120 statements.

IV. RESPONSE TO ASSIGNMENT OF ERROR NO. 3

The third assignment of error raised by the defendant is that the trial court failed to give a Petrich instruction and thus violated the defendant's rights under the Washington State Constitution.

The Petrich instruction is necessary when the prosecution presents evidence of several acts that could form the basis of one count charged. In that instance then the State can either elect a specific act during the time period in question, or give a Petrich instruction which indicates there are multiple acts that the jury must be unanimous on which of those acts within the time period took place. State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); State v. Fisher, 165 Wn.2d 727, 202 P.3d 937 (2009).

However, in our case, the State did not allege several acts in one count that could be the basis of the criminal activity. Therefore the Petrich

instruction is unnecessary. State v. Noltie, 116 Wn.2d 831, 842-843, 809 P.2d 190 (1991).

The Amended Information in our case charged the defendant with four counts of Rape of a Child in the First Degree (CP 48). In doing this the State used the same timeframe in each of the counts (between February 1, 2007 and July 20, 2007) and in each instance further indicated that the act of sexual intercourse between the defendant and the complaining witness took place during that time. However, in each of the four counts it's only referring to one instance of sexual activity. A copy of the Amended Information (CP48) is attached hereto and by this reference incorporated herein.

The court instructed the jury (CP 50) under Instruction No. 4 that a separate crime was charged in each count and that they must be decided separately. Further, that the verdict on one count should not control verdicts on any other counts. In these instructions the elements are set forth in Instructions 8 through 11. The Amended Information refers to it as occurring on "an occasion" and the Jury Instructions indicate "on a date separate". In either instance, the State is referring to one act during that period of time, as charged. It is not relying on multiple acts occurring over a course of time. Thus, when we look at the Verdict Forms for the four counts (CP 65, 66, 67, and 68) they refer to the act of sexual impropriety

“on an occasion”. Copies of the Verdict Forms are attached hereto and by this reference incorporated herein.

Further, this is consistent with the nature of the prosecution as outlined by the prosecutor in her closing argument:

CLOSING STATEMENT (Deputy Prosecutor): Now all the counts – all four of the counts are the same: Rape of a Child in the First Degree. And so it’s my duty as the State to prove four separate incidents. You can’t say, “Oh, yeah. Well, we found it happened once, so we find guilty on every single one.” You have to believe that there were four separate incidents where this happened. And you have to all agree that there were four separate incidents where this happened. And so that’s why it says, “On a date separate from that in Count Two, Three, Four, “ et cetera, “the defendant had sexual intercourse,” and I always bring – also, so that’s really the two.

Cynthia Bull from the Child Abuse Intervention Center, testified that the defendant had talked with her about his activities with the child and had clearly discussed with her oral vaginal contact and had also mentioned to her that one time he penetrated her vagina with his fingers. He recalled it because she didn’t like it and it hurt. (RP 165-166). The defendant also talked with Christopher Dawson and admitted to him on a number of occasions that he had had inappropriate sexual activity with the complaining witness. He described that to Chris Dawson (who is 25) at least three instances of oral vaginal contact that he can recall. In fact, he

gave detailed information to Mr. Dawson concerning this type of inappropriate activity with the child. (RP 89-98).

QUESTION (Deputy Prosecutor): Uh-huh. Did he talk to you about the specific allegations or the specific incidents –

ANSWER (Christopher Dawson): Yeah.

QUESTION: - between him and –

ANSWER: Yes.

QUESTION: - Sierra?

ANSWER: Yes.

QUESTION: What – did he describe them to you?

ANSWER: He described about three of them.

QUESTION: Okay. Could you tell us what he described?

ANSWER: Yeah.

QUESTION: We'll start with the first one. Doesn't have to be first in time, but the first one that you remember.

ANSWER: Okay. They were – we had a red bunk bed in the girls' room, and she would kind of swing from the bunk beds from the top. I really didn't like her to do that, but, you know, she's pretty good with the gymnastics, so she does that a lot.

She swings and 0 so he was in there playing with her. She had a dress on. And he said that she asked him to give her a kiss, and so he gave her a kiss. And then they would say, "Now where?" She would say – he would say, "Now where?" And she would point to a section of her body, whether it be her hand or her elbow or just parts of her, you know, parts that –

QUESTION: Mm-hmm.

ANSWER: - and he would kiss it, kiss that part, and then kiss that part. And his words were, "Eventually she kind of ran out of places to pick, and then so she pointed into her privates, and she asked him, 'Well, how about kiss here?'" So he did.

QUESTION: Mm-hmm. And so was there another incident that he described?

ANSWER: Yes. There was a time that he said that she had gotten up in the middle of the night when – when he was staying there he would sleep down in the family room. She got up in the middle of the night, went down there and asked him to kiss her in her privates, and he did and said that he couldn't do it because it tasted like pee. Apparently she had an accident. That was another time. And –

QUESTION: So did he say whether he actually did it at that incident?

ANSWER: Yeah. He said it tasted like pee. He couldn't keep –

QUESTION: Okay. So –

ANSWER: - doing it. And then the other time is – they were playing tent, which is – they make little clubhouses with blankets, all of them, the kids together, they play like this, so –

QUESTION: Mm-hmm.

ANSWER: - it's, you know, she just chose to play with Uncle Faron at this time when they played tent. So they were using the bed as the tent, had blankets that were draped over the bed, and was – she was – they were both underneath of the bed, and he had said that that was another time that he was doing "it". So there's – I mean, he didn't

say exactly what “it” was when he was telling me that instance, so I don’t know what “it” was. But he was saying that was another time that “it” happened.

QUESTION: Based on the context of the conversation, did you think that “it” was what he had been talking about during –

ANSWER: Yeah.

-(RP 98, L17 – 101, L6)

The State submits that given the nature of the charging, testimony, and the jury instructions, that a Petrich instruction was not needed under these circumstances.

If the court feels that a Petrich instruction was warranted under the facts, then the State would indicate that this would constitute harmless error. When a court reviews a multiple acts case where there was no election by the State or unanimity instruction by the trial court, it must determine if the error was harmless. State v. Kitchen, 110 Wn.2d at 411. An error is not harmless if a rational trier of fact could have reasonable doubt as to whether each incident established the crime beyond a reasonable doubt. Kitchen, 110 Wn.2d at 411. The State would submit that in our case, there was overwhelming evidence, both from the child and witnesses that the defendant had talked to about his activity with the child.

A jury could harbor no reasonable doubts as to whether or not each of these incidents took place.

V. CONCLUSION

The trial court should be affirmed in all respects.

DATED this 1⁹ day of May, 2009.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:


MICHAEL C. KINNIE, WSBA#7869
Senior Deputy Prosecuting Attorney

FILED

APR 22 2008

Sherry W. Parker, Clerk, Clark Co.

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

STATE OF WASHINGTON,

Plaintiff,
v.

FARON WILLIAM ROPER, AKA FARON
WILLIAMS ROPER

Defendant.

AMENDED INFORMATION

No. 07-1-01660-1

(VPD 07-14791)

COMES NOW the Prosecuting Attorney for Clark County, Washington, and does by this inform the Court that the above-named defendant is guilty of the crime(s) committed as follows, to wit:

COUNT 01 - RAPE OF A CHILD IN THE FIRST DEGREE - 9A.44.073

That he, FARON WILLIAM ROPER also known as FARON WILLIAMS ROPER, in the County of Clark, State of Washington, between February 1, 2007 and July 20, 2007 on an occasion separate from counts 2, 3, and 4, did have sexual intercourse with S.A.H.-M., who was less than twelve years old and not married to the defendant and the defendant was at least twenty-four months older than the victim; contrary to Revised Code of Washington 9A.44.073.

This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(29), RCW 9.94A.030(33), RCW 9.94A.505(2)(a)(v) and RCW 9.94A.570).

COUNT 02 - RAPE OF A CHILD IN THE FIRST DEGREE - 9A.44.073

That he, FARON WILLIAM ROPER also known as FARON WILLIAMS ROPER, in the County of Clark, State of Washington, between February 1, 2007 and July 20, 2007 on an occasion separate from counts 1, 3, and 4, did have sexual intercourse with S.A.H.-M., who was less than twelve years old and not married to the defendant and the defendant was at least twenty-four months older than the victim; contrary to Revised Code of Washington 9A.44.073.

This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act (RCW 9.94A.030(29), RCW 9.94A.030(33), RCW 9.94A.505(2)(a)(v) and RCW 9.94A.570).

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3 **COUNT 03 - RAPE OF A CHILD IN THE FIRST DEGREE - 9A.44.073**

4 That he, FARON WILLIAM ROPER also known as FARON WILLIAMS ROPER, in the County of
5 Clark, State of Washington, between February 1, 2007 and July 20, 2007 on an occasion
6 separate from counts 1, 2, and 4, did have sexual intercourse with S.A.H.-M., who was less than
7 twelve years old and not married to the defendant and the defendant was at least twenty-four
8 months older than the victim; contrary to Revised Code of Washington 9A.44.073.

9 This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act
10 (RCW 9.94A.030(29), RCW 9.94A.030(33), RCW 9.94A.505(2)(a)(v) and RCW 9.94A.570).

11 **COUNT 04 - RAPE OF A CHILD IN THE FIRST DEGREE - 9A.44.073**

12 That he, FARON WILLIAM ROPER also known as FARON WILLIAMS ROPER, in the County of
13 Clark, State of Washington, between February 1, 2007 and July 20, 2007 on an occasion
14 separate from counts 1,2, and 3, did have sexual intercourse with S.A.H.-M., who was less than
15 twelve years old and not married to the defendant and the defendant was at least twenty-four
16 months older than the victim; contrary to Revised Code of Washington 9A.44.073.

17 This crime is a "most serious offense" pursuant to the Persistent Offender Accountability Act
18 (RCW 9.94A.030(29), RCW 9.94A.030(33), RCW 9.94A.505(2)(a)(v) and RCW 9.94A.570).

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ARTHUR D. CURTIS
Prosecuting Attorney in and for
Clark County, Washington

Date: April 22, 2008

BY: 
Tonya R. Riddell, WSBA #31465
Deputy Prosecuting Attorney

DEFENDANT: FARON WILLIAM ROPER, AKA FARON WILLIAMS ROPER			
RACE: W	SEX: M	DOB: 8/31/1959	
DOL: ROPERFW410NU WA		SID:	
HGT: 60	WGT: 185	EYES: HAZ	HAIR: GRY
WA DOC:		FBI:	
LAST KNOWN ADDRESS(ES):			
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AMENDED INFORMATION - 2
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FILED

APR 23 2008

Sherry W. Parker, Clerk, Clark Co.

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

STATE OF WASHINGTON,

Plaintiff,

v.

FARON WILLIAM ROPER, AKA FARON
WILLIAMS ROPER,

Defendant.

No. 07-1-01660-1

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APR 22 2008

Sherry W. Parker, Clerk, Clark Co.

Reed @ 3:20 pm
J. Williams
Deputy Clerk

COURT'S INSTRUCTIONS TO THE JURY



SUPERIOR COURT JUDGE

April 22, 2008

DATE

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INSTRUCTION NO. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the

witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence. Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful),

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

INSTRUCTION NO. 2

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

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If, after such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

INSTRUCTION NO. 5

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

INSTRUCTION NO. 6

A person commits the crime of rape of a child in the first degree when that person has sexual intercourse with another person who is less than twelve years old and who is not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

INSTRUCTION NO. 7

Sexual intercourse means any penetration of the vagina or anus however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex or any act of sexual contact between persons involving the sex organs of one person and the mouth of another whether such persons are of the same or opposite sex.

INSTRUCTION NO. 3

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

(1) That between February 1, 2007 and July 20, 2007, on a date separate from that in Counts 2, 3 and 4, the defendant had sexual intercourse with S.A.H.-M.;

(2) That S.A.H.-M. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least twenty-four months older than S.A.H.-M. and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved 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.

INSTRUCTION NO. 9

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

(1) That between February 1, 2007 and July 20, 2007, on a date separate from that in Counts 1, 3 and 4, the defendant had sexual intercourse with S.A.H.-M.;

(2) That S.A.H.-M. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least twenty-four months older than S.A.H.-M. and

(4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved 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.

INSTRUCTION NO. 10

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

- (1) That between February 1, 2007 and July 20, 2007, on a date separate from that in Counts 1, 2 and 4, the defendant had sexual intercourse with S.A.H.-M.;
- (2) That S.A.H.-M. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That the defendant was at least twenty-four months older than S.A.H.-M. and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved 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.

INSTRUCTION NO. 11

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

- (1) That between February 1, 2007 and July 20, 2007, on a date separate from that in Counts 1, 2 and 3, the defendant had sexual intercourse with S.A.H.-M.;
- (2) That S.A.H.-M. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That the defendant was at least twenty-four months older than S.A.H.-M. and
- (4) That the acts occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved 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.

INSTRUCTION NO. 12

When you begin deliberating, you should first select a presiding juror. The presiding juror's duty is to see that you discuss the issues in this case in an orderly and reasonable manner, that you discuss each issue submitted for your decision fully and fairly, and that each one of you has a chance to be heard on every question before you.

During your deliberations, you may discuss any notes that you have taken during the trial, if you wish. You have been allowed to take notes to assist you in remembering clearly, not to substitute for your memory or the memories or notes of other jurors. Do not assume, however, that your notes are more or less accurate than your memory.

You will need to rely on your notes and memory as to the testimony presented in this case. Testimony will rarely, if ever, be repeated for you during your deliberations.

If, after carefully reviewing the evidence and instructions, you feel a need to ask the court a legal or procedural question that you have been unable to answer, write the question out simply and clearly. In your question, do not state how the jury has voted. The presiding juror should sign and date the question and give it to the bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for recording your verdict.

You must fill in the blank provided in each verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict forms to express your

decision. The presiding juror must sign the verdict forms and notify the bailiff. The bailiff will bring you into court to declare your verdict.

FILED

APR 23 2008

Sherry W. Parker, Clerk, Clark Co.

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

STATE OF WASHINGTON,

Plaintiff,

v.

FARON WILLIAM ROPER, AKA FARON
WILLIAMS ROPER,

Defendant.

No. 07-1-01660-1

VERDICT - COUNT 1

We, the jury, find the defendant, FARON WILLIAM ROPER, AKA FARON
WILLIAMS ROPER, Guilty

(Write in not guilty or guilty)

of the crime of RAPE OF A CHILD IN THE FIRST DEGREE, as Charged in Count 1, on
an occasion separate from that in Counts 2, 3 and 4.

DATED this 23 day of April, 2008.

Frans Maloy

Presiding Juror

received

April 23, 2008 c 11:30 AM

[Signature]

59

FILED

APR 23 2008

Sherry W. Parker, Clerk, Clark Co.

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

STATE OF WASHINGTON,

Plaintiff,

v.

FARON WILLIAM ROPER, AKA FARON
WILLIAMS ROPER,

Defendant.

No. 07-1-01660-1

VERDICT - COUNT 2

We, the jury, find the defendant, FARON WILLIAM ROPER, AKA FARON
WILLIAMS ROPER, Guilty

(Write in not guilty or guilty)

of the crime of RAPE OF A CHILD IN THE FIRST DEGREE, as charged in Count 2, on
an occasion separate from that in Counts 1, 3 and 4.

DATED this 23 day of April, 2008.

Presiding Juror

Received April 23, 2008 @ 11:30 AM

FILED

APR 23 2008

Sherry W. Parker, Clerk, Clark Co.

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

STATE OF WASHINGTON,

Plaintiff,

v.

FARON WILLIAM ROPER, AKA FARON
WILLIAMS ROPER,

Defendant.

No. 07-1-01660-1

VERDICT – COUNT 3

We, the jury, find the defendant, FARON WILLIAM ROPER, AKA FARON
WILLIAMS ROPER, Guilty

(Write in not guilty or guilty)

of the crime of RAPE OF A CHILD IN THE FIRST DEGREE, as charged in Count 3, on
an occasion separate from that in Counts 1, 2, and 4.

DATED this 23 day of April, 2008.

James Maloy
Presiding Juror

Received April 23, 2008 @ 11:30 am

[Signature]

[Signature]

FILED

APR 23 2008

Sherry W. Parker, Clerk, Clark Co.

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

STATE OF WASHINGTON,

Plaintiff,

v.

FARON WILLIAM ROPER, AKA FARON
WILLIAMS ROPER,

Defendant.

No. 07-1-01660-1

VERDICT – COUNT 4

We, the jury, find the defendant, FARON WILLIAM ROPER, AKA FARON
WILLIAMS ROPER, Guilty

(Write in not guilty or guilty)

of the crime of RAPE OF A CHILD IN THE FIRST DEGREE, as charged in Count 4, on
an occasion separate from that in Counts 1, 2, and 3.

DATED this 23 day of April, 2008.

Travis M. Moley
Presiding Juror

received April 23, 2008 @ 11:30 pm
[Signature]

[Signature]

FILED
COURT OF APPEALS
DIVISION II

09 MAY 22 AM 11:19

STATE OF WASHINGTON

BY _____ DEPUTY

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

STATE OF WASHINGTON,
Respondent,

v.

FARON WILLIAM ROPER,
Appellant.

No. 37949-0-II

Clark Co. No. 07-1-01660-1

DECLARATION OF
TRANSMISSION BY MAILING

STATE OF WASHINGTON)

: ss

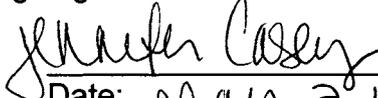
COUNTY OF CLARK)

On May 21, 2009, I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to the below-named individuals, containing a copy of the document to which this Declaration is attached.

TO:	David Ponzoha, Clerk Court of Appeals, Division II 950 Broadway, Suite 300 Tacoma, WA 98402-4454	John A. Hays Attorney at Law 1402 Broadway, Ste. 103 Longview, WA 98632
	Faron William Roper DOC# 270975 Clallam Bay Corrections Ctr. 1830 Eagle Crest Way Clallam Bay, WA 98326-9723	

DOCUMENTS: Brief of Respondent

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.



Date: May 21, 2009.

Place: Vancouver, Washington.