

No. 39148-1-II
THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

Vs.

RAYMOND HERNANDEZ, JR.

Appellant.

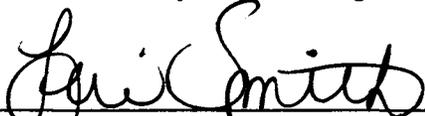
STATE OF WASHINGTON
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COURT REPORTERS
HERNDON

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

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STATEMENT OF THE CASE

Without waiving the right to contest any facts set out by the Appellant, and subject to the citations to the record below, Appellant's recitation of the statement of the case is adequate for purposes of this response.

ARGUMENT

I. THE JURY INSTRUCTIONS ADEQUATELY INFORMED THE JURY THAT IT MUST UNANIMOUSLY AGREE THAT THE STATE PROVED BEYOND A REASONABLE DOUBT A SEPARATE AND DISTINCT ACT FOR EACH COUNT CHARGED, BUT IF THERE WAS ERROR IT SHOULD BE FOUND HARMLESS.

Hernandez claims that the jury instructions pertaining to unanimity "exposed him to multiple punishments for the same offense." Although the instructions did not contain the "separate and distinct" language set out in State v. Borsheim, infra, they were nonetheless adequate under State v. Ellis, infra, and therefore there was no double jeopardy violation, and Hernandez's convictions should be affirmed.

A trial court's jury instructions are reviewed for errors of law *de novo*. State v. Barnes, 153 Wash.2d 378, 382, 103 P.3d 1219 (2005). Jury instructions must be read as a whole, and each instruction must be viewed in context. State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997). Jury instructions are sufficient if

they permit the parties to argue their theories of the case, do not mislead the jury and, when read as a whole, correctly inform the jury of the applicable law. State v. Clausing, 147 Wash.2d 620, 626, 56 P.3d 550 (2002).

Hernandez did not object to any of the jury instructions below. However, 'manifest error affecting a constitutional right' may be raised for the first time on appeal. RAP 2.5(a)(3). Arguments based on jury unanimity and double jeopardy are constitutional. State v. Ellis, 71 Wn.App. 400, 404, 859 P.2d 632 (1993). Accordingly, these issues may be considered by this Court even though Hernandez failed to raise them below.

Hernandez relies largely upon the rulings in State v. Borsheim, 140 Wn.App. 357, 365-374, 165 P.3d 417 (2007), and State v. Hayes, 81 Wn.App. 425, 431, 914 P.2d 788 (1996), for his claim that the jury instructions were improper as to the multiple counts of Child Molestation. Under these cases, where multiple counts of sexual abuse are alleged to have occurred within the same charging period, the jury must find "separate and distinct" acts for convictions on each count. Borsheim, 140 Wn.App. at 357. However, Borsheim also seems to note some circumstances where

failing to give the "separate and distinct act of sexual intercourse for each count" might not necessarily be error. Id. at 368.

For example, the Borsheim Court states that the instructional error there was "further compounded" by the fact that there was only one "to convict" instruction setting out all four counts. Id. The Borsheim Court then compared that error to cases that instructed more appropriately by giving separate "to convict" instructions for *each count alleged*. Id., citing State v. Noltie, 101 Wn.2d 566, 683 P.2d 173 (1984)(two separate "to convict" instructions for two counts of rape);Ellis, 71 Wn.App. at 401-02(four separate "to convict" instructions given for two counts of child molestation and two counts of child rape). In the present case, there were five counts of child molestation alleged, all occurring within the same time period. CP 87-90. But separate "to convict" instructions were given for each count alleged in this case. See jury instructions 8 thru 11 and 3RP 577-580. Although the instructions in this case were not worded exactly as in Ellis, at least in this case there was a separate "to convict" instruction given for each count (using the same exact language in each of the "to convict" instructions). Id. However, it is true that the instructions here were different than in Ellis because in Ellis the "to convict"

instructions for each count alleged a different time period for each count. Nonetheless, the fact that there are separate "to convict" instructions for each count in the present case still distinguishes this case somewhat from Borsheim. Here, given the fact that at least a separate "to convict" instruction was given as to each count charged, this case does not have the same "compounding factor" singled out in Borsheim.

Another mitigating factor present in this case is that here, similar to Ellis, instruction number 4 states, "[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." 3RP 576; Instruction Number 4; Ellis, 71 Wn.App. at 402. While the Borsheim Court noted that this instruction was not sufficient standing alone--the Borsheim Court did admit that this instruction, when viewed together with the separate "to convict" instructions, and other instructional language in Ellis, was at least "marginally adequate." Borsheim at 369, *citing* Ellis at 370. That should be true here as well.

Furthermore, in the present case, the "standard" unanimity instruction was also given. Instruction number 5; 3RP 576. Respondent fully understands the distinction between a "unanimity"

issue and the double jeopardy issue raised by Hernandez here.

However, Court have considered the fact that a unanimity instruction was given in conjunction with the other instructions when deciding the double jeopardy issue alleged here. Ellis at 402-406.

The unanimity instruction given in this case reads as follows:

The State alleges that the defendant committed acts of Child Molestation in the First Degree on multiple occasions. To Convict the defendant on any count of Child Molestation in the First Degree, one particular act of Child Molestation in the First Degree must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not agree that the defendant committed all the acts of Child Molestation in the First Degree.

3RP 576; Jury Instruction Number 5.

In Ellis, the court's decision that the instructions were adequate "was based on the information given to the jurors by the instructions viewed as a whole, rather than by an element of a single instruction viewed in isolation." Borsheim at 369, citing Ellis at 401-06. The same should be true in the present case. Here we have (a) separate "to convict" instructions for each count; (b) the "a separate-crime-is-charged-in-each-count" instruction; and (c) the "you-must-unanimously-agree-as-to-which-act-has-been-proved" instruction number 5. Although there was no instruction using the express "separate and distinct" language as set out in Borsheim,

the instructions here, when read together, should be adequate because they attempted to convey both 'the idea that all 12 jurors must agree on the act used as a factual basis for any given count' (unanimity) and 'the idea that the same act cannot be used to convict twice' (double jeopardy)." Borsheim at 370, *quoting Ellis*, 71 Wn.App. at 407.

Furthermore, in closing argument, the State correctly and emphatically expressed to the jury the necessity of finding "separate and distinct" acts for each count alleged. Specifically, the prosecutor said:

[f]or five counts you have to be convinced beyond a reasonable doubt molestation happened on five different occasions. That's all [Instruction five] means. One act equals one count. You have to be convinced that there was a different act for each of the five counts.

2RP 603(emphasis added). Thus, the prosecutor clearly emphasized to the jury that it needed to be convinced beyond a reasonable doubt that there was a different act proven for each count. Id. And, reviewing court may consider the State's closing argument, together with the instructions as a whole, when resolving issues of this type. State v. Hoffman, 116 Wn.2d 51, 106, 804 P.2d 577 (1991)(noting in its analysis that the prosecutor told the jury in closing argument that it must be unanimous); State v. Bland, 71

Wn.App. 345, 352, 860 P.2d 1046 (1993) (State's closing argument, clarifying the particular act for each count, is one of the ways State elects to tell the jury which act it relied on for a conviction); *but see State v. Kier*, 164 Wash.2d 798, 811-14, 194 P.3d 212 (2008) (suggesting that closing argument *alone* cannot constitute a "clear election" that satisfies the constitutional right to juror unanimity in a verdict).

Because the instructions given in this case, when read as a whole, together with the prosecutor's correct statement of the law in his closing argument, conveyed "to the jury the need for it to base its decision on each charged count on a different underlying event," the instructions given here were adequate.

Furthermore, as correctly predicted by Hernandez in his opening brief, Respondent encourages this Court to not follow State v. Berg, 147 Wn.App. 923, 198 P.3d 529 (2008), and instead rely on the decision in State v. Hayes, 81 Wn.App. 425, 914 P.2d 788, *review denied*, 130 Wn.2d 1013(1996). In Hayes, the Court held that "[n]o double jeopardy violation results when the information, instructions, testimony, and argument clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense." Hayes, 81 Wn.App. at 440

(emphasis added). Hayes, together with the cases cited above, shows that both the jury instructions and the State's closing argument, as well as testimony presented, can be considered in determining whether the State sufficiently proved there were "separate and distinct acts" supporting each charge. The overwhelming evidence presented by the State to support separate and distinct acts is further set out below, after Respondent disposes of a couple of other arguments made by Hernandez.

Hernandez complains that the charging document cannot be considered when determining whether the charges were based upon separate acts because the charging document "is not evidence." Brief of Appellant 14. However, it is clear that appellate courts have considered the charging document, together with the instructions as a whole, plus information from closing arguments. See e.g., Hoffman and Bland, supra. Furthermore, Hernandez's substantive discussion of State v. Kier should be disregarded because in Kier, the issue was *merger*--which is a sentencing issue that pertains only to situations where a crime is raised to a higher degree based upon charged conduct defined as a crime elsewhere in the criminal code (i.e., second degree robbery is raised to first degree robbery when the defendant also assaults the victim and

both the robbery and the assault (the force used to raise the robbery to the higher degree) are charged). While it is true that merger is examined in terms of double jeopardy, it is still a different analysis than here, where multiple acts each forming one specific crime are at issue. Therefore, the ruling in Kier is not germane here.

What is germane, however, is the fact that the State presented overwhelming evidence that a separate and distinct act of molestation was committed by Hernandez supporting each of the five counts of child molestation alleged. Indeed, in deciding the issues raised by Hernandez in this case, this Court should weigh the alleged errors against the undisputable fact that the State presented overwhelming evidence showing that Hernandez molested G.H. in multiple ways, on multiple occasions, in multiple locations in Hernandez's residence. Citations to the record are set out below. Similarly, the significance of any alleged error should be further weighed against the substantial evidence showing that Hernandez had similarly molested a different young girl, S.K., and that Hernandez used a very similar grooming method of befriending and bestowing gifts upon that young girl for the purpose of molesting her--just as he did with G.H. This is demonstrated by the

testimony and physical evidence presented as to G.H., together with the testimony and physical evidence regarding the other victim, S.K. To that end, what follows is a summary of evidence presented at trial (with citations to the record) showing that the evidence in this case was overwhelming, and indeed supported a separate and distinct act supporting each of Hernandez's convictions. Thus, Respondent is arguing both that there was overwhelming evidence presented showing a separate and distinct act for each charge to "mitigate" the claimed double jeopardy issue as to the jury instructions, as well as arguing that if there was instructional error, it should be deemed harmless. Respondent concedes that it has not found a Washington case that expressly states that a double jeopardy error can be deemed harmless. However, under the facts presented here, it should be.¹

Overwhelming Evidence Presented At Trial

At the time of trial in the present case, the victim, G. H., was twelve-and-a-half years old--her birth date is July 2, 1996. 1RP 96.

¹ Respondent means no disrespect with such a "there-oughtta-be-a-law (but I can't find one) argument. Respondent is fully aware of the general rule that arguments submitted without authority need not be considered by this Court. That said, Respondent admittedly hopes that there really is a "law" holding that harmless error can be applied to double jeopardy errors, and that Respondent just didn't find it, despite hours spent searching for same. Undaunted by the dirth of such Washington authority, however, Respondent intends to keep searching, and will submit a statement of additional authorities if such a case is discovered.

G.H. first met Hernandez when he lived in a neighboring residence. 1RP 97. Hernandez had a son who was friends with G.H.'s brother. 1RP 97. G.H. and some of her siblings spent time at Hernandez's house playing on the computer, watching television, playing video games and eating "junk food." 1RP 98. G.H. said that "at first" she looked forward to going to Hernandez's house. 1RP 99. G.H. said that Hernandez told her she was pretty. 1RP 100. Sometimes G.H.'s brothers went with her to Hernandez's house and sometimes she went there alone. 1RP 100. Hernandez also took G.H. shopping. 1RP 101; 2RP 194. Hernandez bought clothing for G.H. such as skirts and shirts. 1RP 101. Hernandez's girlfriend said that she had given the clothing to G.H. 3RP 388. Hernandez also gave G.H. a CD player and he gave her a black hills gold necklace for her birthday--he said the necklace was from him and Michelle and his son. 2RP 151, 166. Hernandez's son Kalen (defense witness) testified that Michelle was the person who gave G.H. the necklace and CD player. 3RP 469.

G.H. began going over to Hernandez's house "around five times a week." 1RP 102. Hernandez testified that G.H. was never alone with him at his residence, and that G.H. never spent the night there. 3RP 503. G.H. claimed that Hernandez showed her his

computer screen showing "naked adult stuff" and people having sex. 1RP 103. Hernandez also showed G.H. pictures of nude girls that were on his cell phone. 1RP 105. G.H. said that Hernandez really didn't want those girls sending him pictures because he really wanted G.H. 1RP 106. G.H. said that Hernandez stuck his "privates" into the back of her pants. 1RP 109. When Hernandez did this, his "private part" was touching G.H.'s "butt." 1RP 110. Hernandez did that particular thing two or three times--in the back room. 1RP 111, 112. Hernandez agreed that he had been in the "back room" with G.H. 3RP 545. Hernandez said the "tool room" and the "back room" are one and the same. 3RP 545. Hernandez also touched G.H. "between [her] legs." Sometimes Hernandez touched G.H. on top of her clothes and sometimes underneath her clothes. 1RP 112. When Hernandez touched G.H. between her legs, he would sometimes use his hand and sometimes use his "privates." 1RP 113.

There was also a squeaky bed in one of the rooms in Hernandez's house, and sometimes when Hernandez was touching G.H. and they were making too much noise, Hernandez was afraid they might wake up his girlfriend Michelle. 1RP 114, 118. Deputy Brown verified that there was a "squeaky bed" in Hernandez's

bedroom that squeaked when Brown put pressure on it. 3RP 357, 358,359; Ex. 33. Brown also located another squeaky set of springs in a different room. 3RP 358; Ex. 8. When Hernandez thought they might be making too much noise, Hernandez would "move off and . . .put his pants back on." 1RP 114. G.H. said Hernandez "touched his privates between" her legs "probably four to five times." 1RP 114.

These incidents happened in different rooms. Id. It happened in Hernandez's bedroom, shop, and the back room. 1RP 115. Hernandez and his girlfriend/partner of 29 years, Michelle, often slept in separate rooms. 3RP 477. When Hernandez and G.H. were in Hernandez's bedroom, he and G.H. would be on the bed. 1RP 115. Hernandez usually just pulled his sweatpants and underwear down a little and did the same to her. 1RP 115. Hernandez's girlfriend Michelle verified that Hernandez wears sweatpants a lot at home. 3RP 405. Hernandez also testified that he does wear sweatpants a lot at home. 3RP 516. Further, Hernandez said he always wears pants with an elastic waist. 3RP 516.

According to G.H., sometimes Hernandez touched his privates on G.H.'s vagina. 1RP 116. Hernandez also asked G.H.

to touch his private. Id. Hernandez also wanted G.H. to lick his private part. 1RP 117. Hernandez also "licked" between G.H.'s legs more than one time. 1RP 117. G.H. said that had happened maybe once in the shop "and a few times in the back room and in his bedroom." 1RP 117. G.H. explained that the touching happened in the back room on a bed, and at a different time on the futon. 1RP 118. G.H. also said that Hernandez "licked her privates" at the park in Hernandez's van. 1RP 119. He also licked G.H.'s chest while they were in the shop but she did not remember the other times he did that. 1RP 117. G.H. said she was around nine or ten when all of this went on. 1RP 122.

Sometimes Hernandez would tell G.H. to say "dirty stuff" and he sometimes video taped her saying such things as prompted by him. 1RP 120; 2RP 144. According to G.H., Hernandez also video taped G.H. in his van and in his bedroom. 1RP 122, 123. Hernandez told a deputy that he made the videotape because he wanted to show G.H.'s father that she "is not as innocent as he" thinks she is. 2RP 203. Hernandez also showed G.H. a video of his girlfriend Michelle performing oral sex on a man. 1RP 123. Michelle denied at trial that there was such a tape, although she

had acknowledged to Deputy Brown that there had been such a tape. 3RP 565, 566.

To sum up, G.H. testified that Hernandez touched her "privates" multiple times in multiple rooms on multiple occasions in Hernandez's house (or in his trailer). Additionally, Hernandez also told G.H. about things he had done with another girl named Cindy. He said that he and Cindy did the same "stuff" that he and G.H. were doing. 1RP 127. G.H. was afraid that she would get in trouble if she told anyone what she and Hernandez were doing. 1RP 128.

G.H.'s testimony about the molestation was corroborated with the findings of her physical examination (rare in these cases). G.H. had injuries to her hymen abnormal for a child her age, that were consistent with penetration. 2RP 241-251. G.H. was examined by Laurie Davis, a nurse/ sexual assault specialist at a sexual assault clinic. Ms. Davis, who has a doctorate in nursing, examined G.H. at the sexual assault clinic in May of 2007. 2RP 246. 2RP 242. The only thing that G.H. told Ms. Davis about Hernandez was that he "used to just rub on the cheeks of [her] butt." 2RP 248. Other than that, G.H. was very "avoidant" about discussing Hernandez. However, because Ms. Davis had listened to the interview Deputy Brown did with G.H., Davis did not need to

get any more details about the abuse from G.H. 2RP 248. During the examination of G.H., Davis saw "very sharp divots" in G.H.'s hymenal tissue. Davis said the hymenal tissue should be smooth but that G.H.'s hymen had a "pretty sharp notch" in it and that was abnormal for a girl G.H.'s age and that such a notch can be caused by penetration. 2RP 249, 250.

G.H. also discussed the molestation with a counselor. The counselor also testified about why victims of sexual abuse delay reporting the incident. 2RP 170. Counselor Colleen Hicks explained delayed disclosure by victims of sex abuse, and about the difficulties children often have regarding specific details of the abuse. 2RP 170-174. Hicks also discussed common grooming techniques used by sexual predators, including buying them presents, allowing access to things like computers and video games. 2RP 176. Showing pornography to victims is also popular with sexual abusers. 2RP 177.

Hicks counseled G.H. about 15 times. 2RP 178. G.H. told Hicks about Hernandez's sexual touching of her and related the same facts about the abuse that she told her mother and that G.H. testified to. 2RP 184. G.H. told Hicks that Hernandez had touched her improperly "lots of times." 2RP 184. Hicks said that G.H. had

Post Traumatic Stress Disorder (PTSD) caused by Hernandez's abuse of her. 2RP 186, 188. Hicks said that G.H. had "symptoms in every category of PTSD." 2RP 186. Hicks observed that G.H. developed "hyper vigilance" towards Hernandez and she watched his house with binoculars and watch him come and go to be sure she was safe. 2RP 187. Hicks said that G.H. told her that the molestation had occurred "lots of times." 2RP 184. Thus, Hicks' testimony also corroborated G.H.'s trial testimony.

G.H.'s demeanor when discussing Hernandez was also observed by Chief Deputy Stacey Brown (formerly Detective Brown). As a former Detective for the Lewis County Sheriff's Office, Chief Deputy Sheriff Stacey Brown has had many hours of training in handling sexual assault cases and had handled hundreds of such cases. 2RP 209-211. Deputy Brown interviewed G.H. in conjunction with the investigation of this case. Id. Deputy Brown observed that ten-year-old G.H.'s demeanor drastically changed when she talked about Hernandez. 2RP 212. G.H. became withdrawn and uncomfortable. 2RP 212.

Deputy Brown also testified about photographs taken of the various rooms in Hernandez's house, seen when executing the search warrant and when Hernandez was arrested. RP 217.

Hernandez's computer was seized pursuant to the warrant. 2RP 217. During the search, Deputies found in Hernandez's residence several CDs that contained pornographic images. 2RP 232. Pornography was also found on the hard drive of Hernandez's computer. 2RP 232. Hernandez denied that there was pornography on his computer and denied that he had ever viewed pornography. 3RP 535.

Indeed, Hernandez basically blamed the victim in this case-- something that should go to "consciousness of guilt"-- given Hernandez's efforts to document by video tape G.H.'s alleged sexual advances towards him. 2RP 202. Hernandez told Deputy Wallace that G.H. "had come of age sexually early and was very preoccupied about sex." 2RP 225,227. Hernandez told Wallace that every time G.H. went over to Hernandez's house that she would talk about sex and wanted to have sex with Hernandez. 2RP 226. Hernandez told Deputy Wallace that G.H. had threatened Hernandez that if he did not touch her sexually as G.H. "wanted," she would report him to the police. 2RP 227. Hernandez said that he made a video tape of G.H. so that he could show her father that G.H. was "not as innocent as" her father thought she was. 2RP 203. Hernandez's version of the video taping of G.H. is that he

recorded the tape in his convertible in the parking lot of Providence Hospital in another county. 3RP 509. On that day, Hernandez said he and G.H. had taken Michelle to the hospital. 3RP 548.

Hernandez's bizarre story about why he made the video tape of G.H. is just not believable. When he testified, Hernandez also denied molesting G.H. and another girl, S.K. (discussed below). 3RP 514.

The bottom line is that all of the just-discussed testimony and evidence presented by the State overwhelmingly proves that Hernandez molested G.H. multiple times, in multiple locations, on multiple occasions. This, together with the jury instructions that were given in this case (previously discussed), plus the prosecutor's clarifying statements in closing regarding the need to find separate and distinct acts for each count charged, takes this case out of the purview of Borsheim and Berg. Therefore, Hernandez's double jeopardy argument is not persuasive. But, even if there was instructional error, it should be found harmless in light of the overwhelming evidence.

"Common Scheme or Plan" Evidence--Different Victim

G.H.'s testimony was further supported by the substantial "common scheme or plan" evidence presented, showing that

Hernandez had "groomed" a different young girl, S.K., using similar techniques he used with G.H. by befriending, and then molesting S.K. like he did G.H. As mentioned, the evidence involving Hernandez's conduct with S.K. was admitted under the "common scheme or plan" rule, and a limiting instruction was given regarding this evidence. 3RP 518 (court reading jury instruction 14 to the jury).

Deputy Wallace was also involved in the investigation of Hernandez's alleged molestation of S.K. 2RP 232. Deputy Callas also attempted to interview S.K. about her experience with Hernandez but S.K. "shut down" and would not talk to him about it. 2RP 238. However, S.K. did testify at Hernandez's trial. S.K. explained that she had also lived near Hernandez, and that when she was under ten years old, she used to go to Hernandez's home with her brother. 2RP 321. Hernandez admitted that S.K. had stayed overnight at his residence, but said she did not do so alone. 3RP 491, 528. Like he did with G.H., S.K. said that Hernandez used to buy her gifts. 2RP 321, 324. S.K. said that Hernandez did "bad things" and would touch her in inappropriate places. 2RP 325. S.K. said that Hernandez would touch her chest under her clothes. 2RP 326. S.K. said that Hernandez also touched her vagina with

his hands and his penis. 2RP 326, 327,328. S.K. said that Hernandez touched her on multiple occasions and in different rooms or in the trailer. 2RP 332, 333,334, 335,336,337,349. S.K. estimated that Hernandez had improperly touched her "more than five times." 2RP 342. S.K. did not remember exactly how old she was when these incidents happened, but she remembered it was when she lived near Hernandez. 2RP 334. S.K. also remembered that when she told her sister what Hernandez had done to her, S.K. was in the 6th grade. 2RP 342.

As he did with G.H., Hernandez showed S.K. pictures that made her uncomfortable. 2RP 338. As with G.H., Hernandez showed S.K. movies of naked people having sex. 2RP 339. And, as in G.H.'s case, there was physical evidence showing that S.K. had damage to her hymen consistent with penetration. 2RP 261. This evidence was presented through the testimony of Dr. Deborah Hall, who works as medical director of the sexual assault clinic at St. Peter's Hospital in Olympia, 2RP 252. Dr. Hall examined S.K. and said that S.K. told Dr. Hall, reluctantly, that Hernandez had touched her in the place where she "goes pee." 2RP 259. S.K. also told Dr. Hall that Hernandez had touched her breasts. 2RP 259. S.K. said Hernandez had touched her like that more than

once. 2RP 260. S.K. told Dr. Hall that she was afraid of Hernandez. 2RP 260. Dr. Hall said that S.K.'s hymen did not look normal because there was less tissue present than Dr. Hall expected for a girl S.K.'s age. 2RP 261. Dr. Hall thought there were "notches" in S.K.'s hymen that indicated injury and partial healing of S.K.'s hymen. 2RP 261. Dr. Hall said her findings in her exam of S.K. were consistent with penetration. Id.

S.K.'s mother, Marianne Kleider, testified that she met Hernandez when he lived nearby and after he gave S.K. a bicycle. 2RP 265, 295, 296. But defense witness Tina Bell said that Hernandez did not give S.K. the bicycle. 3RP 436. S.K. had been a "special ed" student in school. 2RP 313. S.K.'s mother said that all the neighborhood kids played at Hernandez's house. 2RP 266. Ms. Kleider said that Hernandez was basically a babysitter at times for her children. 2RP 274. Ms. Kleider said that in 2001 when they were discussing sleeping arrangements because they were having company, S.K. made a suspicious comment. 2RP 277, 278. Michael Eason corroborated this incident. 2RP 302, 303. But S.K. would not discuss the issue any further with her mother, although S.K. did tell her sister and the sister told Ms. Kleider. 2RP 279,280. Ms. Kleider was very concerned when S.K.'s sister told her what

S.K. had said. 2RP 280. Ms. Kleider went to the police. 2RP 281. Ms. Kleider stopped letting her children go with Hernandez. 2RP 283. Thus, S.K.'s testimony was corroborated in that she told others the same facts, and by the physical evidence showing damage to her hymen.

In sum, this testimony showing the similarities between Hernandez's grooming and molestation of S.K. and his grooming and molestation of G.H. are stunning, and further corroborates G.H.'s testimony.

Respondent therefore respectfully urges this Court to find that the jury instructions given here are adequate under State v. Ellis, supra, because the instructions here as a whole, plus the prosecutor's clarification in his closing, together with the overwhelming evidence presented, proved beyond a reasonable doubt that Hernandez committed "separate and distinct" acts of molestation of G.H. supporting each charge, when he molested her multiple times, in multiple locations (different rooms) on multiple occasions. In this way, the State clearly proved separate and distinct acts of molestation supporting each separate count charged. These facts should defeat Hernandez's alleged

instructional "double jeopardy error." Accordingly, Hernandez's convictions and sentence should be affirmed.

On the other hand, should this Court find that there was prejudicial instructional error, it should nonetheless find that any error was harmless-- for the same "overwhelming evidence" reasons just articulated above. Alternatively, if this Court agrees with Hernandez's double jeopardy argument, this Court should remand this case for vacation of all of the convictions except for one. As to that sole remaining conviction, the State on remand should be allowed to again request an exceptional sentence as to that remaining conviction, because the jury agreed by special verdict that the sentencing aggravators as to every count were proven beyond a reasonable doubt. See 4RP 631-633, reading of special verdict findings as to ongoing pattern of abuse and abuse of trust. Thus, Blakely has already been satisfied as to the sentencing aggravators for every single conviction. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Accordingly, even if only one conviction remains valid, an exceptional sentence may still be imposed as to that count on remand using one or both of the aggravating factors previously found by the jury by special verdict.

CONCLUSION

This Court, in the first instance, should hold that the jury instructions given in this case were adequate, and are distinguishable from the instructions given in Berg and Borsheim, and thus those cases do not apply here. Accordingly, there has been no instructional double jeopardy violation, and Hernandez's convictions should be affirmed. Alternatively, considering the overwhelming evidence presented, together with the instructions that were given, plus the State's clarifying "separate and distinct" explanation during closing argument, "separate and distinct acts" for each allegation were indeed proven beyond a reasonable doubt. Therefore--to the extent that it can--this Court should find any instructional error harmless.

On the other hand, if this Court sides with Hernandez, this case should be remanded for vacation of all of the convictions except for one. On that remaining conviction, because the sentencing aggravators were proven and found by the jury as to every count, the State may request an exceptional sentence again as to the remaining valid conviction on remand.

RESPECTFULLY SUBMITTED this 22nd day of December, 2009.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTING ATTORNEY

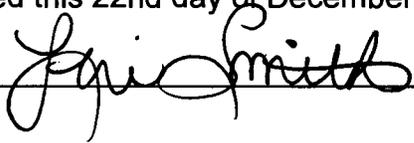
by:


LORI SMITH, WSBA 27961
Deputy Prosecuting Attorney

DECLARATION OF SERVICE BY MAIL

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this date a copy the document to which this declaration is affixed was served upon the Appellant by depositing said document in the United States mail, postage prepaid, addressed to Appellant's attorney as follows: Christopher Gibson, Nielsen, Broman and Koch, 1908 East Madison, Seattle, Washington 98122.

Dated this 22nd day of December, 2009, at Chehalis, Washington.



09 DEC 28 09:11:05
STATE OF WASHINGTON
BY _____ DEPUTY
COUNTY OF CHEHALIS
DIVISION III