

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

STATE OF WASHINGTON,
Respondent,
v.
JIMMY D. WITMER
Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Pomeroy and Carol Murphy, Judges
Cause No. 09-1-00132-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

The State accepts the appellant's Issues Pertaining to Assignments of Error.

B. STATEMENT OF THE CASE.

1. Factual History

On January 7, 2009, T.A.W. (DOB: 3-24-2000) disclosed to her school counselor Linley Olson at Seven Oaks Elementary that "my Daddy put his private into my bottom". *Vol. 1, RP 69-70.* Ms. Olson testified that she had a Master's Degree in Educational Psychology from the University of Washington and had specialized training dealing with working with children who had been sexually assaulted. *Vol.1, RP 40-42.*

Ms. Olson first met T.A.W. earlier in the school year; T.A.W. was in the third grade. *Vol. 1, RP 44-45.* She first worked with T.A.W. after one of T.A.W.'s grandfathers had died and T.A.W. was grieving; Ms. Olson first met with T.A.W. on September 23, 2008 to discuss this issue and other social issues. *Id.*

On January 7, 2009. T.A.W. told Ms. Olson that she had recently moved to her grandmother's house, that there was a little boy who lived nearby that she did not like and that her daddy had

done something during Christmas break that she did not feel comfortable talking about. *Vol. 1, RP 69.* Ms. Olson asked T.A.W. if she would be comfortable writing it down; T.A.W. then wrote, “my Daddy put his private into my bottom”. *Vol. 1, RP 69-70.* T.A.W. then said to Ms. Olson that there were other inappropriate things her daddy did but she didn’t feel good talking about them. *Vol. 1, RP 71-72.*

After that, Ms. Olson made a mandatory report to Child Protective Services (CPS) relating T.A.W.’s disclosure to CPS. *Id., at 72.* Ms. Olson testified that she maintained contact with T.A.W. throughout the year and would check-in with her throughout the rest of the school year to make sure she was doing alright. *Id.* Ms. Olson related that T.A.W. was always very open to talking about things in general but she was did not want to say the things her father did to her out loud. *Vol. 1, RP 79.*

Ms. Deborah Buettner testified that she is the grandmother of T.A.W. and the mother of the appellant. *Vol. 1, RP 82-83.* Ms. Buettner testified that T.A.W. was “the light of her life”. *Vol. 1, RP 85.* She stated that T.A.W. had lived with her the bulk of her life. *Id.* However, T.A.W. lived primarily with the appellant and his

fiancé Gina Winslow from mid-July, 2008 until the first weekend of January, 2009. *Vol. 1, RP 87-88.*

Ms. Buettner testified that the first Friday in January she went to pick up T.A.W. after work to spend the weekend with her at Ms. Buettner's house. *Id.* During that car ride, T.A.W. said that Gina (the appellant's fiancé) was going to jail; after questioning from Ms. Buettner, T.A.W. said Gina had "blackmailed" her dad but T.A.W. could not talk about it or she would have to go live with strangers and would never see her grandma again. *Vol. 1, RP 88-90.*

After reassuring T.A.W., T.A.W. said "well, Gina caught my daddy checking me for a rash and he forgot to zip up his pants". *Id.* Ms. Buettner asked where he was looking for a rash and T.A.W. said "my private place". *Id.* Ms. Buettner asked T.A.W. if there was anything else she wanted to tell her grandma and T.A.W. said no. *Id.*

Ms. Buettner related the disclosure to Kae Ecklebarger who was a very close family friend who was referred to as Auntie Kae. *Vol. 1, RP 84 and 90-92.* Ms. Buettner told Ms. Ecklebarger because Ms. Ecklebarger used to be a social worker that dealt with abused children. *Vol. 1, RP 90-91.* In Ms. Buettner's presence,

Ms. Ecklebarger later asked T.A.W. if her daddy had ever touched her in any way that made her feel bad or uncomfortable. *Vol. 1, RP 94*. T.A.W. stated that her daddy had touched her in her private place; T.A.W. also stated that her daddy had asked her to touch him, specifically that T.A.W. had “touched him with her mouth”. *Id.* Ms. Ecklebarger asked T.A.W. how that tasted and T.A.W. said, “Yuk”. *Id.* Ms. Buettner related that T.A.W. also said that her daddy told her that the words for the private places of a boy and girl was a “cock and a pussy”. *Id.* Ms. Buettner said she had never heard T.A.W. use those words before. *Vol. 1, RP 95*.

Ms. Ecklebarger testified that she had worked as a child protection social worker in Colorado for eleven years and had specialized training in working with child victims of sexual abuse but was currently employed at Madigan Army Medical Center in a training capacity regarding medical software. *Vol. 1, RP 116*. She related that she was an “adopted auntie” for T.A.W. *Vol. 1, RP 118*. Ms. Ecklebarger stated she asked T.A.W. if her dad had ever asked her to touch him and T.A.W. said yes. *Vol. 1, RP 125*. Ms. Ecklebarger then testified that she engaged in the following conversation with T.A.W.,

“And I said, “Where did he ask you to touch him.”

And she pointed down towards her private areas and she said, "Down there."

I said, "What did he ask to you touch him with?" She said, "My mouth."

I said, "What did that taste like?" And she just stuttered and said "lck". I also asked her if her daddy had ever touched her in other ways, and she said he used to check her for rashes.

I was trying to determine how long this had gone on or if it was new. And I said, "Do you remember what teacher you had in school when you know this touching started?" And she said, "Well, it wasn't my kindergarten teacher, I think it was my first grade teacher."

Vol. 1, RP 125.

T.A.W. testified that she trusted her Grandma (Ms. Buettner), her Auntie Kae (Ms. Ecklebarger) and Ms. Olson (to a lesser extent than her Grandma and "Auntie"). *Vol. 1, RP 150-151.* She related that she remembered writing a secret to Ms. Olson (referring to the note previously discussed). T.A.W. stated that she was telling the truth when she wrote that note to Ms. Olson. *Id.* When asked how she felt about her Dad, T.A.W. responded, "Angry and my love has shattered into teeny fragments". *Vol. 1, RP 152.* T.A.W. indicated that when she had been really young, her dad would check her because she used to get rashes; she further stated that she did not think he had checked her for rashes since she was four or five years old but definitely not after she turned

eight years old. *Vol. 1, RP 155-156.* T.A.W. also testified that only her daddy had touched her in her front private part or back bottom part in a way that made her uncomfortable. *Id.*

During her testimony, T.A.W. stated that she had a very bad memory and only remembered certain things, *Vol. 1, RP 142-178.* T.A.W. asked to be able to write in response to questions about the charged sexual assaults. *Vol. 1, RP 154.* During the trial, she indicated that she would only tell the truth but reiterated numerous times that she did not remember much about the charged incidents. *Vol. 1, RP 174-176.* T.A.W. also indicated she was “super nervous” and embarrassed to talk about these incidents in court. *Vol. 1, RP 176.*

Ms. Gina Winslow testified that she first met the appellant in 2003 through an internet chat. They fell in love and eventually agreed to get married. *Vol. 1, RP 180.* Ms. Winslow indicated that she moved from Los Angeles, California to Washington to move in with the appellant on July 3, 2008. *Vol. 1, RP 179 and RP 188.* Ms. Winslow indicated that T.A.W. lived with the appellant some of the time and that at other times T.A.W. split time living at her grandmother’s and her mother’s residences. *Vol. 1, RP 181-182.*

Ms. Winslow then testified,

“It was in December before Christmas, and he had gone to – [T.A.W.’s] room to help her with a report she had to do for school about reindeer, and I went in like five minutes maybe, it didn’t seem like very long, I went to go in there and help them and I opened up the door and they were on the floor, sorry. [T.A.W.] was laying on her back and he was on his hands and knees over her with one hand, his left hand was on the floor near her shoulder supporting his upper body weight. His right hand was inside her pants and he was kissing her and his tongue was in her mouth. Sorry.”

Vol. 1, RP 183.

Ms. Winslow continued,

“And they didn’t realize that I was there right away and then I don’t know if [T.A.W.] heard, I don’t think I made any noise but I don’t know. [T.A.W.] said – she kind of pulled away and said, “Daddy, can we please stop now.” And I guess it took – it seemed like forever, but it was probably only a few seconds for it to filter into him and he stopped making kissing motions and stuff and he looked up and he saw me.”

Vol. 1, RP 183-184.

Ms. Winslow then related that she yelled at the appellant and told him to get out of T.A.W.’s room; she yelled and screamed at the appellant. Ms. Winslow described Mr. Wittmer’s reaction to being discovered, “his eyes got huge and he stiffened all over”; Mr. Wittmer then exited his daughter’s room very quickly. *Id.* Ms.

Winslow continued to yell and scream at the appellant after telling T.A.W. to stay in her room and that she was not in any trouble. *Vol. 1, RP 185*. According to the trial transcript, Ms. Winslow was crying during her testimony. *Id.*

According to Ms. Winslow, Mr. Wittmer claimed that he had been checking T.A.W. for a rash and “he was just kissing her to make her feel better afterwards”. *Vol. 1, RP 187*. Ms. Winslow then went and talked with T.A.W.; T.A.W. told Ms. Winslow that “it’s daddy and me secret”. *Id.* Ms. Winslow could tell that T.A.W. did not want to talk about it so she did not push for details.

Ms. Winslow also testified regarding another incident that pre-dated the above incident that caused her concern,

“I had walked into the living room and she was sitting on the couch and he was standing up in front of her, and when I walked in he like did this quick step back and turn away from her and his zipper was down, and he said that he just forgotten to zip up after going to the restroom. And I asked [T.A.W.] later what her and her daddy had been doing, and she said that they had just been talking and watching the show on Animal Planet and she was just telling me detail what was on there, so I just figure it looked weird.”

Vol. 1, RP 188-189.

Ms. Winslow testified that she asked T.A.W. again about that incident and T.A.W. said that he daddy had asked her to touch him,

“she wanted him to touch his privates – he wanted her to touch his privates.” *Vol. 1, RP 189.*

Ms. Winslow then explained why she did not immediately call the police,

“Because I wanted him to get help. I thought – I just wanted her to be okay, and I thought if I got her out of the house and then he could get help, that everything would be okay. I know it sounds stupid, but I loved them both. I didn’t – I did the best I could, okay? Nothing in my life ever prepared me to deal with this.”

Vol. 1, RP 192.

Ms. Winslow also testified that T.A.W. later said that her daddy called his private part a “cock” and T.A.W.’s private part was a “puss”. *Vol. 1, RP 195.* Ms. Winslow stated that she never heard T.A.W. use those words except when asked on this occasion; Ms. Winslow also testified that Mr. Wittmer did use this language. *Id.*

Ms. Nancy Young testified as the medical examiner that saw T.A.W. at the St. Peter’s Sexual Assault Clinic in Lacey, Washington. *Vol. 2, RP 227-232.* Ms. Young had extensive education and experience in nursing and was the coordinator of the St. Peter’s Sexual Assault Nurse Examiner Program. *Vol. 2, RP 228.* She had also testified as an expert witness in approximately fifty other court cases. *Vol. 2, RP 230.*

Ms. Young testified how she met T.A.W. and how her medical examination was conducted. *Vol. 2, RP 232-238*. During the course of the medical examination, Ms. Young brought up that it would be helpful if T.A.W. could explain a bit about why she had talked with a detective (referring to the sexual abuse); T.A.W. “just kind of got really quiet and almost tearful and said, “I’m just too scared to talk about that. I don’t want to.” *Vol. 2, RP 234*.

Ms. Young testified that T.A.W. had a normal exam; she further explained,

“She had a normal exam. Her hymen looked fine. I didn’t see any loss of tissue that was evident. I didn’t see any discharge in the area, I didn’t see any bruises. It looked like a very normal exam which is mostly, fortunately, with the children that we examine, their exams are normal because much of the touching that they describe either doesn’t leave any signs of injury or it’s already healed up by the time we actually see them.”

Vol. 2, RP 236-237.

The deputy prosecutor asked Ms. Young of cases where there was substantiated sexual abuse of a child, what percentage of those children had normal physical exam findings; Ms. Young responded,

“I would say in the cases that I see, the normal exams are probably at least 95 percent. We have very few abnormal findings in the genital area. **It’s a little more**

prevalent than in the anal area, for anal exams less than one percent of the time is it abnormal, so mostly the children that we have normal exams.” [Emphasis added].

Vol. 2, RP 237-238.

Detective Eric Kolb of the Thurston County Sheriff’s Office (TCSO) testified that he was the detective assigned to investigate the sexual assault allegations involving Mr. Wittmer and T.A.W. Vol. 2, RP 248. Detective Kolb testified regarding the following conversation with T.A.W.,

“So at this point, I asked her some more questions about more specific questions about if her dad had touched here anywhere else, and she said, “Lots.” Basically, at that point she kind of pointed down towards her vaginal area, and that time I kind of talked to her about different parts of her body and if she has names for those parts of her body and if she has names for those parts of her body, and that’s when she told me that she really didn’t want to provide me with a name for that part of her body. And so with her permission, I asked her if we could call it her lower front private area, and she so she agreed that we could call it that name.

Q. Okay.

A. And then she told me that her dad had touched those parts, that part of her body with his fingers and his tongue. Again, she, you know, she would look down and very reluctant to give me really any specific details about these answers. And eventually she told me that she really didn’t want to talk about it anymore.”

Vol. 2, RP 254.

After conducting his investigation, Detective Kolb contacted Mr. Wittmer on January 21, 2009. *Vol. 2, RP 262*. Detective Kolb recounted how he advised Mr. Wittmer of his *Miranda* warnings and how Mr. Wittmer waived those rights and chose to speak to him. *Vol. 2, RP 262-263*.

Detective Kolb stated that initially the appellant denied touching his daughter inappropriately in a sexual manner. *Id.* Detective Kolb then testified,

“At that point I kind of started – focused my interview around what Gina (Ms. Winslow) had witnessed, the fact that Gina had walked in and saw him doing some things. And at that point he went on about that possibly his – the grandma, Deborah (Ms. Buettner), who is brainwashing [T.A.W.], that was her fault.

Really his demeanor changed quite a bit. He was – initially he was very calm, very cooperative, calm, relaxed, and once I brought up the point about Gina and what she observed, he got really upset and at some point he stood up and started yelling and screaming at me.

As the interview went on, my questioning, more so after the fact I had brought up Gina witnessing what she saw, he made the comment that he might have touched her, and this happened in the bedroom but he really couldn't remember doing it.

Further on in the interview, I started recording the interview. With his permission I recorded his interview, and I went into more specific questioning in regards to what happened in the bedroom about when Gina walked in and saw him kissing her and

having his hands placed down the front of her pants. And he said he really – told me he couldn't remember doing that, but that it was possible that it did happen. And he also talked about in the past she had lots of yeast infections and he asked her if he could take a look at those yeast infections. He did recall giving her a kiss on the lips. He kind of recalled Gina yelling at him but really didn't – couldn't remember why or what she was saying to him.”

Vol. 2, RP 263-264.

Detective Kolb then went over the specific allegations with Mr. Wittmer that Mr. Wittmer touched the private parts of his daughter T.A.W.; Detective Kolb stated,

“And at that point, he said it was possible that he did do those things and that he hated the fact that it could have happened, and if it did happen, that he just wants someone to shoot him.”

Vol. 2, RP 265.

Detective Kolb subsequently arrested Mr. Wittmer and explained to him why he was being arrested. *Vol. 2, RP 266.* Detective Kolb stated that Mr. Wittmer,

“He immediately started crying, was very, very upset. He apologized to me. Again, he made comments to me that he wanted me to shoot him in the head and that he deserved it.

Based on – again, this all kind of flowing, when I told him he was under arrest, so based on – he was standing up yelling at me, so I got him in handcuffs right then and there. His behavior was kind of erratic and I didn't feel safe, so I placed handcuffs on him

and explained to him why he was being arrested, and at that point I escorted him down to our jail.”

Vol. 2, RP 267.

Detective Kolb also stated that Mr. Wittmer told him that the person that reported this should receive a medal. *Id.* As Detective Kolb was finishing the booking process, Mr. Wittmer asked to speak to him again; he thanked the detective for “arresting him and making his daughter safe”. *Id.* Detective Kolb and Mr. Wittmer then shook hands. *Id.*

Mr. Wittmer testified at trial that that he did “check” his nine year old daughter for a yeast infection and Gina (Ms. Winslow) “blew up at me” and was shouting at me. *Vol. 2, RP 308.* Mr. Wittmer also stated that he kissed his nine year old daughter on the mouth after checking her for a yeast infection. *Vol. 2, RP 314.*

2. Procedural History

The State accepts the Appellant’s Statement of Procedural History.

C. ARGUMENT.

1. Mr. Wittmer’s conviction for one count of rape of a child in the first degree and one count of incest in the first degree do not violate the constitutional prohibition against double jeopardy because the offenses are based on separate and distinct conduct.

The Washington constitution provides the same protection against double jeopardy as does the federal double jeopardy clause. *State v. Womac*, 160 Wn.2d 643, 650, 160 P.3d 40 (2007). Washington adheres to the “same evidence” rule first adopted in 1896. The “same evidence” test is similar to that articulated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). This rule controls unless the legislature clearly indicated that multiple punishments were not intended. *Womac*, 160 Wn.2d at 652.

The first tool of statutory construction is to inquire whether the offenses are the same both in law and in fact. If so, conviction for both offenses violates double jeopardy. *State v. Cole*, 117 Wn. App. 870, 875, 73 P.3d 411 (2003), (cites omitted). Thus, under the “same evidence test,” multiple crimes do not violate double jeopardy if they are not identical in both law and fact. See *id.* Crimes are not identical in law if each offense includes an element not included in the other, and proof of one does not necessarily also prove the other. *In re Percer*, 150 Wn.2d 41, 50, 75 P.3d 488 (2003).

Under the tests set forth by the Washington Supreme Court and the United States Supreme Court, The Washington Supreme Court held that second degree rape and first degree incest are

separate offenses and that the double jeopardy clause does not prevent convictions, and attendant penalties, for both offenses arising out of a single act of intercourse. *State v. Calle*, 125 Wn.2d 769, 781; 888P.2d 155 (1995). The court in *Calle* noted the differing purposes served by the incest and rape statutes, as well as their location in different chapters of the criminal code, are evidence of the Legislature's intent to punish them as separate offenses. Similarly, in the instant case, rape of a child in the first degree is defined in RCW 9A.44, Sex Offenses, and incest in the first degree is defined in RCW 9A.64, Family Offenses.

Perhaps more importantly, there are separate and distinct events that support an independent basis for the incest in the first degree separate from the rape of a child in the first degree. The appellant himself acknowledges that there are three separate incidents that would support the crime of incest in the first degree (Brief of Appellant, page 15). The State's position is Double Jeopardy is not implicated because the multiple separate allegations of Mr. Wittmer having sexual intercourse with his daughter provide an independent basis for the conviction for the rape of a child in the first degree and the separate conviction for incest in the first degree. The crimes are not identical in law or fact

as they were factually separate and distinct incidents supporting the convictions; and, rape of a child in the first degree and incest in the first degree are legally separate crimes.

The conviction for rape of a child in the first degree and the conviction for incest in the first degree do not put the appellant in double jeopardy as the law for each offense is different and the offenses are supported by evidence of multiple separate and distinct acts of sexual penetration.

2. It was harmless error when the Court failed to provide to provide a *Petrich* jury instruction on the incest in the first degree charge.

To convict a person of a criminal charge, the jury must be unanimous that the defendant committed the criminal act. *State v. Stephens*, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); *State v. Badda*, 63 Wn.App. 176, 385 P.2d 859 (1963). In cases where there is evidence of multiple acts of like misconduct which relate to one charge against the defendant, the State is required to elect which act it is relying upon for a conviction. *State v. Workman*, 66 Wash. 292, 119 P. 751 (1911); *State v. Sargeant*, 62 Wash. 692, 114 P.868 (1911); *State v. Osborne*, 39 Wash. 548, 81 P. 1096 (1905). The Court in *Workman* states,

“[W]hile evidence of separate commissions of the offense may be admitted as tending to prove the commission of the specific act relied upon, the proper course in such a case, after the evidence is in is to require the state to elect which of such acts is relied upon for a conviction.”

Workman, 66 Wash. At 295.

In *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), the court constructed the rule in *Workman* to require the trial court to instruct the jury that all 12 jury members had to agree that the same underlying act has been proven beyond a reasonable doubt if the State neglects to elect which act constituted the crime. In effect, *Petrich* was a reiteration and clarification of *Workman*; the *Workman-Petrich* rule assures a unanimous verdict on one criminal act thereby protecting a criminal defendant’s right to a unanimous verdict. *State v. Petrich*, 101 Wn.2d at 572.

Failure of the court to follow the rule in *Workman* and *Petrich* is “violative of a defendant’s state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial.” *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988); *State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963); *State v. Allen*, 57 Wn.App. 134, 788 P.2d 1084 (1990). When an error occurs during a trial the jury verdict will be affirmed only if that error

was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824, 24 A.L.R.3d 1065 (1967); *State v. Kitchen*, 110 Wn.2d at 409.

The failure to give a unanimity instruction is presumed prejudicial and is not harmless error unless a rational trier of fact could not have a reasonable doubt as to whether the evidence of each incident establishes the commission of the crime. *State v. Camarillo*, 115 Wn.2d 60, 65, 794 P.2d 850 (1990); *State v. Kitchen*, 110 Wn.2d at 411 (citing *State v. Loehner*, 42 Wn. App. 408, 411, 711 P.2d 377 (1985) (Scholfield, A.C.J., concurring), *review denied*, 105 Wn.2d 1011 (1986)); *State v. Huckins*, 66 Wn. App. 213, 222, 836 P.2d 230 (1992), *review denied*, 120 Wn.2d 1020 (1993).

In the present case, the trial court did provide a *Workman-Petrich* instruction on the rape of a child in the first degree charge but did not provide a similar instruction to the jury as regards the incest in the first degree charge. These charges were alleged to have occurred between July 1, 2008 and January 21, 2009. There were multiple acts of sexual intercourse alleged that would have served as a basis for the jury to convict on the charge of incest in the first degree.

In *Camarillo*, the defendant was charged with one count of indecent liberties based on three separate incidents testified to by the boy (the alleged victim); the incidents testified to by the boy occurred between June 4, 1981 and July 10, 1982. *State v. Camarillo*, at 70. The court stated, “we concur that the jury may consider the totality of the evidence of several incidents to ascertain whether there is proof beyond a reasonable doubt to substantiate guilt because of the acts constituting one incident and also to believe that if one happened, then all must have happened.” *Id.*, at 71. The court went on to examine the evidence stating, “the defendant testified on his own behalf and the elderly woman testified that she had never seen the defendant alone with the victim”. *Id.* Therefore, the court said, “the jury was free to believe the victim, disbelieve the defendant and give no weight whatsoever to the seemingly irrelevant testimony of the woman.” *Id.*

In the present case, the appellant provided only a general denial defense to the numerous acts of sexual intercourse alleged; the only specific defense provided was to the count of child molestation in the first degree. On the child molestation in the first degree charge, there was the independent corroboration of Ms. Winslow who saw the appellant have his hand down the pants of

his nine-year old daughter and kissing her on the lips; on that charge, the defendant stated that he had just checked his nine-year old daughter T.A.W. for a yeast infection by visually examining her genitals and had then kissed her to comfort her after his examination.

As to the numerous acts of sexual intercourse, there was limited specificity by T.A.W. as to the details of the repeated acts of penile-oral contact and penetration of her genital and anal areas; the appellant provided a general denial only to all of the acts of sexual intercourse. There were only two charges submitted to the jury that required proof beyond a reasonable doubt that the appellant had sexual intercourse with T.A.W.: the first was the charge of rape of a child in the first degree and the second was incest in the first degree. Both charges covered the same date range. T.A.W. told the school counselor, the police detective, her grandmother, her "Auntie" Kae and the appellant's fiancé about the sexual abuse she endured. As in *Camarillo*, the jury had a choice of believing T.A.W. or of believing the appellant. The testimony of T.A.W. and the testimony of her father were diametrically opposed and it was the jury's responsibility to resolve this contradiction in the testimony. Credibility determinations are for the trier of fact and

cannot be reviewed on appeal. *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987).

Also, the trial court properly provided Jury instruction No. 6 which stated,

“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.”

Vol. 2, RP 341.

As there was no rational basis to distinguish among the acts of sexual intercourse alleged, the failure of the court to provide a jury unanimity instruction is harmless under these facts.

3. T.A.W.'s hearsay statements to Ms. Buettner, Ms. Ecklebarger, Ms. Winslow, Ms. Olson, and Detective Kolb were properly admitted by the trial court.

Mr. Wittmer argues that the trial court improperly admitted the hearsay statements of T.A.W. RCW 9A.44.120 provides, in pertinent part:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A.04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile

offense adjudications, in the courts of the state of Washington if:

(1) the court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(2) the child either:

(a) Testifies at the proceedings; or

(b) is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

As with the competency of a witness, the determination of the reliability of child hearsay statements is reviewed for abuse of discretion.

The trial court is in the best position to make the determination of reliability as it is the only court to see the child and the other witnesses. . . Whether statements are admissible pursuant to the child abuse hearsay exception is within the sound discretion of the trial court and will not be reversed on absent a showing of manifest abuse of discretion. . .

State v. Pham, 75 Wn. App. 626, 631, 879 P.2d 321 (1994)

(internal cites omitted).

Mr. Wittmer challenges that the testimony of T.A.W. did not establish a sufficient basis for determining the admissibility of child hearsay statements and that the court did not make sufficient findings of fact and conclusions of law regarding each of the factors

set forth in *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984).

Those factors are:

- (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; (5) the timing of the declaration and the 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 defendant's involvement.

Id., at 175-76.

Where the trial court has weighed the evidence, the appellate review is limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law and judgment. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). "Substantial evidence' exists when there is a sufficient quantum of proof to support the trial court's findings of fact." *Organization to Preserve Agr. Lands v. Adams County*, 128 Wn.2d 869, 882, 913 P.2d 793 (1996). Where findings of fact and conclusions of law are supported by substantial but disputed

evidence, an appellate court will not disturb the trial court's ruling. *State v. Smith*, 84 Wn.2d 498, 527 P.2d 674 (1974); *State v. Chapman*, 84 Wn.2d 373, 526 P.2d 64 (1974). See also, *House v. Erwin*, 83 Wn.2d 898, 524 P.2d 911 (1974).

Mr. Wittmer argues that the court did not have a sufficient basis to enter findings of facts and conclusions of law because T.A.W. was not questioned specifically regarding each statement she made; Mr. Wittmer cites no case law to support his position. The state called T.A.W. as a witness as well as Ms. Buettner, Ms. Eckleberger, and Ms. Winslow to demonstrate the time, content and circumstances of the statements that T.A.W. made.

In this case, the court found, on the record, that each of the hearsay statements it admitted met the *Ryan* factors. (8-3-09/9-10-09 RP 140). These findings were memorialized in the Findings of Fact and Conclusions of Law. (CP 337-339; Appendix "A").

After testimony was taken regarding the hearsay statements the State sought to admit, there was a lengthy argument in which the *Ryan* factors were discussed, and it is clear from the court's colloquy with the parties that it considered those factors in making its rulings.

“It is clear that not every factor listed in *Ryan* needs to be satisfied before a court will find a child's hearsay statements reliable under the child victim hearsay statute, RCW 9A.44.120.” *State v. Swan*, 114 Wn.2d 613, 652, 790 P.2d 610 (1990). Not every *Ryan* factor must be established; they need only be substantially satisfied. *State v. Woods*, 154 Wn.2d 613, 623-24, 114 P.3d 1174 (1995).

Where the court clearly had the *Ryan* factors in mind and made the findings that they had been satisfied, it was not abuse of discretion to admit the hearsay statements of T.A.W. The court gave tenable reasons to support the admissibility of the statements. The fact that Mr. Wittmer disputes those reasons does not make the court's ruling an abuse of discretion.

For the reasons discussed above, the State submits that the trial court correctly admitted the child hearsay statements of T.A.W. However, if there was error regarding any failure of the court regarding the *Ryan* factor findings, the constitutional right affected by the erroneous admission of hearsay statements is the Sixth Amendment right to confront witnesses. Because of this right, “a hearsay statement that is ‘testimonial’ is inadmissible unless the defendant has an opportunity to cross-examine the witness either

before or at trial.” *State v. Watt*, 160 Wn.2d 626, 630, 160 P.3d 640 (2007) (quoting *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)).

Mr. Wittmer had the opportunity to cross-examine the child victim both at the child hearsay hearing and at trial, as well as the persons who heard and testified to the hearsay statements. Therefore, any failure of the trial court to enter individual findings of fact as to the *Ryan* factors did not result in a manifest error affecting a constitutional right, since T.A.W. was available as a witness and testified both at the child hearsay hearing and again at the trial.

Finally, Mr. Wittmer also challenges that because Detective Kolb and Ms. Olson did not testify at the child hearsay hearing (they both did testify at the jury trial); the admission of their testimony regarding the statements of T.A.W. is error. Mr. Wittmer cites no case law authority for this position. The trial court is required to determine whether the time, content, and circumstances of the child’s statement provides sufficient indicia of reliability. Ms. Buettner testified as to the context of how and when T.A.W. spoke to Detective Kolb. (8-3-09/9-10-09 RP 27-28). Ms. Buettner also provided testimony regarding the context of how and when T.A.W.

communicated with Ms. Olson. (8-3-09/9-10-09 RP 26-27). Ms. Buettner also was presented with the note that T.A.W. wrote to Ms. Olson regarding the anal rape and testified that she recognized the handwriting as belonging to T.A.W. (8-3-09/9-10-09 RP 29-31). Finally, T.A.W. also testified regarding writing the note and talking to Ms. Olson. (8-3-09/9-10-09 RP 49-50). The trial court correctly admitted the child hearsay statements of T.A.W.

4. There was sufficient evidence to support Mr. Wittmer's convictions for rape of a child in the first degree, incest in the first degree and child molestation in the first degree.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

“[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” (Cite omitted.) This inquiry does not require a reviewing court to determine whether *it* believes the evidence at trial established guilt beyond a reasonable doubt. “Instead, the relevant question is whether, after viewing the

evidence in the light most favorable to the prosecution, *any rational trier of fact* could have found the essential elements of the crime *beyond a reasonable doubt*. (Cite omitted, emphasis in original.)

State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Salinas, supra*, at 201. Circumstantial evidence and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. *State v. Bencivenga*, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

Mr. Wittmer argues that, absent the child hearsay statements of his daughter, there would be insufficient evidence to support his convictions. Based on the above statement of facts and

argument, the State submits that the child hearsay statements of T.A.W. were properly admitted and that there clearly is sufficient evidence to support the convictions beyond a reasonable doubt.

Ms. Winslow witnessed two very alarming incidents regarding Mr. Wittmer interacting with his nine-year old daughter (see Factual History above). These incidents corroborated the testimony of T.A.W. and provided direct testimony from Ms. Winslow. T.A.W. was extremely traumatized discussing these incidents and usually chose to write down on paper the details of the sexual assaults except when she spoke with her grandma and "Auntie" Kae; T.A.W., during trial, wrote answers to many questions of the deputy prosecutor and the defense counsel.

Mr. Wittmer alleges that the testimony of Ms. Young regarding a lack of physical findings contradicted T.A.W.'s statement that the defendant put his private in her bottom. In fact, Ms. Young's testimony was quite clear that physical findings are very unusual in young children in cases of vaginal and anal penetration and opined regarding the reasons for this (see Factual History above).

Next, Detective Kolb testified to the incriminating admissions that Mr. Wittmer made regarding these incidents (see Factual

History above). These statements included the appellant acknowledging that he may have done these things; apologizing; asking the detective to shoot him and stating that whoever turned him in should receive a medal. Mr. Wittmer, during the process of being booked into the jail, thanked the detective for arresting him and making his daughter safe, even shaking the detective's hand. Mr. Wittmer now asserts that he was intimidated by Detective Kolb.

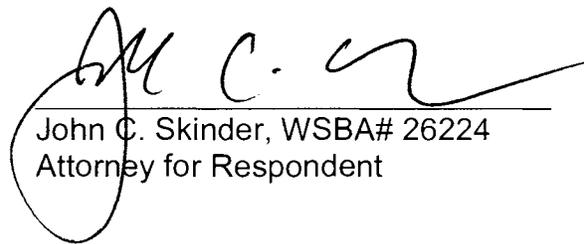
Even when Mr. Wittmer testified at trial, he testified (regarding the incident supporting the charge of child molestation in the first degree) that he checked his nine year-old daughter for a yeast infection and then kissed her on the mouth after examining her genitals. The jury, as trier of the fact, clearly weighed the credibility of the witnesses and believed the testimony of T.A.W., Ms. Ecklebarger, Ms. Olson, Detective Kolb, Ms. Winslow, Ms. Young, and Ms. Buettner and disbelieved the testimony of Mr. Wittmer. Based on the testimony heard at trial and in a light most favorable to the State, the State requests that the court find that there is clearly sufficient evidence to support the convictions beyond a reasonable doubt.

D. CONCLUSION.

As the rape of a child in the first degree charge and the

incest in the first degree charge were based on separate and distinct acts and different laws, as the failure of the court to provide a *Petrich* instruction on the incest in the first degree charge was harmless, as the child hearsay statements were properly admitted, and as there was clearly sufficient evidence to support the convictions for rape of a child in the first degree, incest in the first degree, and child molestation in the first degree, the State respectfully requests that the court deny Mr. Wittmer's appeal and affirm his convictions.

Respectfully submitted this 17th day of JUNE, 2010.


John C. Skinder, WSBA# 26224
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the BRIEF OF RESPONDENT, on all parties or their counsel of record on the date below as follows:

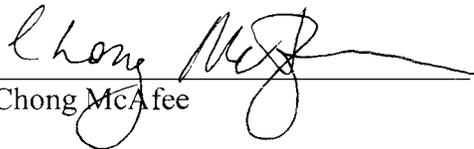
- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by to Supreme Court

TO: PATRICIA A. PETHICK
ATTORNEY AT LAW
PO BOX 7269
TACOMA, WA 98417

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STATE OF WASHINGTON
BY S
CLERK

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

Dated this 17th day of June, 2010, at Olympia, Washington.


Chong McAfee