

NO. 40090-1-II

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

BY *[Signature]*

STATE OF WASHINGTON, RESPONDENT

v.

SEAN PATRICK RYAN, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable James R. Orlando

No. 07-1-04102-0

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**Brief of Respondent**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the defendant waived the issue of a double jeopardy violation where he failed to propose a “separate and distinct act” instruction himself, and whether, assuming that issue was preserved for appeal, the jury was properly informed that it was required to find a “separate and distinct act” for each count where the State properly elected the acts upon which each count was based.
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6. Whether the sentencing court properly imposed conditions of community custody, with the possible exception of conditions 26 and 27 of Appendix H.

B. STATEMENT OF THE CASE.

1. Procedure

On August 6, 2007, Sean Patrick Ryan, hereinafter referred to as “defendant,” was charged by information with four counts of first-degree child rape, listing Ca. N. as the victim, and two counts of second-degree child rape, listing Co. N. as the victim. CP 1-3.

The court called the case for trial on April 14, 2008, and heard motions in limine. RP 1, 5-56.

A hearing was held to determine the admissibility of child hearsay statements made by Ca. N. and Co. N. under RCW 9A.44.120. RP 59-232, At that hearing, the State called Ca. N., RP 59-91, Co. N., RP 91-126, Samuel Nelson, RP 126-62, Michelle Breland, RP 175-208, Keri Arnold-Harms, RP 208-22, and the parties argued the admissibility of the statements. RP 222-28. The trial court thereafter ruled such statements admissible with some redactions. RP 228-32.

The parties selected a jury, RP 246-49, and the State gave its opening statement on April 16, 2008. RP 249.

The defense moved to exclude testimony from Breland that Ca. N. and Co. N. were sexually abused if her examination showed no physical injuries whatsoever. RP 249-50. The deputy prosecutor indicated that he did not anticipate asking that question. RP 250.

The State called Pierce County Sheriff's Deputy Christopher Todd, RP 257-67, Bettye Craft, RP 268-93, and Dr. Jeffrey Blake, RP 294-342.

The defendant moved to exclude testimony from Arnold-Harms regarding her training and interview techniques and the court denied that motion. RP 344-52.

The State called Keri Arnold-Harms, RP 352-74, 383-88. During direct examination of this witness, the defendant moved for a mistrial because of testimony concerning memory. RP 376-77. That motion was denied. RP 377.

The defendant moved to exclude testimony by Breland that findings of no physical injury were still consistent with sexual abuse. RP 389-94, 396-97. The court denied the motion. RP 395, 397.

The State then called Michelle Breland, RP 404-61, Samuel Nelson, RP 465-562, and Ca. N., RP 566-89, 593-623.

At the conclusion of Ca. N.'s direct examination, the defendant moved to dismiss under *Crawford*, but that motion was denied. RP 589-93.

The State then called Co. N., RP 624-740, Natalie Wilson, RP 744-63, Phoebe Mulligan, RP 782-804, Carlin Harris, RP 854-70, and rested. RP 870.

The defendant called Pierce County Sheriff's Department Detective Michael Ames, RP 871-83, Darren Bryant, RP 883-95, George Lummus, RP 901-43, Precious Wright, RP 944-57, Eric Wright, RP 957-83, Julia Lynn Horton, RP 983-95, Pheoebe Mulligan, RP 1022-35, Carlin Harris, RP 1035-42, Nancy Austring, RP 1043-59, Myra Louise Johnson, RP 1066-76, Jennifer Lynn Trueit, RP 1076-85, Denni Nelson, RP 1086-1232, 1238-1400, and Mary Powers. RP 1518-36. The defendant then testified. RP 1401-72, 1480-1518.

The defense rested on May 6, 2008, and the State called Billie Reed-Lyyski, RP 1544-73, and John Maier, RP 1577-91, in rebuttal.

The parties discussed the proposed jury instructions on May 6 to 7, 2008, RP 1595-1610, 1618-23, and the court took formal exceptions to those instructions. RP 1623-25. The court instructed the jury on May 7, 2008. RP 1625-26.

The parties gave closing arguments on May 7, 2008. RP 1626-77 (State's closing), 1679-1714 (defense closing), 1714-42 (State's rebuttal).

On May 12, 2008, the jury returned verdicts of guilty as charged to first-degree child rape in counts I, II, and IV, and guilty as charged to second-degree child rape in count V. RP 1755-59; CP 110-11, 113-14. The jury did not reach a verdict on counts III and VI. RP 1755-56; CP 112, 115.

On September 14, 2009, a competency hearing was held after the defendant attempted suicide in the jail and subsequently underwent competency evaluations. 09/14/09 RP 3-103. The defendant was found competent. 09/30/09 RP 104-13; RP 1762.

On November 6, 2009, the defendant was sentenced to 260 months to life in total confinement on counts I, II, and IV, and to 210 months to life in total confinement on count V, community custody for life, no contact with the victims, completion of a psychosexual evaluation and treatment, and payment of restitution and legal financial obligations. RP 1781-82; CP 282-99; 233-35.

The defendant filed a timely notice of appeal on December 4, 2009. CP 282-99. *Cf.* RP 1782-83.

## 2. Facts

Samuel Nelson testified that he had two daughters, Ca. N., who was nine years of age, and Co. N., who was thirteen at the time of his April 21, 2008, testimony. RP 466; RP 567-69; RP 625-26.

On July 27, 2007, the girls were living with their mother, RP 476, but visiting Samuel Nelson. RP 480-81. While visiting, Ca. N. told Samuel that the defendant was hurting them. RP 481-82, 575. Samuel asked them how the defendant was hurting them, but Ca. N. was very

hesitant to respond. RP 482. She finally repeated that “he’s hurting us,” and simultaneously placed the open palm of her hand from her stomach, and down over her “private parts.” RP 482. Ca. N. then said, “you know?” RP 482.

Ca. N. testified that the defendant touched her number one spot with his hand and that he touched her “[n]umber two” spot with his “his number one spot.” RP 596. She testified that he put his number one in her number two, RP 613, that it would hurt and that, sometimes, she screamed when he did it. RP 606. Ca. N. testified that her number one spot was for “[g]oing pee,” that her number two spot was for “[g]oing poop,” and that boys’ number one spots differed from those of girls. RP 595. She testified that he touched her with his number one spot more than once. RP 596. Ca. N. testified that, aside from spanking her “once –three times,” there was nothing else that the defendant did to her that she did not like. RP 618-19.

Co. N. testified that she was thirteen years of age, RP 625, and liked the defendant when he moved in with her mother. RP 636. She testified that he started touching her in her “private parts,” “between my legs.” RP 641-44. The defendant later began making Co. N. take off her clothes before he touched her vagina and with his fingers. RP 644-46. The defendant would actually place his fingers inside of both her vagina

and her anus. RP 645-46. The defendant tried to place his penis inside of Co. N.'s vagina and anus. RP 647.

She testified that this sometimes hurt and that the defendant would rub petroleum jelly, or Vaseline, on her private parts or put it on his fingers so it did not hurt. RP 651-52, 714-15. Co. N. testified that "we would be going through a lot of that [i.e., petroleum jelly]." RP 652. Co. N. also saw the defendant touch Ca. N. in her private parts. RP 650.

Co. N. testified that she did not disclose what the defendant was doing because she was worried that he would be incarcerated and that her mother would be upset. RP 654-55, 718, 724. She said that the defendant gave her money, ice cream, and candy not to tell. RP 656. Co. N. testified that no one told her or her sister what to say in the disclosures they eventually made. RP 663-65, 669

Samuel was shocked by the disclosure and called his mom and sister for support. RP 484, 746-47. *See* RP 575, 659. With the help of his sister, Natalie Wilson, he took the girls to Mary Bridge Children's Hospital. RP 485. On the way to the hospital, both Wilson and Samuel told the girls to tell the truth. RP 747-48. Nobody told the girls what to say beyond that. RP 747-48, 751-52. Samuel reported to hospital staff what the girls had told him and a doctor performed an examination. RP

486-87. Samuel stepped out of the room at one point, away from the girls, and told a sheriff's deputy what happened. RP 487-88.

Samuel also scheduled appointments for the girls at the Child Abuse Intervention Department (CAID). RP 490; RP 580. Samuel testified that he could not hear the interviews which the girls gave, and did not tell them what to say. RP 493-94. *See* RP 580. He also indicated that he did not discuss with the girls what they should say during the medical examination at the CAID. RP 495. In fact, he was not even in the building at the time that Breland examined the girls. RP 496.

Ca. N. had nightmares, experienced fear, and insisted that all the doors be locked. RP 504. Co. N. experienced anger, fear, and frustration and also suffered some nightmares. RP 504. The girls were placed in counseling to help cope with the abuse. RP 497-504; RP 580-81.

After the girls began counseling, they made additional disclosures regarding, among other things "positions" and use of a pillow during the abuse. RP 504-05.

After the disclosures were made, custody of the girls was transferred to Samuel, RP 505-06. Apparently Denni Nelson, the girls' mother, signed a civil agreement allowing Samuel such custody. RP 506. Ms. Nelson saw them only once thereafter, at the request of a guardian *ad litem*, despite the fact that there were no legal restraints on her visiting the

children. RP 508-10. *See* RP 672-73. Both girls regularly stated that they missed their mother and that they wanted to see her, RP 510, RP 582-83, 589, 672-74, 762-63, 794-99, 1027-29, even though they complained about her getting angry and hitting them. RP 542, 601-02. Co. N. denied that she was making the allegations up to live with her dad, and testified, "I love them both. 50/50.... So I like to see them equally." RP 674. Co. N. told counselor Mulligan that her biggest concern was that her mother might be being hurt. RP 1028-29.

Prior to the girls coming to live with their father, they had not had regular medical or dental care. RP 511-12, 675-76. Co. N. testified that she had to have ten teeth extracted and three filled after coming to live with her father. RP 676. Ca. N. had stomach pain, nausea, blurred vision, and intense headaches after coming to live with her father. RP 513. Ca. N. had also reported to her sister that "she was bleeding in her private parts." RP 661.

At about 1:45 a.m. on July 27, 2007, Pierce County Sheriff's Deputy Christopher Todd arrived at Mary Bridge Childrens' Hospital to investigate a possible sexual assault. RP 260-62. He was told that two female children were reporting that their mother's live-in boyfriend was

sexually assaulting them. RP 263. Deputy Todd met with Samuel Nelson, the girls' father, and had him complete a handwritten statement. RP 263-66.

Dr. Jeffrey Blake, a specialist in pediatric emergency medicine, who worked as an attending physician at Mary Bridge Children's Hospital, examined the girls on July 26, 2007. RP 294-302. Blake agreed that "it is possible to have abuse and not have injury or apparent injury," and that he would not expect to see any sort of injury to the hymen from digital penetration, and sometimes, none from intercourse. RP 315-19, 323-24. Dr. Blake also testified that the use of lubrication, such as baby oil or Vaseline, would decrease the probability of trauma from abuse. RP 337-38.

Blake testified that Ca. N. had a bladder infection, and that she complained of painful urination which may have been caused by external skin inflammation. RP 315-17. Such an infection and injury could be related to a sexual assault. RP 321.

Keri Arnold-Harms testified that she works as a child interviewer and completed training conducted by Harborview Medical Center in an interview technique commonly referred to as the "funnel technique." RP 353-65. She testified that this technique begins with very broad, very open-ended questions, which provide the child no information and simply

request a narrative response. RP 355-56. The interviewer will then ask “focus” questions designed to limit the subject matter while remaining open-ended. RP 356. She stated that through this technique, the children provide the information and the interviewer simply asks clarifying questions to find out what they mean. RP 357.

Arnold-Harms testified that she interviewed both Ca. N. and Co. N. on August 2, 2007, and that these interviews were recorded on DVD. RP 366-74. Co. N. was emotional during her interview and cried at least once. RP 372. The DVD recording of Ca. N.’s interview was admitted and played for the jury. RP 374, 384-85.

Michelle Breland, a pediatric advanced nurse practitioner at Mary Bridge Children’s Hospital in the Child Abuse Intervention Department, RP 404, testified that she had completed a master’s degree in nursing, and specialized training in pediatric sexual assaults. RP 406-11. Breland, who is familiar with the academic literature regarding sexual assault, testified that the genital area tends to heal very quickly and often heals completely. RP 411-15. Breland testified that it is very rare to find an anal injury in an abused child, noting that one study found that only “around one percent of kids who have been sexually abused have anal findings.” RP 416. She indicated that she has seen around 2,000 child patients complaining of

sexual abuse, but that only one of those children had injury to the anus. RP 424-25.

Breland testified that she examined both Ca. N. and Co. N. separately on August 7, 2007. RP 428. Their father, Samuel Nelson was not present. RP 431. When Breland asked Co. N. if she knew why she was there, Co. N. replied, “because I was sexually assaulted” by the defendant. RP 434. Co. N. stated that “[h]e would do it to my bottom, not down in my privates,” RP 437, and verified that what she had told Arnold-Harms was true. RP 435-36. Co. N. told Breland that “[w]hen he did it to me, it would hurt for a while because he would stretch my skin,” but that “[t]he pain would go away in like two minutes.” RP 436. She said that the defendant last did this to her, a couple of weeks before Breland’s examination of her. Breland did not find injuries or healed injuries during her genital examination of Co. N. RP 437-38.

When asked if she understood why she was seeing Breland, Ca. N. said, “Because my dad told me.” RP 439. Breland then explained to Ca. N. that she was there for a check up. RP 439. When asked if there was anything bothering her that day, Ca. N. replied, “I miss my mom, since I can’t talk to her.” RP 439. Ca. N. subsequently reported that the defendant “got on me.” RP 440. When asked if the defendant had ever done anything to hurt her body, Ca. N. replied, “Yes, my privates,” and

later pointed to her genital area and her bottom as her privates. RP 440. When asked if she had ever noticed anything different about her body after something happened with the defendant, Ca. N. stated, “bleeding.” RP 440. She said, “it hurt to go poop and sometimes it stings when I go pee.” RP 440. During her genital examination of Ca. N., Breland did not see any injuries. RP 441. During the anal examination, she did find an “anal tag,” which can be a normal finding. RP 441, 446-47, 453-53.

Breland testified that she would expect the vaginal examination of a child who suffered digital penetration more than two weeks prior to that examination to be normal, and the hymenal tissue to be ample. RP 459-60. She testified that penetration of the vagina will not always injure the hymen and that the hymen may be penetrated without any injury whatsoever. RP 460. Breland further testified that she would expect to see a normal anal examination even after anal penetration where such penetration occurred more than two weeks before the examination. RP 460.

Phoebe Mulligan, who works for Comprehensive Mental Health and the Child Advocacy Center, provides mental health assessments and treatment for children who have reported sexual abuse. RP 783. Mulligan saw both Ca. N. and Co. N. RP 788-89. Both girls were referred to her on

August 2, 2007, and she saw both on August 9. RP 790. They indicated that an adult had touched her “private sexual body parts,” RP 792.

Carlin Harris testified that she was a mental health counselor who provided counseling for both Ca. N. and Co. N. RP 854-57. Co. N. indicated that she understood she was in counseling with Harris because, she “got hurt by my mom’s boyfriend,” and suffered both physical and sexual abuse. RP 858-59. Co. N. indicated that it had started a couple years before, RP 859, and that the defendant touched her vaginal area with his hands and his penis. RP 861-62.

Denni Nelson, the defendant’s former fiancée and victims’ mother, testified that she had both baby oil and Vaseline in her residence at the time that the defendant lived with her and her children, but indicated that she was only aware of one jar of Vaseline. RP 1144-45. She testified that she never found the defendant doing anything inappropriate with the girls, RP 1154, but that there were times that he would be alone with them. RP 1148-49, 1329-30. Ms. Nelson testified that she demanded “complete and total respect and obedience” from her children, and that she “was a pretty hard mom,” who had gotten out of control” with her daughters. RP 1154-56. She admitted that she had never taken either girl to the doctor or the dentist. RP 1311-15. She testified that her daughters never confided in her that the defendant had touched them inappropriately. RP 1154-55, 1221.

The defendant testified that he had not had “any kind of inappropriate sexual contact” with either Co. N. or Ca. N. the night before they went to stay with their father. RP 1469. He also denied putting a finger or his penis in Co. N.’s “private parts,” having her perform oral sex on him, or having sexual contact with Ca. N. RP 1470-71. However, he indicated that, while he was working, he had as much contact as possible with Co. N. and Ca. N. RP 1435. After he started going to school at Clover Park Technical College, he testified that, he “absolutely” had times when he was alone with the girls. RP 1441, 1470, 1496-1507.

C. ARGUMENT.

1. THE DEFENDANT WAIVED THE ISSUE OF A DOUBLE JEOPARDY VIOLATION BY FAILING TO PROPOSE A “SEPARATE AND DISTINCT ACT” INSTRUCTION AND, EVEN IF THAT ISSUE HAD BEEN PRESERVED, THE JURY WAS PROPERLY INFORMED THAT IT WAS REQUIRED TO FIND A “SEPARATE AND DISTINCT ACT” FOR EACH COUNT BECAUSE THE STATE PROPERLY ELECTED THE ACTS UPON WHICH EACH COUNT WAS BASED.

The double jeopardy clause of the Fifth Amendment to the United States Constitution provides that no person shall “be subject for the same offense to be twice put in jeopardy of life or limb.” U.S. Const. Amend.

V. It applies to the states through the due process clause of the Fourteenth

Amendment. *State v. Wright*, 165 Wn.2d 783, 801, 203 P.3d 1027 (2009) (citing *Benton v. Maryland*, 395 U.S. 784, 794, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969)). The Washington State Constitution similarly mandates that no person shall “be twice put in jeopardy for the same offense.” Wn. Const. Art. I, sec. 9. Washington’s double jeopardy clause “offers the same scope of protection as its federal counterpart.” *State v. Adel*, 136 Wn.2d 629, 632, 632, 965 P.2d 1072 (1998) (citing *State v. Gocken*, 127 Wn.2d 95, 107, 896 P.2d 1267 (1995)). The right to be free from double jeopardy protects a defendant, from among other things, “multiple punishments for the same offense.” *State v. Borsheim*, 140 Wn. App. 357, 366, 165 P.3d 417, 421 (2007). However, “[t]he double jeopardy clause does not prohibit the imposition of separate punishments for different offenses.” *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190, 201 (1991).

“[I]f it is not manifestly apparent to a criminal trial jury that the State is *not* seeking to impose multiple punishments for the same offense, the defendant’s right to be free from double jeopardy may be violated.” *Borsheim*, 140 Wn. App. at 367 (emphasis added). In a case in which the State did not elect the acts upon which it was relying for conviction, Division 1 of this Court held that “in sexual abuse cases where multiple identical counts are alleged to have occurred within the same charging

period, the trial court must instruct the jury ‘that they are to find ‘separate and distinct act’ for each count.’ *Id.* (quoting *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996)).

In the present case, although the defendant argues that the trial court violated his rights against double jeopardy by failing to give an instruction that the jury “had to rely on separate and distinct incidents for each conviction,” Brief of Appellant, p. 30, he waived this argument by failing to propose such an instruction below.

Proposed jury instructions must be served and filed when a case is called for trial, CrR 6.15(a), and “[n]o error can be predicated on the failure of the trial court to give an instruction where no request for such an instruction was ever made.” *State v. Kroll*, 87 Wn.2d 829, 843, 558 P.2d 173 (1977); *State v. Lucero*, 140 Wn. App. 782, 787, 167 P.3d 1188 (2007)(quoting *McGarvey v. City of Seattle*, 62 Wn.2d 524, 533, 384 P.2d 127 (1963), for the proposition that if a party fails to propose a desired jury instruction, that party “cannot predicate error on its omission.”); RAP 2.5(a). Indeed, in a context similar to that on review, the Supreme Court held that defendant’s failure to request an instruction informing the jury that it must unanimously agree on the same criminal act for conviction on each charge, did not waive the issue on appeal only because defendant “made a proper motion before the trial court, fully apprising the court of

his argument and its legal basis.” *State v. Petrich*, 101 Wn.2d 566, 571-72, 683 P.2d 173 (1984).

In the present case, contrary to CrR 6.15(a), the defendant refused to propose any jury instructions of his own, and instead told the trial court that he “would just be making objections to the State’s proposed instructions.” RP 1595. The defendant then objected to the State’s proposed jury instructions 7, 8, 9, and 10, as creating a “*Petrich* problem” and “also in theory a double jeopardy problem because they are all exactly the same.” RP 1599; CP 50-80. Proposed Instructions 7, 8, 9, and 10 were “to-convict” instructions pertaining to counts I, II, III, and IV. CP 50-80; Appendix A. The defense attorney, however, refused to propose instructions of his own. RP 1602.

The deputy prosecutor and the court tried to formulate new instructions to meet the defendant’s objections. RP 1600-03. However, the defense attorney indicated that he continued to object to the proposed instructions and expected to object to *any* instruction modified based on his objection. RP 1603. The deputy prosecutor then again asked if the defense attorney was proposing his own instruction, and the defense attorney again, refused to do so. RP 1603-04. The court indicated that it was “[c]ertainly open to other suggestions,” but the defendant refused to provide any. RP 1604.

The defendant also objected to proposed instructions 17 and 18, which were the State's proposed *Petrich* instructions. RP 1608. The State agreed to make changes to these instructions, RP 1608, but the defendant continued to object to them even after the changes were made. RP 1623-24. The defense attorney did not propose an instruction of his own. RP 1620.

Ultimately, the deputy prosecutor stated that “the *Petrich* instruction [which] has been proposed and accepted by the court, is obviously sufficient under the case law in conjunction with the oral arguments that I will be making” such that it would be unnecessary to add “to wit” language to the to convict instructions. RP 1619-20.

The defense attorney simply objected and did not propose an alternative. RP 1620.

The court noted that the defense was “not very helpful,” and ruled that he would instruct using the originally proposed to-convict instructions and the modified *Petrich* instructions. RP 1620-21.

The defendant then took formal exception to instructions 7 and 13, the modified *Petrich* instructions, and instructions 8 through 11 and 14 through 15, the to-convict instructions, without ever requesting any instructions of his own. RP 1623-24.

The defendant now argues that the trial court should have given an instruction which stated that the jury must “find ‘separate and distinct acts’ to support each conviction.” Brief of Appellant, p. 28-35. However, he never proposed such an instruction at trial, despite repeated requests from the State and trial court to propose instructions. *See* RP 1595, 1602-04, 1620-21. Because a party which fails to propose a desired jury instruction, “cannot predicate error on its omission,” *Lucero*, 140 Wn. App. at 787, the defendant has waived the issue of whether the trial court erred in failing to instruct the jury that it must find ‘separate and distinct acts’ to support each conviction. *See Kroll*, 87 Wn.2d at 843; *McGarvey*, 62 Wn.2d at 533. *Cf. State v. Corbett*, 158 Wn. App. 576, 591-92, 242 P.3d 52 (2010).

In *Petrich*, which dealt with jury unanimity, the defendant failed to request an instruction informing the jury that “it must unanimously agree on the same criminal act for conviction on each charge.” *Petrich*, 101 Wn.2d at 571. The Supreme Court held that defendant’s failure to request such an instruction did not waive the issue on appeal only because the defendant “made a proper motion before the trial court, fully apprising the court of his argument and its legal basis.” *Petrich*, 101 Wn.2d at 571-72. No such motion was made by the defendant in this case. Indeed, despite requests for guidance from the court, the defendant presented no legal

authority, made no motion, and requested no jury instruction of his own. *See*, RP 1595-1626.

Because “[n]o error can be predicated on the failure of the trial court to give an instruction where no request for such an instruction was ever made,” *Kroll*, 87 Wn.2d at 843, the defendant waived the issue of whether the trial court erred in failing to instruct the jury that it must find separate and distinct acts to support each conviction. *See* RAP 2.5(a). His convictions should, therefore, be affirmed.

Even had the defendant not waived the issue, the jury was properly informed that it was required to find a “separate and distinct act” for each count because the deputy prosecutor, during closing argument, elected the acts upon which each count was based.

The Supreme Court has held that “[t]he State may, in its discretion,” either rely on a jury instruction or “elect the act upon which it will rely for conviction.” *Petrich*, 101 Wn.2d at 572; *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988); *State v. Noltie*, 116 Wn.2d 831, 843, 809 P.2d 190 (1991).

Although *Petrich* was decided in the context of insuring jury unanimity rather than avoiding double jeopardy, this is a distinction without a difference. The State certainly could not elect to rely on one act for conviction for purposes of jury unanimity, and another for purposes of

double jeopardy. Once it has elected that a specific act pertains to a specific count, which it is clearly permitted to do for purposes of jury unanimity, that same act must pertain to the same count for purposes of double jeopardy. Therefore, once the State makes a sufficient election, it makes “manifestly apparent to a criminal trial jury that the State is not seeking to impose multiple punishments for the same offense,” and the defendant’s right to be free from double jeopardy is protected. *See Borsheim*, 140 Wn. App. at 367.

In the present case, during the trial court’s discussion of jury instructions, the State informed the court and defense counsel that it intended to rely on such an election in its closing argument. RP 1619-20. In that closing argument, the deputy prosecutor then explicitly elected the acts upon which the State was relying for conviction in counts I through IV, stating that the defendant was

Charged with four counts and the way it’s broken down is pretty simple. Ca[. N.] told you on both DVD and on direct examination that *Mr. Ryan stuck his penis in her anus in her bedroom*, right? *That’s Count I, in the bedroom. Count II, on the couch.* Right? Did not he do it on the couch? *Count III, in the mom’s room. And then Count IV, Count IV is for the instance that she described in her bedroom right before she went to go see her dad when she was eight years old.* She said, “Mr. Ryan gagged me with it.” Right? Her word, “He gagged me with it.” And Keri said, “What are you talking about? What do you mean he gagged you with it?” “You know, he gagged me with it.” She said, “I don’t know. What do you mean by

that?” “He shoved it in and gagged me with it.”

And she says, “You are saying he gagged you. What are you talking about?” She said, “His number one. He stuck his number one inside my mouth with nothing on it, and he gagged me with it. And then he stopped when I gagged.

Right? *That is Count IV. Oral sex at that specific time is Count IV.*

RP 1674 (emphasis added). Thus, the State elected to rely the act of penile-anal intercourse in Ca. N.’s bedroom for conviction in count I, the act of sexual intercourse on the couch for conviction in count II, the act of sexual intercourse in Ca. N.’s mother’s room for conviction of count III, and the act of penile-oral sexual intercourse in Ca. N.’s bedroom for conviction of count IV.

In so doing, the State made it “manifestly apparent to a criminal trial jury that [it was] not seeking to impose multiple punishments for the same offense,” but relying on “separate and distinct acts” for each count. *See Borsheim*, 140 Wn. App. at 367. Therefore, the defendant’s right to be free from double jeopardy was protected, and his convictions should be affirmed.

While the defendant quotes division 1 case law for the argument that “[t]he State offers no authority for the proposition that evidence or argument presented at trial may remedy a double jeopardy violation caused by deficient instructions,” Brief of Appellant, p. 34-35 (citing *State*

*v. Berg*, 147 Wn. App. 923, 935-36, 198 P.3d 539 (2008)), such an argument is inapplicable here. The Supreme Court has held repeatedly that the State may “elect the act upon which it will rely for conviction.” *Petrich*, 101 Wn.2d at 572. In so electing, the State makes “manifestly apparent to a criminal trial jury that [it] is not seeking to impose multiple punishments for the same offense,” and the defendant’s right to be free from double jeopardy is protected. See *Borsheim*, 140 Wn. App. at 367.

Although *Berg* cites *State v. Aumick*, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995) for the proposition that “[t]he jury should not have to obtain its instruction on the law from the arguments of counsel,” the Court was simply referring to the fact that defense counsel could not argue that intent was an element of attempted first-degree rape without an instruction to that effect. *Aumick* did not so much as mention jury unanimity, double jeopardy, or *Petrich*. *Aumick*, 126 Wn.2d 422. Therefore, it did not alter the holding thereof that the State may elect the act upon which it relies for conviction.

While *Berg* also cited *State v. Clausing*, 147 Wn.2d 620, 56 P.3d 550 (2002), for the proposition that “it is the judge’s ‘province alone to instruct the jury on relevant legal standards,’” an election during closing argument by the State as to which act it is relying for conviction is not an instruction on legal standards.

Neither case alters the legal right of the State to “elect the act upon which it will rely for conviction.” *Petrich*, 101 Wn.2d at 572. Because the State made such an election in the present case, it made it “manifestly apparent” that it was “not seeking to impose multiple punishments for the same offense,” but relying on “separate and distinct acts” for each count. See *Borsheim*, 140 Wn. App. at 367.

Therefore, the defendant’s right to be free from double jeopardy was protected, and his convictions should be affirmed.

2. THE DEFENDANT HAS FAILED TO MEET HIS BURDEN OF SHOWING PROSECUTORIAL MISCONDUCT OR THAT UNCHALLENGED ARGUMENT WAS FLAGRANT AND ILL-INTENTIONED.

Absent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice’ incurable by a jury instruction.” *State v. Larios-Lopez*, 156 Wn. App. 257, 260, 233 P.3d 899 (2010)(citing *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006)(quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L.Ed.2d 323 (1998))). This is because the absence of an objection “strongly suggests to a court that the argument or event in

question did not appear critically prejudicial to an appellant in the context of the trial.” *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610(1990)(*emphasis in original*).

Even where there was a proper objection, an appellant claiming prosecutorial misconduct “bears the burden of establishing the impropriety of the prosecuting attorney’s comments and their prejudicial effect.” *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009); *State v. Fisher*, 165 Wn.2d 727, 746-47, 202 P.3d 937 (2009); *State v. McKenzie*, 157 Wn.2d 44, 134 P.3d 221 (2006)(quoting *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997); *Beck v. Washington*, 369 U.S. 541, 557, 82 S. Ct. 955, 8 L. Ed. 2d 834 (1962).

Hence, a reviewing court must first evaluate whether the prosecutor’s comments were improper. *Anderson*, 153 Wn. App. at 427. “The State is generally afforded wide latitude in making arguments to the jury and prosecutors are allowed to draw reasonable inferences from the evidence.” *State v. Anderson*, 153 Wn. App. 417, 427-28, 220 P.3d 1273 (2009). However, “it is misconduct for a prosecutor to argue that in order to acquit a defendant, the jury must find that the State’s witnesses are either lying or mistaken.” *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). See *State v. Casteneda-Perez*, 61 Wn. App. 354, 362-63, 810 P.2d 74, 79 (1991). Such an argument misstates the law and

“misrepresent[s] both the role of the jury and the burden of proof” because the jury does not have to find that the State’s witnesses are lying or mistaken to acquit; instead, it “is required to acquit unless it ha[s] an abiding conviction in the truth of [the State’s evidence],” that is, unless it is convinced beyond a reasonable doubt. *Fleming*, 83 Wn. App. at 213. The argument also presents a “false choice” because “[t]he testimony of a witness can be unconvincing or wholly or partially incorrect for a number of reasons without any deliberate misrepresentation being involved.” *Casteneda-Perez*, 61 Wn. App. at 363. See *Fleming*, 83 Wn. App. at 213.

It is not, however, misconduct for a prosecutor to argue that the evidence does not support a defense theory, *State v. Russell*, 125 Wn.2d 24, 87, 882 P.2d 747 (1994) (citing *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314 (1990), *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114, *rev. den.*, 115 Wn.2d 1014, 797 P.2d 514 (1990)), and “the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *Russell*, 125 Wn.2d at 87. Moreover, “[r]emarks of the prosecutor, even if they are improper, are not grounds for reversal if they were invited or provoked by defense counsel and are in reply to his or her acts and statements, unless the remarks are not a pertinent reply or are so prejudicial that a curative instruction would be ineffective.” *Id.* at 86.

In the present case, the defendant argues that, in closing argument, the deputy prosecutor presented a “false choice” by repeatedly arguing to the jury that it “had to find that the girls [Co. N. and Ca. N.] were lying in order to acquit,” and that he thereby misstated “the law, the state’s burden of proof and the juror’s role.” Brief of Appellant, p. 36-41. At trial, however, the defendant objected to only one statement. *See* RP 1629-30. Therefore, review in this case should be limited to whether the defendant has met his burden of showing prosecutorial misconduct stemming from this one sentence.

Absent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice’ incurable by a jury instruction.” *Larios-Lopez*, 156 Wn. App. at 260. Although Division 1 of this Court has found that arguing “that in order to acquit a defendant, the jury must find that the State’s witnesses are lying or mistaken,” is “a flagrant and ill-intentioned violation of the rules governing a prosecutor’s conduct at trial,” *Fleming*, 83 Wn. App. at 213-14, the argument at issue here, for the reasons stated below, was proper and is distinguishable from that in *Fleming*. Therefore, review should be limited to the one sentence to which Defendant objected at trial.

Even were the Court to review all four of the challenged statements, *see* Brief of Appellant, p. 36-37, RP 1627-28, 1629, 1631-32, & 1672, given the context of these remarks and the defense theory to which they responded, *see e.g.*, RP 10-11, 1709, the prosecutors' statements in closing argument were distinguishable from *Fleming* and proper. *See Russell*, 125 Wn.2d at 87.

From the beginning, the defense attorney made clear that the “defense in this case... is that we believe Samuel Nelson talked to these girls and got them to come up with these allegations” to gain “custody of the girls” after his divorce. RP 10-11. In its closing argument, the defense noted that Samuel Nelson was “certainly capable of manipulating two daughters who love him dearly and want to live with him,” RP 1681, and explicitly argued that “we believe that Sam [Nelson] coached these girls.” RP 1709. The defense argued that because Nelson wanted custody of the girls, wanted to stop his ex-wife from taking them out of state, and wanted to stop the State from pursuing him for child support, he coached them to make the allegations which gave rise to this case. RP 1682-90. The defense noted that “[c]hildren can make false accusations just as much as anybody else,” and argued that the jury must “look at the claims and determine: Do they have a reason to make this up?” RP 1710. Ultimately, the defense suggested that both girls came into court and lied. RP 1711.

The deputy prosecutor, in his closing argument noted that the defense was asserting that Nelson coached the girls to fabricate the allegations, and stated,

But you have to accept that version from them to find him not guilty. Because this case boils down to whether or not you believe what the little girls told you or whether you believe they were coached. Those are the options.

RP 1627-28. The defendant did not object to this argument. RP 1628.

The deputy prosecutor went on to say:

And yet the defense wants you to believe they [i.e., Co. N. and Ca. N.] stayed away from [their mother] for nine months to perpetuate a story that their dad told them to say.

But you have to accept that from the defense to find Mr. Ryan not guilty.

RP 1629.

The defense attorney objected as “[i]mproper burden shifting,” and the court instructed the jury that it “need[s] to refer to the instructions as to what their role is in the case,” noting, “[a]gain, this is closing argument.”

RP 1629-30.

The deputy prosecutor later argued that “you would have to accept that version [of events in which the girls had been coached] to find Mr. Ryan not guilty.” RP 1630-31.

Taken in isolation, such statements may appear, as defendant now asserts, Brief of Appellant, p. 35-41, to be an argument that “to acquit

[the] defendant, the jury must find that the State's witnesses are either lying or mistaken." *State v. Fleming*, 83 Wn. App. 209, 213, 921 P.2d 1076 (1996). This Court, however, "do[es] not take allegedly improper comments out of context" but "view[s] them in the context of the entire argument." *State v. Larios-Lopez*, 156 Wn. App. 257, 261, 233 P.3d 899, 901 (2010).

Indeed, in the present case, the deputy prosecutor explained what he meant by these statements in his rebuttal argument. He referred the jury to the court's instruction number 3, which defined reasonable doubt, and then read the last line, which stated that "[i]f from such consideration you have an abiding belief in the truth of the charge, then you are satisfied beyond a reasonable doubt." RP 1733. The deputy prosecutor then argued:

If you have an abiding belief in the truth of the charge, the State has met its burden.

I looked up the definition in a dictionary. "Abiding" means lasting. If you, when you go back into that jury room, say, "You know what? I believe what C[a. N.] said on that DVD, I believe what she said on that CD, I am going to wake up tomorrow and believe it, wake up the next day and believe it, I am going to wake up forever and believe it," that's an abiding belief. If you believe what she said on that DVD, then the State's proved it beyond a reasonable doubt.

*And in order not to believe her, like I said in the beginning, if you think she made it up. Right? So what, she made it up, then obviously I have no case. If you believe what she said, then he's guilty.*

RP 1734 (emphasis added). Here, the prosecutor properly makes clear that the State bears the burden of proving the charges beyond a reasonable doubt, but that the State's proof of those charges depends on the jury finding the testimony of Ca. N. and Co. N. credible. Therefore, if the jury chose not to believe these girls, the State had "no case" and the jury should acquit the defendant, but if it did believe the girls, there was sufficient evidence given their testimony to prove the counts beyond a reasonable doubt, and the jury should find the defendant guilty.

Although the deputy prosecutor may have initially stated this argument inartfully, as noted above, he later clarified what he meant, *see* RP 1734, and repeatedly stated the argument properly. Aside from and largely after the four statements referenced by the Defendant, *see* RP 1627-28, 1629, 1631, and 1672, the deputy prosecutor explicitly and properly stated his argument, that proof of the State's case depended on the proven credibility of the girls, a total of nine times. *See* RP 1631-32, 1644, 1673, 1677, 1717, 1723, 1733-34, 1737, and 1742.

These arguments, with the exception of the clarification that occurred at RP 1733-34, were presented as follows:

And you have to decide whether or not that was something she was told to say, whether that was something she experienced, because if she experienced it and she told you the truth, then he's guilty.

RP 1644.

And really, the only issue is if you believe the girls, he's guilty, because if you believe the girls, he's guilty, because if you believe the girls, each element is satisfied beyond a reasonable doubt.

RP 1673.

So you are left with: Do you believe them [i.e., Co. N. and Ca. N.]? Do you believe them? And are you presented with any evidence that what she said was not true? That's your job. If you believe them, he's guilty. If you do not believe them, then he's not guilty.

RP 1677.

[a]ll you have to do is listen to C[o. N.]'s testimony, C[a. N.]'s interview. And if they are lying, if you think that's made up, acquit him. Let him walk out.

If they're telling the truth, he's guilty. Not complicated.

RP 1717.

This case is really pretty simple. It is if you believe the girls. If you believe the DVD and what they told you, then he's guilty. And if you believe it is fabricated, he is not guilty.

RP 1723.

If you think she's [i.e., Ca. N.,] making this stuff up, acquit him, he's not guilty. If you believe what she says in these clips, then he's guilty. He's guilty.

RP 1737.

If you don't believe her let him go. If you believe her, find him guilty.

RP 1737.

The deputy prosecutor concluded his arguments by stating:

She wasn't coached in those clips. The State's met its burden. If you think that she was just regurgitating what dad told her to say, then Mr. Ryan is not guilty.

Thank you.

RP 1742.

Such an argument does not set up a false choice by which the jury must believe one version of events or another such that to acquit a defendant it must find that the State's witnesses are lying. It simply acknowledges the fact that proof of the State's case beyond a reasonable doubt depends on the jury finding those witnesses credible, and that should the jury not so find, it must acquit the defendant. The prosecutor then goes on to argue that the evidence demonstrates the credibility of these witnesses and that the State therefore "met its burden." RP 1742.

Such argument does not misstate the law or misrepresent the role of the jury or the burden of proof. *Compare Fleming*, 83 Wn. App. at 213. Indeed, it properly stated the burden of proof. The deputy prosecutor actually read from the court's instruction thereon, which was proper and to which the defendant did not take exception. *See* CP 87-109; RP 1733. *See State v. Hickman*, 135 Wn.2d 97, 101, 954 P.2d 900 (1997).

The deputy prosecutor also properly represented the role of the jury, in stating, “[y]ou are the judges of the credibility” of the witnesses, RP 1635, and “[y]ou assess the credibility of the witnesses.” RP 1721. The court also properly instructed the jury on this point using an instruction to which defense did not object. CP 87-109; Appendix A. *See Hickman*, 135 Wn.2d at 101.

As a result, the deputy prosecutor’s argument was proper and the defendant has failed to meet his burden of showing “the impropriety of the prosecuting attorney’s comments.” *See Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). Therefore, the defendant has failed to show prosecutorial misconduct, and his convictions should be affirmed.

Although the defendant also claims that the deputy prosecutor minimized his burden of proof by “repeatedly impl[ying] that jurors should convict because Ryan had failed to *disprove* the prosecution’s claims,” Brief of Appellant, p. 41-43, he is mistaken. The prosecutor did no such thing.

Clearly, the State bears the burden of “pro[ving] beyond a reasonable doubt... every fact necessary to constitute the crime with which [a defendant] is charged.” *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970). Moreover, “[a] prosecutor may commit misconduct if he mentions in closing argument that the defense did not

present witnesses or explain the factual basis of the charges or if he states that the jury should find the defendant guilty simply because he did not present evidence to support his defense theory.” *State v. Jackson*, 150 Wn. App. 877, 885, 209 P.3d 553, 558 (2009). However, “[t]he mere mention that defense evidence is lacking does not constitute prosecutorial misconduct or shift the burden of proof to the defense.” *Id.* at 885-86. Indeed, it is not misconduct for a prosecutor to argue that the evidence does not support a defense theory, *Russell*, 125 Wn.2d at 87 (citing *State v. Graham*, 59 Wn. App. 418, 429, 798 P.2d 314, *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114, *rev. den.*, 115 Wn.2d 1014, 797 P.2d 514 (1990), and “the prosecutor, as an advocate, is entitled to make a fair response to the arguments of defense counsel.” *Russell*, 125 Wn.2d at 87.

In the present case, the deputy prosecutor did no more than make a fair and proper response to the defense theory that the Co. N. and Ca. N. were coached by their father to fabricate the allegations upon which the criminal charges were based. *See, e.g.*, RP 10-11.

The defendant argues that the deputy prosecutor committed misconduct by stating, “he [the defense] didn’t establish that this didn’t happen,” Brief of Appellant, p. 41 (citing RP 1656), but the defendant fails to mention the context in which this sentence was uttered. That context is as follows:

They [i.e., the defense] want you to believe, because she [i.e., Ca. N.] didn't tell her mom, somehow she's making this up, she's following the story by her dad.

What didn't [the defense attorney] establish on cross-examination? What didn't he get from the witness? Well, he got no evidence of coaching, right? There was no evidence in cross-examination that her dad told her to say anything or that she said anything that her dad told her to say.

There was—he didn't establish that this didn't happen. Even on cross-examination she said, "He stuck his penis in my anus lots and lots of times." She never changed her story. She never recanted her story.

RP 1655-56.

Next, the defendant argues that the statement there is "no evidence that this did not happen to her," i.e., Ca. N. was misconduct. Again, this statement is taken out of context. The context is as follows:

So when you consider all the evidence you heard with respect to C[a. N.], there's no evidence that she's coached. There's no evidence that this did not happen to her.

The evidence is consistent from her DVD with the details this happened to her. And so if it happened to her, you can believe her, then he's guilty of the four counts with respect to C[a. N.].

RP 1657.

Third, the defendant challenges the following statements:

So ask yourselves if [the defense theory of coaching] makes any sense. Then ask yourselves if there's any evidence, any piece of evidence that you heard that supports it, that supports their position.

RP 1671-72.

Next the defendant challenges the phrase “provided no evidence that what they [the girls] said is not true or that somebody coached them to do this” as misconduct. Again, however, this phrase is taken out of context. The context is as follows:

That’s really the only issue for you to decide. Because if they [the girls] are telling the truth, he’s guilty. And if they aren’t, he’s not guilty. It’s pretty simple. All the other stuff you heard really is just noise, right? If you believe the girls, he’s guilty. And they have provided no evidence that what they said is not true or that somebody coached them to do this.

RP 1672.

Lastly, the defendant challenges the following argument by the deputy prosecutor:

So you are left with: Do you believe them? Do you believe them? And are you presented with any evidence that what she said was not true? That’s your job. If you believe them, he’s guilty. If you do not believe them, then he’s not guilty.

I am asking you to find him guilty of all six counts, because when you listen to the details of the girls, at least C[a. N.] provided on her DVD, she didn’t make it up. That’s what happened to her. Based on the evidence you heard, I am asking you to find him guilty of all six counts. I am asking you to believe what the girls told you because there’s no evidence not to believe them.

Find him guilty of these counts because he did these things. He did it. They told you.

RP 1677.

When these statements are placed in context, it is clear that in none of these instances is the prosecutor arguing “that the jury should find the defendant guilty simply because he did not present evidence to support his defense theory.” *Jackson*, 150 Wn. App. at 885. The deputy prosecutor said nothing of the sort. Rather, he was speaking to what the State’s own witnesses did and did not say and what the evidence in the record indicated to argue that such evidence did not support the defense theory that the girls were coached. In fact, the prosecutor actually read from the court’s instruction number 3, which indicated that “the State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt,” and that “the defendant has no burden of proving that a reasonable doubt exists.” RP 1733. *See* CP 87-109; Appendix A.

Arguing that there is no evidence not to believe a witness is not the same as arguing that the defendant had the burden to produce such evidence. It is simply an argument from the evidence in the record that a particular witness is credible. There is nothing improper about this, *see Russell*, 125 Wn.2d at 87, and the defendant has failed to show that there is. As a result, the defendant has failed to show that the prosecutor’s arguments were improper. Therefore, he has failed to show prosecutorial misconduct and his convictions should be affirmed.

Even were the defendant to have shown that the deputy prosecutor's argument was improper, however, he has not established its prejudicial effect.

"A prosecutor's improper comments are prejudicial 'only where 'there is a substantial likelihood the misconduct affected the jury's verdict.'" *State v. Yates*, 161 Wn.2d 714, 774, 168 P.3d 359 (2007) (quoting *Brown*, 132 Wn.2d at 561, 940 P.2d 546; *Fisher*, 165 Wn.2d at 747. "A reviewing court does not assess '[t]he prejudicial effect of a prosecutor's improper comments... by looking at the comments in isolation but by placing the remarks 'in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *Id.* (quoting *Brown*, 132 Wn.2d at 561. "[R]emarks must be read in context." *State v. Pastrana*, 94 Wn. App. 463, 479, 972 P.2d 557 (1999); *Larios-Lopez*, 156 Wn. App. at 261. Prosecutorial misconduct may be neutralized by a curative jury instruction, *Russell*, 125 Wn. 2d 24, 86, 882 P.2d 747 (1994), and juries are presumed to follow the court's instructions. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983), from 140 Wn. App. 1023.

In this case, the defendant has failed to show that the challenged statements affected the jury's verdict. In arguing that there was "more than a substantial likelihood that this misconduct affected the verdict,"

Brief of Appellant, p. 46-49, the defendant cites *Casteneda-Perez*, 61 Wn. App. at 362-63, for the proposition that “[t]his very same argument has been called by our courts ‘misleading and unfair’” because it “misstates the law, the state’s burden of proof, and the jurors’ role.” *Casteneda-Perez*, however, dealt not with a deputy prosecutor’s comments during closing argument, but with the impropriety of a prosecutor asking a defendant and other defense witnesses whether police officers who contradicted their testimony were lying. *Casteneda-Perez*, 61 Wn. App. at 354-63. Therefore, it is incorrect to state that the “very same argument” has been called misleading and unfair.

Moreover, it is irrelevant to an analysis of prejudice. Indeed, the defendant’s arguments regarding prejudice serve only to advance the notion that the statements at issue were improper, not that they affected the verdict.

When the statements at issue are actually placed, as they must be, “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury,” there is no “substantial likelihood that they affected the jury’s verdict.” See *Yates*, 161 Wn.2d at 774. Although the deputy prosecutor initially framed his argument by stating that “you have to accept” the defense theory of coaching “to find Mr. Ryan not guilty,” he later clarified what he meant by

that, by stating, “like I said in the beginning, if you think she made it up.... then obviously I have no case.” RP 1734. The deputy prosecutor also went on to state, at least eight other times, that proof of the State’s case depended on the credibility of the girls, and that should the jury not find them credible, then it must find the defendant not guilty. RP 1631-32, 1644, 1673, 1677, 1717, 1723, 1737, and 1742. The deputy prosecutor also reminded the jury that the State bore the burden of proof and read a portion of the court’s instruction on reasonable doubt to the jury. RP 1733, 1742. Thus, in the context of the deputy prosecutor’s total argument, it is unlikely that the jury would have thought that it was required to find anything to find the defendant not guilty.

Rather, given the total argument and the defense theory that the girls were coached to lie, it seems likely that the jury would have taken the statements as an argument that proof of the State’s case depended on the jury finding the girls to be credible. This is, after all, how the deputy prosecutor concluded his arguments: “[s]he wasn’t coached in those clips. The State’s met its burden,” but “[i]f you think that she was just regurgitating what dad told her to say, then Mr. Ryan is not guilty.” RP 1742.

Even were the State’s argument to have introduced any confusion as to “the state’s burden of proof and the juror’s role,” Brief of Appellant,

p. 46, the court's instructions would have eliminated it. *See Yates*, 161 Wn.2d at 774; *Russell*, 125 Wn. 2d at 86; *Weber*, 99 Wn.2d 158.

With respect to the burden of proof and presumption of innocence, the trial court instructed the jury that:

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. ***The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.***

***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, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

CP (emphasis added).

This instruction was read to the jury, given in written form, and referenced and quoted, at least in part, by both attorneys in their closing arguments. RP 1625-26, CP 87-109, RP 1712-13 (defense attorney), 1733-34 (deputy prosecutor). The one time defense attorney objected to the deputy prosecutor's statements in closing argument, the trial court again directed the jury to the instructions. RP 1629-30. Therefore, there can be no doubt that the jury understood that the defendant was presumed

innocent and that the burden of proving the charges beyond a reasonable doubt fell on the State. Any arguments to the contrary by the deputy prosecutor, especially when accompanied by contemporaneous admissions by the prosecutor that he actually bore the burden of proof and that the defendant was presumed innocent would have been unlikely to have affected the jury's understanding or its verdict.

The same can be said with respect to the jury's role in discerning the credibility of witnesses. The court specifically instructed the jury that "[y]ou are the sole judges of the credibility of each witness." CP 87-109; Appendix A. The deputy prosecutor also twice told the jury this during his closing arguments. RP 1635, 1721. Moreover, when the defense attorney objected to the deputy prosecutor's argument, the court again instructed the jury that it "will need to refer to the instructions as to what their role is in the case." RP 1629-30.

Moreover, to the extent the jury may have misinterpreted the deputy prosecutor's argument as one which espoused positions contrary to those announced in the court's instructions, instruction 1 told the jury that it "must disregard" such argument because "it is not supported by the evidence or the law in my instructions." CP 87-109; Appendix A.

Thus, when the challenged statements are analyzed "in the context of the total argument, the issues in the case, the evidence addressed in the

argument, and the instructions given to the jury,” there is no “substantial likelihood the misconduct affected the jury’s verdict.” *Yates*, 161 Wn.2d at 774. As a result, the defendant has failed to show prejudice resulting from the challenged statements. Therefore, regardless of the propriety of the challenged statements, he has failed to show prosecutorial misconduct, and his convictions should be affirmed.

3. THE TRIAL COURT PROPERLY ADMITTED THE TESTIMONY OF ARNOLD-HARMS, AND, THOUGH NOT PRESERVED FOR REVIEW, THE TESTIMONY OF REED-LYYSKI, BECAUSE SUCH TESTIMONY DID NOT CONSTITUTE IMPROPER OPINION TESTIMONY ON THE VERACITY OF THE VICTIMS.

This Court “may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a). Moreover, RAP 2.5(a)(3) does not permit *all* asserted constitutional claims to be raised for the first time on appeal, but only certain questions of constitutional magnitude.” *State v. Kirkman*, 159 Wn.2d 918, 934, 155 P.3d 125 (2007). “Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a ‘manifest’ constitutional error.” *Id.* at 936. Rather, “[m]anifest error’ requires a nearly explicit statement by the witness that the witness believed the accusing victim.” *Id.*

If properly preserved for appeal, a trial court's decision regarding the admissibility of testimonial evidence, including opinion testimony, will only be reversed for a manifest abuse of discretion. *State v. Aguirre*, 168 Wn.2d 350, 359-61, 229 P.3d 669 (2010); *State v. Young*, 158 Wn. App. 707, 243 P.3d, 172, 179 (2010); *State v. George*, 150 Wn. App. 110, 117, 206 P.3d 697 (2009). The trial court abuses its discretion "if no reasonable person would have decided the matter as the trial court did." *State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004), *review granted in part*, 163 Wn.2d 1033, 187 P.3d 269 (2008). "Where reasonable persons could take differing views regarding the propriety of the trial court's actions, the trial court has not abused its discretion." *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). "That is, such judgments merit reversal only if the trial court acts on unreasonable or untenable grounds." *Aguirre*, 168 Wn.2d at 359. However, such a decision may be affirmed on any ground the record adequately supports even if the trial court did not consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004). The burden is on the appellant to "establish that the trial court abused its discretion." *Demery*, 144 Wn.2d at 758.

"Cases involving alleged child sex abuse make the child's credibility 'an inevitable, central issue,' and "[w]here the child's

credibility is thus put in issue, a court has broad discretion to admit evidence corroborating the child's testimony." *Kirkman*, 159 Wn.2d at 933

"Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant," or "the veracity of another witness because such testimony invades the province of the jury as the fact finder in a trial." *Demery*, 144 Wn.2d at 759-65; *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987).

"As to the victim, even if there is uncontradicted testimony on a victim's credibility, the jury is not bound by it," and [j]uries are presumed to have followed the trial court's instructions, absent evidence proving the contrary." *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). Indeed, "[t]he assertion that the province of the jury has been invaded may often be simple rhetoric." *Id.*

"A witness expresses opinion testimony if the witness testifies to beliefs or idea rather than the facts at issue." *Demery*, 144 Wn.2d at 760. The Washington State Supreme Court has "expressly declined to take an expansive view of claims that testimony constitutes an opinion of guilt." *Demery*, 144 Wn.2d at 760 (citing *City of Seattle v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993)).

“In determining whether such statements are impermissible opinion testimony, the court will consider the circumstances of the case, including the following factors: ‘(1) ‘the type of witness involved’, (2) ‘the specific nature of the testimony,’ (3) ‘the nature of the charges,’ (4) ‘the type of defense,’ and (5) ‘the other evidence before the trier of fact.’” *Kirkman*, 159 Wn. App. at 928 (quoting *Demery*, 144 Wn.2d at 759, 30 P.3d 1278 (quoting *State v. Heatley*, 70 Wn. App. 573, 579, 854 P.2d 658 (1993))).

In the present case, the defendant argues that portions of the testimony of Keri Arnold-Harms, Michele Breland, and Billie Reed-Lyyski constituted improper opinion testimony “on guilt, veracity or credibility.” Brief of Appellant, p. 51-66. The defendant is mistaken.

a. Testimony of Keri Arnold-Harms

The defense attorney moved to exclude any testimony of Arnold-Harms concerning her interview techniques and preliminary competency protocol. RP 344-48. The trial court found that the interview technique, which employs open-ended questions designed to funnel information from general to specific, was “out of the norm in terms of how I think most people would expect questions to be asked.” RP 349-50. It found, based on *Kirkman*, that such testimony was therefore, “helpful to the jury to understand why the child witness examiner asks the questions in the

manner that they do.” RP 349. The court thus noted the objection for the record, but allowed the testimony. RP 349-51.

On appeal, the defendant points to several pieces of the testimony of Arnold-Harms as improper opinion testimony on “guilt, veracity or credibility.” Brief of Appellant, p. 52-55. First, the defendant points to testimony that Arnold-Harms employs “the funnel technique” when interviewing children, which entails “start[ing] out with very broad and open-ended questions,” and then using “focus questions” to elicit more specific information to avoid suggesting answers to children. RP 355-60; Brief of Appellant, p. 52.

Second, the defendant challenges testimony that Arnold-Harms used this interview technique with Co. N. and Ca. N. RP 369, 373.

The third and fourth pieces of challenged testimony may be the same. The defendant challenges testimony that Arnold-Harms “used ‘methods’ to ‘assist in determining’ whether a child has been coached.” Brief of Appellant, p. 52. Although the defendant cites to RP 361-85, there is no testimony on these pages which even uses the word “coach” or “coached.” The term “coached” was only used by Arnold-Harms, at RP 387. However, the defendant also separately complains of the testimony found at RP 387, describing it as testimony that “certain things such as a

child's language could indicate 'suggestibility.'" The testimony on RP 387 was as follows:

Any concerns that there could be whether or not say a child has been coached, which is another term that's often used, or suggestibility issues, those are all things that I would look for as well as if a child is using very adult language that they are not able to support. When I ask follow-up questions, if they are not able to provide any supporting information, then I may have concerns about coaching, or if this is, you know, a child where abuse has been suggested to her.

RP 387.

Fifth, the defendant appears to challenge the following exchange:

(By [deputy prosecutor]) In your interaction with Ca[. N.], did you see any indicator indicating she had been coached or suggested an answer?

[Defense Attorney]: Objection, Your honor, again calls –  
THE COURT: Sustain to the form of that question.

RP 387-88. *See* Brief of Appellant, p. 52-55. This exchange, however, clearly contained no testimony. The defendant's trial counsel objected and his objection was sustained before the witness could answer the question. Therefore, there was no improper opinion testimony elicited here because there was no testimony whatsoever.

Sixth, the defendant challenges the exchange which occurred immediately after this one:

Q (By [deputy prosecutor]) You talked about things you would look for in the interview to determine suggestibility. Did you see any indicators in this interview?

[Defense Attorney]: Again I would object, Your

Honor. Improper opinion testimony, needs expert testimony, no Frye hearing.

THE COURT: I will allow her to answer. I think opinion –the objection really goes to the weight of her testimony.

A As to any concerns about suggestibility playing a factor in this interview, no, I did not see anything that caused concern.

RP 388.

Lastly, the defendant challenges the following testimony:

When it comes to issues of suggestibility, the things that I would be looking for is certainly if this is a child that is able to correct me, a child that can tell me no, a child that can tell me when she doesn't know something or if she thinks that I have gotten something wrong.

And those were all things that were present in this interview. She told me that

....

She was able to tell me when she didn't know something, she was able to tell me no, she was able to correct me. If she thought I had gotten something wrong, or if it was something that she thought I had already asked her, she pointed those things out.

RP 386.

In none of this testimony did Arnold-Harms ever testify that she believed Ca. N. or Co. N., that either girl was telling the truth, or that the defendant was not telling the truth. Indeed, in none of this testimony did Arnold-Harms express an opinion regarding the guilt or veracity of the defendant or the veracity of another witness. *See Demery*, 144 Wn.2d at 759-65.

Nevertheless, the defendant argues that, through her testimony, Arnold-Harms “told the jurors that [the victims] “had been tested by the prosecutor’s ‘expert’ and found *not* to have been suggested the answers to the questions,” and therefore, that the victims were telling the truth. Brief of Appellant, p. 53-55 (emphasis in the original).

In *Kirkman*, a combined case, the Supreme Court rejected a virtually identical argument. *Kirkman*, 159 Wn.2d 918. In that case, one detective testified “about the competency protocol that he gave to [the victim], relating to her ability to tell the truth.” *Id.* at 930. The other detective “described a ‘competency’ protocol she administered before interviewing [a victim],” testified that she “tested [the victim]’s ability to distinguish a truth and a lie and asked the child to promise to tell the truth.” *Id.* at 933-34. The issue before the *Kirkman* Court was thus almost the same as the argument presented by defendant here: that because the interviewer “told the jury that he ‘tested [the victim]’s competency and her truthfulness’ ... he ‘[i]n essence’ told the jury that [the victim] told him the truth in providing her account of events.” *Id.* at 930-31.

The Supreme Court in *Kirkman* rejected this argument, finding that “[t]he challenged portion of [the interviewer’s] testimony is simply an account of the interview protocol he used to obtain [the victim]’s statement,” and that “[b]y testifying as to this interview protocol, [the

interviewer] ‘merely provided the necessary context that enabled the jury to assess the reasonableness of the... responses.’ *Kirkman*, 159 Wn.2d at 931 (quoting *Demery*, 144 Wn.2d at 764). The Court noted that “[d]etectives often use a similar protocol in all child witness interviews, whether they believe the child witness or not.” The Court therefore held that “testimony as to the protocol utilized in [child victim] interviews only provides context for the interview of a child victim and does not improperly comment on the truthfulness of the victim.” *Id.* at 934.

In the present case, the testimony of Arnold-Harms that she employs “the funnel technique” when interviewing children, that she used this technique to interview the present victims, and that she looks for suggestibility and coaching when asking follow-up questions did no more than “provide[] context for the interview of [the] child victim[s].” Therefore, under *Kirkman*, such testimony “d[id] not improperly comment on the truthfulness of the victim[s].” *Id.* at 934.

The testimony that Arnold-Harms was not concerned about suggestibility in her interview with Ca. N., is similar to the testimony of detectives in *Kirkman* that they elicited promises to tell the truth from the children they interviewed. Like those detectives, Arnold-Harms never testified that she believed the girls she interviewed. Compare RP 353-74, 83-88 with *Kirkman*, 159 Wn.2d at 931-34. Moreover, Arnold-Harms’

testimony that she was not concerned that suggestibility play[ed] a factor in this interview,” RP 388, is not the same as testimony that Ca. N. was telling the truth. Indeed, such is not even the same as testimony that there was no coaching. Even had the jurors accepted the testimony of Arnold-Harms as credible, which they were told they did not have to do, CP 87-109, they could easily have concluded that Ca. N. was coached, or if she were not, that she was lying or simply mistaken in her testimony. Far from being an opinion of veracity of the girls, testimony that Arnold-Harms looked for signs of suggestibility or coaching was no more than an explanation of an interview protocol, which explained for the jury why certain follow-up questions were asked. Under *Kirkman*, it did no more than “provide[] context for the interview” and “d[id] not improperly comment on the truthfulness of the victim[s].” *Kirkman*. 159 Wn.2d at 934.

Therefore, the trial court did not abuse its discretion in admitting the testimony of Arnold-Harms and the defendant’s convictions should be affirmed.

b. Testimony of Reed-Lyyski

The defendant also complains that the following testimony of Reed-Lyyski constituted “improper opinion testimony on credibility, veracity and guilt”:

Q Did you explain to Ms. Nelson why or how she would become a subject of a report in this case?

A She was placed on as a subject because when we-

[DEFENSE ATTORNEY]: Your Honor, I would object. It is not responsive. He asked did she inform her why.

[DEPUTY PROSECUTOR]: I think she has to explain.

THE COURT: She can answer.

Q (By [DEPUTY PROSECUTOR]) Okay.

A Basically if there's a concern that mom may have known that this was happening to her children, she would have been determined to be neglectful, yes.

Q And did you determine whether or not Ms. Nelson knew and was, in fact, a subject based on her knowing?

A Yes, I did.

Q And what did you determine?

A I determined that it was unfounded, that I did not believe she knew what was happening to her children at that time.

....

Q When did you determine she didn't know?

A After the children's forensic interviews, the children had stated that -

[DEFENSE ATTORNEY]: Your Honor, I would object. It calls for hearsay.

[DEPUTY PROSECUTOR]: Well, it is not offered for the truth.

THE COURT: Not offered for the truth. Goes to establish the date.

[DEFENSE ATTORNEY]: So if it's asking for a date, Your Honor, then I would ask she state what date that was.

[DEPUTY PROSECUTOR]: If she could answer the question, maybe she could.

THE COURT: Go ahead.

Q (By [DEPUTY PROSECUTOR]) Go ahead.

A The children had their forensic interview on August 2<sup>nd</sup>. At that time the children disclosed that they had not told their mother.

RP 1563-65. *See* Brief of Appellant, p. 60-63.

However, the defendant's argument was not properly preserved for review and does not constitute a "manifest error affecting a constitutional right" within the meaning of RAP 2.5(a)(3).

"Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a 'manifest constitutional error.'" *Kirkman*, 159 Wn.2d at 934. Rather, "[m]anifest error' requires a nearly explicit statement by the witness that the witness believed the accusing victim." *Id.*

The defendant concedes that trial counsel did not object to the challenged testimony as improper opinion testimony, and therefore, that the admission of such testimony is not reviewable here unless it was "a nearly explicit statement" that Reed-Lyski believed the girls. Brief of Appellant, p. 61. *See* RP 1563-68.

However, nowhere in the excerpt above nor in any of her testimony did Reed-Lyyski ever testify that she believed the girls. *See* 1544-73. Therefore, she made no explicit or nearly explicit statement that she believed the accusing victims and, as a result, there was no "manifest error" allowing review of this issue in this case. *See Kirkman*, 159 Wn.2d at 934.

The defendant argues that because Reed-Lyyski testified that she based her determination that Nelson was not neglectful on the forensic interviews, she indicated to the jury that she believed “that what the children were claiming had happened had, in fact, occurred.” Brief of Appellant, p. 61-62. The defendant is mistaken.

Such an attenuated line of reasoning is at best an inference which could potentially be drawn from the evidence, not an explicit or “a nearly explicit statement” that Reed-Lyyski believed the girls. As such, it cannot be sufficient to constitute “manifest error,” which would allow review of this issue. *See Kirkman*, 159 Wn.2d at 934. Indeed, the defendant seems to acknowledge as much in his brief, by referring to the disputed testimony as “an *implicit* but clear declaration” that Reed-Lyyski believed the girls. Brief of Appellant, p. 62 (emphasis added).

Even were the issue to be considered reviewable, however, the defendant’s argument is without merit. Reed-Lyyski testified that she determined that concerns of neglect were unfounded because the children disclosed that they had not told their mother their version of events. RP 1565. This is not the same as testifying that she believed the children’s version of events. In fact, one may infer from Reed-Lyyski’s testimony that the veracity of the children’s abuse claims was irrelevant to her neglect determination. If the children’s claims had proven false, Reed-

Lyyski would still have determined that concerns of neglect were unfounded simply because their claims had not been communicated to Ms. Nelson. *See* RP 1565. Thus, her determination was not based on the veracity of the allegations of abuse, but on the mother's steps to safeguard the children while such veracity was determined. As such, Reed-Lyyski's testimony was not, in any way, opinion testimony on the credibility or veracity of the victims in this case.

Because this issue was not properly preserved for review, does not constitute a "manifest error affecting a constitutional right" within the meaning of RAP 2.5(a)(3), and even if reviewable, the challenged testimony was not opinion testimony on the credibility or veracity of the victims in this case, the defendant's convictions should be affirmed.

4. THE TRIAL COURT PROPERLY ADMITTED OF THE TESTIMONY OF ARNOLD-HARMS AND BRELAND AS EXPERT TESTIMONY UNDER ER 702.

Expert testimony is admissible under ER 702, *State v. Jones*, 71 Wn. App. 798, 814, 863 P.2d 85 (1993):

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

ER 702. Generally, “[t]his rule requires [1] the witness be qualified as an expert, [2] any opinion testimony must be based on a theory generally accepted by the scientific community, and [3] the testimony must be helpful to the fact-finder.” *Jones*, 71 Wn. App. 798, 814, 863 P.2d 85, 95 (1993)(citing *State v. Black*, 109 Wn.2d at 341, 745 P.2d 12).

“Education and practical experience may qualify a witness as an expert.” *Id.*

Generally, the *Frye* rule requires that “[a]n expert’s scientific or technical testimony... be based upon a scientific principle or explanatory theory that has gained general acceptance in the scientific community.” *Jones*, 71 Wn. App. at 814 (citing *Black*, 109 Wn. 2d at 342 (citing *Frye v. United States*, 293 Fed. 1013 (D.C. Cir. 1923))). However, it has been held that “the *Frye* rule does not apply to the expression of expert medical opinions concerning the cause of an injury.” *State v. Young*, 62 Wn. App. 895, 906, 802 P.2d 829, 836 (1991). Moreover, “if expert testimony does not concern novel theories of sophisticated or technical matters, it need not meet the stringent requirements for general scientific acceptance.” *Jones*, 71 Wn. App. at 815 (citing *State v. Ortiz*, 119 Wn.2d 294, 310-11, 831 P.2d 1060 (1992)). “Testimony may be based on training, experience, professional observations, and acquired knowledge.” *Id.*

In the present case, the defendant challenges portions of the testimony of Arnold-Harms and that of Breland as improper expert opinion testimony. *See* Brief of Appellant, p. 55-60. The defendant's arguments are unfounded.

a. Testimony of Arnold-Harms

Although the defendant argues that "it is highly questionable whether Arnold-Harms qualified as an 'expert' in child memory," Brief of Appellant, p. 56, it is clear that she never testified as such, RP 362, and therefore, that there was no requirement that she so qualify prior to the proper admission of her testimony. *See* ER 702, *Jones*, 71 Wn. App. at 814.

Arnold-Harms never testified that she was an expert in child memory, nor was she ever offered as such. RP 362. Rather, she testified that she was "employed as a child interviewer," and that she interviews children who are alleged to have been a victim or witness to violent crimes. RP 353-54. She testified that she had undergone training in interviewing such children at Harborview Medical Center, "reviewed literature and research" regarding child development and the dynamics of child abuse, received training in memory, observed others conduct such interviews, completed follow-up training, and conducted about 700 such interviews herself since 2003. RP 353-62. Arnold-Harms therefore had

the “[e]ducation and practical experience” to qualify expert in the field of forensic child interviewing. *See Ortiz*, 119 Wn.2d at 310-11.

Nor did her testimony exceed the scope of that field. Although the defendant claims that her testimony “told jurors that certain interviewing techniques prevent and can even detect whether a child is suggestible or has been subjected to suggestion,” and “that a child’s memory acts in a particular way,” Brief of Appellant, p. 56-57, her testimony was not in the form of an opinion on such topics, but a description of the interview technique employed.

Specifically, Arnold-Harms testified that she employed the “funnel technique” to interview children to try to avoid suggesting answers to the children she interviewed. *See, e.g., RP 355-58*. She indicated that “[t]here’s concerns with kids about suggestibility” and that the funnel technique tries to limit these concerns by asking open-ended questions. *RP 355-57*. However, Arnold-Harms never testified that this technique completely prevented or detected suggestibility in children. *See RP 352-88*. Rather, she simply described why she framed her questions in the manner in which she did.

Moreover, while Arnold-Harms testified about memory in children, she did so only in the context of explaining how she formed her questions and follow-up questions. *See RP 362-65*.

Therefore, her testimony did “not concern novel theories of sophisticated or technical matters,” *Jones*, 71 Wn. App. at 815, but was limited to the interview protocol in which she was trained, which she had employed 700 times previously, and which she used in this case. RP 353-62, 369-73. Her testimony was, therefore, not subject to the *Frye*. *Id.* Rather, it was testimony “based on training, experience, professional observations, and acquired knowledge,” *Id.* and may, perhaps, more properly be characterized not as expert testimony, but as fact testimony. Cf. *State v. Smith*, 67 Wn. App. 838, 841 P.2d 76 (1992).

Because “[b]y testifying as to this interview protocol,” Arnold-Harms also provided the necessary context that enabled the jury to assess the reasonableness of the [victims’] responses,” *Kirkman*, 159 Wn.2d at 931, it was also “helpful to the fact-finder.” *Jones*, 71 Wn. App. at 814.

As a result, the challenged testimony of Arnold-Harms was properly admissible, *see Id.*, and the defendant has failed to “establish that the trial court abused its discretion,” *Demery*, 144 Wn.2d at 758, in so admitting it. Therefore, the defendant’s convictions should be affirmed.

b. Testimony of Breland

The defendant also argues that the court erred in admitting the following testimony of Michelle Breland:

There's also, in the literature they have addressed that, and what they discovered and what my own experience has been is that anal findings are very, very unusual.

The study was around one percent of kids who have been sexually abused have anal findings. So it is very unusual.

RP 416. Brief of Appellant, p. 58-60.

The defendant also argues that Breland's testimony that penetration of the vagina will not always injure the hymen and that the hymen may be penetrated without any injury whatsoever, RP 460, was improper. Brief of Appellant, p. 58-60.

Specifically, the defendant argues that the State failed to present any evidence to show that the "theory" underlying such testimony is "generally accepted in the scientific community." Brief of Appellant, p. 59. The State, however, had no such burden.

In *Young*, the defendant was charged with statutory rape and indecent liberties. *Young*, 62 Wn. App. at 895. Carol Jenny, a physician who worked at the Harborview Sexual Assault Center and examined the victim, was allowed to testify, that the victim's "vaginal opening was 'dramatically dilated' to a diameter of 12 mm, 'extremely large compared to most children her age,'" and that this was "a finding consistent with sexual abuse." *Young*, 62 Wn. App. at 899. Jenny also referred to "one study that looked at several hundred children and set 7 mm. as the upper

range limit.” *Id.* On appeal, Young, like the defendant here, argued that the trial court erred in allowing such testimony because there had been no proof that this opinion was based on a principle that had gained general acceptance in the scientific community under the *Frye* standard. *Id.* at 905-06. The Court noted that Jenny’s testimony “showed a familiarity with the relevant literature consistent with her opinions, her testimony did not involve any new methods of proof or new scientific principles from which conclusions are drawn,” and held that “the *Frye* rule does not apply to the expression of expert medical opinions concerning the cause of an injury.” *Young*, 62 Wn. App. at 906.

The present case is legally indistinguishable from *Young*. In this case, Michelle Breland testified that she was an Advanced Registered Nurse Practitioner (ARNP) with a specialty in pediatrics employed by Mary Bridge Children’s Hospital in the Child Abuse Intervention Department, and that she had been working in that capacity since 1997. RP 404-05. Before that she worked as a registered nurse in the same department from 1992 to 1997. RP 405. Breland had a bachelor’s degree in nursing from Pacific Lutheran University, a master’s degree in nursing from the University of Washington, and was certified as an ARNP. RP 406. She has undergone continuing education in pediatrics, RP 406-07, and has completed about forty trainings on child abuse and completed a

residency program in San Diego. RP 406-11. She was also familiar with the medical literature, including a study titled, “It’s Normal to be Normal,” by Joyce Adams, which found that only one percent of children who were anally raped had “any sort of anal findings.” RP 412-16. In her current position, Breland does nothing but medical evaluations on children who are alleged to have suffered abuse, RP 407-08, and testified that she has seen around 2,500 child patients complaining of sexual abuse, but that only one of those children had injury to the anus. RP 424-25.

Thus, Breland’s testimony, like that of Jenny in *Young*, “showed a familiarity with the relevant literature consistent with her opinions,” and “did not involve any new methods of proof or new scientific principles from which conclusions are drawn.” *Young*, 62 Wn. App. at 906. Therefore, the *Frye* rule does not apply to the expression of Breland’s expert medical opinions, *Id.*, and the State was not required to show that the theory upon which she based that opinion was generally accepted in the scientific community.

Because Breland was “qualified as an expert”, and it is undisputed that her testimony was helpful to the fact-finder, her testimony was properly admitted under ER 702. *See, e.g., Jones*, 71 Wn. App. at 814. Therefore, the defendant has failed to “establish that the trial court abused

its discretion,” *Demery*, 144 Wn.2d at 758, in so admitting it, and his convictions should be affirmed.

5. ALTHOUGH THE DEFENDANT FAILED TO PROPELRY PRESERVE THE ISSUE WITH RESPECT TO MULLIGAN AND HARRIS, THE TRIAL COURT PROPERLY ADMITTED TESTIMONY REGARDING STATEMENTS MADE BY Co. N. AND Ca. N. TO BRELAND, MULLIGAN, AND HARRIS AS STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT UNDER ER 803(a)(4).

Although the defendant failed to properly preserve the issue with respect to Mulligan and Harris, the statements made by Co. N. and Ca. N. to Breland, Mulligan, and Harris, about which the latter three testified at trial, *see* Brief of Appellant, p. 66-68, were properly admissible under ER 803(a)(4). That rule provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....

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

ER 803(a)(4).

ER 803(a)(4) is not limited to physical ailments or statements made to physicians. *In re Dependency of M.P.*, 76 Wn. App. 87, 882 P.2d 1180 (1994). Indeed, “[s]tatements made to counselors in child

abuse or rape situations are encompassed by this exception.” *State v. Ackerman*, 90 Wn. App. 477, 482, 953 P.2d 816 (1998); *M.P.*, 76 Wn. App. at 92-93.

Generally, “[a] party demonstrates a statement to be reasonably pertinent when (1) the declarant’s motive in making the statement is to promote treatment, and (2) the medical profession reasonably relied on the statement for purposes of treatment.” *State v. Williams*, 137 Wn. App. 736, 746, 154 P.3d 322 (2007). “Determining the declarant’s apparent motive ‘rarely presents difficulty [for the court because] the circumstances generally speak for themselves.’” *State v. Kilgore*, 107 Wn. App. 160, 183, 26 P.3d 308, 320 (2001)(quoting 4 CLIFFORD S. FISHMAN, JONES ON EVIDENCE, sec. 30:11, at 744 (7<sup>th</sup> ed. 2000)). Division 1 of this Court noted, “[w]e see no sound basis for presuming young children lack the ability to understand that certain statements they might make are for the purpose of getting help for sickness, pain, or emotional discomfort.” *M.P.*, 76 Wn. App. at 93.

“In domestic violence and sexual abuse situations, a declarant’s statement disclosing the identity of a closely-related perpetrator is admissible under ER 803(a)(4) because part of reasonable treatment and therapy is to prevent recurrence and future injury.” *Id.*; *Ackerman*, 90 Wn. App. at 482 (citing *State v. Bulter*, 53 Wn. App. 214, 221, 766 P.2d

505, *rev. den.*, 112 Wn.2d 1014 (1989)). “[I]dentity is [also] important since child abuse can involve psychological as well as physical injury and there is a risk of further injury if the child and the abuser live in the same household.” *Id.* (citing *State v. Ashcraft*, 71 Wn. App. 444, 859 P.2d 60 (1993)).

In the present case, both Ca. N. and Co. N. saw Advanced Registered Nurse Practitioner Michelle Breland, and counselors Mulligan and Harris.

Breland testified that she performed medical evaluations on children who have allegedly suffered abuse for the purpose of diagnosing any medical problems and treating them. RP 175-76. She saw both Co. N. and Ca. N. for this purpose at the Child Abuse Intervention Department of Mary Bridge Children’s Hospital on August 7, 2007. RP 176-77, 490, 430-31. Breland testified that she questions the children she sees about why they are there and what happened to them so that she can properly evaluate and treat them. RP 178-180, 427. She testified specifically that she makes medical decisions based on what the children tell her, RP 179-80, 427, and that she did so in the case of Ca. N., RP 183-85, and Co. N. RP 185-6.

Breland also testified that she asked then 13-year-old Co. N., RP 625, if she knew why she was in the hospital seeing a nurse, and that Co.

N. expressed that she did. RP 433. Specially, Co. N. told Breland, “I was sexually assaulted” by the defendant. RP 185-86, 433-34. Breland testified that she “wanted to be clear with her [i.e., Co. N.] that she knew she was here for a checkup,” and thus “explained the checkup to her.” RP 186. Co. N. went on to tell Breland that she had some pain and that the “skin around her anus had stretched.” RP 180.

Breland testified that Ca. N. was eight years old during her examination of her. RP 202. Although Ca. N. initially indicated that she was seeing Breland “[b]ecause my Dad told me,” she also indicated that she knew she was at a “doctor’s office,” and according to Breland, after they got her comfortable and got her height and weight, she seemed “to understand what was going on.” RP 182-83, 202. Moreover, Breland explained to Ca. N. that “she had come to see me for a checkup” and “explained the checkup for her.” RP 439. Ultimately, Breland felt that Ca. N. had a “clear understanding” of why she was undergoing the examination. RP 202. In fact, Ca. N. went on to tell Breland that the defendant had hurt her “privates,” RP 183-84, and indicated that she had bleeding around the anus. RP 180.

It is clear from this testimony that Breland, an advanced nurse practitioner who is employed by Mary Bridge Children’s Hospital to diagnose and treat child victims of abuse, RP 175-76, was a “medical

professional” who “reasonably relied on the statement[s of Ca. N. and Co. N.] for purposes of treatment.” *Williams*, 137 Wn. App. at 746. *See* RP 179-80, 183-86, 427.

It is equally clear that Co. N. and Ca. N., who were both sitting in a facility of Mary Bridge Children’s Hospital at the time, *see*, e.g., RP 176-77, and went on to explain to Breland that they had been abused and to describe their symptoms, including a “stretched” anus, and bleeding around the anus, RP 180, made these statements with “the motive... to promote treatment.” *Williams*, 137 Wn. App. at 746.

Therefore, the State demonstrated that the statements made by Co. N. and Ca. N. to Breland were “reasonably pertinent to diagnosis or treatment” within the meaning of ER 803(a)(4), and admissible under ER 803(a)(4). *Williams*, 137 Wn. App. at 746.

The defendant did not seem to object to the statements of Ca. N. or Co. N. made to Mulligan and Harris *about the defendant as hearsay*, *see* RP 766-870. Indeed, the defendant called Mulligan and Harris as witnesses in his case-in-chief and asked both to recount statements made by Co. N. and Ca. N. during their counseling sessions with them. RP 1022-35(Mulligan); RP 1035-42(Harris). Therefore, the issue of whether these statements were improperly admitted under ER 803(a)(4) was not

properly preserved, and should not be reviewed by this Court. *See* RAP 2.5(a).

Assuming that the issue was properly preserved, however, the girls' statements to Mulligan and Harris were properly admitted.

Phoebe Mulligan, who works for Comprehensive Mental Health and the Child Advocacy Center, provides mental health assessments and treatment for children who have reported sexual abuse. RP 783. Mulligan saw both Ca. N. and Co. N. RP 788-89. Both girls were referred to her on August 2, 2007, and she saw both on August 9. RP 790. They indicated that an adult had touched their "private sexual body parts," RP 792. Mulligan testified that she gave the girls standard forms to determine the sort of "stressors" that prompted them to see her, and that she explained these forms to the girls so that they knew what they were filling out and why. RP 790. The statements were then used in the girls' treatment. RP 790-94.

Carlin Harris testified that she was a mental health counselor with a master's degree in counseling, who provided counseling for both Ca. N. and Co. N. RP 854-57. Harris also indicated that she gave both Co. N. and Ca. N. questionnaires for them to fill out to determine what concerns they are dealing. RP 858, 864.

Based on such testimony, it is clear that Mulligan and Harris were

mental health professionals who reasonably relied on the statements of Co. N. and Ca. N. for purposes of treatment for their mental health issues. *See Williams*, 137 Wn. App. at 746.

Co. N. testified that Mulligan was “a mental health counselor” and that Harris was a “[c]ounselor, too.” RP 655, 668. She testified that Mulligan “wanted to see if [she] was emotionally healthy,” and was “one of those people I could express my feelings to” and to whom she could talk about “what happened.” RP 665-666. Co. N. indicated that Mulligan helped her with her mental health. RP 666. Co. N. indicated that she understood she was in counseling with Harris because, she “got hurt by [her] mom’s boyfriend,” and suffered both physical and sexual abuse. RP 858-59. She testified that Harris helped her address her feelings. RP 668-69.

Ca. N. also identified Mulligan and Harris as “counselors,” and testified that she saw Mulligan and then Harris “[t]o make us feel better” because the defendant was hurting her and her sister. RP 580-83.

It is clear from such testimony that the motive of the girls in making their statements to both Mulligan and Harris was to promote treatment of their mental health issues. *See Williams*, 137 Wn. App. at 746.

Thus, the State demonstrated that “the declarant[s]’ motive in

making the statement[s] [wa]s to promote treatment,” and that “(2) the medical professional[s] reasonably relied on the statement[s] for purposes of treatment.” *State v. Williams*, 137 Wn. App. at 746. As a result, it demonstrated that such statements were “reasonably pertinent,” and consequently, admissible under ER 804(a)(4).

Although the defendant failed to properly preserve the issue with respect to Mulligan and Harris, the statements made by Co. N. and Ca. N. to Breland, Mulligan, and Harris, were properly admissible under ER 803(a)(4). As a result, the defendant has failed to “establish that the trial court abused its discretion,” *Demery*, 144 Wn.2d at 758, in admitting them. Therefore, the defendant’s convictions should be affirmed.

6. THE SENTENCING COURT PROPERLY IMPOSED CONDITIONS OF COMMUNITY CUSTODY, WITH THE POSSIBLE EXCEPTION OF CONDITIONS 26 AND 27 OF APPENDIX H.

When a defendant is sentenced under RCW 9.94A.712, the sentencing court must sentence the defendant to community custody, and must sentence that defendant to conditions of community custody listed in former RCW 9.94A.700(4). Former RCW 9.94A.712(5)-(6)(a)(i). The court may also order those conditions provided in RCW 9.94A.700(5). Former RCW 9.94A.712(6)(a)(i).

In addition to the conditions listed in RCW 9.94A.700(4) and (5), “[t]he court may also order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender’s risk of reoffending, or the safety of the community.” *Id.*

“A ‘crime-related prohibition’ is an order prohibiting conduct that *directly relates to the circumstances of the crime.*” *State v. Zimmer*, 146 Wn. App. 405, 413, 190 P.3d 121 (2008). “Sentencing courts have the power to delegate some aspects of community placement to the D[e]partment of Corrections.” *State v. Sansone*, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005).

“Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable.” *State v. Bahl*, 164 Wn.2d 739, 753, 193 P.3d 678 (2008). “Imposition of an unconstitutional condition would... be manifestly unreasonable.” *Id.*

Under the federal due process clause and Article I, section 3 of the Washington State constitution, “a prohibition is void for vagueness if either (1) it does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) it does not provide ascertainable standards of guilt to protect against

arbitrary enforcement.” *State v. Sansone*, 127 Wn. App. at 638-39; *Bahl*, 1164 Wn.2d at 752-53.

In the present case, the court imposed conditions of community custody in its judgment and sentence and in appendices F and H, *see* CP 282-99, 233-35, Appendix B, including seven which are now challenged by the defendant. Brief of Appellant, p. 72-80.

The defendant argues that conditions 14, 24, 26, and 27 of Appendix H were not statutorily authorized. Brief of Appellant, p. 73-80.

Although the defendant may be correct about condition 26, relating to chemical dependency treatment, and 27, relating to mental health treatment, *see State v. Jones*, 118 Wn. App. 199, 207-12, 76 P.3d 258 (2003), conditions 14 and 24 were clearly authorized by statute.

Condition 14 states: “[d]o not possess or peruse pornographic materials. Your Community Corrections Officer will consult with the identified Sexual Deviancy Treatment Provider to define pornographic material.” CP 234. Condition 24 states, “[y]ou shall not have access to the Internet without childblocks in place.” CP 235.

Both conditions were authorized by former RCW 9.94A.712(6)(a)(i), which allowed the court to “order the offender to participate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the

offender's risk of reoffending, or the safety of the community." Indeed, both conditions were necessary to the completion of the psychosexual treatment, a "rehabilitative program" ordered by the court, *see* CP 282-99, and were otherwise reasonably necessary to reduce the defendant's risk of reoffending and to increase the safety of the community.

These conditions were also consistent with RCW 9.94A.700(5)(c), which allows the court to order a defendant to "participate in crime-related treatment or counseling services." Both the judgment and sentence itself, CP 282-99, and Condition 11 of Appendix H did this explicitly, by ordering the defendant to "[o]btain a Psychosexual Evaluation and comply with any recommended treatment by a certified Sexual Deviancy Counselor." CP 234. Neither of these provisions is challenged and both are "crime-related" because they "*directly relate[] to the circumstances of the crime,*" *Zimmer*, 146 Wn. App. at 413, which was child rape. CP 282-99. Conditions 14 and 24 are necessary components of the treatment ordered in Condition 11. Indeed, condition 14 makes this clear by referring to the same treatment provider ordered in unchallenged condition 11. Because these conditions are necessary components of the "crime-related treatment or counseling services" ordered in Condition 11, they were authorized by former RCW 9.94A.712(6)(a)(i), which allowed the court to "order the offender to participate in rehabilitative programs or

otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." Therefore, conditions 14 and 24 were statutorily authorized and should be affirmed.

The defendant also argues that condition 14 of Appendix H, a phrase in the first paragraph of Appendix F, and conditions III and VI of Appendix F were unconstitutionally vague. The defendant is mistaken.

Condition 14 states: "[d]o not possess or peruse pornographic materials. Your Community Corrections Officer will consult with the identified Sexual Deviancy Treatment Provider to define pornographic material." CP 234. Contrary to the defendant's assertion, the second sentence in this condition both "define[s] the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited" and provides "ascertainable standards of guilt to protect against arbitrary enforcement." *Sansone*, 127 Wn. App. at 638-39.

The conditions at issue in *Bahl* and *Sansone* differed significantly from that at issue here. In *Bahl*, the trial court ordered "[d]o not possess or access pornographic materials, as directed by the supervising Community Corrections Officer." *Bahl*, 164 Wn.2d at 743. In *Sansone*, the challenged condition "required that [the defendant] not possess or peruse pornography without prior approval of his probation officer, and

that the term ‘pornography’ was to be defined by his probation officer.” *Sansone*, 127 Wn. App. at 634. These conditions were unconstitutionally vague because they created “a real danger that the prohibition on pornography may ultimately translate to a prohibition on whatever the officer personally finds titillating.” *Id.* at 641 (quoting *United States v. Guagliardo*, 278 F.3d 868, 872 (9<sup>th</sup> Cir. 2002)). See *Bahl*, 164 Wn.2d at 758. Such a concern does not exist here, where, by the terms of the condition, the definition of pornography is to be set in advance by both the community corrections officer and the defendant’s Sexual Deviancy Treatment Provider. Because the treatment provider is involved in setting the definition, he or she can insure that the definition of pornography is precise and treatment-specific. Cf. *Sansone*, 127 Wn. App. at 643.

Nor is there a concern of improper delegation. As the Court in *Sansone* noted “[a] delegation would not necessarily be improper if [the defendant] were in treatment and the sentencing court delegated to the therapist to decide what types of materials [the defendant] could have,” *Id.*, something which was done in condition 14.

Therefore, condition 14 is not unconstitutionally vague and should be affirmed.

The same can be said of the challenged conditions in Appendix F. While the defendant challenges condition III, which states that “[t]he

offender shall participate in crime-related treatment or counseling services,” as unconstitutionally vague, it is not. The judgment and sentence specifies in two places what is meant: that the defendant must complete “a Psychosexual Evaluation and comply with any recommended treatment by a certified Sexual Deviancy Counselor.” CP 282-99; CP 234.

Although the defendant challenges condition VI, which states “[t]he offender shall comply with any crime-related prohibitions,” CP 282-99, as unconstitutionally vague, the crime-related prohibitions at issue are listed throughout the judgment and sentence and its appendices. *See* CP 282-99, 233-35; Appendix B. Similarly, although the defendant challenges language in the first paragraph of Appendix F, which states that he “shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC,” as unconstitutionally vague, such “affirmative acts” are spelled out in the appendices. *See* CP 282-99, 233-35; Appendix B. For example, condition 17 of Appendix H requires the defendant to inform his community corrections officer of any romantic relationships and condition 18 requires him to submit to polygraph and/or plethysmograph testing.” CP 233-35. Therefore, none of the Appendix F conditions are unconstitutionally vague and all should be affirmed.

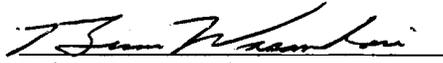
Indeed, all conditions of the defendant's community custody should be affirmed, with the possible exception of conditions 26 and 27, of Appendix H.

D. CONCLUSION.

For the reasons stated above, the defendant's convictions and all conditions of his sentence, except for conditions 26 and 27 of Appendix H should be affirmed.

DATED: May 2, 2011

MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
Brian Wasankari  
Deputy Prosecuting Attorney  
WSB # 28945

Certificate of Service:  
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

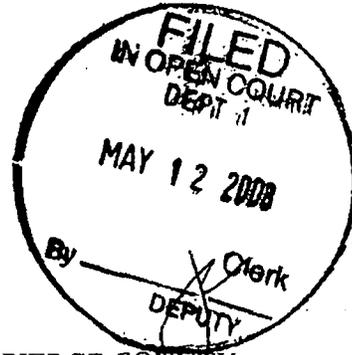
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**APPENDIX A**



07-1-04102-0 29753043 CTINJY 05-14-08



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 07-1-04102-0

vs.

SEAN PATRICK RYAN

Defendant.

**COURT'S INSTRUCTIONS TO THE JURY**

DATED this 7 day of May, 2008.

  
JUDGE **JAMES ORLANDO**

INSTRUCTION NO. 1

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses, stipulations, and the exhibits that I have admitted, during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

You may have heard objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer's objections.

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

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

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper verdict.

INSTRUCTION NO. 1

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. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

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, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

INSTRUCTION NO. 4

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

INSTRUCTION NO. 5

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. 6

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

INSTRUCTION NO. 1

The State alleges that the defendant committed acts of rape of a child in the first degree on multiple occasions. To convict the defendant on any count of rape of a child in the first degree, one particular act of rape of child 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 unanimously agree that the defendant committed all the acts of rape of a child in the first degree.

INSTRUCTION NO. 8

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

- (1) That on or about the period between the 2<sup>nd</sup> day of February, 2004 and the 27<sup>th</sup> day of July 2007, the defendant had sexual intercourse with Ca. N.;
- (2) That Ca. N. 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 Ca. N.; 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, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the the period between the 2<sup>nd</sup> day of February, 2004 and the 27<sup>th</sup> day of July, 2007, the defendant had sexual intercourse with Ca. N.;
- (2) That Ca. N. 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 Ca. N.; 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, as charged in count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the period between the 2nd day of February, 2004 and the 27<sup>th</sup> day of July, 2007, the defendant had sexual intercourse with Ca. N.;
- (2) That Ca. N. 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 Ca. N.; 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, as charged in count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about the period between the 2nd day of February, 2004, and the 27<sup>th</sup> day of July, 2007, the defendant had sexual intercourse with Ca. N.;

(2) That Ca. N. 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 Ca. N.; 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. 17

A person commits the crime of rape of a child in the second degree when the person has sexual intercourse with a child who is at least twelve years old but less than fourteen years old, who is not married to the person, and who is at least thirty-six months younger than the person.

INSTRUCTION NO. 13

The State alleges that the defendant committed acts of rape of a child in the second degree on multiple occasions. To convict the defendant on any count of rape of a child in the second degree, one particular act <sup>of</sup> rape of a child in the second degree must be proved beyond a reasonable doubt and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of rape of a child in the second degree.

INSTRUCTION NO. 14

To convict the defendant of the crime of rape of a child in the second degree, as charged in count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the period between the 29th day of January, 2007, and the 27<sup>th</sup> day of July, 2007, the defendant had sexual intercourse with Co. N.;
- (2) That Co. N. was at least twelve years old but was less than fourteen years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That the defendant was at least thirty-six months older than Co. N.; 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. 19

To convict the defendant of the crime of rape of a child in the second degree, as charged in count VI, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about the period between the 29th day of January, 2007, and the 27<sup>th</sup> day of July, 2007, the defendant had sexual intercourse with Co. N.;
- (2) That Co. N. was at least twelve years old but was less than fourteen years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That the defendant was at least thirty-six months older than Co. N.; 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. 16

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 or anus of another whether such persons are of the same or opposite sex.

INSTRUCTION NO. 17

Married means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in court for legal separation or for dissolution of the marriage.

INSTRUCTION NO. 18

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 re-examine your own views and to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

INSTRUCTION NO. 19

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. For this purpose, use the form provided in the jury room. 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 judicial assistant. I will confer with the lawyers to determine what response, if any, can be given.

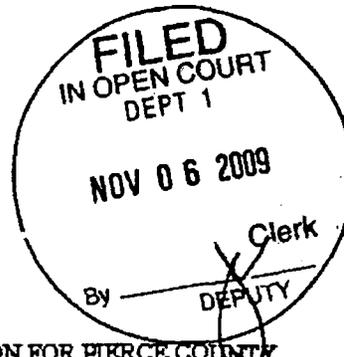
You will be given the exhibits admitted in evidence, these instructions, and verdict forms for recording your verdict. Some exhibits and visual aids may have been used in court but will not go with you to the jury room. The exhibits that have been admitted into evidence will be available to you in the jury room.

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 judicial assistant. The judicial assistant will bring you into court to declare your verdict.

**APPENDIX B**

07-1-04102-0



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

NOV - 9 2009

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 07-1-04102-0

NCO

vs.

AS TO COUNTS I, II, IV, AND V ONLY  
JUDGMENT AND SENTENCE (JS)

SEAN PATRICK RYAN

Defendant.

- Prison  RCW 9.94A.712 Prison Confinement
- Jail One Year or Less
- First-Time Offender
- Special Sexual Offender Sentencing Alternative
- Special Drug Offender Sentencing Alternative
- Breaking The Cycle (BTC)
- Clerk's Action Required, para 4.5 (SDOSA), 4.7 and 4.8 (SSOSA) 4.15.2, 5.3, 5.6 and 5.8

SID: 23283198  
DOB: 05/17/1978

I HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II FINDINGS

There being no reason why judgment should not be pronounced, the court FINDS:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on by  plea  jury-verdict  bench trial of:

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
I	RAPE OF A CHILD IN THE FIRST DEGREE	9A.44.073 10.99.020		Between 2/2/04 and 7/27/07	072071584 Pierce County Sheriff
II	RAPE OF A CHILD IN THE FIRST DEGREE	9A.44.073 10.99.020		Between 2/2/04 and 7/27/07	072071584 Pierce County Sheriff
IV	RAPE OF A CHILD IN THE FIRST DEGREE	9A.44.073 10.99.020		Between 2/2/04 and 7/27/07	072071584 Pierce County Sheriff

JUDGMENT AND SENTENCE (JS)  
(Felony) (7/2007) Page 1 of 14

09-9-14229-8

07-1-04102-0

COUNT	CRIME	RCW	ENHANCEMENT TYPE*	DATE OF CRIME	INCIDENT NO.
V	RAPE OF A CHILD IN THE SECOND DEGREE	9A.44.076 10.99.020		Between 1/29/07 and 7/27/07	072071584 Pierce County Sheriff

\* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Horn, See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual Motivation, (SCF) Sexual Conduct with a Child for a Fee. See RCW 9.94A.533(8). (If the crime is a drug offense, include the type of drug in the second column.)

as charged in the Original Information

- [X] The defendant is a sex offender subject to indeterminate sentencing under RCW 9.94A.712.
- [X] A special verdict/finding that the victims were under 15 years of age at the time of the offenses were returned on Counts I, II, IV and V RCW 9.94A.
- [ ] Current offenses encompassing the same criminal conduct and counting as one crime in determining the offender score are (RCW 9.94A.589):
- [ ] Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number):

2.2 CRIMINAL HISTORY (RCW 9.94A.525):

	CRIME	DATE OF SENTENCE	SENTENCING COURT (County & State)	DATE OF CRIME	A or J ADULT JUV	TYPE OF CRIME
1	OTHER CURRENT OFFENSE 07-1-04102-0 RAPE OF A CHILD IN THE FIRST DEGREE		Pierce County Superior Court, WA	Between 2/2/04 and 7/27/07	A	V
2	OTHER CURRENT OFFENSE 07-1-04102-0 RAPE OF A CHILD IN THE FIRST DEGREE		Pierce County Superior Court, WA	Between 2/2/04 and 7/27/07	A	V
3	OTHER CURRENT OFFENSE 07-1-04102-0 RAPE OF A CHILD IN THE FIRST DEGREE		Pierce County Superior Court, WA	Between 2/2/04 and 7/27/07	A	V
4	OTHER CURRENT OFFENSE 07-1-04102-0 RAPE OF A CHILD IN THE SECOND DEGREE		Pierce County Superior Court, WA	Between 1/29/07 and 7/27/07	A	V

- [ ] The court finds that the following prior convictions are one offense for purposes of determining the offender score (RCW 9.94A.525):

2.3 SENTENCING DATA:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	PLUS ENHANCEMENTS	TOTAL STANDARD RANGE (including enhancements)	MAXIMUM TERM
I	9	XII	240 MOS. TO 318 MOS. (LIFE)		240 MOS. TO 318 MOS.	LIFE / \$50,000
II	9	XII	240 MOS. TO 318 MOS. (LIFE)		240 MOS. TO 318 MOS.	LIFE / \$50,000
IV	9	XII	240 MOS. TO 318 MOS. (LIFE)		240 MOS. TO 318 MOS.	LIFE / \$50,000
V	9	XI	210 MOS. TO 280 MOS. (LIFE)		210 MOS. TO 280 MOS.	LIFE / \$50,000

2.4 [ ] EXCEPTIONAL SENTENCE. Substantial and compelling reasons exist which justify an exceptional sentence:

[ ] within [ ] below the standard range for Count(s) \_\_\_\_\_

[ ] above the standard range for Count(s) \_\_\_\_\_

[ ] The defendant and state stipulate that justice is best served by imposition of the exceptional sentence above the standard range and the court finds the exceptional sentence furthers and is consistent with the interests of justice and the purposes of the sentencing reform act.

[ ] Aggravating factors were [ ] stipulated by the defendant, [ ] found by the court after the defendant waived jury trial, [ ] found by jury by special interrogatory.

Findings of fact and conclusions of law are attached in Appendix 2.4. [ ] Jury's special interrogatory is attached. The Prosecuting Attorney [ ] did [ ] did not recommend a similar sentence.

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defend's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

[ ] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A.753):

[ ] The following extraordinary circumstances exist that make payment of nonmandatory legal financial obligations inappropriate:

JUDGMENT AND SENTENCE (JS)

07-1-04102-0

2.6 For violent offenses, most serious offenses, or armed offenders recommended sentencing agreements or plea agreements are  attached  as follows:

\_\_\_\_\_  
\_\_\_\_\_

III. JUDGMENT

3.1 The defendant is GUILTY of the Counts and Charges listed in Paragraph 2.1.

3.2  The court DISMISSES Counts \_\_\_\_\_  The defendant is found NOT GUILTY of Counts \_\_\_\_\_

IV. SENTENCE AND ORDER

IT IS ORDERED:

4.1 Defendant shall pay to the Clerk of this Court: (Pierce County Clerk, 930 Tacoma Ave #110, Tacoma WA 98402)

JASS CODE

RTNVRJN \$ \_\_\_\_\_ Restitution to: \_\_\_\_\_

\$ \_\_\_\_\_ Restitution to: \_\_\_\_\_  
(Name and Address--address may be withheld and provided confidentially to Clerk's Office).

PCV \$ 500.00 Crime Victim assessment

DNA \$ 100.00 DNA Database Fee

PUB \$ 1000.00 Court-Appointed Attorney Fees and Defense Costs

FRC \$ 200.00 Criminal Filing Fee

FCM \$ \_\_\_\_\_ Fine

OTHER LEGAL FINANCIAL OBLIGATIONS (specify below)

\$ 1270.78 Other Costs for: Restitution

\$ \_\_\_\_\_ Other Costs for: \_\_\_\_\_

\$ 1800.78 TOTAL

\$ 3070.78

The above total does not include all restitution which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

shall be set by the prosecutor.

is scheduled for \_\_\_\_\_

RESTITUTION. Order Attached

Restitution ordered above shall be paid jointly and severally with:

NAME of other defendant CAUSE NUMBER (Victim name) (Amount-\$)  
RIN \_\_\_\_\_

JUDGMENT AND SENTENCE (JS)

(Felony) (7/2007) Page 4 of 14

[ ] The Department of Corrections (DOC) or clerk of the court shall immediately issue a Notice of Payroll Deduction. RCW 9.94A.7602, RCW 9.94A.760(8).

[X] All payments shall be made in accordance with the policies of the clerk, commencing immediately, unless the court specifically sets forth the rate herein: Not less than \$ Per CCD per month commencing Per CCD. RCW 9.94.760. If the court does not set the rate herein, the defendant shall report to the clerk's office within 24 hours of the entry of the judgment and sentence to set up a payment plan.

The defendant shall report to the clerk of the court or as directed by the clerk of the court to provide financial and other information as requested. RCW 9.94A.760(7)(b)

[ ] COSTS OF INCARCERATION. In addition to other costs imposed herein, the court finds that the defendant has or is likely to have the means to pay the costs of incarceration, and the defendant is ordered to pay such costs at the statutory rate. RCW 10.01.160.

COLLECTION COSTS The defendant shall pay the costs of services to collect unpaid legal financial obligations per contract or statute. RCW 36.18.190, 9.94A.780 and 19.16.500.

INTEREST The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090

COSTS ON APPEAL An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW. 10.73.160.

4.1b ELECTRONIC MONITORING REIMBURSEMENT. The defendant is ordered to reimburse \_\_\_\_\_ (name of electronic monitoring agency) at \_\_\_\_\_ for the cost of pretrial electronic monitoring in the amount of \$ \_\_\_\_\_.

4.2 [X] DNA TESTING. The defendant shall have a blood/biological sample drawn for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency, the county or DOC, shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

[X] HIV TESTING. The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. RCW 70.24.340.

4.3 NO CONTACT  
The defendant shall not have contact with \_\_\_\_\_ (name, DOB) including, but not limited to, personal, verbal, telephonic, written or contact through a third party for \_\_\_\_\_ years (not to exceed the maximum statutory sentence).

[X] Domestic Violence No-Contact Order, Antiharassment No-Contact Order, or Sexual Assault Protection Order is filed with this Judgment and Sentence.

4.4 OTHER:

<i>Psycho-sexual evaluation and recommended follow-up treatment, Register per statute</i>

4.4a BOND IS HEREBY EXONERATED

4.5 CONFINEMENT OVER ONE YEAR. The defendant is sentenced as follows:

(a) CONFINEMENT. RCW 9.94A.589. Defendant is sentenced to the following term of total confinement in the custody of the Department of Corrections (DOC):

_____ months on Count	<u>I</u>	_____ months on Count	<u>V</u>
_____ months on Count	<u>II</u>	_____ months on Count	_____
_____ months on Count	<u>IV</u>	_____ months on Count	_____

CONFINEMENT. RCW 9.94A.712. Defendant is sentenced to the following term of confinement in the custody of the Department of Corrections (DOC):

Count I Minimum Term: 260 Months Maximum Term: LIFE

Count II Minimum Term: 260 Months Maximum Term: LIFE

Count IV Minimum Term: 260 Months Maximum Term: LIFE

Count V Minimum Term: 210 Months Maximum Term: LIFE

The Indeterminate Sentencing Review Board may increase the minimum term of confinement.

Actual number of months of total confinement ordered is: 260 months to life

(Add mandatory firearm, deadly weapons, and sexual motivation enhancement time to run consecutively to other counts, see Section 2.3, Sentencing Data, above).

The confinement time on Count(s) \_\_\_\_\_ contain(s) a mandatory minimum term of \_\_\_\_\_.

CONSECUTIVE/CONCURRENT SENTENCES. RCW 9.94A.589. All counts shall be served concurrently, except for the portion of those counts for which there is a special finding of a firearm, other deadly weapon, sexual motivation, VUCSA in a protected zone, or manufacture of methamphetamine with juvenile present as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: \_\_\_\_\_

The sentence herein shall run consecutively to all felony sentences in other cause numbers imposed prior to the commission of the crime(s) being sentenced. The sentence herein shall run concurrently with felony sentences in other cause numbers imposed after the commission of the crime(s) being sentenced except for the following cause numbers. RCW 9.94A.589: \_\_\_\_\_

Confinement shall commence immediately unless otherwise set forth here: \_\_\_\_\_

(c) The defendant shall receive credit for time served prior to sentencing if that confinement was solely under this cause number. RCW 9.94A.505. The time served shall be computed by the jail unless the credit for time served prior to sentencing is specifically set forth by the court: 554 days

4.6 [ ] COMMUNITY PLACEMENT (pre 7/1/00 offenses) is ordered as follows:

Count \_\_\_\_\_ for \_\_\_\_\_ months;

Count \_\_\_\_\_ for \_\_\_\_\_ months;

Count \_\_\_\_\_ for \_\_\_\_\_ months;

[ ] COMMUNITY CUSTODY is ordered as follows:

Count I \_\_\_\_\_ for a range from: \_\_\_\_\_ to \_\_\_\_\_ Months;

Count II \_\_\_\_\_ for a range from: \_\_\_\_\_ to \_\_\_\_\_ Months;

Count IV \_\_\_\_\_ for a range from: \_\_\_\_\_ to \_\_\_\_\_ Months;

Count V \_\_\_\_\_ for a range from: \_\_\_\_\_ to \_\_\_\_\_ Months;

COMMUNITY CUSTODY is Ordered for counts sentenced under RCW 9.94A.712, from time of release from total confinement until the expiration of the maximum sentence:

Count I until \_\_\_\_\_ years from today's date  for the remainder of the Defendant's life.

Count II until \_\_\_\_\_ years from today's date  for the remainder of the Defendant's life.

Count IV until \_\_\_\_\_ years from today's date  for the remainder of the Defendant's life.

Count V until \_\_\_\_\_ years from today's date  for remainder of the defendant's life or for the period of earned release awarded pursuant to RCW 9.94A.728(1) and (2), whichever is longer, and standard mandatory conditions are ordered. [See RCW 9.94A.700 and .705 for community placement offenses which include serious violent offenses, second degree assault, any crime against a person with a deadly weapon finding and chapter 69.50 or 69.52 RCW offense not sentenced under RCW 9.94A.660 committed before July 1, 2000. See RCW 9.94A.715 for community custody range offenses, which include sex offenses not sentenced under RCW 9.94A.712 and violent offenses committed on or after July 1, 2000. Community custody follows a term for a sex offense -- RCW 9.94A. Use paragraph 4.7 to impose community custody following work ethic camp.]

On or after July 1, 2003, DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

a) the defendant committed a current or prior:		
i) Sex offense	ii) Violent offense	iii) Crime against a person (RCW 9.94A.411)
iv) Domestic violence offense (RCW 10.99.020)		v) Residential burglary offense
vi) Offense for manufacture, delivery or possession with intent to deliver methamphetamine including its salts, isomers, and salts of isomers,		
vii) Offense for delivery of a controlled substance to a minor, or attempt, solicitation or conspiracy (vi, vii)		
b) the conditions of community placement or community custody include chemical dependency treatment.		
c) the defendant is subject to supervision under the interstate compact agreement, RCW 9.94A.745.		

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts necessary to monitor compliance with the orders of the court as required by DOC, and (8) for sex offenses, submit to electronic monitoring if imposed by DOC. The residence location and living arrangements are subject to the prior approval of DOC while in community placement or community custody. Community custody for sex offenders not sentenced under RCW 9.94A.712 may be extended for up to the statutory maximum term of the sentence. Violation of community custody imposed for a sex offense may result in additional confinement.

[ ] The defendant shall not consume any alcohol.

[ ] Defendant shall have no contact with: \_\_\_\_\_

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit: \_\_\_\_\_

[ ] Defendant shall not reside in a community protection zone (within 880 feet of the facilities or grounds of a public or private school). (RCW 9.94A.030(8))

[ ] The defendant shall participate in the following crime-related treatment or counseling services: \_\_\_\_\_

[ ] The defendant shall undergo an evaluation for treatment for [ ] domestic violence [ ] substance abuse [ ] mental health [ ] anger management and fully comply with all recommended treatment.

[ ] The defendant shall comply with the following crime-related prohibitions: \_\_\_\_\_

Other conditions may be imposed by the court or DOC during community custody, or are set forth here: \_\_\_\_\_

For sentences imposed under RCW 9.94A.712, other conditions, including electronic monitoring, may be imposed during community custody by the Indeterminate Sentence Review Board, or in an emergency by DOC. Emergency conditions imposed by DOC shall not remain in effect longer than seven working days.

**PROVIDED:** That under no circumstances shall the total term of confinement plus the term of community custody actually served exceed the statutory maximum for each offense

4.7 [ ] **WORK ETHIC CAMP.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic camp and the court recommends that the defendant serve the sentence at a work ethic camp. Upon completion of work ethic camp, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions below. Violation of the conditions of community custody may result in a return to total confinement for the balance of the defendant's remaining time of total confinement. The conditions of community custody are stated above in Section 4.6.

4.8 **OFF LIMITS ORDER** (known drug trafficker) RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the County Jail or Department of Corrections: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

07-1-04102-0

**CONFINEMENT.** RCW 9.94A.712. Defendant is sentenced to the following term of confinement in the custody of the Department of Corrections (DOC):

Count \_\_\_\_\_ Minimum Term: \_\_\_\_\_ Months Maximum Term: \_\_\_\_\_

Count \_\_\_\_\_ Minimum Term \_\_\_\_\_ Months Maximum Term: \_\_\_\_\_

Count \_\_\_\_\_ Minimum Term \_\_\_\_\_ Months Maximum Term: \_\_\_\_\_

The Indeterminate Sentencing Review Board may increase the minimum term of confinement.  **COMMUNITY CUSTODY** is Ordered for counts sentenced under RCW 9.94A.712, from time of release from total confinement until the expiration of the maximum sentence:

Count \_\_\_\_\_ until \_\_\_\_\_ years from today's date  for the remainder of the Defendant's life.

Count \_\_\_\_\_ until \_\_\_\_\_ years from today's date  for the remainder of the Defendant's life.

Count \_\_\_\_\_ until \_\_\_\_\_ years from today's date  for the remainder of the Defendant's life.

#### V. NOTICES AND SIGNATURES

- 5.1 **COLLATERAL ATTACK ON JUDGMENT.** Any petition or motion for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, must be filed within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.
- 5.2 **LENGTH OF SUPERVISION.** For an offense committed prior to July 1, 2000, the defendant shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for the purpose of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505. The clerk of the court is authorized to collect unpaid legal financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).
- 5.3 **NOTICE OF INCOME-WITHHOLDING ACTION.** If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections or the clerk of the court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A may be taken without further notice. RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.
- 5.4 **RESTITUTION HEARING.**  
 Defendant waives any right to be present at any restitution hearing (sign initials): \_\_\_\_\_
- 5.5 **CRIMINAL ENFORCEMENT AND CIVIL COLLECTION.** Any violation of this Judgment and Sentence is punishable by up to 60 days of confinement per violation. Per section 2.5 of this document, legal financial obligations are collectible by civil means. RCW 9.94A.634.
- 5.6 **FIREARMS.** You must immediately surrender any concealed pistol license and you may not own, use or possess any firearm unless your right to do so is restored by a court of record. (The court clerk

JUDGMENT AND SENTENCE (JS)

(Felony) (7/2007) Page 9 of 14

Office of Prosecuting Attorney  
 930 Tacoma Avenue S. Room 946  
 Tacoma, Washington 98402-2171  
 Telephone: (253) 798-7400

shall forward a copy of the defendant's driver's license, identicaid, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9A.41.040, 9.41.047.

5.7 **SEX AND KIDNAPPING OFFENDER REGISTRATION. RCW 9A.44.130, 10.01.200.**

**1. General Applicability and Requirements.** Because this crime involves a sex offense or kidnapping offense (e.g., kidnapping in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW) where the victim is a minor defined in RCW 9A.44.130, you are required to register with the sheriff of the county of the state of Washington where you reside. If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register immediately upon being sentenced unless you are in custody, in which case you must register within 24 hours of your release.

**2. Offenders Who Leave the State and Return:** If you leave the state following your sentencing or release from custody but later move back to Washington, you must register within three (3) business days after moving to this state or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections. If you leave this state following your sentencing or release from custody but later while not a resident of Washington you become employed in Washington, carry out a vocation in Washington, or attend school in Washington, you must register within three (3) business days after starting school in this state or becoming employed or carrying out a vocation in this state, or within 24 hours after doing so if you are under the jurisdiction of this state's Department of Corrections.

**3. Change of Residence Within State and Leaving the State.** If you change your residence within a county, you must send written notice of your change of residence to the sheriff within 72 hours of moving. If you change your residence to a new county within this state, you must send signed written notice of your change of residence to the sheriff of your new county of residence at least 14 days before moving and register with that sheriff within 24 hours of moving. You must also give signed written notice of your change of address to the sheriff of the county where last registered within 10 days of moving. If you move out of Washington State, you must send written notice within 10 days of moving to the county sheriff with whom you last registered in Washington State.

**4. Additional Requirements Upon Moving to Another State.** If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within 10 days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. You must also send written notice within 10 days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

**5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12):** If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. The sheriff shall promptly notify the principal of the school.

**6. Registration by a Person Who Does Not Have a Fixed Residence:** Even if you do not have a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within 48 hours excluding weekends and holidays after losing your fixed residence, you must send signed

written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You may be required to provide a list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

7. Reporting Requirements for Persons Who Are Risk Level II or III: If you have a fixed residence and you are designated as a risk level II or III, you must report, in person, every 90 days to the sheriff of the county where you are registered. Reporting shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. If you comply with the 90-day reporting requirement with no violations for at least five years in the community, you may petition the superior court to be relieved of the duty to report every 90 days.

8. Application for a Name Change: If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within five days of the entry of the order. RCW 9A.44.130(7).

5.8 [ ] The court finds that Count \_\_\_\_\_ is a felony in the commission of which a motor vehicle was used. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke the defendant's driver's license. RCW 46.20.285.

5.9 If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify DOC and the defendant's treatment information must be shared with DOC for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

5.10 OTHER: \_\_\_\_\_

DONE in Open Court and in the presence of the defendant this date: November 6, 2009

JUDGE

Print name

JAMES ORLANDO

Deputy Prosecuting Attorney

Print name: Jared Ausseney

WSB # 32719

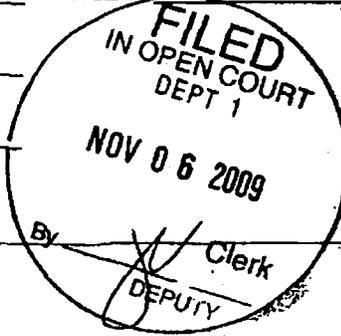
Attorney for Defendant

Print name: John McAlister

WSB # 16712

Defendant

Print name: SEAN RYAN



JUDGMENT AND SENTENCE (JS)  
(Felony) (7/2007) Page 11 of 14

1  
2 **VOTING RIGHTS STATEMENT:** RCW 10.64.140. I acknowledge that my right to vote has been lost due to  
3 felony convictions. If I am registered to vote, my voter registration will be cancelled. My right to vote may be  
4 restored by: a) A certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) A court order issued  
5 by the sentencing court restoring the right, RCW 9.92.066; c) A final order of discharge issued by the indeterminate  
6 sentence review board, RCW 9.96.050; or d) A certificate of restoration issued by the governor, RCW 9.96.020.  
7 Voting before the right is restored is a class C felony, RCW 92A.84.660.

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Defendant's signature: 

07-1-04102-0

**CERTIFICATE OF CLERK**

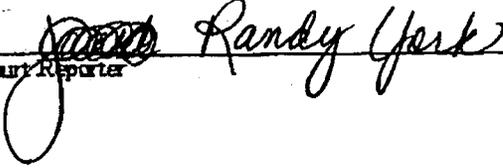
CAUSE NUMBER of this case: 07-1-04102-0

I, KEVIN STOCK Clerk of this Court, certify that the foregoing is a full, true and correct copy of the Judgment and Sentence in the above-entitled action now on record in this office.

WITNESS my hand and seal of the said Superior Court affixed this date: \_\_\_\_\_

Clerk of said County and State, by: \_\_\_\_\_, Deputy Clerk

**IDENTIFICATION OF COURT REPORTER**

  
\_\_\_\_\_  
Court Reporter

APPENDIX "F"

The defendant having been sentenced to the Department of Corrections for a:

- sex offense
- serious violent offense
- assault in the second degree
- any crime where the defendant or an accomplice was armed with a deadly weapon
- any felony under 69.50 and 69.52

The offender shall report to and be available for contact with the assigned community corrections officer as directed:

The offender shall work at Department of Corrections approved education, employment, and/or community service;

The offender shall not consume controlled substances except pursuant to lawfully issued prescriptions;

An offender in community custody shall not unlawfully possess controlled substances;

The offender shall pay community placement fees as determined by DOC:

The residence location and living arrangements are subject to the prior approval of the department of corrections during the period of community placement.

The offender shall submit to affirmative acts necessary to monitor compliance with court orders as required by DOC.

The Court may also order any of the following special conditions:

(I) The offender shall remain within, or outside of, a specified geographical boundary: \_\_\_\_\_

(II) The offender shall not have direct or indirect contact with the victim of the crime or a specified class of individuals: see attached orders prohibiting contact

(III) The offender shall participate in crime-related treatment or counseling services;

(IV) The offender shall not consume alcohol; \_\_\_\_\_

(V) The residence location and living arrangements of a sex offender shall be subject to the prior approval of the department of corrections; or

(VI) The offender shall comply with any crime-related prohibitions.

(VII) Other: \_\_\_\_\_

07-1-04102-0

IDENTIFICATION OF DEFENDANT

SID No 23283198 Date of Birth 05/17/1978  
(If no SID take fingerprint card for State Patrol)

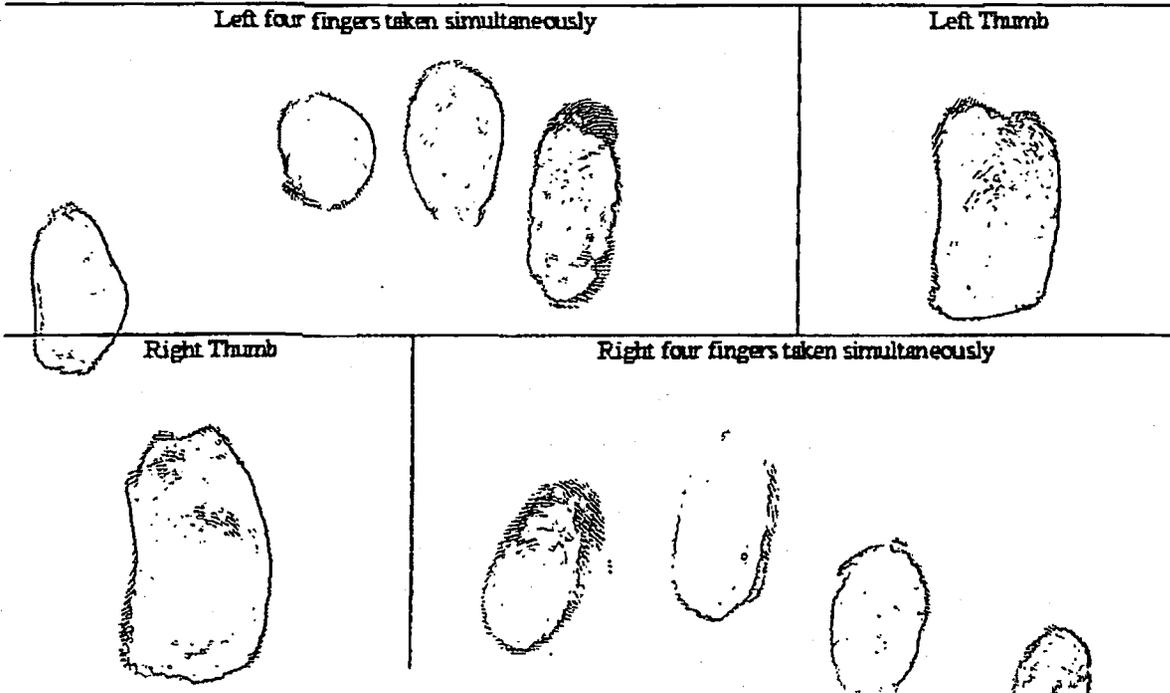
FBI No UNKNOWN Local ID No UNKNOWN

PCN No 539195590 Other

Alias name, SSN, DOB: NONE KNOWN OR CLAIMED

Race: [ ] Asian/Pacific [ ] Black/African-American [X] Caucasian [ ] Hispanic [X] Male  
[ ] Native American [ ] Other: [X] Non-Hispanic [ ] Female

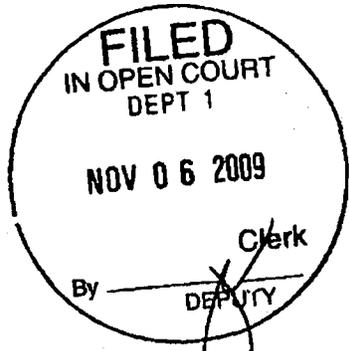
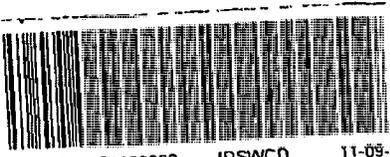
FINGERPRINTS



I attest that I saw the same defendant who appeared in court on this document affix his or her fingerprints and signature thereto. Clerk of the Court, Deputy Clerk, [Signature] Dated: 11.6.09

DEFENDANT'S SIGNATURE: [Signature]

DEFENDANT'S ADDRESS: DOC



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO: 07-1-04102-0

NOV - 9 2009

vs.

AS TO COUNTS I, II, IV, AND V ONLY

SEAN PATRICK RYAN,

Defendant.

WARRANT OF COMMITMENT

- 1)  County Jail
- 2)  Dept. of Corrections
- 3)  Other Custody

THE STATE OF WASHINGTON TO THE DIRECTOR OF ADULT DETENTION OF PIERCE COUNTY:

WHEREAS, Judgment has been pronounced against the defendant in the Superior Court of the State of Washington for the County of Pierce, that the defendant be punished as specified in the Judgment and Sentence/Order Modifying/Revoking Probation/Community Supervision, a full and correct copy of which is attached hereto.

[ ] 1. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence (Sentence of confinement in Pierce County Jail).

X] 2. YOU, THE DIRECTOR, ARE COMMANDED to take and deliver the defendant to the proper officers of the Department of Corrections; and

YOU, THE PROPER OFFICERS OF THE DEPARTMENT OF CORRECTIONS, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement in Department of Corrections custody).

[ ] 3. YOU, THE DIRECTOR, ARE COMMANDED to receive the defendant for classification, confinement and placement as ordered in the Judgment and Sentence. (Sentence of confinement or placement not covered by Sections 1 and 2 above).

Dated: 11-6-09

By direction of the Honorable  
*[Signature]*  
JUDGE  
**JAMES ORLANDO**  
KEVIN STOCK  
CLERK  
By: *[Signature]*  
DEPUTY CLERK

CERTIFIED COPY DELIVERED TO SHERIFF  
Date NOV - 9 2009 By *[Signature]* Deputy

STATE OF WASHINGTON

County of Pierce

I, Kevin Stock, Clerk of the above entitled Court, do hereby certify that this foregoing instrument is a true and correct copy of the original now on file in my office.  
IN WITNESS WHEREOF, I hereunto set my hand and the Seal of Said Court this \_\_\_\_\_ day of \_\_\_\_\_,

KEVIN STOCK, Clerk  
By: \_\_\_\_\_ Deputy

SHS

