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I. INTRODUCTION

The Appellant, Roe Ramirez-Estevez, was convicted by jury of five counts of Rape of a Child in the First Degree following a four and one-half day jury trial before the Honorable Anne Hirsch, Thurston County Superior Court judge. The claimed acts occurred sometime between January 1, 2006, and April 23, 2009. Trial commenced on November 12, 2009 and a verdict of guilty on all counts was returned on November 20, 2009. On December 21, 2009, Mr. Ramirez was sentenced to 280 months in custody. He is currently in custody with the Department of Corrections while appealing his conviction.

II. ASSIGNMENT OF ERROR

- A. *The Trial Court erred in permitting hearsay that the defendant “raped” a child, being E.O., under an “excited utterance” exception. The hearsay statement was not made while under stress of a startling event and therefore lacked spontaneity.*
- B. *The Trial Court erred in admitting a recorded interview between the alleged victim and the lead detective, pertaining to the accusations against the defendant, as being a “prior consistent statement” of the victim’s trial testimony.*
- C. *The “To Convict” jury instructions as presented violated the defendant’s constitutional protection against double jeopardy in that the instructions failed to separate and distinguish each of the five charged acts of Rape of a Child in the First Degree.*
- D. *The defendant suffered undue prejudice when the trial court erroneously permitted a sexual assault examiner to testify that the victim’s physical*

examination was consistent with her medical history interview where she claimed being “raped” by the defendant. Such testimony invades the province of the jury as it presents expert opinion testimony that the alleged victim was sexually assaulted.

III. ISSUES PRESENTED

- a. Does the “excited utterance” hearsay exception permit the admission of an out of court statement about being “raped” when that statement was made two years after the event? Under these circumstances, does the hearsay statement lack spontaneity?
- b. When cross examination calls into question the credibility of a complaining witness, will that in itself justify the admission of “prior consistent statements” under Evidence Rule 801(d)(1)? In addition, can a prior consistent statement under Evidence Rule 801(d)(1) properly be admitted when the prior statement was made during a police interview and at a time when a motive to fabricate existed ?
- c. When there are multiple counts of identical charges, in this case five counts of Rape of a Child in the First Degree, will the jury instructions violate the Double Jeopardy clause if the “To Convict” instruction fails to separate and distinguish each charged count ?
- d. Does an opinion from a sexual assault practitioner invade the province of the jury when she testifies that the victim’s physical examination is consistent with the medical history interview where the victim states that she had been “raped” by the defendant ?

IV. STATEMENT OF THE CASE

A. Statement of Procedural History

On May 4, 2009, Roe Ramirez was charged in Thurston County Superior Court with five counts of Rape of a Child in the First Degree. CP¹ 11. The five charges accused Mr. Ramirez of having sexual intercourse with a child, initials E.O., between January 1, 2006 and April 23, 2009 on five separate occasions. Id.

On November 12, 2009, jury trial commenced and on November 20th, 2009, the jury returned verdicts of guilty on all 5 counts. On December 21, 2009, a Judgment and Sentence was entered ordering the defendant to serve 280 months in custody. CP 83. On January 19, 2010, Mr. Ramirez filed a timely notice of appeal. CP 91.

B. Statement of Facts

The nature of the charges against Mr. Ramirez involved claims that he had sexual intercourse with E.O., who is the daughter of his live-in girlfriend, at least five times. CP 11. Each act was alleged to have occurred in a mobile home trailer occupied by Mr. Ramirez and his girlfriend Guillermina Bucio. RP 395. Also living in the home were Guillermina Bucio's two young sons, who were not part of the case against Mr. Ramirez. Id.

¹ CP shall designate the "Clerk's Papers."

The disclosure of the alleged abuse happened on April 23, 2009. RP 328-337. On that day, E.O.'s elementary school counselor, named Sylvia Wilcox, brought E.O. into the office of the school's Intervention Specialist, named Elizabeth Wilcox. RP 334. The witness described her observations of E.O. as "very nervous . . . she had tears. She was crying, would put her head down. Sort of shaky . . . very upset." RP 334.

After describing the observations, the prosecutor sought to have the witness testify about why E.O. was so upset. RP 336. Defense counsel made an objection, based on inadmissible hearsay, to Ms. Wilcox testifying about why E.O. was upset. *Id.* The prosecutor responded that such testimony would be admissible as an excited utterance. *Id.* The Court permitted the witness to testify over the defendant's objection. *Id.* Elizabeth Wilcox then answered, "She had said that her mom's boyfriend who used to stay with them had raped her." RP 337. Ms. Wilcox further went on to testify that E.O. said that she was "nine years old" at the time and that this happened "a couple years ago." *Id.*

Elizabeth Wilcox also testified that two days after E.O. reported the incident at her office, there was a more formal interview with law enforcement. RP 345. Specifically, present at this interview was counselor Wilcox, lead investigator Detective Eric Kolb, and E.O. RP 346. This

interview was recorded and later on in the trial the recording was introduced into evidence for the jury to consider, over defense counsel's objection. Ex 1 and RP 641.

The State further called as a witness Maria Hinojoza, who is the aunt of E.O. RP 368. Ms. Hinojoza testified that her sister, Guillermina Bucio, dated Roe Ramirez and they eventually moved in together first at an apartment and then later at a "trailer." This was back in 2003. RP 369. Ms. Hinojoza testified that the two had been living together for about "three or four years." She also testified that Roe Ramirez was also known as "Gerardo." RP 369.

The Prosecutor then questioned Ms. Hinojoza about how E.O. disclosed the incident. RP 370. The State asked the witness when E.O. talked "about something that she was concerned about" and Ms. Hinojoza responded that this talk happened in "April or May" of 2009. RP 370-371. Ms. Hinojoza described that E.O. "wanted to talk to me" and that her voice was "like crying, like scared." RP 371. Ms. Hinojoza was in her bedroom at the time and described the scene as both she and E.O. sitting on the bed and that E.O. was "crying" and "scared." RP 372. The Prosecutor then asked the witness, "What did she tell you?" *Id.* Defense counsel made a hearsay objection, which was temporarily sustained by the Court. *Id.* The prosecutor

asked the witness if E.O appeared “scared” which was answered in the affirmative. RP 372. Over defense counsel’s continuing objection, Ms. Hinojoza testified, “That when she was living with Gerardo he raped her.” RP 374. Additionally, defense counsel objected to the continuing hearsay testimony where the witness testified that E.O. said the following:

- *She told me she thought we would not believe her.*
- *She was asked to do things she wanted not to do.*
- *She only told me that she was raped by him but nothing else.*
- *I asked her if it was more than once and she said yes.*

RP 375.

The State then called the mother of E.O., Guillermina Bucio, to testify.

RP 391. Ms. Bucio testified that she met Roe Ramirez at her work, which was a plant nursery. RP 397. Shortly thereafter, they started dating and then moved in together. *Id.* She testified about her work schedule and how she would be gone from home during the day and return usually between 6pm and 7pm. RP 406. During the week, Ms. Bucio would get Sundays off and one other day off during the week that rotated. She testified that Mr. Ramirez would work Monday through Friday and he had both Saturday and Sunday off. Although Mr. Ramirez worked during the days, according to Ms. Bucio, he was usually home at the time she got home from work. RP 407.

Ms. Bucio also described the living arrangements at the trailer. RP 411. Specifically, there were two bedrooms. The main room was where Ms. Bucio and Mr. Ramirez slept. RP 411. The other room is where the three children slept. She also testified that E.O. was “about eight or nine” when Mr. Ramirez, aka “Gerardo,” moved into the trailer. RP 414. Ms. Bucio finally testified that she lived with Mr. Ramirez for about 3 years. RP 432.

The State then called E.O. to testify about the accusations against Mr. Ramirez. E.O. testified that she was born on July 20, 1997. She also testified that prior to her current residence, she lived in the trailer with her mom, her two brothers, and with Roe Ramirez—described as her “mom’s ex-boyfriend.” RP 438-439. E.O. stated that she first met Mr. Ramirez when he was dating her mother, and then he eventually moved in with her family. RP 443.

The prosecutor then had E.O. describe her understanding of her “private parts.” RP 444-445. She identified those areas to include her “Vagina” and “Butt.” *Id.* The prosecutor asked E.O. to explain what happened with the defendant. RP 446. She testified that she first told her friends and then afterward she was brought into the office of her school counselor, Elizabeth Wilcox. RP 446. She testified that she was a bit nervous when she was asked to come to the counselor’s office because she thought

that she might be in some kind of trouble. RP 446. She elaborated by saying that at first, she thought she was in trouble because of her grades. Then the counselor asked “if there was anything I had to say that I had inside me” and she stated, “that’s when I started crying, and I told her.” RP 447. E.O. then said the following during her testimony:

- *I’ve never told anyone about it other than my friends . . . And I was like scared for them to tell my mom.*
- *That my mom’s ex-boyfriend had done something to me . . . Put his private parts onto my private parts.*

RP 448-449.

The prosecutor then asked E.O. when it happened and how often. E.O. responded that it happened when she was “around eight or nine” and that it happened “more than five.” RP 449. The prosecutor asked E.O. where it happened, and she replied, “My mom’s bed.” RP 450. The prosecutor then asked if it happened “the same way every time,” and E.O. replied as follows: “Yeah . . . Well, first he would start to kiss me, and then he took off my clothes.” RP 450. She then went on to testify, “He would put his front lower in my back lower part, my butt.” RP 453. E.O. testified that this happened in her mom’s bedroom. RP 450, 453. On cross examination, E.O. testified that although it was more than 5 times, it was “less than 20 or 15.” RP 503.

The prosecutor then asked E.O. about other areas in the trailer the incidents occurred. RP 474. E.O. testified that “It only happened once in the kitchen.” RP 474. E.O. testified that one time she came home from school really tired and slept in the corner of the kitchen. RP 474. E.O. testified that she was sleeping under her blanket on the kitchen floor when the defendant went over next to her, laying down, and then “He put his dick in my butt.” RP 477. She testified that the incident lasted “Ten minutes? Five, ten minutes.” RP 478. She also testified that at the time her brothers were home in her “mom’s room.” RP 478.

The prosecutor asked E.O. why she did not tell anyone about this at the time. E.O. answered, “Well, I actually thought that they wouldn’t believe me and that I was getting in trouble.” RP 484. E.O. then testified that the first person she told about this was a friend at school, although she did not specify when she told her friend. RP 484.

The prosecutor then asked E.O. about her interview with Detective Kolb. RP 486. E.O. testified that she was surprised to see the detective at her counselor’s office. *Id.* The prosecutor asked E.O. if she told Detective Kolb “the truth” and E.O. simply answered, “Yeah.” RP 487. E.O. then testified that her counselor said that she needed to tell her parents about what

happened. She testified that after her interview with Detective Kolb, she eventually told her aunt and her mom about what happened. RP 487-488.

The defense cross examined E.O. primarily on the location of the alleged rapes and how many times it happened. Specifically, counsel asked if E.O. had been sleeping or watching TV. RP 491. Counsel asked how long the witness had been home alone before Mr. Ramirez returned from work. RP 491. He asked E.O. if she remembered what she did when she returned home from school. RP 492. Counsel inquired about the circumstances surrounding the first disclosure of the alleged rapes to the friends at school. RP 494. Counsel asked the witness to define in her own words what “Rape” means. RP 495-500. Counsel then asked a set of questions inquiring as to how many times the alleged rapes occurred. RP 501-503. E.O. reiterated that it happened “more than five times . . . but less than 20.” *Id.* Counsel then asked the witness about how the acts physically felt to her. RP 504. He then asked the witness details about specific acts that the defendant engaged in against her. RP 504-508. He asked the witness about whether the defendant actually penetrated, to which the witness reiterated that there was penetration. RP 508. The witness again acknowledged that when it happened, it did in fact hurt. RP 509-510. Defense counsel then followed up by asking what the witness did and where did she go afterward. RP 513. The final set of questions on cross

examination involved “what it is to tell the truth.” RP 517. Counsel then started to go into details about what the witness remembered with respect to how long the defendant lived with her family. RP 518-519. The idea behind this line of questioning was to clarify whether the witness knew exactly how long the defendant lived with the family or simply whether she was just not sure as to how long. The cross examination wrapped up with counsel inquiring about the witness’s memory regarding how many times the alleged rapes occurred. RP 539-541. Although defense counsel pointed out arguable inconsistencies as to the witness’s answers during both the trial and her interview with Detective Kolb, there were never any claims of fabrication or lying. *Id.*

The State then called Dr. Laurie Davis to testify about the sexual assault examination of E.O. RP 561. Dr. Davis is a nurse practitioner also known as a “child maltreatment sexual assault counselor.” RP 561. She testified that the examination involved essentially two parts: 1) an interview with the child to take the child’s medical and sexual history and 2) a head to toe physical examination that further involved a colposcope examination. RP 563-565.

As part of the intake for the sexual history, Dr. Davis testified that E.O. was 11 years old at the time of the examination. She further testified that

when they talked “about the assault,” E.O. began “hiding behind her hair.” RP 580. During the medical and sexual history part of the exam, Dr. Davis asked E.O., “What exactly happened?” Dr. Davis testified, “when we got to that subject she just didn’t want to be there.” RP 581. The interview was recorded and admitted into evidence as Exhibit 2 with no objection from the defense. RP 583. The jury then heard the recording of the medical and sexual history part of the examination. RP 585-587; Ex. 2. The jury heard that E.O. suffered from no physical ailments except Asthma. Ex. 2. That she has normal eating habits and a problem with getting toothaches. That she started her menstrual period at a normal time. *Id.* And, that “Roe” put his penis inside both her vagina and rectum which caused her pain. *Id.* In response, Dr. Davis said to E.O., “so this guy is pretty bold” and referred to these acts as “abuse.” *Id.* Dr. Davis also confirmed with E.O., that “This was traumatic . . . [and] . . . Now we can start the healing process.” These statements and opinions were expressed in the medical and sexual history interview that was admitted into evidence as Exhibit 2.²

The prosecutor then asked Dr. Davis about the head to toe physical. Dr. Davis testified that the external genitalia examination appeared normal. RP 590. However, an examination of the hymenal tissue was “concerning”

² Exhibit 2 was admitted exclusively in audio format with no corresponding transcript.

because of the noticeable “notches” or “disruption of the tissue.” RP 591. Dr. Davis testified that notches “can indicate blunt force, traumatic blunt force without a history.” RP 592. The prosecutor then asked the witness about the importance of considering the patient’s history. RP 592. Dr. Davis testified as follows: “Again, like I said, very few exams have any findings at all, and so we have to base our assessment on the history usually by itself.” RP 592. The prosecutor then asked if “blunt trauma” could be diagnosed even if the child is not disclosing any kind of penetration. *Id.* Defense counsel objected on the grounds of relevance. RP 592. Following a sidebar, the Court permitted Dr. Davis to explain. RP 593. Dr. Davis answered, “Yes, we could make a diagnosis of penetrating trauma, and we’d probably send the child to therapy to try to figure out what’s going on. Now penetrating trauma does not always mean sexual abuse.” RP 593. And with respect to the examination of E.O., Dr. Davis testified that the physical observations were “consistent with penetrating trauma.” RP 594. The prosecutor then goes into the following inquiry to elicit opinion testimony that the overall findings (being the physical exam plus the medical history interview) were consistent with sexual assault. Specifically, over defense counsel’s objection, the following question and answer session occurred:

STATE: *And so how do you characterize these notches just from a medical standpoint in terms of its consistency with the kind of disclosure that was given to you by E.O. ?*

DEFENSE: *Objection. Speculation.*

COURT: *Overruled.*

DR. DAVIS: *It's consistent with . . . her medical history.*

RP 595.

As the jury heard from Exhibit 2, the medical history includes the allegations from E.O. that she was raped by the defendant.

The last State witness to testify was the lead detective, Eric Kolb. Detective Kolb testified that on April 23, 2009, there was a CPS referral from counselor Elizabeth Wilcox for a possible sexual assault against E.O. RP 627. On April 28, 2009, Detective Kolb interviewed E.O. at the school counselor's office. Present at this interview was Detective Kolb, Elizabeth Wilcox and E.O. RP 628. The interview was recorded, transcribed, and marked as Exhibit 1. RP 634. When the State initially moved for its admission, the trial judge sustained defense counsel's objection. RP 634. After hearing the State's arguments that the interview should be admitted as a "prior consistent statement" under Evidence Rule 801(d)(1), the trial judge reversed its ruling and admitted the exhibit. The Court's ruling was as follows:

I do think that [the prosecutor's] characterization of the line of questioning by counsel for defense does give rise to at least an inference being made of recent fabrication, including during the time [E.O.] was testifying in open court today and yesterday. I have heard the interview. I don't know if there are other parts of it that are objectionable, but certainly anything that has to do with the number of times and the specifics of the allegations I think are admissible under 801(d)(1), and I am going to allow them.

RP 648.

A transcript of Exhibit 1 was prepared, although the Court did not permit the jury to review the transcript. The Court only permitted the jury to listen to the audio recording. The jury heard from Exhibit 1 the out-of-court question and answer session between Detective Kolb and E.O. This interview occurred after the April 23, 2009, CPS referral, when Mr. Ramirez was already a suspect for committing a sexual assault against E.O. During this interview, the jury heard E.O. state and acknowledge the following:

- *He grabbed me and raped me.*
- *He would take off my clothes and lock the doors.*
- *He told me not to tell my mom.*
- *It lasted for an hour or so . . .*

- *Like sometimes I would push him off with my leg, and I told him to stop and stuff . . . Since he's stronger than me, he would get back on.*

Exhibit 1.

E.O. also described the alleged rape in the kitchen where Mr. Ramirez had sex with her underneath her blanket. She mentioned that she was raped more than five times but less than 20. She also stated during this interview that Mr. Ramirez did not use a condom and that he had sex with her from the “front private part” and from “the back private part.” Ex. 1. Over defense counsel’s objections, the jury got to hear this out of court interview that E.O. had on April 28, 2009, with Detective Kolb. RP 651-655; 661.³

The only defense witness was Roe Ramirez who testified that he never had any inappropriate contact with E.O.—he flat out denied having any sexual contact with E.O. at any point in time. RP 677-678.

The Court then reviewed the jury instructions with all parties. No party objected to the Court’s “To Convict” instruction, being instructions 11 through 15. The first paragraph for instructions 11 through 15 includes language that each charged count occurred “on an occasion different than” the other 4 charged counts. CP 69. The “To Convict” instructions do not contain

³ The trial court only permitted the jury to listen to the recorded interview and did not permit the jury to review the transcript of the interview. RP 655.

the language, “separate and distinct from . . .” in the place of “on an occasion different than . . .”

Finally, during the jury deliberations, the jury asked to listen once again to Exhibit 1 (being the victim interview with Detective Kolb). RP 804. Defense counsel reiterated on the record that he objected to the admissibility of Exhibit 1 in its entirety. RP 804.

V. ARGUMENT

A. The trial judge erred in permitting hearsay testimony that the defendant raped E.O. under an “excited utterance” exception. The declarant, being E.O., made the out of court statements about being raped years after the startling event and therefore the hearsay statement lacks spontaneity. Finally, the prosecutor used the hearsay evidence for the purpose of bolstering the credibility of E.O. and therefore its admission into evidence cannot be considered harmless.

1. *E.O.’s out of court hearsay statement about being raped by the defendant 2 years prior does not fall within the excited utterance hearsay exception because the statement lacked spontaneity when it was made.*

An excited utterance is a statement made while the declarant was still under the stress of excitement caused by an event or condition. *State v. Chapin*, 118 Wn.2d 681, 686, 826 P.2d 194 (1992). Although the reviewing court typically gives deference to a trial court’s evidentiary rulings, “this is not necessarily true with the excited utterance exception.” *State v. Sharp*, 80 Wn. App. 457, 460, 909 P.2d 1333 (1996).

An excited utterance requires three elements: a startling event or condition; a statement made while under the stress of excitement caused by the event; and the statement must relate to the event or condition. *Id.* at 461. The key to the second element is “spontaneity.” This is because “as the time between the event and the statement lengthens, the opportunity for reflective thought arises and the danger of fabrication increases.” *Chapin*, 118 Wn.2d at 687. Furthermore, “the longer the time interval, the greater the need for proof that the declarant did not actually engage in reflective thought.” *Id.*

Although a later startling event may “trigger associations with an original trauma,” thereby recreating the stress associated with the earlier incident, “the startling nature of an event cannot be determined merely by reference to the event itself.” *Chapin*, at 687. Therefore, simply causing and recreating stress by making reference to the initial rape, by asking questions about the original incident, will not sufficiently satisfy the elements of the “excited utterance exception” under Evidence Rule 803(a)(2). *Id.*

In *Sharp*, the police questioned the declarant/victim 30 to 40 minutes after an attempted kidnapping. 80 Wn. App. at 460. During this interview, the police had given the declarant/victim a soda and calmed him down before questioning. *Id.* Although the declarant/victim had exhibited signs of being excited and frightened, the fact was that there had been a sufficient length of

time for reflection. *Id.* Therefore, the out of court statement cannot fall within the definition of the excited utterance hearsay exception.

Similarly, in *State v. Owens*, the Washington State Supreme Court reversed a finding that a victim's statements to his mother and grandmother about being molested satisfied the excited utterance requirements. 128 Wn.2d 908, 913 P.2d 366 (1996). The declarant/victim had exhibited physical ailments that caused suspicions of sexual abuse. *Id.* at 910. A physical examination concluded that there were physical signs of anal penetration. *Id.* On the car ride home, the mother asked the declarant/victim if he had been molested, at which point the boy said "Yes" and began to scream. *Id.* at 911. The trial court permitted this testimony under the excited utterance exception *Id.* Additionally, the grandmother testified that the boy was "scared, shaking, and crying" when the boy said "[the defendant] did this to me Grandma. Why, Grandma?" Again, the trial court permitted this testimony under excited utterance. *Id.* The Supreme Court found that these hearsay statements did not satisfy the excited utterance exception. Simply recreating stress in the victim about an original event (such as sexual assault) by questioning the victim/declarant about the event is insufficient for a finding that the declarant "was still under the influence of the event." *Id.* at 912-913. Thus, "the

statements must be provoked by the occurrence itself rather than by the subsequent questioning.” *Id.* Otherwise, the statement lacks spontaneity.

In the instant case, the initial startling event was the alleged rapes that occurred when E.O. was 8 or 9 years old. Two years later, sometime in 2009, E.O. disclosed the incident to a couple of her school friends. Then in April of 2009, after a CPS referral had been made, E.O. told her school counselor, Elizabeth Wilcox, and her aunt, Maria Hinojoza, that the defendant “raped” her more than five times. At trial, the prosecutor elicited E.O.’s out of court statements that she had been raped by Mr. Ramirez more than five times through both Wilcox and Hinojoza.

The fact that E.O. was able to reflect about the incident for two years and was further able to discuss the claimed incident with her school friends clearly negates any assertion that her statements to both Ms. Wilcox and Ms. Hinojoza were spontaneous. As such, under the ruling and reasoning of *Chapin* and *Owens*, cited above, the statements of E.O. that she had been “raped” were not made under the stress of a startling event and, more important, were not made while *still* under the stress of excitement caused by the event. Accordingly, it was error for the trial judge to permit both witnesses to testify that E.O. told each of the two witnesses that she had been “raped” repeatedly by the defendant.

2. *The error of admitting the out of court statements of E.O., that she had been “raped” by the defendant, cannot be considered harmless error.*

The State will likely argue that even if the trial judge erred in ruling that E.O.’s statements fall within the excited utterance exception, then any error is harmless given that E.O. testified. In *Owens*, the Supreme Court found that the error was harmless because the victim/declarant testified *and furthermore* there was “extensive medical evidence establishing that [the victim] had been subjected to repeated anal penetration.” 128 Wn. 2d at 914. However, the instant case is distinguishable in that there was no extensive medical evidence establishing penetration. At best, there was only testimony that hymenal “notches” had been observed from the physical examination. Therefore, in the instant case, and unlike the *Owens* case, the evidence against Mr. Ramirez essentially boils down to his word against the word of E.O. Supplementing the testimony of E.O. with testimony from two independent witnesses who claim that E.O. made the same accusatory statements has the prejudicial impact of bolstering the credibility of E.O. Because there was no “extensive medical evidence” supporting the accusations, the admission of the hearsay statements of E.O. where she claimed being raped by Mr. Ramirez cannot be considered harmless.

B. The trial court erred in admitting E.O.’s interview with Detective Eric Kolb as a “prior consistent statement.” First, the defense at trial never made any inference that E.O. had a motive to lie or fabricate. Second, the prior statement was made at a police interview for purposes of future prosecution and therefore at the time of the prior statement a motive to fabricate existed. The error of admitting the interview as a prior consistent statement cannot be considered harmless where no other evidence corroborated the E.O.’s testimony.

The standard of review for determining whether a trial court erroneously admitted a prior statement under ER 801(d)(1)(ii) is abuse of discretion. *State v. Dictado*, 102 Wn.2d 277, 290, 687 P.2d 172 (1984), *abrogated* on other grounds in *State v. Harris*, 106 Wn.2d 784, 790, 725 P. 2d 975 (1986).

A prior statement that merely corroborates a witness’ testimony is generally inadmissible as being irrelevant under Evidence Rules 401 through 403. *State v. Harper*, 35 Wn. App. 855, 857, 670 P.2d 296 (1983). However, the trial court may admit a witness’s out of court statements to rehabilitate testimony that has been “impugned by a suggestion of recent fabrication.” *State v. Stark*, 48 Wn. App. 245, 249, 738 P.2d 684 (1987), *superseded* by statute on other grounds. Evidence Rule 801(d)(1)(ii). Cross examination alone does not justify admission of a “prior consistent statement”. *Dictado*, 102 Wn.2d at 290. Finally, to be admitted as a prior consistent statement under ER 801(d)(1), the prior statement must have been made *before* a motive

to falsify has arisen. *State v. Stubbsjoen*, 48 Wn. App. 139, 146, 738 P.2d 306 (1987). See also, *Tome v. United States*, 513 U.S. 150, 156, 115 S.Ct. 696, 130 L.Ed. 2d 574 (1995)(a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive is only admissible if the statement had been made *before* the alleged fabrication, influence, or motive came into being).

1. *The defense's cross examination did not create any inference that E.O. had a motive to lie or fabricate. The cross examination was aimed at calling into question her ability to recall the number of times the events occurred as well as locations.*

Cross examination of a witness serves a purpose of calling into question statements and assertions made by a witness so that the jury can assess the credibility of that witness. As such, a cross examination that raises questions about the witness's credibility or questions whether the witness fabricated her story does not in itself lead to the admission of a "prior consistent statement." *Harper*, 35 Wn. App. at 856-857.

In *Harper*, throughout the trial the defense suggested that the complaining witnesses "had fabricated their stories as acts of retribution because they believed the defendant had unjustly punished them on several occasions." *Id.* at 856. The reviewing court found it improper for the trial judge to permit the caseworker to testify about prior statements made by the

complaining witnesses regarding acts of sexual abuse that were “consistent” with their trial testimony. *Id.* at 856-857. The Court of Appeals made the following ruling regarding instances where the defense questions the credibility of the witness and the prosecution then attempts to rehabilitate the witness via a prior consistent statement:

In the case at bench, defendant attempted to shake the jury’s confidence in the integrity of the child victim (1) by obtaining the admission on cross examination that she had told untruths in the past, and (2) by implying that she and her older stepsister were motivated to falsify these accusations against him by reason of his past role in the family as the (unjust) disciplinarian. The caseworker’s testimony, about the child’s recital of the event more than 2 months after the event and about the child’s repeated recitation of the same story thereafter, tended in no way to rebut either basis for the attempted impeachment.

Id. at 858.

In the our case, The State argued that the defense’s cross examination of E.O. created a suggestion of fabrication that justified the admission of her interview with Detective Kolb on April 28, 2009. At trial, the defense cross examined E.O. primarily on the location of the alleged rapes and how many times it happened. In fact, the trial judge ruled that the prior consistent statements may be admitted to rehabilitate the suggestion of fabrication with respect to the locations of the alleged rapes and the number of times it allegedly occurred. However, the defense’s cross examination never raised

any claim that the victim was outright lying about the rape. Rather, the cross examination called into question her credibility when she claimed that it happened more than five times, that it happened in the bedroom, and in once in the kitchen. In all, the cross examination was no different than Harper where the cross examination called into question the credibility of the complaining witness. By nature and definition, an effective cross examination must always serve the purpose of calling into question the credibility of a complaining witness. Effectively calling into question the credibility of a witness does not in itself open the door to rehabilitation via the admission of a prior consistent statement. See Harper, at 858.

The prior statement made during the April 28, 2009, interview reiterated that the defendant “grabbed me and raped me;” That, “he would take off my clothes and lock the doors;” That, “he told me not to tell my mom;” That, it “lasted for an hour or so . . . like sometimes I would just push him off with my leg, and I told him to stop and stuff . . . since he’s stronger than me, he would get back on.” Ex.1. And finally, there was an incident in the kitchen where the “rape” happened under E.O.’s blanket and that the defendant did not use a condom. Id. These prior statements cannot serve a purpose of rebutting a claim that E.O. lied about the number of times she was raped or about where these rapes occurred. Although the defense questioned

the witness about her ability to recall the number of times as well as the locations of the alleged rapes, these topics do not cry out that E.O. is necessarily lying. Instead, they call into question her credibility when she claims that the rapes happened more than five times and that they occurred every time in her mom's bedroom and one time in the kitchen. Accordingly, the prior statements from the police interview simply served the purpose of bolstering the credibility of E.O.'s testimony. That purpose is improper under ER 801(d)(1) and cannot be considered harmless in a trial where the evidence essentially boils down to the victim's word against the defendant's.

2. *Even if the defense's cross examination effectively impeached E.O with a claim of fabrication, the prior statements cannot be admitted because the statements from the April 28, 2009, police interview would have been made after the alleged claim of fabrication.*

The alleged fabrication would be that E.O. lied when she disclosed to her aunt and the school counselor that the defendant had raped her when she was 8 or 9 years old. This disclosure occurred on April 23, 2009. At that point, CPS got involved and a criminal investigation commenced. The statements made during the April 28, 2009, police interview necessarily involve prior statements made after an alleged motive to lie exists. Accordingly, these prior statements are inadmissible hearsay and are not covered by the ER 801(d)(1) exception. *State v. McDaniel*, 37 Wn. App. 768,

771, 693 P.2d 231 (1984) (Court found no showing that the victim's prior consistent statements were made at a time when the motive to falsify was not present); *State v. Ellison*, 36 Wn.App. 564, 568, 676 P.2d 531 (1984) (a prior consistent statement meeting the requirements of ER 801(d)(1)(ii) is nonetheless inadmissible if it is tainted by a motive to fabricate); *Tome*, 513 U.S. at 156 (The rule permits the introduction of a declarant's consistent out of court statements to rebut a charge of recent fabrication or improper influence or motive *only when those statements were made before the charged fabrication, influence, or motive*); *See also, State v. Purdom*, 106 Wn.2d 745, 750, 725 P.2d 622 (1986) (The prior consistent statement exception to the hearsay rule, ER 801(d)(1), does not apply to statements which merely reinforce or bolster the witness's testimony through repetition).

Specifically, the evidence of the April 28, 2009, interview, that was made one week after the initial disclosure, necessarily means that the prior statements from the interview were made during the period of the charged fabrication. It would be a completely different analysis if the State attempted to introduce "prior consistent statements" that E.O. perhaps made to her school friends about being raped, as these statements arguably were made before the CPS referral and before the motive to fabricate developed. Accordingly, the probative value of the prior interview simply serves the

irrelevant purpose of “repeating” E.O.’s claims, via hearsay testimony, that she had been raped by the defendant. That goes against the purpose of Rule 801(d)(1) and cannot be considered harmless since the remaining evidence boiled down to the victim’s uncorroborated word.

C. The five “To Convict” jury instructions violate the defendant’s constitutional protection against double jeopardy in that the instructions fail to separate and distinguish each of the five charged acts of Rape of a Child in the First Degree. Such error is of constitutional magnitude and may be raised for the first time on appeal.

Errors pertaining to jury instructions are reviewed *de novo* and may be reviewed for the first time on appeal if the claim involves manifest error affecting a constitutional right. *State v. Berg*, 147 Wn.App. 923, 930-931, 198 P.3d 529 (2008). An error involving a violation of the Double Jeopardy clause, protected by the 5th Amendment of the U.S. Constitution and Article I, Section 9, of the Washington Constitution, is of constitutional magnitude that may be raised for the first time on appeal. *Id.* In the instant case, no party objected to the five jury instructions at issue.

When several counts of sexual assault are charged within the same charging period, in order to protect the defendant from a Double Jeopardy violation, the trial court must instruct the jury that a conviction of each charged count must be based on a *separate and distinct* underlying act. *Berg*,

147 Wn.App. at 932. The “to convict” instruction must therefore make abundantly clear to the jury that each count involves a charge that is “separate and distinct from that charged in [the remaining counts].” *Id.* That is, the “to convict” instruction must convey the need to base each charged count on a “separate and distinct” underlying event. *Id.* A “to convict” instruction that lacks the required “separate and distinct” language will run afoul of the constitutional protection against double jeopardy. *Id.*

The jury instructions in our case contain 5 constitutionally defective “to convict” instructions—specifically instructions # 11 through #15. For purposes of this appellate issue, the operative language reads as follows:

To convict the defendant of the crime of Rape of a Child in the First Degree, as charged in Count I, on an occasion different than alleged in Counts II, III, IV, or V, each of the following elements of the crime must be proved beyond a reasonable doubt:

The remaining four “to convict” instructions contain the same language except that the counts are renumbered accordingly. At issue for this appeal is whether the language “on an occasion different than” serves the same purpose and meaning as the required language of “an occasion *separate and distinct* from . . .” We submit that these two phrases will have two different meanings to a jury and that the language used in the Ramirez jury instructions violates his protection against Double Jeopardy.

We assert on appeal that the phrase “separate and distinct” is fundamentally different in meaning than the phrase “on an occasion different than . . .” The phrase “on an occasion different than” can suggest separate acts that are not necessarily distinct from one-another. That is, it may be that there is one continuous act that can extend in time to occur on separate occasions. Thus, the language “on an occasion different than” certainly satisfies the meaning of a “separate” occasion, *but it does not necessarily mean that there is a distinct act.* In order to satisfy the requirement of a “separate and distinct” act, there must be language that somehow meets the definition of “distinct.” The jury instructions submitted and filed in the instant case fail to make clear to the jury that each count must be “separate and distinct” from one-another. Simply stating that each count must occur “on an occasion different than” one another fails to satisfy the requirement that each act must also be “distinct” from one-another. E.O. testified that there were at least 5 acts of rape, but no more than 20 (or perhaps no more than 15). This is not a case where she testified that there were only 5 acts, no more and no less. Because the jury must find both a *separate* act and a *distinct* act as to each of the 5 counts, we must presume a double jeopardy violation if the language used in the jury instruction only requires the jury to

find that the act of Rape occurred on separate occasions without further instructing the jury that the acts must also be distinct from one-another.

The instant jury instructions fail to give us the assurance that the jury was able to unanimously find, beyond a reasonable doubt, five separate and distinct acts of Child Rape. The proper remedy for this Double Jeopardy violation is to vacate all but one count against the defendant.

D. The defendant suffered undue prejudice when the trial court erroneously permitted Dr. Davis to testify that the observed hymenal notches are consistent with penetration and also consistent with the victim's "medical history interview". The testimony invades the province of the jury because it presents an opinion that E.O. was sexually assaulted by Roe Ramirez.

An opinion from a witness, whether lay or expert, that sexual abuse occurred invades the province of the jury and amounts to Constitutional error. *State v. Carlson*, 80 Wn. App. 116, 126-127, 906 P.2d 999 (1995); *State v. Florczak*, 76 Wn. App. 55, 74, 882 P.2d 199 (1995). It is simply improper for a sexual assault examiner or nurse practitioner to give an opinion that a child has been sexually assaulted based solely on the statements made by the child. *Carlson*, 80 Wn. App. at 126-127.

In *Carlson*, a sexual assault physician conducted an examination of a child that encompassed both a physical examination and a medical history interview. *Id.* at 118-119. The examining physician testified that the physical

findings were inconclusive. *Id.* However, based on the interview with the child, the doctor provided opinion testimony that the child had been sexually abused. *Id.* at 120-121. Specifically, the following question and answer as to the assessment of sexual assault amounted to reversible error as it amounted to an opinion that invaded the province of the jury:

Q: Was that [based] in part [on] the physical findings and in part upon the interview ?

A: Almost entirely on the interview. The physical findings were compatible, but their absence would not change my impression, so when I look at how I come to my diagnosis, . . . the main [thing] is the history.

Id. at 121.

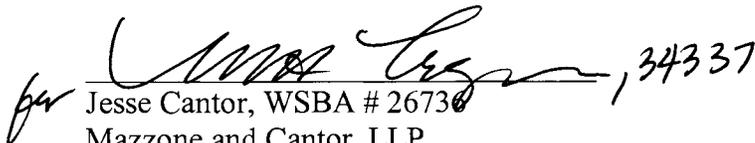
In the instant case, Dr. Davis testified that the physical examination of E.O. was consistent with “a diagnosis of penetrating trauma . . . [However] penetrating trauma does not always mean sexual abuse.” Ex. 1; RP 594. This testimony translates into the physical examination being inconclusive as to the occurrence of sexual abuse. Nevertheless, the testimony of Dr. Davis crossed the line and invaded the province of the jury when she testified that the “notches” observed during this physical examination are “consistent with . . . [E.O.’s] medical history.” RP 595. The medical history interview contains assertions from E.O. that she was sexually abused specifically by Mr. Ramirez. To have a medical expert testify that the observed notches are

consistent with the medical history interview, that contain these assertions of abuse, is improper and reversible error under the ruling and reasoning of Carlson. And, similar to the ruling in Carlson, because the evidence against Mr. Ramirez essentially boiled down to his word against the word of E.O., this error cannot be considered harmless. Mr. Ramirez is entitled to a new trial.

VI. CONCLUSION

For the reasons stated in this opening brief, and as may further appear on the record, the Appellant respectfully requests that his judgment and conviction be vacated and that a new trial be ordered. Alternatively, the Appellant respectfully requests that counts 2 through 5 be dismissed.

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CERTIFICATE OF SERVICE

I, Jesse Cantor, attorney for the Appellant, hereby certify that on This 24th Day of May, 2010, I sent for service a true and correct copy of the foregoing opening brief by legal messenger, on the following parties:

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