

COURT OF APPEALS
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NO. 40575-0-II

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

STATE OF WASHINGTON, Respondent

v.

RODNEY L ERDLE, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
THE HONORABLE JOHN F. NICHOLS
CLARK COUNTY SUPERIOR COURT CAUSE NO.08-1-01675-7

BRIEF OF RESPONDENT

Attorneys for Respondent:

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I. STATEMENT OF FACTS

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

II. RESPONSE TO ASSIGNMENT OF ERROR

The assignment of error raised by the defendant is a claim of ineffective assistance of counsel because counsel failed to request a lesser included instruction of Fourth Degree Assault.

The defendant was brought to jury trial on a Third Amended Information (CP 76) charging him with five counts of Child Molestation. The counts involve two different victims and run the gamut from Child Molestation in the First Degree through to Child Molestation in the Third Degree and time elements that range from September 2002 through November 2004. A copy of the Third Amended Information is attached hereto and by this reference incorporated herein. Obviously, the activity involved (“tickling”) multiple children over an extended period of time was more than one specific act. Nevertheless, the defense on appeal maintains that the defense attorney at trial was ineffective because he should have requested a lesser included of Assault in the Fourth Degree.

It's unclear from the nature of the brief as to how many different allegations or counts of Assault in the Fourth Degree would be referred to. However, the State presumes that what the defense is talking about on appeal is that there should have been lesser included Fourth Degree Assault relating to all five counts. The Court's Instructions to the Jury (CP 79) are attached hereto and by this reference incorporated herein.

As set out in the brief of the appellant, the allegations concerning the children are multiple acts of sexual misconduct occurring here and also in the State of Alaska. There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). The reasonableness of trial counsel's performance is reviewed in light of all of the circumstances of the case at the time of counsel's conduct. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

As the Supreme Court explained in Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to

conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-134[, 102 S. Ct. 1558, 1574-75, 71 L. Ed. 2d 783] (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, [350 U.S. 91, 101, 76 S. Ct. 158, 100 L. Ed. 83 (1995)].

-(Strickland, 466 U.S. at 689.)

A trial court need not give a limiting instruction absent a party's request. State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997). Where a party fails to request a limiting instruction, our courts have consistently held that such a failure can be presumed to be a legitimate tactical decision designed to prevent reemphasis on the damaging evidence. State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000); State v Russell, 154 Wn. App. 775, 225 P.3d 478 (2010). The failure of a court to give a cautionary instruction is not error if no instruction was requested. State v. Hess, 86 Wn.2d 51, 52, 541 P.2d 1222 (1975). The defendant never requested a limiting instruction. And, absent a request for a limiting instruction, evidence admitted as relevant for one purpose is deemed

relevant for others. Lockwood v. AC & S, Inc., 109 Wn.2d 235, 255, 744 P.2d 605 (1987).

As explained in State v. Yarbrough, 151 Wn. App. 66, 91, 210 P.3d 1029 (2009):

But prior cases have established that failure to request a limiting instruction for evidence admitted under ER 404(b) may be a legitimate tactical decision not to reemphasize damaging evidence. See State v. Price, 126 Wn. App. 617, 649, 109 P.3d 27 (“[w]e can presume that counsel did not request a limiting instruction” for ER 404(b) evidence to avoid reemphasizing damaging evidence), review denied, 155 Wn.2d 1018 (2005); State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (failure to propose a limiting instruction for the proper use of ER 404(b) evidence of prior fights in prison dorms was a tactical decision not to reemphasize damaging evidence); State v. Donald, 68 Wn. App. 543, 551, 844 P.2d 447, review denied, 121 Wn.2d 1024 (1993). Yarbrough does not attempt to distinguish these cases. We presume, therefore, that Yarbrough's trial counsel decided not to request a limiting instruction on the gang-related evidence as a legitimate trial strategy not to reemphasize damaging evidence. And a legitimate trial strategy or tactic cannot serve as a basis for an ineffective assistance of counsel claim. State v McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

The tactical nature of the defense is set out throughout the entire case but it is certainly clarified in the discussion concerning the jury instructions to be given in the case and also then in the closing argument.

The defense makes it quite clear that the activity took place but that it was not of a sexual nature. In other words, the defense is not maintaining that this is some type of assaultive behavior but was something that was willingly entertained by the children and was not meant as an assault of a sexual or non-sexual nature. When the parties are discussing the jury instructions, the defense attorney makes it quite clear as to the nature of the defense when addressing this with the Judge, prosecutor, and the defendant being present:

MR. BUCKLEY (Defense counsel): Well, my argument is that the reason we have – I mean, there's no exclusion in the definition of sexual contact. I think that essentially the reason I always put those in is because it's kind of a no-harm/no-foul issue. There's no – it's not detrimental to the State, first of all, because it is an intent crime and you have got to commit it. You can't do it by accident. You have to do it knowingly to have to commit it by intentionally. So both those definitions just define what the, you know, crime itself, sexual contact, is for. So I always put them in. I believe that they bring to light that accidental touching is not a crime. And in the case of this particular nature that's specifically – we believe is defense's position.

-(RP 443, L13 – 444, L1)

Later on in the discussion with the court and counsel concerning jury instructions this matter is spelled out again by the defense attorney:

MR. BUCKLEY (Defense counsel): If I may supplement my argument just – that is that jury instructions are not, in

and of themselves, required to be limited to the elements of the crime because Defense is allowed to put in instructions that augment their case. And obviously in our particular case in this matter that is specifically what this is all about because there's an admission on the part of the defense that the conduct which is being complained about, in fact, was done. It's just how it was done and for what purpose. So for that reason, I would argue that that outlines the defense position in this case, and therefore we should be allowed to supplement the instructions with that particular situation.

-(RP 445, L6-18)

This discussion is further fleshed out then in the argument to the jury. The defense argument raises a number of issues. For example, the question is raised as to why there are no injuries, for example bruising or scratches on the bodies of the children. Also the question is raised as to motivation and why the children would make up this story. The obvious part of this entire argument is that the conduct with the children is not assaultive behavior and clearly the defense does not wish it to be interpreted that way. Certainly if it's assaultive behavior, given the nature of the allegations and the nature of testimony, then the jury would find a sexual component also and thus lead you directly into the molestation situation.

[Portion of Defense attorney's closing argument]: But I'm going to start off with this is a case that I always refer to as a she-said/he-said case. There's no physical evidence here. Could there have been physical evidence? Sure. I mean, if this raw tickling was so raw that it caused bruises and

things like that, which is what I first thought of when I heard about it, there would have been some bruises on the thigh. They could have shown Sabrina, "Look at what he's doing. He's hurting me." Has that ever happened? It never happens.

It is impossible to produce evidence to convince you that something didn't happen. How can you do that? You can't do it. So what we have here is two different situations. One says this happened, the other one says it didn't happen. And it's your job to decide who is more credible. Now, having said that, it's not a coin flip. It's really not a coin flip because you have a duty to believe beyond a reasonable doubt that those girls are telling the truth and that Mr. Erdle isn't.

So the State would have you believe because they got up on the stand and they cried and they told a story, it's got to be true. Why would they do it? Well, there's a lot of reasons they would do it. There's a lot of facts in this particular scenario that causes concern in my mind in regards to the credibility of the testimony of the two girls.

The first is a late reporting. Late reporting always is suspicious unless there's some other factors behind it such as you are living in a house with man and your mother, and that man is taking advantage of you someplace, and you are deathly afraid of this person because you have nobody to report to because you believe that Mom is going to believe him and not you, number one. Number two, is you have no place to escape. There's no escape hatch here. There's nobody you can talk to. And in this particular case that's just not here, and the reason it's not here is because every other weekend – or strike that, every weekend these girls go see their father, Rick McVicker. They see their other sister. They see their other siblings. They see their other sister. They see their other siblings. They never report until Jessica goes to school five year later because she's having sex dreams and makes these reports, and then it flows that Andrea is then brought into that investigation and then she reports. Is that credible?

That's for you to determine, not for me, but that's one of the issues that I have in this case, the credibility issue in terms of why the late reporting.

Another thing that comes to mind in terms of this issue is Jessica says it was horrible. It happened a couple times a day. It was just unbearable. She never tells Dad every weekend that she goes to see him. There's no testimony that it was so horrible that she reported to anybody. More telling is the fact that they went back to live with Dad in January of 2004 and during that period of time every other weekend or every weekend depending on the exact situation, they went back and spent time with Sabrina and Rodney and the youngster. Is that credible? I mean, I don't find it credible, but it's not for me to decide. It's for you to decide, but I'm pointing it out because it really bothers me that she would continue to go back and back and eventually move to a different state and live with these people.

-(RP 491, L8 – 493, L18)

It's quite clear that the defense is raising a number of areas of concern which all point to questions of credibility, or lack of credibility, on the part of the alleged victims. Another telling area of the argument is the claim that at least one of the children has totally changed her testimony.

[Defense closing argument]: The story that she tells – the report that she makes is that, "When I was in Alaska," all this stuff went on, and we know that's the case because Ms. Carmichael said it. That's what she thought when the report went down. Officer Anderson said, "Yeah, that's what I thought. That's what my report said." And Jessica, "Well, they were mistaken I was talking really about Clark County

and when we were living down here.” But the interesting thing is that she didn’t say that until nine or ten months later after talking to me on the tape, and she told me, “Nothing happened at the residence. It all happened up in Alaska.” That’s what she said. And that was a few months after she talked with the officers, but then nine months later she changes her story.

“Beyond a reasonable doubt” requires that you believe somebody who changes their story and another person who doesn’t. I just find Jessica not credible because of that factor alone. She’s angry at Rodney Erdle. She testifies to that. She hates him from the get-go, from back in September of 2002 or whenever it was.

-(RP 493, L21 – 494, L16)

Finally, the defense raises the argument that the “tickling” was not offensive but was something that was done on a regular basis among the children and, it sounds like, some of the adults.

[Defense closing argument]: So I have significant doubts as to that whole scenario, but more importantly Sabrina was there or she wasn’t there is concerning to me. What also is concerning to me is Mr. Erdel’s work. Now, we know it happened during a school day. Everybody testified it had to be a school day because they spent the weekends with Dad, so it’s during the school day. It’s after school. Sabrina testifies that she cooks dinner. Mr. Erdle doesn’t get home until 5:30 or so. So I submit that Sabrina was home and it would be unreasonable to assume that Mr. Erdle would go into a door of a young girl, close it and try to molest her. It’s not credible.

Would he tickle her? Yeah. He would. That’s how he played with them. That’s how they played with each other. Andrea says that’s how they played with each other. She

doesn't talk about raw tickling or anything. She talks about three incidents of unwanted touching, but other than that, she doesn't say the tickling is offensive or anything like that. The only person who does is Jessica who talks of the raw tickling and things of that nature.

And, of course, Jessica also says, "Well, he didn't touch me on the breasts." It was on her knees, on top. "He was up on my thigh then an inch and half of an inch from my thigh." Well, the law requires that it be on an intimate part for sexual gratification. And the State hasn't proved beyond a reasonable doubt that that's what Rodney Erdle was tickling these girls for. And he tickled his wife, and he tickled the other kids, too, that were there. Awe know that. So it was a common practice. Did he deny it? No, he didn't deny it. Did say, "Well, I touched them. It could have happened. Didn't mean to." Accidental touching when you are tickling kids and stuff like that. It happens every single day.

-(RP 501, L2 – 502, L8)

The State submits that this was all part of tactics and strategy on the part of the defense. They did not wish to raise a lesser of any kind. As the defense attorney says at the end of his closing argument, "And it's a he-says/she-says case without any other evidence; the scale has got to tip in favor of the defendant because that's what this process is all about." (RP 505, L25 -- 506, L2).

Under the test announced in State v. Workman, 90 Wn.2d 443, 584 P.2d 382 (1978), a "defendant is entitled to an instruction on a lesser included offense if (1) each element of the lesser offense is necessarily

included in the charged offense and (2) the evidence in the case supports an inference that the defendant committed only the lesser crime.” State v. Gamble, 137 Wn. App. 892, 905, 155 P.3d 962 (2007), *aff’d*, 168 Wn.2d 161, 225 P.3d 973 (2010). The two parts of the test are respectively referred to as the “legal” and the “factual” prongs. State v. Rodriguez, 48 Wn. App. 815, 817, 740 P.2d 904 (1987). After satisfying the two Workman prongs, the “Washington rule” commands that “a lesser included offense instruction is required as a matter of right.” In re Pers. Restraint of Andress, 147 Wn.2d 602, 613, 56 P.3d 981 (2002); State v. Lyon, 96 Wn. App. 447, 450, 979 P.2d 926 (1999), overruled on other grounds by Andress, 147 Wn.2d at 613-16.

The petitioner satisfies the factual prong of the Workman test “when substantial evidence in the record supports a rational inference that the defendant committed only the lesser included ... offense to the exclusion of the greater offense.” State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000). “It is not enough that the jury might simply disbelieve the State's evidence. Instead, some evidence must be presented which affirmatively establishes the defendant's theory on the lesser included offense before an instruction will be given.” State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991). “When determining if the

evidence at trial was sufficient to support the giving of an instruction, the appellate court is to view the supporting evidence in the light most favorable to the party that requested the instruction.” Fernandez-Medina, 141 Wn.2d at 455-56. Under the legal prong, a defendant is entitled to an instruction on the lesser offense only if the charged crime could not be committed without also committing the lesser offense. Id. “To satisfy the factual prong of Workman, the evidence must support an inference that the lesser offense was committed instead of the greater offense.” State v. Karp, 69 Wn. App. 369, 376, 848 P.2d 1304, review denied, 122 Wn.2d 1005 (1993). In other words, “the record must support an inference that only the lesser offense was committed.” Id.

The State submits that the evidence does not support the giving of the lesser of Assault in the Fourth Degree. Given the nature of the defense being raised, it would lead to various types of conflicts and questions of credibility with the jury as it relates to the defense. For example, is the defendant merely throwing a bunch of concepts up on the wall and hoping that one of them sticks! That certainly appears to be the argument if it were to be supported by the evidence. However, the defense is not that this was some type of assaultive behavior that is misinterpreted, but it was nothing but horse play with children having a separate motivation for trying to get the defendant in trouble.

III. CONCLUSION

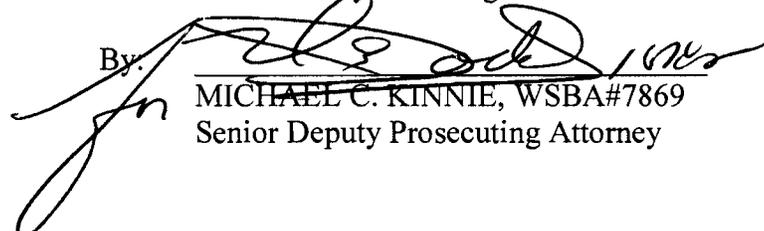
The trial court should be affirmed in all respects.

DATED this 10th day of Nov, 2010.

Respectfully submitted:

ARTHUR D. CURTIS
Prosecuting Attorney
Clark County, Washington

By:

A large, stylized handwritten signature in black ink, appearing to read "Michael C. Kinnie". The signature is written over a horizontal line.

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

FILED
JAN 12 2010
3:13 PM
Sherry W. Parker, Clerk, Clark Co.

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

STATE OF WASHINGTON,

Plaintiff,

v.

RODNEY L ERDLE

Defendant.

THIRD AMENDED INFORMATION

No. 08-1-01675-7

(CCSO 08-10423)

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

COUNT 01 - CHILD MOLESTATION IN THE SECOND DEGREE - 9A.44.086

That he, RODNEY L ERDLE, in the County of Clark, State of Washington, between September 1, 2002 and November 30, 2003, on an occasion separate from that in Count 2 and Count 3, did have sexual contact with A.G.M., who was at least twelve (12) years old but less than fourteen (14) years old, and not married to the defendant and the defendant was at least thirty-six months older than the victim; contrary to Revised Code of Washington 9A.44.086.

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

COUNT 02 - CHILD MOLESTATION IN THE THIRD DEGREE - 9A.44.089

That he, RODNEY L ERDLE, in the County of Clark, State of Washington, between September 1, 2002 and November 30, 2004, on an occasion separate from that in Count 1 and Count 3, did have sexual contact with A.G.M., who was less than sixteen (16) years old, and not married to the defendant and the defendant was at least forty-eight months older than the victim; contrary to Revised Code of Washington 9A.44.089.

COUNT 03 - CHILD MOLESTATION IN THE THIRD DEGREE - 9A.44.089

That he, RODNEY L ERDLE, in the County of Clark, State of Washington, between September 1, 2002 and November 30, 2004, on an occasion separate from that in Count 1 and Count 2, did have sexual contact with A.G.M., who was less than sixteen (16) years old, and not married to the defendant and the defendant was at least forty-eight months older than the victim; contrary to Revised Code of Washington 9A.44.089.

COUNT 04 - CHILD MOLESTATION IN THE FIRST DEGREE - 9A.44.083

That he, RODNEY L ERDLE, in the County of Clark, State of Washington, between September 1, 2002 and November 11, 2003, on an occasion separate from that in Count 5, did have sexual contact with J.R.M., who was less than twelve years old and not married to the defendant and

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1 the defendant was at least thirty-six months older than the victim; contrary to Revised Code of
2 Washington 9A.44.083.

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

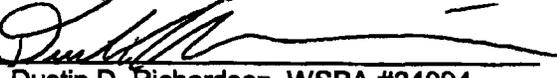
5 **COUNT 05 - CHILD MOLESTATION IN THE FIRST DEGREE - 9A.44.083**

6 That he, RODNEY L ERDLE, in the County of Clark, State of Washington, between September
7 1, 2002 and November 11, 2003, on an occasion separate from that in Count 4, did have sexual
8 contact with J.R.M., who was less than twelve years old and not married to the defendant and
9 the defendant was at least thirty-six months older than the victim; contrary to Revised Code of
10 Washington 9A.44.083.

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

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

16 Date: January 12, 2010

17 BY: 
18 Dustin D. Richardson, WSBA #34094
19 Deputy Prosecuting Attorney

DEFENDANT: RODNEY L ERDLE			
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THIRD AMENDED INFORMATION - 2
blm

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FILED
JAN 13 2010
9:54 AM
Sherry W. Parker, Clerk, Clark Co.
K. Boehm, Deputy Clerk

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

STATE OF WASHINGTON,
Plaintiff,
v.
RODNEY L ERDLE,
Defendant.

No. 08-1-01675-7

**COURT'S INSTRUCTIONS
TO THE JURY**


SUPERIOR COURT JUDGE

DATED this 13 day of Jan, 2010.

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INSTRUCTION NO. 1

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

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

The complaint in this case is only an accusation against the defendant which informs the defendant of the charge. You are not to consider the filing of the complaint or its contents as proof of the matters charged.

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

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

You are the sole judges of the credibility of the witnesses and of what weight is to be given the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

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

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

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence.

Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

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

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

INSTRUCTION NO. 2

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

INSTRUCTION NO. 3

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State of Washington 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 as to these elements.

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

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. 5

There has been evidence introduced by the state in this case of prior statements of the victims made to the police. They were entered for the limited purpose of assisting you in evaluating the credibility of the witnesses. They are not to be considered by you as proof of the matters recited in such statements, but only in evaluating the creditability of the witnesses.

INSTRUCTION NO. 6

The State has introduced evidence of alleged sexual conduct in the State of Alaska. You are not to consider this evidence as prior criminal conduct on the part of the Defendant in your deliberations except for the sole purpose of showing a lustful disposition directed toward the offended female. They are allegations only. You are the sole judges of credibility in this case.

INSTRUCTION NO: 7

If a party does not produce the testimony of a witness who is within the control of that party and as a matter of reasonable probability it appears naturally in the interest of the party to produce the witness, and if the party fails to satisfactorily explain why it has not called the witness, you may infer that the testimony that the witness would have given would have been unfavorable to the party, if you believe such inference is warranted under all the circumstances of the case.

INSTRUCTION NO. 8

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. 9

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.

INSTRUCTION NO. 9 - A

The State alleges that the defendant committed acts of Child Molestation in the Second Degree on multiple occasions. To convict the defendant on any count of Child Molestation in the Second Degree, one particular act of Child Molestation 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 Child Molestation in the Second Degree.

INSTRUCTION NO. 10

A person commits the crime of child molestation in the second degree when the person has sexual contact 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. 11

To convict the defendant of the crime of child molestation in the second degree as alleged in Count 1, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between September 1, 2002 and November 30, 2003, the defendant had sexual contact with A.G.M., on an occasion separate from that in Count 2 and Count 3;

(2) That A.G.M. was at least twelve years old but less than fourteen years old at the time of the sexual contact and was not married to the defendant;

(3) That A.G.M. was at least thirty-six months younger than the defendant; and

(4) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

INSTRUCTION NO. 12

The State alleges that the defendant committed acts of Child Molestation in the Third Degree on multiple occasions. To convict the defendant on any count of Child Molestation in the Third Degree, one particular act of Child Molestation in the Third 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 Child Molestation in the Third Degree.

INSTRUCTION NO. 13

A person commits the crime of child molestation in the third degree when the person has sexual contact with a child who is less than sixteen years old, who is not married to him or her, and who is at least forty-eight months younger than the person.

INSTRUCTION NO. 14

To convict the defendant of the crime of child molestation in the third degree as alleged in Count 2, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between September 1, 2002 and November 30, 2004, the defendant had sexual contact with A.G.M. on an occasion separate from that in Count 1 and Count 3;

(2) That A.G.M. was less than sixteen years old at the time of the sexual contact and was not married to the defendant;

(3) That A.G.M. was at least forty-eight months younger than the defendant; and

(4) That this act 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. 15

To convict the defendant of the crime of child molestation in the third degree as alleged in Count 3, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between September 1, 2002 and November 30, 2004, the defendant had sexual contact with A.G.M. on an occasion separate from that in Count 1 and Count 2;

(2) That A.G.M. was less than sixteen years old at the time of the sexual contact and was not married to the defendant;

(3) That A.G.M. was at least forty-eight months younger than the defendant; and

(4) That this act 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

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

INSTRUCTION NO. 17

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

INSTRUCTION NO. 18

To convict the defendant of the crime of child molestation in the first degree as to Count 4, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between September 1, 2002 and November 11, 2003, on an occasion separate from that in Count 5, the defendant had sexual contact with J.R.M.;

(2) That J.R.M. was less than twelve years old at the time of the sexual contact and was not married to the defendant;

(3) That J.R.M. was at least thirty-six months younger than the defendant; and

(4) That this act 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 child molestation in the first degree as to Count 5, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between September 1, 2002 and November 11, 2003, on an occasion separate from that in Count 4, the defendant had sexual contact with J.R.M.;

(2) That J.R.M. was less than twelve years old at the time of the sexual contact and was not married to the defendant;

(3) That J.R.M. was at least thirty-six months younger than the defendant; and

(4) That this act 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. 20

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 bailiff. I will confer with the lawyers to determine what response, if any, can be given.

You will be given the exhibits admitted in evidence, these instructions, and verdict forms for recording your verdict. 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 bailiff. The bailiff will bring you into court to declare your verdict.

