

NO. 41916-5

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

STATE OF WASHINGTON, RESPONDENT

v.

JEFFREY RANDALL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Susan K. Serko

No. 08-1-02916-8

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR 1

 1. Did the use of general testimony to establish defendant’s practice of employing minors to sell his marijuana comply with due process when it was sufficiently specific to enable his defense?..... 1

 2. Were defendant’s convictions for unlawful delivery of a controlled substance and involving a minor in a transaction to deliver a controlled substance supported by sufficient evidence when the evidence established he was a forty year old man who employed two fifteen year old girls to sell his marijuana?..... 1

 3. Was the omission of a *Petrich* instruction harmless error when defendant's criminal acts were collectively established by uncontroverted evidence? 1

 4. Are the findings of sexual motivation supported by the record when it shows defendant’s marijuana deliveries were partially aimed at drawing the victims into a sexual relationship?..... 1

 5. Should defendant's claim of a Bashaw error be rejected when it was not preserved for review and is not supported by the record 1

B. STATEMENT OF THE CASE..... 2

 1. Procedure 2

 2. Facts..... 3

C. ARGUMENT..... 9

 1. THE USE OF GENERAL TESTIMONY TO ESTABLISH DEFENDANT’S PRACTICE OF EMPLOYING MINORS TO SELL MARIJUANA COMPLIED WITH DUE PROCESS BECAUSE IT WAS SUFFICIENTLY SPECIFIC TO ENABLE HIS DEFENSE. 9

2.	DEFENDANT’S DRUG CONVICTIONS WERE SUPPORTED BY SUFFICIENT EVIDENCE THAT HE WAS A FORTY YEAR OLD MAN WHO EMPLOYED TWO FIFTEEN YEAR OLD GIRLS TO SELL HIS MARIJUANA.....	14
3.	THE ABSENCE OF A <i>PETRICH</i> INSTRUCTION IS HARMLESS ERROR BECAUSE DEFENDANT’S CRIMINAL ACTS WERE COLLECTIVELY ESTABLISHED THROUGH UNCONTROVERTED EVIDENCE.	19
4.	THE SEXUAL MOTIVATION SENTENCE ENHANCEMENTS WERE SUPPORTED BY SUFFICIENT EVIDENCE THAT DEFENDANT’S MARIJUANA DELIVERIES WERE PARTIALLY AIMED AT DRAWING HIS VICTIMS INTO A SEXUAL RELATIONSHIP.....	29
5.	DEFENDANT’S CLAIM OF A <i>BASHAW</i> ERROR SHOULD BE REJECTED BECAUSE IT WAS NOT PRESERVED FOR REVIEW AND IS NOT SUPPORTED BY THE RECORD.....	33
D.	<u>CONCLUSION</u>	37

Table of Authorities

State Cases

<i>Hewson Construction, Inc., v. Reintree Corp.</i> , 101 Wn.2d 819, 823, 685 P.2d 1062 (1984).....	23
<i>Lake v. Woodcreek Homeowners Ass’n</i> , 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).....	16, 30
<i>Pepper v. City Park Transit Co.</i> , 15 Wash. 176, 180, 45 P. 743 (1896)..	34
<i>State v. Adel</i> , 136 Wn.2d 629, 965 P.2d 1072 (1998)	23
<i>State v. Allen</i> , 57 Wn. App. 134, 135-136, 787 P.2d 566 (1990).....	10, 21, 25, 26, 28
<i>State v. Bashaw</i> 169 Wn.2d 133, 146-147, 234 P.3d 195 (2010).....	1, 33, 34, 35, 36, 37
<i>State v. Berlin</i> , ___ Wn. App. ___, ___ P.3d ___, No. 41307-8-II (2012).....	35, 36
<i>State v. Bobenhouse</i> , 166 Wn.2d 881, 885-886, 214 P.3d 907 (2009).....	10, 20, 21, 25, 28
<i>State v. Boot</i> , 89 Wn. App. 780, 789, 950 P.2d 964, <i>review denied</i> , 135 Wn.2d 1015, 960 P.2d 939 (1998).....	30
<i>State v. Brown</i> , 55 Wn. App. 738, 741-742, 780 P.2d 880 (1989).....	9, 10
<i>State v. Camarillo</i> , 115 Wn.2d 60, 63-64, 794 P.2d 850 (1990).....	15, 20, 21, 25, 26, 28, 36
<i>State v. Casbeer</i> , 48 Wn. App. 539, 542, 740 P.2d 335, <i>review denied</i> , 109 Wn.2d 1009 (1987).....	15
<i>State v. Chanthabouly</i> , 164 Wn. App. 104, 142, 262 P.3d 144 (2011) ...	29
<i>State v. Coleman</i> , 152 Wn. App. 552, 564-565, 216 P.3d 479 (2009).....	37
<i>State v. Coleman</i> , 159 Wn.2d 509, 511-512, 150 P.3d 1126 (2007).....	20, 27

<i>State v. Cord</i> , 103 Wn.2d 361, 367, 693 P.2d 81 (1985).....	15
<i>State v. Delmarter</i> , 94 Wn.2d 634, 638, 618 P.2d 99 (1980).....	14
<i>State v. Dent</i> , 123 Wn.2d 467, 477, 869 P.2d 392 (1994).....	34
<i>State v. Edwards</i> , 84 Wn. App. 5, 10, 924 P.2d 397 (1996), <i>review denied</i> , 131 Wn.2d 1016, 936 P.2d 416 (1997).....	16, 30
<i>State v. Ferguson</i> , 100 Wn.2d 131, 139, 667 P.2d 68 (1983).....	10
<i>State v. Fiallo-Lopez</i> , 78 Wn. App. 717, 725-726, 889 P.2d 1294 (1995).....	23
<i>State v. Flores</i> , 164 Wn.2d 1, 186 P.3d 1038 (2008)	16, 17, 23, 28
<i>State v. Fowler</i> , 114 Wn.2d 59, 69, 785 P.2d 808 (1990)	34
<i>State v. Goins</i> , 151 Wn.2d 728, 733-734, 736-738, 92 P.3d 181 (2004).....	33
<i>State v. Goldberg</i> , 149 Wn.2d 888, 893, 72 P.3d 1083 (2003).....	33, 36, 37
<i>State v. Gordon</i> , 172 Wn.2d 671, 676, 260 P.3d 884 (2011)	36
<i>State v. Grimes</i> , 165 Wn. App. 172, 175, 267 P.3d 454 (2011).....	35, 36
<i>State v. Halstien</i> , 122 Wn. 2d 109, 857 P.2d 270 (1990).....	30, 32
<i>State v. Hames</i> , 74 Wn.2d 721, 725, 446 P.2d 344 (1968)	34
<i>State v. Hanson</i> , 59 Wn. App. 651, 800 P.2d 1124 (1990).....	27
<i>State v. Haq</i> , ___ Wn. App. ___, 268 P.3d 997, No. 64839-0-I (2012)...	30
<i>State v. Hayes</i> , 81 Wn. App. 425, 435-436, 914 P.2d 788 (1996).....	9, 10, 11, 12, 13
<i>State v. Hermann</i> , 138 Wn. App. 596, 602, 158 P.3d 96 (2007).....	14
<i>State v. Hickman</i> , 135 Wn.2d 97, 102 n. 2, 954 P.2d 900 (1998).....	34
<i>State v. Holland</i> , 77 Wn. App. 420, 424-425, 891 P.2d 49 (1995)	27

<i>State v. Hollis</i> , 93 Wn. App. 804, 812, 970 P.2d 813 (1999).....	16, 17, 23, 28, 30
<i>State v. Kitchen</i> , 110 Wn.2d 403, 409, 756 P.2d 105 (1998).....	19, 20, 21, 25, 27
<i>State v. McCullum</i> , 98 Wn.2d 484, 489, 656 P.2d 1064 (1983).....	14
<i>State v. McNeal</i> , 145 Wn.2d 352, 360, 37 P.3d 280 (2002).....	14
<i>State v. Morgan</i> , 163 Wn. App. 341, 352-353, 261 P.3d 167(2011), <i>petition for rev. filed</i> , No. 86555-8 (Wash. Oct. 3, 2011).....	35
<i>State v. Nunez</i> , 160 Wn. App. 150, 158-165, 248 P.3d 103, <i>review granted</i> , 172 Wn.2d 1004 (2011).....	35, 36
<i>State v. O’Hara</i> , 167 Wn.2d 91, 100, 217, P.3d 756 (2009).....	36
<i>State v. Petrich</i> , 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984).....	1, 2, 19, 20, 23, 26
<i>State v. Read</i> , 163 Wn. App. 853, 868 P.3d 207 (2011).....	30
<i>State v. Ryan</i> , 160 Wn. App. 944, 948-949, 252 P.3d 895, <i>review granted</i> , 172 Wn.2d 1004 (2011).....	35-36
<i>State v. Salinas</i> , 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).....	14
<i>State v. Stubbs</i> , 170 Wn.2d 117, 123, 240 P.3d 143 (2010).....	29
<i>State v. Swan</i> , 114 Wn.2d 613, 661-662, 790 P.2d 610 (1990).....	22
<i>State v. Teal</i> , 152 Wn.2d 333, 337, 96 P.3d 974 (2004).....	14
<i>State v. Workman</i> , 66 Wash. 292, 294-205, 119 P. 751 (1911).....	19
<i>State v. Yarbrough</i> , 151 Wn. App. 66, 84, 210 P.3d 1029 (2009).....	30
<i>State v. Yates</i> , 161 Wn.2d 714, 752, 168 P.3d 359 (2007).....	29

Federal and Other Jurisdictions

Delaware v. Van Arsdall, 475 U.S. 673, 680-682, 106 S. Ct. 1431,
1436-1437, 89 L. Ed. 2d 674 (1986)..... 20

People v. Jones, 270 Cal.Rptr. 611, 623, 792 P.2d 643 (1990)..... 9

People v. Obremski, 207 Cal.App.3d 1346, 255 Cal.Rptr. 715,
719 (1989)..... 10

United States v. Maxey, 989 F.2d 303, 306 (9th Cir. 1993)..... 23

Statutes

RCW 69.50 16

RCW 69.50.401(1)(2)(b) 18

RCW 69.50.401(e)..... 23

RCW 69.50.4015 16, 23

RCW 69.50.406(2)..... 18

RCW 9.79.210 27

RCW 9.94.585(4)..... 29

RCW 9.94A.030..... 30

RCW 9.94A.030(47)..... 30, 32

RCW 9.94A.533..... 2

RCW 9.94A.533(8)(a) 30

RCW 9A.44.010(1)..... 32

RCW 9A.44.079..... 32

RCW 9A.44.080..... 27

RCW 9A.44.100..... 27

Rules and Regulations

CrR 6.15(c) 34
RAP 2.5(a) 34

Other Authorities

Blacks Law Dictionary, 8th Ed. 1535 (2004) 16
Webster’s Third New International Dictionary 2425 (2002)..... 16
Webster’s Third New International Dictionary 991-992 (2002) 30
WPIC 4.25..... 2

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

1. Did the use of general testimony to establish defendant's practice of employing minors to sell his marijuana comply with due process when it was sufficiently specific to enable his defense?
2. Were defendant's convictions for unlawful delivery of a controlled substance and involving a minor in a transaction to deliver a controlled substance supported by sufficient evidence when the evidence established he was a forty year old man who employed two fifteen year old girls to sell his marijuana?
3. Was the omission of a *Petrich*¹ instruction harmless error when defendant's criminal acts were collectively established by uncontroverted evidence?

¹ 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984) (When the State presents evidence of several acts that could form the basis of one count charged, either the State must elect the act it is relying upon or the court must instruct the jury to agree on a specific criminal act).

4. Are the findings of sexual motivation supported by the record when it shows defendant's marijuana deliveries were partially aimed at drawing the victims into a sexual relationship?

5. Should defendant's claim of a *Bashaw*² error be rejected when it was not preserved for review and is not supported by the record?

B. STATEMENT OF THE CASE.

1. Procedure

On January 13, 2011, the Pierce County Prosecutor's Office filed a third amended information charging appellant, Jeffrey Lamont Randall ("defendant"), with four counts of third degree rape of a child (Counts I-IV), two counts of involving a minor in a transaction to deliver a controlled substance (Counts V-VI), and two counts of unlawful delivery of a controlled substance to a person under the age of eighteen (Counts VII-VIII). CP 223-226. The State alleged defendant committed Counts VII and VIII with sexual motivation. CP 223.

The Honorable Susan K. Serko presided over the trial. RP 1. Defendant proposed a *Petrich* instruction for each count.³ CP 228-233; RP 1727-1737. The State objected to the *Petrich* instructions, arguing the charged offenses were part of a continuing course of conduct that did not

² 169 Wn.2d 133, 146-147, 234 P.3d 195 (2010) (Juror unanimity is required to find the presence of a penalty enhancing-fact, but is not required to find its absence).

³ WPIC 4.25; see also *Petrich*, 101 Wn.2d at 572.

require election. RP 1734-1741. The trial court agreed with the State and did not give the instructions. RP 1734-1735, 1741, 1813-1881; CP 270-304. The jury convicted defendant of two counts of involving a minor in a transaction to deliver a controlled substance (Counts V-VI) and two counts of unlawful delivery of a controlled substance to a person under the age of eighteen (Counts VII-VIII). CP 309-312. The jury concluded defendant committed the unlawful deliveries with sexual motivation. CP 313-314. Defendant was acquitted of the child rape counts. CP 305-308.

The Court imposed sentence on March 18, 2011. CP 438-455. Defendant's offender score was 10 as to Counts V-VI and 12 as to Counts VII-VIII. CP 442. Defendant's standard range was 100 to 120 months for each offense. CP 442. The court was statutorily required to impose a consecutive 48 month sentence for the sexual motivation enhancements. CP 441-442; RCW 9.94A.533. The Court imposed a high end sentence of 168 months. CP 441-442. Defendant filed a timely notice of appeal on March 24, 2011. CP 493-519.

2. Facts

Several Wilson High School students regularly congregated at a Tacoma bus stop across the street from the school during the spring semester of 2008. RP 223-226, 286-287, 547-552, 632, 634-636, 645, 671, 756-757, 761-762, 829, 846, 1130, 1322-1334, 1371-1372, 1387,

1518-1527. The students referred to that location as “smoker’s corner.”⁴ *Id.* Students went there to socialize while smoking cigarettes and, less frequently, marijuana. RP 1326-1327. Several students also went to “smoker’s corner” to purchase marijuana. RP 1327. H.T. and V.N. were fifteen year old girls known to frequent “smoker’s corner” after school. RP 632-635, 637-638, 643-644, 756, 767, 1327. H.T. was enrolled at Wilson High School at the time. RP 632-635, 637-638, 756-759. V.N. was a former Wilson High School student who had transferred to Oakland High School. *Id.*

Defendant was forty years old in March, 2008. RP 1626. Defendant began associating with the adolescent friends of H.T. and V.N. around that time. RP 223-226, 286-287, 547-552, 632, 634-636, 645, 671, 756-757, 761-762, 829, 846, 1130, 1322-1334, 1371-1372, 1387, 1518-1527. Most of the kids variously knew defendant by the aliases “House” and “Weed Man;” defendant had H.T. and V.N. refer to him as “Papa.” RP 636-637, 733, 761, 1328. Defendant became known as a person who would purchase alcohol for kids, sell marijuana to them, and provide them transportation. RP 646-648, 767, 778, 1330-1331, 1334. Several kids began selling marijuana “through” defendant; this meant they sold defendant’s marijuana to others on his behalf. RP 898, 1333.

Defendant knew H.T. and V.N. were only fifteen years old. RP

⁴ The corner at Orchard and 11th was described as both “The Corner” and “Smoker’s

670, 782. V.N. felt as if she was being treated poorly by her peers. RP 777-778. Defendant encouraged V.N. to depend on him. RP 776. Defendant told V.N. the other kids would respect her if she spent time with him. RP 670, 777-778, 782. Defendant convinced V.N. to smoke marijuana with him. RP 769-770. V.N. felt fortunate defendant took an interest in her. RP 801. They discussed the possibility of V.N. selling marijuana for him. RP 788. Defendant told V.N. he needed to trust her if she was going to deal his marijuana. RP 788. Defendant continued to raise the issue of trust as their relationship progressed. RP 788.

Defendant told V.N. she would have to pass a series of loyalty tests before she could sell his marijuana. RP 789. Defendant required a kiss as V.N.'s first demonstration of loyalty. RP 789. Defendant later required V.N. to take her shirt off. RP 790-791. At a different meeting defendant told V.N. she had to perform oral sex on him. RP 793. V.N. testified defendant required sexual intercourse as a final demonstration of her loyalty. RP 808-816. Defendant congratulated V.N. for passing her final loyalty test when he was finished and told her to keep it a secret. RP 795-796, 817-818. V.N. testified defendant forced her to have sex with him a second time approximately two weeks later when she was intoxicated. RP 818-828, 833.

H.T. also thought of herself as a "looser" who was "lucky" to

Corner." RP 643, 1325-1327.

spend time with defendant because “everybody knew him” and she “wanted to be known too.” RP 665, 750. Defendant told H.T. she needed to earn his trust by proving her loyalty to him. RP 663. Defendant required H.T. to remain continually available to assist in his marijuana sales. RP 663. Defendant began asking H.T. sexual questions about her bathing practices. RP 670. H.T. testified defendant “raped” her on two occasions after giving her marijuana to smoke. RP 670-678, 683-685-690, 1083-1084, 1137. Defendant told another adolescent he supplied with marijuana that he had sex with V.N. and H.T. RP 1373, 1387, 1383.

H.T. and V.N. regularly participated in defendant’s marijuana sales. RP 650-651, 659-662-663, 720-722, 772-773, 779-781, 837, 885, 894-895. Their participation began in March, 2008, and ended in May, 2008. RP 632, 634-636, 671, 756-757, 762, 829, 846, 1130. They were the only girls working for defendant. RP 719-720, 779. Defendant referred to H.T. as “Mama” and V.N. as “Little Mama.” RP 665, 837. Defendant picked up H.T. and V.N. from school nearly every day. RP 650, 654, 774, 780, 1333-1335. The three of them delivered marijuana from defendant’s car to multiple locations in Tacoma, Lakewood, Spanaway, and elsewhere, but always in Washington. RP 650-651, 659-662-663, 720-722, 772-773, 779-781, 837, 885, 894-895. The marijuana was kept in a blue backpack between sales. RP 651, 653, 770.

H.T. typically arranged the marijuana deliveries to her friends and prepared defendant’s marijuana for sale. RP 651-653, 658. Defendant

regularly provided H.T. alcohol when they were together. RP 657-658, 660. H.T. worked until she had to return home in the evening; she then left her house without permission “every night” and continued selling marijuana with defendant. RP 651, 655, 659, 661, 780. They sold marijuana to roughly twelve people a day, which resulted approximately \$140.00 of revenue per day. RP 723. Meanwhile, V.N. arranged marijuana sales to kids at Wilson and Oakland High School, often with H.T.’s assistance. RP 779-780, 872-873, 874, 896, 965. Defendant compensated them with marijuana and a small portion of the proceeds. RP 722, 724, 779-780, 785, 870, 885, 898-899. Defendant punished the girls for perceived missteps by “belittle[ing]” them and withholding marijuana. RP 799, 801. Defendant also told them he had “goons” (dangerous individuals) to send after disloyal people. RP 664, 692, 743, 802-805, 881-882, 885-886. This pattern continued for several weeks. RP 723.

Wilson High School student C.H. reported defendant’s activities with V.N. and H.T. to her father, Todd Hilton (“Hilton”). RP 540-545, 1328, 1337, 1348-1349. Hilton investigated the report by surveilling V.N. at a bus stop on May 13, 2008. RP 546, 549, 1351. Hilton watched V.N. enter defendant’s car. RP 547-548, 551-552. Hilton and his daughter reported their concerns to the Wilson High School Principal on May 13, 2008. RP 549, 1351. The principal immediately notified the police. RP 1351.

Detective Reopelle was assigned to investigate on May 13, 2008. RP 1567, 1573. H.T. initially disavowed any involvement with defendant. RP 696, 1655-1656. H.T. and V.N. subsequently disclosed their participation in the marijuana sales as well as their sexual encounters with defendant. RP 1582-1583, 1624. Police executed a warrant to search at defendant's residence. RP 1588. A blue backpack containing marijuana was located in the trunk of defendant's car. RP 1209, 1601-1602. Defendant's telephone records were also obtained. RP 1603, 1617. The records revealed sixteen calls to H.T.'s telephone number and twelve to V.N.'s telephone number. RP 1603, 1617. A bottle of baby oil was located in defendant's room; this corroborated the victims' account that defendant used baby oil as a lubricant during the reported sexual intercourse. RP 1625.

Defendant was interviewed by Detective Reopelle following his arrest on June 16, 2008. RP 1188-1190, 1597. Defendant "put his head in his hands [and] turned away" when Detective Reopelle asked about the victims. RP 1599. Defendant said he met them through "some people that he dealt with." RP 1598. Defendant admitted he "rolled" with them. RP 1599. Defendant admitted they had been in his car. RP 1599. Defendant said he was shocked by the accusation he had slept with minors; at that time Detective Reopelle had not given defendant any information about the victims' respective ages. RP 1600-1601.

Defendant called one witness at trial. RP 1704-1726. Defendant's

witness, Tasha Lewis (“Lewis”), was a manager at the Har-Mal facility where he lived. RP 1705. Lewis said she was not aware of defendant bringing anyone into the facility after hours. RP 1704-1723. Lewis conceded on cross-examination that people could be secreted into the building without her knowledge. *Id.*

C. ARGUMENT.

1. THE USE OF GENERAL TESTIMONY TO ESTABLISH DEFENDANT'S PRACTICE OF EMPLOYING MINORS TO SELL MARIJUANA COMPLIED WITH DUE PROCESS BECAUSE IT WAS SUFFICIENTLY SPECIFIC TO ENABLE HIS DEFENSE.

General testimony may be sufficient to support a conviction provided it is specific enough to enable the defendant's right to present a defense. *State v. Hayes*, 81 Wn. App. 425, 435-436, 914 P.2d 788 (1996) (citing *State v. Brown*, 55 Wn. App. 738, 741-742, 780 P.2d 880 (1989)).

That right is accommodated without unfairly immunizing from prosecution offenders that subject victims to multiple crimes when the following three conditions are met:

- (1) The victim must describe the kind of act or acts with sufficient specificity to allow the trier of fact to determine what offense, if any, has been committed;
- (2) The victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged by the prosecution;
- (3) The victim must be able to describe the general time period in which the acts occurred. The trier of fact must determine whether the testimony of the victim is credible on these basic points.

See *State v. Hayes*, 81 Wn. App. at 438 (citing *People v. Jones*, 270 Cal.Rptr. 611, 623, 792 P.2d 643 (1990)).

General descriptions of a defendant's usual criminal conduct can be specific enough to satisfy this three part test when they are limited to estimates of the number of incidents with general accounts about the

frequency of particular acts. *See Hayes*, 81 Wn. App. at 435, 438-439 (victim's testimony satisfied the three-part test when it implied vaginal penetration occurred at least four times, and up to two or three times a week, over a period of two years) (*citing Brown*, 55 Wn. App. at 741-742, 749).

Washington's appellate courts have upheld the use of general testimony because it is often unreasonable to require victims to pinpoint when repeated offenses occurred. *See Hayes*, 81 Wn. App. at 435-436 (*citing Brown*, 55 Wn. App. at 747; *State v. Ferguson*, 100 Wn.2d 131, 139, 667 P.2d 68 (1983)). For instance, victims are often incapable of providing exacting detail in cases in which a perpetrator regularly subjects them to substantially similar offenses over a protracted period of time. To require more than a general description of such a pattern of similar conduct would incentivize perpetrators to insulate themselves from prosecution by reoffending until they could be confident the sheer number of offenses had overwhelmed their victims' capacity to neatly compartmentalize a memory of each incident. *See generally Hayes*, 81 Wn. App. at 437 (*citing Brown*, 55 Wn. App. at 749; *People v. Obremski*, 207 Cal.App.3d 1346, 255 Cal.Rptr. 715, 719 (1989); *see also State v. Bobenhouse*, 166 Wn.2d 881, 885-886, 214 P.3d 907 (2009); *State v. Allen*, 57 Wn. App. 134, 135-136, 787 P.2d 566 (1990)).

Defendant's ongoing inclusion of H.T. and V.N. in his marijuana business was largely proved through the victims' general descriptions of

their illicit activities. RP 632-635, 637-638, 643-648, 650-663, 720-723, 756, 767-770, 772-774, 779-781, 788, 795-796, 817-818, 837, 872-874, 885, 894-896, 965, 1086, 1138, 1327, 1330-1331, 1333-1335. That level of detail was to be expected. Each victim was providing testimony about events that transpired three years before trial when they were fifteen years old. *Id.* The evidence supported an inference that their capacity to form detailed memories of each criminal act was compromised by the alcohol and marijuana defendant regularly provided them during the offenses. *Id.* The victims had also made concerted efforts to move on with their lives after defendant's crimes were interrupted by police. RP 702, 834. Thus, the combination of youth, routine intoxication, temporal and emotional distance, made defendant's victims comparable to the younger—yet unimpaired—juvenile victimized in *Hayes*, 81 Wn. App. at 427-429.

The evidence adduced at trial was still definite enough to satisfy *Hayes*' three part test. The testimony described the kind of acts that occurred with sufficient specificity to permit the jury to determine what offenses had been committed. Uncontroverted evidence established defendant was a forty year old man who paid two fifteen year old girls marijuana and money to assist him with his daily marijuana sales throughout Pierce County. RP 632-635, 637-638, 643-648, 650-663, 720-723, 756, 767-770, 772-774, 779-781, 788, 795-796, 817-818, 837, 872-874, 885, 894-896, 965, 1086, 1138, 1327-1331, 1333-1335, 1371-1372, 1387, 1518-1527, 1626, 1704-1726. That evidence provided the jury with

an adequate understanding of defendant's conduct to determine whether it was proscribed by the offenses properly defined in the trial court's instructions. CP 285 (Instruction No. 13),⁵ 290 (Instruction No. 18).⁶ The first prong of the *Hayes* test is satisfied.

The number of acts committed was also sufficiently defined to support each count. CP 223-226, 286-287, 293-294. Both victims said they physically participated in several marijuana sales a day over a period of weeks when they were fifteen years old; the evidence established defendant was forty years old at the time. RP 632-635, 637-638, 643-648, 650-663, 720-723, 756, 767-770, 772-774, 779-781, 788, 795-796, 817-818, 837, 872-874, 885, 894-896, 965, 1327, 1330-1331, 1333-1335, 1626. This amounted to at least one instance of each offense a day, per victim, for weeks; yet defendant was only charged with committing one count of each offense per victim. Each count was therefore amply

5 "A person commits the crime of Involving a Minor in a Transaction to Deliver a Controlled Substance when he or she knowingly compensates, threatens, solicits, or in any other manner, involves a person under the age of eighteen years in a transaction to unlawfully deliver a controlled substance, marijuana." "The phrase "in any other manner involves" includes: surrounding, enclosing, or drawing in a person under the age of eighteen in an unlawful drug transaction, or obliging a person under the age of eighteen to become associated with the drug transaction; or inviting, bringing, or attempting to bring, a person under the age of eighteen, to a drug transaction. Mere exposure of a minor to an unlawful drug transaction is insufficient." CP 289 (Instruction No. 17).
6 "A person commits the crime of Unlawful Delivery of a Controlled Substance to a Person Under the Age of Eighteen when the person is eighteen years of age or over and knowingly delivers to a person who is under eighteen years of age and at least three years the person's junior a controlled substance." "Deliver or delivery means the actual or constructive or attempted transfer of a controlled substance from one person to another." CP 292 (Instruction No. 20).

supported by the evidence. The requirement of *Hayes*' second prong has been fulfilled.

The victims were equally clear about when the offenses occurred. Defendant was charged with committing the offenses on or about the period between March 1, 2008, and June 4, 2008. CP 223-226, 286-287, 293-294. H.T. testified that the crimes occurred from about March, 2008, to the end of May, 2008. RP 632, 634-636, 671, 1130. V.N. similarly placed the incidents between March, 2008, and May, 2008. RP 756-757, 762, 829, 846. Several other witnesses corroborated the accuracy of that testimony. RP 547-548, 551-552, 1322, 1324, 1327-1329, 1333-1334, 1371-1372, 1387, 1518-1527. The police were alerted to defendant's activities with the victims on May 13, 2008. RP 549, 1351. The temporal component of the *Hayes* test is established.

At the same time defendant's due process right to present a defense was unaffected by the testimony's general quality. RP 1840-1872. Pinpointing the occurrence of each marijuana delivery was immaterial to the defense because defendant conceded the victims were selling marijuana. RP 1840-1872. Defendant presented a defense of general denial, arguing he was not the person responsible for providing marijuana to the victims. RP 1840-1872. Counsel contended the victims used defendant as a scapegoat when their own illicit activities were exposed. RP 1871. Defendant's claim that the evidence was too vague to support his convictions is not supported by the record.

2. DEFENDANT’S DRUG CONVICTIONS WERE SUPPORTED BY SUFFICIENT EVIDENCE THAT HE WAS A FORTY YEAR OLD MAN WHO EMPLOYED TWO FIFTEEN YEAR OLD GIRLS TO SELL HIS MARIJUANA.

“The State bears the burden of proving all the elements of the crime charged beyond a reasonable doubt.” *Id.* (citing *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983)). “The standard for determining the sufficiency of the evidence on appeal is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilty beyond a reasonable doubt.” *State v. Hermann*, 138 Wn. App. 596, 602, 158 P.3d 96 (2007) (citing *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). “In challenging the sufficiency of the evidence, the appellant admits the truth of the State’s evidence and all inferences that can be reasonably be drawn from it.” *Id.* (citing *State v. McNeal*, 145 Wn.2d 352, 360, 37 P.3d 280 (2002)).

“Circumstantial and direct evidence are considered equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). At the same time the written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the

witnesses and evaluate their testimony as it is given. See *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed on appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1009 (1987)). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

a. The Evidence Proved Defendant Involved Two Minors in a Transaction to Deliver Marijuana.

To convict defendant of Involving a Minor in a Transaction to Deliver a Controlled Substance as charged in counts V and VII, the jury had to find each of the following elements was proved beyond a reasonable doubt:

- (1) That during the time period between March 1, 2008, and June, 2008, the defendant involved [H.T. as to Count V and V.N. as to Count VI] in a transaction to deliver a controlled substance: marijuana;
- (2) That the defendant knew that the substance was marijuana;
- (3) That [H.T. as to Count V and V.N. as to Count VI] was a person under the age of eighteen years;
- (4) That the defendant knew [H.T. as to Count V and V.N. as to Count VI] was under the age of eighteen years; and
- (5) That the act(s) occurred in the State of Washington.

CP 286 (Count V, Instruction No. 14), 287 (Count VI, Instruction No. 15); RCW 69.50.4015.⁷ A person involves a minor in a transaction⁸ to deliver marijuana when that person knowingly compensates, threatens, solicits, or in any other manner involves a person under the age of eighteen years in a transaction to unlawfully deliver marijuana. CP 285 (Instruction No.285); RCW 69.50.4015; *see also State v. Flores*, 164 Wn.2d 1, 186 P.3d 1038 (2008); *State v. Hollis*, 93 Wn. App. 804, 812, 970 P.2d 813 (1999). The phrase “in any manner involves” includes:

surrounding, enclosing, or drawing in a person under the age of eighteen in an unlawful drug transaction, or obliging a person under the age of eighteen to become associated with the drug transaction; or inviting, bringing, or attempting to bring, a person under the age of eighteen to a drug transaction. Mere exposure of a minor to an unlawful drug transaction is insufficient.

CP 289 (Instruction No. 17); RCW 69.50.4015; *Flores*, 164 Wn.2d at 14-16, 24; *Hollis*, 93 Wn. App. at 812-818. “[T]he statute does not require the minor’s actual participation in the drug transaction: the minor’s

⁷ Wash. Legis. 2003 c 53 § 336, former 69.50.401(f) enacted under Wash. Legis. 1987 c 458 § 4.

⁸ “Transaction” is not defined in RCW 69.50. “Where a term used in a statute is not defined therein, [appellate courts] may rely on the ordinary meaning of the term.” *Hollis*, 93 Wn. App. at 811 (*citing State v. Edwards*, 84 Wn. App. 5, 10, 924 P.2d 397 (1996), *review denied*, 131 Wn.2d 1016, 936 P.2d 416 (1997); *see also Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010). The ordinary meaning of “transaction” is “a compact or covenant...[or] a communicative ...activity involving two parties or two things reciprocally affecting or influencing each other [or] something that is transacted: as a business deal.” Webster’s Third New International Dictionary 2425 (2002); *see also* Blacks Law Dictionary, 8th Ed. 1535 (2004) (“The act or an instance of conducting business or other dealings; esp., the formation, performance, or discharge of a contract ... Something performed or carried out; a business agreement or exchange”).

culpability and actions—which are proscribed under other statutes—are inapposite for the purposes of the involving a minor in a drug transaction statute.” *Flores*, 164 Wn.2d at 12 (citing *Hollis*, 93 Wn. App. at 812) (internal quotation marks omitted).

Defendant involved H.T. and V.N. in transactions to deliver marijuana when he employed them in his daily marijuana sales for several weeks within the period set forth in the third amended information. RP 547-548, 551-552, 632-635, 637-638, 643-648, 650-663, 720-723, 756, 767-770, 772-774, 779-781, 788, 795-796, 817-818, 837, 872-874, 885, 894-896, 965, 1327, 1322, 1324, 1327-1335, 1371-1372, 1387, 1518-1527, 1626, 1704-1726; CP 223-226. Defendant was forty years old at the time and he knew both girls were fifteen. RP 670, 782, 1626. Defendant had both girls weigh and package his marijuana for sale as well as coordinate marijuana sales to other kids. RP 652-653, 658, 779, 872-873, 965. Each girl helped defendant deliver marijuana from his car to numerous locations throughout Pierce County. RP 650-651, 654, 658, 663, 719-722, 780-781. Defendant paid the girls money and marijuana for their participation. RP 722, 724, 785, 898-899. Defendant admitted to police that he met the victims through “some people he dealt with” and “rolled” with them in his vehicle. RP 1598-1599. The evidence of the victims’ involvement in defendant’s drug trafficking was uncontroverted. RP 1704-1726. Counts V and IV were clearly supported by the evidence.

b. The Evidence Proved Defendant Unlawfully Delivered Marijuana to Two People Under the Age of Eighteen.

To convicted defendant of the crime of Unlawful Delivery of a Controlled Substance to a Person Under the Age of Eighteen as charged in Court VII (as to H.T.) and Count VIII (as to V.N.) the jury had to find that each of the following elements was proved beyond a reasonable doubt:

- (1) That between the 1st day of March, 2008[,] and the 4th day of June, 2008[,] the defendant was at least 18 years of age;
- (2) That between 1st day of March, 2008[,] and the 4th day of June, 2008[,] the defendant delivered a controlled substance;
- (3) That the defendant knew that the substance delivered was a controlled substance, marijuana;
- (4) That the defendant knew the delivery was made to a person under eighteen years of age and at least three years defendant's junior; and
- (5) That this act occurred in the State of Washington.

CP 293 (Count VII, Instruction No. 21), 294 (Count VIII, Instruction No. 22); RCW 69.50.401(1)(2)(b); 69.50.406(2).

As discussed above, uncontroverted evidence showed defendant continuously supplied H.T. and V.N. with marijuana to smoke and sell in Pierce County, Washington. RP 547-548, 551-552, 632-635, 637-638, 643-648, 650-663, 720-723, 756, 767-770, 772-774, 779-781, 788, 795-796, 817-818, 837, 872-874, 885, 894-896, 965, 1327, 1322, 1324, 1327-1335, 1371-1372, 1387, 1518-1527, 1626, 1704-1726. The deliveries took place over the course of a several week relationship within the time period

alleged in the third amended information when defendant was forty years old and knew both girls were fifteen. *Id.*; CP 223-226, 293 (Count VII, Instruction No. 21), 294 (Count VIII, Instruction No. 22). The evidence of defendant's unlawful deliveries was corroborated by several witnesses. RP 547-548, 551-552, 1322-1369, 1370-1431, 1518-1527. Defendant admitted he met the victims through "some people he dealt with" and "rolled" with them in his vehicle. RP 1598-1599. Defendant's convictions for Counts VII and VIII are clearly supported by the record.

3. THE ABSENCE OF A **PETRICH** INSTRUCTION IS HARMLESS ERROR BECAUSE DEFENDANT'S CRIMINAL ACTS WERE COLLECTIVELY ESTABLISHED THROUGH UNCONTROVERTED EVIDENCE.

"In Washington, a defendant may be convicted only when a unanimous jury concludes that the criminal act charged in the information has been committed." *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1998) (citation omitted). "When the prosecution presents evidence of several acts that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific criminal act." *Id.* (citing *State v. Petrich*, 101 Wn.2d 566, 570, 572, 683 P.2d 173 (1984); *State v. Workman*, 66 Wash. 292, 294-205, 119 P. 751 (1911)).

“By requiring a unanimous verdict on one criminal act [appellant courts] protect a criminal defendant’s right to a unanimous verdict based on an act proved beyond a reasonable doubt.” *State v. Coleman*, 159 Wn.2d 509, 511-512, 150 P.3d 1126 (2007) (citing *State v. Camarillo*, 115 Wn.2d 60, 63-64, 794 P.2d 850 (1990)). “Where there is neither an election nor a unanimity instruction in a multiple acts case, omission of the unanimity instruction is presumed to result in prejudice ... because of the possibility that some jurors relied on one act or incident and some relied on another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction. *Coleman*, 159 Wn.2d at 512 (citing *Kitchen*, 110 Wn.2d at 411-412).

A conviction in a multiple acts case containing a *Petrich* error may nonetheless be upheld if it is harmless beyond a reasonable doubt. *Bobenhouse*, 166 Wn.2d 881, 893-894, 214 P.3d 907 (2009); *Camarillo*, 115 Wn.2d 60, 63-64; *Kitchen*, 110 Wn.2d at 411-412. The constitutional harmless error rule “preserves an accused’s right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.” *Kitchen*, 110 Wn.2d at 409 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680-682, 106 S. Ct. 1431, 1436-1437, 89 L. Ed. 2d 674 (1986)). This test allows the presumption of prejudice to be overcome if the appellate court finds no rational juror could have a reasonable doubt as to any one of the incidents established by the evidence. *Id.* (citations omitted).

Failure to instruct on unanimity in a multiple acts case has been held harmless error when the totality of the evidence shows the jury would not have found one of the acts occurred if it did not believe each of the acts occurred. See *Bobenhouse*, 166 Wn.2d at 894; *Camarillo*, 115 Wn.2d at 70-71; *State v. Allen*, 57 Wn. App. 134, 138-139, 787 P.2d 566 (1990). Interdependent acceptance of each act is implied by uniform verdicts based on uncontroverted evidence of substantially similar incidents. See *Bobenhouse*, 166 Wn.2d at 894; *Camarillo*, 115 Wn.2d at 70; *Allen*, 57 Wn. App. at 139. This is due to the corresponding absence of evidence upon which the jury could rationally discriminate as to the respective occurrence among incidents supported by the evidence. See *Bobenhouse*, 166 Wn.2d at 895; *Camarillo*, 115 Wn.2d at 70; *Kitchen*, 110 Wn.2d at 414; *Allen*, 57 Wn. App. at 139.

At the same time appellant courts will not construe evidence supporting a defendant's theory of general denial as contravening the demonstrated existence of any particular incident in a multiple acts case. See *Camarillo*, 115 Wn.2d at 71; *Kitchen*, 110 Wn.2d at 414; *Allen*, 57 Wn. App. 139. This is because a general denial does not provide the jury with a rational basis to discriminate among demonstrated incidents; it presents an irreconcilable version of events. See *Camarillo*, 115 Wn.2d at 71; *Allen*, 57 Wn. App. 139. The verdict reflects the jury's decision about the respective credibility of the competing claims and a jury's resolution of a credibility issue is not subject to review. See *Camarillo*, 115 Wn.2d

at 71. Conviction attests to the jury's rejection of a defendant's general denial since the countervailing evidence must have engendered an abiding belief in the truth of the charge. CP 274 (Instruction No. 2); *see also State v. Swan*, 114 Wn.2d 613, 661-662, 790 P.2d 610 (1990) (the jury is presumed to follow the court's instructions).

The drug convictions at issue required the jury to unanimously agree defendant delivered marijuana to two minors, *i.e.*, H.T. and V.N., as well as involved them in a transaction to deliver marijuana. CP 286 (Instruction No. 14), 287 (Instruction No. 15), 292 (Instruction No. 20), 293 (Instruction No. 21), 294 (Instruction No. 22), 309-312. The State concedes it was error not to instruct the jury on unanimity because it

presented evidence of multiple acts which could have independently supported the charges, yet it did not specify which acts it was relying on.⁹ RP 650, 654, 659-662, 768, 772-774, 779-780, 837, 885, 894-895, 1333-1335; *see also Petrich*, 101 Wn.2d at 572. The instructional error was nonetheless harmless beyond a reasonable doubt.

⁹ At a hearing outside of the jury's presence the State argued the acts of delivering a controlled substance to a person under the age of eighteen and involving a minor in a drug transaction were part of a continuing course of conduct; the trial court agreed. RP 1734-1741. Controlled substance deliveries committed at different times are generally distinct offenses notwithstanding the fact that they were a part of an ongoing criminal enterprise. *See State v. Fiallo-Lopez*, 78 Wn. App. 717, 725-726, 889 P.2d 1294 (1995); *see also United States v. Maxey*, 989 F.2d 303, 306 (9th Cir. 1993) (rejecting the proposition multiple illicit drug sales committed in the course of an ongoing drug-trafficking business comprise a single criminal episode. To so hold would insulate the very career criminals delivery statutes are designed to reach—those continuously engaged in criminal conduct).

The same may not be true of certain conduct proscribed by RCW 69.50.4015 (involving a minor in a transaction to deliver a controlled substance). The statute does not denote the unit of prosecution. *Id.* The statute criminalizes several activities including an offender's formation of an agency agreement with a minor, wherein the minor is employed to sell a controlled substance on behalf of the offender so long as the agreement remains in place. *Id.* The "transaction" is not demarcated by a minor's completion of each delivery since conviction under RCW 69.50.4015 does not require proof the minor engaged in any affirmative act pursuant to the agreement. *Flores*, 164 Wn.2d at 12, *Hollis*, 93 Wn. App. at 812. Deliveries completed by the minor according to the original agreement would then amount to evidence of the agreement (or transaction to deliver) instead of discrete violations of the RCW 69.50.4015. *See generally Flores*, 164 Wn.2d at 12, *Hollis*, 93 Wn. App. at 812; *see also Hewson Construction, Inc., v. Reintree Corp.*, 101 Wn.2d 819, 823, 685 P.2d 1062 (1984) ("An agency relationship may exist, either expressly or by implication, when one party acts at the instance of and, in some material degree, under the direction and control of another.") (citations omitted).

Multiple count convictions for violations of RCW 69.50.4015—when the underlying facts prove a single overarching agreement—might require some evidence of separate agreements or an agreement renewed after an intervening interruption. *See generally State v. Adel*, 136 Wn.2d 629, 965 P.2d 1072 (1998) (interpreting RCW 69.50.401(e) as creating one unit of unlawful possession of a controlled substance).

The State nonetheless concedes multiple violations of RCW 69.50.4015 occurred in the case at bar because the evidence shows defendant repeatedly solicited the victims agreement to participate in his marijuana deliveries instead of merely supervising their independent marijuana sales on his behalf pursuant to a single agreement.

The jury was properly instructed on the elements of each offense. CP 286 (Instruction No.14), 287 (Instruction No. 15), 292 (Instruction No. 20), 293 (Instruction No. 21), 294 (Instruction No. 22). The jury was also accurately instructed on the State's burden of proof, the presumption of innocence, and that a separate crime requiring the jury's independent determination was charged in each count. CP 274 (Instruction No. 2), 277 (Instruction No. 5).

Uncontroverted evidence established defendant employed two fifteen year girls to assist in an illicit marijuana enterprise. RP 547-548, 551-552, 632-635, 637-638, 643-648, 650-663, 720-723, 756, 767-770, 772-774, 779-781, 788, 795-796, 817-818, 837, 872-874, 885, 894-896, 965, 1327, 1322, 1324, 1327-1335, 1371-1372, 1387, 1518-1527, 1626, 1704-1726. On nearly a daily basis—over the course of several weeks—defendant gave H.T. and V.N. marijuana to smoke and prepare for sale. *Id.* The victims' uncontroverted testimony was corroborated by several witnesses. RP 547-548, 551-552, 1327, 1322, 1324, 1327-1335, 1371-1372, 1387, 1518-1527. The quantum of evidence offered in support of each criminal act only varied in so much as the victims were able to provide representative examples of how defendant conducted his marijuana business. RP 547-548, 551-552, 632-635, 637-638, 643-648, 650-663, 720-723, 756, 767-770, 772-774, 779-781, 788, 795-796, 817-818, 837, 872-874, 885, 894-896, 965, 1327, 1322, 1324, 1327-1335, 1371-1372, 1387, 1518-1527, 1626, 1704-1726. The uniformity of the

evidence makes it unreasonable to conclude the jury would have believed one of the demonstrated criminal acts occurred if it did not believe that they all occurred.

Defendant's case is plainly analogous to *Camarillo*, *Bobenhouse*, and *Allen*. *Infra*. Each case presents a pattern of substantially similar criminal acts that occurred during a comparable timeframe. *Bobenhouse*, 166 Wn.2d at 895; *Camarillo*, 115 Wn.2d at 70; *Kitchen*, 110 Wn.2d at 414; *Allen*, 57 Wn. App. at 139; CP 223-226. The frequency of the similar criminal acts in *Allen*¹⁰ were described as occurring "almost every day" over a period of several months as they were in defendant's case; in *Bobenhouse*¹¹ the similar criminal acts were more generally described as occurring "regularly" over the course of several years. *See also Kitchen*, 110 Wn.2d 408.

Defendant is also like the perpetrator in *Bobenhouse*¹² in that his counsel advanced an unsubstantiated defense of general denial that did not challenge the occurrence of any particular act that could have supported the charges. RP 1840-1872. Counsel conceded the victims were selling marijuana. RP 1855, 1870. Counsel also conceded that someone was selling marijuana to them, but argued "there [wa]s no credible evidence that it was [defendant]." RP 1857, 1869. Counsel argued the victims set

10. 57 Wn. App. at 135-136.

11 166 Wn.2d at 885-886.

12 166 Wn.2d at 887.

defendant up as a “Patsy” by falsely accusing him of directing their illicit marijuana business in order to insulate themselves from criminal liability. RP 1871. Counsel invited the jury to categorically reject the evidence of defendant’s culpability in the controlled substance offenses; she never attempted to isolate any particular delivery as being less likely to have occurred. RP 1855-1857, 1869-1871. On appeal, defendant similarly concedes that “it was impossible for the jury to distinguish among the alleged acts....” App. Br. at 1.

The facts of defendant’s case present an even stronger case for harmless error than those presented in *Allen* and *Camarillo*. *Infra*. The perpetrators in those cases testified in support of their general denial. *Camarillo*, 115 Wn.2d at 68-69; *Allen*, 57 Wn. App. at 139. Defendant did not. RP 1704-1726. The record is consequently devoid of direct evidence disputing the existence of any criminal act described by the victims. RP 1704-1726.¹³

At the same time defendant’s case is markedly distinguishable from multiple acts cases in which the evidence did not support a finding of harmless error. In *Petrich*, the jury’s unanimous belief in the occurrence

¹³ Defendant’s residence manager testified she was not aware of defendant bringing anyone into the building after hours, but that fact did not make the occurrence of any of the conceded marijuana deliveries outside the apartment facility less likely. *See Camarillo*, 115 Wn.2d at 66, 69-71 (testimony that defendant was never seen alone with the victim from a woman who lived with defendant during the relevant period did not controvert the victim’s claim he was molested in defendant’s house).

of each criminal act was called into question by the victim's expressed uncertainty about the type of sexual contact that occurred during each instance of abuse. 101 Wn.2d 566. Petrich was charged with indecent liberties and second degree statutory rape which criminalize different types of sexual conduct.¹⁴ Under those facts the Supreme Court could not conclude the jurors the verdicts reflected unanimous agreement on each incident that potentially supported the convictions. 101 Wn.2d 566; *see also State v. Holland*, 77 Wn. App. 420, 424-425, 891 P.2d 49 (1995) (acquittal on one of three counts of first degree rape made it impossible to know whether the jury was unanimous as to the remaining two); *Coleman*, 153 Wn.2d at 514 (the occurrence of one of the multiple acts called into question by contravening evidence and victim inconsistency); *Kitchen*, 110 Wn.2d 406-408 (conflicting evidence as to each of the several acts for which evidence was presented); *State v. Hanson*, 59 Wn. App. 651, 800 P.2d 1124 (1990) (defendant's participation not clearly shown in each of the alleged incidents).

The record in defendant's case is not similarly afflicted with discrepant proof of the nature or existence of any particular act that could

¹⁴ RCW 9A.44.100; 9.79.210, Recodified as 9A.44.080 pursuant to 1979 ex.s. c 244 § 8.

have independently supported his convictions.¹⁵ RP 547-548, 551-552, 632-635, 637-638, 643-648, 650-663, 720-723, 756, 767-770, 772-774, 779-781, 788, 795-796, 817-818, 837, 872-874, 885, 894-896, 965, 1327, 1322, 1324, 1327-1335, 1371-1372, 1387, 1518-1527. The evidence pertaining to each of the substantially similar acts of physically involving two minors in illicit marijuana trafficking was uncontroverted and their occurrence—aside from defendant’s involvement—was generally conceded by the defense. RP 1869-1871.¹⁶ The record is consequently devoid of any reason for the jury to question the existence of any particular act, so there was no rational basis for the jurors to have maintained discrepant beliefs about each act’s respective occurrence when reaching their uniform verdicts. Defendant concedes as much on appeal. App.Br. at 1.

¹⁵ The jury was presented with a series of substantially similar marijuana deliveries that shared the common objective of furthering defendant’s marijuana enterprise while making the victims more susceptible to his sexual advances. *Id.* There was evidence that at least one of the victims at bar denied having any involvement in defendant’s marijuana business when she was initially questioned by law enforcement. RP 712-713.¹⁵ Evidence a victim categorically denied the occurrence of all wrongdoing on the part of a defendant before inculcating a defendant in multiple criminal acts at trial may call the entirety of the victim’s testimony into question. Its material effect is nonetheless substantively indistinguishable from the general denials addressed in *Camarillo*, (115 Wn.2d at 70, *Bobenhouse*, 166 Wn.2d at 887, and *Allen*, 57 Wn. App. at 139, because it does not provide a rational basis to discriminate among incidents. The jury was still left with the ultimate decision of having to decide between two versions of events. In the instant case H.T.’s out-of-court dishonesty may have given the jury cause to disbelieve her testimony, yet her categorical denial did not provide the jury a reason believe some marijuana deliveries occurred while maintaining doubt as to others.

¹⁶ This fact does not result a double jeopardy problem as the victim of the delivery counts was the public while victims of the involving a minor in a drug transaction offenses were the minors and actual delivery is not a necessary condition of this offense. *See Flores*, 164 Wn.2d at 12; *Hollis*, 93 Wn. App. at 812-814.

The jury decided the uncontroverted evidence of defendant's role in the victims' marijuana dealings was sufficient to overcome any doubt attending his general denial of involvement. The verdicts that followed prove the jury concluded the victims were telling the truth about defendant's drug crimes while the uniformity of those verdicts expressed the jury's interdependent belief in truth of each incident. The instructional error was consequently harmless beyond a reasonable doubt. Defendant's convictions should be affirmed.

4. THE SEXUAL MOTIVATION SENTENCE ENHANCEMENTS WERE SUPPORTED BY SUFFICIENT EVIDENCE THAT DEFENDANT'S MARIJUANA DELIVERIES WERE PARTIALLY AIMED AT DRAWING HIS VICTIMS INTO A SEXUAL RELATIONSHIP.

A jury's special verdict findings are reviewed under the sufficiency of the evidence standard. See *State v. Chanthabouly*, 164 Wn. App. 104, 142, 262 P.3d 144 (2011) (citing *State v. Stubbs*, 170 Wn.2d 117, 123, 240 P.3d 143 (2010); RCW 9.94.585(4)). The evidence is therefore considered in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the sentence-enhancing fact beyond a reasonable doubt. See *Chanthabouly*, 164 Wn. App. at 143 (citing *State v. Yates*, 161 Wn.2d 714, 752, 168 P.3d 359 (2007)).

A sentencing court may impose an exceptional sentence when an offense is committed with “sexual motivation.” RCW 9.94A.533(8)(a). “Sexual motivation” means that “one of the purposes for which the defendant committed the [underlying] crime was for the purpose of his or her sexual gratification.” RCW 9.94A.030(47).¹⁷ The evidence does not need to show that sexual gratification was a defendant’s sole motivation¹⁸ for committing the crime. *See generally State v. Haq*, ___ Wn. App. ___, 268 P.3d 997, No. 64839-0-I (2012); *State v. Read*, 163 Wn. App. 853, 868 P.3d 207 (2011). It is sufficient that a defendant was “motivated in part” by the pursuit of sexual gratification. *See generally Haq*, 268 P.3d at 1027.

Although a defendant’s motivations for committing an offense may be multifarious there must be evidence of an identifiable sexual motivation underlying the offense. *See State v. Halstien*, 122 Wn. 2d 109, 857 P.2d 270 (1990). Evidence of sexual motivation is not limited to criminal sexual contact. *See Halstien*, 122 Wn. 2d at 121, 124. Reading a requirement of sexual contact into the sexual motivation enhancement

¹⁷ “Gratification” is not defined in RCW 9.94A.030. “Where a term used in a statute is not defined therein, [appellate courts] may rely on the ordinary meaning of the term.” *Hollis*, 93 Wn. App. at 811 (citing *State v. Edwards*, 84 Wn. App. 5, 10, 924 P.2d 397 (1996), review denied, 131 Wn.2d 1016, 936 P.2d 416 (1997); see also *Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

“gratification” is “the state of being gratified” to “gratify” is to “give or be a source of pleasure ...” Webster’s Third New International Dictionary 991-992 (2002).

¹⁸ “Motive” is an “inducement which tempts a mind to commit a crime.” *State v. Yarbrough*, 151 Wn. App. 66, 84, 210 P.3d 1029 (2009) (citing *State v. Boot*, 89 Wn. App. 780, 789, 950 P.2d 964, review denied, 135 Wn.2d 1015, 960 P.2d 939 (1998)).

would undermine the purpose of the statute, which was enacted to fill a perceived gap in the criminal code not covered by existing sex offense crimes and to mandate treatment for such offenders in an effort to prevent them from later committing more serious sex offenses. *Id.* The overarching policy is to protect the public from offenders who are making a connection between criminal acts and sexual objectives. *Id.*

Defendant's jury was presented evidence defendant used his marijuana deliveries to manipulate two fifteen year old girls into performing sexual acts for him. The evidence supports an inference defendant singled the victims out for sexual gratification—rather than merely to advance his pecuniary interest in juvenile drug runners with contacts at the local high schools—because they were the only females employed to sell his marijuana. RP 719-720, 779. Defendant respectively referred to his victims as “mama” and “little mama,” and had them refer to him as “Papa;” the other kids that dealt with defendant variously referred to him by the aliases “House” and “Weed Man.” RP 636-637, 665, 733, 761, 837, 1328. Defendant conditioned the victims' participation in his marijuana business on the performance of sexualized-loyalty tests. RP 663-690, 789-833, 1083-1084, 1137, 1583. Defendant exploited the victims' low self esteem by encouraging their belief that selling marijuana for him would improve their social standing among their peers. RP 663-665, 750, 776-788, 801. The sexual interactions generally commenced, or were otherwise closely associated, with defendant's delivery of marijuana

to the victims. RP 670-678, 683-685-690, 801, 806, 820, 1083-1084, 1137. Defendant withheld marijuana whenever the victims upset him. RP 799-801. Defendant bragged about his sexual intercourse with the victims to another adolescent receiving a marijuana “allowance” from him. RP 1373, 1387, 1383.

There was no evidence defendant employed similar tactics with the males that sold marijuana on his behalf. RP 1-1726. Defendant eventually manifested a demeanor that could have been reasonably interpreted as shame when police questioned him about the victims. RP 1598-1601. A rational jury could conclude defendant’s marijuana deliveries to the victims were at least partially motivated by his prurient interest in them.

Defendant claims the jury’s decision to acquit him of the allegations of third degree rape of a child demonstrates there was insufficient evidence of his sexual motivation, describing the result as instance of inconsistent verdicts. App.Br. at 20. The verdicts were not inconsistent. Defendant’s argument seemingly dismisses the fact that a finding of “sexual motivation” does not require proof of sexual intercourse. *Halstien*, 122 Wn. 2d at 121, 124; RCW 9.94A.030(47); RCW 9A.44.010(1), .079. The jury could have consistently believed that defendant’s marijuana deliveries were partially intended to render the victims more receptive to his illegal-sexual advances while simultaneously believing that the evidence failed to establish—beyond a reasonable

doubt—that sexual intercourse with them occurred. *See also State v. Goins*, 151 Wn.2d 728, 733-734, 736-738, 92 P.3d 181 (2004) (Juries return seemingly inconsistent verdicts for various reasons, including compromise and lenity. So long as a jury’s verdicts are supported by sufficient evidence, appellate courts will not reverse a guilty verdict simply because it was inconsistent with an acquittal on another count). The special verdicts should be affirmed because they are supported by the record.

5. DEFENDANT’S CLAIM OF A **BASHAW** ERROR SHOULD BE REJECTED BECAUSE IT WAS NOT PRESERVED FOR REVIEW AND IS NOT SUPPORTED BY THE RECORD.

In *State v. Bashaw*, the Supreme Court reaffirmed that jury unanimity is required to find the presence of a penalty-enhancing fact but is not required to find its absence. *State v. Bashaw* 169 Wn.2d 133, 146-147, 234 P.3d 195 (2010) (citing *State v. Goldberg*, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003)). *Bashaw* justified this rule as a means of advancing several policy objectives such as judicial economy. 169 Wn.2d at 146 n. 7 (“This rule is not compelled by constitutional protections against double jeopardy ... but rather by the common law precedent of this court, as articulated in *Goldberg*.”).

a. Defendant Waived His Ability to Raise a **Bashaw** Claim when He Failed to Object to the Special Verdict Instruction Below.

“Before instructing the jury, the court ... shall ... afford ... each counsel an opportunity ... to object to the giving of any instruction...” CrR 6.15(c). Thereafter, “[a]n objection to a jury instruction cannot be raised ... on appeal unless the instructional error is of constitutional magnitude.” *State v. Dent*, 123 Wn.2d 467, 477, 869 P.2d 392 (1994) (citing *State v. Fowler*, 114 Wn.2d 59, 69, 785 P.2d 808 (1990)). If the instructional error is not of a constitutional magnitude, then “whether the instruction was rightfully or wrongfully given, it [i]s binding and conclusive upon the jury, and constitutes ... the law of the case.” *State v. Hickman*, 135 Wn.2d 97, 102 n. 2, 954 P.2d 900 (1998) (quoting *Pepper v. City Park Transit Co.*, 15 Wash. 176, 180, 45 P. 743 (1896)); see also RAP 2.5(a); *State v. Hames*, 74 Wn.2d 721, 725, 446 P.2d 344 (1968). “[T]he law of the case doctrine benefits the system by encouraging trial counsel to review all jury instructions to ensure their propriety before the instructions are given to the jury.” *Hickman*, 135 Wn.2d at 105.

Defendant filed proposed jury instructions at trial that included two special verdict forms pertaining to the sexual motivation enhancements. CP 227-258. Defendant did not propose an instruction directing special verdict deliberations or object to the special verdict instruction issued by

the trial court. RP 1784-1785, 1803-1811; CP 227-258, CP 304 (Instruction No. 31). Defendant did file a motion to vacate the special verdicts at sentencing, claiming a *Bashaw* error he did not raise before the jury was instructed. CP459-466.

Defendant maintains he received a *Bashaw* instruction that resulted in manifest constitutional error. App.Br.¹⁹ at 23-24. *Bashaw* instructions are not manifest constitutional error because the constitution does not require nonunanimous acquittal to dispose of penalty-enhancing factors. See *Bashaw*, 169 Wn.2d at 145-148. This Court has recently held that *Bashaw* instructions are not constitutional error. See *State v. Berlin*, ___ Wn. App. ___, ___ P.3d ___, No. 41307-8-II (2012) (Published in Part); *State v. Grimes*, 165 Wn. App. 172, 175, 267 P.3d 454 (2011); see also *State v. Morgan*, 163 Wn. App. 341, 352-353, 261 P.3d 167(2011), petition for rev. filed, No. 86555-8 (Wash. Oct. 3, 2011); *State v. Nunez*, 160 Wn. App. 150, 158-165, 248 P.3d 103, review granted, 172 Wn.2d 1004 (2011); but see *State v. Ryan*, 160 Wn. App. 944, 948-949, 252 P.3d

¹⁹ Appellant's Brief ("App.Br.").

895, review granted, 172 Wn.2d 1004 (2011).²⁰ Defendant's is procedurally barred from raising this claim for the first time on appeal.

²⁰ This Court has determined that it is prudent to conduct a complete analysis of *Bashaw* claims even when it determines they have been waived; this is due to the uncertainty attending their constitutional nature given the Supreme Court's acceptance of review in *Ryan* and *Nunez*. See *Berlin*, __ Wn. App. __, __ P.3d __, No. 41307-8-II (2012) (Published in Part).

Assuming the Supreme Court holds *Bashaw* errors are based on constitutional protections, in defendant's case the error would not be "manifest." For an error to be "manifest," the defendant must show that it had practical and identifiable consequences at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). To ascertain whether the trial court could have corrected the error given its knowledge at the time, the appellate court must place itself in the trial court's shoes when determining if the alleged error had practical and identifiable consequences. *State v. O'Hara*, 167 Wn.2d 91, 100, 217, P.3d 756 (2009).

In *Grimes*, this Court held that the instructional error could not have had a practical and identifiable consequence at trial because: (1) "unlike *Bashaw*" Grimes did not cast doubt on the existence of the evidence supporting the imposition of the sentence enhancement on the record at trial, (2) "unlike ... *Goldberg*, the record did not show that the jury disagreed about whether the sentence enhancement was proven beyond a reasonable doubt," and (3) "Grime's jury was not instructed to deliberate after first returning a verdict that was not unanimous on the sentence enhancement." 165 Wn. App. at 189-190 (internal alterations omitted).

Each of those conditions is also true of defendant's case as he did not present evidence that negated his motivations for hiring the victims to sell marijuana with him and the jury's deliberations were not accompanied with the irregularities identified in *Grimes*. RP 636, 645, 663-665, 670-678, 683-685-690, 719-720, 761-762, 776, 779, 788, 789 790-791, 808-828, 833, 837, 1083-1084, 1137, 1328, 1330, 1704-1726, 1886-1895; CP 313-314.

The error would otherwise be harmless beyond a reasonable doubt because uncontroverted testimony gave rise to a reasonable inference that defendant was motivated to employ the victims at least in part to facilitate a sexual relationship with them. *Id.* The persuasiveness of that evidence required the jury's unreviewable determination of the victims' credibility. See *Camarillo*, 115 Wn.2d at 71. Conversely, the jury in *Bashaw* heard no properly admitted direct evidence establishing the sentencing enhancement. 169 Wn.2d at 138, 143; see also *Grimes*, 165 Wn. App. at 191; *Berlin*, __ Wn. App. __, __ P.3d __, No. 41307-8-II (2012) (Published in Part) (This Court does not "divorce the focus on a 'flawed deliberative process' in its analysis of these instructional errors from the context of the entire record, including the State's evidence.").

- b. *Bashaw* is Immaterial to Defendant's Case because His Jury was not Given a *Bashaw* Instruction .

Bashaw identified the following instructional language as error:

“Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.”

169 Wn.2d at 139. Whereas defendant's special verdict instruction stated in relevant part that:

“In order to answer the special verdict forms ‘yes,’ you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you have a reasonable doubt as to the question, you must answer ‘no.’”

CP 304 (Instruction No. 31).

Defendant's instruction did not contain the unanimity language identified as error in *Bashaw*. The language used in defendant's instruction was upheld as proper in *Goldberg*, 149 Wn.2d 893-984 and *State v. Coleman*, 152 Wn. App. 552, 564-565, 216 P.3d 479 (2009). *Bashaw* is therefore immaterial to defendant's case.

D. CONCLUSION.

Defendant's controlled substance convictions and sexual motivation enhancements were established through uncontroverted evidence that rendered the trial court's instructional error harmless beyond

a reasonable doubt. Defendant's convictions and sentence should be affirmed.

DATED: APRIL 19, 2012

MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

Certificate of Service:

The undersigned certifies that on this day she delivered by ~~U.S. mail~~ ^{email} 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.

Date _____ Signature _____

PIERCE COUNTY PROSECUTOR

April 19, 2012 - 3:17 PM

Transmittal Letter

Document Uploaded: 419165-Respondent's Brief.pdf

Case Name: State v. Jeffrey Randall

Court of Appeals Case Number: 41916-5

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us

A copy of this document has been emailed to the following addresses:

david@washapp.org