

No. 42366-9-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION TWO

In re Personal Restraint of:

ROBERT MARK DOBYNS,

Petitioner.

Response to Personal Restraint Petition

JONATHAN L. MEYER
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By:

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State v. Robert Mark Dobyys, COA # 64952-3-1

I. **AUTHORITY FOR PETITIONER'S RESTRAINT**

Robert Mark Dobyms¹ was found guilty of three counts of rape of a child in the first degree, two counts of child molestation in the first degree and five counts of rape of child in the second degree after a jury trial on June 26, 2008. Appendix A, J 3.² The jury also found that Dobyms had used his position of trust or confidence to facilitate committing the crimes and that the offenses were part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time via special verdicts for the aggravating factors on all counts. Appendix A, J 3. Dobyms was sentenced to an exceptional sentence of 599 months. SRP³ 20; Appendix A. Dobyms timely appealed and the Court of Appeals affirmed his conviction. Appendix J.

¹ Hereafter Dobyms.

² The State will refer to the page number of the decision in citing to page numbers in Appendix J. The first two pages of Appendix J are the Mandate and a blank page, which is how Appendix J was filed in the Lewis County Superior Court file.

³ The state will be referring to the verbatim report of proceedings as follows: the four day jury trial as RP (they are sequentially numbered in the four volumes); the sentencing hearing as SRP and the various other hearings as RP and the date the hearing occurred.

II. RESPONSE TO PETITIONER'S CLAIMED GROUNDS FOR RELIEF

A. Dobyms received effective assistance from his trial counsel.

III. STATEMENT OF THE CASE

Dobyms was charged by information on March 6, 2006 in Lewis County Superior Court with rape of a child in the first degree, counts I through III, child molestation in the first degree, counts IV through V, rape of a child in the second degree, counts VI through X. Appendix B. The victim was N.M., whose date of birth is September 20, 1989. Appendix B. The information was amended for a second time on June 20, 2008. Appendix C. The second amended information had all of the original charges with the addition of two aggravating factors on each count, abuse of a position of trust and ongoing pattern of abuse of the same victim, under 18 years of age, over a prolonged period of time. Appendix C. Dobyms was found guilty on all counts and sentenced in October 2008. Appendix A.

The Court of Appeals, in case number 64952-3-I, wrote a good summary of the facts elicited during the jury trial. Appendix J. The State will rely upon that statement of the facts but will also

supplement the facts throughout the argument portion of its brief below. See Appendix J.

IV. ARGUMENT

A. DOBYNS RECEIVED COMPETANT AND EFFICTIVE ASSISTANCE OF HIS TRIAL COUNSEL THROUGHOUT THE TRIAL COURT PROCEEDINGS.

To prevail on an ineffective assistance of counsel claim Dobyns must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 688, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *State v. Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. If counsel's performance is found to be deficient, than the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Horton*, 116 Wn. App. at 921-22, citing *Strickland v. Washington*, 466 U.S. at 694.

1. Doby's Trial Counsel Was Not Required To Go Out And Obtain Evidence In Regards To The Computer And His Mistake Regarding Whether Pornography Was Viewed On The Computer Was Not Ineffective Assistance Of Counsel.

When a defendant raises a failure to investigate claim the defendant must show "a reasonable likelihood that the investigation would have produced **useful** information not already known to the defendant's trial counsel." *In re Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004) (emphasis added). A defendant who makes a showing that his or her trial counsel failed to investigate still must show that the deficient performance prejudiced him or her. *In re Davis*, 152 Wn,2d at 739. "In evaluating prejudice, ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case." *Id.* (citation omitted) (internal quotation marks omitted).

Dobyns argues two points to this Court that in regards to testimony and discussion that Dobyns watched pornography on the computer with N.M. sitting on his lap when some of the inappropriate touching occurred. First, Dobyns argues that trial

counsel's arguments "demonstrates a remarkable deficiency in defense counsel's knowledge of the state of the discovery in the case." Petitioner's Brief 4. Second, Dobyngs argues that trial counsel's argument that the burden was on the State to find the computer and have it analyzed is misplaced because at some point trial counsel has a duty to investigate, locate, question and consult witnesses on Dobyngs's behalf. Petitioner's Brief 7.

During its case in chief, the State asked N.M. if while she was looking at the computer with Dobyngs if any pop-ups with pornography ever appeared on the screen. RP 215. N.M. stated yes and Dobyngs's trial counsel objected, stating:

Your Honor, I'm going to object to this whole line of questioning. I'd like to be heard outside the presence of the jury...

Your Honor, I'm going to object to this. In fact, in the police statements, I have never been supplied with anything about computers whatsoever except for the fact of supposedly there was a pop-up. This individual stated it was not pornographic. I've never been supplied with anything about a computer. As part of their discovery the police officer found out where this computer was, to my knowledge never went and got it, never checked it. I received nothing. Now for this individual to sit up here and act like there was something that was pornographic on a computer when they didn't go get this computer, and if they did they didn't find anything or I'd have had it.

I'm going to ask for a mistrial at this point because the jury's already heard this and that puts him in the

position of being like a child porn person. And we have been supplied with no information that they ever even checked that computer, even though they said they were going to get it.

RP 215-16. The deputy prosecutor pointed out that the police reports indicated that N.M. had been asked about the pop-ups and she stated some were pornographic and Dobyms had commented on them. RP 216. Dobyms's trial counsel countered and stated that in N.M.'s **statement** she said it was not pornographic or anything. RP 216. The court concluded that the information regarding the pornographic pop-ups had been disclosed and provided in the discovery. RP 219.

An insignificant mistake in what was in the discovery does not rise to the level of deficient performance. It is clear from reading trial counsel's arguments that he had thoroughly read N.M.'s recorded statement she had given to the police. See RP 215-19. This is further evidenced by trial counsel's cross-examination of N.M. See RP 221-307. Trial counsel had met and interviewed N.M. on at least two prior occasions with his investigator and the second interview was actually a deposition. RP 229-233. There was no deficiency in trial counsel's performance in regards to the mistaken belief that N.M. stated absolutely there was no pornography on the computer. Trial

counsel thoroughly prepared for N.M.'s testimony and his cross-examination of her, which is evidenced by the multiple interviews, use of an investigator at those interviews and trial counsel's use of N.M.'s taped statement in his cross-examination of her.

Arguendo, while the State is not conceding that Dobyns's trial counsel was deficient, if this Court were to find Dobyns's trial counsel's performance deficient, Dobyns's has failed to show how he was prejudiced by his trial counsel's mistaken belief that there was not any pornography viewed on the computer. The evidence in this case, as testified to by N.M. was that Dobyns's molested her, forced her to perform and receive oral sex and digitally penetrated her vagina approximately three to five nights a week for close to three years. RP 155-58. The fact that Dobyns's may have commented on some pornography that popped up on the computer while he inappropriately touched N.M. as she sat in his lap is insignificant to the totality of the evidence that was presented in this case. The State had a strong case against Dobyns's and his victim could clearly and effectively provide testimony to the jury about the abuse she suffered at Dobyns's hands. Dobyns's has suffered no prejudice from his trial counsel's deficient performance.

Furthermore, Dobyyns's argument that his trial counsel had the duty to investigate in regards to the computer is unfounded. This case was investigated in 2006, four years after Dobyyns's moved out of N.M.'s house. RP 124, 376-80. There is no showing that there is a reasonable likelihood that anything useful or helpful would be found on the computer. Dobyyns's has not met the threshold to even get to the next part of the test, which is whether the failure to investigate has prejudiced him. Dobyyns's trial counsel's failure to obtain the computer for analysis was not deficient performance and therefore, he was not ineffective in his representation of Dobyyns. This petition should be dismissed.

2. Dobyyn's Trial Counsel Was Not Ineffective For Failing To Hire Expert Witnesses.

Dobyyns claims that his trial counsel was ineffective for failing to hire an expert in the computers, medication and medical issues regarding N.M. Petitioner's Brief 7-10. The standard for a failure to investigate claim is argued in the above section. An attorney's decision whether to call a witness to testify on behalf of his or her client is "a matter of legitimate trial tactics, which will not support a claim of ineffective assistance of counsel." *State v. Manschke*, 160 Wn. App. 479, 492, 251 P.3d 884 (2011), *citing* *State v. Byrd*, 30 Wash.App. 794, 799, 638 P.2d 601 (1981) (internal quotations

omitted). If a petitioner can show that his or her trial counsel failed to prepare for trial or adequately investigate then the petitioner has overcome the presumption of effectiveness. *Id.* (citations omitted).

a. Investigation and testimony regarding the computer that Dobyms used while he lived with N.M. and her mother.

Dobyms argues to this Court that the burden shifted to his trial counsel, once trial counsel was notified that N.M. viewed pornographic images on the computer with Dobyms, to try to locate the computer and to conduct tests on the computer to disprove those allegations. Petitioner's Brief 8. Dobyms cites not case law in support of this claim. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." *State v. Dow*, 162 Wn. App. 324, 331, 253 P.3d 476 (2011) (citations and internal quotation marks omitted). As argued above, Dobyms has not met his burden of showing that there would likely be useful evidence contained on the computer for his case, therefore his argument that his trial counsel was ineffective in regards to the computer fail.

b. Hiring an expert to testify about the side effects of the medication Dobyms was allegedly taking during the period of time that the sexual abuse occurred.

Dobyms's trial counsel argued to the trial court that he should be allowed to elicit from Ms. Mudrow that Dobyms's was taking Welbutrin. RP 406-12. Trial counsel's plan appeared to be to have Detective Fitzgerald testify in regards to the side effects of Welbutrin because she had discussed it in her police report. RP 406-12. The trial court sustained an objection from the State and did not allow the testimony. RP 412. Trial counsel did clarify that Dobyms would be allowed to testify regarding the side effects he suffered. RP 412-13.

Again, Dobyms must show that by consulting an expert there was a reasonable likelihood that the expert would produce useful information. See *In re Davis*, 152 Wn.2d at 739. There is no showing by Dobyms that a medical expert would have produced favorable testimony on his behalf in regards to what Welbutrin does to a person's sex drive. If Dobyms were to introduce expert testimony stating that Welbutrin lowers a person's sexual desires, the State would then be able to counter with its own experts. The State would have been able to bring in evidence that "rape is not about sex; it is about power and control." *Garcia-Martinez v.*

Ashcroft, 371 F.3d 1066, 1076(2004), *citing* Margaret A. Cain, THE CIVIL RIGHTS PROVISION OF THE VIOLENCE AGAINST WOMEN ACT, 43 Tulsa L.J. 367, 407 n.32 (1999). Therefore, he does not even get to the next step of whether failure to investigate in this manner would be prejudicial to Dobyons's case. If, for the sake of argument, this Court were to find that an expert would likely produce useful information, while not conceding the issue, the State argues that Dobyons cannot show that he was prejudiced.

c. Consulting with an expert in regards to physical signs and evidence of sexual abuse.

Dobyons argues that his trial counsel was ineffective for failing to at a minimum consult a medical expert as to the likelihood that there would be evidence of physical trauma in or around N.M.'s vagina. Petitioner's Brief 9. Dobyons goes so far to argue that his trial counsel should have perhaps motioned the court to require N.M. to submit to an examination by a defense expert. Petitioner's Brief 10.

Dobyons's trial attorney made the following argument in closing argument:

But going through those facts is important. Medical evidence, a colposcope, did she have any trauma, did she have any history of trauma? They didn't bring it to you. That's their job. I want you to understand it's

not my job to bring you anything, nothing. It's their job to convict. Doesn't mean I have to disprove everything they say. It's not my job. It's their job to bring it forward. It's their witnesses. They can give them consents.

RP 689. Doby's trial counsel was using a legitimate trial tactic, arguing the prosecution had not provided the jury with any corroborating physical evidence to support these claims of prolonged sexual assaults, rapes, over a period of years. See *State v. Manschke*, 160 Wn. App. at 492. Attempting to raise reasonable doubt by arguing if N.M. was victimized in this way, would there not be physical evidence, signs of trauma and then why is the State not giving you, the jury this information?

The argument that Doby's trial counsel should have requested the trial court require N.M. to submit to an independent physical examination is ludicrous. The courts in Washington have previously held that in a criminal action the court does not have power or authority over a victim of a sexual assault to require the victim to have an independent, and invasive, medical examination. *State v. Allen*, 128 Wn. 217, 222-23, 222 P. 502 (1924). Doby's trial counsel was not required to make arguments to the trial court that are not founded in the law.

Dobyns cannot show that his trial attorney was deficient in his handling of medical issues concerning N.M. Dobyns's trial counsel acted within professional norms and standards in his handling of his argument regarding the lack of physical evidence in this case. Arguendo, if this Court were to find trial counsel's actions in regards to the preparation of Dobyns's case for trial were ineffective, Dobyns has still not made an adequate showing that he was prejudiced. Dobyns has to show, with reasonable probability, that but for his trial attorney's failure to call an expert witness to testify regarding or medical issues concerning N.M. that the outcome of the trial would have been different. Dobyns has failed to do so in this case. There was ample evidence for the jury to convict Dobyns on all counts and there is nothing presented by Dobyns that shows the outcome of the trial would have been different if his trial attorney had consulted or called any expert witnesses to testify.

3. Dobyns's Trial Counsel Was Not Ineffective For Failing To Admit The Tape Recordings Into Evidence.

The State reluctantly agrees that failing to admit the tape recordings into evidence was obviously not a tactical decision by Dobyns's trial counsel. As Dobyns's points out in his brief, trial

counsel repeatedly urged the jury to listen again to the recordings during his closing argument. RP 684, 692, 704-05. After closing arguments, when trial counsel realized the tapes had not been admitted into evidence he stated, "Your Honor, I do have one thing prior to, I assumed the tapes would be introduced, we discussed that they were, 5 and 6. I move for the admission of them. I assumed they already were." RP 720. The trial court stated it was too late to move for the tapes introduction into evidence. RP 720.

The tapes did not need to be admitted into evidence. The jury heard the tapes played and were able to read a transcript of the recording played. RP 178-205. The jury was able to listen to the tapes, hear the inflection in Dobyns voice, the fact that Dobyns was stammering, stating repeatedly "I don't know."

Dobyns's argues to this court that urging the jury to listen to the tapes which were not admitted "is clearly ineffective assistance of counsel under any standard." Petitioner's Brief 14. Dobyns's conclusory statement is not sufficient to show his trial counsel was ineffective. Deficient perhaps, although the State is not conceding that trial counsel was deficient here, but not ineffective. In order to show his trial counsel was ineffective Dobyns's must show this court that his trial counsel's deficient performance prejudiced him.

See Strickland v. Washington, 466 U.S. at 687. Dobyng's must show with reasonable probability that but for his trial attorney's unprofessional errors, the outcome of the trial would have been different. *State v. Horton*, 116 Wn. App. at 921-22. Dobyng has not met this requirement. The State again argues that the victim's powerful testimony provided the jury with ample evidence to convict Dobyng in this case regardless of whether or not the tapes were admitted into evidence. This petition should be dismissed.

4. Trial Counsel Was Not Ineffective In Regards To His Cross-Examination Of Detective Buster.

Dobyng argues to this Court that his trial counsel was ineffective because of how trial counsel cross-examined Detective Carl Buster. Petitioner's Brief 14-17. Dobyng argues that the testimony elicited from Detective Buster that he was trained to decipher, or attempt to decipher when people are lying, including in court and that trial counsel's questions regarding whether or not Detective Buster had an idea if people were lying and this line of questioning implied that Dobyng was lying and guilty. Petitioner's Brief 14-17. Yet, when one reads the entire transcript, not just the snippet Dobyng provides in his brief, it is clear what trial counsel was attempting to establish, that Detective Buster had no personal knowledge in regards to the allegations against Dobyng. *See RP*

462-67. Multiple times during this cross-examination trial counsel gets Detective Buster to admit he has no personal knowledge and knows only what he has been told by others. RP 462-63.

The Washington State Supreme Court has previously held:

If counsel is to be stultified at trial by a post trial scrutiny of the myriad choices he must make in the course of a trial: whether to examine on a fact, whether and how much to cross-examine, whether to put some witnesses on the stand and leave others off—indeed, in some instances, whether to interview some witnesses before trial or leave them alone—he will lose the very freedom of action so essential to a skillful representation of the accused.

State v. Stenson, 142 Wn.2d 710, 735, 16 P.3d 1 (2001) (citations omitted). In the present case trial counsel's cross-examination did not suggest to the jury that N.M. was being truthful and therefore Dobyns was guilty. While Dobyns is correct that no witness may testify to his or her opinion of guilt of the defendant, that is not what happened here. Trial counsel was simply establishing that Detective Buster had no personal knowledge of the sexual abuse and he had to base his opinions on the information he received from others. Trial counsel was not deficient in his performance and if for the sake of argument he was there is no prejudice to Dobyns for the reasons argued repeatedly in the sections above.

5. There Is No Cumulative Error In This Case.

The doctrine of cumulative error applies in situations where there are a number of trial errors, which standing alone may not be sufficient justification for a reversal of the case, but when those errors are combined the defendant has been denied a fair trial. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000) (citations omitted).

When looking at trial counsel's performance as a whole it is clear that Dobyms received effective assistance of counsel. Dobyms's trial counsel filed various pretrial motions including motions for discovery, depositions and a motion to suppress evidence. Appendix D, E, F, G. The trial court granted trial counsel's motion for depositions of N.M. and her mother. Appendix H. Trial counsel submitted a witness list. Appendix I. Trial counsel interviewed N.M. and her mother and conducted a deposition on both N.M. and her mother. RP 229-233, 428, 430. Trial counsel had an investigator, Jim Armstrong. RP 428, 430. Trial counsel motioned at the close of the State's case for the trial court to dismiss the charges. RP 476-79. Trial counsel called Dan Garry, Robert Gebhart, Deputy Chris Rubin, Amanda Gray and Dobyms to testify at the trial. RP 480-618. Trial counsel did extensive work

preparing for and trying Doby's case. As argued above, none of the alleged errors were prejudicial, and it is the State's position that none of the alleged errors by trial counsel constituted deficient performance. Doby received a fair trial and his petition should be denied.

V. CONCLUSION

Doby's convictions should be affirmed and his personal restraint petition should be dismissed for the reasons argued in the sections above.

RESPECTFULLY submitted this 7th day of November, 2011.

JONATHAN MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for the Respondent.

LEWIS COUNTY PROSECUTOR
November 07, 2011 - 11:39 AM
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Case Name:

Court of Appeals Case Number: 42366-9

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

 Brief: Response

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: Teresa L Bryant - Email: teri.bryant@lewiscountywa.gov

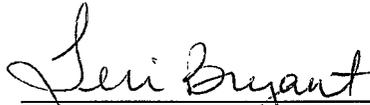
**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

IN THE PERSONAL	)	NO. 42366-9-II
RESTRAINT PETITION OF:)	
	)	DECLARATION OF
ROBERT MARK DOBYNS,	)	MAILING
_____)	

Ms. Teri Bryant, paralegal for Sara I. Beigh, Senior Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On November 7, 2011, Robert Mark Dobyms was served with a copy of the State's **Response to Personal Restraint Petition** by depositing same in the United States Mail, postage pre-paid, to the attorney for Appellant at the name and address indicated below:

Robert M. Quillian
Attorney at Law
2633-A Parkmont Lane SW
Olympia, WA 98502

DATED this 7th day of November, 2011, at Chehalis, Washington.



Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR
November 07, 2011 - 11:41 AM

Transmittal Letter

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Case Name:

Court of Appeals Case Number: 42366-9

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

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Cost Bill

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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

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Sender Name: Teresa L Bryant - Email: teri.bryant@lewiscountywa.gov

Appendix A

Judgment and Sentence Case No. 06-1-00148-1

ORIGINAL

Received & Filed
LEWIS COUNTY, WASH
Superior Court

OCT 31 2008

By *[Signature]*
Kathy A. Brack, Clerk
Deputy

Superior Court of Washington
County of Lewis

State of Washington, Plaintiff,

No. 06-1-00148-1

vs.

Felony Judgment and Sentence --
Prison

ROBERT MARK DOBYNS,
Defendant.

RCW 9.94A.712 Prison Confinement
(Sex Offense and Kidnapping of a Minor Offense)
(FJS)

SID:
DOB:

Clerk's Action Required, para 2,1, 4.1, 4.3a,
4.3b, 5.2, 5.3, 5.5 and 5.7

Defendant Used Motor Vehicle

I. Hearing

1.1 The court conducted a sentencing hearing on October 31, 2008; the defendant, the defendant's lawyer, Sheryl Gordon McCloud, and the (deputy) prosecuting attorney, Colin P. Hayes, were present.

II. Findings

2.1 **Current Offenses:** The defendant is guilty of the following offense, based upon
 guilty plea (date) _____ jury-verdict (date) June 26, 2008 bench trial (date) _____ as
charged in the Fourth Amended Information:

Count	Crime	RCW (w/subsection)	Class	Date of Crime
I	Rape of a Child in the First Degree	9A.44.073	FA	On or about and between Aug. 1, 1999, and Sept. 19, 2001
II	Rape of a Child in the First Degree	9A.44.073	FA	On or about and between Aug. 1, 1999, and Sept. 19, 2001
III	Rape of a Child in the First Degree	9A.44.073	FA	On or about and between Aug. 1, 1999, and Sept. 19, 2001

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)

(If the crime is a drug offense, include the type of drug in the second column.)

Additional current offenses are attached in Appendix 2.1a.

The defendant is a sex offender subject to indeterminate sentencing under RCW 9.94A.712.

The jury returned a special verdict or the court made a special finding with regard to the following:

Felony Judgment and Sentence (FJS) (Prison)
(Sex Offense and Kidnapping of a Minor Offense)
(RCW 9.94A.500, .505)(WPF CR 84.0400 (6/2008))

*3: ally
& def*

08-9-1770-L

- The defendant engaged, agreed, offered, attempted, solicited another, or conspired to engage a victim of child rape or child molestation in sexual conduct in return for a fee in the commission of the offense in Count _____. RCW 9.94A._____.
- The offense was predatory as to Count _____. RCW 9.94A.836.
- The victim was under 15 years of age at the time of the offense in Count _____. RCW 9.94A.837.
- The victim was developmentally disabled, mentally disordered, or a frail elder or vulnerable adult at the time of the offense in Count _____. RCW 9.94A.838, 9A.44.010.
- The defendant acted with **sexual motivation** in committing the offense in Count _____. RCW 9.94A.835.
- This case involves **kidnapping** in the first degree, kidnapping in the second degree, or unlawful imprisonment as defined in chapter 9A.40 RCW, where the victim is a minor and the offender is not the minor's parent. RCW 9A.44.130.
- The defendant used a **firearm** in the commission of the offense in Count _____. RCW 9.94A.602, 9.94A.533.
- The defendant used a **deadly weapon other than a firearm** in committing the offense in Count _____.
- Count _____, **Violation of the Uniform Controlled Substances Act (VUCSA)**, RCW 69.50.401 and RCW 69.50.435, took place in a school, school bus, within 1000 feet of the perimeter of a school grounds or within 1000 feet of a school bus route stop designated by the school district; or in a public park, public transit vehicle, or public transit stop shelter; or in, or within 1000 feet of the perimeter of a civic center designated as a drug-free zone by a local government authority, or in a public housing project designated by a local governing authority as a drug-free zone.
- The defendant committed a crime involving the manufacture of methamphetamine, including its salts, isomers, and salts of isomers, **when a juvenile was present in or upon the premises of manufacture** in Count _____.
- Count _____ is a **criminal street gang**-related felony offense in which the defendant compensated, threatened, or solicited a minor in order to involve that **minor** in the commission of the offense. Laws of 2008, ch. 276, § 302.
- Count _____ is the crime of **unlawful possession of a firearm**. The defendant was a **criminal street gang** member or associate when the defendant committed the crime. RCW 9.94A.545.
- The defendant committed **vehicular homicide** **vehicular assault** proximately caused by driving a vehicle while under the influence of intoxicating liquor or drug or by operating a vehicle in a reckless manner. The offense is, therefore, deemed a violent offense. RCW 9.94A.030.
- Count _____ involves **attempting to elude** a police vehicle and during the commission of the crime the defendant endangered one or more persons other than the defendant or the pursuing law enforcement officer. Laws of 2008, ch. 219 § 2.
- Count _____ is a felony in the commission of which the defendant used a **motor vehicle**. RCW 46.20.285.
- The defendant has a **chemical dependency** that has contributed to the offense(s). RCW 9.94A.607. The crime(s) charged in Count _____ involve(s) **domestic violence**. RCW 10.99.020.
- Counts _____ encompass the same criminal conduct and count as one crime in determining the offender score (RCW 9.94A.589).
- Other current convictions listed under different cause numbers used in calculating the offender score are** (list offense and cause number):

	<i>Crime</i>	<i>Cause Number</i>	<i>Court (county & state)</i>
1.			
2.			

- Additional current convictions listed under different cause numbers used in calculating the offender score are attached in Appendix 2.1b.

2.2 Criminal History (RCW 9.94A.525):

	Crime	Date of Crime	Date of Sentence	Sentencing Court (county & state)	A or J Adult, Juv.	Type of Crime
1						
2						
3						
4						
5						

- Additional criminal history is attached in Appendix 2.2.
- The defendant committed a current offense while on community placement/community custody (adds one point to score). RCW 9.94A.525.
- The prior convictions listed as number(s) _____, above, or in appendix 2.2, are one offense for purposes of determining the offender score (RCW 9.94A.525)
- The prior convictions listed as number(s) _____, above, or in appendix 2.2, are not counted as points but as enhancements pursuant to RCW 46.61.520.

2.3 Sentencing Data:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
I	27	XII	Min. of 240-318 months and max. of life	N/A	Min. of 240-318 months and max. of life	Life
II	27	XII	Min. of 240-318 months and max. of life	N/A	Min. of 240-318 months and max. of life	Life
III III	27	XII	Min. of 240-318 months and max. of life	N/A	Min. of 240-318 months and max. of life	Life

* (F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. Hom, see RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee, RCW 9.94A.533(9), (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude.

Additional current offense sentencing data is attached in Appendix 2.3.

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

2.4 Exceptional Sentence. The court finds substantial and compelling reasons that justify an exceptional sentence:

- within below the standard range for Count(s) _____.
- above the standard range for Count(s) I-X _____.

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

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

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

2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present, and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds:

That the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753.

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

The defendant has the present means to pay costs of incarceration. RCW 9.94A.760.

III. Judgment

3.1 The defendant is **guilty** of the Counts and Charges listed in Paragraph 2.1 and Appendix 2.1.

3.2 The court **dismisses** Counts _____ in the charging document.

IV. Sentence and Order

It is ordered:

4.1 Confinement. The court sentences the defendant to total confinement as follows:

(a) **Confinement.** RCW 9.94A.589. A term of total confinement in the custody of the Department of Corrections (DOC):

<u>240</u> months on Count <u>I</u>	<u>149</u> months on Count <u>IV</u>
<u>240</u> months on Count <u>II</u>	<u>149</u> months on Count <u>V</u>
<u>240</u> months on Count <u>III</u>	_____ months on Count _____

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

The confinement time on Count _____ includes _____ months as enhancement for firearm deadly weapon sexual motivation VUCSA in a protected zone manufacture of methamphetamine with juvenile present sexual conduct with a child for a fee.

Actual number of months of total confinement ordered is: minimum of 599 months and maximum of life.

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at Section 2.3, and except for the following counts which shall be served consecutively: Counts I, II, III shall run concurrent with each other but shall

run consecutive to counts IV, V and Counts VI - X; counts II and III shall run concurrent to each other but shall run consecutive to all other counts; counts VI - X shall run concurrently with each other but shall run consecutive to all other counts.

The sentence herein shall run consecutively with the sentence in cause number(s) _____ but concurrently to any other felony cause not referred to in this Judgment. RCW 9.94A.589.

Confinement shall commence immediately unless otherwise set forth here: _____

(b) **Confinement.** RCW 9.94A.712 (Sex Offenses only): The court orders the following term of confinement in the custody of the DOC:

Count	<u>VI</u>	minimum term:	<u>210</u>	maximum term:	<u>Life</u>
Count	<u>VII</u>	minimum term:	<u>210</u>	maximum term:	<u>Life</u>
Count	<u>VIII</u>	minimum term:	<u>210</u>	maximum term:	<u>Life</u>
Count	<u>IX</u>	minimum term:	<u>210</u>	maximum term:	<u>Life</u>
Count	<u>X</u>	minimum term:	<u>210</u>	maximum term:	<u>Life</u>

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

132 days

(d) **Work Ethic Program.** RCW 9.94A.690, RCW 72.09.410. The court finds that the defendant is eligible and is likely to qualify for work ethic program. The court recommends that the defendant serve the sentence at a work ethic program. Upon completion of work ethic program, the defendant shall be released on community custody for any remaining time of total confinement, subject to the conditions in Section 4.2. Violation of the conditions of community custody may result in a return to total confinement for remaining time of confinement.

4.2 Community Placement or Community Custody. (To determine which offenses are eligible for or required for community placement or community custody see RCW 9.94A.700, .705, and .715)

(A) The defendant shall be on community placement or community custody for the longer of:

(1) the period of early release. RCW 9.94A.728(1)(2); or

(2) the period imposed by the court, as follows:

Count I for 36 months; Count II for 36 months; Count III for 36 months;

Count IV for for 36 months; Count V for 36 months;

(Sex offenses, only) For count(s) VI-X, sentenced under RCW 9.94A.712, for any period of time the defendant is released from total confinement before the expiration of the statutory maximum.

The combined term of community confinement and community custody shall not exceed the maximum statutory sentence.

(B) DOC shall supervise the defendant if DOC classifies the defendant in the A or B risk categories; or, DOC classifies the defendant in the C or D risk categories and at least one of the following apply:

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

While on community placement or community custody, the defendant shall: (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution (service); (3) notify DOC of any change in defendant's address or employment; (4) not consume controlled substances except pursuant to lawfully issued prescriptions; (5) not unlawfully possess controlled substances while in community custody; (6) not own, use, or possess firearms or ammunition; (7) pay supervision fees as determined by DOC; (8) perform affirmative acts as required by DOC to confirm compliance with the orders of the court; (9) for sex offenses, submit to electronic monitoring if imposed by DOC; and (10) abide by any additional conditions imposed by DOC under RCW 9.94A.720. The defendant's residence location and living arrangements are subject to the prior approval of DOC while in

community placement or community custody. For sex offenders sentenced under RCW 9.94A.710, the court may extend community custody up to the statutory maximum term of the sentence.

The court orders that during the period of supervision the defendant shall:

consume no alcohol.

have no contact with: _____

remain within outside of a specified geographical boundary, to wit: _____

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

participate in the following crime-related treatment or counseling services: _____

undergo an evaluation for treatment for domestic violence substance abuse

mental health anger management, and fully comply with all recommended treatment. _____

comply with the following crime-related prohibitions: _____

Other conditions:

Defendant shall have no criminal law violations; have law abiding behavior; abide by all conditions and requirements in Appendix H (attached); follow all conditions and requirements of DOC

(C) For sentences imposed under RCW 9.94A.712, the Indeterminate Sentence Review Board may impose other conditions (including electronic monitoring if DOC so recommends). In an emergency, DOC may impose other conditions for a period not to exceed seven working days.

Court Ordered Treatment: If any court orders mental health or chemical dependency treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

4.3a Legal Financial Obligations: The defendant shall pay to the clerk of this court:

JASS CODE

<i>PCV</i>	\$ <u>500</u>	Victim assessment	RCW 7.68.035
	\$ _____	Domestic Violence assessment	RCW 10.99.080
<i>CRC</i>	\$ _____	Court costs, including RCW 9.94A.760, 9.94A.505, 10.01.160, 10.46.190	
		Criminal filing fee \$ <u>200.00</u>	FRC
		Witness costs \$ _____	WFR
		Sheriff service fees \$ <u>431.10</u>	SFR/SFS/SFW/WRF
		Jury demand fee \$ _____	JFR
		Extradition costs \$ _____	EXT
		Other \$ _____	
<i>PUB</i>	\$ _____	Fees for court appointed attorney	RCW 9.94A.760
<i>WFR</i>	\$ <u>TBD</u>	Court appointed defense expert and other defense costs	RCW 9.94A.760
<i>FCM/MTH</i>	\$ _____	Fine RCW 9A.20.021; <input type="checkbox"/> VUCSA chapter 69.50 RCW, <input type="checkbox"/> VUCSA additional fine deferred due to indigency RCW 69.50.430	
<i>CDF/LDI/FCD</i> <i>NTF/SAD/SDI</i>	\$ _____	Drug enforcement fund of _____	RCW 9.94A.760

CLF \$ _____ Crime lab fee [] suspended due to indigency RCW 43.43.690
 \$ 100.00 DNA collection fee RCW 43.43.7541
 RTN/RJN \$ _____ Emergency response costs (Vehicular Assault, Vehicular Homicide only, \$1000 maximum) RCW 38.52.430
 \$ 1,000.00 Lewis County Jail Fee Reimbursement RCW 9.94A.760(2)
 \$ _____ Other fines or costs for: _____
 RTN/RJN \$ TBD Restitution to: _____
 \$ TBD Restitution to: _____
 \$ TBD Restitution to: _____
 (Name and Address--address may be withheld and provided confidentially to Clerk of the Court's office.)
 \$ _____ **Total** RCW 9.94A.760

[X] The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753. A restitution hearing:

[X] shall be set by the prosecutor.
 [] is scheduled for _____ (date).

The defendant waives any right to be present at any restitution hearing (sign initials): AKND

[] Restitution Schedule attached.

[] Restitution ordered above shall be paid jointly and severally with:

<u>Name of other defendant</u>	<u>Cause Number</u>	<u>(Victim's name)</u>	<u>(Amount-\$)</u>

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

[X] All payments shall be made in accordance with the policies of the clerk of the court and on a schedule established by DOC or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here: Not less than \$ 25 per month commencing 60 days after entry of this order
 RCW 9.94A.760.

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

~~[X] The court orders the defendant to pay costs of incarceration at the rate of \$ _____ per day, (actual costs not to exceed \$100 per day). (JLR) RCW 9.94A.760.~~

The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments. RCW 10.82.090. An award of costs on appeal against the defendant may be added to the total legal financial obligations. RCW 10.73.160.

4.3b [] Electronic Monitoring Reimbursement. The defendant is ordered to reimburse _____ (name of electronic monitoring agency) at _____

_____, for the cost of pretrial electronic monitoring in the amount of \$_____.

4.4 DNA Testing. The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. The appropriate agency shall be responsible for obtaining the sample prior to the defendant's release from confinement. RCW 43.43.754.

HIV Testing. The defendant shall submit to HIV testing. RCW 70.24.340.

4.5 No Contact: The defendant shall not have contact with Nikolinka L. Modrow (DOB 9/20/1989) and the immediate family of Nikolinka L. Modrow, including grandparents, including, but not limited to, personal, verbal, telephonic, written or contact through a third party for life (not to exceed the maximum statutory sentence).

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

4.6 Other: The conditions of community custody listed in Section 4.2 and Appendix H are incorporated as conditions of this sentence. A violation of these conditions is punishable pursuant to RCW 9.94A.634 regardless of whether the defendant is on community custody at the time of the violation.

4.7 Off-Limits Order. (Known drug trafficker). RCW 10.66.020. The following areas are off limits to the defendant while under the supervision of the county jail or Department of Corrections: _____

4.8 Findings and Order Extending Conditions of Sentence Regarding Counts I - V. Under former RCW 9.94A.120(10)(c) (recodified as RCW 9.94A.715(5)), the Court finds that public safety would be enhanced by the extension of all the conditions imposed in Section 4.2, 4.5, and 4.6 for the maximum allowable sentence as it is classified in chapter 9A.20 RCW for the crimes listed in Counts I-V regardless of the expiration of the offender's term of community custody. The Court hereby orders that the conditions of Section 4.2, Section 4.5, and Section 4.6 of this Judgment and Sentence shall be permanent regarding those Counts. If a violation of a condition extended under this subsection occurs after the expiration of the offender's term of community custody, it shall be deemed a violation of the sentence for the purposes of former RCW 9.94A.195 (2001 c 10 § 6, effective July 1, 2001, recodified RCW 9.94A.195 to RCW 9.94A.631) and may be punishable as contempt of court as provided for in RCW 7.21.040. The department is not responsible for supervision of the offender's compliance with the conditions after the expiration of the terms of community custody.

V. Notices and Signatures

5.1 Collateral Attack on Judgment. If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment, motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 Length of Supervision. If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action. If the court has not ordered an immediate notice of payroll deduction in Section 4.1, you are notified that the Department of Corrections (DOC) or the clerk of the court

may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW 9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 Community Custody Violation.

(a) If you are subject to a first or second violation hearing and DOC finds that you committed the violation, you may receive as a sanction up to 60 days of confinement per violation. RCW 9.94A.634.

(b) If you have not completed your maximum term of total confinement and you are subject to a third violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.737(2).

5.5 Firearms. You may not own, use or possess any firearm unless your right to do so is restored by a superior court in Washington State, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identicaid, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

5.6 Sex and Kidnapping Offender Registration. RCW 9A.44.130, 10.01.200.

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

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

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

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

5. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12): If you are a resident of Washington and you are admitted to a public or private institution of higher education, you are required to notify the sheriff of the county of your residence of your intent to attend the institution within 10 days of enrolling or by the first business day after arriving at the institution, whichever is earlier. If you become employed at a public or private institution of higher education, you are required to notify the sheriff for the county of your residence of your

employment by the institution within 10 days of accepting employment or by the first business day after beginning to work at the institution, whichever is earlier. If your enrollment or employment at a public or private institution of higher education is terminated, you are required to notify the sheriff for the county of your residence of your termination of enrollment or employment within 10 days of such termination. If you attend, or plan to attend, a public or private school regulated under Title 28A RCW or chapter 72.40 RCW, you are required to notify the sheriff of the county of your residence of your intent to attend the school. You must notify the sheriff within 10 days of enrolling or 10 days prior to arriving at the school to attend classes, whichever is earlier. The sheriff shall promptly notify the principal of the school.

6. Registration by a Person Who Does Not Have a Fixed Residence: Even if you do not have a fixed residence, you are required to register. Registration must occur within 24 hours of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within 48 hours excluding weekends and holidays, after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register in the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You may be required to provide a list the locations where you have stayed during the last seven days. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

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

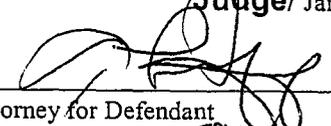
8. Application for a Name Change: If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your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

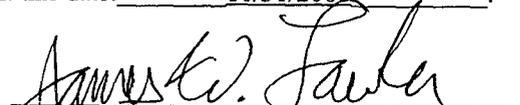
5.7 Motor Vehicle: If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

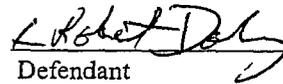
5.9 Other: Any bond previously posted in this case is hereby exonerated.

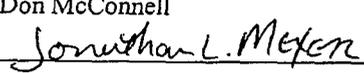
Done in Open Court and in the presence of the defendant this date: 10/31/2008


Deputy Prosecuting Attorney
WSBA No. 35387
Colin P. Hayes


Attorney for Defendant
WSBA No. ~~16789~~ 28238
Don McConnell


Judge/ James Lawler


Defendant
Robert Mark Dobyns



Voting Rights Statement: I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled. My right to vote may be restored by: a) a certificate of

discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140. Termination of monitoring by DOC does not restore my right to vote.

Defendant's signature: Robert Dohy

I am a certified interpreter of, or the court has found me otherwise qualified to interpret, the _____ language, which the defendant understands. I translated this Judgment and Sentence for the defendant into that language.

Interpreter signature/Print name: _____

VI. Identification of the Defendant

SID No. _____ Date of Birth 4/26/1957
(If no SID complete a separate Applicant card (form FD-258) for State Patrol)

FBI No. _____ Local ID No. _____

PCN No. _____ Other DOC# 319952

Alias name, DOB: _____

Race: Asian/Pacific Islander Black/African-American Caucasian Native American Other: _____
Ethnicity: Hispanic Non-Hispanic
Sex: Male Female

Fingerprints: I attest that I saw the defendant who appeared in court affix his or her fingerprints and signature on this document.

Clerk of the Court, Deputy Clerk, K Alexander Dated: 10/31/08

The defendant's signature: Robert Dohy

Left four fingers taken simultaneously

Left Thumb

Right Thumb

Right four fingers taken simultaneously

Felony Judgment and Sentence (FJS) (Prison)
(Sex Offense and Kidnapping of a Minor Offense)
(RCW 9.94A.500, .505)(WPF CR 84.0400 (6/2008))

**Superior Court of Washington
County of Lewis**

State of Washington, Plaintiff,

No. 06-1-00148-1

vs.
ROBERT MARK DOBYNS,
Defendant.

**Additional Current Offenses (Appendix 2.1a,
Judgment and Sentence) (APX)**

2.1a The defendant has the following additional current offenses:

Count	Crime	RCW (w/subsection)	Class	Date of Crime
IV	Child Molestation in the First Degree	9A.44.083	A	On or about and between Aug. 1, 1999, and Sept. 19, 2001
V	Child Molestation in the First Degree	9A.44.083	A	On or about and between Aug. 1, 1999, and Sept. 19, 2001
VI	Rape of a Child in the Second Degree	9A.44.076	A	On or about and between Sept. 20, 2001, and Dec. 31, 2002
VII	Rape of a Child in the Second Degree	9A.44.076	A	On or about and between Sept. 20, 2001, and Dec. 31, 2002
VIII	Rape of a Child in the Second Degree	9A.44.076	A	On or about and between Sept. 20, 2001, and Dec. 31, 2002
IX	Rape of a Child in the Second Degree	9A.44.076	A	On or about and between Sept. 20, 2001, and Dec. 31, 2002
X	Rape of a Child in the Second Degree	9A.44.076	A	On or about and between Sept. 20, 2001, and Dec. 31, 2002

Class: FA (Felony-A), FB (Felony-B), FC (Felony-C)

(If the crime is a drug offense, include the type of drug in the second column.)

**Superior Court of Washington
County of**

State of Washington, Plaintiff,

No. 06-1-00148-1

vs.
ROBERT MARK DOBYNS,
Defendant.

**Additional Current Offense Sentencing Data
(Appendix 2.3, Judgment and Sentence) (APX)**

2.3 The additional current offense sentencing data is as follows:

Count No.	Offender Score	Seriousness Level	Standard Range (not including enhancements)	Plus Enhancements*	Total Standard Range (including enhancements)	Maximum Term
IV	27	X	Min. of 149 - 198 mo. and max. of life	N/A	Min. of 149 -198 mo. and max. of life	Life
V	27	X	Min. of 149 - 198 mo. and max. of life	N/A	Min. of 149 -198 mo. and max. of life	Life
VI	27	XI	Min. of 210 - 280 mo. and max. of life	N/A	Min. of 210 -280 mo. and max. of life	Life
VII	27	XI	Min. of 210 - 280 mo. and max. of life	N/A	Min. of 210 -280 mo. and max. of life	Life
VIII	27	XI	Min. of 210 - 280 mo. and max. of life	N/A	Min. of 210 -280 mo. and max. of life	Life
IX	27	XI	Min. of 210 - 280 mo. and max. of life	N/A	Min. of 210 -280 mo. and max. of life	Life
X	27	XI	Min. of 210 - 280 mo. and max. of life	N/A	Min. of 210 -280 mo. and max. of life	Life

*(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (VH) Veh. hom. See RCW 46.61.520, (JP) Juvenile present, (SM) Sexual motivation, RCW 9.94A.533(8), (SCF) Sexual conduct with a child for a fee RCW 9.94A.533(9), (CSG) criminal street gang involving minor, (AE) endangerment while attempting to elude.

[] See additional sheets for more criminal history and current offense sentencing data.

Superior Court of Washington
County of Lewis

State of Washington, Plaintiff,

No. 06-1-00148-1

vs.
ROBERT MARK DOBYNS,
Defendant.

Findings of Fact and Conclusions of Law for
an Exceptional Sentence
(Appendix 2.4 Judgment and Sentence)
(Optional)
(FNFL)

The court imposes upon the defendant an exceptional sentence above [] within [] below the standard range based upon the following Findings of Fact and Conclusions of Law:

Findings of Fact

- I. The exceptional sentences on Counts ~~I-X~~ are justified by the following aggravating circumstances:
- (a) The defendant used his position of trust or confidence to facilitate the commission of the crimes.
 - (b) The offenses were part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.
 - (c) ~~That, under former RCW 9.94A.535 in effect at the time of the offenses, the defendant's multiple current offenses, combined with his high offender score, would otherwise result in there being no additional penalty for some of his current offenses; the operation of the multiple offense policy of RCW 9.94A.589 would result in a presumptive sentence that is clearly too lenient in light of the purpose of the SRA; this conclusion applies only to the determination of whether the current offenses should be served concurrently or consecutively and is not being applied to adjust for the effect of prior felony convictions on calculation of the presumptive sentence.~~

Does not apply

The grounds listed in the preceding paragraph, taken together or considered individually, constitute sufficient cause to impose the exceptional sentence. This court would impose the same sentence if only one of the grounds listed in the preceding paragraph is valid.

II.

[Handwritten scribbles]

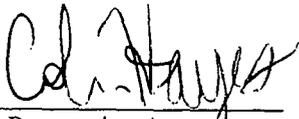
Conclusions of Law

- I. There are substantial and compelling reasons to impose an exceptional sentence pursuant to former RCW 9.94A.535 in effect at the time of the commission of the current offense.

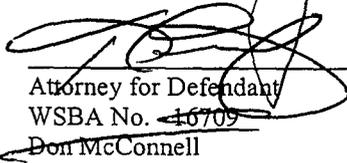
II.

[Handwritten scribbles]

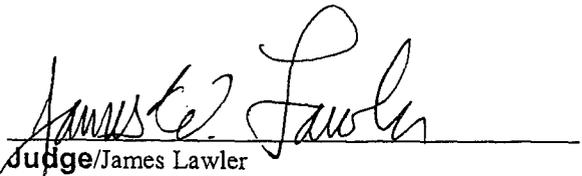
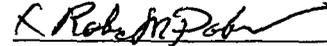
Dated: October 31, 2008



Deputy Prosecuting Attorney
WSBA No.
Colin P. Hayes



Attorney for Defendant
WSBA No. ~~46709~~
Don McConnell


Judge/James Lawler

Defendant
Robert Mark Dobyms



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

STATE OF WASHINGTON	]	Cause No.: 06-1-00148-1
]	
Plaintiff	]	JUDGEMENT AND SENTENCE (FELONY)
v.	]	APPENDIX H
DOBYNS, ROBERT	]	COMMUNITY PLACEMENT / CUSTODY
]	
Defendant]	
]	
DOC No. 319952]	

The court having found the defendant guilty of offense(s) qualifying for community placement, it is further ordered as set forth below.

COMMUNITY PLACEMENT/CUSTODY: Defendant additionally is sentenced on convictions herein, for each sex offense and serious violent offense committed on or after June 6, 1996 to community placement/custody for three years or up to the period of earned early release awarded pursuant to RCW 9.94A.150 (1) and (2) whichever is longer; and on conviction herein for an offense categorized as a sex offense or serious violent offense committed on or after July 1, 1990, but before June 6, 1996, to community placement for two years or up to the period of earned release awarded pursuant to RCW 9.94A.150 (1) and (2) whichever is longer; and on conviction herein for an offense categorized as a sex offense or a serious violent offense committed after July 1, 1988, but before July 1, 1990, assault in the second degree, any crime against a person where it is determined in accordance with RCW 9.94A.125 that the defendant or an accomplice was armed with a deadly weapon at the time of commission, or any felony under chapter 69.50 or 69.52 RCW, committed on or after July 1, 1988, to a one-year term of community placement.

Community placement/custody is to begin either upon completion of the term of confinement or at such time as the defendant is transferred to community custody in lieu of early release.

(a) **MANDATORY CONDITIONS:** Defendant shall comply with the following conditions during

06-1-00148-1
DOBYNS, ROBERT 319952
Page 1 of 3

the term of community placement/custody:

- (1) Report to and be available for contact with the assigned Community Corrections Officer as directed;
- (2) Work at Department of Corrections' approved education, employment, and/or community service;
- (3) Not consume controlled substances except pursuant to lawfully issued prescriptions;
- (4) While in community custody not unlawfully possess controlled substances;
- (5) Pay supervision fees as determined by the Department of Corrections;
- (6) Receive prior approval for living arrangements and residence location;
- (7) Defendant shall not own, use, or possess a firearm or ammunition when sentenced to community service, community supervision, or both (RCW 9.94A, 120 (13));
- (8) Notify community corrections officer of any change in address or employment; and
- (9) Remain within geographic boundary, as set fourth in writing by the Community Corrections Officer.

WAIVER: The following above-listed mandatory conditions are waived by the Court:

(b) **OTHER CONDITIONS:** Defendant shall comply with the following other conditions during the term of community placement / custody:

- 1) The defendant shall submit to a sexual deviancy evaluation with a therapist approved by the Community Corrections Officer, and follow all treatment recommendations.
- 2) The defendant shall have no contact with minor aged children without prior approval from the Community Corrections Officer and/or treatment provider.
- 3) The defendant shall hold no position of authority or trust involving minor aged children.
- 4) The defendant shall not enter into any relationship with persons who have minor aged children in their custody or care without prior approval of the Community Corrections Officer and/or treatment provider.
- 5) The defendant shall not possess or view sexually explicit material as defined by RCW 9.68.130, or other materials as deemed inappropriate by treatment provider.
- 6) The defendant shall not use or possess alcohol during the period of community custody.
- 7) The defendant shall have no contact with NLM for LIFE.
- 8) The defendant shall submit to polygraph testing and provide non-deceptive polygraphs at the request of the Community Corrections Officer and/or treatment provider, and the defendant shall submit to plethysmograph testing at the request of the treatment provider.

06-1-00148-1

DOBYNS, ROBERT 319952

Page 2 of 3

9) Must consent to allow home visits by DOC to monitor compliance with supervision. Home visits will include access for purposes of visual inspection of all areas of the residence in which the offender lives or has exclusive or joint control or access.

10/31/08
DATE

James W. Sawin
JUDGE, LEWIS COUNTY SUPERIOR COURT

Appendix B

Information

Received & Filed
LEWIS COUNTY, WASH
Superior Court

MAR 06 2006

By Kathy A. Brack, Clerk
Deputy

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR LEWIS COUNTY

STATE OF WASHINGTON,
Plaintiff,

vs.

ROBERT MARK DOBYNS,
DOB: 04/26/1957
Defendant.

No. 06-1-00148-1
INFORMATION

COUNT I - RAPE OF CHILD IN THE FIRST DEGREE

By this Information the Prosecuting Attorney for Lewis County accuses the defendant of the crime of RAPE OF CHILD IN THE FIRST DEGREE, which is a violation of RCW 9A.44.073, the maximum penalty for which is life in prison and a \$50,000 fine, in that defendant on or about and between August 01, 1999, and August 31, 2001, in Lewis County, Washington, then and there did engage in sexual intercourse with and was at least twenty four months older than N.L.M., DOB: 09/20/1989, a person who was less than twelve years of age and not married to the defendant; against the peace and dignity of the State of Washington.

COUNT II - RAPE OF CHILD IN THE FIRST DEGREE

And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of the crime of RAPE OF CHILD IN THE FIRST DEGREE, which is a violation of RCW 9A.44.073, the maximum penalty for which is life in prison and a \$50,000 fine, in that defendant on or about and between August 01, 1999, and August 31, 2001, in
INFORMATION

1 Lewis County, Washington, then and there did engage in sexual
2 intercourse with and was at least twenty four months older than
3 N.L.M., DOB: 09/20/1989, a person who was less than twelve years
4 of age and not married to the defendant; against the peace and
5 dignity of the State of Washington.

6
7
8 **COUNT III - RAPE OF CHILD IN THE FIRST DEGREE**

9 And I, the Prosecuting Attorney aforesaid, further do accuse
10 the defendant of the crime of RAPE OF CHILD IN THE FIRST DEGREE,
11 which is a violation of RCW 9A.44.073, the maximum penalty for
12 which is life in prison and a \$50,000 fine, in that defendant on
13 or about and between August 01, 1999, and August 31, 2001, in
14 Lewis County, Washington, then and there did engage in sexual
15 intercourse with and was at least twenty four months older than
16 N.L.M., DOB: 09/20/1989, a person who was less than twelve years
17 of age and not married to the defendant; against the peace and
18 dignity of the State of Washington.

19
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21 **COUNT IV - CHILD MOLESTATION IN THE FIRST DEGREE**

22 And I, the Prosecuting Attorney aforesaid, further do accuse
23 the defendant of the crime of CHILD MOLESTATION IN THE FIRST
DEGREE, which is a violation of RCW 9A.44.083, the maximum
penalty for which is life in prison and a \$50,000 fine, in that
defendant on or about and between August 01, 1999, and August 31,
2001, in Lewis County, Washington, then and there being at least
36 months older than N.L.M., did have sexual contact with N.L.M.,
DOB: 09/20/1989, who was less than 12 years of age and not
married to the defendant; against the peace and dignity of the
State of Washington.

COUNT V - CHILD MOLESTATION IN THE FIRST DEGREE

1 And I, the Prosecuting Attorney aforesaid, further do accuse
2 the defendant of the crime of CHILD MOLESTATION IN THE FIRST
3 DEGREE, which is a violation of RCW 9A.44.083, the maximum
4 penalty for which is life in prison and a \$50,000 fine, in that
5 defendant on or about and between August 01, 1999, and August 31,
6 2001, in Lewis County, Washington, then and there being at least
7 36 months older than N.L.M., did have sexual contact with N.L.M.,
8 DOB: 09/20/1989, who was less than 12 years of age and not
9 married to the defendant; against the peace and dignity of the
10 State of Washington.

COUNT VI - RAPE OF CHILD IN THE SECOND DEGREE

11 And I, the Prosecuting Attorney aforesaid, further do accuse
12 the defendant of the crime of RAPE OF CHILD IN THE SECOND DEGREE,
13 which is a violation of RCW 9A.44.076, the maximum penalty for
14 which is life in prison and a \$50,000 fine, in that defendant on
15 or about and between September 20, 2001, and December 31, 2002,
16 in Lewis County, Washington, then and there did engage in sexual
17 intercourse with and was at least thirty six months older than
18 N.L.M., DOB: 09/20/1989, a person who was at least twelve years
19 of age but less than fourteen years of age and not married to the
20 defendant; against the peace and dignity of the State of
21 Washington.

COUNT VII - RAPE OF CHILD IN THE SECOND DEGREE

22 And I, the Prosecuting Attorney aforesaid, further do accuse
23 the defendant of the crime of RAPE OF CHILD IN THE SECOND DEGREE,
which is a violation of RCW 9A.44.076, the maximum penalty for
which is life in prison and a \$50,000 fine, in that defendant on
or about and between September 20, 2001, and December 31, 2002,
in Lewis County, Washington, then and there did engage in sexual
INFORMATION

intercourse with and was at least thirty six months older than N.L.M., DOB: 09/20/1989, a person who was at least twelve years of age but less than fourteen years of age and not married to the defendant; against the peace and dignity of the State of Washington.

COUNT VIII - RAPE OF CHILD IN THE SECOND DEGREE

And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of the crime of RAPE OF CHILD IN THE SECOND DEGREE, which is a violation of RCW 9A.44.076, the maximum penalty for which is life in prison and a \$50,000 fine, in that defendant on or about and between September 20, 2001, and December 31, 2002, in Lewis County, Washington, then and there did engage in sexual intercourse with and was at least thirty six months older than N.L.M., DOB: 09/20/1989, a person who was at least twelve years of age but less than fourteen years of age and not married to the defendant; against the peace and dignity of the State of Washington.

COUNT IX - RAPE OF CHILD IN THE SECOND DEGREE

And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of the crime of RAPE OF CHILD IN THE SECOND DEGREE, which is a violation of RCW 9A.44.076, the maximum penalty for which is life in prison and a \$50,000 fine, in that defendant on or about and between September 20, 2001, and December 31, 2002, in Lewis County, Washington, then and there did engage in sexual intercourse with and was at least thirty six months older than N.L.M., DOB: 09/20/1989, a person who was at least twelve years of age but less than fourteen years of age and not married to the defendant; against the peace and dignity of the State of Washington.

COUNT X - RAPE OF CHILD IN THE SECOND DEGREE

1 And I, the Prosecuting Attorney aforesaid, further do accuse
2 the defendant of the crime of RAPE OF CHILD IN THE SECOND DEGREE,
3 which is a violation of RCW 9A.44.076, the maximum penalty for
4 which is life in prison and a \$50,000 fine, in that defendant on
5 or about and between September 20, 2001, and December 31, 2002,
6 in Lewis County, Washington, then and there did engage in sexual
7 intercourse with and was at least thirty six months older than
8 N.L.M., DOB: 09/20/1989, a person who was at least twelve years
9 of age but less than fourteen years of age and not married to the
10 defendant; against the peace and dignity of the State of
11 Washington.

12 Dated: 3/6/2006

JEREMY RANDOLPH
Prosecuting Attorney

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By:


TERRI J. GALLFUS, WSBA# 30489
Deputy Prosecuting Attorney

DEFENDANT INFORMATION

NAME: ROBERT MARK DOBYNS		DOB: 04/26/1957						
ADDRESS: 184 PIER RD		CITY: CHEHALIS						
STATE: WA		ZIP CODE: 98532		PHONE #(s):				
SSN:		SID:		FBI:		LEA#: 06A-3221		
DRIV. LIC. NO.		DL ST	SEX: M	RACE:	HGT: 5'10"	WGT: 160	EYES: GRN	HAIR: BRN
OTHER IDENTIFYING INFORMATION:								

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INFORMATION

Appendix C

Second Amended Information

COUNT II - RAPE OF CHILD IN THE FIRST DEGREE

And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of the crime of RAPE OF CHILD IN THE FIRST DEGREE, which is a violation of RCW 9A.44.073, the maximum penalty for which is life in prison and a \$50,000 fine, in that defendant on or about and between August 1, 1999, and August 31, 2001, in Lewis County, Washington, then and there did engage in sexual intercourse with and was at least twenty four months older than N.L.M., DOB: 09/20/1989, a person who was less than twelve years of age and not married to the defendant; furthermore, the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time; and/or the defendant used his position of trust or confidence to facilitate the commission of the current offense; against the peace and dignity of the State of Washington.

COUNT III - RAPE OF CHILD IN THE FIRST DEGREE

And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of the crime of RAPE OF CHILD IN THE FIRST DEGREE, which is a violation of RCW 9A.44.073, the maximum penalty for which is life in prison and a \$50,000 fine, in that defendant on or about and between August 1, 1999, and August 31, 2001, in Lewis County, Washington, then and there did engage in sexual intercourse with and was at least twenty four months older than N.L.M., DOB: 09/20/1989, a person who was less than twelve years of age and not married to the defendant; furthermore, the offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time; and/or the defendant used his position of trust or confidence to facilitate the commission of the current offense; against the peace and dignity of the State of Washington.

COUNT IV - CHILD MOLESTATION IN THE FIRST DEGREE

And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of the crime of CHILD MOLESTATION IN THE FIRST DEGREE, which is a violation of RCW 9A.44.083, the maximum penalty for which is life in prison and a \$50,000 fine, in that defendant on or about and between August 1, 1999, and August 31, 2001, in Lewis County, Washington, then and there being at least 36 months older than N.L.M., did

SECOND AMENDED
INFORMATION

1 have sexual contact with N.L.M., DOB: 09/20/1989, who was less than 12 years of age
2 and not married to the defendant; furthermore, the offense was part of an ongoing
3 pattern of sexual abuse of the same victim under the age of eighteen years manifested
4 by multiple incidents over a prolonged period of time; and/or the defendant used his
5 position of trust or confidence to facilitate the commission of the current offense;
6 against the peace and dignity of the State of Washington.

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14 **COUNT V - CHILD MOLESTATION IN THE FIRST DEGREE**

15 And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of
16 the crime of CHILD MOLESTATION IN THE FIRST DEGREE, which is a violation of
17 RCW 9A.44.083, the maximum penalty for which is life in prison and a \$50,000 fine, in
18 that defendant on or about and between August 1, 1999, and August 31, 2001, in Lewis
19 County, Washington, then and there being at least 36 months older than N.L.M., did
20 have sexual contact with N.L.M., DOB: 09/20/1989, who was less than 12 years of age
21 and not married to the defendant; furthermore, the offense was part of an ongoing
22 pattern of sexual abuse of the same victim under the age of eighteen years manifested
23 by multiple incidents over a prolonged period of time; and/or the defendant used his
position of trust or confidence to facilitate the commission of the current offense;
against the peace and dignity of the State of Washington.

14 **COUNT VI - RAPE OF CHILD IN THE SECOND DEGREE**

15 And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of
16 the crime of RAPE OF CHILD IN THE SECOND DEGREE, which is a violation of RCW
17 9A.44.076, the maximum penalty for which is life in prison and a \$50,000 fine, in that
18 defendant on or about and between September 20, 2001, and December 31, 2002, in
19 Lewis County, Washington, then and there did engage in sexual intercourse with and
20 was at least thirty six months older than N.L.M., DOB: 09/20/1989, a person who was at
21 least twelve years of age but less than fourteen years of age and not married to the
22 defendant; furthermore, the offense was part of an ongoing pattern of sexual abuse of
23 the same victim under the age of eighteen years manifested by multiple incidents over
a prolonged period of time; and/or the defendant used his position of trust or confidence
to facilitate the commission of the current offense; against the peace and dignity of the

SECOND AMENDED
INFORMATION

State of Washington.

COUNT VII - RAPE OF CHILD IN THE SECOND DEGREE

1 And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of
2 the crime of RAPE OF CHILD IN THE SECOND DEGREE, which is a violation of RCW
3 9A.44.076, the maximum penalty for which is life in prison and a \$50,000 fine, in that
4 defendant on or about and between September 20, 2001, and December 31, 2002, in
5 Lewis County, Washington, then and there did engage in sexual intercourse with and
6 was at least thirty six months older than N.L.M., DOB: 09/20/1989, a person who was at
7 least twelve years of age but less than fourteen years of age and not married to the
8 defendant; furthermore, the offense was part of an ongoing pattern of sexual abuse of
9 the same victim under the age of eighteen years manifested by multiple incidents over
10 a prolonged period of time; and/or the defendant used his position of trust or confidence
11 to facilitate the commission of the current offense; against the peace and dignity of the
12 State of Washington.

COUNT VIII - RAPE OF CHILD IN THE SECOND DEGREE

11 And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of
12 the crime of RAPE OF CHILD IN THE SECOND DEGREE, which is a violation of RCW
13 9A.44.076, the maximum penalty for which is life in prison and a \$50,000 fine, in that
14 defendant on or about and between September 20, 2001, and December 31, 2002, in
15 Lewis County, Washington, then and there did engage in sexual intercourse with and
16 was at least thirty six months older than N.L.M., DOB: 09/20/1989, a person who was at
17 least twelve years of age but less than fourteen years of age and not married to the
18 defendant; furthermore, the offense was part of an ongoing pattern of sexual abuse of
19 the same victim under the age of eighteen years manifested by multiple incidents over
20 a prolonged period of time; and/or the defendant used his position of trust or confidence
21 to facilitate the commission of the current offense; against the peace and dignity of the
22 State of Washington.

COUNT IX - RAPE OF CHILD IN THE SECOND DEGREE

23 And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of
the crime of RAPE OF CHILD IN THE SECOND DEGREE, which is a violation of RCW

SECOND AMENDED
INFORMATION

1 9A.44.076, the maximum penalty for which is life in prison and a \$50,000 fine, in that
2 defendant on or about and between September 20, 2001, and December 31, 2002, in
3 Lewis County, Washington, then and there did engage in sexual intercourse with and
4 was at least thirty six months older than N.L.M., DOB: 09/20/1989, a person who was at
5 least twelve years of age but less than fourteen years of age and not married to the
6 defendant; furthermore, the offense was part of an ongoing pattern of sexual abuse of
7 the same victim under the age of eighteen years manifested by multiple incidents over
8 a prolonged period of time; and/or the defendant used his position of trust or confidence
9 to facilitate the commission of the current offense; against the peace and dignity of the
10 State of Washington.

11 **COUNT X - RAPE OF CHILD IN THE SECOND DEGREE**

12 And I, the Prosecuting Attorney aforesaid, further do accuse the defendant of
13 the crime of RAPE OF CHILD IN THE SECOND DEGREE, which is a violation of RCW
14 9A.44.076, the maximum penalty for which is life in prison and a \$50,000 fine, in that
15 defendant on or about and between September 20, 2001, and December 31, 2002, in
16 Lewis County, Washington, then and there did engage in sexual intercourse with and
17 was at least thirty six months older than N.L.M., DOB: 09/20/1989, a person who was at
18 least twelve years of age but less than fourteen years of age and not married to the
19 defendant; furthermore, the offense was part of an ongoing pattern of sexual abuse of
20 the same victim under the age of eighteen years manifested by multiple incidents over
21 a prolonged period of time; and/or the defendant used his position of trust or confidence
22 to facilitate the commission of the current offense; against the peace and dignity of the
23 State of Washington.

Dated: 6/13/2008

L. MICHAEL GOLDEN
Prosecuting Attorney

By:


COLIN P. HAYES, WSBA# 35387 18685
Deputy Prosecuting Attorney

SECOND AMENDED
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DEFENDANT INFORMATION								
NAME: ROBERT MARK DOBYNS				DOB: 04/26/1957				
ADDRESS: 184 PIER RD				CITY: CHEHALIS				
STATE: WA		ZIP CODE: 98532		PHONE #(s):				
SSN:		SID:		FBI:		LEA#: 06A-3221		
DRIV. LIC. NO.		DL	SEX: M	RACE: W	HGT: 5'10"	WGT: 160	EYES: GRN	HAIR: BRN
OTHER IDENTIFYING INFORMATION:								

SECOND AMENDED
INFORMATION

Appendix D

Motion and Affidavit for Order Allowing Defense Access to
Reports, Notes and Person Interviews and/or Depositions

SUPERIOR COURT
LEWIS COUNTY, WASH
REC'D & FILED

2007 OCT -1 PM 1:46

KATHLEEN BRANNON CLERK

BY [Signature]
CLERK

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF LEWIS

STATE OF WASHINGTON,	)	NO. 06-1-00148-1
)	
Plaintiff,	)	MOTION AND AFFIDAVIT
	)	FOR ORDER ALLOWING
vs.	)	DEFENSE ACCESS TO
	)	REPORTS, NOTES AND
ROBERT DOBYNS,	)	PERSONAL INTERVIEWS
	)	AND/OR DEPOSITIONS
Defendant.)	

I. MOTION

COMES NOW the defendant, ROBERT DOBYNS by and through his attorney of record, DON A. McCONNELL of the Law Offices of McCONNELL, MEYER & ASSOCIATES, L.L.P. and requests the court for an order requiring all notes, reports, files and documentations of (1) RENATE STAROFF, (2) DR. JESSICA ROBERTS, and (3) DR. LILLY LO, involving NICHOLE MODROW and all documentation that may include statements and/or interviews, comments of MARY MODROW. Finally, any and all notes or contacts with the state of Washington in regard to the above-captioned case in the possession of the prosecutor from prior prosecutors or victims advocates of interviews

McCONNELL, MEYER & ASSOCIATES, L.L.P.

ATTORNEYS AT LAW
207 WEST MAIN STREET
CENTRALIA, WA 98531
PHONE (360)736-9736
FAX (360)736-2004

MOTION AND AFFIDAVIT FOR ORDER
ALLOWING DEFENSE ACCESS TO
REPORTS, NOTES AND PERSONAL
INTERVIEWS AND/OR DEPOSITIONS

1 with state's witnesses.

2 The Defendant also requests an order setting a
3 deposition of both MARY MODROW and NICHOLE MODROW at the Law
4 Offices of McCONNELL, MEYER & ASSOCIATES, L.L.P. to be set by
5 defense counsel.

6 Also, the defense requests an order requiring the state
7 and/or NICHOLE MODROW and MARY MODROW, to disclose any and
8 all counselors in Spokane that NICHOLE MODROW has used since
9 her move to Spokane after this case originated (i.e. names,
10 addresses, phone numbers). Finally, the defense requests the
11 Court order NICHOLE MODROW and MARY MODROW to sign releases
12 of information so defense can obtain records.

13 II. FACTS

14 MR. DOBYNS waived speedy trial on July 5, 2007, due to
15 the new attorney being on board, and discovery issues.
16 Further, we had been told by several of the prosecutors
17 differing things regarding whether SSOSA or plea offers would
18 be forthcoming and/or changed. We could not adequately advise
19 our client if a plea offer was available. We informed the
20 state we needed counseling notes. MR. MEAGER was not on the
21 case long enough to be in control of anything as I understand
22 it.

23 Since that date, we have tried to continue discovery.
24 We have attempted to contact the alleged victim. We have
25 attempted to obtain discovery and interviews from counseling
26

1 in Chehalis. Further, we have attempted to find out about
2 any new counselors in Spokane. We have not been successful
3 in obtaining interviews or copies from ccounselors on the
4 state's Witness List. Further, our Witness List (supplied to
5 us by the State prior to MR. HAYES) did not tell us who the
6 doctors alleged to be called were. We complained and were
7 sent a Witness List purporting to be sent to us in February,
8 2007. We have supplied the only Witness List we ever had
9 until August 14, 2007.

10 On August 15, 2007, we were contacted by attorney WADE
11 SAMUELSON, who informed us that he had advised MS. RENATE
12 STARROFF that she did not have to comply with our Subpoena
13 Duces Tecum for records. We had been in contact with RENATE
14 STAROFF and she had informed my staff (NATALIE HELLEM) that
15 she would go through her file and get back to us. This was
16 told to my staff on August 14, 2007.

17 We have not received any reports from her, nor have we
18 been informed of any new counselors in Spokane. The alleged
19 victim was, as we understand it, set up for counseling in
20 Spokane when she left the local area. Now it seems she has
21 been seeing a counselor in Spokane. Although we were
22 informed we would receive the information on the new
23 counselor (etc.), from prior counsel, we have not received
24 any information at all. We are now told that if we proceed
25 to attempt to subpoena NICHOLE'S medical records, the state
26

1 will file motions to stop (see letter of COLIN HAYES).

2 We received a faxed Amended Supplemental State's
3 Witness List on August 14, 2007 which I had not received
4 prior to that date. This was in response to my requesting
5 the name and contact information for whatever "physician" was
6 on the Witness List that I actually did receive in this case,
7 prior to August 14, 2007. (See Exhibit A). The Court can
8 see where the prosecutor wrote my name on at the top. On
9 August 14, 2007, I received Exhibit B. As the court can see,
10 I had not received this prior to August 14, 2007. We served
11 a Subpoena Duces Tecum to MS. RENATE STARROFF on July 31,
12 2007, and was contacted by MR. SAMUELSON on August 15, 2007.

13 We had been in contact with MS. STAROFF, and understood she
14 was going over her files. Then we received Exhibit C, a
15 letter from WADE SAMUELSON, after a phone call with him.

16 As stated above, MR. SAMUELSON informed me, by
17 telephone, that he had advised his client not to provide me
18 the requested documents. I then, on August 15, 2007, received
19 the attached letter (Exhibit C).

20 On August 17, 2007, we had been scheduled by the
21 prosecutor to meet at their office and conduct an interview
22 with the alleged victim and her mother. We arrived and were
23 told by MR. BAUM, who was standing in for MR. HAYES, that,
24 "they don't want to talk to you - their adanant." We were
25 also told that, "I do not want to get into the middle of
26

1 this, I'll go back and see what their position is about
2 signing releases." MR. BAUM returned and informed us that
3 they, "would not talk to us and would not sign anything."
4 (emphasis added). We had prepared the requested releases
5 (see Exhibit D).

6 On August 20, 2007, my office received a message on the
7 voice mail from MR. HAYES that he spoke with the alleged
8 victim in this case. He informed us that the alleged victim
9 is going to be meeting with DETECTIVE BUSTER, and that he has
10 new details about the alleged incidents over the last few
11 years.

12 Then we were told to set up an interview with "ANNE"
13 and contact "CHRIS" (BAUM - I assume) if we have any further
14 questions.

15 MR. DOBYNS has been forced to waive speedy trial in
16 this matter on July 5, 2007, due to the state having had a
17 change to its 4th Prosecutor, MR. HAYES. Although this was
18 not a reflection on MR. HAYES, who simply had this case
19 dumped on him, it is not fair to the Defendant to continue to
20 shift and change discovery, plea offers (ways to resolve this
21 matter short of Trial) and now new information, which since
22 March 6, 2006, has not been forthcoming. It is now a clear
23 that the present prosecutor, due to his recent letter of
24 September 18, 2007 (see Exhibit E), is going to attempt to
25 thwart discovery.
26

1 The defense has been entitled to full discovery and
2 cooperation in obtaining discoverable materials. We were
3 promised by two (2) separate prosecutors that we would
4 receive the information regarding counselors and meetings
5 with others. To date, we have received nothing. Now the
6 state is attempting to thwart discovery efforts and
7 interviews/records.

8 Even though we did not like it, we were forced to seek
9 a continuance so that we could obtain reliable discovery, any
10 new issues, and statements made to others to include
11 counseling materials, as well as interview for new materials,
12 due to the continued problems requiring continuances.

13 The State had put the counselor on their Witness List,
14 but now we are being told we cannot obtain discovery without
15 MARY MODROW'S or NICHOLE MODROW'S approval, which they
16 refuse.

17 Finally, now after all this time (March 6, 2007 -
18 filing of information) the State informs us in a phone
19 message that they have new information from the alleged
20 victim. Now, we are told that three (3) of the state's
21 witnesses are not to be called (Exhibit E).

22 MR. DOBYNS is entitled to have all of the information
23 so we can conduct a real defense on his behalf.

24 If the court looks at the record of this case, we have
25 simply attempted to obtain discovery we are entitled to.
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III. BASIS

This Motion is based upon the forgoing factual basis, Criminal Rules, Washington Constitution, United States Constitution and the files and Memorandum in this case.

DATED this 24 day of September, 2007.

McCONNELL, MEYER & ASSOCIATES, L.L.P.

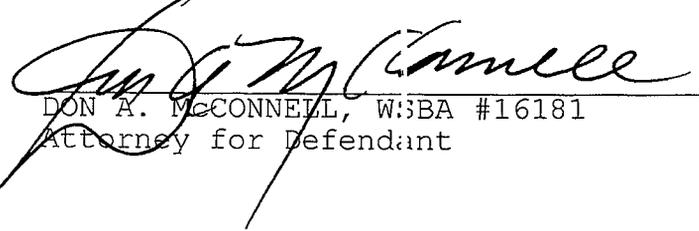

DON A. McCONNELL, W:3BA #16181
Attorney for Defendant

EXHIBIT A

McConnell

Witness List

See police reports for expected testimony.

State v. Robert Mark Dobyns

Cause Number: 06-1-148-1

Charges: Rape of a Child in the First Degree / Child Molest 1st

Detective Carl Buster
Centralia PD

Detective Chris Fitzgerald
Centralia PD

Officer Compton
Centralia PD

Renetta Starroff 748-6580
Counselor

Mary Modrow ~~235-8998~~
PMB 3788
PO Box 257
Olympia, WA 98507

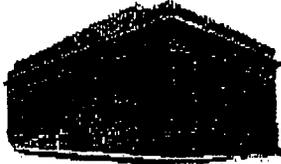
N.L.M. DOB 5-20-89 235-8998
PMB 3788
PO Box 257
Olympia, WA 98507

Physician
Providence Medical Center
Portland 800-833-8899

EXHIBIT B

"Equal Justice For All"

Lewis County Prosecuting Attorney



Lewis County Courthouse - Chehalis WA

Michael Golden
Prosecuting Attorney

Douglas E. Jensen
Chief Civil Deputy

Jason Richards
Chief Criminal Deputy

FAX COVER SHEET

DATE: August 14, 2007
RECIPIENT: Don McConnell
AGENCY/COMPANY: McConnell, Meyer & Associates
FAX NUMBER: 360-736-2004
DOCUMENTS SENT: Amended/Supplemental/Witness List
Re: ROBERT MARK DOBYNS
SENDING PARTY: Donna Ross for Colin P. Hayes

Telephone: 360/740-1240 FAX: 360/740-1497

Number of pages transmitted not including the cover sheet 2

[] Original(s) to be mailed [X] FAX transmission, only

If there is any difficulty in receiving this transmission, please contact the sending party at 360/740-1240.

COMMENTS:

NOTE: The Lewis County Prosecuting Attorney will not accept service by facsimile transmission unless by prior arrangement with the designated prosecuting attorney. The information contained in this facsimile is attorney privileged and confidential information intended only for use by the individual or entity named above. If the reader of this message is not the intended recipient, or the employee or agent responsible to deliver it to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. If you have received this communication in error, immediately notify this office to effect its return and to arrange for postage reimbursement.

MCCARY

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IN THE SUPERIOR COURT OF STATE OF WASHINGTON
FOR LEWIS COUNTY

STATE OF WASHINGTON,)	
	)	No. 06-1-00148-1
Plaintiff,)	
	)	AMENDED/SUPPLEMENTAL
	)	STATE'S WITNESS LIST
vs.)	
ROBERT MARK DOBYNS,)	
Defendant.)	

COMES NOW the Plaintiff, State of Washington, by and through its Deputy, Terri J. Gailfus, and gives notice of the following witnesses whose testimony may be presented at trial. The testimony of the below-listed witnesses is anticipated to be consistent with the reports already provided to the defense. Any further witnesses will be disclosed pursuant to CrR 4.7.

- Detective Carl Buster 360-330-7680
Centralia Police Department
(LEA 06A-3221)
- Detective Chris Fitzgerald 360-330-7680
Centralia Police Department
(LEA 06A-3221)
- Officer Compton 360-330-7680
Centralia Police Department
(LEA 06A-3221)

AMENDED/SUPPLEMENTAL
STATE'S WITNESS LIST

DM 2-2-07

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Renetta Staroff - Counselor 360-748-6580
Northwest Family Therapy
1034 South Market
Chehalis, WA 98532

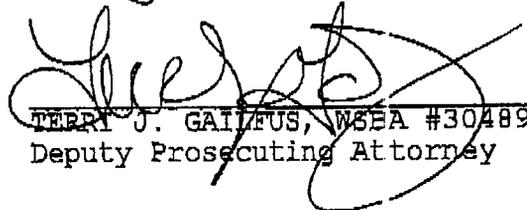
Mary Modrow 360-235-8998
PMB 3788
PO BOX 257
Olympia, WA 98507

N.L.M. (DOB: 5/20/89)

Dr. Jessica Roberts, MD. 503-215-6018
Providence Medical Center 800-833-8899
4805 NE Glisan St
Portland, OR 97213-2967

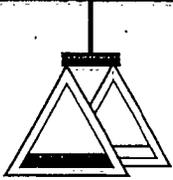
Dr. Lilly Lo 360-736-6778
Northwest Pediatrics
1911 Cooks Hill Rd.
Centralia, WA 98531

Dated this 21 day of Feb, 2007.


TERRY J. GALFUS, WSEA #30489
Deputy Prosecuting Attorney

AMENDED/SUPPLEMENTAL
STATE'S WITNESS LIST

EXHIBIT C



Olson Althaus Lawler Samuelson & Rayan

Attorneys and Counselors at Law

114 West Magnolia, P.O. Box 210, Centralia, WA 98531 Phone: 360-736-301 Fax: 360-736-4802

August 15, 2007

McConnell Meyer & Associates LLP

Mr. Don McConnell
Attorney at Law
207 W. Main Street
Centralia, WA 98531

ALG 16 2007

Received

RE: *State of Washington v. Robert Mark Dobyms*
Lewis County Superior Court Cause No. 06-1-00148-1

Dear Mr. McConnell:

As you know from today's telephone conversation, Renate Staroff is unable to deliver any of her records concerning Nikolinka L. Modrow because she has received no verification that Ms. Modrow has been informed of your attempt to have Ms. Staroff disclose these records. RCW 70.02.060 requires that advance notice be provided to the patient and that the patient have an opportunity to seek a protective order. If you have any questions for either Ms. Staroff or myself, please do not hesitate to contact me. I am happy to speak with you.

Sincerely yours,

OLSON ALTHAUSER LAWLER
SAMUELSON & RAYAN

**SENT WITHOUT SIGNATURE
TO AVOID DELAY**

Wade S. Samuelson

WSS: alb
cc: client

~~SUPERIOR COURT
LEWIS COUNTY, WASH.
REC'D & FILED~~

~~2007 OCT 11 PM 1:47~~

~~KATHY BRADY, CLERK~~

~~BY _____
DEPUTY~~

EXHIBIT D

MEDICAL AUTHORIZATION

TO:

RE: NIKOLINKA (NICHOLE) L. MODROW (DOB: 9/20/1989).

The undersigned hereby requests and authorizes the above-named provider to furnish to my attorneys at the following address any and all information, records or opinions which they may request:

**McCONNELL, MEYER & ASSOCIATES, L.L.P.
207 West Main
Centralia, Washington 98531**

This authorization includes, but is not limited to, the release of all medical, mental health, substance abuse treatment, and psychiatric reports, evaluations, diagnoses, prognoses, medical histories, notes, x-rays, photographs, prescriptions, chart and other results of testing, and bills (whether payable by myself or by third parties, or other insurance). I hereby give my express consent to release any health care information relating to testing, diagnosis, and/or treatment for HIV (AIDS) virus and sexually transmitted diseases. This authorization also includes the release of findings and reports by police, administrative agencies, or any other person or source, whether public or private.

You are further requested not to disclose any information concerning me to any insurance adjuster, investigator, law enforcement officer, or any other person without my express written consent or that of my attorney.

In furtherance of this authorization, I do hereby waive all provisions of the law and privileges relating to the disclosure hereby authorized. This authorization is subject to revocation at any time except to the extent that the information has already been released and will expire in 90 days from this date.

I specifically revoke any and all other authorizations to release such information previously executed by me.

My Rights:

I understand I do not have to sign this authorization in order to obtain health care benefits (treatment, payment or enrollment). I may revoke this authorization in writing. I understand that once the health information I have authorized to be disclosed reaches the noted recipient, that person or organization may re-disclose it, at which time it may no longer be protected under Privacy laws.

A photocopy of this authorization shall be as valid as the original.

DATE: _____

Signature

NIKOLINKA (NICHOLE) L. MODROW
Printed Name

Social Security No. _____

Date of Birth: 9/20/1989

MEDICAL AUTHORIZATION

TO: Renate Starroff, MA

RE: NIKOLINKA (NICHOLE) L. MODROW (DOB: 9/20/1989).

The undersigned hereby requests and authorizes the above-named provider to furnish to my attorneys at the following address any and all information, records or opinions which they may request:

McCONNELL, MEYER & ASSOCIATES, L.L.P.
207 West Main
Centralia, Washington 98531

This authorization includes, but is not limited to, the release of all medical, mental health, substance abuse treatment, and psychiatric reports, evaluations, diagnoses, prognoses, medical histories, notes, x-rays, photographs, prescriptions, chart and other results of testing, and bills (whether payable by myself or by third parties, or other insurance). I hereby give my express consent to release any health care information relating to testing, diagnosis, and/or treatment for HIV (AIDS) virus and sexually transmitted diseases. This authorization also includes the release of findings and reports by police, administrative agencies, or any other person or source, whether public or private.

You are further requested not to disclose any information concerning me to any insurance adjuster, investigator, law enforcement officer, or any other person without my express written consent or that of my attorney.

In furtherance of this authorization, I do hereby waive all provisions of the law and privileges relating to the disclosure hereby authorized. This authorization is subject to revocation at any time except to the extent that the information has already been released and will expire in 90 days from this date.

I specifically revoke any and all other authorizations to release such information previously executed by me.

My Rights:

I understand I do not have to sign this authorization in order to obtain health care benefits (treatment, payment or enrollment). I may revoke this authorization in writing. I understand that once the health information I have authorized to be disclosed reaches the noted recipient, that person or organization may re-disclose it, at which time it may no longer be protected under Privacy laws.

A photocopy of this authorization shall be as valid as the original.

DATE: _____

Signature

NIKOLINKA (NICHOLE) L. MODROW

Printed Name

Social Security No. _____

Date of Birth: 9/20/1989 _____

MEDICAL AUTHORIZATION

TO:

RE: MARY MODROW

The undersigned hereby requests and authorizes the above-named provider to furnish to my attorneys at the following address any and all information, records or opinions which they may request:

McCONNELL, MEYER & ASSOCIATES, L.L.P.
207 West Main
Centralia, Washington 98531

This authorization includes, but is not limited to, the release of all medical, mental health, substance abuse treatment, and psychiatric reports, evaluations, diagnoses, prognoses, medical histories, notes, ex-rays, photographs, prescriptions, chart and other results of testing, and bills (whether payable by myself or by third parties, or other insurance). I hereby give my express consent to release any health care information relating to testing, diagnosis, and/or treatment for HIV (AIDS) virus and sexually transmitted diseases. This authorization also includes the release of findings and reports by police, administrative agencies, or any other person or source, whether public or private.

You are further requested not to disclose any information concerning me to any insurance adjuster, investigator, law enforcement officer, or any other person without my express written consent or that of my attorney.

In furtherance of this authorization, I do hereby waive all provisions of the law and privileges relating to the disclosure hereby authorized. This authorization is subject to revocation at any time except to the extent that the information has already been released and will expire in 90 days from this date.

I specifically revoke any and all other authorizations to release such information previously executed by me.

My Rights:

I understand I do not have to sign this authorization in order to obtain health care benefits (treatment, payment or enrollment). I may revoke this authorization in writing. I understand that once the health information I have authorized to be disclosed reaches the noted recipient, that person or organization may re-disclose it, at which time it may no longer be protected under Privacy laws.

A photocopy of this authorization shall be as valid as the original.

DATE: _____

Signature

MARY MODROW
Printed Name

Social Security No. _____

Date of Birth: _____

MEDICAL AUTHORIZATION

TO: Renate Starroff, MA

RE: MARY MODROW

The undersigned hereby requests and authorizes the above-named provider to furnish to my attorneys at the following address any and all information, records or opinions which they may request:

McCONNELL, MEYER & ASSOCIATES, L.L.P.
207 West Main
Centralia, Washington 98531

This authorization includes, but is not limited to, the release of all medical, mental health, substance abuse treatment, and psychiatric reports, evaluations, diagnoses, prognoses, medical histories, notes, x-rays, photographs, prescriptions, chart and other results of testing, and bills (whether payable by myself or by third parties, or other insurance). I hereby give my express consent to release any health care information relating to testing, diagnosis, and/or treatment for HIV (AIDS) virus and sexually transmitted diseases. This authorization also includes the release of findings and reports by police, administrative agencies, or any other person or source, whether public or private.

You are further requested not to disclose any information concerning me to any insurance adjuster, investigator, law enforcement officer, or any other person without my express written consent or that of my attorney.

In furtherance of this authorization, I do hereby waive all provisions of the law and privileges relating to the disclosure hereby authorized. This authorization is subject to revocation at any time except to the extent that the information has already been released and will expire in 90 days from this date.

I specifically revoke any and all other authorizations to release such information previously executed by me.

My Rights:

I understand I do not have to sign this authorization in order to obtain health care benefits (treatment, payment or enrollment). I may revoke this authorization in writing. I understand that once the health information I have authorized to be disclosed reaches the noted recipient, that person or organization may re-disclose it, at which time it may no longer be protected under Privacy laws.

A photocopy of this authorization shall be as valid as the original.

DATE: _____

Signature

MARY MODROW

Printed Name

Social Security No. _____

Date of Birth: _____

SUPERIOR COURT
LEWIS COUNTY, WASH
REC'D & FILED

2007 OCT -1 PM 1:46

KATHY BRACK, CLERK

BY _____
DEPUTY

EXHIBIT E

"Equal Justice For All"



Lewis County Courthouse - Chehalis WA

Lewis County Prosecuting Attorney

Michael Golden

Prosecuting Attorney

Douglas E. Jensen

Chief Civil Deputy

Jason Richards

Chief Criminal Deputy

September 18, 2007

Mr. Don McConnell
207 W. Main
Centralia, WA 98531

RE: State v. Robert Mark Dobyms, 06-1-148-1

Dear Mr. McConnell:

I am writing to notify you that I will not be calling Renetta Staroff or Dr. Jessica Roberts at trial and I will be removing both from my witness list. I am attempting to contact Dr. Lilly Lo and I anticipate removing her from my witness list as well. Nikole has been seeing a counselor in Spokane, but I have not spoken to the counselor nor do I intend to call the counselor as a witness. Accordingly, I do not see any remaining discovery issues regarding Nikole's medical records. If you continue to attempt to subpoena Nikole's medical records, I will file a motion to quash the subpoena duces tecum.

Regarding your request for a second victim interview, I have spoken with Mary Modrow. She indicated that the first interview you conducted with Nikole Modrow lasted approximately two hours. Your first interview with Mary Modrow lasted approximately one hour. Terri Gailfus has informed me that she believes that the only discovery that you did not have at the time of these interviews consisted of the medical records from Nikole's hospitalization in Oregon. At this time, neither Mary nor Nikole wish to be interviewed a second time. I also do not see any need for a second interview.

345 W. Main Street, 2nd Floor • Chehalis, WA 98532
(360) 740-1240 • Fax (360) 740-1497 • TDD (360) 740-1480

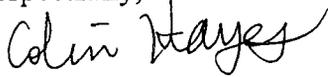
McCormell Meyer & Associates LLP
SEP 20 2007
Received

LEWIS COUNTY PROSECUTING ATTORNEY

Page 2 of 2

In regards to your witnesses, I have not received any documentation regarding the substance of their testimony. I also have incomplete contact information for your witnesses. I need this information as soon as you can provide it.

Respectfully,



Colin Hayes
Deputy Prosecuting Attorney

Appendix E

Defendant's Memorandum of Law

RE: Discovery and Depositions

SUPERIOR COURT
LEWIS COUNTY, WASH
REC'D & FILED

2007 OCT -1 PM 1:46

KATHY DREYER, CLERK

BY: *[Signature]*
DEPUTY

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF LEWIS

STATE OF WASHINGTON,	)	NO. 06-1-00148-1
)	
Plaintiff,	)	MEMORANDUM OF LAW
)	
vs.)	
)	
ROBERT DOBYNS,)	
)	
Defendant.)	

17 The Defendant is facing 20 to 26.5 years to life for
18 the charges pending. Further, the state is now requesting an
19 exceptional sentence for aggravating circumstances. The
20 defense has attempted to obtain compliance with discovery for
21 well over one and a half years.

22 Criminal Rule 4.7 requires the state to disclose to the
23 Defendant certain materials no later than the omnibus
24 hearing. These materials include:

- 25 (1) The names and addresses of persons whom the
26 prosecuting attorney intends to call as witnesses at the

MCCONNELL, MEYER & ASSOCIATES, L.L.P.
ATTORNEYS AT LAW
207 WEST MAIN STREET
CENTRALIA, WA 98531
PHONE (360) 736-9736
FAX (360) 736-2004

1 hearing or Trial, together with any written or recorded
2 statements and the substance of any oral statements of such
3 witnesses (emphasis added) CrR 4.7A(1)(i).

4 (2) Any reports or statements of experts made in
5 connection with the particular case, including results of
6 physical or mental examinations and scientific tests,
7 experiments or comparisons (emphasis added) CrR
8 4.7(A)(1)(IV).

9 Also, the Defendant, under CrR 4.7(D), can request and
10 designate (which we have) materials or information in the
11 knowledge, possession or control of other persons, which
12 would be discoverable if in the knowledge of the prosecuting
13 attorney, the prosecuting attorney shall attempt to cause
14 such materials or information to be made available to the
15 defendant (emphasis added) CrR 4.7(D).

16 The facts of this case as shown are quite the opposite
17 of the law. Here counsel, after having been told of
18 discovery issues the defense has had for well over one and a
19 half years, has decided to withdraw three (3) experts from
20 his witness list. Having this in mind, the court hopefully
21 will realize that the new prosecutor just supplied us with
22 the Witness List that was faxed to us on August 14, 2007. On
23 that list, there are three (3) experts. First, RENATE
24 STAROFF (counselor), DR. JESSICA ROBERTS, MD, and DR. LILLY
25 LO.

26 Now, after we have requested assistance from the state,
MCCONNELL, MEYER & ASSOCIATES, L.L.P.

1 we are sent a letter from the state informing us that they
2 will oppose any efforts on our part to obtain discovery.
3 Further, in an effort to stop our discovery, the state is now
4 taking the position that they will not call off their
5 witnesses (emphasis added), and will file a Motion to Quash
6 the Subpoena Duces Tecum.

7 The state now, it seems from Exhibit E, has information
8 that NICHOLE MODROW (and possibly her mother, MARY MODROW)
9 have been seeing a counselor in Spokane, Washington. Simply
10 because the state does not intend to call this person as a
11 witness, we have requested for well over a year the contact
12 information from the state of any and all counselors who
13 NICHOLE MODROW has met with. We believe this is entirely
14 discoverable material.

15 On another note, MR. ARMSTRONG, private investigator,
16 and myself were set to interview NICHOLE MODROW and her
17 mother, MARY MODROW on August 17, 2007. We were told to be
18 there, and we appeared. As stated in our earlier affidavit
19 for continuance, we did not receive the interview. MARY
20 MODROW and NICHOLE MODROW refused to meet with us, or sign
21 releases so we could obtain the counseling records or records
22 of the alleged experts on the witness list. Further, it had
23 been indicated to the defense that MS. MODROW had been coming
24 up with some new information about the case, and was going to
25 be interviewed by a detective.

26 On August 20, 2007, we received a phone message from
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1 the state informing us that DETECTIVE BUSTER would be meeting
2 with her on new information about alleged incidents that she
3 had not informed us of. We were told to contact the state
4 about resetting an interview. We were already in the process
5 of our Motion to Continue, so we waited until that was over
6 to reset the interviews.

7 Now, the state (see Exhibit E to the Motion) is again
8 taking a different position and denying us an interview. We
9 believe the Defendant has no choice but to request a
10 deposition of both MARY MODROW and NICHOLE MODROW.

11 The defense has no way of finding out any new
12 information (as we were told), nor can we obtain any
13 testimony regarding discoverable materials of counselors, or
14 the like.

15 The facts display that the state has continued to
16 attempt to disrupt the flow of discoverable material (see
17 Exhibits E and F to Motion). Now the state, after one and a
18 half or more years, has filed a Notice of Aggravating
19 Factors. Naturally, the state is entitled to do so, but on
20 the day after the discovery letter is unusual at best. We
21 believe this shows action tantamount to bad faith under the
22 discovery rules.

23 Under CrR 4.7(7), the court is given wide latitude in
24 ruling when a party (the state) has failed to comply with an
25 applicable discovery rule; to order a party to permit the
26 discovery of material and information not previously

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1 disclosed, grant a continuance, dismiss the action or enter
2 such other order as it deems just under the circumstances.

3 This court has already allowed a continuance, and
4 dismissal under case law is an extraordinary remedy (which is
5 probably not available under our facts and time for Trial).
6 The court can enter such other orders as it deems just under
7 the circumstances. The defense requests and order requiring
8 the full disclosure of the three (3) experts that the state
9 now intends not to call. Further, full disclosure of the
10 counselor(s) in Spokane or others not in Spokane sought/and
11 counseled with since the MODROW'S move to Spokane.

12 Finally, a deposition to be set for counsel at his
13 office, at MR. DOBYN'S expense of MARY MODROW and NICHOLE
14 MODROW.

15 There are reasons why discovery is fair. Under CrR
16 4.7(D), the defense has shown materiality (as well as it can
17 without appropriate discovery) for the preparation of its
18 defense.

19 Why would the state have three (3) experts and a
20 possible fourth in Spokane (or that area) and now take them
21 all off their Witness List? We are entitled to know what
22 they know to determine if exculpatory evidence is available
23 or has been.

24 Surely if the counselor, MS. RENATE STARROFF, was on
25 their Witness List, then they had to have a reason to put her
26 on there. We have been "stonewalled" in regard to her. This

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1 is by her, her attorney, and now the state (see Exhibit E to
2 Motion).

3 Also, the state is aware that we were entitled to re-
4 interview the MODROWS on new materials, as well as materials
5 not available to us at our first interview, which was not two
6 (2) hours long.

7 The state set one meeting on August 17, 2007, and told
8 us to reset the interviews shortly after that date. Further,
9 the state was told at our first interview we would need a
10 second one once we got the medical records. Now, they are
11 again changing their position. Why? What new information
12 was/is there? We should be able to interview at our own
13 expense if the state cannot get their witness to cooperate in
14 the form of interviews. We had informed the prosecutor at
15 the first interviews that we would need to ask follow up
16 questions after we got the Portland discovery. There was no
17 mention of a problem back then. There should not be one now.
18 Depositions are necessary

19 We believe if the Court reviews CrR 4.7(D)(2), we are
20 surely not at risk to anyone/any persons of physical harm;
21 intimidation (the state is the one that informed us of new
22 issues); bribery; economic reprisals; or unnecessary
23 annoyance or embarrassment resulting from such disclosure
24 which outweighs the usefulness of the disclosure to the
25 Defendant.

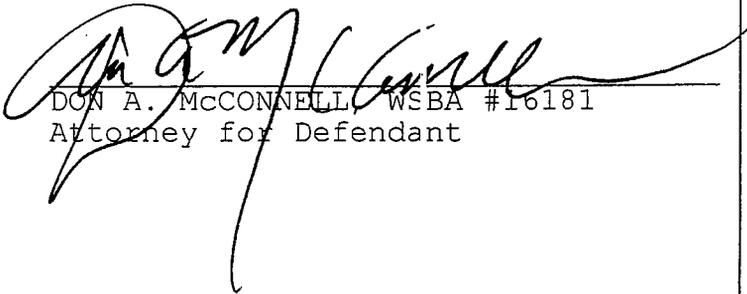
26 In conclusion, the defense, as stated above,
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1 respectfully requests the above disclosure and depositions
2 with MARY MODROW and NICHOLE MODROW and full disclosure by
3 order of the court from the state's three (3) expert
4 witnesses and what ever counselor is being seen or has been
5 seen in Spokane, or that area. The Court can simply order
6 the mother and alleged victim to sign the release so we can
7 obtain the requested discovery.

8 DATED this 26 day of September, 2007.

9 McCONNELL, MEYER & ASSOCIATES, L.L.P.

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DON A. McCONNELL WSBA #16181
Attorney for Defendant

Appendix F

Defendant's Motion to Suppress

SUPERIOR COURT
LEWIS COUNTY, WASH
REC'D & FILED

2007 OCT 18 Fri 2:32

KATHY BRACK, CLERK
BY 1057
DEPUTY

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SUPERIOR COURT OF WASHINGTON
COUNTY OF LEWIS

STATE OF WASHINGTON,)	NO. 06-1-00148-1
)	
Plaintiff,	)	MOTION TO SUPPRESS
)	
vs.)	
)	
ROBERT DOBYNS,)	
)	
Defendant.)	

COMES NOW the defendant, ROBERT DOBYNS, by and through his attorney of record, DON A. McCONNELL of the Law Offices of McCONNELL, MEYER & ASSOCIATES, L.L.P. and requests the court enter an order suppressing the telephone intercept calls to the Defendant, ROBERT DOBYNS, or any conversations which are recorded between MR. DOBYNS and/or the alleged victim, NICHOLE MODROW.

This Motion is based upon the Criminal Rules, Washington Constitution, United States Constitution and the files and Memorandum in this case.

DATED this 4 day of October, 2007.

McCONNELL, MEYER & ASSOCIATES, L.L.P.

Don A. McConnell
DON A. McCONNELL, WSBA #16181
Attorney for Defendant
McCONNELL, MEYER & ASSOCIATES, L.L.P.

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Appendix G

Memorandum in Support of Motion to Suppress

ORIGINAL

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SUPERIOR COURT
LEWIS COUNTY, WASH
REC'D & FILED

2007 FEB 27 2:32

KATYNE JACK, CLERK
BY [Signature]
DEPUTY

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

STATE OF WASHINGTON,	)	NO. 06-1-00148-1
)	
Plaintiff,	)	MEMORANDUM IN SUPPORT
	)	OF MOTION TO SUPPRESS
vs.)	
)	
ROBERT DOBYNS,)	
)	
Defendant.)	
)	

I. FACTS

The state alleges that on approximately February 26, 2007, officer COMPTON of Centralia Police Department was contacted by MARY MODROW (i.e. mother of NICHOLE MODROW - 16 year old female) regarding an allegation of sexual assault.

Allegedly, the girl informed her mother (MARY MODROW) while she was having dinner at a restaurant that she had been "hurt" by her mother's ex-boyfriend, ROBERT DOBYNS. The girl and mother were interviewed by DETECTIVE BUSTER and OFFICER PAT FITZGERALD, of the Centralia Police Department.

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1 Allegedly, when the girl was eight (8) or nine (9)
2 years old (seven or eight years before the interview) she was
3 being instructed in Tae Kwon Do lessons, taught by MR.
4 DOBYNS. Evidently, MARY MODROW (mother) began a romantic
5 relationship with MR. DOBYNS. Eventually, MR. DOBYNS moved
6 into a home with them in Lewis County, Washington.

7 It is alleged that the mother worked nights as a nurse.
8 It is further alleged that MR. DOBYNS would touch the girl
9 which eventually progressed into oral sex and the insertion
10 of his fingers into her vagina. The girl alleged that the
11 sexual activity began approximately three (3) months after he
12 moved into the house with the MODROWS. The girl further
13 alleged that it continued and escalated until approximately
14 three (3) months before he moved out. MR. DOBYNS was
15 present in approximately 1998 to 2002 (four (4) years, as
16 alleged by the girl). Allegedly, MR. DOBYNS would view
17 things on the MODROW computer. The mother and NICHOLE allege
18 it was porn. No one ever checked the computer, even though
19 it was left with MARY MODROW. The girl alleged that the
20 sexual activity occurred almost every night after her mother
21 went to work for the approximate four (4) years.

22 The girl claims MR. DOBYNS made her wear a white see-
23 thru negligee, which was never located, even though he lived
24 in the residence with NICHOLE MODROW and her mother, MARY
25 MODROW. They remained in the same residence after MR.
26 DOBYNS left.

1 MR. DOBYNS was never informed of any allegations, nor
2 given an opportunity to discuss the matter with the police.
3 Further, he was never given the opportunity to have counsel
4 prior to any questioning. MR. DOBYNS was not even given an
5 opportunity at normal investigative technique like a simple
6 interview.

7 In the request for the intercept and record application
8 (exhibit A), DETECTIVE BUSTER claims that "Detectives are
9 not aware of other normal investigative methods to obtain
10 evidence pertaining to the above-described crimes.
11 DETECTIVE BUSTER claimed in his application (exhibit A) that
12 ROBERT DOBYNS is not likely to discuss his sexual activity
13 with NICHOLE with anyone other than NICHOLE. DETECTIVE
14 BUSTER states that MR. DOBYNS is, "far more likely to
15 discuss the incidents with NICHOLE if he is not first
16 alerted to the scope of the investigation by being
17 interviewed by detectives." DETECTIVE BUSTER makes other
18 assumptions with no real explanation of how he determines
19 other than what he stated in the application for the
20 intercept and record authority affidavit.

21 On March 3, 2006, JUDGE NELSON HUNT authorized an Order
22 of Interception and Recording of Communications or
23 Conversation Pursuant to RCW 9.73.090. The Order was from
24 March 4, 2006 to March 11, 2007. Subsequent to March 3,
25 2006, there were two (2) telephone calls to MR. DOBYNS. One
26 on March 4, 2006 and one on March 5, 2005.

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1 This case was filed by the Lewis Count Prosecutor on
2 March 6, 2006. The information which consists of ten (10)
3 counts plus a Probable Cause Statement. The defense
4 believes that the information was already being drafted
5 during the time of March 4th and 5th, when the officers were
6 using the telephone intercept technique. The state's ten
7 (10) count information is date stamped March 6, 2006.

8 **II. ISSUES**

9 The issues in this case are:

- 10 (1) Whether or not the Lewis County Sheriff's
11 Department complied with RCW 9.73.090 and .130, in
12 applying for and obtaining order authorizing the
13 interception and recording of private
14 conversations between the Defendant and NICHOLE
15 MODROW without his consent; and
- 16 (2) Did the State deprive the Defendant so his right
17 to counsel by using an agent (NICHOLE MODROW) to
18 question him rather than the police questioning
19 him, despite the fact that they had probable cause
20 to arrest him and obviously were/had drafted the
21 ten (10) count complaint/Probably Cause statement?

22 **III. ARGUMENT**

- 23 1. LAW ENFORCEMENT DID NOT COMPLY WITH RCW 9.73.130
24 PRIOR TO INTERCEPTING AND RECORDING PRIVATE TELEPHONE
CONVERSATIONS WITH THE DEFENDANT.

25 A. There is insufficient factual background in the
26 application to record telephone conversations to establish

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1 probable cause to believe incriminating disclosures would be
2 made.

3 Washington has long recognized and protected the
4 privacy interest of its citizens. State v. Clark, 129 Wn.2d
5 211; 916 P.2d 384 (1996); and Peninsula Counseling Center v.
6 Rahm, 105 Wn.2d 296 (1986). One method of protecting that
7 privacy was the adoption of the Privacy Act (RCW 9.73) in
8 1967. The primary purpose of the act was to protect privacy
9 and to prevent the distribution of improperly obtained
10 information. State v. Fjermastad, 114 Wn.2d 828; 791 P.2d
11 897 (1990), and State v. Baird, 83 Wn.App. 477; 922 P.2d 157
12 (1996). The act's purpose is "to preserve as private those
13 communications intended to be private." State v. Baird,
14 supra. The Act prohibits a number of things, such as
15 divulging the contents of a telegram (RCW 9.73.010); opening
16 sealed letters (RCW 9.73.020); and intercepting and recording
17 private communications, such as telephone calls (RCW 9.73.030
18 & .040).

19 As the United States Supreme Court warned in Berger v.
20 New York, "Few threats to liberty exist which are greater
21 than that posed by the use of eavesdropping devices," 388
22 U.S. 41, 63, 41 L.Ed2 1040, 87 S.Ct. 1873 (1967).

23 The underlying theme of the act is to prohibit the
24 recording and disclosure of private conversations and, for
25 purposes of this case, telephone conversations with specific
26 exceptions. That tone is set by RCW 9.73.030(10, which

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1 states in part:

2 "(1) Except as otherwise provided in this chapter, it
3 shall be unlawful for any individual, partnership,
4 corporation, association, or the State of Washington,
its agencies and political subdivisions to intercept,
or record any:

5 (a) Private communication transmitted by telephone..."

6 Much on the remainder of the act addresses a multitude
7 of closely guarded exceptions and the consequences for
8 violating the act.

9 Certain exceptions include communications of an
10 emergency nature, the conveyance of threats, of extortion,
11 blackmail, bodily harm, etc. The act also excepts those
12 communications that occur anonymously, repeatedly, or ones
13 that relate to a hostage holder, as long as there is the
14 consent of one party to the conversation (RCW 9.73.030(2)).
15 There also is an exception to news agencies (RCW
16 9.73.030(4)).

17 The basic rule is that private telephone conversations
18 should not be recorded or divulged without having the consent
19 of both parties to the conversation.

20 In the present case, there is nothing in the records
21 that even suggests that the Defendant gave his consent,
22 impliedly (RCW 9.73.030(3)) or otherwise to the recording or
23 reporting go his conversations at issue here.

24 In that context, RCW 9.73.090 must be analyzed. The
25 title of that section should not go unnoticed:

26 "§ 9.73.090 Contains certain emergency response
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1 personnel exempted from RCW 9.73.030 through
2 9.73.080...standards...court authorizations...admissibility..."

3 Subsection 1 then addresses the substance of the title,
4 exemptions from the act for emergency communications.
5 Subsection 2 is the heart of the statute, as it relates to
6 the present case. That section allows law enforcement, while
7 acting in their official capacity to, among other things,
8 records a conversation if one of the parties to the
9 conversation has given prior approval to the interception and
10 recording of the conversation. However, law enforcement must
11 first obtain judicial approval upon a showing that there is
12 "probable cause to believe that the non-consenting party has
13 committed, is engaged in, or is about to commit a felony."
14 RCW 9.73.090(2). In the present case, there is no question
15 that DETECTIVE BUSTER was acting in his official capacity and
16 he had NICHOLE MODROW'S consent to record the calls. More
17 specific requirements of the application for judicial
18 approval are contained in RCW 9.73.130. Here, law
19 enforcement applied for and obtained an order authorizing the
20 interception and recording of conversations between the
21 Defendant and the alleged victim. The application must be
22 carefully scrutinized under the requirements of RCW 9.73.130.
23 The application to the court was dated March 3, 2006 and is
24 attached hereto as Exhibit A.

25 It would appear from a review of the application
26 (Exhibit A) that the first two requirements of RCW

1 9.73.130(3)(a) and (b) are met in that the applications do
2 identify the Defendant and describe the details of the
3 offense the Defendant is supposed to have committed, however,
4 there is no corroboration whatsoever, that a crime was, in
5 fact, committed. It is the third requirement as contained in
6 RCW 9.73.130(3)(c) that presents the first problem. That
7 section requires that the application provides:

8 "3. A particular statement of facts relied upon
9 by the applicant to justify his belief that an
authorization should be issued, including:

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(c) The particular type of communication or
conversation not be recorded and a showing
that there is probable cause to believe such
communication will be communicated on the
wire communication facility involved or at a
particular place where the oral communication
is to be recorded." (emphasis supplied)

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This is significant in the present case because this
section emphasizes, somewhat, why this process is not
intended to be used as law enforcement is using it in this
case. Law enforcement in this case, pure and simple, is just
trying to get the Defendant to confess on tape. DETECTIVE
BUSTER in his application states, "I asked both (mother and
daughter) if they thought ROBERT would admit to me if he had
done these things to NICHOLE or not. They both agreed that
he would never admit it to me." While the statute speaks in
terms of a suspect "has committed, is engaged in, or is about
to commit a felony," it is clear from a close reading of the
statute itself, as well as the case law, that it was intended

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1 to be used in situations involving an informant and an
2 ongoing criminal enterprise or activity, not to simply obtain
3 confessions and avoid advising a suspect of his
4 constitutional rights two or three years after the alleged
5 crime. That specific issue will be discussed later. This
6 court should remember MR. DOBYNS had been away from the
7 MODROWS for approximately three (3) years before any
8 allegations surfaced.

9 What is missing under this section, in the present
10 case, is the lack of any factual background that would
11 establish probable cause to believe there will be an
12 incriminating disclosure on the tape. All there is, is what
13 the officer believes, that MR. DOBYNS will not talk to him
14 about the allegation. This could simply be used in every
15 case to circumvent the law. Keep in mind there is no
16 corroboration of the allegations of the alleged victim.
17 DETECTIVE BUSTER chose to seek a recording prior to
18 attempting to obtain any corroboration. DETECTIVE BUSTER
19 advises the judge, "I anticipate that if NICHOLE called
20 ROBERT and informed him about the sexual abuse under the
21 pretense that she had been thinking about it and wants to
22 tell her counselor at school about what happened ROBERT will
23 talk freely about the incident and she may have had those
24 beliefs. The officer is not required to have any corroboration
25 establishing probable cause for him to have those beliefs.
26 The statute is clear. It allows more than the officer's

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1 opinions and boilerplate assertions. State v. Manning, 81
2 Wn.App. 714;915 P.2 1162 (1996).

3 This gets us back to the real purpose of the statute.
4 Most of the case law involved situations where an informant
5 is being used or who has come forward with information about
6 drug deals or fencing stolen property operations, and the
7 recording is utilized to obtain evidence of the crime being
8 committed, based on the informant's past involvement in the
9 previous transactions. Clearly with that background, there
10 is probable cause to believe the recordings will produce
11 evidence of the transactions, since it is the transactions
12 themselves being recorded and they are based on the previous
13 evidence of the transactions.

14 Here, the detective basically hopes the Defendant will
15 apologize or confess to something he was supposed to have
16 done approximately three (3) to seven (7) years ago. As
17 DETECTIVE BUSTER said on his application, the incidents
18 alleged were supposed to have occurred form 1998 to 2002.
19 This would make the last alleged incident approximately 3 ½
20 to 4 years ago. The alleged victim was 16 when the
21 application was made. According to the application itself,
22 they were seeking to obtain statements from a suspect on
23 allegations that were not ongoing, but were several years
24 old.

25 B. There is an insufficient factual background
26 establishing other investigative background either failed or

1 would not work, and other techniques normally used that were
2 not attempted.

3 The State has failed to satisfy subsection (c) of RCW
4 9.73.130(3).

5 Subsection (f) of RCW 9.73.130 requires:

6 "A particular statement of facts showing that
7 other normal investigative procedures, with
8 respect to the offense, have been tried and have
9 failed or reasonably appear to be unlikely to
10 succeed if tried, or to be too dangerous to
11 employ."

12 In the present case, law enforcement neither provided
13 "a particular statement of facts," which would indicate that
14 other methods failed or would not work, but they also didn't
15 try other methods and ignored a number of other methods that
16 have been used in hundreds of other cases in the past.
17 Again, the boiler plate assertion that other techniques did
18 not or would not work, is not sufficient by the very terms of
19 the statute above quoted. DETECTIVE BUSTER advised the judge
20 in essence that regular techniques would not work, yet no
21 particularized proof of attempt or failure was forthcoming.
22 The simple assertions fall well short of the "particular
23 statement of facts" requirement of the statute, it emphasizes
24 the problem with the State's position in this case. The
25 State refers to "other investigative techniques" for
26 obtaining a statement, not necessarily evidence. The State
seeks to rely on this ad applying only to getting the
Defendant to talk and to do so without confronting him and

1 advising him of his constitutional rights.

2 There are a number of other ways of attempting to
3 obtain evidence that have been used with success numerous
4 times in the past by law enforcement, and DETECTIVE BUSTER
5 in particular, that were not even attempted or, according to
6 the declaration, considered in the application. These other
7 techniques will become apparent, particularly as it relates
8 to this case, at the hearing. It is incumbent, however, on
9 law enforcement to outline to the judge, at the time of the
10 application, "a particular statement of facts" that show to
11 the judge that other techniques have either been tried and
12 failed, or why other techniques would fail. Neither is
13 present in the applications in this case. Simple assertions
14 that he would not talk to me is insufficient and must be,
15 otherwise the real law is null and void.

16 As the courts have held, the police do not need to have
17 exhausted all alternatives, but they need to have, at least,
18 seriously considered other alternatives and inform the court
19 of the reasons why the other alternatives would not likely
20 work. Sate v. Cisneros, 63 Wn.App. 724; 821 P.2d 1262
21 (1992), and State v. Knight, 54 Wn.App. 143;772 P.2d 1042
22 (1995). In the present case, DETECTIVE BUSTER only gave the
23 opinion that, in his experience, other unidentified
24 alternatives would not work. The only other alternative
25 addressed, and then only by implication, was perhaps having
26 someone else present during a conversation with the

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1 Defendant. As indicated, there are numerous other
2 alternatives that were not tried and, apparently, not
3 considered.

4 It has been held that the failure to comply with the
5 statutory requirements of RCW 9.73.090 and .130, renders any
6 order allowing the interception and recording unlawful and
7 the recording inadmissible. State v. Mayes, 20 Wn.App. 184;
8 79 P.2d 999 (1978); and State v. Kichinko, 26 Wn.App. 304;
9 613 P.2d 792 (1980).

10 "Mere conclusions by the affiant are insufficient to
11 justify a search warrant, Aguilar v. Texas, 378 U.S. 108; 12
12 L.Ed.2d 723; 84 S.Ct. 1509 (1964), or a wiretap order."
13 United States v. Kalustian, 529 F.2d 585 (9th Cir. 1975).
14 The Kalustian case is instructive on why the application in
15 this case falls woefully short of satisfying, not only the
16 statute, but meeting constitutional muster.

17 In analyzing the statute and case law as it applies
18 here, it is important to keep in mind that the statute itself
19 represents an invasion of an individual's constitutional
20 privacy rights and must, therefore, be closely scrutinized.
21 Although the 9th Circuit Court was discussing the federal
22 statute in Kalustian, supra, the same rationale would apply
23 to the State statute. In the Kalustian case, the court
24 states: "The act had been declared constitutional only
25 because of its precise requirements and its provisions for
26 close judicial scrutiny." 529 F.2d at 589. If we allow

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1 these recordings and the invasions of an individual's rights,
2 based on the opinion, hope, and speculation of an officer,
3 then we have taken away the very protections that make the
4 statutes constitutional.

5 2. THE USE OF NICHOLE MODROW BY LAW ENFORCEMENT TO
6 ATTEMPT TO OBTAIN A CONFESSION FROM THE DEFENDANT ON
7 TAPE WITHOUT HIS PERMISSION OR KNOWLEDGE VIOLATED HIS
8 RIGHT TO COUNSEL AND HIS RIGHT NOT TO INCRIMINATE
9 HIMSELF.

10 The Washington State and United States Constitutions
11 have various provisions that are applicable to this case.
12 Article 1, Section 7 of the Washington State Constitution
13 provides:

14 "No person shall be disturbed in his private affairs,
15 or his home invaded without authority of law."

16 While this provision generally is looked upon as
17 keeping the citizens of this state free from unreasonable
18 searched and seizures, similar to the Fourth Amendment of the
19 United States Constitution, the first part keeps a person's
20 private affairs free from invasions. The recorded
21 conversations in this case certainly constitute an intrusion,
22 but one that would be allowed if done within the "authority
23 of law." It has already been demonstrated that the
24 "authority of law" in this case was not valid.

25 This provision must be kept in mind when considering
26 this case along with the provisions of Article 1, Section 9
of the Washington State Constitution, which says:

"No person shall be compelled in any criminal case to

1 give evidence against himself, or be twice put in
2 jeopardy for the same offense."

3 Along with its counterpart, the Fifth Amendment to the United
4 States Constitution.

5 So a person's private affairs are to be from invasion
6 and a person need not give evidence against his or herself.
7 In addition, under Article 1, Section 22 of the Washington
8 State Constitution, and the Fifth and Sixth Amendments of the
9 United States Constitution, a person also has the right to an
10 attorney. This constitutional right to counsel has been
11 deemed to be "a categorical requirement necessary to give
12 substance to other constitutional procedural protection
13 afforded criminal defendants."

14 Further, a criminal defendant is entitled to the
15 representation of counsel at all critical stages of the
16 proceedings. Garrison v. Rhay, 75 Wn.2d 98, 449 P.2d 92
17 (1968); and Maine v. Moulton, 474 U.S. 159, 88 L.Ed.2d 481,
18 106 S.Ct. 477 (1985).

19 When DETECTIVE BUSTER was informed that NICHOLE MODROW
20 had been sexually abused by the Defendant, and then confirmed
21 that after talking to NICHOLE MODROW, DETECTIVE BUSTER had
22 probable cause to arrest the Defendant, and certainly to
23 bring him in for questioning. This would particularly be
24 true if he would have continued the investigation by actually
25 talking to the person who supposedly did the abuse, MR.
26 DOBYNS. However, since DETECTIVE BUSTER chose not to do

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1 that interview, does not make this stage of the proceedings
2 any less critical. It had been common policy of the Lewis
3 County Sheriff's Office for years at this stage of the
4 proceeding to call the suspect in and have him or her come to
5 the Sheriff's Office and talk to the detectives after being
6 advised of his or her rights. Not only would MR. DOBYNS have
7 had the right to bring an attorney with him; had DETECTIVE
8 BUSTER called him, he would have had the right to be informed
9 of that right, had he appeared without counsel.

10 The right to counsel, as stated, is mandated by the 6th
11 Amendment to the United States Constitution, and Article 1,
12 Section 22 of the Washington State Constitution.
13 Procedurally, whether that right is violated is often
14 determined by the standards set forth in Miranda v. Arizona,
15 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1964); and
16 State v. Stewart, 113 Wn.2d 462, 780 P.2d 844 (1989).

17 By applying for and obtaining a wire recording of these
18 invasions of the Defendant's privacy, DETECTIVE BUSTER
19 avoided the necessity of having to advise the Defendant of
20 his right to counsel.

21 It is clear from the applications that the substances
22 of, not only the conversations, but specifically what NICHOLE
23 MODROW would ask the Defendant, were known and discussed
24 between DETECTIVE BUSTER and NICHOLE MODROW, her mother, and
25 others, prior to the applications and any of the calls. It
26 seems clear that NICHOLE MODROW, although, maybe not given a

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1 script, was certainly told by law enforcement what questions
2 to ask, and how to direct the conversation. This was to get
3 it to the place the police wanted it to go... "get a
4 confession." This can be seen in DETECTIVE BUSTER'S
5 application.

6 There is no question that if this were strictly a
7 private action, with no state involvement there would be no
8 constitutional issue, although there may still be an
9 admissibility issue. Burdeau v. McDowell, 256 U.S. 465, 415
10 S.Ct. 574, 65 L.Ed 1048 (1921); and State v. Ludisk, 20
11 Wn.App. 257, 698 P.2d 1064 (1985). However, there can't be
12 much doubt that NICHOLE MODROW and MARY MODROW were acting as
13 agents of the police and, therefore, stood in their shoes.
14 State v. Heritage, 114 Wn.App 591, 61 P.3d 1190 (2002).

15 As the U.S. Supreme Court stated in Moulton, supra:

16 "...the Court has also has recognized that the
17 assistance of counsel cannot be limited to
18 participation in a trial; to deprive a person of
19 counsel during the period prior to trial may be
20 more damaging than denial of counsel during the
21 trial itself. Recognizing that the right to the
22 assistance of counsel is shaped by the need for
23 the assistance of counsel, we have found that the
24 right attaches at earlier, "critical" stages in
25 the criminal justice process "where the results
26 might well settle the accused's fate and reduce
the trial itself to a mere formality." 474 U.S.
at 170.

23 The facts of the Moulton case are very similar to the
24 facts in this case, in that the issue involved intercepted
25 and recorded conversations.

26 After analyzing a series of similar cases, Messiah v.
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1 United States, 377 U.S. 201, 12 L.Ed.2 246, 84 S.Ct. 1199
2 (1964); United States v. Henry, 447 U.S. 264, 65 L.Ed.2 115,
3 100 S.Ct 2183 (1980); and Spano v. New York, 360 U.S. 315, 3
4 L.Ed.2 1265 79 S.Ct. 1202 (1959); the Moulton court
5 concluded:

6 "However, knowing exploitation by the state of an
7 opportunity to confront the accused without
8 counsel begin present is as much a breach of the
9 state's obligation not to circumvent the right to
10 the assistance of counsel as is the intentional
11 creation of such an opportunity. Accordingly, the
12 Sixth Amendment is violated when the state obtains
13 incriminating statements by knowingly
14 circumventing the accused's right to have counsel
15 present with a confrontation between the accused
16 and a state agent.

17 "Applying this principle to the case at hand, it
18 is clear that the state violated Moulton's Sixth
19 Amendment right when it arranged to record
20 conversations between Moulton and its undercover
21 informant, Colson. It was the police who
22 suggested to Colson that he record his telephone
23 conversations with Moulton. Having learned from
24 those recordings that Moulton and Colson were
25 going to meet, the police asked Colson to let him
26 put a body wire transmitter on him to record what
was said... The police thus knew that Moulton would
make statements that he had a constitutional right
not to make to their agent prior to consulting
with counsel." 474 U.S. at 176-177.

Law enforcement specifically chose to get NICHOLE
MODROW to call the Defendant while being recorded for the
sole purpose of trying to get the Defendant to confess to a
crime, for which they had probable cause to arrest, so that
they would not have to advise him of his right to counsel
after which he may have invoked his rights and that would be
precluded of having any chance of getting him to confess to

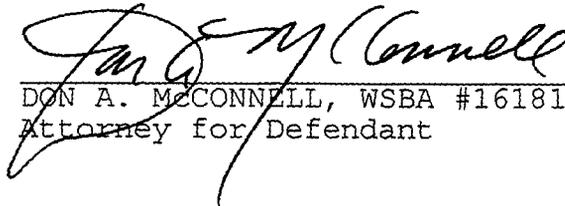
1 the crime. Further, it is clear that the investigation was
2 well underway as far as the state we concerned by the
3 probable cause and filing of the information on ten (10)
4 counts, which were filed within less than one-half work day.

5 **IV. CONCLUSION**

6 Based upon the foregoing arguments and authorities, the
7 recordings of the telephone conversations in question, as
8 well as the substance of those conversations should be
9 suppressed and not allowed into evidence at Trial.

10 DATED this 11 day of October, 2007.

11 McCONNELL, MEYER & ASSOCIATES, L.L.P.

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13 
14 DON A. McCONNELL, WSBA #16181
15 Attorney for Defendant
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Appendix H

Order on Motions (November 30, 2007)

SUPERIOR COURT
LEWIS COUNTY, WASH
REC'D & FILED

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KATHY BRACK, CLERK
BY [Signature]
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF LEWIS

STATE OF WASHINGTON,	)	NO. 06-1-00148-1
)	
Plaintiff,	)	ORDER ON MOTIONS
)	
vs.)	
)	
ROBERT DOBYNS,)	
)	
Defendant.)	
_____)	

THIS MATTER having come before the Court, and the Court having reviewed the filed and contents therein, it is hereby

ORDERED, ADJUDGED AND DECREED that the mother of the alleged victim, MARY MODROW, and the alleged victim, NICHOLE MODROW, shall present themselves for depositions by defense counsel at a neutral location (not the defense office or prosecutor's office) at a time to be set by the defendant; it is further

ORDERED, ADJUDGED AND DECREED that the questioning shall be limited to new information since the last interview, but not limited to questioning regarding counselors, medical visits involving this case (including MS. RENATE STAROFF, DR.

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OLYMPIA NUMBER (360)943-9557

1 JESSICA ROBERTS, DR. LILLIAN LO, or other counselors
2 regarding this case); it is further

3 ORDERED, ADJUDGED AND DECREED that prior to filing any
4 new subpoenas under the attorney subpoena power regarding
5 medical/counseling records, the defense is required to
6 proceed to a materiality hearing before the court, prior to
7 the issuance of subpoenas.

8 DATED this 30th day of November, 2007.

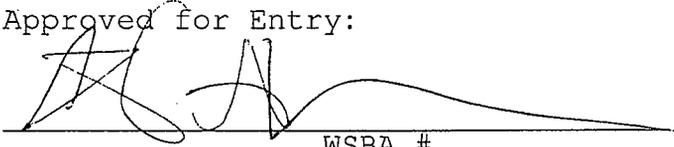
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JUDGE
Richard E. Blasey

13 Presented by:
14 McCONNELL, MEYER & ASSOCIATES, L.L.P.

15 
16 DON A. McCONNELL, WSBA #16181
Attorney for Defendant

17 Approved for Entry:
18 
19 _____, WSBA # _____
20 Prosecuting Attorney

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Appendix I

Defendant's Amended Witness List

SUPERIOR COURT
LEWIS COUNTY, WASH
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KATHY BRACK, CLERK

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ORIGINAL

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

STATE OF WASHINGTON,	)	NO. 06-1-00148-1
)	
Plaintiff,	)	DEFENDANT'S WITNESS LIST
	)	<u>AMENDED</u>
vs.)	
)	
ROBERT DOBYNS,)	
)	
Defendant.)	

TO: CLERK, Lewis County Superior Court
AND TO: PROSECUTING ATTORNEY

TO: Deputy Prosecuting Attorney

COMES NOW the Defendant, ROBERT DOBYNS, by and through his attorney, DON A. McCONNELL, of the law offices of McCONNELL, MEYER & ASSOCIATES, L.L.P., and hereby states that the Defendant intends to call the following witnesses at the Trial in the above-entitled cause:

1. Rob Gebhart, (360)269-3351 - Fire Department Chief;
2. Chris Rubin, Lewis County Sheriff (360)807-6125;
3. Dan Garry, 6th grade teacher, taught Nichole;
4. Amanda Gray, Student at DoJo, knew Nichole; AND

DEFENDANT'S WITNESS LIST - 1

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5. Patricia Dobyms, (360)785-3281.

DATED this 8 day of January, 2008.

McCONNELL, MEYER & ASSOCIATES, L.L.P.


DON A. McCONNELL, WSBA #16181
Attorney for Defendant

DEFENDANT'S WITNESS LIST - 2

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Appendix J

Memorandum in Support of Motion for New Trial

SUPERIOR COURT
LEWIS COUNTY, WASH
REC'D & FILED

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KATHY BRACK, CLERK
BY [Signature]
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF LEWIS

STATE OF WASHINGTON,	)	NO. 06-1-00148-1
)	
Plaintiff,	)	MEMORANDUM IN SUPPORT
	)	OF MOTION FOR NEW TRIAL
vs.)	
)	
ROBERT DOBYNS,)	
)	
Defendant.)	
_____)	

I. FACTS

During this Trial, the Court, during initial intake and questioning of the jury, prior to defense and prosecutor questioning, told the jurors and others in the courtroom that, "given the nature of this case, if there are things that you would like to have discussed outside the presence of the rest of the jurors, let us know, we can make arrangements for that. So again, based on what you know about this case, do you know of any reason why you should not be allowed to serve on this case?" (Emphasis added). See Exhibit A, pp. 15 - Verbatim Report of Proceedings.

The court acknowledged #16 and #21. The court asks the

1 potential juror (#16), "Alright: Number 16," (emphasis
2 added), Number 16 responds, "well, I'd like to tell you in
3 private." (Emphasis added). The court acknowledges it by
4 saying, "alright." See Exhibit A, pp. 15 - Verbatim Report
5 of Proceedings.

6 During the question and answer session, the courtroom
7 had numerous parties who were present and heard that the
8 court agreed to talk to Number 16 in private. A few minutes
9 later, after going through other jurors, the Judges goes back
10 to juror Number 16 and said "Oh, okay. Alright and number
11 16, you wanted to talke -- this issue you want to talk
12 about later." Juror #16 responded, "Yeah." (Emphasis added).
13 This also was a reaffirmation that he wanted to talk to the
14 (court) Judge in private. See Exhibit B, pp. 25 - Verbatim
15 Report of Proceedings.

16 After initial questioning of the potential jurors, the
17 court stated to the courtroom, "Thank you, Mr. McConnell.
18 Alright. I'm going to excuse the jury panel at this time to
19 go back to the jury assembly room to wait for a few moments.
20 I don't believe we'll take too long. Then I'll have you
21 come back and then we'll do the rest of the jury selection.
22 Number 16 can stay here. (Jury panel exits the court room)".
23 (Emphasis added). See Exhibit C, pp. 75 - Verbatim Report of
24 Proceedings.

25 The court went on to say, "Alright. The jury panel has
26 now been excused with the exception of number 16 who is

1 here." (Emphasis added). See Exhibit C, pp. 75 - Verbatim
2 Report of Proceedings.

3 The people and family (and others) exited the court
4 room when the jury panel was instructed to leave. The court
5 did not inform the people in the court room that they could
6 remain prior to their leaving, with the other jury panel
7 members. Attached are several statements from family members
8 and citizen observers who believed they were required to
9 leave when the Judge sent the other jury members out. See
10 Exhibit F, attached hereto. The court did not make it clear
11 to the court observers or bystanders that they could remain
12 in attendance during the voir dire of juror #16 or #21. As a
13 matter of fact, pursuant to the normal procedure and
14 historical system in Lewis County, Washington, counsel for
15 Defendant knew the family members and others were required to
16 leave. Counsel was surprised when the court did not move to
17 another room as is the normal system, but the spectators and
18 family had left the court room already as indicated by the
19 court that this would be in private. We have no idea who
20 (maybe attorneys) remained, as all others had left pursuant
21 to the instructions of the court.

22 **II. LEGAL ARGUMENT**

23 The Court of appeals (Division II) recently came down
24 with the decision in State of Washington v. David Erickson
25 (filed July 29, 2008) See Exhibit D, attached hereto. This
26 case deals with unfiltered public access to Trial (including
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MOTION FOR NEW TRIAL
Page - 3

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1 voir dire selection of jurors). This case was right after
2 the Trial in question.

3 The Court in a more recent case affirmed its position
4 on this issue by actually expanding its protection to include
5 voir dire and all phase of jury selection.

6 Our courts hold now that, and the recent cases cited
7 above state:

8 "Article I, section 22 of the Washington
9 Constitution[8] and the sixth amendment to the United States
10 Constitution[9] both guarantee criminal defendants the right
11 to a public trial." State v. Sadler, (10/14/08) See Exhibit
12 E, attached hereto.

13 State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150
14 (2005). The right to an open public trial ensures that the
15 defendant receives a fair trial, in part by reminding the
16 officers of the court of the importance of their functions,
17 encouraging witnesses to come forward, and discouraging
18 perjury.

19 Waller v. Georgia, 467 U.S. 39, 46-47, 104 S. Ct.
20 2210, 81 L. Ed. 2d 31 (1984); see Brightman, 155 Wn.2d at
21 514. Although the right to a public trial can serve the
22 public or the defendant, the public's right and the
23 defendant's right "serve complementary and interdependent
24 functions in assuring the fairness of our judicial system.
25 In particular, the public trial right operates as an
26

1 essential cog in the constitutional design of fair trial
2 safeguards." 11 State v. Bone-Club, 128

3 8 Section 22 provides in relevant part:

4 In criminal prosecutions the accused shall have the
5 right . . . to have a speedy public trial by an impartial
6 jury of the county in which the offense is charged to
7 have been committed and the right to appeal in all cases[.]

8 9 The Sixth Amendment provides in relevant part:

9 "In all criminal prosecutions, the accused shall
10 enjoy the right to a speedy and public trial."

11 10 Article I, section 10 of the Washington
12 Constitution gives the public and the press a right to open
13 and accessible court proceedings. Section 10 provides:

14 "Justice in all cases shall be administered openly,
15 and without unnecessary delay." In State v. Bone-Club, 128
16 Wn.2d 254, 259, 906 P.2d 325 (1995), our Supreme Court held
17 that the same closure standards apply for both section 10
18 and section 22 rights.

19 11 In Waller, the United States Supreme Court noted
20 that "[t]he requirement of a public trial is for the benefit
21 of the accused; that the public may see he is fairly dealt
22 with and not unjustly condemned, and that the presence of
23 interested spectators may keep his triers keenly alive to a
24 sense of their responsibility and to the importance of their
25 functions." Waller, 467 U.S. at 46 (quotations omitted). As
26 succinctly put by the California Court of Appeals,

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1 This benefit of public oversight or superintendence
2 accruing to a criminal defendant as a result of the openness
3 inherent in a truly public trial is largely lost if
4 the only openness attending the trial proceedings (or any
5 portion thereof) is to be found in an after-the-fact review
6 of a cold written record of proceedings to which the public
7 had no access. (Emphasis added).

8 People v. Harris, 10 Cal. App. 4th 672, 685, 12 Cal. Rptr.
9 2d 758 (Cal. Ct. App. 1992) (emphasis added). Wn.2d 254,
259, 906 P.2d 325 (1995).

10 Additionally, "it is well settled that the right to
11 a public trial also extends to jury selection." Brightman,
12 155 Wn.2d at 515 (citing In re Pers. Restraint of Orange,
13 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (citing Press-Enter.
14 Co. v. Superior Court of Calif., Riverside County, 464 U.S.
15 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984))). "[A]
16 closed jury selection process harms the defendant by
17 preventing his or her family from contributing their
18 knowledge or insight to jury selection and by preventing the
19 venire from seeing the interested individuals." Brightman,
20 155 Wn.2d at 515 (emphasis added) (citing Orange, 152 Wn.2d
21 at 812). In addition, "[t]he guaranty of open criminal
22 proceedings extends to '[t]he process of juror selection'"
23 because the jury selection process "'is itself a matter of
24 importance, not simply to the adversaries but to the
25 criminal justice system.'" Orange, 152 Wn.2d at 804
26

1 (emphasis added) (quoting Press-Enter. Co., 464 U.S. at 505
2 (second alteration in original)).

3 Generally, to protect these important rights, before
4 a trial court may exclude the public from the courtroom, it
5 must conduct a five-part Bone-Club inquiry¹² and determine
6 if the closure will unjustifiably interfere with the
7 defendant's right to a public trial. Brightman, 155 Wn.2d
8 at 12 Under Bone-Club:

- 9 1. The proponent of closure or sealing must make
10 some showing [of a compelling interest], and
11 where that need is based on a right other
12 than an accused's right to a fair trial, the
13 proponent must show a "serious and imminent
14 threat" to that right.
- 15 2. Anyone present when the closure motion is
16 made must be given an opportunity to object
17 to the closure.
- 18 3. The proposed method for curtailing open access
19 must be the least restrictive means available
20 for protecting the threatened interests.
- 21 4. The court must weigh the competing interests
22 of the proponent of closure and the public.
- 23 5. The order must be no broader in its
24 application or duration than necessary to
25 serve its purpose.

26 Bone-Club, 128 Wn.2d at 258-59 (alteration in original)
(quotation omitted). 515.

27 If the proceeding is subject to the right to a public
28 trial, a trial court's failure to conduct a Bone-Club
29 inquiry before excluding the public "results in a violation
30 of the defendant's public trial rights." Brightman, 155
31 Wn.2d at 515-16 (emphasis added) (citing Orange, 152 Wn.2d

MCCONNELL, MEYER & ASSOCIATES, L.L.P.

MOTION FOR NEW TRIAL
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1 at 809). The defendant need show no prejudice resulting
2 from a violation of this right; prejudice is presumed.
3 Bone-Club, 128 Wn.2d at 261-62 (citing State v. Marsh, 126
4 Wash. 142, 147, 217 P. 705 (1923)); State v. Rivera, 108 Wn.
5 App. 645, 652, 32 P.3d 292 (2001). Furthermore, a
6 defendant's failure to "lodge a contemporaneous objection"
7 at the time of the closure does not amount to a waiver of
8 his right to a public trial.¹³ Brightman, 155 Wn.2d at 517
9 (citing Bone-Club, 128 Wn.2d at 257). The remedy for a
10 violation of article I, section 22 is remand for a new
11 trial. Rivera, 108 Wn.App. at 652 (citing Bone-Club, 128
12 Wn.2d at 261-62). Because the issue of whether a
13 defendant's right to a public trial has been violated is a
14 question of law, we review it de novo. Brightman, 155 Wn.2d
15 at 514.

16
17 B. Closure Excluding the Public

18 To determine whether the trial court violated
19 Sadler's right to a public trial, we must first decide
20 whether the trial court's action here amounted to a closure
21 excluding the public. We conclude that it did.

22 Without citation to authority, the State argues that
23 the proceeding was not closed to the public because the
24 trial court never asked anyone in the courtroom to leave the
25 courtroom;

1 13 Although the State notes that Sadler did not
2 object to the trial court considering the Batson challenge
3 in the jury room, any assertion that Sadler's failure to
4 object waived his right to bring this issue on appeal has no
5 merit. The record does not show that the trial court ever
6 advised Sadler of his right to a public trial or asked him
7 to waive this right, and case law clearly requires that the
8 trial court ensure the defendant is aware of his right to
9 public trial before waiver can occur. Bone-Club, 128 Wn.2d
10 at 261 ("[T]his court has held an opportunity to object
11 holds no 'practical meaning' unless the court informs
12 potential objectors of the nature of the asserted
13 interests.") (quoting Seattle Times Co. v. Ishikawa, 97
14 Wn.2d 30, 39, 640 P.2d 716 (1982)).

15 Nothing in the record shows that the trial court
16 affirmatively excluded the public from the Batson hearing;
17 and because counsel, the trial court, the defendant, two
18 correctional officers, and the court reporter were present
19 at the hearing. Sadler responds, also without citation to
20 authority, that the proceeding was closed to the public
21 because the trial court moved it into the jury room and did
22 not invite the public to attend the hearing. We agree with
23 Sadler.

24 To determine whether the trial court excluded the
25 public from the Batson hearing, we look at the nature of the
26

1 closure. See Orange, 152 Wn.2d at 807-08. Admittedly,
2 unlike the situations in Orange, 152 Wn.2d at 808, and
3 Brightman, 155 Wn.2d at 511, the trial court did not
4 expressly exclude the public during the jury selection
5 process. But this case is also not similar to those
6 instances that did not amount to a closure where the trial
7 court limited access to the proceedings by imposing security
8 measures or where the courtroom was simply not large enough
9 to accommodate all potential spectators. See, e.g., United
10 States v. Shryock, 342 F.3d 948, 974 (9th Cir. 2003) (no
11 Sixth Amendment violation when seating limited by size of
12 courtroom). Here, the trial court's affirmative act of
13 moving the proceeding into the jury room, a part of the
14 court not ordinarily accessible to the public, without
15 inviting the public to attend, had the same effect as
16 expressly excluding the public. Jury rooms are not
17 ordinarily accessible to the public; in fact, it is well
18 known that juries are often taken into the jury room to be
19 insulated from events occurring in the courtroom. Nor does
20 the mere presence of the parties, security, and the court
21 reporter demonstrate that the public was entitled to attend
22 this hearing. Without an explicit invitation by the trial
23 judge, no member of the public would have understood that
24 the jury room was serving as a courtroom for the purposes of
25 the Batson hearing. And in this case, the trial court told
26 everyone sitting in the courtroom, "Just don't leave the

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1 courtroom." RP at 855. Under these circumstances the
2 trial court's removal of the proceedings to a non-courtroom
3 was equivalent to closing the courtroom to the public.

4 The dissent relies on State v. Momah, 141 Wn. App. 705,
5 171 P.3d 1064 (2007), review granted, 163 Wn.2d 1012 (2008),
6 14 in which Division One takes a very different approach to
7 what constitutes a violation of the right to a public trial.

8 Dissent at 37-38. In that case, the trial court conducted
9 individual questioning of certain jurors in chambers or in
10 the jury room with the defendant, counsel, and a court
11 reporter present. Momah, 141 Wn. App. at 710-11. The court
12 held that a defendant's right to a public trial is not
13 triggered until the trial court explicitly orders the
14 courtroom closed, citing Brightman's rule that "'once the
15 plain language of the trial court's ruling imposes a
16 closure, the burden is on the State to overcome the strong
17 presumption that the courtroom was closed.'" Momah, 141 Wn.
18 App. at 714 (emphasis omitted) (alteration omitted) (quoting
19 Brightman, 155 Wn.2d at 516). But Division One's analysis
20 seems to foreclose any possibility that a defendant could
21 prove that a courtroom was closed by other than an explicit
22 ruling by the trial court. We have joined Division Three in
23 strongly disagreeing with this approach. (Emphasis added).
24 State v. Erickson, ___ Wn. App. ___, 189 P.3d 245, 249-50
25 (2008); see State v. Duckett, 141 Wn. App. 797, 809, 173
26 P.3d 948 (2007); State v. Frawley, 140 Wn. App. 713, 720,

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1 167 P.3d 593 (2007). Despite the absence of any explicit
2 exclusion of the public, Sadler has met his burden to show
3 that moving his Batson hearing into the jury room
4 constituted a courtroom closure.

5 The facts of this case, although somewhat different
6 than those in both State v. Stanley Scott Sadler, and State
7 v. David Erickson, parties (shown by their statements) felt
8 they were required by the court to exit the courtroom due to
9 the earlier statements of the judge in open court. The court
10 did not clarify to the family or observers in the court room
11 that they had an alternative to leaving while jurors #16 and
12 #21 were questioned "in private." Pp. 15, Transcript of
13 Proceedings, Voir Dire (emphasis added) (Exhibit A). The
14 court further acknowledged that it would talk to juror #16
15 "later." Pp. 25, Transcript of Proceedings, Voir Dire
16 (emphasis added) (Exhibit B). The statements of the people
17 in the courtroom are clear that they believed there was a
18 closure due to the events that led up to the clearing of the
19 jury panel out of the courtroom. The court acknowledges that
20 most people left the court room by saying to juror #16,
21 "alright. The jury panel has now been excused with the
22 exception of number 16 who is here. Number 16, the panel has
23 been excused. There are still a few other people in the
24 courtroom (meaning many had left). I can ask them to leave
25 too. Do you..." pp., 75 Transcript of Proceedings, Voir Dire
26 (emphasis added) (Exhibit C).

EXHIBIT A

1 upon what you know about this case, know of any reason
2 why you should not be allowed to serve? Before you
3 answer these next few questions, they are -- given the
4 nature of this case, if there are things that you would
5 like to have discussed outside the presence of the rest
6 of the jurors, let us know, we can make arrangements for
7 that. So again, based on what you know about this case,
8 do you know of any reason why you should not be allowed
9 to serve on this case?

0 BAILIFF: 16, 21.

1 THE COURT: All right. Number 16?

2 JUROR NO. 16: well, I'd like to tell you in
3 private.

4 THE COURT: All right.

5 BAILIFF: Number 10, also.

6 THE COURT: All right. Number 10?

7 JUROR NO. 10: Yes.

8 THE COURT: what is your reason why you should
9 not be allowed to serve?

0 JUROR NO. 10: I know the person that is being
1 tried.

2 THE COURT: Okay. You're acquainted with him?

3 JUROR NO. 10: Mm-hmm.

4 THE COURT: All right. we'll come back to that.
5 Number 21?

EXHIBIT B

consideration of this case?

JUROR NO. 9: I don't believe so because it was a divorce case.

THE COURT: Oh, okay. All right.

And Number 16, you wanted to talk about -- this issue you want to talk about later.

JUROR NO. 16: Yeah.

THE COURT: Number 40, would this influence your consideration of the case?

JUROR NO. 40: No.

THE BAILIFF: We have an addendum 32 also.

THE COURT: Okay. 32?

JUROR NO. 32: I served on a jury years ago with a rape, sodomy.

THE COURT: Would that affect your ability to sit in this case?

JUROR NO. 32: No.

THE COURT: All right. Do any of you have a close friend or relative who has had experience as a witness or as a victim or as a defendant in a similar or related type of case, a close friend or relative?

THE BAILIFF: 27.

THE COURT: All right. 27, is there anything about that that would make it difficult for you to sit as a fair and impartial juror in this case?

EXHIBIT C

1 joke and we try and have a little fun here, this is
2 important. And that's all I'm trying to get to. Just
3 because a person steps on the stand and said something
4 or did something, one thing you can be sure of, we
5 weren't there. Thank you.

6 THE COURT: Thank you, Mr. McConnell. All
7 right. I'm going to excuse the jury panel at this time
8 to go back to the jury assembly room to wait for a few
9 moments. I don't believe we'll take too long and then
0 I'll have you come back and then we'll do the rest of
1 the jury selection. Number 16 can stay here.

2 (Jury panel exits the
3 courtroom.)

4 THE COURT: All right. The jury panel has now
5 been excused with the exception of Number 16 who is
6 here.

7 Number 16, the panel has been excused. There are
8 still a few other people in the courtroom. I can ask
9 them to leave too. Do you --

0 JUROR NO. 16: I don't care, don't matter.

1 THE COURT: All right. Okay. You had indicated
2 before questioning that there were some reasons why you
3 should not serve on this case. During jury selection I
4 think some of those issues came out. So let's talk
5 about that a little bit.

EXHIBIT D



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Court of Appeals Division II
State of Washington

Opinion Information Sheet

Docket Number: 35628-7

Title of Case: State Of Washington, Respondent, V. David Erickson, Appellant

File Date: 07/29/2008

SOURCE OF APPEAL

Appeal from Pierce County Superior Court

Docket No: 06-1-00053-8

Judgment or order under review

Date filed: 11/30/2006

Judge signing: Honorable Thomas J Felnagle

JUDGES

Authored by Elaine Houghton

Concurring: C. C. Bridgewater

Dissenting: Christine Quinn-Brintnall

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 35628-7-II

Respondent,

v.

DAVID LEE ERICKSON,

PUBLISHED OPINION

Appellant.

Houghton, P.J. -- David Erickson appeals his conviction of two counts of first degree child rape. He argues that the trial court denied him his constitutional right to public trial by allowing private questioning of prospective jurors. We reverse and remand for a new trial.¹

FACTS

The State charged Erickson with two counts of first degree child rape. Before trial, the court asked whether the parties wanted to give the prospective jurors a questionnaire before beginning voir dire. The prosecutor responded, "I'm hopeful that [defense counsel] and I can agree on one that we can present to the Court. We both drafted one that we exchanged, and I think they're pretty similar. I haven't had an opportunity to discuss that with [defense counsel]."

¹ Because we reverse and remand for a new trial, we do not address Erickson's other assignments of error that involve sentencing conditions, the trial court's admission of certain items into evidence, and ineffective assistance of counsel.

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II Report of Proceedings (RP) at 179. Defense counsel replied, "I don't think that will be a problem, Your Honor. I will probably add some questions, based on what [the prosecutor] had, and I don't think [the prosecutor's] got major problems about questions that I had." II RP at 179. The trial court then replied:

I guess the main [questions] from my perspective, are that you have a list of witnesses in there so the jurors can respond to that; that you ask them whether or not there's any reason that they might not be fair and impartial so we get that kind of broad, general question in. Give them a suggested time frame which is liberal, and be sure they can accommodate us for the time frame, and factor in some deliberation time into that. And then ask them whether or not any of them want to be talked to privately so we get an idea as to how many of those we might have.

II RP at 179.

The next day of the proceedings, before the prospective jurors' orientation, the trial court noted that the questionnaire "looked good." III RP at 185. During discussion on the matter, the prosecutor mentioned, "I suspect that there's going to be a number of people who want to talk in private." III RP at 188. Erickson's counsel did not object and acquiesced to the trial court's decision to begin any private questioning of individual prospective jurors after their orientation.

After the prospective jurors answered the questionnaire, the judicial assistant notified the trial court and counsel that according to prospective jurors' answers to the questionnaire, three individuals wanted to be questioned privately. During the trial court's orientation, it told the prospective jurors, "You have the option to ask to have your questions asked and answered with fewer people present. . . . [I]t's certainly possible that the answers may involve an area that you are uncomfortable talking about in front of such a large group." III RP at 260.

Later, the trial court asked whether any prospective jurors wanted to be examined privately. Four individuals wished to do so. Except for those four, the trial court excused the rest

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of the prospective jurors from the courtroom and proceeded with counsel and the court reporter to the jury room. Once there, the trial court called each prospective juror into the jury room individually, and both sides questioned each individual. Three of the prospective jurors described personal experiences with sexual abuse or assault, while the fourth suggested he knew defense counsel.

During the interviews in the jury room, the trial court denied Erickson's challenges for cause directed toward two prospective jurors and excused the prospective juror who knew defense counsel. The trial court later excused one of these four prospective jurors for unrelated reasons. Erickson later exercised peremptory challenges against the other two prospective jurors whom the parties had questioned in the jury room.

The jury found Erickson guilty of both counts. He appeals.

ANALYSIS

Erickson contends that the trial court denied him his constitutional rights. He asserts that moving individual prospective jurors in the jury room for private questioning violated his right to a public trial.

We review de novo whether a trial court procedure violates the right to a public trial. State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). ~~We presume prejudice where the court proceedings violate this right.~~ State v. Rivera, 108 Wn. App. 645, 652, 32 P.3d 292 (200) ~~and defendant's failure to object at the time of a courtroom closure does not waive this right.~~ Brightman, 155 Wn.2d at 514-15. The remedy for such a violation is to reverse and remand for a new trial. In the Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004).

The Sixth Amendment to the United States Constitution and article I, section 22 of the

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Washington Constitution each guarantee a criminal defendant the right to a public trial. State v. Russell, 141 Wn. App. 733, 737-38, 172 P.3d 361 (2007)). Additionally, article I, section 10 of the Washington Constitution states, "Justice in all cases shall be administered openly," which provides the public itself a right to open, accessible proceedings. Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

Article I, Section 10's guarantee of public access to proceedings and article I, section 22's public trial right together perform complementary, interdependent functions that assure the fairness of our judicial system.² State v. Bone-Club, 128 Wn.2d 254, 259, 906 P.2d 235 (1995); see also State v. Easterling, 157 Wn.2d 167, 187, 137 P.3d 825 (2006) (Chambers, J.,

² The dissent suggests that Erickson lacks standing to invoke the public's right to a public trial. Dissent at 14. The dissent further states that Erickson's interest in full candor during questioning conflicts with the public's interest in open proceedings, and thus he cannot "fairly represent the

public's interests in exercising its public trial rights" under article I, section 10. Dissent at 15. We disagree.

As noted in *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 235 (1995), article I, section 10 and article I, section 22 are interdependent means of ensuring the fairness of our judicial system. The five-part Bone-Club inquiry itself contemplates the conflict between constitutional protections and the need for closure in certain circumstances. According to the Bone-Club court, "[T]he five criteria a trial court must obey to protect the public's right of access before granting a motion to close are likewise mandated to protect a defendant's right to public trial." 128 Wn.2d at 259 (emphasis added). Regardless whether Erickson has standing under article I, section 10, he did not ask the trial court to close the courtroom. He merely acquiesced to the trial court's proposal and Erickson's failure to object does not waive his right to public trial under article I, section 22. *Brightman*, 155 Wn.2d at 517. Furthermore, helping shape a questionnaire before beginning voir dire does not indicate his desire to move the proceedings out of the courtroom.

Although we note that a courtroom closure requires a Bone-Club analysis, here the trial court could have followed a different procedure not implicating Bone-Club. It had already excused all other prospective jurors from the courtroom; questioning of individual jurors regarding sensitive topics separate from other prospective jurors could have then taken place in open court. See *State v. Vega*, ___ Wn. App. ___, 184 P.3d 677, 678-79 (2008). Such an approach is not a closure of the courtroom and it secures the right to a public trial.

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concurring) ("[T]he constitutional requirement that justice be administered openly is not just a right held by the defendant. It is a constitutional obligation of the courts.")

The right to public trial helps ensure a fair trial, reminds officers of the court of the importance of their functions, encourages witnesses to come forward, and discourages perjury. *Brightman*, 155 Wn.2d at 514. The public's access to jury selection is important, not only to the parties but also to the criminal justice system itself. *Orange*, 152 Wn.2d at 804. A closed jury selection process prevents a defendant's family from contributing their knowledge or insight during jury selection. *Brightman*, 155 Wn.2d at 515. And closure also prevents other interested members of the public, including the press, from viewing the proceedings.

Protection of the right to public trial requires a trial court "to resist a closure motion except under the most unusual circumstances." *Bone-Club*, 128 Wn.2d at 259. A trial court may close a courtroom only after considering the five requirements enumerated in Bone-Club and entering specific findings on the record to justify the closure order.³ 128 Wn.2d at 258-59. A

³ Relying on *Allied Daily Newspapers v. Eickenberry*, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993), the Bone-Club court articulated five criteria to "assure careful, case-by-case analysis of a closure motion":

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

128 Wn.2d at 258-59.

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trial court's failure to undertake the Bone-Club analysis, which directs the trial court to allow anyone present an opportunity to object to the closure, undercuts the guarantees enshrined in both article I, section 10 as well as article I, section 22. 128 Wn.2d at 258-59.

Erickson argues that the trial court's relocation of a portion of voir dire to the jury room

violated his right to public trial. Relying on a Division Three case, *State v. Frawley*, 140 Wn. App. 713, 167 P.3d 593 (2007), Erickson asserts that the trial court's decision to move interviews of prospective jurors into the jury room "prohibit[ed] the public from observing this examination." Appellant's Br. at 5. The Frawley court held that conducting interviews of prospective jurors in the jury room is equivalent to a courtroom closure. 140 Wn. App. at 720. See also *State v. Duckett*, 141 Wn. App. 797, 809, 173 P.3d 948 (2007) (a Division Three case following Frawley and holding that a trial court must undertake the Bone-Club analysis before questioning prospective jurors individually in a jury room). Because the trial court did not undertake the necessary Bone-Club analysis on the record, Erickson argues that the trial court violated his public trial right.

The State urges us to follow a Division One case, *State v. Momah*, 141 Wn. App. 705, 171 P.3d 1064 (2007).⁴ In *Momah*, the court held that individual questioning of prospective jurors in chambers and in the jury room does not constitute a closure, making a Bone-Club analysis unnecessary.

In this case, the trial court excused prospective jurors from the courtroom and proceeded

4 After granting review on the public trial issue in *Momah*, the Washington Supreme Court heard oral argument on the case on June 10, 2008. *State v. Momah*, 163 Wn.2d 1012, 180 P.3d 1291 (2008).

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with counsel and the court reporter to the jury room, where both sides questioned prospective jurors individually about their answers to a questionnaire.⁵ Thus, we must decide whether a trial court must undertake a Bone-Club analysis before individual questioning of prospective jurors outside the courtroom or in the jury room.

The process of jury selection lies within the ambit of the right to a public trial. *Brightman*, 155 Wn.2d at 511, 515. Thus, if private questioning of prospective jurors in a jury room acts as a courtroom closure, Bone-Club mandates findings to support such an action by the trial court. 128 Wn.2d at 259-60.

In *Brightman*, the trial court ordered a full courtroom closure during jury selection. 155 Wn.2d at 511. The trial court, *sua sponte*, told the attorneys that during jury selection the courtroom would be too full of prospective jurors and would pose a security risk if observers, witnesses, and friends and relatives of the victim and defendant remained.⁶ *Brightman*, 155 Wn.2d at 511. Our Supreme Court disagreed and reversed and remanded for a new trial based on the trial court's failure to engage in the Bone-Club analysis before closing the courtroom.

⁵ Although the dissent suggests that Erickson submitted the juror questionnaire, our review of the record indicates that before beginning *voir dire*, the trial court and the parties agreed together to formulate appropriate questions to include in a questionnaire. Further, it appears the trial court made the decision to move questioning of the prospective jurors into the jury room after the questionnaire was formulated. Thus, we disagree with the dissent's suggestion that Erickson in effect "requested" a courtroom closure making his public trial argument subject to the invited error doctrine. Dissent at 13.

⁶ The record before the *Brightman* court did not make clear whether the trial court actually followed through on its statement to the attorneys, but the court decided that "once the plain language of the trial court's ruling imposes a closure, the burden is on the State to overcome the strong presumption that the courtroom was closed." 155 Wn.2d at 516. The State did not

present evidence to overcome the presumption that closure occurred during jury selection. Brightman, 155 Wn.2d at 516.

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Brightman, 155 Wn.2d at 518.

Although the Brightman court noted that trivial closures may not violate a defendant's public trial right, the court made evident that its understanding of "trivial" derived from federal cases where "brief and inadvertent" closures had no real affect on the conduct of the proceedings. 155 Wn.2d at 517.

In Peterson, the trial court, on motion, closed the courtroom so that an undercover officer could testify but inadvertently left the courtroom closed for 15-20 minutes of the defendant's testimony. Peterson v. Williams, 85 F.3d 39, 41-42 (2d Cir. 1996). In Al-Smadi, court security officers closed federal courthouse doors at the usual time of 4:30 P.M., 20 minutes before the close of a trial's proceedings at 4:50 P.M. United States v. Al-Smadi, 15 F.3d 153, 154 (10th Cir. 1994). And in Snyder, during counsels' arguments to the jury, a bailiff refused to allow persons to enter or leave the courtroom. Snyder v. Coiner, 510 F.2d 224, 230 (4th Cir. 1975)). Such condition was brief, quickly changed by the trial court, and placed no restrictions on any of the trial's participants or observers. Snyder, 510 F.2d at 230.

In none of these federal cases did the circuit courts of appeals find a violation of the Sixth Amendment public trial right. In other words, the closures in the federal cases the Brightman court cited were too "trivial" to warrant such a conclusion. 155 Wn.2d at 517. In light of those cases, the private questioning of jurors, even if done to protect jurors' privacy or to elicit more truthful or forthright answers during voir dire regarding their ability to serve, is more than trivial in terms of its effect on the proceedings. Nor is an intentional decision to remove private questioning of jurors to a place outside the presence of the public "brief and inadvertent." Brightman, 155 Wn.2d at 517.

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Because the decision to remove individual questioning of prospective jurors outside the courtroom has more than an inadvertent or trivial impact on the proceedings, we hold that it acts as a closure for purposes of Bone-Club. Individual questioning of prospective jurors in a jury room acts as a closure because it is improbable that a member of the public would feel free and welcome to enter a jury room of his or her own accord. Also, removing the proceedings makes it difficult, if not impossible, for a criminal defendant's family or friends, or any other member of the public, to view the entirety of the jury selection process. Most courts have jury rooms and chambers adjacent to, but separate from, the courtroom.⁷

Obviously, there are times when a courtroom closure is appropriate. But it is not the public's responsibility to safeguard these rights; it is the responsibility of the courts to take the appropriate steps under Bone-Club to ensure and protect the defendant's and the public's right to open proceedings before any courtroom closure. 128 Wn.2d at 258-59.

Although a trial court would understandably want to protect prospective jurors' privacy during jury selection, we agree with Frawley, and more specifically with Duckett, insofar as they require a Bone-Club analysis before private questioning of prospective jurors outside the courtroom. See Duckett, 141 Wn. App. at 809; Frawley, 140 Wn. App. at 720-21. These cases' approach to this issue comports with our understanding of Brightman.

In Frawley, the trial court conducted voir dire of individual jurors in the judge's chambers outside the presence of the public. 140 Wn. App. at 718. Before the questioning began, the trial court did not ask the defendant whether he specifically wished to waive his public trial right, nor

7 Moreover, a person entering a courtroom and not finding the trial court, counsel, and the court reporter present might not discern that the trial was proceeding.

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did the trial court ask those in the courtroom whether anyone would waive the public trial right. Frawley, 140 Wn. App. at 718. The Frawley court discerned no material distinction between private questioning of prospective jurors and general voir dire of the jury panel. 140 Wn. App. at 720. Reversing the defendant's conviction and remanding for new trial due to the trial court's failure to engage in a Bone-Club analysis, the Frawley court noted that denial of the right to a public trial "is one of the limited classes of fundamental rights not subject to harmless error analysis." 140 Wn. App. at 721 (quoting Easterling, 157 Wn.2d at 181).

Duckett involved a scenario nearly identical to the present case. During voir dire, the court questioned a number of prospective jurors individually in the jury room, based on their responses to a questionnaire. Duckett, 141 Wn. App. at 800. Also, the trial court did not perform a Bone-Club inquiry. Duckett, 141 Wn. App. at 805. Division Three overturned the case, deciding that "[t]he closure here was deliberate, and the questioning of the prospective jurors concerned their ability to serve; this cannot be characterized as ministerial in nature or trivial in result." Duckett, 141 Wn. App. at 809.

We agree with the principle stated in Duckett, that "the guaranty of a public trial under our constitution has never been subject to a de minimus exception." 141 Wn. App. at 809. Even though one can articulate pragmatic and salutary reasons for moving voir dire outside the courtroom in certain circumstances, such a course of action requires the trial court to engage in a Bone-Club inquiry before doing so. Because the trial court did not do so here, it violated Erickson's right to a public trial.

In sum, the trial court erred in not performing the five-part Bone-Club inquiry before its decision to move voir dire questioning of four prospective jurors into the jury room.⁸ As

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Erickson's failure to object to the process does not constitute a waiver⁹ and because we presume

⁸ We again note that the better practice is to question individual jurors regarding sensitive topics separate from the rest of the prospective jurors, but within the courtroom. See Vega, 184 P.3d at 679. Such an approach is not a closure of the courtroom and thus requires no Bone-Club analysis.

⁹ Nor does Erickson's assistance in drafting a juror questionnaire before beginning voir dire and

before the trial court called prospective jurors into the jury room constitute a waiver under these facts.

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prejudice, we reverse and remand for a new trial. Brightman, 155 Wn.2d at 514-15.; Rivera, 108 Wn. App. at 652.

Reversed and remanded for new trial.

Houghton, P.J.

I concur:

Bridgewater, J.

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Quinn-Brintnall, J. (dissenting) -- I disagree with the majority's decision to review the public trial right on the merits and, therefore, respectfully dissent. The majority holds that privately interviewing four prospective witnesses who were never seated on the jury was a courtroom closure that violated David Erickson's and the public's right to a public trial. Although I agree that trial courts have a duty to apply the Bone-Club¹⁰ factors before closing a courtroom, in my opinion Erickson invited this error and may not now complain that his personal public trial right was violated. Moreover, Erickson does not have standing to assert the public's right.

Initially, I note that Erickson invited any error regarding his personal right to a public trial. Under the invited error doctrine, a court should decline to review a claimed error if the appealing party induced the court to err. State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990). This invited error doctrine applies even to manifest constitutional errors. State v. McLoyd, 87 Wn. App. 66, 70, 939 P.2d 1255 (1997). Here, Erickson submitted a jury questionnaire in which he asked potential jurors whether they wanted private interviews. Erickson agreed with the trial court's decision to begin private interviews of jurors. Then, Erickson and the prosecutor proceeded to privately interview the four potential jurors who wanted to answer certain questions in a private forum. By submitting the jury questionnaire and conducting private questioning without objection, Erickson agreed that the courtroom should be "closed" for this very limited purpose and very short duration. Cf. In re Pers. Restraint of Orange, 152 Wn.2d 795, 825, 827, 100 P.3d 291 (2004) (Madsen, J., concurring, and Ireland, J., dissenting) (noting that de minimis courtroom closures do not violate public trial rights); see also State v. Easterling, 157 Wn.2d 10 State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

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167, 180-81, 137 P.3d 825 (2006); State v. Brightman, 155 Wn.2d 506, 517, 122 P.3d 150 (2005) (declining to rule on whether de minimis courtroom closures implicate the right to a public trial). He should not now be heard to complain that the closure he requested was improper.

The invited error doctrine is an important aspect of our appellate process that was crafted to prevent the injustice of a party benefiting from an error that he caused or should have prevented. *City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). In my opinion, such an injustice could be prevented today by applying the doctrine. The doctrine's application makes particular sense here, where the trial court understandably did not believe it was closing the courtroom, no one objected or even mentioned closure, and there are extremely strong public interests in allowing private interviews of potential jurors on matters of sexual abuse.

Erickson argues that if this court determines that he invited this error, then he received ineffective assistance of counsel. I strongly disagree. Counsel is not ineffective for making tactical decisions. *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (quoting *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)). Where, as here, the defendant needs to inquire into potential jurors' sexual experiences, the parties have fundamentally important reasons to allow potential jurors to answer such questions privately. Regarding sexual abuse, privacy is essential to encourage candid and truthful answers. Candid and truthful answers are essential to allow an attorney to soundly exercise challenges to the jury pool, thus ensuring an unbiased and unprejudiced jury. And the right to an unbiased and unprejudiced jury is an essential component of a defendant's constitutional right to a fair trial. *State v. Davis*, 141 Wn.2d 798, 824, 10 P.3d 977 (2000). As the record here revealed, three of the jurors who wanted private interviews admitted that they were sexual abuse victims. This is just the sort of candor that

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attorneys require to ensure a fair trial and are not likely to achieve without privacy. Erickson's counsel was not ineffective for suggesting and agreeing to conduct private questioning on these delicate issues.

The remaining question is whether Erickson has standing to invoke the public's right to a public trial. I would hold that he does not.¹¹ The standing doctrine generally prohibits a party from suing to vindicate another's rights. *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 138, 744 P.2d 1032, 750 P.2d 254 (1987), dismissed, 488 U.S. 805 (1988).

Apparently, our Supreme Court has never been asked to rule on whether a criminal defendant may assert the public's right to a public trial, although it has ruled on the public's right through a criminal defendant's appeal.¹² *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995).

Article I, section 10 of the Washington Constitution sets forth the public's right to the open administration of justice, including the right to public trials. *Bone-Club*, 128 Wn.2d at 259.

Members of the public -- including courtroom spectators, members of the media who wish to cover the trial, and even an attorney in his or her individual capacity -- are proper parties to appeal courtroom closure under this constitutional provision. Erickson is not arguing that he was

¹¹ I am aware of a recent holding to the contrary. See *State v. Duckett*, 141 Wn. App. 797, 804-05, 173 P.3d 948 (2007).

¹² Cases outside this jurisdiction are similarly unhelpful. See *Hutchins v. Garrison*, 724 F.2d 1425, 1432 (4th Cir. 1983) (assuming, in arguendo, defendant's standing to assert public's claim of First Amendment violation based on courtroom closure when issue failed on the merits), cert. denied, 464 U.S. 1065 (1984); *Tharp v. State*, 362 Md. 77, 119, 763 A.2d 151 (2000) (holding

that the petitioner's trial attorney had the right, as a member of the public, to challenge a courtroom closure on the public's behalf); *Massachusetts v. Jaynes*, 55 Mass. App. Ct. 301, 312, 770 N.E.2d 483 (2002) (declining to sua sponte raise "serious question" of whether defendant had standing to raise public's right to public trial when issue is "distinct" under state law and defendant's claim failed on the merits), review denied, 437 Mass. 1108 (2002).

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excluded from the courtroom. He was not. And he does not claim that he stands in the public's shoes here. He does not.

More importantly, this is not a situation in which the defendant's and the public's right to public trial are aligned to the degree that the defendant can fairly represent the public's interests in exercising its public trial rights. Rather, here, those rights conflict. As demonstrated at trial, Erickson had a strong interest to hold private interviews in order to encourage potential juror's candor while protecting them from the embarrassment inherent in discussing publicly, perhaps for the first time and under oath, the sexual abuse they suffered. Private voir dire in sexual abuse cases gives the defendant a tactical advantage and is crucial to protect his constitutional right to fully participate in selecting an unbiased and unprejudiced jury.

The public, in contrast, had an interest to know about the jury proceedings, learn how and why potential jurors were challenged, and oversee the trial to prevent and discover any abuses in the legal system.¹³ Erickson was present and benefited from private voir dire; he did not represent the public's interests in this case. In other circumstances where the defendant's and public's trial rights conflict, the defendant's rights and prerogatives generally trump the public's rights and prerogatives. For example, the defendant may waive his rights to a speedy trial, a jury, and a trial without regard to the public's interests except to the extent that court rules and

¹³ The right to a public trial is based partially on the theory that the "knowledge that every criminal trial [is] subject to contemporaneous review in the forum of public opinion [will constitute] an effective restraint on possible abuse of judicial power." *United States v. Kobli*, 172 F.2d 919, 921 (3d Cir.1949).

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legislation embody those public interests.¹⁴ Our high court has made these rulings despite the fact that our constitution announces the public's right that "[j]ustice in all cases shall be administered openly, and without unnecessary delay." Wash. Const. art. I, § 10. I would hold that the defendant's and public's interest in a public trial are not sufficiently aligned here to grant Erickson standing to assert that the proceedings violated the public's right under article I, section 10.

In summary, I would hold that Erickson invited the error alleged regarding his personal right to a wholly public jury trial, his attorney employed sound jury selection tactics to ensure his right to a fair trial, and Erickson does not have standing to represent the public's interest in a public trial. Accordingly, I respectfully dissent.

 QUINN-BRINTNALL, J.

¹⁴ See, e.g., *State v. Stegall*, 124 Wn.2d 719, 729, 881 P.2d 979 (1994) (relying on language of court rule to hold that a defendant may waive his right to a 12-person jury); *State v. Martin*, 94 Wn.2d 1, 5, 614 P.2d 164 (1980) (holding that the State may not prevent a defendant from entering a guilty plea that is valid under a court rule, even in a death penalty case); *State v.*

Williams, 85 Wn.2d 29, 32, 530 P.2d 225 (1975) (holding that the defendant may waive his right to a speedy trial under a court rule, which embodies the public's right to a speedy trial); see also Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 383-84, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979) (holding that, given the defendant's waiver, the public cannot demand a jury trial based on social interest in that mode of fact-finding and cannot prevent a continuance to protect speedy trial right).

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Court of Appeals Division II
State of Washington

Opinion Information Sheet

Docket Number: 35021-1

Title of Case: State Of Washington, Respondent V. Stanley Scott Sadler, Appellant

File Date: 10/14/2008

SOURCE OF APPEAL

Appeal from Pierce County Superior Court

Docket No: 04-1-04384-2

Judgment or order under review

Date filed: 07/21/2006

Judge signing: Honorable Vicki Hogan

JUDGES

Authored by David H. Armstrong

Concurring: Elaine Houghton

Dissenting: J. Robin Hunt

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

No. 35021-1-II

Respondent,

v.

STANLEY SCOTT SADLER,

PUBLISHED OPINION

Appellant.

Armstrong, J. -- Stanley Scott Sadler appeals his convictions of eight counts of sexual exploitation of a minor. Through counsel, he argues that the trial court erred when it: (1) heard his Batson¹ challenge in the jury room rather than the open courtroom, thereby violating his right to an open public trial; (2) denied his CrR 3.6 motion to suppress the evidence discovered in his residence; and (3) admitted his statements to law enforcement. In a pro se statement of additional grounds for review (SAG),² Sadler also argues that the statutory defense to the sexual exploitation of a minor charges, RCW 9.68A.110(3), is unconstitutionally vague as applied.³

We hold that the trial court violated Sadler's constitutional right to an open public trial

¹ Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

² RAP 10.10.

³ Both through counsel and in his pro se SAG, Sadler raises numerous additional issues. Because we reverse Sadler's convictions and remand for further proceedings based on the denial of his right to a public trial, we address only those issues that could affect the State's ability to retry Sadler or those that may arise again on retrial.

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when it held the Batson hearing in the jury room. We further hold that (1) the trial court erred when it concluded that a second warrantless entry into Sadler's residence by law enforcement for the sole purpose of obtaining information to support a search warrant application was lawful, (2) the trial court properly admitted Sadler's statements to law enforcement, and (3) Sadler's vagueness argument is without merit. Accordingly, we reverse the convictions and remand for a hearing on the validity of the search warrant under the independent source doctrine and, if the search warrant is valid and the State chooses to retry Sadler, for a new trial.

FACTS

On August 29, 2004, 14-year-old K.T. ran away from her Clark County, Washington foster home and was reported missing. Following a tip from a private organization that had tracked K.T.'s recent Internet activity, officers eventually located K.T. at Sadler's residence.

The subsequent searches of Sadler's residence and computer equipment yielded a significant amount of evidence,⁴ including numerous images of K.T. engaging in sexually explicit activities. Based on this evidence, the State charged Sadler by second amended information with 38 felony offenses, including 8 counts of sexual exploitation of a minor.⁵

During jury selection, the parties conducted an extensive voir dire of the 71-member jury

⁴ This evidence included (1) a wide variety of items that were sexual in nature and related to bondage, discipline, and sadomasochistic practices; (2) a digital camera; and (3) Sadler's computer. The camera and computer contained photographs of K.T. engaged in a variety of sexually explicit conduct. The later search warrants authorizing an additional forensic search of Sadler's computer revealed additional sexually explicit photographs of K.T., including photos of her interacting with a variety of BDSM related items that the police found in Sadler's house during the initial search. It also revealed e-mails containing sexually explicit pictures of K.T. that Sadler sent to three people as well as numerous instant-message chats.

⁵ The State also charged Sadler with: (1) one count of first degree kidnapping with sexual motivation, (2) three counts of third degree child rape, (3) twenty-three counts of possession of depictions of minors engaged in sexually explicit conduct with sexual motivation, and (4) three counts of dealing in depictions of minors engaged in sexually explicit conduct. The jury acquitted

Sadler on these charges and they are not at issue in this appeal.

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panel. Following voir dire, the State exercised two of its peremptory challenges to dismiss juror 2 and juror 27, the only two African-American jurors on the panel. At the close of voir dire, defense counsel raised a Batson challenge to the State's exercise of peremptory challenges against jurors 2 and 27, asserting that the State was unlawfully excluding these jurors because of their race.

Without discussing its reasons for doing so on the record or asking Sadler or anyone else present to comment, the trial court heard Sadler's Batson challenge in the jury room. Before moving the hearing, the trial judge stated, "We are going to step into the jury room for one matter on the record. Just don't leave the courtroom" Report of Proceedings (RP) at 855. The record does not reflect whether members of the public were present in the courtroom at the time or whether the trial court intended to allow spectators into the jury room. Sadler, defense counsel, the deputy prosecutor, corrections officers, and the court reporter were present at the hearing.

During the Batson hearing, the State posited several justifications for striking each of the two African-American jurors. Defense counsel argued that these reasons were pretextual, but the trial court found that the State had carried its burden of showing that the peremptory strikes were not racially motivated.

At trial,⁶ Sadler admitted that he met K.T. online through a bondage, discipline, and sadomasochistic (BDSM) oriented web site and, at her request, took her to his home after picking her up in Camas, Washington; that he had repeated sexual contact with K.T.; that he photographed K.T. engaging in a variety of sexually explicit conduct; and that he distributed some of these photographs to others. But he asserted that K.T. consented to the activities; that K.T. ⁶ Before trial, K.T. ran away from another foster home; she was unavailable at trial.

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had represented to him that she was 19 and he reasonably believed her; that K.T. showed him a Michigan birth certificate and a Washington identification card or driver's license via webcam, which showed she was 19; and that others appeared to believe K.T. was over 18.

Sadler's assertion that K.T. had shown him identification proving she was over 18 went to the statutory defense for the sexual exploitation of a minor charges, RCW 9.68A.110(3). That statute required Sadler to prove that he made a reasonable bona fide attempt to ascertain the true age of the minor^[7] by requiring production of a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper and did not rely solely on the oral allegations or apparent age of the minor.

The State attempted to show that Sadler's claim that K.T. showed him identification via webcam was not credible and that even if K.T. had shown him such identification, it was not a reasonable bona fide attempt to establish her age.

The jury convicted Sadler on eight counts of sexual exploitation of a minor and acquitted

him of the remaining thirty counts.

ANALYSIS

I. Open Public Trial

Sadler first argues that the trial court denied him his constitutional right to an open public trial when it heard his Batson challenge in the jury room rather than in the open courtroom. We agree.

7 In this context, a minor is any person under 18. RCW 9.68A.011(4).

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A. Right to Open Public Trial

"Article I, section 22 of the Washington Constitution[8] and the sixth amendment to the United States Constitution[9] both guarantee criminal defendants the right to a public trial."10 *State v. Brightman*, 155 Wn.2d 506, 514, 122 P.3d 150 (2005). The right to an open public trial ensures that the defendant receives a fair trial, in part by reminding the officers of the court of the importance of their functions, encouraging witnesses to come forward, and discouraging perjury. *Waller v. Georgia*, 467 U.S. 39, 46-47, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984); see *Brightman*, 155 Wn.2d at 514. Although the right to a public trial can serve the public or the defendant, the public's right and the defendant's right "serve complementary and interdependent functions in assuring the fairness of our judicial system. In particular, the public trial right operates as an essential cog in the constitutional design of fair trial safeguards."11 *State v. Bone-Club*, 128

8 Section 22 provides in relevant part:

In criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]

9 The Sixth Amendment provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

10 Article I, section 10 of the Washington Constitution gives the public and the press a right to open and accessible court proceedings. Section 10 provides: "Justice in all cases shall be administered openly, and without unnecessary delay." In *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995), our Supreme Court held that the same closure standards apply for both section 10 and section 22 rights.

11 In *Waller*, the United States Supreme Court noted that "[t]he requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions." *Waller*, 467 U.S. at 46 (quotations omitted). As succinctly put by the California Court of Appeals,

This benefit of public oversight or superintendence accruing to a criminal defendant as a result of the openness inherent in a truly public trial is largely lost if the only openness attending the trial proceedings (or any portion thereof) is to be found in an after-the-fact review of a cold written record of proceedings to which the public had no access.

People v. Harris, 10 Cal. App. 4th 672, 685, 12 Cal. Rptr. 2d 758 (Cal. Ct. App. 1992) (emphasis added).

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Wn.2d 254, 259, 906 P.2d 325 (1995).

Additionally, "it is well settled that the right to a public trial also extends to jury selection." *Brightman*, 155 Wn.2d at 515 (citing *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004) (citing *Press-Enter. Co. v. Superior Court of Calif., Riverside*

County, 464 U.S. 501, 505, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984)). "[A] closed jury selection process harms the defendant by preventing his or her family from contributing their knowledge or insight to jury selection and by preventing the venire from seeing the interested individuals." Brightman, 155 Wn.2d at 515 (emphasis added) (citing Orange, 152 Wn.2d at 812). In addition, "[t]he guaranty of open criminal proceedings extends to '[t]he process of juror selection'" because the jury selection process "is itself a matter of importance, not simply to the adversaries but to the criminal justice system." Orange, 152 Wn.2d at 804 (emphasis added) (quoting Press-Enter. Co., 464 U.S. at 505 (second alteration in original)).

Generally, to protect these important rights, before a trial court may exclude the public from the courtroom, it must conduct a five-part Bone-Club inquiry¹² and determine if the closure will unjustifiably interfere with the defendant's right to a public trial. Brightman, 155 Wn.2d at

12 Under Bone-Club:

1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.
4. The court must weigh the competing interests of the proponent of closure and the public.
5. The order must be no broader in its application or duration than necessary to serve its purpose.

Bone-Club, 128 Wn.2d at 258-59 (alteration in original) (quotation omitted).

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515. If the proceeding is subject to the right to a public trial, a trial court's failure to conduct a Bone-Club inquiry before excluding the public "results in a violation of the defendant's public trial rights." Brightman, 155 Wn.2d at 515-16 (citing Orange, 152 Wn.2d at 809). The defendant need show no prejudice resulting from a violation of this right; prejudice is presumed. Bone-Club, 128 Wn.2d at 261-62 (citing State v. Marsh, 126 Wash. 142, 147, 217 P. 705 (1923)); State v. Rivera, 108 Wn. App. 645, 652, 32 P.3d 292 (2001). Furthermore, a defendant's failure to "lodge a contemporaneous objection" at the time of the closure does not amount to a waiver of his right to a public trial.¹³ Brightman, 155 Wn.2d at 517 (citing Bone-Club, 128 Wn.2d at 257). The remedy for a violation of article I, section 22 is remand for a new trial. Rivera, 108 Wn. App. at 652 (citing Bone-Club, 128 Wn.2d at 261-62). Because the issue of whether a defendant's right to a public trial has been violated is a question of law, we review it de novo. Brightman, 155 Wn.2d at 514.

B. Closure Excluding the Public

To determine whether the trial court violated Sadler's right to a public trial, we must first decide whether the trial court's action here amounted to a closure excluding the public. We conclude that it did.

Without citation to authority, the State argues that the proceeding was not closed to the public because the trial court never asked anyone in the courtroom to leave the courtroom;

¹³ Although the State notes that Sadler did not object to the trial court considering the Batson challenge in the jury room, any assertion that Sadler's failure to object waived his right to bring

this issue on appeal has no merit. The record does not show that the trial court ever advised Sadler of his right to a public trial or asked him to waive this right, and case law clearly requires that the trial court ensure the defendant is aware of his right to public trial before waiver can occur. *Bone-Club*, 128 Wn.2d at 261 ("[T]his court has held an opportunity to object holds no 'practical meaning' unless the court informs potential objectors of the nature of the asserted interests.") (quoting *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 39, 640 P.2d 716 (1982)).

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nothing in the record shows that the trial court affirmatively excluded the public from the Batson hearing; and because counsel, the trial court, the defendant, two correctional officers, and the court reporter were present at the hearing. Sadler responds, also without citation to authority, that the proceeding was closed to the public because the trial court moved it into the jury room and did not invite the public to attend the hearing. We agree with Sadler.

To determine whether the trial court excluded the public from the Batson hearing, we look at the nature of the closure. See *Orange*, 152 Wn.2d at 807-08. Admittedly, unlike the situations in *Orange*, 152 Wn.2d at 808, and *Brightman*, 155 Wn.2d at 511, the trial court did not expressly exclude the public during the jury selection process. But this case is also not similar to those instances that did not amount to a closure where the trial court limited access to the proceedings by imposing security measures or where the courtroom was simply not large enough to accommodate all potential spectators. See, e.g., *United States v. Shryock*, 342 F.3d 948, 974 (9th Cir. 2003) (no Sixth Amendment violation when seating limited by size of courtroom). Here, the trial court's affirmative act of moving the proceeding into the jury room, a part of the court not ordinarily accessible to the public, without inviting the public to attend, had the same effect as expressly excluding the public. Jury rooms are not ordinarily accessible to the public; in fact, it is well known that juries are often taken into the jury room to be insulated from events occurring in the courtroom. Nor does the mere presence of the parties, security, and the court reporter demonstrate that the public was entitled to attend this hearing. Without an explicit invitation by the trial judge, no member of the public would have understood that the jury room was serving as a courtroom for the purposes of the Batson hearing. And in this case, the trial court told everyone sitting in the courtroom, "Just don't leave the courtroom." RP at 855. Under these circumstances the trial court's removal of the

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proceedings to a non-courtroom was equivalent to closing the courtroom to the public.

The dissent relies on *State v. Momah*, 141 Wn. App. 705, 171 P.3d 1064 (2007), review granted, 163 Wn.2d 1012 (2008),¹⁴ in which Division One takes a very different approach to what constitutes a violation of the right to a public trial. Dissent at 37-38. In that case, the trial court conducted individual questioning of certain jurors in chambers or in the jury room with the defendant, counsel, and a court reporter present. *Momah*, 141 Wn. App. at 710-11. The court held that a defendant's right to a public trial is not triggered until the trial court explicitly orders the courtroom closed, citing *Brightman's* rule that "once the plain language of the trial court's ruling imposes a closure, the burden is on the State to overcome the strong presumption that the

courtroom was closed.'" Momah, 141 Wn. App. at 714 (emphasis omitted) (alteration omitted) (quoting Brightman, 155 Wn.2d at 516). But Division One's analysis seems to foreclose any possibility that a defendant could prove that a courtroom was closed by other than an explicit ruling by the trial court. We have joined Division Three in strongly disagreeing with this approach. State v. Erickson, ___ Wn. App. ___, 189 P.3d 245, 249-50 (2008); see State v. Duckett, 141 Wn. App. 797, 809, 173 P.3d 948 (2007); State v. Frawley, 140 Wn. App. 713, 720, 167 P.3d 593 (2007). Despite the absence of any explicit exclusion of the public, Sadler has met his burden to show that moving his Batson hearing into the jury room constituted a courtroom closure.

C. Right to Public Trial in Batson Hearing Context

Next, we must determine whether the right to a public trial extends to Batson hearings. Citing *In re Personal Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835 (1994), *In re* 14 The Supreme Court heard oral argument in this case on June 10, 2008. State v. Erickson, ___ Wn. App. ___, 189 P.3d 245, 249 n.4 (2008).

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Personal Restraint of Pirtle, 136 Wn.2d 467, 484, 965 P.2d 593 (1998), and *Tolbert v. Page*, 182 F.3d 677, 680 (9th Cir. 1999), the State contends that even if holding the Batson hearing in the jury room excluded the public, Sadler had no right to a public hearing because the Batson hearing was equivalent to an in-chambers or bench conference on a purely legal matter to which Sadler himself, let alone the public, had no right to attend. We disagree.

"The public trial right applies to the evidentiary phases of the trial, and to other 'adversary proceedings.'" *Rivera*, 108 Wn. App. at 652-53 (emphasis added) (quoting *Ayala v. Speckard*, 131 F.3d 62, 69 (2d Cir. 1997)). The right to public trial is linked to the defendant's constitutional right to be present during the critical phases of trial; thus, "a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, . . . during voir dire," and during the jury selection process. *Rivera*, 108 Wn. App. at 653 (citing *Press-Enter. Co.*, 464 U.S. 501). A defendant does not, however, have a right to a public hearing on purely ministerial or legal issues that do not require the resolution of disputed facts. See *Rivera*, 108 Wn. App. at 653 (neither public nor defendant had a right to be present when trial court addressed a juror's complaint about another juror's hygiene); see also *State v. Bremer*, 98 Wn. App. 832, 835, 991 P.2d 118 (2000).

When a party raises a Batson challenge, the trial court applies a three-part test to determine if the peremptory challenge is race-based: (1) the trial court must determine initially whether the party raising the Batson challenge "has made out a prima facie case of racial discrimination"; (2) if it determines there is a prima facie case of racial discrimination, "the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation"; and (3) if the proponent of the strike tenders a race-neutral explanation, "the trial court must then decide . . . whether the

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opponent of the strike has proved purposeful racial discrimination.'" *State v. Vreen*, 143 Wn.2d 923, 926-27, 26 P.3d 236 (2001) (quoting *Purkett v. Elem*, 514 U.S. 765, 767, 115 S. Ct. 1769, 131 L. Ed. 2d 834 (1995)).

Although not a "factual question" on the merits of the underlying case, "the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." *Hernandez v. New York*, 500 U.S. 352, 364, 372, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (plurality opinion but with six justices agreeing on this rule) (citing *Batson*, 476 U.S. at 98 n.21); *State v. Rhodes*, 82 Wn. App. 192, 197, 917 P.2d 149 (1996) (quotations omitted); see also *Snyder v. Louisiana*, ___ U.S. ___, 128 S. Ct. 1203, 1207-08, 170 L. Ed. 2d 175 (2008). Indeed, the United States Supreme Court has characterized the "intent to discriminate" determination as a "pure issue of fact" because the underlying question is whether counsel's race-neutral explanation for striking a juror should be believed. *Hernandez*, 500 U.S. at 364-65; *Rhodes*, 82 Wn. App. at 196. Even though the trial court is not taking sworn testimony from witnesses, the attorney's explanation itself constitutes new facts not previously before the public, and the court's decision involves an evaluation not only of whether the attorney's explanation is consistent with what the trial court observed during voir dire, but also of the challenging attorney's credibility.¹⁵ See *Snyder*, 128 S. Ct. at 1208; *State v. Hicks*, 163 Wn.2d 477, 493, 181 P.3d 831 (2008) (quoting *Batson*, 476 U.S. at 98 n.21). As the Court recently reiterated, "the best evidence [of discriminatory intent] often will be the demeanor of the attorney who exercises the challenge.'" *Snyder*, 128 S. Ct. at 1208 (alteration in original) (quoting

¹⁵ We note that even absent being sworn as a witness, attorneys have an independent obligation to provide truthful information to the court under the rules of professional conduct. RPC 3.3(a)(1) (a lawyer shall not knowingly "make a false statement of fact or law to a tribunal[.]").

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Hernandez, 500 U.S. at 365). The dissent's argument that the trial court did not rely on "evidence not previously taken in the courtroom" is not persuasive. Dissent at 36. And it is axiomatic that assessment of demeanor and credibility is "'peculiarly within a trial judge's province'" as a finder of fact.¹⁶ *Snyder*, 128 S. Ct. at 1208 (quoting *Hernandez*, 500 U.S. at 365 (quoting *Wainwright v. Witt*, 469 U.S. 412, 428, 105 S. Ct. 844, 83 L. Ed. 2d 841 (1985))); *Hicks*, 163 Wn.2d at 493 (quotation omitted); *Rhodes*, 82 Wn. App. at 196-97 (quotations omitted).

Additionally, the purposes underlying a public trial include ensuring that the public can see that the accused is dealt with fairly, *Waller*, 467 U.S. at 46, and reminding officers of the court of their responsibilities to assure that the defendant receives a fair trial. Few aspects of a trial can be more important to these goals than whether the prosecutor has excused jurors because of their race, an issue in which the public has a vital interest. And the court cannot serve this vital interest by hearing and evaluating the prosecutor's justification for excusing the jurors behind closed

doors. Rather, the prosecutor's explanation must be tested in a forum open to the public.

Furthermore, although the State's cited cases establish that defendants are not entitled to attend in-chambers or bench conferences addressing purely legal or ministerial matters, these cases do not show that a Batson challenge falls under either category. Both Lord and Pirtle addressed whether the defendant had a right to be present when the trial court was addressing purely ministerial or legal matters. In Lord, the matters included: (1) a deferred ruling on an ER 609 motion, (2) a defense motion for funds to get Lord's hair cut and to provide him with

16 A trial court's ruling on a Batson challenge will be upheld "unless it is clearly erroneous." Snyder, 128 S. Ct. at 1207; Hicks, 163 Wn.2d at 486 (quoting State v. Luvane, 127 Wn.2d 690, 699, 903 P.2d 960 (1995) (quoting Hernandez, 500 U.S. at 369)). This standard of review also supports the conclusion that the trial court is not addressing purely legal issues, which we would normally review de novo.

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clothing for trial, (3) questions regarding the wording of the jury questionnaires and pretrial instructions, (4) a time limit for testing certain evidence, (5) the trial court's announcement of its rulings on previously argued evidentiary matters, (6) a decision allowing the jurors to take notes during trial, and (7) an order directing the State to provide the defense with summaries of its witnesses' testimony. Lord, 123 Wn.2d at 306. In Pirtle, the matters included: (1) the wording of jury instructions; (2) ministerial matters; and (3) whether the jury should be sequestered. Pirtle, 136 Wn.2d at 484. Thus, in Lord and Pirtle, the matters were more clearly ministerial or purely legal issues. Here, in contrast, the Batson challenge was an integral part of the jury selection process requiring the trial court to make credibility determinations based, at least in part, on "the demeanor of the attorney . . . exercis[ing] the challenge" when evaluating the State's purported reasons for excluding the only two African-American jurors on the panel, rather than a purely ministerial matter. Snyder, 128 S. Ct. at 1208 (quoting Hernandez, 500 U.S. at 365).

Tolbert is likewise inapposite. In Tolbert, the issue was whether the trial court properly denied a defendant's Batson challenge. Tolbert, 182 F.3d at 679. It did not address whether a Batson challenge is subject to the right of an open public trial. The Tolbert court did say that portions of a Batson analysis, specifically whether the race-neutral justification is an adequate race-neutral explanation or whether the challenged juror is a member of a protected class for Batson purposes, involve purely legal issues. But it did not say that a Batson analysis, as a whole, is a purely legal issue. In fact, the Tolbert court explained that "[w]hether the defendant has satisfied the ultimate burden of proving purposeful discrimination is, of course, a question of fact reviewed for clear error." Tolbert, 182 F.3d at 680 n.5 (emphasis added) (citations omitted). And, as we have already noted, the United State Supreme Court recently reiterated that the trial court is making factual determinations, including

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evaluation of the credibility of the party accused of dismissing jurors for racially motivated reasons, that are clearly not purely legal matters. Snyder, 128 S. Ct. at 1207-08. Here, the trial

court addressed the Batson challenge in its entirety, not just the legal aspects of that analysis, outside the presence of the jury.

D. Conclusion

Because a Batson hearing involves factual and credibility determinations and is relevant to the fairness and integrity of the judicial process as a whole, we conclude that the right to public trial exists in this context. Here, nothing in the record suggests that the trial court recognized, let alone considered, Sadler's right to a public trial before removing the hearing to the jury room. And although Sadler has not shown prejudice, his right to public trial is structural error that is "per se" reversible error. Thus, we reverse Sadler's convictions and remand for further proceedings.¹⁷

II. Denial of CrR 3.6 Motion

Sadler next contends that the trial court erred when it denied his CrR 3.6 motion to suppress the evidence found during the search of his residence.¹⁸ We hold that the trial court did not err when it concluded that the initial warrantless entry into Sadler's residence was lawful.

¹⁷ We note that we do not hold that a trial court can never consider a Batson challenge in a closed proceeding outside the public forum. Such a proceeding may be permissible if the trial court first conducts a proper Bone-Club inquiry.

¹⁸ The State argues that Sadler cannot attempt to suppress evidence found when the police executed the search warrant because he did not argue below that the search warrant affidavit would be insufficient if any of the information in it was excluded due to an initial unlawful entry. In effect, the State argues that Sadler cannot challenge the evidence found in the search unless he established below that the independent source doctrine did not apply. This argument is difficult to understand. The trial court found that the officers' entries were lawful, thus, Sadler had no reason to challenge the sufficiency of the search warrant affidavit.

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But we further hold that the trial court erred when it found that a second warrantless entry into the residence for the purpose of gathering information for the search warrant was lawful and when it failed to consider whether the search warrant was valid without the information obtained during the second warrantless entry.

A. Related Facts

On September 12, 2004, a private organization contacted the Clark County Sheriff's Office and reported that it had tracked some of K.T.'s recent Internet activity to an internet provider (IP) address. After an investigator tracked the IP address to Sadler and obtained his physical address in University Place, Washington, the Clark County Sheriff's Office sent a teletype to the Pierce County Sheriff's Office requesting that it attempt to contact K.T. at Sadler's address. In this request, the Clark County Sheriff's Office stated that K.T. had disappeared from a foster home two weeks earlier, that she might have met someone on the Internet, that she was possibly attempting to pass as a 19-year-old, and that she might be involved in sadomasochistic sexual activity.

Fircrest Police Officer Eric Norling and Deputy Christopher Rather were provided with this information and dispatched to Sadler's house. When they arrived, Officer Norling knocked loudly on the front door and rang the doorbell several times while Deputy Rather watched the

back of the residence. Eventually, a man who appeared to be in his 40s opened the door. Officer Norling observed that the man was sweating profusely and that he "looked surprised." Report of Proceedings (RP) (3.5/3.6 Hearing) at 15.

After verifying that the man was Sadler, Officer Norling asked him if K.T. was there; Sadler responded that she was asleep. Sadler then turned and started up the stairs while calling K.T.'s name. Officer Norling followed Sadler

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to an upstairs bedroom. Deputy Rather, who had followed Officer Norling inside, remained downstairs and began to look for other people to ensure officer safety.

Once upstairs, Officer Norling saw K.T. laying on a bed in the fetal position. K.T.'s skirt was pulled up to just below her waist. She did not have on any underwear and her buttocks were exposed. Officer Norling also observed chains on the bed frame, leather cuffs on the nightstand, and a vibrator nearby. K.T. appeared to be sleeping or unconscious, and she was slow to respond when Officer Norling called her name.

Upon discovering K.T., Officer Norling called to Deputy Rather to join him upstairs. Deputy Rather ran into Sadler coming down the stairs as he was heading up, and he took Sadler back upstairs. When they approached the bedroom, Officer Norling asked Deputy Rather to detain Sadler. Deputy Rather handcuffed Sadler, patted him down for weapons, and had him sit on the floor. Deputy Rather then looked into the bedroom and saw K.T. on the bed.

When K.T. finally responded to Officer Norling, she moaned and told him that her stomach hurt and that she was dizzy; she did not respond when he asked her how old she was. Deputy Rather called for medical assistance and then left Sadler with Officer Norling to finish his "security sweep." RP (3.5/3.6 Hearing) at 53.

While performing his "security sweep," which he later characterized as a "routine" activity, Deputy Rather entered another room near the bedroom. RP (3.5/3.6 Hearing) at 54-55. The walls of this room were covered with black plastic, and the room contained numerous sexual devices related to BDSM practices as well as a video camera on a tripod. After medical assistance arrived, Officer Norling also looked in this room. In addition to looking into the adjacent rooms, Deputy Rather checked the closets to make sure no one was hiding. At the suppression hearing, neither officer testified

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that they had any specific reason to suspect anyone else was in the residence.

After the medical assistance arrived, Deputy Rather escorted Sadler to the living area to get him out of the way. When the medical personnel left with K.T., Deputy Rather turned Sadler over to Officer Norling and joined K.T. at the hospital.

After placing Sadler in a patrol car, Officer Norling contacted his supervisors and waited for them to arrive. At that point, the officers had "secured" the front and back of Sadler's

residence, "[s]o no one could enter until [the officers] were able to attempt to obtain a search warrant." RP (3.5/3.6 Hearing) at 22. Detective Jackson from the Pierce County Sheriff's Office arrived a short time later.

At the suppression hearing, Detective Jackson testified that when he arrived at the scene, he contacted the officers, "they briefed [him] on what had happened," and then he and Officer Norling "walked through the residence" using "the same path that the officers used when they first went through." RP (3.5/3.6 Hearing) at 78. He stated that he conducted this walk-through with Officer Norling to "get a layout of the place" so he could describe it in a search warrant affidavit. RP (3.5/3.6 Hearing) at 79. In addition, he testified that when he talked to the officers, they (1) told him they had been in the residence, (2) stated that they had looked in a number of rooms, and (3) described what they had seen inside the residence.

Detective Jackson further stated that, although he and Officer Norling walked through the house to get a general layout, he did not enter the room with the black plastic on the walls, and Officer Norling did not show him anything inside that room. But he admitted that he could see into the room through the open door and that he saw "bondage stuff," like chains, straps, some kind of a box or table, and black sheeting. RP (3.5/3.6 Hearing) at 88. Detective Jackson then went to the hospital, where he talked to a social

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worker to get any additional information K.T. had disclosed and then to the City-County Building to write the search warrant affidavit.¹⁹ Detective Jackson testified that when he wrote the search warrant affidavit, he listed what he had seen in the house as well as what the officers and K.T. had told him they had seen in the house, but he could not say whether any of the information in the affidavit was based solely on his personal observations.²⁰

When he finished writing the affidavit, Detective Jackson obtained a search warrant for Sadler's residence. He then returned to the residence and served the search warrant. As noted above, this search and subsequent searches of Sadler's computer under additional search warrants yielded a significant amount of evidence.

Sadler moved under CrR 3.6 to suppress the evidence discovered when officers executed the various search warrants, arguing that Officer Norling and Deputy Rather's initial entry into his residence was unlawful. Sadler did not assert that Detective Jackson's entry was unlawful or challenge the validity of the search warrants directly. The State responded that the officers' initial entry and security sweep were valid under the emergency or community caretaking exception to the warrant requirement.²¹ The testimony at the suppression hearing was consistent with the facts

¹⁹ The search warrant and search warrant affidavit were not admitted below and are not part of the appellate record. Additionally, at the suppression hearing, none of the parties discussed the content of the search warrant affidavit with any specificity.

On October 3, 2007, apparently anticipating that we might want to address the independent source doctrine, the State filed a motion to allow additional evidence asking that we review the search warrant under RAP 9.11. The State attached a copy of the search warrant and Detective Jackson's affidavit to this motion. On October 12, 2007, our commissioner denied this motion.

²⁰ He stated only that everything in the affidavit was "either something that [he] saw or [the other officers] described for [him] or that [K.T.] described for [him]." RP (3.5/3.6 Hearing) at 90.

21 In addition, the State moved under CrR 3.5 to admit Sadler's custodial and non-custodial statements to Officer Norling, Deputy Rather, and Detective Jackson. We present the facts related to the CrR 3.5 hearing below.

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described above.

The trial court denied the CrR 3.6 motion. In its written findings of fact, the trial court found that Detective Jackson entered Sadler's residence to "get a description of the house for purposes of writing a search warrant" and that he recorded his own observations in the complaint for the search warrant. Clerk's Papers (CP) at 273. The trial court then concluded that, "Det. Jackson's entry was not improper." CP at 275.

B. Analysis

Sadler contends that Officer Norling and Deputy Rather's initial entry into the house was not justified under the exigent circumstances, emergency, or community caretaking exceptions to the warrant requirement. He further argues that Deputy Rather's "protective sweep" of the residence was not justified and that it exceeded the scope of the original entry and that he did not impliedly consent to the search. Br. of Appellant at 40.

In reviewing a trial court's denial of a suppression motion, we review challenged findings of fact to determine whether substantial evidence supports them. *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the finding. *Mendez*, 137 Wn.2d at 214. We review the trial court's conclusions of law de novo, *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006), deferring to the trial court on issues of credibility and weight. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

We presume that warrantless searches of constitutionally protected areas are unreasonable absent proof that one of the well-established exceptions applies. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). The State bears the burden

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of establishing an exception to the warrant requirement. *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006).

1. Initial Warrantless Entry

Sadler argues that the emergency exception to the warrant requirement does not apply to the initial entry into his residence because that entry was merely a pretext for conducting an evidentiary search and there was no evidence of an emergency or reason to believe K.T. was in imminent danger of death or injury. This argument has no merit; the facts here clearly support the conclusion that Officer Norling and Deputy Rather lawfully entered Sadler's residence under the emergency exception to the warrant requirement.

The emergency exception to the warrant requirement applies when: (1) an officer

subjectively believes someone is in need of assistance for health or safety reasons, (2) a reasonable person in the same situation would believe there was a need for assistance, and (3) there is a reasonable basis to associate the place searched with a need for assistance. *State v. Gocken*, 71 Wn. App. 267, 276-77, 857 P.2d 1074 (1993). This exception recognizes the community caretaking function of police officers and exists so police can aid citizens and protect property. *State v. Menz*, 75 Wn. App. 351, 353, 880 P.2d 48 (1994). "When invoking the emergency exception, the State must show that the claimed emergency is not merely a pretext for conducting an evidentiary search." *State v. Leffler*, 142 Wn. App. 175, 182, 178 P.3d 1042 (2007) (citing *State v. Schlieker*, 115 Wn. App. 264, 270, 62 P.3d 520 (2003)).

Here, when the officers entered Sadler's house, they knew the following facts: (1) a 14-year-old girl had "disappeared" from her foster home in another county, (2) she had been missing for some time, (3) she was suspected to be involved in sadomasochistic sex, (4) she was inside the home of a significantly older man, (5) the man

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took some time to come to the door when Officer Norling knocked and rang the doorbell, and (6) the man was sweating profusely and looked surprised when he finally opened the door. And the officers' testimony supports their subjective belief that K.T. was in a potentially dangerous situation that put her health or safety at risk. Furthermore, nothing in the record shows that at the time they entered, the officers had any purpose other than locating K.T. to ensure her safety.

Additionally, given the risk that K.T., a minor, was involved in a sadomasochistic relationship (a relationship that necessarily implies the infliction of pain on at least one of the parties as well as sexual activity) with an older man, a reasonable person would believe that this circumstance justified immediate entry into Sadler's home to find K.T. and determine that she was not in distress or in need of assistance. A reasonable person could also easily conclude that leaving such a child alone in the presence of someone who may have been engaging in sadomasochistic activities with her to await a warrant would potentially expose that child to additional risks. Finally, once Sadler told the officers that K.T. was inside, the officers had a reasonable basis for believing she was in the residence. Accordingly, the trial court's findings clearly support entry under the emergency or community caretaking exceptions and the facts support those findings. Thus Sadler does not show that the trial court erred by denying his CrR 3.6 motion based on an unlawful initial entry.²²

2. Scope of Search

Sadler further argues that even if the initial entry was lawful, the officers exceeded the permissible scope of the entry when Deputy Rather conducted a security or protective sweep of

²² Because we conclude that the initial entry was valid under the emergency exception to the warrant requirement, we do not address whether exigent circumstances also existed or whether Sadler impliedly consented to the entry.

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the premises. Again, we disagree.

Police may conduct a protective sweep of the premises for security purposes as part of the lawful arrest of a suspect. *State v. Hopkins*, 113 Wn. App. 954, 959, 55 P.3d 691 (2002) (citing *Maryland v. Buie*, 494 U.S. 325, 334-35, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1990)). The scope of such a sweep is limited to a visual inspection of only those places where a person may be hiding. *Hopkins*, 113 Wn. App. at 959. An officer need not justify his actions in searching the area that immediately adjoins the place of the arrest. *Hopkins*, 113 Wn. App. at 959. But if the sweep extends beyond the immediately adjoining area, the officer must be able to point to articulable facts, which, taken together with rational inferences from those facts, warrant a reasonable belief that the area involved in the protective sweep may harbor an individual who poses a danger to those on the scene. *Hopkins*, 113 Wn. App. at 959-60. A general desire to make sure that there are no other individuals present is not sufficient to justify an extended protective sweep. *Hopkins*, 113 Wn. App. at 960.

Here, (1) the officers took Sadler into custody just outside the upstairs bedroom where they found K.T.; (2) Deputy Rather searched the adjoining rooms and did a cursory search of the floor below, where he detained Sadler for a short time; and (3) nothing in the record suggests that Deputy Rather's search went beyond a cursory visual inspection of only those places where someone could be hiding. Thus, the trial court did not err when it found that Deputy Rather's security sweep was lawful.

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3. Second Warrantless Entry

We agree with the trial court that the officers' initial entry and subsequent security sweep were lawful, but we do not agree that Detective Jackson's later entry into Sadler's residence was lawful. First, Detective Jackson entered Sadler's residence without permission. Second, there was no longer an emergency because the officers had removed K.T. from the residence and secured the residence. Having ensured K.T.'s safety, the officers could have easily awaited a search warrant based on Officer Norling's and Deputy Rather's observations (and potentially any statements from K.T.) before they reentered the residence. And, finally, Detective Jackson's sole purpose for entering the residence was to gather information to use in the search warrant affidavit, in other words, to investigate a possible crime; the fact that he merely retraced the other officers' steps was irrelevant to whether his warrantless entry was lawful. Thus, the trial court's finding that the second entry was proper is incorrect and any information in the search warrant affidavit based on this entry should be struck.

Although the independent source doctrine would likely help resolve this issue, the record does not establish what sources Detective Jackson relied on for each allegation in his search warrant affidavit. In fact, the record does not contain the search warrant or the supporting affidavit and, at the suppression hearing, Detective Jackson did not specify what information came

from which source. Furthermore, because the trial court found Detective Jackson's entry was proper, Sadler had no reason to challenge the sufficiency of the search warrant affidavit on this basis at that time.

Accordingly, on remand, the trial court should give Sadler the opportunity to challenge the search warrant affidavit, and the trial court should determine whether the officers would have sought the search warrant without the

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information Detective Jackson gathered and whether the independent information supports the search warrant. See *Murray v. United States*, 487 U.S. 533, 542-43, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988) (trial court must conduct separate factual inquiry into the effect of illegally obtained information upon the officer's decision to seek the warrant); *State v. Gaines*, 154 Wn.2d 711, 721-22, 116 P.3d 993 (2005); see also *State v. Spring*, 128 Wn. App. 398, 405, 115 P.3d 1052 (2005), review denied, 156 Wn.2d 1032 (2006).

III. Denial of CrR 3.5 Motion

Sadler next challenges the trial court's admission, under CrR 3.5, of his statements to the officers.²³

A. Additional Related Facts

At the suppression hearing, Officer Norling testified that at about the same time Deputy Rather called for medical help for K.T., he advised Sadler of his Miranda²⁴ rights, that Sadler acknowledged that he understood his rights, and that Sadler then agreed to talk to him. Deputy Rather testified, however, that he did not hear anyone advise Sadler of his Miranda rights while he was upstairs with Officer Norling and K.T.

Officer Norling also testified that after he advised Sadler of his Miranda rights, he asked Sadler how long K.T. had been with him, and Sadler responded that she had been with him about a week. Sadler then asked why Officer Norling questioned K.T. about her age and said she had told him she was 19. Officer Norling further testified that he believed Sadler asked for a lawyer at this point and that he did not ask Sadler any more questions.

²³ During trial, the State attempted to use Sadler's statements to the officers to show that Sadler told the officers only that K.T. had told him she was 19, not that she had shown him identification proving she was 19.

²⁴ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

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In addition, Officer Norling stated that after the medical team left with K.T., he took Sadler outside to put him in his patrol car. Officer Norling initially said that he did not ask Sadler any questions at this time because Sadler had already requested a lawyer, but he contradicted this testimony a couple of times as his testimony continued. At one point, he stated that Sadler did not request a lawyer until after he was in the patrol car. Officer Norling told Sadler that K.T. was a 14-year-old runaway; in response, Sadler "started yelling that she told [him] that she was 19." RP (3.5/3.6 Hearing) at 21. At another point, he testified that Sadler did not ask for a lawyer

until the officers asked if he would consent to a search of his residence.

Detective Jackson testified that after he walked through Sadler's residence, he went back to Officer Norling's car, told Sadler what they were doing, and advised him that they were going to seek a search warrant for the house. He stated that when he spoke to Sadler, he did not intend to engage him in conversation because he knew that Sadler had already been advised of his rights and was not waiving those rights "so it was just information just for him, just to kind of keep him up to speed." RP (3.5/3.6 Hearing) at 80. After he told Sadler this, Sadler "said a couple of times that he thought . . . the girl was 19." RP (3.5/3.6 Hearing) at 80. Detective Jackson stated that he then told Sadler that he was not asking him any question so he should not say anything, that he knew Sadler had not waived his rights, and that he was just there to tell Sadler what was going on.

The trial court's findings of fact stated in part:

11. Officer Norling read the defendant his Miranda warnings with the assistance of a department issued card. The defendant stated that he understood his warnings and wished to speak with Officer Norling. The defendant did not appear confused and was able to track Officer Norling's statements and questions appropriately.
12. After being asked, the defendant stated that K.T. had been staying with him

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for about a week and said, "She told me she was 19."

13. The defendant was placed in Officer Norling's patrol car. Officer Norling stated that he told the defendant that K.T. was a runaway and was 14 years old. The defendant yelled, "She told me she was 19."

14. Officer Norling later asked the defendant if police could search his residence. The defendant stated that he wanted an attorney.

16. After Det. Jackson viewed the inside of the defendant's residence, he approached the defendant, who was still sitting in a patrol car, and, as a courtesy, told him that he would be requesting a search warrant for the residence and that he would be looking for evidence. Det. Jackson also told the defendant that K.T. was a 14-year-old runaway. In response to the Det. Jackson's statements, the defendant stated, "She told me she was 19." Det. Jackson reminded the defendant that he asked for an attorney and not to say anything. Det. Jackson told the defendant that he was just informing him of the status of the investigation, to which the defendant again stated, "She told me she was 19."

CP at 272-73.

The trial court concluded:

7. The defendant was in-custody at the time Officer Norling read the defendant his Miranda warnings.

8. Officer Norling properly read the defendant his Miranda warnings.

10. The defendant's statements to Det. Jackson were made spontaneously by the defendant and were not made as a result of custodial interrogation. Those statements are also admissible at trial.

CP at 275.

B. Analysis

Sadler contends that the trial court erred when it admitted his statements to Officer Norling and Detective Jackson, arguing that (1) the record does not support the trial court's conclusion that Officer Norling advised him of his Miranda rights before Sadler made any statements and (2) Sadler's statements to Detective Jackson were not spontaneous but were

instead intentionally elicited by Detective Jackson despite that Sadler had already stated that he

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wanted an attorney. We disagree.

Sadler argues that while Officer Norling testified that he read him his Miranda warnings shortly after Deputy Rather detained him, Deputy Rather testified that he did not hear Officer Norling advise Sadler of his rights at that time; thus, the record does not support a finding that Officer Norling read him his Miranda rights shortly after he was officially detained. This argument has no merit because the two officers' statements are not necessarily inconsistent. It is conceivable that Deputy Rather did not hear Officer Norling read Sadler his rights because Deputy Rather was performing other duties during this time and his focus was elsewhere. Even if we preferred to resolve this factual dispute differently, the trial court's finding is supported by substantial evidence and we are bound to affirm it. See *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

Although Sadler also attempts to question the accuracy of Officer Norling's testimony by pointing out that he stated Sadler invoked his right to counsel at three different times, that argument does not change the above conclusion. The record shows that Officer Norling's testimony about when Sadler requested counsel was confusing and that he appeared to state that Sadler requested counsel at three different points in time, but his testimony regarding when he advised Sadler of his Miranda rights was straightforward and consistent. And, again, the weight accorded to Officer Norling's testimony regarding when he advised Sadler of his Miranda rights is an issue we do not address.

Sadler next contends that the trial court erred when it concluded that "[t]he defendant's statements to Det. Jackson were made spontaneously by the defendant and were not made as a result of custodial interrogation." CP at 275. He argues Detective Jackson's statements to him were reasonably likely to elicit an incriminating

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response. Again, this argument has no merit.

Federal and state constitutions guarantee the privilege against self incrimination. U.S. Const. amend. V; Wash. Const. art. I, § 9; *In re Pers. Restraint of Ecklund*, 139 Wn.2d 166, 172, 985 P.2d 342 (1999). "Miranda warnings were designed to protect a defendant's right not to make incriminating statements while in police custody." *State v. Lorenz*, 152 Wn.2d 22, 36, 93 P.3d 133 (2004) (citing *State v. Harris*, 106 Wn.2d 784, 789, 725 P.2d 975 (1986)). But Miranda does not apply to voluntary, spontaneous statements made outside the context of custodial interrogation. *Miranda*, 384 U.S. at 478; *State v. Ortiz*, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985). "The general rule is that a statement is voluntary if it is made spontaneously, is not solicited, and not the product of custodial interrogation." *Ortiz*, 104 Wn.2d at 484.

Here, Detective Jackson merely advised Sadler that he intended to apply for a search

warrant. He did not ask Sadler any questions, let alone any specific questions about his contact with K.T. or what K.T. had told him about her age. Merely telling a suspect about the status of the investigation is not reasonably likely to elicit a response. Furthermore, Sadler's statement that K.T. had told him she was 19 is not related to the information Detective Jackson gave Sadler at that time. These facts are sufficient to support the trial court's conclusion that Sadler's statement to Detective Jackson was spontaneous and voluntary.

Accordingly, Sadler does not show that the trial court erred when it admitted his statements to the officers.

IV. Vagueness Challenge

Finally, in his pro se SAG, Sadler contends that the statutory affirmative defense to sexual exploitation of a minor is unconstitutionally vague as applied, asserting that the phrase "requiring production" is too ambiguous because it is

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unclear whether the "production" element can be satisfied if a person shows the identification via a webcam. SAG at 3 (quoting RCW 9.68A.110(3)). Assuming, without deciding, that a statutory affirmative defense can be subject to a vagueness challenge, this argument has no merit.

A. Additional Related Facts

As noted above, at trial Sadler admitted that he had photographed K.T. engaging in a variety of sexually explicit conduct. But he also asserted that he had established the statutory affirmative defense to the sexual exploitation of a minor charges because he proved that K.T. had shown him a Michigan birth certificate and a Washington driver's license or identification establishing her age as 19 through a webcam. As previously noted, this defense required Sadler to prove that he

made a reasonable bona fide attempt to ascertain the true age of the minor by requiring production of a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper and did not rely solely on the oral allegations or apparent age of the minor.

RCW 9.68A.110(3).

The State attempted to show Sadler's assertion that K.T. showed him identification via webcam was not credible and that even if K.T. had shown him identification in this way, this was not a reasonable bona fide attempt to establish her age by requiring production of such documentation. Although most of the State's evidence and argument focused on whether viewing identification via a webcam was a reasonable bona fide attempt to verify K.T.'s age, the State also briefly suggested in its rebuttal closing argument that viewing identification over a

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webcam did not amount to "requiring production" of the required documentation.²⁵

During its deliberations, while another attorney was standing in for defense counsel, the jury sent a question to the trial court asking it to define the phrase "requiring production" as used

in jury instruction 27.26 With the prosecutor's and stand-in counsel's approval, the trial court instructed the jury that it would not receive any additional instructions.

A short time later, the jury returned its verdict. But, before the trial court could read it, defense counsel returned and informed the trial court that he had discussed the jury question with stand-in counsel and had just emailed the trial court a proposed supplemental instruction

25 Specifically, it argued:

Instruction No. 27 requires production of the identification, not a request to see it on a webcam. When someone goes to buy alcohol or cigarettes or something like that, the store clerk doesn't say, can you give me a copy of your driver's license. They need to see the actual license, the actual document, production of the document. Not show it to me; prove it to me.

And the Defendant, the adult, is burdened with making sure that their attempt at getting this documentation is a bona fide attempt. A good faith attempt. Even if you believe the Defendant when he says she showed me a birth certificate, regardless of the fact that he cannot give you details about when he saw it, what it looked like, he didn't write it down anywhere that anybody knows of, or any of those things, despite that, even if you believe the Defendant when he says I asked her for a copy, or she showed me her birth certificate on the webcam, according to the law, that is not enough. The law requires production, not seeing it over a fuzzy webcam, production of the document.

RP at 2670-71 (emphasis added).

26 Jury Instruction 27 provided:

It is not a defense to the charge of sexual exploitation of a minor that at the time of the offense the defendant did not know the age of K.T. or that the defendant believed her to be older.

It is, however, a defense to the charge of sexual exploitation of a minor that at the time of the offense the defendant made a reasonable bona fide attempt to ascertain the true age of the minor by requiring production of a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper and did not rely solely on the oral allegations or apparent age of the minor[.]

This defense must be established by the defendant by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true. If you find the defendant has established this defense, it will be your duty to return a verdict of not guilty on all of the sexual exploitation of a minor counts.

CP at 427 (emphasis added).

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responding to the jury's question.27 Defense counsel asserted that this additional instruction was necessary because "production" was not a term of common understanding but, instead, a "legal definition." RP at 2690. The trial court refused to give the jury the proposed instruction and read the verdict.

B. Analysis

The constitutionality of a statute is an issue of law that we review de novo. *State v. Watson*, 160 Wn.2d 1, 5-6, 154 P.3d 909 (2007). The standard for finding a statute unconstitutionally vague is high because a statute is presumed to be constitutional. *Watson*, 160 Wn.2d at 11 (citing *State v. Coria*, 120 Wn.2d 156, 163, 839 P.2d 890 (1992)). One who challenges a statute's constitutionality for vagueness bears the burden of proving beyond a reasonable doubt that it is unconstitutionally vague. *Watson*, 160 Wn.2d at 11 (citing *City of Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). The presumption in favor of a law's constitutionality should be overcome only in exceptional cases. *Watson*, 160 Wn.2d at 11 (quoting *State v. Eze*, 111 Wn.2d 22, 28, 759 P.2d 366 (1988)). Because RCW 9.68A.110(3) does not involve First Amendment rights, we evaluate its constitutionality as applied to the facts

of this case. See *Watson*, 160 Wn.2d at 6 (quoting *Coria*, 120 Wn.2d at 163).

A statute is void for vagueness if either: (1) the statute does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed; or (2) the statute does not provide ascertainable standards of guilt to protect against arbitrary enforcement. *Watson*, 160 Wn.2d at 6 (quoting *State v. Williams*, 144 Wn.2d 197, 203, 26 P.3d 27). The proposed instruction, which defense counsel asserted was based on the dictionary definition of "production," stated: "The term production means the act of producing, or to offer to view or notice." CP at 397.

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890 (2001)). *Sadler* asserts he is challenging the statutory defense statute on both grounds.

Under the first ground, "[t]he due process clause of the fourteenth amendment to the United States Constitution requires statutes to provide fair notice of the conduct they proscribe." *Watson*, 160 Wn.2d at 6 (citations omitted). To meet this standard, "the language of a penal statute 'must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.'" *Watson*, 160 Wn.2d at 6-7 (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). "A statute fails to provide the required notice if it 'either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'" *Watson*, 160 Wn.2d at 7 (quoting *Connally*, 269 U.S. at 391).

But because "[s]ome measure of vagueness is inherent in the use of language," *Watson*, 160 Wn.2d at 7 (alteration in original) (quoting *Haley v. Med. Disciplinary Bd.*, 117 Wn.2d 720, 740, 818 P.2d 1062 (1991)), we "do not require 'impossible standards of specificity or absolute agreement.'" *Watson*, 160 Wn.2d at 7 (quotations omitted). "[V]agueness in the constitutional sense is not mere uncertainty," and "a statute is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which his [or her] actions would be classified as prohibited conduct." *Watson*, 160 Wn.2d at 7 (quotations omitted) (alteration in original). Given this, "a statute meets constitutional requirements '[i]f persons of ordinary intelligence can understand what the ordinance proscribes, notwithstanding some possible areas of disagreement.'" *Watson*, 160 Wn.2d at 7 (alteration in original) (quoting *Douglass*, 115 Wn.2d at 179).

Under the second ground, "the due process clause requires that a penal statute provide adequate standards to protect against arbitrary,

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erratic, and discriminatory enforcement." *Douglass*, 115 Wn.2d at 180. A statute is unconstitutionally vague on this ground if it "'contain[s] no standards and allow[s] police officers, judge, and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a statute in any given case.'" *Douglass*, 115 Wn.2d at 181 (quoting *State v.*

Maciolek, 101 Wn.2d 259, 267, 676 P.2d 996 (1984)). The statute must "provide 'minimal guidelines . . . to guide law enforcement.'" Douglass, 115 Wn.2d at 181 (quoting State v. Worrell, 111 Wn.2d 537, 544, 761 P.2d 56 (1988)). But these determinations are not made in a vacuum, rather, the question is whether "[t]he terms are not inherently subjective in the context in which they are used." Worrell, 111 Wn.2d at 544 (emphasis added). Additionally, the mere fact that a statute may require some degree of subjective evaluation by a police officer to determine whether the statute applies does not mean the statute is unconstitutionally vague. Am. Dog Owners Ass'n v. City of Yakima, 113 Wn.2d 213, 216, 777 P.2d 1046 (1989). "Under the due process clause, the enactment is unconstitutional only if it invites an inordinate amount of police discretion." Douglass, 115 Wn.2d at 181 (citing Am. Dog Owners Ass'n, 113 Wn.2d at 216).

Sadler contends that the statutory affirmative defense is unconstitutionally vague as applied here because the phrase "requiring production" is too ambiguous. He asserts that a reasonable person would not understand that viewing identification via a webcam would not satisfy the "production" element of the defense and that the phrase "requiring production" is too vague to protect against arbitrary, erratic, or discriminatory enforcement.

Sadler's argument focuses on whether viewing identification over a webcam can ever meet the "production" requirement of the statutory defense. Although a brief portion of the State's rebuttal argument suggested that viewing identification over a webcam was not "production," and the jury's question to the trial court during its

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deliberations suggested that the jury's discussions focused to some extent on the meaning of the phrase "requiring production," the jury was never instructed that viewing identification via a webcam was not sufficient to show "production." Furthermore, when taken in context, the State's argument focused extensively on whether viewing identification over the web without the opportunity to examine it fully was a reasonable bona fide attempt to ascertain K.T.'s true age given the circumstances of this case. Thus, the crux of the defense was really whether the jury believed Sadler's assertion that K.T. showed him identification over the web and whether the jury believed that viewing the identification over the web was a reasonable bona fide attempt to identify K.T.'s true age given the surrounding circumstances.

On these facts, we cannot conclude that the term "production" was unconstitutionally vague. Instead, given the argument and instructions in this case, the determining factor was whether Sadler's alleged attempts to verify K.T.'s age were reasonable. Although a reasonableness standard is not precise, Sadler does not show that this standard is so vague a person of ordinary intelligence would not understand what behavior was prohibited or that it invites an inordinate amount of police discretion. Thus, Sadler's vagueness challenge fails.

In sum, we hold that (1) the trial court violated Sadler's constitutional right to an open public trial when it held the Batson hearing in the jury room, (2) the trial court erred when it concluded that a second warrantless entry into Sadler's residence by law enforcement for the sole

purpose of obtaining information to support a search warrant application was lawful, (3) the trial court properly admitted Sadler's statements to law enforcement, and (4) Sadler's vagueness argument is without merit. Accordingly, we reverse the convictions for sexual exploitation of a minor and remand for a hearing on the validity of the search warrant under the independent source doctrine and, if the search warrant is valid and

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the State chooses to retry Sadler, for a new trial.

Armstrong, J.

I concur:

Houghton, P.J.

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Hunt, J. (dissent) - Although I agree that the best practice is to conduct Batson hearings in open court, I respectfully dissent from the majority's remand for a new trial. I disagree with the majority's holding that the trial court's jury-room Batson hearing here violated Stanley Sadler's public trial right such that reversal of his convictions is required. No case mandates reversal under the unique circumstances here, which differ from those in cases where remand for a new trial was the only remedy. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

Rather than mandating reversal here, case law supports the conclusion that the trial court did not violate Sadler's right to a public trial by hearing counsel's Batson arguments (1) in the jury room, outside the presence of the large jury venire, which remained in the courtroom; (2) absent a showing that the general public was excluded from these jury room arguments; and (3) especially when, in reaching its Batson decision, the trial court did not rely on any evidence other than that previously taken in the courtroom.²⁸

The record does not support the majority's assumption that the trial court excluded the public from the jury room during Sadler's Batson hearing - nowhere does the record reflect that the trial court expressly excluded anyone from the jury room colloquy, other than the large jury venire, whom the court instructed to remain in the courtroom.²⁹ Moreover, there is no indication in the record that any non-jury member of the public was present in the courtroom, let alone was

²⁸ It is undisputed that the jury room arguments took place in Sadler's presence, with the prosecutor, defense counsel, and the court reporter in attendance.

²⁹ Before entering the jury room, the trial court stated on the record, apparently to the jury venire, "We are going to step into the jury room for one matter on the record. Just don't leave the courtroom." Report of Proceedings (RP) (May 10, 2006) at 855.

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excluded from the jury room arguments.³⁰

Division One confronted an analogous record concerning jury room voir dire of some individual jurors in *State v. Momah*.³¹ In that case, the court noted:

[T]here is nothing in the record to indicate that any member of the public

(including members of Dr. Momah's family) or the press was excluded from voir dire. The court reporter in this case scrupulously recorded everything that took place during the morning session from the time the trial judge, both parties' counsel, Dr. Momah, and the court reporter went into chambers adjacent to the presiding courtroom. Similarly, the court reporter also scrupulously recorded all that took place from the time the trial judge, counsel, Dr. Momah, and the court reporter went into the jury room in room West 813 after the noon recess. Other than the entry and exit of the individual jurors and the questioning that ensued for each, there is nothing in this record indicating any attempt by either the press or the public (including members of Dr. Momah's family) to gain admittance to witness voir dire. We simply do not know what would have happened if such an

30 Inside the jury room, the State remarked, "I am not sure, Judge, but we should probably make a record that we are in the jury room with all counsel and the Defendant present having this hearing outside the presence of the jury, but not the Defendant." RP (May 10, 2006) at 862-63.

31 In Momah, Division One of our court recognized the trial court's reasonable exercise of discretion in conducting individual juror voir dire in the jury room, away from the venire in the courtroom, in order to prevent contaminating the rest of the jurors concerning prior knowledge of this high-profile case. There were many jurors remaining in the courtroom and some even outside in the hall; there neither enough space nor chairs to move them all into the jury room. Writing for the majority, Judge Cox noted, "[L]imited seating by itself is insufficient to violate the defendant's public trial right." State v. Momah, 141 Wn. App. 705, 709, 171 P.3d 1064 (2007), review pending, 163 Wn.2d 1012 (April 1, 2008).

Judge Brown's dissent in State v Ducket, 141 Wn. App. 797, 812, 173 P.3d 948 (2007), is also instructive. In that case, the trial court interviewed individual jurors in the jury room concerning private sexual abuse issues noted on their confidential juror questionnaires. In addition to defending the trial court's action in protecting juror privacy, Judge Brown similarly noted:

I do not believe any closure occurred The judge never actually ordered the public excluded or the courtroom closed. We do not know if any members of the public were actually present when the procedures were discussed and adopted or may have been excluded. No public objections are recorded. Recently, these similarities helped influence Division One of this court to reject public trial defect contentions in State v. Momah, 141 Wn. App. 705, 716, 171 P.3d 1064 (2007) (declining to follow [State v.] Frawley, [140 Wn. App. 713, 724, 167 P.3d 593 (2007)] to the extent it "holds that all in-chambers proceedings are per se closed to the public").

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attempt had been made either during the morning or afternoon sessions of voir dire. We will not speculate on whether the trial court would have ordered closure if any attempt had been made by anyone to join the judge, counsel, Dr. Momah, and the court reporter in chambers or in the jury room.

State v. Momah, 141 Wn. App. 705, 712, 171 P.3d 1064 (2007), review pending, 163 Wn.2d 1012 (April 1, 2008). In noting that it would not engage in speculation, Division One contrasted the facts in Momah with cases in which the trial court's exclusion of public had been explicit; in those distinguished cases, the "plain language" of the trial court's ruling made clear that the trial court had imposed a closure of the courtroom, thus triggering application of the Bone-Club factors. Momah, 141 Wn. App. at 713-14. Such was not the case, however, in Momah, and such is not the case here.

As in Momah, the court reporter here "scrupulously recorded everything" that occurred during the jury room Batson colloquy. Similarly, here, "[w]e [should] not speculate on whether the trial court would have ordered closure if any attempt had been made by anyone to join the judge, counsel, [the defendant], and the court reporter . . . in the jury room." 141 Wn. App. at 712.

I would apply Division One's Momah holding here. In my view, something more is required to warrant the majority's holding that the trial court excluded the public from the jury room Batson colloquy. On the record before us, there has been no showing of denial of Sadler's

constitutional right to a public trial such that reversal of his convictions and remand for a new

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trial is required under Bone-Club, especially where it is uncontroverted that no jury voir dire occurred during the jury room colloquy. I would affirm.³²

Hunt, J.

32 Alternatively, rather than reversing Sadler's convictions summarily, we could (1) stay our opinion pending the Supreme Court's decision in Momah or (2) remand to the trial court to conduct a reference hearing to determine whether the public was actually excluded from the Batson arguments in the jury room and to enter findings on whether the court received any evidence during the jury room hearing that bore on its Batson decision. Only after such a remand hearing might I be able to concur in the majority's reversal and remand for a new trial. Given the present state of the record before us, however, I cannot.

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EXHIBIT F

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SUPERIOR COURT OF WASHINGTON
COUNTY OF LEWIS

STATE OF WASHINGTON,)	NO. 06-1-00148-1
)	
Plaintiff,	)	DECLARATION OF
	)	LESLIE McCONNELL
VS.)	
)	
ROBERT DOBYNS,)	
)	
Respondent.)	

I, LESLIE McCONNELL, declare and state as follows:

I was at the jury selection of the above case. While the members were being interviewed the people present in the courtroom were asked to leave so the judge could talk to a jury member about something private. I felt I did not have a choice but to exit the courtroom and wait outside.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

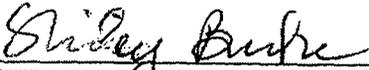
Signed at Centralia, Washington on this 30 day of September, 2008.



 LESLIE McCONNELL, Declarant
 McCONNELL, MEYER & ASSOCIATES, L.L.P.

the State of Washington that the foregoing is true and correct to the best of my knowledge.

Signed at Centralia, Washington on this 25 day of September, 2008.


SHIRLEY BURKE, Declarant

DECLARATION OF
SHIRLEY BURKE
Page - 2

McCONNELL, MEYER & ASSOCIATES, L.L.P.
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**SUPERIOR COURT OF WASHINGTON
COUNTY OF LEWIS**

STATE OF WASHINGTON,)	NO. 06-1-00148-1
)	
Plaintiff,	)	DECLARATION OF
	)	PATRICIA G. McGEE
VS.)	
)	
ROBERT DOBYNS,)	
)	
Respondent.)	

15 I, PATRICIA G. McGEE, declare and state as follows:

16 I attended the trial of Robert Mark Dobyms from June 23

17 - June 26, 2008 and was in the audience during the first

18 day's jury selection. During the juror questioning, I

19 understood the judge to ask the selected jury panel to leave

20 the room. This also meant all audience members needed to

21 leave the courtroom so a potential juror could be

22 interviewed in private. Because of Judge Lawler's request, I

23 left the courtroom during this interview process and did not

24 hear what was discussed with the potential juror.

25 I declare under penalty of perjury under the laws of

26 the State of Washington that the foregoing is true and

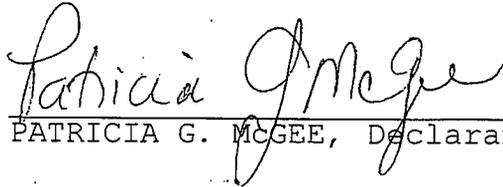
DECLARATION OF
PATRICIA G. McGEE
Page - 1

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OLYMPIA NUMBER (360)943-9557

1 correct to the best of my knowledge.

2 Signed at Centralia, Washington on this 24 day of
3 September, 2008.

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5 PATRICIA G. MCGEE, Declarant

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**SUPERIOR COURT OF WASHINGTON
COUNTY OF LEWIS**

STATE OF WASHINGTON,)	NO. 06-1-00148-1
)	
Plaintiff,	)	DECLARATION OF
	)	PATRICIA DOBYNS
VS.)	
)	
ROBERT DOBYNS,)	
)	
Respondent.)	

I, PATRICIA DOBYNS, declare and state as follows:

I was present during jury selection in Robert DobyNS' Trial. During the selection process one of the jurors requested to be questioned in private. The Judge agreed. It was my understanding in listening to the Judge that we needed to leave the courtroom. When juror #16 was finally going to be questioned, the panel was excused, and we left the courtroom too so that the juror could be questioned in private.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

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Signed at Centralia, Washington on this 16 day of
October, 2008.



PATRICIA DOBYNS, Declarant

Appendix K

Mandate and Unpublished Opinion

State v. Robert Mark Dobyms,

COA # 64952-3-I



IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
	)	No. 64952-3-1
Respondent,)	
	)	DIVISION ONE
v.)	
	)	UNPUBLISHED OPINION
ROBERT MARK DOBYNS,)	
)	
Appellant.	)	FILED: June 7, 2010

GROSSE, J. — A recorded conversation of a child rape suspect who did not consent to the recording may be judicially authorized when, as here, the police present the alleged rape victim’s statements identifying the suspect as the abuser and describing the time, place, and manner of abuse, and the police describe in detail why other investigatory methods would not be effective. Thus, the trial court did not err by admitting evidence of the recorded conversations. Accordingly, we affirm.

FACTS

Robert Dobyns was N.M.’s Tae Kwon Do instructor when she was eight years old. During this time, he became involved in a romantic relationship with her mother and moved in with N.M. and her mother when N.M. was nine. When the relationship between Dobyns and the mother ended, he moved out in December 2002.

In February 2006, N.M. disclosed to her mother that Dobyns sexually abused her when he lived with them. The mother immediately reported N.M.’s disclosure to the police and detectives interviewed N.M. and her mother. N.M. told police that shortly after Dobyns moved in, he fondled her while viewing pornography on the computer.

She said that after this happened, Dobyms called her to his room at night while her mother worked. He would ask her to "snuggle" and would then engage in oral sex with her and digitally penetrate her. According to N.M., this happened nearly every night that her mother was at work. N.M.'s mother confirmed that she was out of the house in the evenings working the night shift as a nurse.

After interviewing N.M., police detectives decided on a plan to have N.M. call Dobyms on the telephone and confront him. A detective applied to the court for authorization to intercept and record the conversation under RCW 9.73.090. The court issued an order authorizing the interception and recording of conversations between Dobyms and N.M. relating to the commission of the crimes of first degree child rape and first degree child molestation.

N.M. then made a few calls to Dobyms and police taped the conversations. In the first conversation, N.M. told Dobyms that she needed to talk to him because there was a discussion at school about sex and she was confused. She told him she had so many questions for him, such as whether she was still a virgin and whether what they did was wrong or right. She also said she was thinking she should tell someone but she did not know whether she should. When he asked her what she was going to tell, she said that he kissed her, touched her, took her clothes off, digitally penetrated her, and engaged in oral sex with her. He initially denied digital penetration, but ultimately admitted to it. He also admitted that they "slept together." She then asked him if she was still a virgin because he digitally penetrated her. He told her that he was not at a place where he could talk but wanted to talk to her later and that she should call him at work the next day.

N.M. called him at work the next day and asked if they could talk about what they were talking about the day before. She told him again that she was still confused and had questions about whether she was still a virgin and whether “[it was] wrong what we did.” He told her that he “would imagine” she was still a virgin and admitted that “what we did was wrong on my part.” But he also said he was not comfortable talking about it on the phone because he did not want “things to be misconstrued.” He mentioned that he knew of another incident when the police “taped somebody’s phone for exactly this thing.” When N.M. said she really needed to talk now, he agreed that they needed to talk and said he wanted to help her, but also expressed concern that if she talked to anyone else, there would be “consequences, . . . consequences for me but neither one of our lives will be the same after that,” and that he would be “going to jail.”

The State charged Dobyms with three counts of first degree rape of a child, two counts of first degree child molestation, and five counts of second degree rape of a child and alleged aggravating factors in support of an exceptional sentence. The trial court denied Dobyms’ motion to suppress the taped telephone conversations. The jury found Dobyms guilty as charged and found by special verdict that the aggravating factors had been established.

ANALYSIS

I. Evidence of Taped Conversations

Dobyms challenges the admissibility of the taped telephone conversations, contending that police did not comply with RCW 9.73.130 in obtaining judicial authorization to intercept the conversations, that police violated his rights to counsel and against self incrimination by using N.M. to obtain his statements, and that the trial court

erred by allowing the jury to hear the taped conversations when the tape was not admitted into evidence. We disagree.

RCW 9.73.030(1)(a) prohibits the interception and recording of private conversations without the consent of all participants in the conversation. But RCW 9.73.090(2) permits police to intercept or record a conversation with the consent of one party to the conversation:

PROVIDED, That prior to the interception, transmission, or recording the officer shall obtain written or telephonic authorization from a judge or magistrate, who shall approve the interception, recording, or disclosure of communications or conversations with a nonconsenting party for a reasonable and specified period of time, if there is probable cause to believe that the nonconsenting party has committed, is engaged in, or is about to commit a felony.

Among other things, RCW 9.73.130 requires that the following be included in the application for judicial authorization to record the conversation:

(3) A particular statement of the facts relied upon by the applicant to justify his belief that an authorization should be issued, including:

(a) The identity of the particular person, if known, committing the offense and whose communications or conversations are to be recorded;

(b) The details as to the particular offense that has been, is being, or is about to be committed;

(c) The particular type of communication or conversation to be recorded and a showing that there is probable cause to believe such communication will be communicated on the wire communication facility involved or at the particular place where the oral communication is to be recorded;

(d) The character and location of the particular wire communication facilities involved or the particular place where the oral communication is to be recorded;

(e) A statement of the period of time for which the recording is required to be maintained, if the character of the investigation is such that the authorization for recording should not automatically terminate when the described type of communication or conversation has been first obtained, a particular statement of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(f) A particular statement of facts showing that other normal investigative procedures with respect to the offense have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ[.]

A judge who issues an order to intercept private conversations has “considerable discretion” to determine whether the order satisfies the relevant statutes.¹ Thus, we do not review the application's sufficiency de novo, but decide if the facts in the application were “minimally adequate” to support the issuing judge’s determination.²

Dobyns contends that the application here did not satisfy subsection (3)(c) of RCW 9.73.130 because it lacked a “factual background that would establish probable cause to believe there will be an incriminating disclosure on the tape,” and contends that there was no corroboration that a crime was committed. But as the trial court found, the affidavit was quite specific and detailed in its description of the facts establishing probable cause to believe a sexual assault was committed. It described N.M.’s interview, which included detailed facts about the time, place, and manner of sexual contact Dobyns engaged in with her. The affidavit also provided corroborating facts from the mother, who confirmed that she was out of the house in the evenings working as a night shift nurse, which is when N.M. stated that the abuse occurred.

Dobyns asserts that “it is clear from a close reading of the statute itself, as well as the case law, that it was intended to be used in situations involving an informant and an ongoing criminal enterprise or activity; not simply to obtain confessions” But nowhere does the statute limit authorized recordings to such conversations. Rather, as

¹ State v. Porter, 98 Wn. App. 631, 634, 990 P.2d 460 (1999), rev. denied, 140 Wn.2d 1024 (2000).

² Porter, 98 Wn. App. at 634.

Dobyns acknowledges, the statute's plain language refers to conversations involving a nonconsenting party who "has committed, is engaged in, or is about to commit a felony."³ It is undisputed here that the nonconsenting party was believed to have committed a felony.

Dobyns further contends that the application did not meet the requirements of subsection (f) because it did not contain facts showing that other normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried.⁴ In fact, the case law does not require that police must actually pursue alternative methods, only that police must "seriously consider" other techniques and inform the court of the reasons the alternatives have been or "likely will be inadequate."⁵ Here, as the trial court found, the affidavit sufficiently identifies other investigative methods and provides the reasons they would be inadequate, stating:

Because of the nature of the assault on [N.M.] with only minimal penetration, and the fact that the assaults took place before and after [N.M.] started her period, it is reasonable to believe that no physical evidence would be present inside [N.M.]'s body that would corroborate her statements. [N.M.] made mention in her statement about a white negligee that Robert Dobyns kept in his bedroom and would have her wear during these sexual assaults. I considered applying for a search warrant for Robert Dobyns residence to search for that particular negligee but being that the time between the last known sexual assault and [N.M.]'s disclosure is greater than three years, the likelihood of being granted that warrant and finding that negligee is remote.

Normal investigative techniques might include detectives interviewing Robert Dobyns, but here that would likely fail. Robert Dobyns has demonstrated through his covert sexual assaults against [N.M.] when he was living at their house and in a position of leadership over her as her Tae Kwon Do instructor that he is well aware that his sexual activity with [N.M.] is criminal. Robert Dobyns is not likely

³ RCW 9.73.090(2).

⁴ He also asserts that police did not "try other methods and ignored a number of other methods that have been used in hundreds of other cases in the past," but fails to identify any such methods.

⁵ State v. Cisneros, 63 Wn. App. 724, 729, 821 P.2d 1262 (1992).

to discuss his sexual activity with [N.M.] with anyone other than [N.M.] He is far more likely to discuss the incidents with [N.M.] if he is not first alerted to the scope of the investigation by being interviewed by Detectives. I considered using a "phone tip" or "phone tilt" but I feel that the exact words of the conversation should be recorded on tape so that the conversation between [N.M.] and Robert is not left to paraphrasing thereby eliminating the chance of words being misconstrued. A verbatim recording of the conversations between [N.M.] and Robert is necessary to obtain a record of what is said because the statements of Robert may corroborate the allegations. . . . Only a recorded conversation between Robert Dobyms and [N.M.] will provide definitive evidence showing whether Robert Dobyms had sexual intercourse and sexually molested [N.M.] on numerous occasions over the period of time that Robert Dobyms lived with [N.M.] Finally, if the evidence ultimately merits such a conclusion, only a recorded conversation between these two individuals will clear Robert Dobyms of this crime. Detectives are not aware of other normal investigative methods to obtain evidence pertaining to the above-described crimes.

Dobyms next contends that by using N.M. to obtain his statement, the police illegally obtained his confession in violation of his constitutional rights to counsel and against self incrimination. He contends N.M. was acting as an agent of the police and that by using her to obtain his statements the police circumvented his Fifth Amendment right against self incrimination and Sixth Amendment right to counsel during police questioning. We disagree.

Dobyms cites State v. Heritage⁶ to support his assertion that N.M. was acting as an agent of the police and that he was therefore entitled Miranda⁷ protections during her questioning of him. But in Heritage, the "agents" of the state were government employees acting in an official capacity: they were park security officers who were city employees, wore uniforms identifying them as security officers, carried law enforcement equipment, and whose functions included patrolling for unlawful activities. While the court acknowledged that "Miranda [applies] to a broader class of government

⁶ 152 Wn.2d 210, 95 P.3d 345 (2004).

⁷ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

employees rather than merely law enforcement officers," it did not hold, as Dobyms suggests, that the scope of state agents reaches beyond government employees.⁸ Here, it is undisputed that N.M. was not a government employee. Dobyms' Fifth Amendment claim is therefore without basis.

His Sixth Amendment right to counsel claim is likewise without merit. As the cases he cites make clear, the Sixth Amendment right to counsel attaches only after a person has been charged.⁹ Here, it is undisputed that Dobyms was not charged with a crime at the time the conversations were recorded. Thus, he had no Sixth Amendment right to counsel that could have been violated at this time.

Dobyms further argues that the trial court erred by allowing the prosecutor to play the tape of the recorded conversation when the tape itself was not admitted into evidence. But because Dobyms did not object to the playing of the tape at trial he has waived any objection to admission of this evidence.¹⁰

II. Right to a Public Trial

Dobyms next contends that the trial court violated his right to a public trial by questioning a juror individually in the courtroom. He contends that in doing so, the court closed the courtroom to the public before questioning the juror without first determining whether a courtroom closure was justified and engaging in the inquiry required by State

⁸ 152 Wn.2d at 216.

⁹ See Maine v. Moulton, 474 U.S. 159, 170, 106 S. Ct. 477, 88 L. Ed. 2d 481 (1985) (reiterating that "the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer *at or after the time that judicial proceedings have been initiated against him*") (quoting Brewer v. Williams, 430 U.S. 387, 398, 97 S. Ct. 1232, 51 L. Ed. 2d 424 (1977)) (emphasis added).

¹⁰ State v. Gray, 134 Wn. App. 547, 558-59, 557, 138 P.3d 1123 (2006), rev. denied, 160 Wn.2d 1008 (2007) (to challenge a trial court's admission of evidence on appeal, a party must raise a timely and specific objection at trial).

v. Bone-Club.¹¹ The State contends that there was no courtroom closure triggering the need for such an inquiry. We agree.

Failure to conduct the Bone-Club inquiry before closing a courtroom violates the right to a public trial and results in reversal for a new trial.¹² While the right to a public trial applies during jury voir dire,¹³ questioning of individual jurors apart from other jurors does not violate that right because once the jurors are sworn in, they are no longer members of the public, but officers of the court.¹⁴ Thus, there is no courtroom closure when the trial court conducts individual voir dire of one juror in the courtroom apart from the other jurors when the trial court has not otherwise ordered the courtroom closed to

¹¹ 128 Wn.2d 254, 906 P.2d 325 (1995). In Bone-Club, the court set forth the following factors that a trial court must consider on the record before ordering a courtroom closure:

“(1) The proponent of closure or sealing must make some showing [of a compelling state interest], and where that need is based on a right other than an accused’s right to a fair trial, the proponent must show a ‘serious and imminent threat’ to that right.

“(2) Anyone present when the closure motion is made must be given an opportunity to object to the closure.

“(3) The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests.

“(4) The court must weigh the competing interests of the proponent of closure and the public.

“(5) The order must be no broader in its application or duration than necessary to serve its purpose.”

128 Wn.2d at 258-59 (quoting Allied Daily Newspapers v. Eikenberry, 121 Wn.2d 205, 210-11, 848 P.2d 1258 (1993)).

¹² State v. Brightman, 155 Wn.2d 506, 518, 122 P.3d 150 (2005).

¹³ Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 379, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1999); Federal Publications, Inc. v. Kurtz, 94 Wn.2d 51, 59-60, 615 P.2d 440 (1980).

¹⁴ State v. Vega, 144 Wn. App. 914, 917, 184 P.3d 677 (2008), rev. denied, 165 Wn.2d 1024 (2009).

the public.¹⁵ To determine whether the court ordered a courtroom closure, we consider the plain language of the closure request.¹⁶

Here, one of the jurors, Juror 16, asked to be questioned privately about his past experience as a victim. During general voir dire, this juror stated that he was a victim, but defense counsel interrupted and asked if he wanted to discuss this later. The court then advised the juror that it was up to him whether he talked about it now or later and he agreed to do it later. After more general voir questioning, the court stated:

I'm going to excuse the jury panel at this time to go back to the jury assembly room to wait for a few moments. I don't believe we'll take too long and then I'll have you come back and then we'll do the rest of the jury selection. Number 16 can stay here. . . All right. The jury panel has now been excused with the exception of Number 16 who is here. Number 16, the panel has been excused. There are still a few other people in the courtroom. I can ask them to leave too. Do you –.

Juror 16 responded, "I don't care, don't matter." The court then continued questioning of Juror 16 in the courtroom.

Following the verdict, Dobyms moved for a new trial, asserting that his right to a public trial had been violated by the court's closure of the courtroom during the questioning of Juror 16. For support, Dobyms submitted affidavits of individuals who were spectators in the courtroom, some of whom were members of Dobyms' family. In those affidavits, the individuals stated that they believed that they were required to leave the courtroom during the questioning of the juror. The trial court denied the motion, explaining:

I think [defense counsel] mischaracterize[s] a little bit of what was stated because I never asked the question of whether any of the jurors wanted to be questioned in private. I asked if they wanted to be questioned outside the presence of the

¹⁵ See State v. Price, 154 Wn. App. 480, ___ P.3d ___ (2009).

¹⁶ Bone-Club, 128 Wn.2d at 261.

other jurors. And that's [sic] we did. The courtroom was never closed. No one else was ever asked to leave the courtroom. The jurors, the other jurors, were excused and that is the only thing that happened here.

We agree with the trial court that Dobyms mischaracterizes the record. The trial court did not order anyone to leave, but simply stated that the court "could ask" the spectators to leave if the juror wanted. In fact, the juror replied that he did not care and the court did not ask anyone to leave. That some of the spectators left the courtroom was based on their subjective belief that the court ordered them to leave; the record is clear that the court did not issue such an order.¹⁷ Thus, there was no courtroom closure implicating Dobyms' right to a public trial.¹⁸

III. Juror Challenge

Dobyms next contends that the trial court erred by denying his challenges to two jurors for bias. A trial judge must excuse any juror who "has manifested unfitness as a juror by reason of bias [or] prejudice."¹⁹ The party challenging the juror has the burden of proving bias.²⁰ Even equivocal answers do not require removal of a juror; rather, "the question is whether a juror with preconceived ideas can set them aside."²¹

Because the trial court is in the best position to determine a juror's impartiality, we will not reverse a trial court's denial of a challenge to a juror for actual bias unless it is a manifest abuse of discretion.²² We review a trial court's decision on actual bias as

¹⁷ The affidavits do not indicate whether there were other spectators in the courtroom and whether they also left courtroom.

¹⁸ See also Price, 154 Wn. App. at 489 (no courtroom closure "implied or otherwise" where court did not ask spectators to leave, but spectator left at prosecutor's request).

¹⁹ RCW 2.36.110.

²⁰ State v. Noltie, 116 Wn.2d 831, 838, 809 P.2d 190 (1991).

²¹ Noltie, 116 Wn.2d at 839.

²² Noltie, 116 Wn.2d at 838.

a factual determination and must defer to the trial court's decision.²³ "This is done by taking the evidence in the light most favorable to the prevailing party below, which in turn means that the appellate court must accept the trial judge's decision regarding the credibility of the prospective juror and any other persons involved, as well as the trial judge's choice of reasonable inferences."²⁴

Here, Juror 43 stated:

I could listen to the evidence and I could follow the court's instructions. But I have -- you know, like I say, I may have a hard time with this so I don't know if I could be totally impartial.

....

I would like to presume everyone innocent until proven guilty but my daughter is the same age as the victim and I think I would probably have prejudices.

When asked by the prosecutor if he could "go along with the notion in our system that people are presumed innocent until proven guilty," he responded, "Yes." The prosecutor also asked if he could try to wait until he heard all the evidence to make any decisions and he responded, "Yes." Defense counsel then asked if he could assure them he will, not whether he "would try to," and he responded, "I don't know that."

Juror 35 initially said that he felt like he could not be fair because of the nature of the crime, stating: "For sex crimes, that's top of my list. You know, I just don't like that at all, you know, whole works" When the prosecutor asked if he could "hold back making decisions about what may or may not have happened" until he heard "the whole story," he responded, "It's going to be hard." The prosecutor then asked if he could do his best to put that aside and just listen to the evidence and he replied, "I could try, yes."

²³ Ottis v. Stevenson-Carson School Dist. No. 303, 61 Wn. App. 747, 755, 812 P.2d 133 (1991).

²⁴ Ottis, 61 Wn. App. at 756 (footnotes omitted).

But when defense counsel asked if he could “assure” them, he responded, “No, I don’t think so.”

In a similar case, State v. Noltie,²⁵ the court held that the trial court did not abuse its discretion by denying a challenge to a juror for actual bias when the juror expressed discomfort about listening to an alleged child victim of sexual abuse and stated that it would be difficult for her to be impartial. There, the juror stated that she thought she might have difficulty being fair because she had two little granddaughters and thought it might be traumatic when the child witness testified.²⁶ When asked if she would want a person like her on the jury, she responded, “No, I don’t think so. . . . I don’t know. I don’t know. It is just, I guess children, I don’t know.”²⁷ When defense counsel asked whether it was a possibility or a probability that she would lean in favor of the State, she replied that it was a “possibility.”²⁸

The court concluded that the juror’s testimony did not show a probability of actual bias, but at most demonstrated a possibility of prejudice.²⁹ The court also gave considerable deference to the trial court’s judgment, recognizing that the trial court was in the best position to judge whether the juror’s answers merely reflected honest caution or whether they manifested a likelihood of actual bias.³⁰ The court recognized that “the trial court has, and must have, a large measure of discretion” and concluded, “[f]or the

²⁵ 116 Wn.2d 831, 838, 809 P.2d 190 (1991).

²⁶ Noltie, 116 Wn.2d at 836.

²⁷ Noltie, 116 Wn.2d at 836 (internal quotation marks omitted).

²⁸ Noltie, 116 Wn.2d at 837 (internal quotation marks omitted).

²⁹ Noltie, 116 Wn.2d at 838-39.

³⁰ Noltie, 116 Wn.2d at 839-40.

very reason that reasonable minds can well differ on this issue, we defer to the judgment of the trial court in this case.”³¹

Likewise here, the trial court did not abuse its discretion by determining that either challenged juror demonstrated actual bias. While their responses to questions about their ability to be impartial were equivocal, they demonstrated a possibility of impartiality, not a probability. While neither could assure the court with absolute certainty that they could put aside their prejudices, both convinced the trial court that they were willing to try and we defer to the trial court’s credibility determinations. Thus, the jurors demonstrated at most a “possibility” of bias, which does not establish actual bias.

IV. Court’s Treatment of Defense Counsel

Dobyns next contends that “[t]he court’s repeated comments, short retorts and attitude was a comment on the defense, his case and the veracity of the State’s witnesses.” But he does not refer to any specific comments or incidents of mistreatment of counsel nor does he provide any citations to the record for these contentions. Rather, he simply notes that “[s]uch comments by the judge did not go unnoticed” and refers only to the following comments by defense counsel to the court:

Okay. I’ve only been doing this for a couple of days myself, and I’ve never had this problem. And my concern is -- and I want to make a record here -- that this jury is seeing you jump me here in public continuously and I’m afraid they’re going to get prejudiced and I don’t want that to occur.

³¹Noltie, 116 Wn.2d at 839-40 (quoting 14 LEWIS H. ORLAND & KARL B. TEGLAND, WASHINGTON PRACTICE: TRIAL PRACTICES § 202, AT 331 (4th ed. 1986)).

Put in context, this exchange occurred after the trial court sustained foundation objections during Doby's testimony when defense counsel sought to refresh his recollection about the taped phone conversation. The exchange continued as follows:

THE COURT: I don't want it to occur either --

[DEFENSE COUNSEL]: I'm doing the best I can do to maintain. Counsel objects every time I open my mouth. And that's fine. But it's getting to be where I can't even get a word out where people are starting to laugh now. And this is getting not -- this is not a fair trial if that continues.

THE COURT: [Defense counsel], if the questions are asked properly for refreshing the recollection, that can happen. I'll let you do that.

[DEFENSE COUNSEL]: How about if I just play the tape?

THE COURT: I'm not going to tell you how to try your case, Mr. McConnell.

[DEFENSE COUNSEL]: Okay. That's fine. I'm just trying not to go through two hours at this rate.

[PROSECUTOR]: Your Honor, my objections are just based under ER 612. The proper question and foundations aren't being asked, which is would it help to refresh your memory, yes, take a look at that, let me know when your [sic] done, has that refreshed your memory, he can answer, instead of just having him read off the transcript.

[DEFENSE COUNSEL]: Your Honor, I've done that three times. I went through that process three times.

THE COURT: Well, but you have not, [defense counsel]. You have not asked those questions. That's why I've --

[DEFENSE COUNSEL]: Okay.

THE COURT: -- sustained the objection. If those questions are asked, then we don't have any problem. All right. And it's basically referring back to the question that you're trying to seek the answer from, not would it refresh or do you remember what it says on line 5, but do you remember -- would it refresh your recollection to review this as to what your answer was when she asked the question.

Thus, it is clear that the court was simply sustaining objections that were appropriate and signaling to defense counsel that he was not asking the correct foundation questions. The record does not support Doby's contention that the court treated counsel unfairly to the detriment of his case.

V. Prosecutorial Misconduct

Dobyns contends that the prosecutor improperly vouched for the witnesses' credibility by making the following comments in closing argument:

"If they were making this thing up -- well, they were straight shooters, both of them, when they were on the stand."

"People who are making things up like that don't have problems talking about it. . . This is a normal response for a parent who's just learned this kind of information."

"[S]he shot me looks like please don't make me talk about this. . . . People fabricating stories can't come up with those kinds of details."

"[Y]ou can't make that stuff up, the detail, unless you're telling the truth."

"If she was making it up, she would have said, yeah, I saw him ejaculate every time. Instead she said well, no, but she remembered that she saw his penis wet. Why . . . She's telling us the truth."

"It's confusing for kids, conflicting feelings, so they don't really know what they should do. And she was, by the way, nine when this started. Nine-year-olds are nine-year-old. They don't -- how are they supposed to understand this kind of thing? You can't hold a nine-year-old to the same standard as an adult. It's ridiculous to do so."

To establish that a prosecutor's misconduct amounts to prejudicial error, the defendant must show that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and circumstances at trial.³² A prosecutor's remarks must be reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.³³ A prosecutor has wide latitude in closing argument to draw and express reasonable

³² State v. Gregory, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006).

³³ State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997).

inferences from the evidence.³⁴ This includes comments on a witness's credibility based on the evidence.³⁵

Here, the challenged remarks were arguments about inferences from the evidence.³⁶ The prosecutor did not argue that the witnesses should be believed because the prosecutor believed them; rather, the prosecutor argued reasons why their stories were credible based on the evidence presented, e.g., the lack of inconsistencies in the testimony, the level of detail in the testimony, N.M.'s age at the time of the crimes, and the witnesses' general demeanor. Additionally, some of the comments were in response to the defense arguments, which is also proper argument.³⁷ Thus, Doby's prosecutorial misconduct claim is without merit.

VI. Jury Instruction

Finally, Doby's challenges Instruction 27, contending that it "created confusion within the jury as to the issue of aggravating factors." Curiously, Doby's does not reproduce the challenged jury instruction nor has it been designated for the appellate record. He simply quotes the last sentence of that instruction, asserting:

Instruction 27's last sentence indicates that "[i]f you unanimously have a reasonable doubt as to this question, you must answer no." While the proper sentence indicates "no" is the appropriate answer if any one person has a reasonable doubt, the final sentence contradicts that and, thereby, may be confusing to the jurors.

Without an instruction in the record for us to review, we are unable to consider this claim.

³⁴ State v. Hoffman, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991).

³⁵ State v. Stenson, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997).

³⁶ The court sustained Doby's objection to the comment that the witnesses were "straight shooters," and Doby's fails to show that any prejudice from this comment was not cured by the court's ruling or otherwise warrants reversal.

³⁷ See State v. Carver, 122 Wn. App. 300, 306, 93 P.3d 947 (2004).

VII. Statement of Additional Grounds

In a pro se statement, Dobyms identifies two additional grounds for appeal, asserting that a juror was sleeping at times during the trial and that the jury foreman's wife worked for the prosecutor's office, sat in the back of the courtroom during the trial, was overheard discussing the trial with the foreman during lunch, and was told not to return to the courtroom. Because Dobyms fails to substantiate these claims or demonstrate why they require reversal, we find no merit in them.

We affirm the judgment and sentence.

Grosse, J

WE CONCUR:

Dupe, C. S.

Edenfor, J

LEWIS COUNTY PROSECUTOR
November 07, 2011 - 11:40 AM
Transmittal Letter

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Court of Appeals Case Number: 42366-9

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

Brief: ____

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: Dobyns Appendices to State's Response to PRP

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