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DIVISION II

NO. 46366-1-II

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STATE OF WASHINGTON

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

HAROLD SPENCER GEORGE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Edmund Murphy

No. 13-1-03842-2

APPELLANT'S BRIEF

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ORIGINAL

Table of Contents

A.	<u>ASSIGNMENTS OF ERROR</u>	1
1.	Whether Mr. George was denied effective assistance of counsel?	1
2.	Whether Mr. George was denied a unanimous jury where there were multiple counts of Rape of a Child in the Second Degree and the Court gave a <i>Petrich</i> instruction but where neither the <i>Petrich</i> instruction nor the "to-convict" instruction clearly distinguished the acts that the jurors may consider for each count?.....	1
3.	Whether there was sufficient evidence that Mr. George knew that C.D. was particularly vulnerable or incapable of resistance?.....	1
4.	Whether the State elicited improper opinion evidence in violation of ER 608, ER 402, and ER 403?.....	1
5.	Whether there was sufficient evidence to support the convictions?.....	1
B.	<u>STATEMENT OF THE CASE</u>	1
1.	Procedure	1
2.	Facts.....	2
C.	<u>ARGUMENT</u>	12
1.	MR. GEORGE'S WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANE OF COUNSEL.....	12
2.	MR. GEORGE WAS DENIED A UNANIMOUS JURY WHERE THERE WERE MULTIPLE COUNTS OF RAPE OF A CHILD IN THE SECOND DEGREE AND THE COURT GAVE A <i>PETRICH</i> INSTRUCTION BUT WHERE NEITHER THE <i>PETRICH</i> INSTRUCTION NOR	

THE "TO-CONVICT" INSTRUCTION CLEARLY
DISTINGUISHED THE ACTS THAT THE JURORS
MAY CONSIDER FOR EACH COUNT.....23

3. THERE WAS INSUFFICIENT EVIDENCE THAT MR.
GEORGE KNEW THAT C.D. WAS PARTICULARLY
VULNERABLE OR INCAPABLE OF
RESISTANCE.....28

4. THE STATE ELICITED IMPROPER OPINION
EVIDENCE IN VIOLATION OF ER 608, ER 402 AND
ER 403.....31

5. THERE WAS INSUFFICIENT EVIDENCE TO
SUPPORT THE CONVICTIONS.....38

D. CONCLUSION.....40

Table of Authorities

Appellant's Appellate Court Cases

<i>State v. Hepton</i> , 113 Wn.App. 673, 54 P.3d 233 (2002).....	25
<i>State v. Moultrie</i> , 143 Wn.App. 387, 177 P.3d 776 (2008).....	25
<i>State v. Phillips</i> , 160 Wash.App. 36, 246 P.3d 589 (2011).....	29, 39
<i>State v. Saunders</i> , 91 Wn. App. 575, 578, 958 P.2d 364 (1998).....	21
<i>State v. Smith</i> , 162 Wash.App. 833, 262 P.3d 72 (2011).....	34
<i>State v. Thach</i> , 126 Wash.App. 297, 106 P.3d 782 (2005).....	34, 35, 36
<i>State v. Watkins</i> , 136 Wn.App. 240, 148 P.3d 1112 (2006).....	25, 26, 27

State Supreme Court Cases

<i>In re Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004).....	19
<i>State v. Carillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990).....	25
<i>State v. Guloy</i> , 104 Wash.2d 412, 425, 705 P.2d 1182 (1985), <i>cert. denied</i> , 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986).....	34
<i>State v. Kitchen</i> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	25
<i>State v. McFarland</i> , 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)....	13, 14
<i>State v. McNeal</i> , 145 Wn.2d 352, 362, 37 P.3d 280 (2002).....	14
<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	24, 25
<i>State v. Powell</i> , 126 Wash.2d 244, 893 P.2d 615 (1995).....	38
<i>State v. Suleiman</i> , 158 Wash.2d 280, 143 P.3d 795 (2006).....	28
<i>State v. Thomas</i> , 109 Wn.2d 222, 226, 743 P.2d 816 (1987).....	14
<i>State v. White</i> , 81 Wn.2d 223, 225, 500 P.2d 964 (1993).....	13

Federal and Other Jurisdictions

Strickland v. Washington, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S. Ct.
2052 (1984)..... 13, 14

Constitutional Provisions

U.S.Const. amend. VI 12
Wash. Const. art. 1 § 22..... 12

Rules

ER 401.....21, 37
ER 402.....21, 36
ER 403..... 37, 38
ER 608..... 34
RAP 2.5.....34

WPICS

4.2524, 25, 26, 27

A. ASSIGNMENTS OF ERROR.

1. Whether Mr. George was denied effective assistance of counsel?
2. Whether Mr. George was denied a unanimous jury where there were multiple counts of Rape of a Child in the Second Degree and the Court gave a *Petrich* instruction but where neither the *Petrich* instruction nor the "to-convict" instruction clearly distinguished the acts that the jurors may consider for each count?
3. Whether there was sufficient evidence that Mr. George knew that C.D. was particularly vulnerable or incapable of resistance?
4. Whether the State elicited improper opinion evidence in violation of ER 608, ER 402, and ER 403?
5. Whether there was sufficient evidence to support the convictions?

B. STATEMENT OF THE CASE.

1. Procedure

On October 8, 2013, the Pierce County Prosecuting Attorney's Office charged HAROLD SPENCER GEORGE with four counts of Rape of a Child in the Second Degree and one count of Child Molestation in the

Second Degree in Pierce County Cause No. 13-1-03842-2. CP 1-3. On March 14, 2014, the State amended the information to include two aggravating factors, multiple incidents and particularly vulnerable victim. CP 12-15; RP 33-34. Trial commenced on March 25, 2014 before the Honorable Edmund Murphy. Mr. George made a motion to have his counsel removed from the case. RP 4. The motion was denied. RP 13. On April 3, 2014, the jury returned a verdict finding Mr. George guilty as charged with both aggravating factors on counts one, two, three, and four, and the aggravating factor of particular vulnerable victim on count five. CP 19-26, 28. On May 12, 2014, Mr. George was sentenced to an exceptional sentence of 420 months on each of counts one, two, three, and four (the standard range is 210 to 280 months in prison), and sentenced to a standard range sentence of 116 months on count five. CP 65-81.

2. Facts

On April 27, 2013, Mitchell Dysert called the police to report that his daughter, C.D., told him about a sexual relationship with an older man. RP 236-237. On April 30, 2013, Detective Gary Sanders with the Pierce County Sheriff's Department was assigned to investigate the claim. RP 73, 75. During the investigation, Harold Spencer George was identified as a possible suspect. RP 75-76. On October 8, 2013, the State charged Mr. George with four counts of Rape of a Child in the Second Degree and one

count of Child Molestation in the Second Degree in relation to the allegations made by C.D. CP 1-3. Aggravating factors were subsequently added.

Before trial, Mr. George's counsel, Terry Rogers-Kemp ("Rogers-Kemp") missed the scheduled status conference on March 14, 2014. RP 11. Another status conference was scheduled for the morning of March 21, 2014. RP 11-12. Rogers-Kemp was so late to that scheduled status conference that Mr. George had already been transported back to the jail. RP 11-12. Rogers-Kemp indicated that she was late because she was overbooked. RP 5.

Trial was set to begin on March 25, 2014. RP 4. On the day of trial, Rogers-Kemp made a motion to be removed as counsel. RP 4. Rogers-Kemp stated that she had lost Mr. George's other trial and communication between the two had since broken down. RP 5-6. Rogers-Kemp expressed her concern that she would not be paid for her work on the case and stated that she could not afford to not be paid the remainder of her fee. RP 6-7. Rogers-Kemp informed the Court that due to cost, she had not ordered the transcripts of her interviews with the alleged victim, C.D., and C.D.'s father. RP 7.

On the day of trial, Rogers-Kemp informed the court that she did not complete a trial memorandum and had not put in any more work on

the case since leaving Mr. George the day before. RP 8. Rogers-Kemp told the court that she would need a day to prepare for trial if the court did not grant her motion to be removed as counsel. RP 8.

Judge Murphy denied the motion to remove Rogers-Kemp as defense counsel, finding that there was not a sufficient breakdown in communications to warrant a substitution of counsel and that Rogers-Kemp's financial situation was not something that the court would take into consideration. RP 13.

The court inquired of Rogers-Kemp as to the schedule for trial including beginning motions in limine. RP 14, 17-18. Rogers-Kemp admitted to the court that she had not yet prepared the motions in limine and would need until the following morning to prepare. RP 17-18.

On March 31, 2014, Rogers-Kemp failed to appear for trial and did not send a coverage attorney. RP 84. She left a message for the court and the prosecutor that she had a sore throat and nausea so she couldn't be there for trial. RP 84. Trial reconvened on April 1, 2014. RP 87.

At trial, Rogers-Kemp reserved presenting a defense opening statement until after the State's case. RP 72, 190.

Detective Gary Sanders testified for the State. RP 72. Rogers-Kemp did not cross examine Detective Sanders. RP 79.

Rogers-Kemp had conducted pre-trial interviews with the State's witnesses but failed to obtain complete transcripts of the witness interviews and failed to obtain the declaration of court reporter authenticating the transcripts. RP 120-121, 123.

The alleged victim, C.D., testified for the State. She testified that she was born on March 19, 2000 and was currently in seventh grade. RP 90. C.D. first testified that she wasn't sure when the defendant first touched her in a way that made her feel uncomfortable. RP 94. The prosecutor then asked C.D. "[w]as there a time around Christmas 2012 that the defendant touched you in a way that made you feel uncomfortable?" RP 94. Rogers-Kemp did not object.

C.D. then said "probably a year or two ago." RP 94. C.D. testified that on Christmas morning when she was 12, Mr. George pulled her pants down and touched the outside of her vagina. RP 96-98. She said that during the incident, there were several other people in the house including her dad, her sister, her sister's boyfriend, Tony, and Gus. RP 98. She said that Tony and Gus were in the room with her when Mr. George touched her but they were asleep. RP 96, 98. Neither Tony nor Gus were called to testify at trial.

C.D. testified that in January or February 2013, she was over at Mr. George's house with her dad, sister, and brother for a campfire night.

RP 99. She went to sleep in a trailer in Mr. George's yard. RP 99. Mr. George came into the trailer and put his penis inside her vagina. RP 99-101. She said it stopped because Mr. George asked her if she wanted him to stop and she said "yes" so he stopped. RP 103. C.D. testified that later in the trailer, Mr. George repeated this act. RP 104. C.D. testified that another man, Mr. Kinsel, was in the trailer asleep during this time. RP 116. Mr. Kinsel was not called to testify at trial.

C.D. testified that sometime after the trailer incident, Mr. George raped her in her bedroom, multiple times in the defendant's garage, guest room, and his bedroom at his house. RP 106-110.

C.D. testified that she never told her dad about what Mr. George was doing. RP 111. She first testified that her dad never asked her about what was happening with Mr. George but then changed her testimony and said that her dad had asked her about it. RP 113.

Mitchell Dysert, C.D.'s father, testified for the State. RP 140. He testified that C.D. is developmentally disabled. RP 145. Mr. Dysert testified that he asked C.D. if she had sex with Mr. George and C.D. said yes so he called the sheriff to report it. RP 148. Mr. Dysert testified that Mr. George would sometimes stay the night at his house but that Mr. George had not spent the night on a Christmas eve. RP 143, 160. Mr. Dysert also testified that C.D. was not present at Mr. George's campfire

night. RP 161. The State asked Mr. Dysert “[i]s it fair to say that you don’t want additional details because you may not be able to control your anger or rage, if you found out about them?” RP 149. Rogers-Kemp did not object to the question. RP 149. Mr. Dysert replied “[y]es, my baby girl was a victim of child molestation. If I find out any details, I’m not in control of myself at that point.” RP 149. Rogers-Kemp did not object and move to strike. RP 149.

The State also questioned Mr. Dysert about C.D.’s disability. RP 144-146. The following exchange took place:

Q: Currently, where does C. go to school?

A: Frontier High School – Frontier Middle School.

Q: Is she in any type of special program?

A: Yes.

Q: Can you describe that for us?

A: The special program, I usually leave that to her teachers, but it’s like a LAP program. She’s developmentally disabled.

Q: As a result of her developmentally disabled [sic], has she ever been held back in school?

A: Yes, third grade.

Q: Just one year or more than one year?

A: One year because she needed speech therapy. She couldn't communicate.

Q: You've lived with her all of her life. How does her developmentally disabled [sic] affect her in a normal life, normal day?

A: Some things she just doesn't understand. Things that are obvious to you and I, and would comprehend immediately, she just doesn't comprehend at all.

Q: As a result of that, do you have to explain things or do you have to find different ways of explaining it to her?

A: Often.

Q: She's 14. Now does she function like a 14-year-old?

A: Sometimes. Often like a nine-year-old, though.

Q: You said that sometimes she has problems understanding things. Can you give us an example where that's come up?

A: We watch movies often, and sometimes I have to explain the plot to her in great detail because like I said, what's obvious to us is not obvious to her. RP 144-46.

Dr. Yolanda Duralde, the director at the Child Abuse Intervention Department at Mary Bridge Hospital also testified for the State. RP 165. Dr. Duralde testified that she conducted a physical examination on C.D.

and determined that C.D. had a transection of her hymen which indicates penetrating trauma. RP 171, 174, 181, 184.

The State also questioned Dr. Duralde regarding C.D.'s behavioral history. RP 177-78. The following exchange took place regarding C.D.'s developmental disability.

Q: What was the behavioral history in this case with C.?

A: Well, Cheyenne, her dad was worried about her. She's a little bit slow developmentally, and she had had speech therapy in the past, and he couldn't explain what it was exactly how she was slow, but she was getting special classes at school. He felt like she was more depressed recently and was dressing more provocatively, more adult like at that point. RP 177-78.

The State rested its case and Rogers-Kemp requested to make a defense opening statement which she had previously reserved. RP 72, 188, 190. However, Rogers-Kemp had not filed a Defense Witness List or subpoenaed any witnesses for trial and did not intend to put on a defense case. RP 61-62, 72, 190. Judge Murphy denied Rogers-Kemp's request to make a delayed opening statement, finding that an opening statement is meant to outline what evidence you intend to produce during the case. RP 190. Since the defense was not presenting a case, the opening statement should have been presented before the State's case in chief. RP 190-191.

At the end of trial, the Jury returned a verdict finding Mr. George guilty of four counts of Rape of a Child in the Second degree with two aggravating factors on each count and guilty of one count of Child Molestation in the Second Degree with one aggravating factor. CP 19-26, 28.

Sentencing was scheduled for May 2, 2014. Sentencing RP 3. However, Rogers-Kemp did not appear for sentencing and did not send coverage in her place. Sentencing RP 3. Instead, she emailed the prosecutor and judicial assistant that she was ill and would not be at the sentencing hearing. Sentencing RP 3.

Sentencing was rescheduled to May 9, 2014. Sentencing RP 6. Rogers-Kemp again did not appear for sentencing hearing. Sentencing RP 6. Although she sent an attorney to cover, she did not inform the court or the prosecutor that she would not be present at sentencing. Sentencing RP 6. Rogers-Kemp gave the covering attorney minimal information about the case, simply telling the covering attorney to ask for the low end of the standard range. Sentencing RP 7-8. The court set over sentencing until May 12, 2014, finding that it was not “appropriate to go forward without her [Rogers-Kemp] here. This is a very serious case, a lot of charges that he has been convicted of. It has a lot of – a lot riding on this. I don’t think it is appropriate to have somebody that doesn’t know anything about the

case step in on the day of sentencing and come down and try to cover it.” Sentencing RP 10. The court ordered that Rogers-Kemp appear at sentencing on May 12, 2014. RP 10-11, 13.

On May 12, 2014, Rogers-Kemp sent an email to the prosecutor stating that she again could not appear at sentencing but the prosecutor reminded her that the court ordered her to be at this sentencing hearing. Sentencing RP 15. Rogers-Kemp appeared at the sentencing hearing but was late. Sentencing RP 16.

During the sentencing hearing, Rogers-Kemp claimed she had emailed a sentencing brief to the court and the prosecutor but no such brief was located. Sentencing RP 7, 9-10, 16, 17-18. Rogers-Kemp did not have a hard copy of the brief to provide to the court or the prosecutor and did not bring Mr. George’s file to the sentencing. Sentencing RP 17.

The State asked the court for an exceptional upward sentence of 600 months to life in prison. Sentencing RP 23.

During sentencing, Rogers-Kemp did not present any information about Mr. George’s life or provide any mitigating factors regarding the requested sentence. Sentencing RP 27-29. Rogers-Kemp did not ask the court to take leniency on Mr. George. She simply informed the court that Mr. George intended to appeal, asked the court to give Mr. George the low end of the standard range of 210 months in prison, and asked the court not

to punish Mr. George for his attorney's failures to appear in court.

Sentencing RP 27-29.

The Court found that an exceptional sentence was appropriate based on Mr. George's criminal history, offender score, and aggravating factors in the case. Sentencing RP 33-34. The Judge sentenced Mr. George to an exceptional upward sentence of 420 months in prison on counts one through four and 116 months on count five. Sentencing RP 34.

At the end of the sentencing hearing, Rogers-Kemp asked the court to sign paperwork explaining that if that paperwork was not completed that day, Mr. George would miss his appeal filing deadline on two other cases. Sentencing RP 38. The paperwork Rogers-Kemp provided to the court for signing was incomplete and did not even include case numbers. Sentencing RP 39. The court refused to sign the paperwork as Rogers-Kemp had presented it to the wrong court and the wrong judge. Sentencing RP 40.

C. ARGUMENT.

1. MR. GEORGE'S WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal

prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test. First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U. S. at 687, 80 L.Ed.2d at 693, 104 S. Ct. at 2064 -65.

In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994). Defendant must show, from the record as a whole, that defense counsel lacked a legitimate strategic reason to support his or her challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

The test for prejudice is whether there is a reasonable probability that, but for counsel's errors, the result of the trial would have been

different. *State v. McFarland*, 127 Wn.2d at 337; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U. S. at 694, 80 L.Ed.2d at 698, 104 S. Ct. at 2068). In order to prevail on a claim of ineffective assistance of counsel, both prongs of the test must be met. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

In the present case, Rogers-Kemp provided ineffective assistance of counsel. She was overbooked, unprepared and unwilling to put further work into Mr. George's case once she stopped receiving his payments. Rogers-Kemp informed the court that she had been dealing with a family emergency and scheduling problems prior to trial. RP 4-5. She was overbooked with court appearances. RP 5.

a. *Rogers-Kemp was so overbooked that she repeatedly missed or was late to Mr. George's court hearings.*

Rogers-Kemp repeatedly missed or was late to hearings. She missed the scheduled status conference on March 14, 2014 and was so late to the following scheduled status conference on March 21, 2014 that Mr. George had already been taken back to jail. RP 11-12. She did not send an attorney to cover either of those hearings.

Rogers-Kemp failed to appear or send an attorney to cover for trial

on March 31, 2014. RP 84. She left a message for the court and the prosecutor that she had a sore throat and nausea so she couldn't be there. RP 84. This conduct continued throughout Mr. George's case and into sentencing.

On May 2, 2014, Rogers-Kemp did not appear for sentencing and did not send coverage in her place. Sentencing RP 3. She emailed the prosecutor and judicial assistant saying that she was ill and wouldn't be at sentencing. Sentencing RP 3.

On May 9, 2014, Rogers-Kemp again did not appear for sentencing. Sentencing RP 6. Although she sent an attorney to cover, she did not inform the court or the prosecutor that she would not be present at sentencing. Sentencing RP 6. Rogers-Kemp gave the covering attorney minimal information about the case, simply telling the covering attorney to ask for the low end of the standard range. Sentencing RP 7-8. Rogers-Kemp did not provide any sentencing briefing to the court, the prosecutor, or the covering attorney.

The court set over the sentencing hearing, finding that it was not "appropriate to go forward without her here. This is a very serious case, a lot of charges that he has been convicted of. It has a lot of – a lot riding on this. I don't think it is appropriate to have somebody that doesn't know anything about the case step in on the day of sentencing and come down

and try to cover it.” Sentencing RP 10. The court ordered that Rogers-Kemp appear at sentencing on May 12, 2014. RP 10-11, 13.

On May 12, 2014, Rogers-Kemp sent an email to the prosecutor saying she again could not appear at sentencing but the prosecutor reminded her that the court ordered her to be at the sentencing hearing. Sentencing RP 15. Rogers-Kemp did appear, but was late and did not provide any sentencing briefing to the court or prosecutor. Sentencing RP 16.

b. Rogers-Kemp failed to provide a sentencing brief or any argument at sentencing to support a lesser sentence.

Mr. George was looking at a very lengthy sentence. When Mr. George’s sentencing hearing was finally held, Rogers-Kemp arrived late and completely unprepared. She did not even bring Mr. George’s file to the sentencing hearing. Sentencing RP 17. Although Rogers-Kemp claimed to have filed a sentencing brief, it could not be located and she did not have a hard copy of the brief to provide to the court.

Rogers-Kemp did not present any information about Mr. George’s life and did not ask the court to take leniency on Mr. George. She simply informed the court that Mr. George intended to appeal, asked the court to give Mr. George the low end of the standard range of 210 months in prison, and asked the court to not punish Mr. George for his attorney’s

failures to appear in court. Sentencing RP 27-29. She failed to present any mitigating factors or arguments to support a lesser sentence. RP 27-29.

There is no legitimate strategic reason to fail to file a sentencing brief or present any argument to support a lesser sentence, especially considering Mr. George was looking at a possible 600 month sentence. Rogers-Kemp's conduct shows that she not prepared to adequately represent Mr. George. If Rogers-Kemp had prepared a sentencing brief or presented some argument at sentencing about Mr. George, the Judge may have sentenced Mr. George to a standard range sentence.

In addition to Rogers-Kemp's frequent absences and being unprepared for sentencing, she showed a pattern of being unprepared for trial. Rogers-Kemp did not file a Defense Witness List or subpoena any witnesses for trial. RP 61-62.

c. Rogers-Kemp did not adequately prepare for trial.

On the day of trial, Rogers-Kemp admitted to the court that she was unprepared. Rogers-Kemp started by making a motion to be removed as counsel. RP 4. During the motion Rogers-Kemp expressed that she was concerned she would not be paid her fee and could not afford to not be paid the remainder of her fee. RP 6-7. Rogers-Kemp told the court that she had not been able to order the transcripts from the pretrial

interviews with C.D. or C.D.'s father because of the cost. RP 7. Later in trial, Rogers-Kemp finally provided the transcripts to the court but failed to obtain the declaration of court report authenticating the transcripts. RP 120-121, 123.

After Judge Murphy denied the motion to be removed as counsel, Rogers-Kemp informed the court that she did not complete a trial memorandum and had not yet prepared the motions in limine. RP 8, 17-18.

d. Rogers-Kemp failed to make an opening statement.

During trial, Rogers-Kemp failed to give an opening statement or present the jury with any kind of defense theory. After the State presented its opening statement, Rogers-Kemp reserved defense opening statement until after the close of the State's case. RP 72, 190. However, since she chose not to present a defense, the court denied her request to present a delayed opening statement since opening is to outline what evidence the defense intends to produce during the case. RP 72, 190. The defense's opening statement should have been given before the State's case in chief. RP 190-191.

Rogers-Kemp's failure to make an opening statement fell below the objective standard of reasonableness because it was not a decision based on any legitimate trial strategy. Rogers-Kemp wanted to make an

opening statement but failed to do so at the proper time and therefore waived defense's opening. Rather than being a tactical decision, it was a misunderstanding on Rogers-Kemp's part about the proper order of a criminal trial.

If Rogers-Kemp had made an opening statement, the jury would have had the opportunity to hear the defense theory of the case and put the witness's testimony into context. Rather, the jury was not presented with any defense opening in which to guide their consideration of the facts and was not presented with any testimony on behalf of Mr. George by which they could view the evidence in a way favorable to the defense. By not presenting an opening statement, the jury heard all of the State's evidence without any defense theory to take into consideration.

There is no legitimate strategic reason to skip opening statement and fail to present a clear defense theory.

e. Rogers-Kemp failed to adequately investigate witnesses.

The Washington Supreme Court has recognized that not adequately investigating evidence which corroborates the defendant's story may establish constitutionally deficient performance. *In re Davis*, 152 Wn.2d 647, 739, 101 P.3d 1 (2004). Although the duty to investigate does not necessarily require that every conceivable witness be interviewed, defense counsel has an obligation to provide factual support

for the defense where corroboration is available. *Id.* (*internal citations omitted*).

C.D. identified several people who were allegedly in the room during two of the incidents when Mr. George allegedly raped C.D. RP 96, 98, 116. C.D. disclosed that two people were sleeping in the room with her when Mr. George allegedly raped her the first time and that one person was in the trailer with her when Mr. George allegedly raped her at the campfire night. RP 96, 98, 116. There is no indication that Rogers-Kemp even attempted to locate these critical witnesses. The State did not call these witnesses to testify and Rogers-Kemp did not ask for a missing witness instruction at trial. These witnesses could have provided evidence corroborating Mr. George's story. The State's entire case rested on the testimony of the alleged victim, C.D., making it even more critical to interview witnesses who were in the room when C.D. claims she was raped. There is no legitimate strategic reason for failing to investigate witnesses who could possibly exculpate Mr. George.

f. Rogers-Kemp failed to object to a prejudicial question.

In addition, Rogers-Kemp failed to object to a prejudicial question that called for irrelevant information. The prosecutor asked Mr. Dysert "[i]s it fair to say that you don't want additional details because you may not be able to control your anger or rage, if you found out about them?"

RP 149. Rogers-Kemp did not object. Mr. Dysert answered “[y]es, my baby girl was a victim of child molestation. If I find out any details, I’m not in control of myself at that point.” RP 149. Rogers-Kemp again failed to object and did not make a motion to strike.

To prevail on a claim of ineffective assistance of counsel for a failure to object at trial defendant must show that the objection would likely have been sustained. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

The question the prosecutor asked Mr. Dysert was objectionable on many grounds. First, it was completely irrelevant to the charges. For evidence to be relevant, it must have a tendency to make any fact of consequence to the determination of the action more or less probable that it would be without the evidence. *See* ER 401, 402. The only purpose of the question was to explore Mr. Dysert’s feelings about what happened to his daughter. Mr. Dysert’s feelings about the allegations do not tend to make any fact of consequence more or less likely and therefore are irrelevant. Second, the question called for a prejudicial statement from Mr. Dysert. Mr. Dysert’s statement was designed to inflame the passions of the jury as they were hearing a plea from a child’s father. Third, Mr. Dysert lacked personal knowledge to testify that his daughter had in fact been molested. *See* ER 602.

The question and resulting testimony was completely inappropriate and there was no legitimate tactical reason for Rogers-Kemp not to object. If she had objected, the objection would have been sustained on a number of grounds.

g. *Mr. George was prejudiced by Rogers-Kemp's deficient performance.*

Rogers-Kemp performance at trial and sentencing fell well below the standard for effective assistance of counsel. She was completely unprepared and it prejudiced Mr. George.

Rogers-Kemp expressed her concern for not being paid numerous times and it appears that she stopped working on Mr. George's case when the payments stopped coming in. Even during sentencing she again brings up that she hadn't been paid. Sentencing RP 38. She almost missed the appeal filing deadline on Mr. George's other two cases. Sentencing RP 38.

Rogers-Kemp was unprepared at every stage of Mr. George's case. She voiced her frustration with not getting paid, on the day of trial she tried to be removed from the case, and admitted to not having prepared a trial memorandum or motions in limine. She failed to object to a question that called for a prejudicial response from the victim's father, failed to present anything for the defense case, and failed to prepare anything for

sentencing. She was either late or missed numerous court appearances. There is no strategic reason for any of these actions. Her performance fell well below the objective standard of reasonableness.

Mr. George's trial was undoubtedly effected by his counsel's failure to prepare for trial, failure to make proper objections at trial, failure to file a witness list, subpoena witnesses, properly investigate three witnesses who were in the room when C.D. was allegedly raped, and failure to present any mitigating factors at sentencing.

Even with C.D. and her father's conflicting testimony, Mr. George was found guilty as charged with nine aggravating factors and sentenced to 420 months in prison. There can no confidence in the outcome of this case. Rogers-Kemp's lack of preparation clearly affected Mr. George's trial.

2. WHETHER MR. GEORGE WAS DENIED A UNANIMOUS JURY WHERE THERE ARE MULTIPLE COUNTS OF RAPE OF A CHILD IN THE SECOND DEGREE, THE COURT GAVE A *PETRICH* INSTRUCTION, BUT THE TO-CONVICT INSTRUCTIONS DID NOT CLEARLY DISTINGUISH THE ACTS THAT THE JURY WAS TO CONSIDER.

The State charged Mr. George with four counts of Rape of a Child in the Second Degree by way of amended information. CP 19. Counts I, II, III and IV, all read identical. The time period for each of those counts is "between the 1st day of January, 2013 and the 27th day of April, 2013." CP

19. Additionally, all four of those counts is identical in every other aspect. They do not distinguish in any way the acts that the jurors may consider for each count. CP 19. Consequently, it is impossible to tell whether the jurors used the same acts or different acts to support the conviction for counts I, II, III and IV.

The State proposed and the Court gave Instruction No. 13, based on WPIC 4.25, commonly referred to as a *Petrich* instruction. CP 16.

Instruction No. 13 reads:

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

The State did not elect specific acts upon which to base the charges, but chose to offer the *Petrich* unanimity instruction.

Mr. George did not object to either the *Petrich* instruction or the “to-convict” instructions.

The *Petrich* instruction is based on *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984). In *Petrich*, the court held that in cases in which the evidence indicates that several distinct criminal acts have been committed, but the defendant is charged with only one count of criminal

conduct, the constitutional requirement of jury unanimity is assured by either (1) requiring the prosecution to elect the act upon which it will rely for conviction; or (2) instructing the jury that all 12 jurors must agree that the same criminal act has been proved beyond a reasonable doubt. When the prosecution chooses not to elect, a jury instruction must be given to assure the jury's understanding of the unanimity requirement. *Id.* at 572. Failure to follow one of these options is violative of a defendant's state constitutional right to a unanimous jury verdict and United States constitutional right to a jury trial." *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988). Also see *State v. Hepton*, 113 Wn.App. 673, 684, 54 P.3d 233 (2002); *State v. Carillo*, 115 Wn.2d 60, 794 P.2d 850 (1990). The current version of the pattern instruction was approved in *State v. Moultrie*, 143 Wn.App. 387, 392-94, 177 P.3d 776 (2008).

Where there are multiple counts, then the instruction needs to clearly require unanimity for one particular act for each count charged. *State v. Watkins*, 136 Wn.App. 240, 148 P.3d 1112 (2006), review denied at 161 Wn.2d 1028 (2007). See also comments to WPIC 4.25.

In *Watkins*, the defendant was charged with four counts of Rape of a Child in the First Degree based on multiple acts of oral sex and for touching the bottoms and breasts of his two step-children. *Watkins*, 136 Wn.App. at 242, 148 P.3d at 1114.

The *Watkins* court gave a modified version of WPIC 4.25, which read:

There are allegations that the defendant committed multiple acts of Rape of a Child in the First Degree against T.H..[sic] Although the twelve of you need not agree that all of the acts have been proved, to convict the defendant of Count I or Count II *you must unanimously agree that at least one separate act of Rape of a Child in the First Degree pertaining to each count has been proved beyond a reasonable doubt.*

Watkins, 136 Wn.App. at 244, 148 P.3d at 1114-15.

Watkins did not object to the instruction. *Id.* “ If a defendant fails to object at trial, an error may be raised for the first time on appeal if it ‘invades a fundamental right of the accused.’ A unanimity instruction that does not adequately inform the jury of the applicable law violates a defendant’s constitutional right to a unanimous jury verdict.” *Watkins*, 136 Wn.App. at 244, 148 P.3d at 1115 (citations omitted). Therefore, Mr. George may raise the issue for the first time on appeal.

The *Watkins* court found that the instruction as given did not adequately insure the jury unanimity.

We agree that the instruction does not appear to adequately insure jury unanimity. Instructing the jury to unanimously agree on “*at least one separate act*” for each count arguably does not make it manifestly clear that the jury must agree on the *same* act for each count. All the jurors could agree that one separate act was committed without necessarily agreeing that the same act was the basis for conviction.

Watkins, 136 Wn.App. at 246, 148 P.3d at 1116.

In the current case, the *Petrich* instruction as given was not modified at all from the WPIC, so there is even less clarity that the jury must agree on the separate and discrete act that would support the conviction on each individual count than the inadequate instruction as given in *Watkins*. It is presumably for this reason that the comments to WPIC 4.25 under Multiple counts says “[i]f the instruction is being modified for multiple counts,…” The comments presume that when there are multiple counts, the instruction will be modified. In the current case, the instruction was not modified.

Likewise, the Note on Use section of WPIC 4.25 reads:

If this pattern instruction applies to more than one count of the charged crime, then the to-convict instructions need to clearly distinguish the acts that the jurors may consider for each count, so that jurors will not use the same act to support two separate counts.

WPIC 4.25 Note on Use.

In the current case, neither the *Petrich* instruction nor the “to-convict” instructions adequately distinguished the various acts that might support each individual count. Therefore, it is impossible to tell whether each juror relied on the same act to support each individual count for count I, II, III and IV. The error in the instructions requires reversal. See *Watkins*, 136 Wn.App. 240, 148 P.3d 1112.

3. WHETHER THERE WAS SUFFICIENT EVIDENCE THAT MR. GEORGE KNEW OR SHOULD HAVE KNOWN THAT C.D. WAS PARTICULARLY VULNERABLE OR INCAPABLE OF RESISTENCE?

The jury convicted Mr. George of four counts of Rape of a Child in the Second Degree and one count of Child Molestation in the Second Degree. CP 11 – 15. The jury found the vulnerable person aggravating factor on each count. CP 6-10.

...[W]hether an aggravating factor is present in a particular case, in other words whether a stated reason is supported by the record, is a factual determination. (*internal citations omitted*) Thus, whether a particular aggravating factor is supported by the record is a question of fact, while the question of whether the found factors are sufficiently substantial and compelling is a matter of law.

State v. Suleiman, 158 Wash.2d 280, 291, 143 P.3d 795, 800 (2006) (*internal citations omitted*).

The facts established at trial do not support the jury's finding that the victim was particularly vulnerable or incapable of resistance.

In order for the victim's vulnerability to justify an exceptional sentence, the State must show (1) that the defendant knew or should have known (2) of the victim's *particular* vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime.

State v. Suleiman, 158 Wash.2d 280, 291-292, 143 P.3d 795, 800 - 801 (2006) (*internal citations omitted*).

In evaluating the sufficiency of the evidence, we view the evidence in the light most favorable to the State. *State v. Phillips*, 160 Wash.App. 36, 48, 246 P.3d 589, 595 (2011) (*internal citations omitted*). “The relevant question is ‘whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.’ *Id.*” An appellant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences reasonably drawn from it. Circumstantial and direct evidence are equally reliable, and we defer to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence. *Id.*

In the current case, the evidence does not support the jury's finding that the victim was particularly vulnerable. The evidence of C.D.'s disability comes largely from her father, Mitchell Dysert. RP 144-146. He testified that C.D. was in a “special program.” RP 145. The program is not described. There is no course description. No goals are mentioned. No tests were mentioned. No expert was called to discuss the nature of C.D.'s specific disability. Mr. Dysert could not describe the program. RP 145. In response to the State's question, “[c]an you describe that [special program] for us?” Mr. Dysert said, [t]he special program, I usually leave that to her teachers, but it's like a LAP program. She's developmentally disabled.” There is no description of the LAP program. There is no

description from C.D.'s teachers. The State asked Mr. Dysert, "[a]s a result of her developmentally disabled, [sic] has she ever been held back in school?" Mr. Dysert responded, "Yes, third grade...." One year because she needed speech therapy. She couldn't communicate." RP 145.

The only other testimony from Mr. Dysert related to C.D.'s developmental disability is that sometimes things that are obvious to us [adults] she doesn't "comprehend immediately," and you have to "find different ways of explaining things to her." RP 145.

The only other evidence of C.D.'s disability is from Dr. Duralde, who reported that Mr. Dysert was concerned about C.D. but was unable to explain the nature of her disability. RP 177-78.

There was no testimony about Mr. George's knowledge of C.D.'s developmental disability. There was no testimony that Mr. George was familiar with C.D.'s schooling, or that she had been held back. There is no indication that speech therapy was related to any decision making process. It seems obvious that simply because a person may have a speech impediment does not mean that there is a decision-making disability that would make C.D. *particularly* vulnerable or unable to resist. At minimum, the State has produced no evidence that there is such a connection.

To require that Mr. George knew or should have known about C.D.'s developmental disability because she needed speech therapy would

assume that a person with a speech impediment has cognitive impairment, a presumption for which there is no evidence and defies common sense.

The only other real evidence of C.D.'s disability is that she needs the plot to movies described in detail. RP 146. The examples given by Mr. Dysert of C.D.s disability appears to be that of a typical 14-year old. She "sometimes" acts like a 9-year old. But there is no evidence that establishes what a normal 14-year old acts like or what a normal 9-year old acts like.

If C.D.'s father is unable to articulate, even the barest description of C.D.'s disability, there is insufficient evidence to support the finding that Mr. George knew or should have known about a *particular* vulnerability. There is no evidence as to what that *particular* vulnerability is, other than developmentally disable as evidenced by an apparent speech impediment that resulted in being held back one year for speech therapy.

Mr. George did not overcome C.D.s resistance. C.D. testified that when Mr. George asked C.D. if she wanted him to stop. She said "Yes." So he stopped. RP 103.

4. THE STATE ELICITED IMPROPER OPINION EVIDENCE, IMPROPER VOUCHING AND INFLIMED THE PASSIONS OF THE WITNESS AND JURY IN VIOLATION OF ER 608 AND ER 403.

The State questioned Mr. Dysert about his conversation with C.D.

after he heard about possible abuse. RP 147-149. After having heard about possible abuse, Mr. Dyster spoke to C.D. about the allegations. RP 147-148. The following testimony was elicited from the State.

Q: After that occurred [learning of possible allegations], did you then ask your daughter C.D., about her and the defendant?

A: Yes.

Q: What did you ask C.D.?

A: She, because of her age, was aware of, you know, intimacy between a man and a woman. I asked her if she had had – I don't remember my exacts [sic] words. I basically asked her if she had sex with him.

Q: How did she respond?

A: She answered in the affirmative.

Q: Which would have been yes?

A: Yes.

Q: At that point, after you asked that one question and got that response, did you ask anything further of C.D.?

A: No, I don't want to know details.

Q: What did you do in response to hearing about this?

A: I called the Sheriff.

Q: After you called the sheriff, did they actually come out and

come talk to you on that day?

A: Yes, they did.

Q: Do you recall how soon after you had this conversation with C.D. that you called the police? Was it a matter of seconds, minutes, hours?

A: Right after I spoke with her, I called the sheriff immediately.

Q: Did you later on take C.D. to an interview as part of the sheriff's investigation?

A: Yes, we did.

Q: Did you take C.D. for a medical exam as part of this investigation?

A: That was part of it, yes.

Q: Is it fair to say that you don't want additional details because you may not be able to control your anger or rage, if you found out about them?

A: Yes, my baby girl was a victim of child molestation. If I find out any details, I'm not in control of myself at that point.

Q: Thank you. No further questions, Your Honor.

RP 147-149.

There was no objection by Mr. George.

a. Improper ER 608 evidence.

ER 608 prohibits the State from vouching for a witness. *State v. Smith*, 162 Wash.App. 833, 262 P.3d 72 (2011). ER 608 prohibits a witness for vouching for the credibility of another witness. *State v. Thach*, 126 Wash.App. 297, 106 P.3d 782 (2005).

Improper opinion testimony violates the defendant's right to a jury trial and invades the fact-finding province of the jury. A witness is not allowed to give an opinion on another witness's credibility. Because improper opinion testimony violates a constitutional right, a defendant may generally raise the issue for the first time on appeal. Under RAP 2.5(a)(3), we may consider a manifest error affecting a constitutional right raised for the first time on appeal.

Where a defendant contends a manifest error occurred at the trial level, we review the error employing a four-part test. First, we determine whether the alleged error is a constitutional error. Second, we determine whether the alleged error is manifest. Key to this determination is “a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case.” Third, if we find the alleged error to be manifest, then we must address the merits of the constitutional issue. Finally, if we determine that a constitutional error occurred, then we undertake a harmless error analysis.

As previously stated, improper opinion testimony invades the province of the jury and thus violates a constitutional right of the defendant. Thus, we need not address the first three points in the test. Instead, we now must determine whether the admission of the improper opinion testimony was a harmless error. We use the harmless error test set forth in *State v. Guloy*, 104 Wash.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986), to determine if a constitutional error is harmless. Under that test “[a]

constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” We employ the “overwhelming untainted evidence” test to determine if the error was harmless. Under the overwhelming evidence test, the court examines whether the untainted evidence is so overwhelming that it leads necessarily to a finding of guilt.

State v. Thach, 126 Wash.App. 297, 312-313, 106 P.3d 782, 790 - 791 (2005) (*internal citations omitted*).

In the current case, the State elicited improper opinion evidence when it asked Mr. Dysert, “[i]s it fair to say that you don’t want additional details because you may not be able to control your anger or rage, if you found out about them?” RP 149.

The question was a request for an improper opinion on the truthfulness of C.D.’s statements. If Mr. Dysert did not believe his daughter, he would not feel outrage or the inability to control his anger. By Mr. Dysert saying that he did not want additional details because he would not be able to control his anger or rage, implies that Mr. Dysert did believe his daughter. That is improper vouching for the credibility of another witness, C.D.

The question posed by the State was not in response to a question by the defense such as, “why did you not ask or talk about additional details?”, in which case perhaps the defense might have opened the door and it would be proper for the State to ask such a question. But that is not

the case here. The question was asked by the State, on direct, at the end of the State's examination, presumably so that it would have the have the greatest emotional impact on the jury.

Because vouching invades the province of the jury, it is structural error that can be raised for the first time on appeal. *Thach*, 126 Wash.App. at 312, 106 P.3d at 790.

b. The evidence was not so overwhelming that the error is harmless.

The evidence was not so overwhelming that the structural error is harmless. Mr. Dyster contradicted C.D.'s testimony regarding whether Mr. George was with C.D. on Christmas Eve. Mr. Dysert testified that Mr. George would sometimes stay the night at his house, but that he did not do so on Christmas Eve. RP 143, 160. C.D. testified that one of the occasions of abuse occurred in a trailer at Mr. George's campfire. RP 99 – 101. Mr. Dysert testified that C.D. was not at the campfire in question. RP 161.

c. The elicited testimony violates ER 402 and ER 403.

ER 402 reads:

Relevant evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or

regulations applicable in the courts of this state.
Evidence which is not relevant is not admissible.

ER 401 reads:

Definition of “Relevant Evidence”

“Relevant Evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The question and the answer was irrelevant as it did not make the existence of any fact of consequence more or less probable. The question posed by the State related to why Mr. Dysert did not ask for more details when speaking to C.D. That evidence does not make the existence of any fact that goes to any element of any of the charges. The defense had not challenged the statement. The witness did not express any question or uncertainty that needed clarification. The question was asked directly by the State, prompted by neither the defense, nor the witness, and the witness did not broach the topic sua sponte.

The question and answer also violate ER 403 as they are highly prejudicial and designed to enrage the passions of the jury.

ER 403 reads:

Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its

probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

In addition to the evidence of Mr. Dysert's anger and rage being inadmissible to begin with, and therefore, irrelevant, it also clearly inflames the passions of the jury. It is understandable that a parent would be very angry at hearing that his or her minor child had been sexually abused by an adult. It seems inevitable that jurors are likely to feel some sympathy for Mr. Dysert's anger.

ER 403 prohibits the admission of evidence that would cause "unfair prejudice," usually meaning prejudice by evidence that is more likely to arouse an emotional response than a rational decision among the jurors. *State v. Powell*, 126 Wash.2d 244, 264, 893 P.2d 615, 627 (1995).

In the current case, Mr. Dysert's anger and rage are irrelevant to whether Mr. George committed the acts alleged. Nevertheless, it is improbable that the improper questions and answers had no effect on the jury. Given the significant other inconsistencies in C.D.'s testimony, the error is not harmless.

5. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS ON COUNTS I, II, III, IV AND V.

In evaluating the sufficiency of the evidence, we view the evidence in the light most favorable to the State. *State v. Phillips*, 160 Wash.App. 36, 48, 246 P.3d 589, 595 (2011) (*internal citations omitted*). The relevant question is “whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* An appellant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences reasonably drawn from it. *Id.* Circumstantial and direct evidence are equally reliable, and we defer to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence. *Id.*

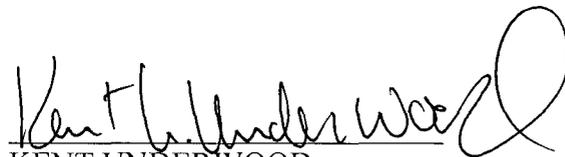
Because the State did not elect upon which acts each count was based, and because neither the “to-convict” instruction, nor the *Petrich* instruction differentiated each different count, it is impossible to accurately distinguish counts I through IV.

Although C.D. testified about various incidents where Mr. George put his penis in her vagina, there are insufficient details for the jury to find unanimously and beyond a reasonable doubt that each incident occurred during the time specified. RP 93 – 115.

D. CONCLUSION.

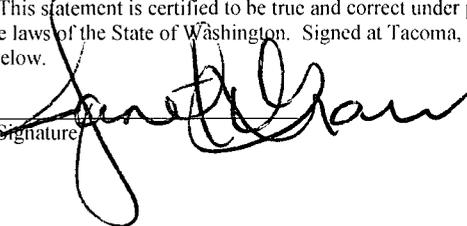
For the forgoing reasons, the appellant respectfully requests this Court reverse Mr. George's convictions for four counts of Rape of a Child in the Second Degree and one count of Child Molestation in the Second Degree and enter an order granting Mr. George a new trial.

DATED this 8th day of December, 2014.


KENT UNDERWOOD
Attorney for Appellant
WSBA # 27250

Certificate of Service:

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

12-8-14 
Date Signature