

NO. 47347-0-II

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

STATE OF WASHINGTON,
Respondent,

v.

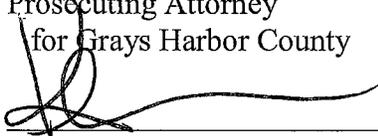
JOSE FLORES-RODRIGUEZ,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

KATHERINE L. SVOBODA
Prosecuting Attorney
for Grays Harbor County



WSBA #34097

OFFICE AND POST OFFICE ADDRESS

County Courthouse
102 W. Broadway, Rm. 102
Montesano, Washington 98563
Telephone: (360) 249-3951

T A B L E

Table of Contents

I. COUNTER STATEMENT OF THE CASE	1
a. Procedural History	1
b. Statement of Facts.....	1
II. RESPONSE TO ASSIGNMENTS OF ERROR	7
1) Prosecutorial Misconduct Allegations	7
2) Ineffective Assistance of Defense Counsel Allegations	15
3) Allegation of a Time for Trial Violation.....	17
4) Allegation that Information Omitted an Essential Element of Communicating with a Minor for Immoral Purposes	20
5) Allegation That Convictions for both Communicating with a Minor for Immoral Purposes and Sexual Exploitation of a Minor Violated Double Jeopardy.....	23
6) The Court’s Comment on the Evidence of the Aggravating Circumstance.....	25
III. CONCLUSION	28

TABLE OF AUTHORITIES

Cases

<i>Blockburger v. U.S.</i> , 284 U.S. 299, 52 S.Ct. 180.....	24
<i>In re Pers. Restraint of Orange</i> , 152 Wash.2d 795, 100 P.3d 291 (2004)	23
<i>State ex rel. Carroll v. Junker</i> , 79 Wash.2d 12, 482 P.2d 775 (1971).....	19
<i>State v. Boast</i> , 87 Wash.2d 447, 553 P.2d 1322 (1976).....	12
<i>State v. Boehning</i> , 127 Wash.App. 511, 111 P.3d 899 (2005).....	8
<i>State v. Brown</i> , 132 Wash.2d 529, 940 P.2d 546 (1997).....	8
<i>State v. Brush</i> , 183 Wash. 2d 550, 353 P.3d 213, 217 (2015)	25, 26, 27
<i>State v. Calle</i> , 125 Wash.2d 769, 888 P.2d 155 (1995).....	24
<i>State v. Carlyle</i> , 84 Wash.App. 33, 925 P.2d 635 (1996).....	19
<i>State v. Cox</i> , 109 Wash.App. 779, 37 P.3d 1240 (2002)	24
<i>State v. Deryke</i> , 110 Wash.App. 815, 41 P.3d 1225 (2002)	24
<i>State v. Dhaliwal</i> , 150 Wash.2d 559, 79 P.3d 432 (2003).....	8
<i>State v. Downing</i> , 151 Wash.2d 265, 87 P.3d 1169 (2004)	19
<i>State v. Flinn</i> , 154 Wash.2d 193, 110 P.3d 748 (2005).....	19
<i>State v. Freeman</i> , 153 Wash.2d 765, 108 P.3d 753 (2005)	23
<i>State v. Gocken</i> , 127 Wash.2d 95, 896 P.2d 1267(1995).....	23
<i>State v. Guloy</i> , 104 Wash.2d 412, 705 P.2d 1182 (1985)	11
<i>State v. Hendrickson</i> , 129 Wash.2d 61, 917 P.2d 563	15
<i>State v. Johnson</i> , 119 Wash.2d 143, 829 P.2d 1078 (1992)	21, 22
<i>State v. Kjorsvik</i> , 117 Wash.2d 93, 812 P.2d 86 (1991)	20, 21
<i>State v. Leach</i> , 113 Wash.2d 679, 782 P.2d 552 (1989).....	22
<i>State v. Levy</i> , 156 Wash.2d 709, 132 P.3d 1076 (2006)	26, 27
<i>State v. Lynn</i> , 67 Wash.App. 339, 835 P.2d 251 (1992).....	13
<i>State v. McCarty</i> , 140 Wash.2d 420, 998 P.2d 296 (2000).....	21
<i>State v. McFarland</i> , 127 Wash.2d 322, 899 P.2d 1251 (1995).....	12, 13, 15
<i>State v. Nonog</i> , 169 Wash.2d 220, 237 P.3d 250 (2010).....	22
<i>State v. Powell</i> , 167 Wash.2d 672, 223 P.3d 493 (2009).....	21
<i>State v. Russell</i> , 125 Wash.2d 24, 882 P.2d 747 (1994)	14
<i>State v. Saunders</i> , 153 Wash. App. 209, 220 P.3d 1238, 1243 (2009).....	20
<i>State v. Schimmelpfennig</i> , 92 Wash. 2d 95, 594 P.2d 442, 447 (1979) ...	22, 23
<i>State v. Scott</i> , 110 Wash.2d 682, 757 P.2d 492 (1988).....	12, 13
<i>State v. Sells</i> , 166 Wn. App. 918, 271 P.3d 952 (2012).....	14
<i>State v. Siers</i> , 174 Wash.2d 269, 274 P.3d 358 (2012).....	21
<i>State v. Thorgerson</i> , 172 Wash.2d 438, 258 P.3d 43 (2011)	7, 8, 9, 14
<i>State v. Tolia</i> , 135 Wash.2d 133, 954 P.2d 907 (1998).....	12
<i>State v. Valladares</i> , 31 Wn. App. 63, 639 P.2d 813 (1982).....	13
<i>State v. Vladovic</i> , 99 Wash.2d 413, 662 P.2d 853 (1983)	24

<i>State v. Walsh</i> , 143 Wash.2d 1, 17 P.3d 591 (2001).....	12
<i>State v. Ward</i> , 148 Wash.2d 803, 64 P.3d 640 (2003).....	21
<i>State v. WWJ Corp.</i> , 138 Wash.2d 595, 980 P.2d 1257 (1999).....	12
Statutes	
RCW 9.68A.090.....	22
RCW 9.94A.535(3)(g).....	16
Other Authorities	
Const. art. I, § 9.....	23
U.S. Const. amend. VI.....	20
Wash. Const. art. I, § 22.....	20
WPIC 300.17.....	25
Rules	
CrR 2.1.....	21
CrR 3.3.....	18, 19
RAP 2.5(a).....	12

I. COUNTER STATEMENT OF THE CASE

a. Procedural History

The Appellant was originally charged by Information filed on August 26, 2014. CP 2. An Amended Information was filed on November 17, 2014 alleging three charges: 1) Communicating With a Minor for Immoral Purposes, 2) Rape of a Child in the Third Degree, and 3) Sexual Exploitation of a Minor. The State further alleged that the rape of a child was part of an ongoing pattern of sexual abuse. CP 4-5.

The trial commenced on January 13, 2015. The Appellant was found guilty as charged on January 14, 2015. CP 14-17. The Appellant was sentenced to an exceptional sentence of 150 months on March 23, 2015. CP 33-49.

b. Statement of Facts

L.C. is a minor female born on May 24, 1999. RP 34, 80. She was fifteen years old at the time of the trial. RP 34. Sheila Bouback is L.C.'s mother and Markee Bouback's sister. RP 33, 70. At the time of trial, Markee Bouback was married to the Appellant. RP 33, 68-69.

Sheila¹ and L.C. moved into an apartment behind the Aberdeen Police Department with Markee and the Appellant. RP 36, 71. After a

¹ Due to Sheila and Markee Bouback sharing a surname, the State will refer to them by their first names. No disrespect is intended by this.

“few months” Sheila moved into her own place on Market Street. RP 36,71. L.C. did not move to the Market Street residence, she remained with Markee and the Appellant for approximately four or five months. RP 37, 71.

Markee observed that L.C. and the Appellant were “pretty close” and that he helped L.C. with homework and “stuff like that.” RP 72. If L.C. was having problems, she would usually go to the Appellant for counsel. RP 72. The two also texted back and forth. RP 72. Eventually, L.C. was asked to move out because she came to Markee and told her that she had kissed the Appellant. RP 71-72, 82. L.C. was about twelve and a half years old when this happened. RP 83. Markee asked the Appellant about this, and he admitted the kiss had happened and he was “scared” to tell her, and that L.C. was “evil.” RP 74-75. After this, Markee didn’t want the Appellant and L.C. to be talking and L.C. wasn’t allowed back to the home for a time. RP 74.

At trial, L.C. testified that the physical contact between her and the Appellant, when she was 12 and a half, was more than just kissing. RP 112-113. L.C. described the Appellant coming home from work and into her bedroom when she was asleep. RP 113. L.C. woke up to the Appellant lying next to her. RP 113-. The Appellant told L.C. to pull down her pants,

and then the Appellant had sexual intercourse with L.C. RP 114-115. L.C. stated this happened more than once. RP 115-116.

When she returned to her mother's home, some time passed and L.C. continued to visit Markee and the Appellant a couple of times a week, including some overnight visits. RP 39-40, 75. Sometime in 2014, the Appellant asked L.C. to have contact with him on Facebook. RP 118. He told her that "he needed to talk" and wanted L.C. to "create a different Facebook account." RP 118. The Appellant gave L.C. the alias "Ralee Mafie" to use when creating the fictitious account. RP 118-119. The Appellant created his own fictitious account under the name of "Alan Knot." RP 119. The two communicated for several months via Facebook. RP 119.

In May of 2014, L.C. and the Appellant started having a physical relationship as well. RP 120. This began by the Appellant telling L.C. to ask Markee to let her stay the night. RP 121. Markee agreed, and when Markee went to bed, the Appellant approached L.C. and they had sexual intercourse in the "game room." RP 121-122. A few days later, L.C. and the Appellant again had sex in the game room. RP 123. L.C. testified that the sex occurred "most of the times" she went to the Appellant's residence. RP 124. They also continued to exchange electronic messages

on a daily basis. RP 124. During this time, L.C. viewed the relationship as being a dating relationship. RP 125. However, L.C. also felt “forced” to have sex as the Appellant would get very angry if she didn’t agree do it. RP 136.

L.C. spent most of the 2014 summer in Milton Freewater, Oregon with her paternal grandmother. RP 38. She continued to be in contact with the Appellant via Facebook and Skype on her tablet. RP 125-126. Skype is a video chat program that allowed L.C. and the Appellant to see each other in real time. RP 126. L.C. stated that she and the Appellant talked about everything , including sex. When using Skype, L.C. testified that they would each be nude for the other while on camera. RP 126. On more than one occasion, L.C. took nude photographs of herself at the Appellant’s request. RP 127. These photographs were sent to the Appellant. RP 128-129.

The Appellant also had L.C. give him a “show” on Skype, specifically asking her to be unclothed on camera. RP 161-162. The Appellant told L.C. “When u play with ur V, i want u to play with it like ur alone by urself n u r really horny.” Exhibit 1, Message Sent 7-17-2014 at 07:46:56 UTC. “V” in these conversations meant “vagina.” RP 156.

When L.C. came home from Oregon she was to live with her mother. RP 38-39. However, there had been discussion of her continuing to live with Markee and the Appellant, but a final decision hadn't been made. RP 39, 75-76. A cousin of Markee's, Tate DeBoer, also lived with Markee and the Appellant from July 2014 through the time of trial. RP 76.

After L.C. returned home, Sheila was woken in the middle of the night, at approximately 1-2 in the morning, by a younger child. RP 40. She went and retrieved her phone from L.C. who had fallen asleep on top of the phone. RP 40, 41-42, 53. L.C. would use the phone to log into her Facebook account. RP 41. When Sheila opened Facebook, it was already logged into an account under a name she didn't recognize. RP 42.

Sheila looked at the "friend's list" and saw that the account had only one friend, a male's name. RP 42-43. Sheila then checked the messages. Sheila was concerned because they "were pretty sexually explicit." RP 43. She then went and spoke to L.C. After this conversation, Sheila went to the Appellant's residence to confront him. RP 43. When she got to the residence, Sheila told the Appellant "...that he was a sorry son of a bitch and that he was going to jail for rape." RP 54. The Appellant "laughed" and "...said that [Sheila had] nothing to prove that he was touching [L.C.]" RP 54. Later, the Appellant told Sheila that "...he had

herpes and if he was [having sex with L.C.] she would have them too.” RP 55.

Markee confirmed that the Appellant did have herpes. RP 78. Also, the Appellant testified that it was impossible that he had sex with L.C. because he has herpes. RP 179. L.C. was asked “Have you had any medical issues lately with your mouth?” She replied “Yes.” “What’s going on?” “They’re not for sure yet.” RP 137. The Court sustained the defense objection and the jury was instructed to disregard. RP 140.

The Appellant testified that, at the time of his arrest, he had a cell phone and laptop that had Internet access. RP 181. These items were seized by the police. RP 181. When being asked about Internet access, the Appellant testified that he also volunteered his PlayStation that was not seized. RP 182.

Exhibit One was admitted by the trial court and consisted of the messages sent between L.C. and the Appellant. RP 144-145. The contents of this binder are crucial to the State’s case and summary of the messages is given through L.C.’s testimony. RP 146-166. Specifically, the messages offered information that was likely only known to the Appellant.

On July 16, 2014, L.C. and the Appellant discuss him shaving his pubic area. Exhibit 1, Messages Sent 7-16-14 at 08:45:55; 08:50:44; and

08:52:58 UTC. Markee confirmed that the Appellant did, on occasion, shave his pubic area. RP 78.

Then L.C. asks the Appellant how often he and Markee have been having sex. He replies, “We haven’t been doing it a lot cause she is too tired all the time.” Exhibit 1, Message Sent 7-16-14 at 08:54:41 UTC. Markee testified that she and the Appellant were not having sex regularly during the summer of 2014 due to Markee being tired. RP 78.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1) Prosecutorial Misconduct Allegations

The appellant makes several allegations of prosecutorial misconduct in this case. An appellant who alleges prosecutorial misconduct bears the burden of proving that, in the context of the record and circumstances of the trial, the prosecutor's conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wash.2d 438, 442, 258 P.3d 43 (2011).

A defendant establishes prejudice by showing a substantial likelihood that the misconduct affected the jury verdict. *Thorgerson*, 172 Wash.2d at 443. Where the defendant fails to object to the prosecutor's improper statements at trial, such failure constitutes a waiver unless the

prosecutor's statement is “ ‘so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.’ ” *State v. Dhaliwal*, 150 Wash.2d 559, 578, 79 P.3d 432 (2003) (quoting *State v. Brown*, 132 Wash.2d 529, 561, 940 P.2d 546 (1997)). This standard requires the defendant to establish that (1) the misconduct resulted in prejudice that “had a substantial likelihood of affecting the jury verdict,” and (2) no curative instruction would have obviated the prejudicial effect on the jury. *Thorgerson*, 172 Wash.2d at 454.

In determining whether the misconduct warrants reversal, the Court will consider its prejudicial nature and cumulative effect. *State v. Boehning*, 127 Wash.App. 511, 518, 111 P.3d 899 (2005). The Court will review a prosecutor's remarks during closing argument in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Dhaliwal*, 150 Wash.2d at 578.

The appellant complains on three specific grounds to the State’s closing argument. These will be addressed separately below.

First of all, the Appellant complains of two statements made by the State in closing argument: 1) the argument that the PlayStation 3 could

have accessed the Internet; and 2) the State “insinuated” that L.C.’s nude photos had been disseminated. Appellant’s Brief at 14-15.

The actual argument made by the State regarding how the Appellant may have accessed the Internet undetected was as follows:

And the defendant took a lot of steps to try and safeguard this relationship. He knew that he couldn't message her from his own Facebook, had her set up a fake account. He set up a fake account, giving her reminders, Are you deleting this? When you get your new tablet did you erase the messages? And so it makes sense that there would be no messages on his devices. He is an obviously taking steps to delete them. It could be that he has a burn phone. Our common experience is these things are readily available, a smart phone, TracFone or the PS3 which wasn't seized. He said that, you know, that was something that he could have used to communicate.

RP 195-196.

This is based, in part, on the Appellant’s own testimony regarding his electronic devices. RP 181-182. Based on the Appellant’s testimony, it is reasonable to infer that the PlayStation 3 was able to access the Internet. This is a proper argument. In closing argument the prosecuting attorney has wide latitude to argue reasonable inferences from the evidence, including evidence respecting the credibility of witnesses. *Thorgerson* at 448.

The second argument is based on a statement in the State's rebuttal that "[h]e took from her digital photographs that end up who knows where..." RP 220. There was no objection by defense counsel to this statement. Contrary to the Appellant's assertion that "the [S]tate effectively told the jury that Mr. Flores-Rodriguez had distributed child pornography" this statement was, at worst, an erroneous diversion from the heart of the case. Appellant's Brief at 15.

This one statement did not amount to anything of significance in the totality of this trial. The jury already knew that the photographs had left the Appellant's control. In fact, they ended up in the possession of law enforcement, the Prosecutor, defense counsel, and the court. Any ill-effect this statement may have had could have been easily remedied by a curative instruction; however, one was not necessary. In this case, the jury was properly instructed that:

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

CP 7; Instruction No. 1.

The Appellant cannot carry his burden that either of these statements resulted in prejudice that “had a substantial likelihood of affecting the jury verdict” and that no curative instruction would have obviated the prejudicial effect on the jury.

Second of all, the Appellant asserts that the State improperly appealed to the passion and prejudice of the jury. Appellant’s Brief at 15-17. This argument is based on one statement made at the end of the State’s rebuttal: “He took from her digital photographs that end up who knows where, he exposed her to herpes, and he shouldn't walk away from that.” RP 220.

The State agrees that this was not a proper argument. However, as addressed above, the jury was properly instructed that the attorney’s arguments were not evidence. Further, contrary to the Appellant’s argument, this one statement is hardly so inflammatory as to change the course of the entire trial.

Further, there was no objection during the trial to the statement at issue. A party may assign evidentiary error on appeal only on a specific ground made at trial. *State v. Guloy*, 104 Wash.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). This objection gives a trial court the opportunity to prevent or cure

error. *State v. Boast*, 87 Wash.2d 447, 451, 553 P.2d 1322 (1976). For example, a trial court may strike testimony or provide a curative instruction to the jury.

In this case, the appellant failed to object or move to strike allegedly erroneous statement of the prosecutor and did not give the trial courts such an opportunity. Thus, he did not preserve the issue for appellate review.

The general rule is that appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. Tolias*, 135 Wash.2d 133, 140, 954 P.2d 907 (1998); *State v. McFarland*, 127 Wash.2d 322, 332–33, 899 P.2d 1251 (1995). However, a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). *State v. Walsh*, 143 Wash.2d 1, 7, 17 P.3d 591 (2001); *Tolias*, 135 Wash.2d at 140, 954 P.2d 907.

Pursuant to RAP 2.5(a)(3), to raise an error for the first time on appeal, the error must be “manifest” and truly of constitutional dimension. *State v. WWJ Corp.*, 138 Wash.2d 595, 602, 980 P.2d 1257 (1999); *State v. Scott*, 110 Wash.2d 682, 688, 757 P.2d 492 (1988). The defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice

that makes the error “manifest,” allowing appellate review. *McFarland*, 127 Wash.2d at 333, 899 P.2d 1251; *Scott*, 110 Wash.2d at 688, 757 P.2d 492. If a court determines the claim raises a manifest constitutional error, it may still be subject to harmless error analysis. *McFarland*, 127 Wash.2d at 333, 899 P.2d 1251; *State v. Lynn*, 67 Wash.App. 339, 345, 835 P.2d 251 (1992).

Since no objection was made, the Appellant has to show that it was a manifest constitutional error. He cannot do so. Both the terms manifest and constitutional have meaning. The “constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can ‘identify a constitutional issue not litigated below.’” *State v. Scott*, 110 Wn.2d 682, 687, 757 P.2d 492 (1988) (quoting *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982)). “The exception actually is a narrow one, affording review only of certain constitutional questions.” *Id.* The Appellant makes no statement of how he is entitled to review and the Court should not review this issue.

Finally, the Appellant asserts that the State “repeatedly told the jury that Mr. Flores-Rodriguez had adduced ‘no evidence’ and ‘no testimony’ tending to show that L.M.C. had written both sides of the conversation.” Appellant’s Brief at 18. First, as argued above, the

appellant made no objection to this statement in the trial court and has waived any appellate review. Second, even if the appellant could show that this was a Constitutional error that should be reviewed, any error is harmless.

The Appellant takes issue with several statements made by the State; however, he mischaracterizes the State's argument. At no time did the State argue that the Appellant had failed to produce evidence or that he was required to produce evidence. Instead, the State argued that the evidence did not support the theory argued by the defense.²

It is not misconduct to argue that the evidence fails to support the defense's theory, and the prosecutor is entitled to make a fair response to the defense's arguments. *State v. Russell*, 125 Wash.2d 24, 87, 882 P.2d 747 (1994). A prosecutor may "point out a lack of evidentiary support for the defendant's theory of the case" or "state that certain testimony is not denied, without reference to who could have denied it." *State v. Sells*, 166 Wn. App. 918, 930, 271 P.3d 952 (2012), *Thorgerson*, 172 Wn.2d at 467.

²Ex.—“What evidence is there that [L.C.] was having a conversation with herself? It makes no sense and there [is] no evidence to support it...Is it possible? It is possible that [L.C.] had this conversation with herself, but that's not what happened here.”

2) Ineffective Assistance of Defense Counsel Allegations

Where the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, *State v. McFarland*, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995); (2) that an objection to the evidence would likely have been sustained, *McFarland*, 127 Wash.2d at 337, 899 P.2d 1251; *State v. Hendrickson*, 129 Wash.2d at 80, 917 P.2d 563; and (3) that the result of the trial would have been different had the evidence not been admitted, *Hendrickson*, 129 Wash.2d at 80, 917 P.2d 563.

The appellant cannot make this showing.

The Appellant contends that defense counsel should have moved to exclude all testimony regarding the defendant's herpes. While this may have been sustained, it is highly unlikely that the trial would have been different had the evidence not been admitted.

In fact, the Appellant brought up his herpes, unsolicited, during his own testimony. The fact that he has herpes corroborated Sheila Bouback's testimony regarding her confrontation with the Appellant. Further, the Appellant persisted in his assertion that he had herpes, so he couldn't have had sex with L.C. because she did not have herpes.

The bulk of the State's evidence was the testimony of L.C. and the electronic messages memorialized in Exhibit 1. Neither of these reference any of the complained of information.

The Appellant complains that no limiting instruction was sought for L.C.'s testimony about being raped by the Appellant when she was 12. The testimony given by L.C. regarding sexual intercourse that occurred outside of the time period charged in the Amended Information went directly to the heart of the special allegation on Count Two. To prove this allegation, the State had to prove, beyond a reasonable doubt, that:

...this 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 contrary to RCW 9.94A.535(3)(g)...

CP 5.

The testimony of L.C. regarding this pattern of sexual abuse was key to the State's case in chief, and the Appellant was not entitled to a limiting instruction. Therefore, defense counsel was not ineffective.

When looking at the totality of the State's closing and rebuttal, only the penultimate statement in the rebuttal is objectionable. Defense counsel vigorously objected throughout the trial and clearly would have done so here if he had felt it was necessary. It was clearly a tactical decision on the

attorney's part. There is no credible evidence in the record to support any contention that defense counsel was anything less than effective.

3) Allegation of a Time for Trial Violation

Supplemental Procedural History

The original commencement date in this matter was September 2, 2014. CP 54. This gave a last day for trial of November 1, 2014. Based on the State's request, the Court set the trial for October 28, 2014. CP 55. On October 13, 2014, the State filed a Motion to Continue. CP 1-3. This was based on a first degree murder case, *State v. Patrick Parnel*, going to trial. CP 2; 10/13/14 RP 4. The Deputy assigned to the case had worked with the family, including the young victim, and believed that the case could not be transferred to another deputy without prejudice to the State. CP 2. Defense counsel agreed that there was no prejudice to the defense in granting this continuance. 10/13/14 RP 4-5.

The Court found good cause for the continuance and set the case for trial on December 2, 2014. The Court also set a review for November 3, 2014 to attempt to begin the trial on the November 18, 2014 trial date. 10/13/14 RP 6. At the November 3, 2014 hearing, defense counsel stated that there were no open trial dates prior to the December 2, 2014 setting. 11/3/14 RP.

On November 17, 2014, the State moved for a continuance. The assigned deputy prosecutor was elected as Grays Harbor County Prosecutor a few days prior. She received last-minute notice of a training for newly elected officials that could only be taken during the scheduled trial time. 11/17/14 RP 10. It is only offered every four years. *Id.* Further, the Prosecutor stated that this case was not suitable to transfer to another deputy and such a transfer would result in prejudice to the State. *Id.*³ The trial court found good cause and no prejudice to the defendant and continued the trial to January 6, 2015. CP 57.

On January 6, 2015, the trial court continued the trial to January 13, 2015 due to flooding that cause a state of emergency to be declared in the county. RP 28-29.

At the time of the original motion to continue, on October 13, 2014, 40 days of time for trial had elapsed. A motion to continue can be made by either party or the court. CrR 3.3(f)(2). Based on such a motion, “the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant

³ The Appellant opines that “...Grays Harbor is not a ‘heavily populated’ county where other available prosecutors would likely already be in trial...” However, this overlooks the fact that Grays Harbor has fewer attorneys than other counties, sex offenses require special knowledge and experience, and the Grays Harbor office was in transition and short attorneys after electing a new prosecutor.

will not be prejudiced in the presentation of his...defense.” CrR 3.3(f)(2). The time period from October 13, 2014 through January 6, 2015 would be excluded under CrR 3.3(e)(3).

When the case was continued on January 6, 2015 there were 20 days of time for trial remaining, not counting any cure period. Therefore, the case was tried well within the limits of CrR 3.3.

An alleged violation of the speedy trial rule is reviewed de novo. *State v. Carlyle*, 84 Wash.App. 33, 35–36, 925 P.2d 635 (1996). “ ‘[T]he decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court,’ ” and we will not disturb the trial court's decision unless there is a clear showing it is “ ‘manifestly unreasonable, or exercised on untenable grounds, or for some untenable reasons.’ ” *State v. Flinn*, 154 Wash.2d 193, 199, 110 P.3d 748 (2005) (quoting *State v. Downing*, 151 Wash.2d 265, 272, 87 P.3d 1169 (2004) and *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 26, 482 P.2d 775 (1971)).

In *Saunders*, the Court noted: “While the assertion that a specific trial prosecutor “just got out of a seven-week-long trial” may serve as a legitimate reason for a continuance, the record here is clear that the State's delay was caused by a failure of the prosecutor's office to assign

Saunders's case to a trial prosecutor once negotiations failed..." *State v. Saunders*, 153 Wash. App. 209, 219, 220 P.3d 1238, 1243 (2009).

In this case, court congestion was not the problem. The assigned prosecutor had a first degree murder trial and a training necessary for newly elected officials. The trial court was in the best position to judge whether or not these merited a continuance and whether or not the defendant would suffer any prejudice. The continuances were properly granted under the facts of this case, and the defendant suffered no prejudice.

4) Allegation that Information Omitted an Essential Element of Communicating with a Minor for Immoral Purposes

"All essential elements of a crime ... must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him." *State v. Kjorsvik*, 117 Wash.2d 93, 97, 812 P.2d 86 (1991). The essential elements rule is grounded in the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall ... be informed of the nature and cause of the accusation."); Wash. Const. art. I, § 22 ("In criminal prosecutions the accused shall have the right ... to demand the nature and

same offense.’ ” *State v. Nonog*, 169 Wash.2d 220, 226, 237 P.3d 250 (2010) (quoting *State v. Leach*, 113 Wash.2d 679, 688, 782 P.2d 552 (1989)).

That being said, the State need not include definitions of elements in the information. In this case, it was enough that the State alleged all of the essential elements found in the statute. *State v. Johnson*, 180 Wash. 2d 295, 302, 325 P.3d 135, 138 (2014).

In *State v. Schimmelpfennig*, the defendant asserted that RCW 9.68A.090 was vague as to “immoral purposes.” The Court ruled as follows:

The statute attacked here is the first provision in a chapter which prohibits conduct relating to exposure of the person, prostitution, and certain indecent liberties. Thus, structure of this chapter of our criminal code gives ample notice of the legislature's intent to prohibit sexual misconduct. This commonsense understanding of the intent of the statute is reinforced by the language of RCW 9A.88.020 itself, which escalates the misdemeanor to a felony where the defendant has previously been convicted of a felony Sexual offense. The scope of the statutory prohibition is thus limited by its context and wording to communication for the purposes of sexual misconduct.

State v. Schimmelpfennig, 92 Wash. 2d 95, 102, 594 P.2d 442, 447 (1979).

cause of the accusation against him.”); *see also* CrR 2.1(a)(1) (“[T]he information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged.”). “We review allegations of constitutional violations de novo.” *State v. Siers*, 174 Wash.2d 269, 273–74, 274 P.3d 358 (2012).

“An ‘essential element is one whose specification is necessary to establish the very illegality of the behavior’ charged.” *State v. Ward*, 148 Wash.2d 803, 811, 64 P.3d 640 (2003) (quoting *State v. Johnson*, 119 Wash.2d 143, 147, 829 P.2d 1078 (1992)). “ ‘[E]ssential elements’ include only those facts that must be proved beyond a reasonable doubt to convict a defendant of the charged crime.” *State v. Powell*, 167 Wash.2d 672, 683, 223 P.3d 493 (2009) (lead opinion) (quoting *State v. McCarty*, 140 Wash.2d 420, 425, 998 P.2d 296 (2000)), *overruled on other grounds by Siers*, 174 Wash.2d at 276, 274 P.3d 358 (adopting the position advanced by the lead opinion in *Powell*). Essential elements include statutory and non-statutory elements. *Kjorsvik*, 117 Wash.2d at 101–02, 812 P.2d 86.

“The primary goal of the ‘essential elements’ rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against.” *Id.* at 101, 812 P.2d 86. A secondary purpose for the essential elements rule is to bar “ ‘any subsequent prosecution for the

Under the rationale of *Schimmelpfennig*, “of a sexual nature” is simply used to define “immoral purposes.” It is not an essential element that must be charged in the Information.

5) Allegation That Convictions for both Communicating with a Minor for Immoral Purposes and Sexual Exploitation of a Minor Violated Double Jeopardy

The Fifth Amendment to the United States Constitution prohibits the government from putting any person in jeopardy twice for the same offense. *See* Const. art. I, § 9. The Courts interpret the Washington Constitution's analogous double jeopardy clause in the same way that the United States Supreme Court interprets the Fifth Amendment. *State v. Gocken*, 127 Wash.2d 95, 107, 896 P.2d 1267(1995).

Courts may not enter multiple convictions for the same offense without offending double jeopardy. *State v. Freeman*, 153 Wash.2d 765, 771, 108 P.3d 753 (2005). “Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense.” *In re Pers. Restraint of Orange*, 152 Wash.2d 795, 815, 100 P.3d 291 (2004).

The merger doctrine applies when the Legislature clearly indicates that, to prove a particular degree of a crime, the State must prove, not only that the defendant committed the crime, but also that the crime was accompanied by an act that is defined as a crime elsewhere in the criminal statutes. *State v. Deryke*, 110 Wash.App. 815, 823, 41 P.3d 1225 (2002) (citing *State v. Vladovic*, 99 Wash.2d 413, 421, 662 P.2d 853 (1983)). But when the legislative intent is unclear, the appellate courts apply the *Blockburger* “same elements” test. In undertaking this analysis, it must be determined whether each crime contains an element that the other does not. *State v. Cox*, 109 Wash.App. 779, 784, 37 P.3d 1240 (2002) (citing *Blockburger*, 284 U.S. at 304, 52 S.Ct. 180). If each crime contains an element not contained in the other, the offenses are not the same for double jeopardy purposes. *Cox*, 109 Wash.App. at 784, 37 P.3d 1240; see *State v. Calle*, 125 Wash.2d 769, 777–78, 888 P.2d 155 (1995).

In this case, in order to prove Communicating with a Minor for Immoral Purposes, the State had to prove:

- (1) That on or about the period beginning July 1, 2014 and ending August 3, 2014, the defendant communicated with L.M.C., through the sending of an electronic communication, for immoral purposes of a sexual nature;
- (2) That L.M.C. was a minor; and
- (3) That this act occurred in the *State of Washington*.

To prove Sexual Exploitation of a Minor, the State had to prove:

- (1) That on or about the period beginning July 1, 2014 and ending August 3, 2014, the defendant *aided, invited, authorized, or caused* a minor to engage in sexually explicit conduct;
- (2) That the defendant knew the conduct would be photographed or would be part of a live performance; and
- (3) That any of these acts occurred in the State of Washington.

The Communicative charge focuses on the Appellant's actions in sending sexually explicit messages to the child. On the other hand, the Sexual Exploitation of a Minor charge focuses on the photographing or live performance of the minor. By the plain language of the jury instructions, separate and distinct conduct had to constitute each of these offenses.

6) The Court's Comment on the Evidence of the Aggravating Circumstance

On July 2, 2015, the Washington Supreme Court held that WPIC 300.17 is an erroneous statement of law insofar as it purports to define "prolonged period of time" as a period lasting "more than a few weeks." *State v. Brush*, 183 Wash. 2d 550, 557, 353 P.3d 213, 217 (2015). The Supreme Court seems to conclude that it is error to instruct or imply to a

jury that a period of “more than a few weeks” is necessarily a “prolonged period of time,” because it is strictly within the province of a jury to decide what a “prolonged period” is. *State v. Brush*, 183 Wash. 2d at 559. The majority held that the trial court's use of the (unaltered) pattern instruction in Brush's case amounted to an unconstitutional comment by that trial court on the evidence. *Brush* at 559.

“Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted.” *State v. Levy*, 156 Wash.2d 709, 723, 132 P.3d 1076 (2006).

Under the circumstances present in the instant case, this Court can conclude that he suffered no prejudice here. The *Brush* court was specifically troubled by the fact that Brush's prior abuse of his victim had occurred over a span of time “just longer than a few weeks” prior to her murder. *Brush* 559-560. In light of this time period, the *Brush* court concluded that a “straightforward application of the jury instruction would likely lead a jury to conclude that the abuse in this case met the given definition of a ‘prolonged period of time.’” *Id.* Accordingly, the Supreme Court concluded that the State could not meet its high burden of showing an absence of prejudice. *Id.*

In contrast, the Supreme Court found no prejudice in *State v. Levy*, where the trial court altered a pattern instruction providing the elements of first-degree burglary in order to expressly instruct the jury that the targeted apartment in the case constituted a “building.” *State v. Levy*, 156 Wn.2d at 716. While finding that the trial court's tailoring of the pattern instruction amounted to an improper comment, the Court declined to reverse Levy's burglary conviction because the question of whether the apartment was a building had never been challenged during the trial, and the absence of any challenge - along with common sense - compelled the conclusion that the jury could not have found the apartment to be anything besides a building. *Id.* at 726.

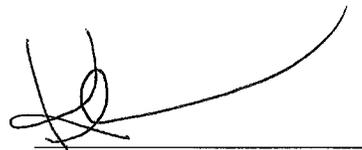
The Appellant's case is far more aligned with *Levy* than with *Brush*. Unlike the evidence against the defendant in *Brush*, which showed no more than an eight-week period of abusive behavior, here the State presented evidence that the abuse had occurred over approximately three years. The jury here, as in *Levy*, could have reached no decision other than that the aggravator applied to the instant offenses.

III. CONCLUSION

The State respectfully requests that, for the reasons stated above, the Appellant's appeal be denied and the trial court's verdict be affirmed.

DATED this 30 day of January, 2016.

Respectfully Submitted,



WSBA #34097

GRAYS HARBOR COUNTY PROSECUTOR

January 20, 2016 - 6:56 PM

Transmittal Letter

Document Uploaded: 6-473470-Respondent's Brief.pdf

Case Name:

Court of Appeals Case Number: 47347-0

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

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

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

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

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Katherine L Svoboda - Email: ksvoboda@co.grays-harbor.wa.us

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

backlundmistry@gmail.com