

FILED

APR 15 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 28985-1-III
(consolidated with No. 28986-9-III)

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

TAYLOR LANDRUM,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Cameron Mitchell

APPELLANT'S OPENING BRIEF

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
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A. ASSIGNMENTS OF ERROR

1. The trial court erred in granting the State's motion for joinder and in denying Mr. Landrum's motion for severance of the counts.
2. The trial court violated the defendant's right to a public trial.
3. The defendant's four convictions for solicitation of perjury violated Double Jeopardy.
4. All but one of the defendant's convictions for solicitation of perjury were unsupported by sufficient evidence.
5. The solicitation verdicts lack assurances of jury unanimity.
6. Defense counsel was ineffective.
7. The defendant was erroneously prevented from asking the rape complainant about her use of prescription medications.
8. Over objection, the prosecutor elicited Officer Lee's opinion that Ms. Strand's demeanor was consistent with a rape victim.
9. Cumulative prejudice requires reversal of the rape count.
10. The evidence was insufficient to support the charge of attempted indecent liberties.
11. The attempted indecent liberties conviction must be reversed for comment on the defendant's right to silence.
12. The trial court acted without statutory authority when it ordered the defendant's sentences to run consecutively.

13. The trial court acted without statutory authority when it failed to impose sentence for attempted indecent liberties at 75 percent of the standard range for the completed offense.
14. The trial court erroneously imposed court costs and fees.
15. The trial court failed to adequately inquire into a potential conflict of interest of defense counsel.
16. The court erred when it entered “Findings on Motion to Sever Counts” findings of fact nos. 1 and no. 2. CP 158-59.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion in reconsidering joinder and denying severance?
2. Did the trial court err in sealing the juror questionnaires without conducting a Bone-Club analysis?
3. Did the order to seal the questionnaires violate Mr. Landrum’s right to a public trial, requiring reversal?
4. Did the defendant’s multiple convictions for solicitation of perjury violate Double Jeopardy?
5. Must all but one of the defendant’s convictions for solicitation of perjury be reversed as unsupported by sufficient proof?
6. Do the verdicts on the solicitation charges lack express assurances of jury unanimity as required by State v. Petrich?

7. Was defense counsel ineffective for failing to argue that the four solicitation convictions constituted the same criminal conduct?
8. Was the defendant erroneously prevented from asking Ms. Strand, the rape complainant, about her use of medications?
9. Was Mr. Landrum, by this error, prevented from confronting, cross-examining, and or impeaching the rape complainant?
10. Did the prosecutor improperly elicit from a police officer that the rape complainant's demeanor was like that of a rape victim?
11. May Mr. Landrum appeal the above error?
12. Was Mr. Landrum's right to due process and/or to a jury trial violated by this error?
13. Was the defendant's due process right to a fair trial on the rape count violated by cumulative prejudice?
14. Was the evidence insufficient to support the charge of attempted indecent liberties tried to kiss the complainant's neck?
15. Was the evidence insufficient to support the charge of attempted indecent liberties absent proof of non-marriage?
16. When Officer Buchan testified the defendant refused to come down and talk to police, did this violate his right to pre-arrest silence?
17. Did the trial court act without statutory authority when it ordered the defendant's sentences to run consecutively?

18. Did the trial court act without statutory authority when it failed to calculate the defendant's sentence for attempted indecent liberties as 75 percent of the range for the completed offense?

19. Did the court err when it imposed costs and fees without determining that Mr. Landrum had an ability to pay?

20. Did the trial court fail to adequately inquire into a potential conflict of interest of defense counsel?

C. STATEMENT OF THE CASE

Taylor Landrum was charged in Benton County No. 08-1-01051-5 with second degree rape of Carolyn Strand, allegedly committed on October 10, 2008. CP 106. Strand claimed she had forced nonconsensual intercourse with Mr. Landrum in his truck, after meeting him outside the Towne Crier bar, in Richland. 9/30/09RP at 680-88.

Two years previously, Christina Hutchins had filed a report with Kennewick police, claiming that on October 21, 2006, Mr. Landrum had attempted to kiss her neck, while they were sitting in the front seat of his truck after he offered to give her a ride home from the Branding Iron bar. 9/29/09RP at 541-44. On July 15, 2008, Mr. Landrum was charged with the offense of attempted indecent liberties against Ms. Hutchins, CP 1-2, CP 125-28, and the Benton County prosecutor then sought, ultimately

successfully, to join the second degree rape and indecent liberties cases and try Mr. Landrum on both in a single proceeding. 8/28/09RP at 77-78.

Shortly prior to the approaching (as yet still separate) trial dates in both cases, Mr. Landrum was also charged with four counts solicitation of perjury under RCW 9A.72.020 and 9A.28.030(1), in connection with the Strand rape allegation. These new charges were based on a series of letters or notes the defendant “sent” or passed to Robert Pyke, a fellow inmate at the Benton County Jail, in an alleged effort to try and get Pyke to lie about Ms. Strand, and the rape claim. CP 125-28; 9/29/09RP at 640-64.

The State’s evidence at Mr. Landrum’s joined trial included the testimony of the complainants Strand and Hutchins, the testimony of the defendant’s jail mate Pyke, and the testimony of several additional ER 404(b) witnesses, who claimed that Mr. Landrum had made unwanted sexual advances toward them, including an instance of intercourse. 9/29/09RP at 527, 563, 588. These last witnesses testified pursuant to the trial court’s pre-trial ruling that the alleged prior acts were admissible to show a “common scheme or plan,” although the trial court specifically deemed them not admissible to show “intent.” 9/28/09RP at 452.

Following verdicts of guilty, Mr. Landrum was sentenced to terms of 160 months, and 280 months to Life. CP 90-104, CP 133-47. The trial court ordered the 280 month sentence for intercourse with Strand to run

consecutive to the 160 month sentence for the attempted kissing of Hutchins. 4/2/10 at 887. Mr. Landrum also received terms of 40.5 months on each of the solicitation convictions. CP 90-104, CP 133-47. His offender scores included separate scoring of the solicitation counts. CP 90-104, CP 133-47.

Mr. Landrum appeals. CP 105, 148.

D. ARGUMENT

1. THE COURT ERRED IN ORDERING A SINGLE TRIAL ON THE 2006 AND 2008 COMPLAINTS.

a. The issue was properly raised. Initially, the trial court denied the State's motion for joinder of the rape and attempted indecent liberties conviction. The court concluded, before it addressed the question of cross-admissibility of the charged counts, that "the overriding consideration [of] unfair prejudice," which would be caused by trying the counts together, overcame any need for judicial economy. 8/28/09RP at 80-83. The court specifically noted, at the same time that it denied joinder, that the ER 404(b) matters involving multiple alleged prior acts, including the charged crimes (the issue of "cross-admissibility"), would be decided later, in implicit recognition that cross-admissibility would not necessarily change its ruling on joinder. 8/28/09RP at 80; CP 154-55.

On September 25, the trial court addressed the State's interest in relitigating the separate trials issue, and the defense motion to sever the counts. 9/25/09RP at 438-39.

On September 28, the court addressed trial matters including the ER 404(b) ruling, 9/28/09RP at 452 and 444-53, then reversed its previous ruling, now stating that judicial economy required a single trial, and rejected the defense fears of prejudice. 9/28/09RP at 462. In justifying its reversal of course, the court also stated that the two charged crimes were cross-admissible pursuant to its ER 404(b) ruling issued that morning. 9/28/09RP at 462. Trial had started. See also CP 194-204 (minutes of 9/28/10).

On September 29, 2009, the court noted that Mr. Landrum again objected to trying the counts together, but the court indicated it was adhering to its original reasoning. 9/29/10RP at 481.

The issue of separate trials was not waived for appeal; it was placed in front of the trial court on multiple occasions, including during trial. See also CP 192 (minutes of 8/20/10). Under the plain language of the criminal rules a motion to sever may also be made during trial if the interests of justice require. CrR 4.4(a)(2). Unlike pretrial severance motions that are denied, severance motions made during trial need not be raised again during trial to preserve the issue for appeal. CrR 4.4(a) (1), (2); State v. Jones, 93 Wn. App. 166, 171 n. 2, 968 P.2d 888 (1998).

b. The trial court abused its discretion in trying the rape and the attempted indecent liberties counts together.

The trial court's orders directing a single trial were error under the "manifest abuse of discretion" standard in the circumstances of this case.

See State v. Bythrow, 114 Wn.2d 713, 718, 790 P.2d 154 (1990). CrR 4.3 provides in pertinent part:

(a) Joinder of Offenses. Two or more offenses may be joined in one charging document, with each offense stated in a separate count, when the offenses, whether felonies or misdemeanors or both:

(1) Are of the same or similar character, even if not part of a single scheme or plan; or

(2) Are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

CrR 4.3(a)(1), (2). In addition, CrR 4.4(b) requires severance if "the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense." CrR 4.4(b).

Accumulation of evidence. The essential issue is whether a single trial of multiple counts "unduly embarrasses or prejudices" the defendant. State v. Smith, 74 Wn.2d 744, 754-55, 446 P.2d 571 (1968). Here, the trial court initially denied joinder, correctly and emphatically ruling that this very sort of inherent prejudice would result. The court found that "trying to try these cases together I think would result in the very real possibility that the jury might look at these two matters together and say if they're charging

him with two of these things then he must have committed these crimes.”
8/28/09RP at 82-83. Mr. Landrum would be prejudiced by a single trial
because evidence of the crimes was likely to cumulate and harm his right to
fair resolution of each count. State v. Russell, 125 Wn.2d 24, 62-63, 882
P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed.
2d 1005 (1995).

Here the risk was that the jury would conclude that if the defendant
was being charged for two separate sex offenses committed over a span of
time, he must be a serial sex offender, which may be a proper focus of other
sorts of proceedings, but is not a fair manner of deciding individual,
unrelated criminal charges. This unfair prejudice to a defendant, which the
court below specifically identified, may exist even if the joinder of the
counts is otherwise technically proper. State v. Gatalski, 40 Wn. App. 601,
606, 699 P.2d 804, review denied, 104 Wn.2d 1019 (1985).

Prejudice of similar charges. As the trial court recognized, when
the crimes charged are both sexual in nature, the joinder of like charges can
be particularly prejudicial. See State v. Saltarelli, 98 Wn.2d 358, 363, 655
P.2d 697 (1982). This prejudice exists even when the jury is instructed to
consider the crimes separately. State v. Harris, 36 Wn. App. 746, 750, 677
P.2d 202 (1984).

This consideration also demanded separate trials. Mr. Landrum's alleged sex offenses of second degree forcible rape of Ms. Strand, and attempted indecent liberties by allegedly trying to kiss Ms. Hutchins on her neck two years previously, involved separate victims, in different cities, in different years, 2006 and 2008, but they were both sex offenses, and matters a lay jury is likely to react to with emotional scorn, simply on the basis of the mere fact of the accusations. The concerns of prejudice that always arise when trying like offenses in one proceeding are heightened in such cases, as the trial court understood. 8/28/09RP at 82.

The trial court found that a single trial would cause unacceptable prejudice. The trial court rendered its initial ruling apparently notwithstanding a possible later court ruling of cross-admissibility of the counts as ER 404(b) evidence. Thus, the only substantive subsequent change to the balance of factors regarding separate trials was that the State later added counts of solicitation attached to the second degree rape charge. This changed the severance analysis only in that it rendered the strengths of the State's cases even more unequal – this being a key consideration on the question whether the charges should be tried separately:

Difference in the relative strengths of the State's cases on the charges. Certainly, in assessing the prejudice of multiple counts, the trial court should consider the relative strength of the State's case on each count.

State v. Watkins, 53 Wn. App. 264, 269, 766 P.2d 484 (1989). Other factors may offset prejudice from joinder, including:

(1) the strength of the state's evidence on each count, (2) the clarity of defenses to each count, (3) whether the court properly instructed the jury to consider the evidence of each crime, and (4) the admissibility of the evidence of the other crimes even if they had been tried separately or never charged or joined.

State v. York, 50 Wn. App. 446, 451, 749 P.2d 683 (1987)). Thus the prejudice of joined counts is mitigated where the State's evidence is strong on each count. Russell, 125 Wn.2d at 63.

In this case there was no such mitigation; rather, the opposite is true. Where the strength of the State's evidence on each count is significantly different, the jury may be inclined to use the strength of one count to convict on a weaker count. State v. Bythrow, 114 Wn.2d at 721-22 (citing Smith, 74 Wn.2d at 755).

This concern – which the court below correctly identified, and weighed – militated conclusively in favor of separate trials. The cases were of unfairly different strength for purposes of a single trial even before the State further tipped the scales by adding seven counts of solicitation that added to its proof that the rape occurred. The prosecution's pre-trial offer of proof indicated that the defendant met Carolyn Strand in a tavern in Richland on October 10th, 2008, and the pair drove in his truck heading to another drinking establishment. However, Mr. Landrum then parked

behind the bar, allegedly refused to let Ms. Strand leave the vehicle, then forced her to have penile-vaginal sexual intercourse with him. CP 106-08. Afterwards, Strand was able to exit from the truck, and ran into the bar asking for help, minus her pants. Police responded to the bartender's 911 call and later stopped the defendant as he was driving out of Richland; when questioned he denied involvement in any rape, but officers located Ms. Strand's pants in the passenger compartment of the truck. CP 106-08. Mr. Landrum would later raise viable impeachment matters during the evidence phase, but the State's case was very strong on the facts and the law when viewed prior to trial.

This was very different than the attempted incident liberties allegations that two years previously, in 2006, Mr. Landrum was giving Christina Hutchins a ride home. "During the drive, the defendant pulled the car over on a dark road and parked. The defendant then pinned the victim down and tried kissing her." CP 3. This alleged forcible sexual conduct supposedly occurred with the complainant's friend in the back seat. CP 3.

The charge of an inchoate attempt, even if the jury believed that Mr. Landrum moved upon the complainant (perhaps in some way that constituted, at best, fourth degree assault) still inherently depended upon speculation by the jury as to what the defendant "intended" wrongfully to do, if anything, in this incident occurring four years previously. The

indecent liberties charge was extraordinarily weak on both the law and the facts.

A joined trial on the unrelated sex accusations would result in unfair prejudice from an “accumulation of charges” and the multiplicity of counts, heightened by the significant difference in the strength of the proof on the respective cases, which are the risks that the Washington decisions identify as warranting separate trials generally – and which the trial court found existed here specifically.

The Washington Courts have held that the primary concern in determining severance must be whether the jury could be reasonably expected to keep the testimony and evidence of each offense separate. Gatalski, 40 Wn. App. at 607; State v. Kalakosky, 121 Wn.2d 525, 537, 852 P.2d 1064 (1993). The unique aspects of the present case show that the jury would never be able to keep these charges “separate.” In fact, it appears the prosecution and conviction on the extraordinarily weak count of attempted indecent liberties from 2006 was only deemed viable for prosecution by in 2008, after the State made a determination that a single proceeding would be obtained.

c. The charged counts were not cross-admissible.

After the trial court denied joinder it proceeded to address the State’s ER 404(b) motion. 9/25/09RP at 153. When the court granted the

motion, the State re-raised joinder, relying on what it called the court's immediately previous "cross-admissibility" ruling. 9/28/09RP at 461.

However, for counts to be cross-admissible in a joined trial, they must both pass muster, each as to the other, under ER 404(b). See State v. Watkins, 53 Wn. App. at 270 (ER 404(b) is the appropriate evidentiary standard when addressing cross-admissibility of counts in the context of the issue of joined or separate trials).

In order to admit prior bad act evidence under ER 404(b), the trial court must conclude the acts occurred, identify the proper non-propensity purpose for which the evidence is offered, and determine if the evidence is relevant to prove an essential element of the crime. State v. Saltarelli, 98 Wn.2d 358, 362, 655 P.2d 697 (1982); State v. Lough, 125 Wn.2d 847, 853, 889 P.2d 487 (1995). The court must identify the purpose and relevance of the evidence on the record. State v. Jackson, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984).

The trial court must then balance the probative value of the evidence against the prejudicial effect, also on the record. State v. Lough, 125 Wn.2d at 853. In marginal cases of ER 404(b) admissibility, the prior bad act evidence should be excluded. State v. Smith, 106 Wn.2d 772, 776, 725 P.2d 951 (1986).

In addition, particular caveats and standards apply where, as here, the State proffers prior sexual wrongdoing to prove a current sexual allegation, State v. Saltarelli, 98 Wn.2d 358, supra, and where the State's evidentiary claim for introducing the defendant's past is "common scheme."

Here, first, the alleged matters are sexual offenses. As the court below recognized analogously, weighing the unfairly prejudicial effect of bad act evidence is especially important in assessing joinder of sexual criminal complaints. Saltarelli, 98 Wn.2d at 363; Lough, 125 Wn.2d at 862; see 8/28/09RP at 83. Once again, the trial court's initial gut reaction to the prosecution's plan to secure guilt makes sense. Unfair prejudice is defined as "that which is more likely to arouse an emotional response [by the jury rather] than a rational decision." State v. Cronin, 142 Wn.2d 568, 584, 14 P.3d 752 (2000) (quoting State v. Gould, 58 Wn. App. 175, 183, 791 P.2d 569 (1990)). This is never more true than in sex cases.

With regard to "common scheme," the general theory of this exception is that "other acts" by the defendant may prove guilt on the charged crime if they appear, too much so to be coincidence, to follow such a similar plan in commission of this type of offense charged, that it seems unlikely that the complainants are mistaken or lying when they allege the defendant acted in a similar manner.

For “common scheme,” the acts must have a marked and substantial similarity, and a concurrence of features that are naturally explained as caused by a single plan for committing them both. State v. DeVincentis, 150 Wn.2d 11, 13, 19-20, 74 P.3d 119 (2003); State v. Carleton, 82 Wn. App. 680, 683, 919 P.2d 128 (1996).

The similarity between the prior and the charged acts must be clearly more than coincidental; instead, it must show conduct created by design. Lough, 125 Wn.2d at 860. Thus, as the DeVincentis Court said overall, “caution is required in applying the common scheme or plan exception.”¹ Id.

Here, factually, the Hutchins and Strand incidents lacked the similarity required to show a common scheme, and the differences in the facts of the incidents demonstrate the prejudice, in particular, of admitting evidence of a very serious violent sexual crime committed by threat of a weapon, as ER 404(b) evidence in a trial on a count of attempted indecent liberties that amounted to allegations of an attempt to kiss a woman.

In looking at the offers of proof, first, there was not the sort of similarity required to establish the common scheme or plan exception to the ER 404(b) propensity evidence bar. For comparison, in DeVincentis, the

¹ Additionally, the passage of time “erodes the commonality between acts and makes the probability of an ongoing plan more tenuous.” North Carolina v. McKinney, 430 S.E.2d 300, 304 (N.C.App. 1993).

court found a common scheme of molestation when the defendant spent time with each victim getting them used to him wearing skimpy underwear, giving them massages, and then convincing the victims to take off their clothes and engage in sexual acts with him. State v. DeVincentis, 150 Wn.2d at 15-16.

Here, where the State proffered the alleged violent rape of Ms. Strand to show some alleged scheme used to attempt to take the liberties of Ms. Hutchins, the inadequate degree of similarity – beyond the routine fact that the two crimes are sex offenses claiming unwanted conduct -- is pivotal. Common scheme is established by evidence the defendant committed “markedly similar acts of misconduct against similar victims under similar circumstances.” Lough, at 856 (quoting People v. Ewoldt, 7 Cal.4th 380, 399, 27 Cal.Rptr.2d 646, 867 P.2d 757 (1994)). Such evidence is relevant when “an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes.” Lough, at 855.

In this case, there was no adequate showing of any overarching or even general scheme or plan for committing sex offenses where both matters simply involved allegations the defendant forced himself upon a woman in a vehicle during or after bar-room drinking. Sexual encounters and victimizations very commonly involve two people in a vehicle, and alcohol. Common scheme does not require uniqueness, only “substantial

similarity” beyond likely coincidence; but these facts do not meet that standard.

The crime of attempted indecent liberties is of course not to be dismissed as trivial. But in all of these determinations, the question of unfair prejudice is paramount. One of the “recognized hallmarks of overly prejudicial evidence” under ER 404(b) includes “violent acts” and acts “greater in magnitude” than the charged crime – where the greater is admitted in an attempt to prove the lesser, the seriousness of the violent accusation is highly unfairly prejudicial, and can improperly “occupy more of the jury’s time than the evidence of the charged offenses.” United States v. Hernandez-Guevara, 162 F.3d 863, 872 (5th Cir. 1998) (citing United States v. Fortenberry, 860 F.2d 628, 632 (5th Cir. 1988)).

Here, it is of great significance that one alleged crime was violent consummated rape, and the trial court should have been properly restrictive in admitting that act in a trial of a less grave offense. With regard to the rape charge, in order to be admissible under ER 404(b) in a trial on the attempted indecent liberties, it was required to carry a probative value that outweighed its unfairly prejudicial effect.² State v. Hernandez, 99 Wn.

² Compare the less-stringent general ER 403 standard, under which relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.” ER 403.

App. 312, 321-22, 997 P.2d 923 (1999), review denied, 140 Wn.2d 1015 (2000).

But in this case, allowing the 2008 rape into evidence to prove a “common scheme” corrupted a fair determination of the indecent liberties allegation. To admit evidence of a violent rape in a trial on the latter allegation would effectively transform any other attempts by the defendant to kiss a woman into the crime of attempted forcible rape. The serious sex crime overwhelms the earlier matter, pushing the jury to speculate wildly on the defendant’s intentions, instead of viewing the witnesses, their demeanor, and the circumstances of the proof on their own to assess guilt on the 2006 case.

d. Ultimately, severance was required.

The trial court’s cross-admissibility ruling was an abuse of discretion and as such fails to support denial of severance. However, the court’s initial ruling denying joinder could not have been clearer in its rejection of the idea of a single proceeding as a matter of fundamental fairness, even *before* any discussion of cross-admissibility. The court’s later reversal of course, and its grant to the State of its single wish for a joined trial on the two different and unequal sex cases, rendered Mr. Landrum’s trial fundamentally unfair. Mr. Landrum asks this Court to find that the trial court abused its discretion, whether by allowing joinder or

denying severance. The Court should reverse the convictions and order separate trials.

2. SEALING THE JUROR QUESTIONNAIRES VIOLATED ARTICLE 1, SECTION 22, AND REQUIRES REVERSAL.

Confidential juror questionnaires, when used in a criminal trial, are an important part of the *voir dire* process of questioning and selecting jurors who are unbiased and can sit fairly in judgment on the case. The examination of the venire members by means of such questionnaires differs from “live” courtroom *voir dire* only by the fact that this means of questioning potential jurors is conducted on paper. However, unlike *voir dire* in open court, since they are court documents, juror questionnaires are subject to state law, General Rule 31 and the Benton County Superior Court’s local rules for public access to court records. Those rules manifestly do not allow any member of the public to inspect the juror questionnaires by obtaining them from the court or counsel while they are in use in court during jury selection, prior to their filing.

Therefore, where, as here, juror questionnaires are ordered sealed at the same time that they are filed with the Clerk’s Office -- the only location where public access to copies of case records, by any person for any reason, can legally occur -- the public is entirely barred from inspecting this written portion of the *voir dire* process. Sub # 62 (sealed questionnaires designated 4/1/11); CP 193 (order sealing). This is a violation of the defendant’s and

the public's Article 1, section 22 right to a public trial, just as surely as is a closure of the courtroom doors to the public during jury selection.

The order to seal, entered contemporaneous with the filing of the questionnaires in the Clerk's Office, prevented the public from fully inspecting *voir dire* and thus assessing the correctness and fairness of jury selection in Mr. Landrum's trial, and further, deprived the defendant of the benefit of that public scrutiny of his prosecution at a meaningful time, when such scrutiny can make a difference. That juncture has now forever passed. The inadequate remedy of remand for an after-the-fact Bone-Club hearing would therefore be no remedy at all. The constitutional error was structural, and demands reversal of Mr. Landrum's convictions.

a. The right to a public trial is violated where the trial court, without a proper *Bone-Club* analysis, prevents public scrutiny of the *voir dire* process of jury selection.

Mr. Landrum's right to a public trial is protected by both the state and federal constitutions. The Sixth Amendment provides, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." And article I, § 22, of the Washington Constitution provides "[i]n criminal prosecutions the accused shall have the right . . . to have a speedy public trial by an impartial jury."

Additionally, separate from Section 22's guarantee of a public trial,

section 10 of article I provides that “[j]ustice in all cases shall be administered openly.” This section protects the public's right to open and accessible court proceedings, similar to the public's right under the First Amendment, because open proceedings “assure a fair trial, foster public understanding and trust in the judicial system, and give judges the check of public scrutiny.” State v. Coleman, 151 Wn. App. 614, 620, 214 P.3d 158 (2009); see U.S. Const. amend. 1.

The constitutional guarantees of a public trial and open criminal proceedings extend to the process of *jury selection*, which process is a critical component of the jury trial right “ ‘not simply to the adversaries but to the criminal justice system’ “ as a whole. State v. Momah, 167 Wn.2d 140, 148, 217 P.3d 321 (2009), cert. denied, ___ U.S. ___, 131 S.Ct. 160, 178 L.Ed.2d 40 (2010).

In State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995), the Supreme Court set out the standards that must be met before the rare incident of a trial judge closing all, or any portion, of a criminal trial, can come to pass. Bone-Club, 128 Wn.2d at 258-59. Because the two rights under article I, section 22 and article I, section 10 are interrelated, the same requirements, which were not followed below, apply to any curtailment of these rights. Bone-Club, at 258.

When the defendant’s right to a public trial is deemed violated,

which occurs by closure of the process from public scrutiny accompanied by the absence of a proper Bone-Club analysis, as appellant contends occurred here, the appellate court will devise a remedy appropriate to the violation. If the error is structural in nature, the conviction must be reversed and a new trial is required. Momah, 167 Wn.2d at 149. An error is considered structural when it “ ‘necessarily render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.’ “ (Emphasis added.) Momah, at 149 (quoting Washington v. Recuenco, 548 U.S. 212, 218-19, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)).

Juror questionnaires constitute voir dire questioning on paper.

The Benton County Superior Court’s act of sealing the juror questionnaires in his prosecution without a Bone-Club analysis violated article I, section 22, in addition to article I, section 10. Jury questionnaires, if used, are a standard tool for juror selection, and thus they constitute a fundamental component part of the *voir dire* process that is the central feature of jury selection. See, e.g., State v. Young, 158 Wn. App. 707, 243 P.3d 172 (2010); State v. Erickson, 146 Wn. App. 200, 203, 207-08, 189 P.3d 245 (2008); State v. Duckett, 141 Wn. App. 797, 807, 173 P.3d 948 (2007). But *voir dire* questioning of the venire is normally conducted in open court by questioning of the potential jurors.

Division One of the Court of Appeals has been presented with the

question whether sealing juror questionnaires violated one or both of the aforementioned constitutional provisions. In State v. Coleman, supra, a jury questionnaire was employed for *voir dire*, and several days after the jury was accepted by the parties and sworn, the trial court ordered the juror questionnaires sealed, following findings deemed inadequate under Bone-Club's multi-factor analysis. Coleman, 151 Wn. App. at 618-19.

The Coleman Court materially misapprehended the mechanics of the public trial right with regard to the voir dire process of jury selection.

Mr. Landrum respectfully but strongly urges this Court to reject the Coleman Court's reasoning that the sealing of the jury questionnaires was non-structural error. In Coleman, Division One concluded that the failure to do a Bone-Club analysis -- prior to sealing the questionnaires as required -- offended only the public's right to open and accessible court proceedings under section 10. Coleman, 151 Wn. App. at 618. As remedy, therefore, the Court of Appeals ordered merely "remand for reconsideration of the order." Coleman, 151 Wn. App. at 219. The Court reasoned that there was no violation of the public trial right that amounted to presumed prejudice and structural error requiring reversal of Coleman's convictions, because the juror questionnaires were not sealed until several days after the jury was selected, a fact which the Court deemed significant:

[First], the questionnaires were used only for selection of the jury, which proceeded in open court.

[Second], the questionnaires were not sealed until several days after the jury was seated and sworn. [Third], unlike answers given verbally in closed courtrooms, there is nothing to indicate that the questionnaires were not available for public inspection during the jury selection process. Thus, the subsequent sealing order had no effect on Coleman's public trial right and did not "create 'defect[s] affecting the framework within which the trial proceeds.' "

(Numbering modified for clarity.) Coleman, at 623-24.

This analysis was in error. By definition, a trial court's order to seal juror questionnaires prevents public access to a portion of the *voir dire* jury selection process. An essential aspect of a criminal trial is the selection of the jurors, so that the jury will be free of bias and decide the facts based on the evidence, in a manner of choosing jurors that each litigant deems fair to him or her as a party.

In order to empanel [this] impartial jury, the parties may engage in *voir dire*. *Voir dire* plays a critical role in ensuring a fair trial because it allows counsel to inquire into potential bias.

State v. Strode, 167 Wn.2d 222, 238, 217 P.3d 310 (2009) (Johnson, J., dissenting).

The sealing of such questionnaires therefore hides the jury selection process from public inspection just as effectively as does an order physically closing the entire courtroom during traditional *voir dire*, or as does questioning of individual potential jurors *in camera*.

Importantly, the public has no right or ability to inspect sealed, or unsealed, documents that are then in the possession of the parties and the judge and are being employed by the court and counsel during the trial process. Coleman was exactly wrong in asserting to the contrary. See Coleman, at 624.

GR 31(d)(1) provides that "[t]he public shall have access to all court records except as restricted by federal law, state law, court rule, court order, or case law." This Rule is compelled by the aforecited state constitutional dictates of Article 1, Section 10. See GR 31(a). When a member of the public or the press desires to scrutinize the contents of documents filed as part of the trial process that exist as court records, she or he makes a request to view and/or copy the documents, and the request is granted by the Clerk. See GR 31(c)(1) (" 'Access' means the ability to view or obtain a copy of a court record").

Critically, the Washington Courts provide public access to documents and other case records only where they have been filed in the Clerk's Office by the parties, by the court itself, or by the administrative office of the courts. JIS-Link, the electronic portal that provides public access to see the titles of the documents that have been filed in the Clerk's Office in a case, repeatedly emphasizes that it is through the court of record

by which members of the public obtain access to court records in a case.³

However, where documents of the case are filed in the court record “under seal,” a request by a member of the public to view or copy such document(s) must be and will be denied by the Clerk.⁴ Such sealing prevents all access for public inspection of the document(s) in question. In Mr. Landrum’s prosecution, because the trial court’s order to seal the juror questionnaires was issued contemporaneous with the filing of those documents in the Clerk’s Office, the questionnaires were never present in the Clerk’s record of the case in a non-sealed state.

The Coleman decision unquestionably depends on the untenable proposition that court documents are somehow available to the public in the courtroom itself, just by asking to see them. However, under state law the Clerk's Office only has available for viewing, or for copying, those documents that are "on file of record." Title 36 confirms that the documents that are available are only those that have been filed in "the official public records." See RCW 36.18.005(1) to (3). The specific means by which the public can view the documents that have been filed in the record of criminal cases is by request made at the Superior Court Clerk's Office.

³ <http://www.courts.wa.gov/jislink/>.

⁴ The court records electronic access portal referred to by GR 31 states that the “[th]e public cannot view or copy sealed documents or sealed case records.” <http://www.courts.wa.gov/jislink/>.

Furthermore, nowhere in RCW 36.18 *et seq.*, on the Benton County Clerk's Office website, or in the Benton County Local Civil Rules or the Local Criminal Rules, is there any provision for the viewing, copying, or removal of documents in cases where such documents are not "on file of record."

This Court should reject the reasoning of cases that rely on assumptions to the contrary, and rule that the sealing of juror questionnaires, in the absence of a Bone-Club analysis, results in the public having no ability to scrutinize the critical trial process of jury selection, to assess whether the trial is proceeding as a fair and reliable vehicle for determining a particular defendant's guilt or innocence. Open jury selection is a critical component of a public trial. State v. Easterling, 157 Wn.2d 167, 174, 137 P.3d 825 (2006). Jury selection in Mr. Landrum's criminal trial was not open.

Further, the recent post-Coleman cases of State v. Strode and State v. Momah, when considered in conjunction with GR 31, RCW 36.18 *et seq.*, and the court rules cited above, make clear that the sealing of juror questionnaires is a violation of the right to a public trial which cannot be deemed non-structural upon appellate review by means of the unpersuasive contentions in Coleman and Lee. State v. Strode, *supra*, 167 Wn.2d 222; State v. Momah, *supra*, 167 Wn.2d 140.

b. Reversal is required. These opinions decided the trial courts below either expressly or implicitly closed the courtrooms by conducting a portion of *voir dire* in chambers. Because the closure in Strode was not preceded by a Bone-Club analysis; the closure in that case resulted in violation of the defendant’s public trial rights. Strode, 167 Wn.2d at 228, 231. Addressing the appropriate remedy in Strode, the Court held that “denial of the public trial right [absent the required analysis] is deemed to be a structural error and prejudice is presumed.” Strode, 167 Wn.2d at 231.

3. THE DEFENDANT’S MULTIPLE CONVICTIONS FOR SOLICITATION OF PERJURY MUST BE REVERSED, DISMISSED, AND/OR VACATED.

a. The jury instructions caused Double Jeopardy error.

Mr. Landrum was also charged and convicted on four (4) counts of solicitation to commit perjury in the first degree, related to the Strand rape case, pursuant to RCW 9A.72.020 and 9A.28.030(1). CP 81, 82, 83, 84. According to the amended information, Mr. Landrum wrote multiple letters or passed a series of notes to jail mate Richard Pyke “during the time intervening between the 11th day of October, 2008, and the 1st day of September, 2009,” in which allegedly he allegedly offered to give a

thing of value to Robert Pyke so that Robert Pyke or an accomplice would engage in specific conduct, to wit: have Robert Pyke or an accomplice make up a story and testify [in a manner which] would constitute such crime or would establish complicity of the other person or an accomplice in

the commission or attempted commission of the crime of perjury in the first degree.

CP 125-28. At trial, Mr. Pyke testified that he received five (5) notes or letters from Mr. Landrum while they were jail mates together during a “seven months” period starting from “October of last year [2008].” 9/29/09RP at 642; CP 162 (Exhibit list, exhibits 5, 6, 7, 8). In the jury instructions, the single “to-convict” instruction which comprised within itself all four of the counts of solicitation, read as follows:

The defendant has been charged with three counts of solicitation to commit perjury in the first degree. To convict the defendant of the three separate crimes of criminal solicitation, each of the following elements of the crime must be proved beyond a reasonable doubt for each of the three counts:

(1) That between October 11, 2008 and September 1, 2009 the defendant [setting forth elements].

CP 45-76 (Instruction No. 13). In the present case, the jury instructions were required, but here failed, to make it manifestly clear to the jury that it was required to find “separate and distinct acts” upon which to base each count of solicitation. This error violates Double Jeopardy, which “is the constitutional guarantee protecting a defendant against multiple punishments for the same offense.” State v. Borsheim, 140 Wn. App. 357, 366, 165 P.3d 417 (2007); Wash. Const. art. I, sec. 9; U.S. Const. amend. 5. In the context of jury instructions, a defendant's right to be free from double jeopardy is violated if the instructions do not make clear to the jury the

State is not seeking to impose multiple punishments for the same offense.

State v. Berg, 147 Wn. App. 923, 931, 198 P.3d 529 (2008).

This standard demands more than simply requiring that jury instructions be “accurate” and convey the law -- they must make the relevant legal standard “manifestly apparent to the average juror.” State v. Berg, 147 Wn. App. at 931; see also Borsheim, 140 Wn. App. at 366. The jury instructions in Mr. Landrum's case did not satisfy this standard. The single “to-convict” instruction comprised all of the multiple separate counts, and failed to meet the “separate and distinct acts” language requirement. CP 45-76 (Instruction No. 13), CP 81, 82, 83, 84. Vacation of all but one count is required. Borsheim, at 371; Berg, at 937, 944.

Importantly, although the charges of solicitation were based on multiple letters that the defendant sent to Mr. Pike while they were both in Jail, it has been decided that neither the nature of the evidence at trial nor anything the State contends in closing argument can erase Double Jeopardy error induced by the jury instructions, or render such error in constitutionally harmless:

The State offers no authority for the proposition that evidence or argument presented at trial may remedy a double jeopardy violation caused by deficient instructions.

Berg, at 935; see also State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212

(2008). Indeed, the jury in Mr. Landrum’s case was specifically instructed

by the court to not discern the facts or the law in any respect from the lawyers' arguments: "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 45-76 (Instruction no. 1); see also State v. Aumick, 126 Wn.2d 422, 431, 894 P.2d 1325 (1995) ("it is the judge's 'province alone to instruct the jury on relevant legal standards'").

b. Three of the defendant's convictions for solicitation of perjury were unsupported by sufficient evidence.

The evidence below was insufficient to support the four individual counts of solicitation to commit first degree perjury. There were not four letters individually providing sufficient evidence of all of the elements of solicitation of perjury to support four separate counts of the crime as charged. CP 125-28; CP 45-76 (Instruction No. 13). Importantly, the prosecutor did not charge a single count of solicitation based on a theory of a continuing course of conduct as manifested by the letters considered together; thus, each of the four counts must stand on their own, supported by proof beyond a reasonable doubt of all of the elements of the crime. CP 125-28 (amended information).

The evidence in a criminal case is sufficient to support a count of conviction if, when viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime

beyond a reasonable doubt. U.S. Const. amend. 14; State v. Green, 94 Wn.2d 216, 220-222, 616 P.2d 628 (1980); State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” Salinas, 119 Wn.2d at 201.

With regard to the letters, there was no evidence of an offer of, or a giving of, value in exchange for perjurious testimony, with the exception of one of the letters as testified to by Pyke as being accompanied by a vague mention of money or a vehicle. The solicitation statute, RCW 9A.28.030(1), provides as follows:

A person is guilty of criminal solicitation when, with intent to promote or facilitate the commission of a crime, he offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed.

RCW 9A.28.030(1); CP 45-76 (Instruction no. 12). First degree perjury is defined at RCW 9A.72.020(1) as follows:

A person is guilty of perjury in the first degree if in any official proceeding he makes a materially false statement which he knows to be false under an oath required or authorized by law.

RCW 9A.72.020(1); see CP 45-76 (Instruction No. 13).

No request for perjury. In order to be culpable of the crime charged, the State was required to present proof beyond a reasonable that

Mr. Landrum solicited the crime of first degree perjury. RCW 9A.28.030(1) (solicitation); RCW 9A.72.020(1) (first degree perjury). This means that the defendant must be shown to have requested another (in exchange for value) to commit that offense or to be complicit in its commission or attempted commission by procuring others to perjure themselves. Id.

However, here, there is certainly no such request in letter/exhibit number 9, in which Mr. Landrum merely calls one Spencer a “rat,” and makes other negative statements about him. Exhibit 9; 9/29/09RP at 655-56. The State charged individual counts, alleging that the letters were each instances of commission of the crime. CP 125-28 (amended information). But even when the letter is viewed in the light most favorable to the State, and all reasonable inferences are drawn from the evidence, there is no request whatsoever in letter 9 by the defendant that Pike make a false statement under oath, or that he find others who will do so or attempt to do so. RCW 9A.28.030(1); RCW 9A.72.020(1) (first degree perjury); CP 45-76 (Instructions Nos. 12, 13); see Salinas, 119 Wn.2d at 201.

No offer of value. Mr. Pyke’s trial testimony indicates that, at best, only one of these individual letters was accompanied by some offer by Mr. Landrum to give Mr. Pyke “money or other thing of value” to engage in perjury.” See RCW 9A.28.030(1).

The extent of Mr. Pyke's testimony regarding any offer by the defendant to give a thing of value to him pertained only to letter number 5. Mr. Pike was asked by the prosecutor, regarding the contents of that letter ("all we need is a couple guys to come forward . . ."), whether in turn Mr. Landrum was "offering anything" for getting the people mentioned in the letter to do this. 9/29/09RP at 650-51. During the discussion of letter 5, the questioning proceeded as follows, in pertinent part.

Q: All right. And was he offering anything?

A: He was offering – he wanted me – there was nothing ever stated exactly.

Q: What were the –

A: He was always bragging how rich his parents were and I would be taken care of.

9/29/09RP at 649. When asked more specifically what Mr. Landrum "was specific about giving you if you got these people to do this," Mr. Pyke answered "[c]ash and a pickup that was in impound." 9/29/09RP at 650.

After discussing letter 5 and the mention of a truck and/or cash, the prosecutor then stated that he wanted "to move to the next one [letter] and that will be Number 6." 9/29/09RP at 651. As detailed supra, the State then questioned Mr. Pyke regarding the remaining letters, exhibits 6, 7, 8, and 9, as detailed supra. 9/29/09RP at 651-56.

No testimony was elicited as to any offers of value made by Mr. Landrum in exchange for the various requests made in these subsequent letters. Nothing in the letters themselves, exhibits 5, 6, 7, 8, or 9, or any

testimony, established Mr. Landrum was offering to give or gave value to Mr. Pike for the requests made in those letters. The testimonial evidence and letters 6 through 9 fail to establish solicitation of perjury. RCW 9A.28.030(1); U.S. Const. amend. 14.

Mr. Landrum asks the Court to reverse the defendant's convictions for solicitation of perjury on all but count 2 (verdict form B) of the third amended information in Benton County 08-1-01051-5. U.S. Const. amend, 14; Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

c. There was only a single “unit of prosecution.”

Under a given criminal statute, the “unit of prosecution” for the crime can be either an act, or a course of conduct. State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005). However, pursuant to Double Jeopardy protections, including as explained in the context of Chapter 28 solicitation of crime in State v. Jensen, 164 Wn.2d 943, 956, 195 P.3d 512 (2008), and State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007), Mr. Landrum's conduct did not constitute multiple commissions of the crime, but rather, permitted only one conviction. Wash. Const. art. I, sec. 9; U.S. Const. amend. 5.

The question whether a defendant is improperly convicted and sentenced for multiple counts where there was only one commission of the

offense turns on the question of the unit of prosecution, which is determined by looking to the language of the statute defining the crime. State v. Westling, 145 Wn.2d 607, 610, 40 P.3d 669 (2002) (citing State v. Adel, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998)).

This Court must therefore decide whether Mr. Landrum committed one count of solicitation of perjury or whether the offense was committed again and again with each letter he sent to Mr. Pyke trying to get him to lie and/or find people to lie.⁵ See, e.g., State v. Hall, 168 Wn.2d 726, 730, 230 P.3d 1048 (2010) (defendant's multiple telephone calls to assault complainant on different days in March and April, constituted one continuing effort to tamper with a witness and was one unit, not three counts). The question is one that starts with the statute. State v. Varnell, 162 Wn.2d at 168 (citing State v. Bobic, 140 Wn.2d 250, 263-66, 996 P.2d 610 (2000)).

Varnell was a solicitation case, there, for murder. The defendant/offeror offered value to a person (who turned out to be an undercover officer), soliciting him to kill multiple people, and was convicted of separate counts of solicitation of murder for each person whose death he desired. The Supreme Court held that only one solicitation offense

⁵ The solicitation statute criminalizes the offering or giving of value to another to engage in conduct that would constitute commission of the crime by that person, or that would constitute complicity of that person with another in commission of the crime. RCW 9A.28.030(1).

was committed, because one offeree was solicited. State v. Varnell, 162 Wn.2d at 169. The statutory language of RCW 9A.28.030, as was also charged here with perjury being the solicited crime, showed that the evil targeted by the Legislature was the act of soliciting or enticing another person into crime by trying to contract with them:

The language of the solicitation statute focuses on a person's "intent to promote or facilitate" a crime rather than the crime to be committed. The evil the legislature has criminalized is the act of solicitation. The number of victims is secondary to the statutory aim, which centers on the agreement on solicitation of a criminal act.

(Emphasis added.) State v. Varnell, 162 Wn.2d at 169.

Although the undercover officer would presumably be guilty of as many units of murder as persons he killed (if he had performed on the contract), Mr. Varnell solicited only one offeree, albeit for a very bad thing. Based just solely on Varnell, a defendant like Mr. Landrum who offers value if another will commit perjury (as a principal, by lying in court; or by complicity, by finding others and getting them to lie), has solicited one offeree and committed one unit of prosecution. RCW 9A.28.030(1) and RCW 9A.72.020(1).

The Double Jeopardy "unit of prosecution" analysis has also been conducted for purposes of solicitation of perjury, in a case where it was necessary to determine if separate counts could be obtained based on the number of "communications" made to an offeree, by a defendant. State v.

Jensen, 164 Wn.2d at 946-47. The Jensen Court held that the defendant (a jail inmate) committed only one "enticement," which in that context was the legislatively-focused-upon evil of the crime, when he requested, in exchange for value, that Carpenter (a fellow inmate), kill four of the defendant's family members when the offeree was released from detention. Jensen, 164 Wn.2d at 947, 954-55.

Jensen and Carpenter had multiple conversations on different days, about topics including the crimes, about the defendant's receipt of an apparently sizable family estate, and then an actual provision of "front money" was arranged. Jensen, 164 Wn.2d at 947.

Like the conspiracy statute, the solicitation statute punishes a course of conduct, not a single act. See [Braverman v. United States, 317 U.S. 49, 53-54, 63 S.Ct. 99, 87 L.Ed. 23 (1942)] (characterizing conspiracy as a course of conduct crime). The prohibited course of conduct is attempting to engage another person to participate in a specific crime. This is an "inherently continuous offense." See In re Snow, 120 U.S. 274, 7 S.Ct. 556, 30 L.Ed. 658 (1887). The crime continues so long as the offer remains open, exposing another person to the corrupting influence of the enticement.

Jensen, 164 Wn.2d at 956-57. Based on these facts, Jensen's multiple conversations seeking to solicit Carpenter constituted commission of only one unit of solicitation, which is a continuing effort to offer or pay value to another to commit a crime or be complicit with another. Jensen, 164 Wn.2d at 955-57.

The foregoing authorities are on all fours with Mr. Landrum's facts, and indicates that the defendant in this case committed a single unit of the crime of solicitation of perjury under RCW 9A.28.030(1) and RCW 9A.72.020(1), by engaging in an ongoing letter-writing campaign to solicit Mr. Pyke to commit perjury.

d. The defendant's four convictions for solicitation of perjury violate jury unanimity, and the error is not harmless.

The State introduced five (5) letters sent by Mr. Landrum to Mr. Pyke, to support the four (4) charges of solicitation of perjury. This was, therefore, a multiple acts case, requiring an election by the prosecutor or a unanimity instruction. But the prosecutor did not elect which letters it was relying on for conviction on the 4 counts, and there was no Petrich instruction. Additionally, the criminal acts were controverted, and jurors could have had a reasonable doubt thereon, as to at least one or more of the letters, in particular letter 9, which the appellant in fact contends completely failed as an instance of solicitation of perjury.

Thus it cannot be said that no juror could have had a reasonable doubt as to any of the 5 acts offered in evidence to support the 4 counts. Because this Court cannot be sure that no jurors relied on letter 9 for their

verdict on a count, the Petrich error was not harmless beyond a reasonable doubt, and reversal of the four counts of solicitation of perjury is required.⁶

Criminal defendants have a right to an expressly unanimous verdict of guilty. Wash. Const. art. 1, § 21; State v. Stephens, 93 Wn.2d 186, 190, 607 P.2d 304 (1980); U.S. Const. amend. 6; United States v. Payseno, 782 F.2d 832, 836 (9th Cir.1986).

In a case where the State proffers evidence of multiple acts that may constitute the single offense charged, but fails to elect in closing argument which incident should be relied on by the jury for conviction on the count, and the trial court subsequently does not give a unanimity instruction, the defendant's right, which is to an expressly unanimous jury verdict, is violated. State v. Petrich, 101 Wn.2d 566, 569-70, 683 P.2d 173 (1984); see also State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (same).

As indicated, this rule of Petrich applies where the State presents evidence of "multiple acts" in support of a single count. Petrich, 101 Wn.2d at 571; see State v. Handran, 113 Wn.2d 11, 17, 775 P.2d 453 (1989). Analogously, in a prosecution charging multiple counts of the same offense, where the State presents evidence of a number of acts that is greater

⁶ The unanimity issue is one of constitutional magnitude that may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Camarillo, 115 Wn.2d 60, 63 n. 4, 794 P.2d 850 (1990); State v. Holland, 77 Wn. App. 420, 424, 891 P.2d 49 (1995).

than the number of counts of the crime charged, Petrich also applies. See, e.g., State v. Noltie, 116 Wn.2d 831, 843, 809 P.2d 190 (1991).

Here, Mr. Landrum was charged and convicted on four (4) counts of solicitation to commit perjury in the first degree, pursuant to RCW 9A.72.020 and 9A.28.030(1). CP 81, 82, 83, 84. Robert Pyke testified at trial that he received five (5) letters from Mr. Landrum while they were jail mates together in Benton County, and these letters were proffered by the prosecution in support of the counts of solicitation. 9/29/09RP at 642-47. This was a “multiple acts” case.

The prosecutor argued in closing to the jury that “the letters” rendered the defendant guilty, and did not specify which 4 of the 5 letters the jury was to rely on for the 4 counts:

These [sic] the defendant’s letters. This is what the defendant was trying to get people to do.

10/2/09RP at 46. This was the extent of specificity in the State’s closing argument regarding the existence of multiple acts and the charged counts, and it was no election. State v. Heaven, 127 Wn. App. 156, 160-61, 110 P.3d 835 (2005) (State’s non-exclusive discussion in closing argument of certain acts as supporting certain charged counts did not amount to a clear election such as to render unanimity instruction unnecessary).

In addition to this absence of election by the prosecutor in closing argument, there was no jury unanimity instruction. CP 45-76 (Jury

instructions); see 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 4 .25, at 110-14 (3d ed. 2008).

These circumstances are classic Petrich error, and here, the error requires reversal. A Petrich error is presumed to be prejudicial, and that presumption can be overcome only "if no rational juror could have a reasonable doubt as to any one of the incidents alleged." (Emphasis added.) Kitchen, 110 Wn.2d at 411 (clarifying Petrich), review denied, 105 Wn.2d 1011 (1986)).

Under this standard, affirmance of the solicitation counts requires this Court to find that no reasonable juror could have done anything other than conclude that every one of the 5 letters sent to Robert Pyke established solicitation beyond a reasonable doubt. However, the evidence below was controverted, if not inadequate, with regard to at least one of the counts.

As argued supra, in letter/exhibit number 9, Mr. Landrum writes to Mr. Pyke regarding one Mr. Spencer, who he calls a "rat," and tells Mr. Pyke to have Spencer, who was also another Jail inmate, to write how he had wanted to "sell me down the creek." 9/29/09RP at 655. This letter fails to include a request for perjury. There is no request to "engage in specific conduct which would constitute [perjury in the first degree] or which would establish complicity of such other person in its commission". See RCW 9A.28.030(1). Furthermore, neither the letter itself nor Mr. Pyke's

testimony shows any offer by the defendant to give a thing of value to Pyke, another element required for solicitation, in exchange for perjury requested in the letter. The writing is merely a jailhouse screed and fails to establish the elements of any criminal offense. This renders the Petrich error not harmless beyond a reasonable doubt.

e. Mr. Landrum's counsel was ineffective for failing to have the solicitation convictions scored as the same conduct.

To sustain an ineffective assistance claim under the Sixth Amendment, a defendant must establish that his counsel's performance was objectively unreasonable and that there is a reasonable probability that the result of the proceeding would have been different absent the unprofessional errors. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996); Strickland v. Washington, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S. Const. amend. 6.

Same criminal conduct generally. The “same criminal conduct” means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). In this case, only by characterizing the solicitation offenses differently than how they were proved and the way they were depicted in the court below, could a party in opposition to the argument

show these were not the same conduct. See State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996) (“If the time an offense was committed affects the seriousness of the sentence, the State must prove the relevant time.”).

Same victim. The victim of RCW 9A.28.030 “solicitation” to commit a crime may be considered the person enroped into crime by the defendant/solicitor. As State v. Varnell affirms, the evil targeted by the Legislature in the solicitation statute is the “act of solicitation,” which is directed toward the offeree, here, Mr. Pyke. Varnell, supra, 162 Wn.2d at 169. In Jensen, in the context of unit of prosecution analysis, the Supreme Court rejected the State's suggestion that the statutory language supported a separate conviction for every person "exposed" to the solicitation, including persons the solicitee recruits in turn. Jensen, at 957-58. Instead, the Court stated that the evil of the crime is the act of “exposing another person to the corrupting influence of the enticement.” Jensen, 164 Wn.2d at 956-57. This person in the present case would also be the offeree, Pyke.

On the other hand, under the Court of Appeals decision in State v. Varnell, 132 Wn. App. 441, 448, 132 P.3d 772 (2006), the victim was the planned murder victim. Applying that analysis here, the victim of Mr. Landrum's solicitation of perjury could be either the courts and therefore the public as a whole, or the rape victim Carolyn Strand, where the defendant

sought perjurers in defense of that charge. Under any of these analyses, the victim of Mr. Landrum's four counts of solicitation of perjury was the "same."

Same place. The offenses were committed at the same place. The letters were sent to Mr. Pyke by and from the defendant Mr. Landrum at the Benton County Jail. 9/29/09RP at 642-44. The place is the same.

Same time. The "same time" element does not require that the crimes occur simultaneously. State v. Porter, 133 Wn.2d 177, 185-86, 942 P.2d 974 (1997); Dolen, 83 Wn. App. at 365. Individual crimes may be considered the same criminal conduct if they occur during an uninterrupted incident. Porter, 133 Wn.2d at 185-86; Dolen, 83 Wn. App. at 365.

Here, none of the letters, on which the solicitation charges were based, bear any dates. 9/29/09RP at 642-44, see 9/29/09RP at 640 to 664; CP 162. The testimony of Robert Pyke did not show that the letters were sent or passed to him on separate days within that period, or even, in fact, that they were not sent together or immediately one after the other on the same day.

And significantly, it turns out that the letters were sent at a minimum on the same day, for sentencing purposes. The judgment and sentence lists the "[d]ate of crime" for the solicitations as October 11, 2008. See CP 90-104 (judgment and sentence in No. 08-1-01051-5, listing the dates of the

commission of counts 2 through 5 as October 11, 2008). This is the same “time,” absent any showing to the contrary.

Same intent. The “same criminal intent” element is determined by looking at whether the defendant's objective intent changed from one crime to the next. Dolen, 83 Wn. App. at 364-65; State v. Grantham, 84 Wn. App. 854, 859, 932 P.2d 657 (1997). In this case, there is no viable claim that Mr. Landrum’s intent, in committing the multiple counts of the exact same offense with a clearly singular purpose, ever changed, irregardless of what that intent is characterized as.

The four potential acts of solicitation of perjury of which Mr. Landrum was convicted in this case involved the same intent, and involved the same victim. The time and place were also the same. Thus they all constituted the same criminal conduct. See State v. Tili, 139 Wn.2d 107, 123, 985 P.2d 365 (1999) (multiple offenses against the same victim constitute the “same criminal conduct.”); State v. Porter, 133 Wn.2d at 183, 185-186 (different drug deliveries were part of a continuing, uninterrupted sequence of conduct).

Counsel should have requested the four convictions be scored accordingly, and was deficient; because they would have been so scored had he asked, counsel’s error was material. Strickland v. Washington, 466 U.S. at 694. Mr. Landrum asks that this Court remand the case for resentencing.

**4. THE DEFENDANT'S SECOND DEGREE RAPE
CONVICTION MUST BE REVERSED FOR INDIVIDUAL
OR CUMULATIVE ERROR.**

Two trial court evidentiary errors require reversal of Mr. Landrum's second degree rape conviction, individually, or because the errors together carried such prejudice that they deprived him of a fair trial. See State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129 (1995); U.S. Const. amend. 14. Under the latter doctrine the reviewing court can consider any errors that were not adequately preserved, and the constitutional nature of any error will aggravate the cumulative prejudicial impact on the verdict. State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

a. Over objection, the trial court erroneously precluded Mr. Landrum from inquiring into the whether the rape complainant, Strand, was under the influence of medications affecting her perception on the night of the alleged incident.

Carolyn Strand testified that when she met Mr. Landrum outside the Town Crier bar, she asked him if he had a light for her cigarette. 9/30/09RP at 680. Mr. Landrum invited her to his truck and then, she claimed, he began driving away once she was inside. Strand claimed the defendant stopped in an alley, then allegedly said he had a knife, told her to take off her pants, and had intercourse with her forcibly and against her will.

9/30/09RP at 681-88. Ms. Strand admitted that she had been drinking alcohol that night, having been imbibing multiple beverages, including a “Spider Bite,” made of Tequila and Red Bull. 9/30/09RP at 681.

Mr. Landrum attempted to inquire about whether Strand was using also medications at the time of the alleged incident. 9/30/09RP at 691. The prosecutor objected, whereupon counsel informed the court that the basis for his question was the complainant’s statements in her defense interview that she was indeed taking drugs, including drugs that are also commonly known to interact with alcohol, such as Diazepam and Lithium. 9/30/09RP at 693.

However, the trial court concluded that the complainant could not be asked about contemporaneous use of medications, absent “some offer of proof as to how these medications that she was taking, or is taking, how that impacts her ability to either observe or to recall.” 9/30/09RP at 691-92, 697.

This was error. It is widely understood that evidence of a complainant’s drug use, where there is a “reasonable inference that the witness was under the influence of drugs either at the time of the events in question, or at the time of testifying at trial,” is relevant and admissible to impeach the alleged victim’s credibility. State v. Tigano, 63 Wn. App. 336, 344, 818 P.2d 1369 (1991); see also State v. Russell, 125 Wn.2d 24, 882

P.2d 747 (1994) (witness's use of drugs and alcohol on the night of the charged crime was admissible); State v. Clark, 48 Wn. App. 850, 743 P.2d 822 (1987) (evidence of defendant's use of marijuana was admissible "for an assessment of his memory of events").

Here, any prescription drug use by Ms. Strand would be relevant in these circumstances, even absent additional concerns about drug interactions with alcohol, and neither the trial court nor the prosecutor cited any authority stating that the defendant must provide expert testimony in order to admit simple evidence of this sort of drug usage.

Additionally, because the error precluded Mr. Landrum's ability to raise a central claim of his defense to the charge of rape, the error was constitutional in scale, and it was not harmless beyond a reasonable doubt. The Sixth Amendment to the United States Constitution, and Article 1, section 22 of the Washington Constitution, give a criminal defendant the right to confront, cross-examine and impeach adverse witnesses. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.32d 514 (1983).

In this case, which turned on the complainant's characterization of her intercourse with the defendant as nonconsensual and forced, this inquiry was critical to raising reasonable doubt. Because the rape count was essentially a credibility contest, the evidentiary error was not harmless beyond a reasonable doubt. This Court should reverse the rape conviction.

b. Over objection, Officer Lee was asked by the prosecutor, and was permitted, to tell the jury his opinion of the believability of the rape complainant, which also constituted an opinion as to Mr. Landrum's guilt.

A prosecutor commits misconduct when he elicits a witness's comment on the credibility of another witness, including in particular the complainant, because the credibility of a witness is a jury question. State v. Whelchel, 115 Wn.2d 708, 724, 801 P.2d 948 (1990); U.S. Const. amend. 6. Additionally, no witness may express an opinion as to the guilt of the defendant, whether by direct statement or inference. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). Such an opinion improperly invades the province of the jury and thereby violates the defendant's constitutional right to trial by jury. State v. Carlin, 40 Wn. App. 698, 701, 700 P.2d 323 (1985), overruled on other grounds by City of Seattle v. Heatley, 70 Wn. App. 573, 854 P.2d 658 (1993); U.S. Const. amend. 6.

Here, the prosecutor elicited from Officer Christopher Lee his opinion whether Ms. Strand, during the officer's interview of her, was behaving "consistent or inconsistent" with someone who has experienced the "type of crime" she alleged against Mr. Landrum:

Q: And you've had a chance to interview victims and witnesses of traumatic events; is that fairly said?

A: Yes.

Q: Can you tell us whether or not Ms. Strand was consistent or inconsistent with those people you've seen?

MR. METRO: I'm going to object, Your Honor.

THE COURT: Overrule the objection.

Q: (By Mr. Johnson) Again my question was – well how many witnesses, victims of traumatic events have you had to deal with in your years as a police officer?

A: Several. I was a detective with Pasco so it's – to give you a definitive number, I'm not positive. Specific to these types of crimes, say probably over a hundred.

Q: And Mr. Metro asked you about Ms. Strand's demeanor. And my question to you is, was it consistent with what you've seen in cases you've investigated?

A: It's consistent.

MR. JOHNSON: Thank you, I don't have any further questions of Officer Lee, Your Honor.

9/30/09RP at 725-26.⁷

First, Mr. Landrum's counsel did not open the door to this improper questioning. The introduction of evidence that would be inadmissible if offered by the opposing party opens the door to the opposing party to explain or contradict that evidence. State v. Avendano-Lopez, 79 Wn. App. 706, 714, 904 P.2d 324 (1995). Here, based on previously-elicited evidence that Ms. Landrum had been drinking alcohol on the night in question, Mr. Landrum's attorney asked Officer Lee earlier in cross-examination whether Ms. Strand was "coherent." 9/30/09RP at 723. Counsel carefully and specifically steered away from the officer's initial reply, that wondered

⁷ The basis for Mr. Landrum's stated objection was clear under the circumstances – improper elicitation of officer opinions on credibility and guilt. An appellate court may consider a claimed error following the party's general objection if the specific legal basis for the objection is apparent from the context. State v. Braham, 67 Wn. App. 930, 935, 841 P.2d 785 (1992) (citing State v. Pittman, 54 Wn. App. 58, 66, 772 P.2d 516 (1989); ER 103(a)(1)).

aloud whether counsel was asking about the complainant's emotional demeanor, instead making clear that he was inquiring simply whether Strand's account would "change from time to time." 9/30/09RP at 723-24. The officer responded that Strand gave her account in a non-chronological manner which he said was typical of someone who is traumatized. 9/30/09RP at 724. Defense counsel stopped asking questions about the officer's interview of Strand, perceiving a witness who seemed interested in injecting his personal assessment of the entire matter into the case.

The questions posed by defense counsel did not seek to elicit improper matters to benefit from their introduction to the jury, and as can be seen, attempted with all reasonable efforts to direct the State's witness away from testimony that could be improper under the evidence rules or constitutional proscriptions. See State v. Stockton, 91 Wn. App. 35, 40, 955 P.2d 805 (1998) (a passing reference to a prohibited topic does not open door for cross-examination about that topic); State v. Avendano-Lopez, 79 Wn. App. at 714-15 (defendant's testimony that he had recently been released from jail did not open the door to questions about his prior drug transactions). The defendant's counsel asked no questions of Officer Lee seeking to elicit testimony that Strand possessed a demeanor inconsistent with honesty. His routine cross-examination merely inquired about her alcohol intoxication level – a matter that was proper to explore,

and important to the defense, because it was all counsel had left, following the court's previous ruling barring routine questions about drug use.

The prosecutor's subsequent inquiry of the police witness, however, produced improper evidence, and was misconduct. One witness cannot be asked, directly or indirectly, to express an opinion on another witness's credibility. ER 608(a); State v. Black, 109 Wn.2d at 348; State v. Jones, 117 Wn. App. 89, 91, 68 P.3d 1153 (2003). Additionally, police officers must not comment on the alleged victim's credibility. State v. Barr, 123 Wn. App. 373, 384, 98 P.3d 518, review denied, 154 Wn.2d 1009 (2004); State v. Farr Lenzini, 93 Wn. App. 453, 459-60, 970 P.2d 313 (1999) ("Because it is the jury's responsibility to determine the defendant's guilt or innocence, no witness, lay or expert, may opine as to the defendant's guilt, whether by direct statement or by inference").

Officer Lee's testimony was comparable to State v. Barr, supra, 123 Wn. App. at 382) (impermissible opinion where officer testified that defendant's behavior indicated deception and that he had the training to determine guilt from a suspect's behavior); and State v. Jones, 71 Wn. App. 798, 812, 863 P.2d 85 (1993) (impermissible opinion where victim advocate testified that "I felt that this child had been sexually molested by [the defendant.]")

This error was prejudicial, and it requires reversal under the constitutional error standard. Improper opinion testimony from a law enforcement officer is especially likely to influence the jury whose province it invades. State v. Barr, 123 Wn. App. at 384; State v. Carlin, 40 Wn. App. at 701. This is particularly true in a close case where, as here, the charge of rape by forcible, non-consensual intercourse, stood or fell on the believability of the complainant, and Officer Lee was allowed to opine for the jury that in his substantial expert law enforcement experience, Ms. Strand acted like someone who was telling the truth that the defendant raped her.

5. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE “ATTEMPTED SEXUAL CONTACT” AND “NON-MARRIAGE” ELEMENTS OF THE ATTEMPTED INDECENT LIBERTIES CHARGE.

a. The defendant’s conviction lacked proof that Mr. Landrum intended to have sexual contact with the complainant.

Mr. Landrum’s attempted indecent liberties conviction was not supported by proof that he attempted to have “sexual contact” with Christina Hutchins, where attempting to kiss a person on the neck is not contact with the “sexual or intimate parts of a person.” See RCW 9A.44.010(2). In every criminal prosecution, the State must prove all elements of the charged crimes beyond a reasonable doubt. U.S. Const. amend. 14; Wash. Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed.

2d 368, 90 S. Ct. 1068 (1970); State v. Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996).

On appeal, a reviewing court should reverse any conviction for insufficient evidence where no rational trier of fact could find that all the essential elements of the crime were proved beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979).

The jury in Mr. Landrum's trial was required to find that the defendant took a substantial step toward the crime of indecent liberties with intent to commit that offense. CP 45-76 (Instructions nos. 22, 23, 24); RCW 9A.44.100(1)(a); RCW 9A.28.020.

Indecent liberties is committed when, *inter alia*, a defendant has sexual contact with another. RCW 9A.44.100(1)(a). "Sexual contact" is

any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

RCW 9A.44.010(2); CP 45-76 (Instruction No. 26) (not including the "third party" language). No jury instruction was provided to Mr. Landrum's jury that defined the phrase, "the sexual or other intimate parts of a person." see CP 45-76.

However, the undisputed facts and the relevant case law indicates that the charged offense was not committed. On the night in question, Mr.

Landrum was giving Hutchins a ride home after they had been drinking at the Branding Iron bar, along with Hutchins' friend "Bri," who was in the back seat in a state of intoxication. 9/29/09RP at 541-42. Ms. Hutchins claimed that Mr. Landrum put his hands on her shoulders and pushed her in the seat, as he moved over toward her, trying to kiss her. 9/29/09RP at 542-44. Specifically, Hutchins was asked if Mr. Landrum tried to kiss her:

Q: Did the defendant ever try to kiss you in any way?

A: A little, yeah, but I got away.

Q: Describe how that happened.

A: Well, when he was moving over, he tried to kiss my neck.

9/29/09RP at 545-46. Hutchins made clear that Mr. Landrum never made any contact with her skin. 9/29/09RP at 550.

No evidence of any different or greater conduct by the defendant was introduced through the witnesses, including the complainant, or through investigating Kennewick police officer Mary Buchan. See 9/29/09RP at 553-61. In addition, the ER 404(b) evidence of prior acts added nothing to the State's case as far as Mr. Landrum's intent to commit the crime of indecent liberties, which is an essential element of the attempt offense that was charged, along with the "substantial step" requirement. See CP 45-76 (Instructions Nos. 22, 24). Prior to trial, the court had deemed the alleged prior acts admissible under the "common scheme or plan" exception, but specifically ruled that they were not admissible to

show any “intent;” the jury was later instructed as to the limited permissible use of the evidence. 9/28/09RP at 452; CP 45-76 (Instruction no. 4).

These facts are inadequate. In State v. R.P., 67 Wn. App. 663, 668-69, 838 P.2d 701 (1992), aff'd in part, rev'd in part, State v. R.P., 122 Wn.2d 735, 862 P.2d 127 (1993), Division One of the Court of Appeals sought to apply the “intimate parts” language of the definition of “sexual contact,” in a case where the accused was convicted of two counts of indecent liberties. The second count was based on the defendant’s conduct of holding a girl’s wrists so she was unable to get away, touching her breasts under her shirt, and touching her buttocks area. State v. R.P., 67 Wn. App. at 665-66. This was plainly “indecent liberties.” RCW 9A.44.010(2).

The first count of the crime, however, was based on the fact that R.P., on a different date, “kissed her [the same complainant] and eventually placed what is commonly known as a hickey or passion mark on her right neck area.” State v. R.P., 67 Wn. App. at 665-66.

The Court rejected the appellant’s sufficiency challenge to his conviction on this count of indecent liberties, ruling that the extended contact between the accused’s lips and the complainant’s neck rendered the conduct “sexual contact.” State v. R.P., at 669.⁸ But on subsequent review,

⁸ State v. Allen, cited by the R.P. Court, actually involved unwanted *mouth-to-mouth* kissing. State v. Allen, 57 Wn. App. at 139 (mouth-to-mouth kissing was “sexual contact” under RCW 9A.44.010 definition).

the Supreme Court reversed the portion of the Court of Appeals' decision, in a 6 to 3 vote that held the kissing evidence to be insufficient to sustain count 1. The Supreme Court specifically held that under the facts, where that the accused kissed the complainant so as to place a "hickey" on her "right neck area," there was "insufficient evidence of sexual contact to sustain count 1 (indecent liberties)." State v. R.P., 122 Wn.2d 735, 736, 862 P.2d 127 (1993).

It is quite clear what aspect of indecent liberties the Supreme Court in R.P. found to be unsupported. The definition of "sexual contact" at RCW 9A.44.010(2) requires touching of the sexual "or other intimate parts" of a person, and the Court reversed the Court of Appeals' decision that the evidence was sufficient.

Although the R.P. Court did not set forth its reasoning for reversal of the indecent liberties count in very lengthy detail, the Court necessarily rejected outright the Court of Appeals' approach to determining whether "sexual contact" had occurred. The Court's holding is clear: the dissent, as had the Court of Appeals, concluded the evidence was sufficient to establish the "intimate parts" requirement, and the Court of Appeals decision was reversed.

This Court should hold in this case following R.P. that there was insufficient evidence of attempted indecent liberties. Mr. Landrum's

attempt to “kiss my [Ms. Hutchins’] neck,” which the complainant stated the defendant had tried “a little” to do, was not attempted indecent liberties. 9/29/09RP at 545-46. This Court should reverse the defendant’s 160-month sentence and conviction for attempted indecent liberties. U.S. Const. amend, 14; State v. R.P., 122 Wn.2d at 735-36; State v. Green, *supra*, at 220-22.

b. The defendant’s conviction for attempted indecent liberties lacked proof, circumstantial or otherwise, that Mr. Landrum was not married to the complainant.

In presenting its case on the charge of second degree rape, the prosecution did not ask the complainant, Ms. Strand, about the fact of non-marriage to Mr. Landrum -- but non-marriage is not an element of second degree rape. See RCW 9A.44.050(1).

However, the State also did not elicit any testimony as to non-marriage with regard to the complainant in the *indecent liberties* count. Ms. Hutchins testified that she was acquainted with Mr. Landrum. 9/29/09RP at 539. She also stated, further, that she met the defendant previously, while going through her divorce. 9/29/09RP at 540.

The Supreme Court has affirmed convictions where the State supported the non-marriage element with evidence that the victim and the defendant in one case were total strangers, and that the victim in another

case “was under the age of fourteen years, . . . was living at home with her father and mother, . . . [bore] her maiden name[,] . . . was a mere school girl, and there [wa]s nothing in the record to indicate that she was married.”

State v. May, 59 Wash. 414, 415, 109 P. 1026 (1910); State v. Rhoads, 101 Wn.2d 529, 532, 681 P.2d 841 (1984).

The State can of course prove non-marriage, just as a party can prove anything, by circumstantial evidence. State v. Rhoads, 101 Wn. 2d at 532; State v. Bailey, 52 Wn. App. 42, 50-51, 757 P.2d 541 (1988), affd, 114 Wn.2d 340, 787 P.2d 1378 (1990).

But here, there was no affirmative evidence sufficient to uphold the jury’s necessary finding that Mr. Landrum was not the spouse of Ms. Hutchins at the time of the attempted kissing incident. CP 45-76 (Instruction No. 25); RCW 9A.44.100.

For example, in Bailey, it was circumstantial evidence, including testimony that the defendant Bailey had lived with the complainant’s family for a short time and “had served as [the complainant's] babysitter on several occasions,” that defeated the appellant’s sufficiency challenge. Bailey, 52 Wn. App. at 51. Also taking into account the fact that the complainant was a 3-year-old toddler, the Court stated that “[f]rom this evidence, the jury could properly conclude that [the victim] was not married to the defendant.” Bailey, 52 Wn. App. at 51.

The appellant's claim in Bailey that he could have been married to the complainant was too far-fetched to warrant reversal for insufficient evidence. In contrast, in the present case, Landrum and Hutchins were adults, and there was no evidence of a caregiver relationship that carried with it a highly likely aspect of non-marriage.

This Court has also held that sufficient evidence supported the element of non-marriage where the complainant was in ninth grade, knew the defendant for only a month, had a boyfriend, and had never stayed at the defendant's home. State v. Shuck, 34 Wn. App. 456, 458, 661 P.2d 1020 (1983).

It was far-fetched for the appellant in Shuck to think he might receive reversal and dismissal of his conviction for a serious sex crime based on insufficiency, simply because the prosecutor failed to ask the complainant if she was married to the defendant.

But in the present case, the complainant did not testify to knowing the defendant for some period of time incompatible with marriage, the complainant was not a schoolgirl, and the complainant did not offer evidence that she was married to a third party at the time of the alleged crime, such as would render the circumstances in total to be proof of non-marriage. In fact, here, Ms. Hutchins appeared to have met the defendant during or after her divorce from a prior husband. 9/29/09RP at 540.

This present case is one involving two full-grown adults, not one where young age or familial relationships between the defendant and complainant makes it viable to simply assume non-marriage, as the above cases have done from arguably trace evidence, and thus excuse the State's failure to ask the complainant the question – "are you married to the defendant?"

This Court should not excuse the prosecution's failure in this case to assemble the basic elements of proof required at trial to obtain, and on appeal to sustain, a guilty verdict. Instead, Mr. Landrum asks the Court to reverse the defendant's conviction for attempted indecent liberties, with directions to dismiss the charge with prejudice, for insufficiency of the evidence. U.S. Const. amend, 14; Jackson v. Virginia, supra, 443 U.S. at 319.

6. THE DEFENDANT'S INDECENT LIBERTIES CONVICTION MUST BE REVERSED WHERE THE PROSECUTOR IMPROPERLY ELICITED POLICE TESTIMONY THAT MR. LANDRUM REFUSED TO COME TO THE POLICE STATION TO DISCUSS THE ALLEGED INCIDENT.

During the testimony of Kennewick police officer Mary Buchan, who investigated Ms. Hutchins' claim of attempted indecent liberties, the deputy prosecutor pointedly elicited the fact that, after discussing the incident briefly with the defendant on the telephone, Mr. Landrum outright

refused her request that he come down to the police station and discuss the matter further with the officer in person. 9/29/09RP at 555-57.

Subsequently, in closing argument, the prosecutor discussed the defendant's telephone call with Officer Buchan at some length, stating that Mr. Landrum gave only some details about what he said happened that night. 9/29/09RP at 65-66 ("And you heard Officer Buchan, who told you that she talked to the defendant and the defendant admits that, yeah, Miss Hutchins was with me"). The prosecutor then concluded with this remark: "And the defendant gives a little, but when you look at the whole story you know what the truth of the matter is." 9/29/09RP at 66. This comment called further attention to the prosecutor's more explicit emphasis, by his questioning during trial testimony, to the fact that Mr. Landrum had refused to discuss the incident with Officer Buchan any further as the officer had desired. See 9/29/09RP at 555-57.⁹

⁹ Where the prosecution elicits testimony infringing upon the exercise of a constitutional right, the defendant's assignment of error involves a "claim of manifest constitutional error, which can be raised for the first time on appeal" under RAP 2.5(a)(3). State v. Curtis, 110 Wn. App. at 9. Further, when a prosecutor commits serious, prejudicial and flagrant misconduct, such as by commenting improperly on the defendant's exercise of the right to pre-arrest silence, the issue may be raised on appeal despite the failure of counsel to object below. State v. Knapp, 148 Wn. App. 414, 419, 199 P.3d 505 (2009).

a. The prosecutor must not, by questioning or argument, equate the defendant's silence with guilt, even by implication.

The right to be silent in the face of police inquisitiveness exists even prior to arrest and Miranda warnings. This right has its practical protection in the rule that the State may not invite the jury at the defendant's criminal trial to draw a negative inference against a defendant for exercising it.

The Fifth Amendment states that no person "shall . . . be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Washington Constitution, article 1, § 9, contains almost identical language, and the Washington Supreme Court has determined that the two provisions are to be interpreted equivalently. State v. Easter, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); see Wash. Const. art. 1 § 9.

These constitutional guarantees are intended to prohibit the inquisitorial method of investigation or prosecution in which the accused is forced to disclose the contents of his mind, or speak to his guilt or innocence regarding an incident. State v. Easter, 130 Wn.2d at 235 (citing Doe v. United States, 487 U.S. 201, 210-12, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988)).

On a practical level, these provisions proscribe any attempt by the State, at trial, to use a defendant's silence against him by implying to the jury that such silence shows that he is guilty. Doyle v. Ohio, 426 U.S. 610,

617, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); State v. Fricks, 91 Wn.2d 391, 396, 588 P.2d 1328 (1979). Thus, the Fifth Amendment and the state constitution not only prohibit the State from compelling the defendant to speak, but also prohibit the State from using the defendant's decision to not speak against him. Easter, 130 Wn.2d at 238-39; State v. Curtis, 110 Wn. App. 6, 13, 37 P.3d 1274 (2002) (eliciting testimony or remarking in closing argument so as to comment negatively violates Fifth Amendment); State v. Romero, 113 Wn. App. 779, 786, 54 P.3d 1255 (2002).

This right to silence described above plainly applies in pre-arrest situations. State v. Burke, 163 Wn.2d 204, 206, 223, 181 P.3d 1 (2008); Easter, 130 Wn.2d at 243; Doe v. United States, 487 U.S. at 213. Here, during trial, Officer Buchan testified that after she spoke with Ms. Hutchins, she telephoned Mr. Landrum and informed him of her allegations against him. 9/29/09RP at 554-55. Mr. Landrum at first described to the officer what had occurred that night, including the fact that he had asked Ms. Hutchins why she did not like him, and her response, which was that he was ugly. 9/29/09RP at 555-56. However, the deputy prosecutor then engaged Officer Buchan in the following colloquy, plainly directed at casting Mr. Landrum in a negative light for not being willing to discuss the incident with authorities further:

Q: Did you want to sit down with Mr. Landrum and talk with him?

A: Yes, I did.
Q: And were you actually able to do that?
A: No. I asked Mr. Landrum if he would be willing to come to the Kennewick Police Department and he said no because he was afraid I was going to arrest him and charge him with something. He also stated that he didn't trust me.

9/29/09RP at 556. The prosecutor further elicited that Officer Buchan was, as a result, unable to have any contact with Mr. Landrum for questioning "about the specifics of this incident that night or that day." 9/29/09RP at 556-57.

It is difficult if not impossible to conceive of why this inquiry was necessary, except for any purpose but to cast the defendant in a negative, inculpatory light for being unwilling to further discuss Ms. Hutchins' allegation of the incident with law enforcement – which Mr. Landrum was under no obligation to do. Thus, in Romero, supra, the Court noted, even in cases where the prosecutor did not "harp" on an officer's testimony about silence in closing and the question and answer were limited, the testimony was still improper because it was – as here -- "injected into the trial for no discernible purpose other than to inform the jury that the defendant refused to talk to police." Romero, 113 Wn. App. at 793.

b. Reversal is required. In State v. Keene, 86 Wn. App. 589, 938 P.2d 839 (1997), the Court of Appeals reversed where a detective testified that the defendant refused to return telephone calls after being

told that such failure would result in the allegations being turned over for prosecution. State v. Keene, 86 Wn. App. at 592. In closing argument, the prosecutor referred *once* to the testimony and then told the jury it was their "decision if those are the actions of a person who did not commit these acts." State v. Keene, at 592. Here, essentially the same prejudice resulted when the prosecutor emphasized the defendant's refusal, and the resulting inability of Officer Buchan to gain further information about the crime, in the testimony phase.

The State cannot show that it is "beyond a reasonable doubt" that the verdict was not affected by the error. Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The evidence was no where near "overwhelming" such that the jury would have convicted absent the error. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). This case contains no such amount of evidence.

7. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY WHEN IT IMPOSED CONSECUTIVE TERMS OF INCARCERATION ON MR. LANDRUM'S INDECENT LIBERTIES AND RAPE CONVICTIONS.

The SRA provides that sentences for multiple current offenses that are not "serious violent offenses" are to be served concurrently, in the absence of exceptions to that provision that are inapplicable here. RCW 9.94A.589(1)(a), (b). The court imposed consecutive sentences on the attempted indecent liberties and second degree rape convictions, in the

absence of statutory authority, and Mr. Landrum may challenge that illegal sentence now. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 877, 50 P.3d 618 (2002).

Mr. Landrum was sentenced to 160 months on the Class A felony of attempted indecent liberties, and a term of 280 months to the Statutory Maximum of Life on the second degree rape count. The sentences for these convictions were entered at the April 2, 2010 sentencing proceeding, which concluded with the court's completion of two separate judgment and sentence documents. 4/2/10 RP at 880-87; CP 90-104, CP 133-47.

The prosecutor requested that the court order the sentences to run consecutively to each other, and the trial court so ordered. 4/2/10RP at 887. However, first, the attempted indecent liberties conviction and the second degree rape conviction were "other current offenses." RCW 9.94A.525(1). In turn, RCW 9.94A.589(1)(a) provides that sentences for multiple current offenses are to be served concurrently. By the terms of these sentencing statutes, consecutive sentences, for multiple current offenses, can only be procured under the statutory requirements for exceptional sentences. State v. Newlun, 142 Wn. App. 730, 735 n. 3, 176 P.3d 529 (2008); RCW 9.94A.589(1)(a); see RCW 9.94A.535, .537. The State was not requesting such a sentence. CP 163 (pre-sentence investigation).

None of these requirements were or could be purported to have been complied with here.

8. THE TRIAL COURT ERRONEOUSLY IMPOSED 160 MONTHS INCARCERATION ON THE ATTEMPTED INDECENT LIBERTIES CONVICTION, WHERE THE SENTENCE FOR AN INCHOATE OFFENSE IS 75 PERCENT OF THE STANDARD RANGE FOR THE COMPLETED CRIME.

The standard range for an attempted offense is 75 percent of the range for the completed crime. See RCW 9.94A.533(2); RCW 9.94A.595 (stating the standard sentence range for attempt is 75 percent of the completed crime); see In re Postsentence Review of Leach, 161 Wn.2d 180, 187, 163 P.3d 782 (2007); State v. Chavez, 163 Wn.2d 262, 271 n. 8, 180 P.3d 1250 (2008).

Mr. Landrum's 100 percent sentence on the attempted indecent liberties count must be reversed and remanded for a sentence based on a properly calculated sentencing range.

9. THE TRIAL COURT EXCEEDED ITS STATUTORY AUTHORITY IN IMPOSING COURT COSTS WITHOUT FINDING MR. LANDRUM HAD AN ABILITY TO PAY.

The court may impose court costs and fees only after a finding of an ability to pay. The allowance and recovery of costs is entirely statutory. State v. Nolan, 98 Wn. App. 75, 78-79, 988 P.2d 473 (1999). Under RCW 10.01.160(1), the court can order a defendant convicted of a felony to repay

court costs as part of the judgment and sentence. However, RCW 10.01.160(3) states that the sentencing court cannot order a defendant to pay court costs “unless the defendant is or will be able to pay them.”

In making that determination, the sentencing court must take into consideration the financial resources of the defendant and the burden imposed by ordering payment of court costs. “The initial imposition of court costs at sentencing is predicated on the determination that the defendant either has or will have the ability to pay.” RCW 10.01.160(3); State v. Smits, 152 Wn. App. 514, 216 P.3d 1097 (2009).

In State v. Curry, the Washington Supreme Court considered a challenge brought under RCW 10.01.160. State v. Curry, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). The Court held that formal findings of fact on ability to pay are not required for recoupment of trial costs under RCW 10.01.160. Id. The Court stated that certain determinations are constitutionally required, including that repayment may only be ordered if the defendant is or will be able to pay; that the financial resources of the defendant must be taken into account; and that a repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end. Curry, 118 Wn.2d at 915-16. Courts are required to adhere to the these requirements prior to imposing costs. State v. Blank, 131 Wn.2d 230, 239, 930 P.2d 1213 (1997); State v. Baldwin, 63 Wn. App. 303, 312, 818

P.2d 1116 (1991). Here, the court imposed the costs without considering Mr. Landrum's ability to pay either now or in the future. CP 90-104, CP 133-47; 4/2/10RP at 888-91.

10. THE TRIAL COURT FAILED TO PROPERLY INQUIRE INTO DEFENSE COUNSEL'S CONFLICT OF INTEREST RESULTING FROM REPRESENTATION OF PROSECUTION WITNESS ROBERT PYKE.

During pre-trial discussions regarding certain discovery matters, the prosecutor indicated that State's witness Robert Pyke had told him in an interview that Mr. Landrum's defense counsel, Mr. Metro, had represented Mr. Pyke or "did something on [his] behalf," and had presented Pyke with a document to sign, apparently regarding that representation. 8/28/09RP at 38-39. The prosecutor expressed his frustration that any such document had not been provided to the State. 8/28/09RP at 39, 46.

Mr. Metro conceded that he had represented Mr. Pyke and that a document had been executed in connection with that representation, but asserted it involved a small matter:

As to the document that Mr. Johnson complains of. It is true that I have a document somewhere where Mr. Pyke many, many months ago, which had nothing to do with Mr. Landrum at all, asked me to do a favor for him. And because I represent a variety of different people who are in this pod and around here, I went to each one of them, I'll do a favor, I'll go down and see if you paid your fines and then I'm out of here.

I went down, found he did not pay his fines and found out no one let him put his fines together. That's all I did. I told Mr. Johnson that yesterday. That's the only

document I have. I don't know how it's relevant in this case. I'll gladly produce it. I have looked for it. I know I had it and I know I filed a document with the court saying that I would represent him only to look at fines, that's all I did.

8/28/09RP at 53.

The trial court did not conduct any inquiry into the conflict, requiring remand to determine if an actual conflict existed. The Sixth Amendment to the United States Constitution guarantees the right to the assistance of an attorney free from conflict of interest. Wood v. Georgia, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981); State v. Davis, 141 Wn.2d 798, 860, 10 P.3d 977 (2000); State v. Tjeerdsma, 104 Wn. App. 878, 882, 17 P.3d 678 (2001).

The trial court has a duty to investigate potential attorney-client conflicts of interest if it knows or reasonably should know that a potential conflict exists. State v. Regan, 143 Wn. App. 419, 425-26, 177 P.3d 783 (2008) (citing Mickens v. Taylor, 535 U.S. 162, 167-72, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002); Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980)); see also Wood, 450 U.S. at 271.

Here, the trial court was placed on notice of a potential conflict and failed to further inquire. RPC 1.7(b) prohibits counsel from representing a client if the counsel's duties to another client or a third person materially limit that representation. See State v. White, 80 Wn. App. 406, 412, 907

P.2d 310 (1995), review denied, 129 Wn.2d 1012 (1996).

Importantly, the rules of conflict apply to circumstances beyond just an attorney who represents two defendants. In the case of In re Personal Restraint of Richardson, 100 Wn.2d 669, 675 P.2d 209 (1983), an attorney represented both a witness and the criminal defendant, as here. The Supreme Court stated:

The application of these [conflict of interest] rules is not limited to joint representation of codefendants. While most of the cases have involved that fact situation, the rules apply to any situation where defense counsel represents conflicting interests.

Richardson, 100 Wn.2d at 677; see also Regan, at 426-27.

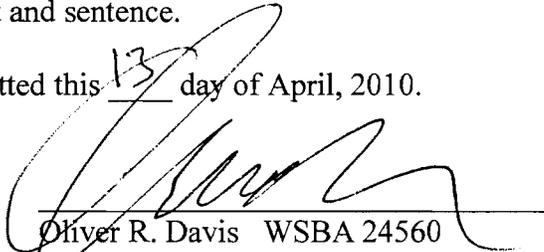
In the present case, the trial court, perhaps viewing the matter as counsel did, as involving a discovery dispute, failed to engage in any inquiry to determine the nature of any conflict. See 8/28/09RP at 54 (deferring any ruling regarding a failure to provide discovery).

But the trial court must make an adequate inquiry. Holloway, 435 U.S. at 488; Regan, 143 Wn. App. at 425-26. The court here did not do so.

E. CONCLUSION

Based on the foregoing, Mr. Landrum respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this 13 day of April, 2010.



Oliver R. Davis WSBA 24560
Washington Appellate Project - 9105
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 28985-1-III
)	(consolidated with
TAYLOR LANDRUM,)	No. 28986-9-III)
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, JOSEPH ALVARADO, STATE THAT ON THE 13TH DAY OF APRIL, 2011, I CAUSED THE ORIGINAL **APPELLANT'S SHORTENED OPENING BRIEF** TO BE FILED IN THE **COURT OF APPEALS - DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ANDREW MILLER, DPA BENTON COUNTY PROSECUTOR'S OFFICE 7122 W OKANOGAN AVE KENNEWICK WA 99336-2341	(X) () () ()	U.S. MAIL HAND DELIVERY _____
[X] TAYLOR LANDRUM DOC #889074 COYOTE RIDGE CORRECTIONS CENTER PO BOX 769 CONNELL WA 99326-0769	(X) () () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF APRIL, 2011.

X _____ 

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