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Court of Appeals  
Division III  
State of Washington

NO. 294293-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON, Respondent

v.

ROBERT RUSSEL TRAINOR, Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 10-1-00077-5

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BRIEF OF RESPONDENT

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ANDY MILLER  
Prosecuting Attorney  
for Benton County

ANITA I. PETRA, Deputy  
Prosecuting Attorney  
BAR NO. 32535  
OFFICE ID 91004

7122 West Okanogan Place  
Bldg. A  
Kennewick WA 99336  
(509) 735-3591

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1. **Did defense counsel's conduct constitute ineffective assistance of counsel and thereby deprive the defendant of a fair trial and due process of law?**
2. **Did the Prosecutor engage in misconduct, which deprived the defendant of a fair trial and due process of law?**
3. **Did the trial court commit errors, which deprived the defendant of a fair trial and due process of law?**
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## STATEMENT OF THE CASE

On the morning of January 12, 2010, Jamie Lynn Smith discovered a suicide note in her twelve-year-old daughter A.N.S.'s (DOB 05-30-1997) bedroom. (EX. 1; RP 115-17, 150-51, 234). The letter stated:

By the time you find this I'll be dead and you'll all wonder why. There are many reasons why, but we'll only focus on the three main ones.

The first one is I was depressed. The reason why is stated last, but I finally had enough. Sitting all alone in my room, the depression ate me alive. I have been feeling the strands unwind and tug at me for to [sic] years now. I couldn't tell anyone why, and the reason is stated last.

Secondly, and this kind of goes along with the first, was all the lies I've told, big and small, finally ate me alive on this night of the term 'old demons come to mind' while writing this. This term could be applied while writing this entire letter.

And thirdly, the very last reason. If Robert Russel Trainor is here, make sure he doesn't leave this building, if not, you may want to make sure that this does not go without justice, for he is guilty for sexual abuse. I would know because I was his victim. This started about six months before the date of August 6, 2006. There is not one part of me that this Boy has [not] touched or seen. I didn't want to tell my mother because after her mother died (August 6, 2006) she used him as a crutch, and her reaction would of been unknown. Add to that, I was afraid of Robert. He was six foot six, and ex-marine, hefty body type, volunteer fire fighter.

Nothing anyone could have done would have helped me. Trust me. I thought about all of you before I made this decision. Please forgive me.

(EX. 1).

Ms. Sanders had four daughters, thirteen-year-old C.M.S. (DOB 06-06-1996), twelve-year-old A.N.S., ten-year-old, D.L.S. (DOB 7-31-1999), and Kaitlyn. (RP 225). Ms. Sanders also had a new stepdaughter, fourteen-year-old M.A.S. (DOB 2-1-1995). (RP 226). M.A.S. was living with them. (RP 226).

The defendant, Robert Trainor, was married to Ms. Sanders' mom, Donna Louise Sanders. (RP 224). Ms. Sanders was 12-years-old when her mom married the defendant. (RP 226). The defendant and Donna Trainor had no children. (RP 225).

After reading the note written by A.N.S., Ms. Sanders immediately asked her daughter if this was true. (RP 235-36). Ms. Sanders told her

daughter that such an accusation could ruin someone's life and that A.N.S. must be honest. (RP 235). A.N.S. began crying and told her mom that it was true. (RP 236). Ms. Sanders called the school and advised that she needed to speak with Ms. Ronnelle Gall, the counselor at Carmichael Middle School. (RP 236-37). Ms. Gall is someone Ms. Sanders trusted. (RP 237).

After calling Ms. Gall, Ms. Sanders sent a text to her husband and the defendant stating, "my daughter came to be sexually molested four years ago, what should I do?" (RP 237). Ms. Sanders then sent a message via Facebook to her twenty-year-old cousin, E.M.W., DOB 11-18-1989. (RP 238). Ms. Sanders told E.M.W. that A.N.S. had wrote a suicide note claiming to have been sexually molested by a close family member. (RP 238). Ms. Sanders asked E.M.W. if anything like this had happened to her. (RP 238). Ms. Sanders did not mention the name, Robert Trainor, in the message. (RP 238).

After sending those messages, Ms. Sanders loaded up A.N.S., C.M.S., and M.A.S., and drove off to Carmichael Middle School to meet with Ms. Gall. (RP 241). During the car ride, A.N.S. was sitting in the front seat crying. (RP 241). During the car ride, Ms. Sanders did not tell the other girls why A.N.S. was crying. (RP 213, 241). She began to pray, and told the girls that it is important to tell when things are bothering you.

(RP 180, 212–13, 241). Ms. Sanders told them if someone forces you to do something you do not wish to do, you must tell someone. (RP 241).

When they got to school, M.A.S. and C.M.S. went off to class, and A.N.S. and Ms. Sanders went to Ms. Gall's office. Ms. Sanders handed Ms. Gall the suicide note. (RP 295). Ms. Gall began to do crisis counseling and to assure the safety of A.N.S. (RP 242). Ms. Gall called the school resource officer, Athena Clark with the Richland Police Department. (RP 242, 301-02).

On the way to class, M.A.S. and C.M.S. began talking about why A.N.S. was crying on the car ride to school. (RP 180-81, 214). C.M.S. told M.A.S. that she thinks she knows what A.N.S. was crying about. (RP 181). C.M.S. said she thinks Grandpa Bob hurt A.N.S., and he had hurt her too. (RP 181). M.A.S. said he had hurt her as well, and both girls rushed to Ms. Gall's office. (RP 181).

While Ms. Gall was in crisis mode with A.N.S., she heard a persistent knocking on her door. (RP 295-96). Ms. Gall opened the door and C.M.S. and M.A.S. barged in. (RP 181). C.M.S. and M.A.S. told Ms. Gall that the defendant had also abused them. (RP 182, 214, 296).

Ms. Sanders contacted her sister, Kyla Winkler, and told her that she believes her daughters had been sexually abused, and asked her to go get her other daughter, ten-year-old D.L.S. at her elementary school and

bring her to Ms. Galls' office. (RP 286). Ms. Winkler went and picked up D.L.S. (RP 287). Ms. Winkler told D.L.S. that her older sisters and her mom were at school, and that a counselor was going to ask her some questions. (RP 287). Ms. Winkler told her that she needed to tell the truth. (RP 287-88). Ms. Winkler never mentioned Robert Trainor. (RP 288).

Ms. Winkler and D.L.S. arrived at Ms. Gall's office, and A.N.S., C.M.S., and M.A.S. were all present and crying. (RP 288). Ms. Sanders asked her daughter, D.L.S., if she had ever been touched. (RP 243). D.L.S. said she had. (RP 243). Ms. Sanders asked by whom, and D.L.S. said, "Grandpa Bob." (RP 243). Ms. Sanders made it very clear to the girls that what they were saying could change a person's life, and they had to be truthful. (RP 296).

Eventually the school resource officer, Athena Clark, arrived. (RP 303). The scene was very emotional with all the girls crying. (RP 303). Officer Athena Clark took some general information and referred the case to the detective division with the Benton County Sheriff's Office. (RP 303).

During this time, Ms. Sanders got two voicemail messages from her cousin E.M.W. The first message indicated that E.M.W. frantically wanted to talk to Ms. Sanders. (RP 244). The second message stated

E.M.W. was on her way to the Tri-Cities and was tired of living a lie. (RP 244).

Later that day, the case was assigned to Detective Mathew Clarke. (RP 310). Detective Clarke contacted Ms. Sanders to get additional information and to arrange a child forensic interview for all four girls. (RP 311). Ms. Sanders advised Detective Clarke that her cousin E.M.W. was on her way to the Tri-Cities, and that she wanted to talk to the police. (RP 312). E.M.W. got to Ms. Sanders house, and they drove to the police station. (RP 381). Ms. Sanders and E.M.W. did not talk about the case during the car ride. (RP 381-82). At approximately four o'clock, E.M.W. arrived and was interviewed by Detective Clarke. (RP 382). On January 13, 2010, a child forensic interviewer interviewed C.M.S., A.N.S., D.L.S., and M.A.S. (RP 313).

The defendant was arrested on January 14, 2010, and interviewed by Detective Clarke. (CP 140-141; EX. 3 and 4). On January 20, 2010, the State filed an Information alleging two counts of Rape of a Child in the First degree, one count of Rape of a Child in the Second degree, one count of Child Molestation in the First Degree, and one count of Child Molestation in the Third Degree. (CP 1-3).

On August 6, 2010, the State filed a First Amended Information alleging one count of Rape of a Child in the First Degree, two counts of

Rape of a Child in the Second degree, one count of Child Molestation in the First Degree, and one count of Child Molestation in the Third Degree. (CP 50-52). On August 9, 2010, this matter proceeded to a jury trial. (CP 214-32).

At trial, thirteen-year-old, A.N.S., testified that the defendant was her step grandfather and she had known him since she was born. (RP 138). A.N.S. said the defendant started to molest her when she was eight or nine years old in 2006. (RP 139). A.N.S. said she would give the defendant back rubs, and when she was done he would place her hand on his male private part. (RP 140). A.N.S. never told anyone because she thought no one would believe her. (RP 140). A.N.S. said it happened multiple times after that. (RP 141). During those times, the defendant would touch A.N.S.'s breast area with his hand and touch her private part. (RP 141). When he touched her private part, he would put his fingers inside. (RP 142). Eventually, A.N.S. tried to avoid going over to the defendant's house alone. (RP 143). A.N.S. stated that when she was there with her sisters, sleeping with them, he would not abuse her. (RP 143). A.N.S. testified that in August or September of 2009, when she was twelve years old, she found herself alone over at the defendant's house. (RP 145). At that time he touched her again. (RP 146). A.N.S. said the defendant put his hand on her breast and placed his fingers in her vagina.

(RP 146). A.N.S. further testified that the defendant performed oral sex on her. (RP 146). A.N.S. testified that after that time, she told her best friend, Kaitlyn Henley, about the abuse. (RP 147, 577).

At trial, fourteen-year-old C.M.S. testified that she had known the defendant all her life as Grandpa Bob. (RP 169). The defendant began molesting C.M.S. when she was eleven years old. (RP 170-71). The touching began when C.M.S. would give the defendant a back rub. (RP 173-74). The defendant would have C.M.S. straddle him as she gave him a back rub. (RP 174). The defendant would rub C.M.S.'s stomach, and then he would rub her breasts under her bra. (RP 175). In November during her seventh-grade year, the defendant touched C.M.S. below the waist. (RP 176). The defendant came into C.M.S.'s room before church and began rubbing her back. (RP 176). The defendant then began to rub C.M.S.'s stomach and breasts. (RP 176-77). The defendant then placed his hand on her vagina and placed his fingers between the lips of her vagina. (RP 177). C.M.S. asked the defendant to stop, and he told her it was supposed to make her feel good. (RP 177). C.M.S. testified that she never told anyone because, "I was scared. He was supposed to be your grandfather, someone you can trust. I wanted to believe that he was better than that." (RP 178-79).

At trial, eleven-year-old, D.L.S. testified that the defendant touched her when she was seven years old. (RP 191-92). D.L.S. said it happened at the defendant's house in his bed. (RP 192). D.L.S. said the defendant was playing poker on the computer, and then crawled into bed. (RP 193). The defendant then stuck his hands down D.L.S.'s underwear and felt her vagina. (RP 193). The defendant rubbed D.L.S.'s vagina with his fingers and inserted his fingers in her vagina. (RP 195). D.L.S. rolled over, "because I knew it was wrong and I just didn't want it." (RP 195). After that, she never went to the defendant's house alone. (RP 195). D.L.S. knew if she was not alone, he would not touch her. (RP 195).

At trial, fifteen-year-old M.A.S. testified that her father married Jamie Sanders in December of 2009. (RP 201-01). Prior to that, she had been living with Ms. Sanders for two months. (RP 203). M.A.S. said she did not have much interaction with the defendant. (RP 204-05). M.A.S. testified that in December of 2009, the defendant invited her to spend the night at his house; C.M.S., A.N.S., and D.L.S. were going to their biological father's house. (RP 207). M.A.S. went over to the defendant's house on December 29, 2009, for two nights. (RP 207). The first night they watched movies together. (RP 207). While watching the movie, the defendant reached over and began rubbing M.A.S.'s stomach and this made her very uncomfortable. (RP 208). The defendant asked if M.A.S.

would like to stay in his bed, and she said, “no.” (RP 207). M.A.S. testified that the morning of December 31, 2009, the defendant came into the room she was sleeping in and woke her up. (RP 209). The defendant then left, came back, and asked if he could lay down next to her. (RP 209). The defendant then started rubbing M.A.S.’s back and belly. (RP 209). The defendant pulled M.A.S. closer to where he was lying and placed his hands underneath her clothes and above her pubic hairline. (RP 210). The defendant rubbed his hands there for awhile, then he went underneath her bra and cupped her left breast. (RP 210). M.A.S. tried to pull away, but the defendant pulled her back to where he was. (RP 210-11). M.A.S. said she did not tell for fear of not being believed. (RP 215). When asked why, she stated, “Because he is their grandfather. They had known him longer than I ever have. I had only known him for a maximum of two months and I didn’t know whether they would take me seriously or not.” (RP 216).

At trial, E.M.W. testified that Donna Trainer was her Aunt. (RP 362). In January of 2000, her parents separated and she moved to the Tri-Cities with her mom and brother. (RP 363). E.M.W. was ten years old. (RP 363). Over the next two years, E.M.W. became very close to her Aunt Donna and the defendant. (RP 264). They were like a second set of parents to her. (RP 364). In the Summer of 2002, E.M.W. testified that

the defendant tried to kiss her, and it made her uncomfortable. (RP 366). E.M.W. testified that one night when she was twelve years old, she was sleeping with her Aunt and the defendant. (RP 364, 366). E.M.W. woke up in the middle of the night, and the defendant's hands were in her underwear. (RP 366). The defendant was stroking her vagina and rocking his hips back and forth. (RP 366-67). The defendant inserted his fingers in E.M.W.'s vagina. (RP 367). E.M.W. got out of bed, went into the garage, grabbed a shovel, and slept there. (RP 367).

E.M.W. testified that the abuse continued a multitude of times. (RP 368). The defendant would come into E.M.W.'s bedroom in the morning for "snuggle" time. (RP 368). The defendant would start touching E.M.W.'s stomach or her back and thighs. (RP 368-69). The touching would continue to E.M.W.'s breasts and vagina. (RP 369). The defendant would place his fingers in E.M.W.'s vagina. (RP 369). The defendant would also place E.M.W.'s hand on his penis. (RP 369). E.M.W. asked him to stop many times. (RP 369). E.M.W. said the defendant would just continue or tell her that she got him all hot and bothered. (RP 369-70). E.M.W. felt the defendant was blaming her for the abuse. (RP 30). After the summer of 2003, E.M.W. tried to avoid the defendant, but her Aunt was diagnosed with cancer and she wanted to be there for her Aunt. (RP 370).

When E.M.W. was 14 years old, she once again found herself at the defendant's home. (RP 371). The defendant continued to touch E.M.W. at night and in the early morning. (RP 371). The defendant would put his hands down E.M.W.'s pants and put his fingers in her vagina. (RP 371).

In 2005, E.M.W. moved to Spokane to live with her Dad. (RP 372). In August of 2006 she learned her Aunt was going to die, so she came back to the Tri-Cities. (RP 372). E.M.W. was now 16 years old. When E.M.W. came back, the defendant had her sleep in his bed. (RP 373). After her Aunt passed away, E.M.W. found herself alone with the defendant in his home. (RP 374). At this point, the abuse escalated to the defendant penetrating E.M.W. with his penis. (RP 374-75). E.M.W. testified that the defendant would take out his penis and ejaculate outside of her vagina. (RP 375).

The defendant continued to abuse E.M.W. on a trip to Montana, once on the Oregon Coast, and in the Grand Canyon. (RP 376-78). E.M.W. graduated from high school in June of 2008. (RP 379). After graduation, E.M.W. moved on with her life, never telling anyone about the abuse for fear she would not be believed. (RP 380). E.M.W. testified that in January of 2010, when she received the text message from her cousin, Ms. Sanders, she decided to disclose the abuse. (RP 380-81).

On August 16, 2010, the defendant was found guilty on all counts. (CP 209-213). On September 29, 2010, the defendant was sentenced to a total of 280 months. (CP 268, 280). The Judgment and Sentence ordered restitution in the amount of \$539.99 to Crime Victims Compensation. (CP 266, 280). At the time of sentencing, neither the Prosecutor nor defense counsel knew what this amount was for. (*Please see*: Affidavit of Larry C. Stephenson and Affidavit of Sergeant Mathew Clarke<sup>1</sup>).

In July of 2011, Appellate Counsel for the defendant contacted the Prosecutor's Office to inquire about the restitution. (Affidavit of Sergeant Mathew Clarke). At this time it was discovered that A.N.S. had undergone a sexual assault exam on February 2, 2011. (Affidavit of Sergeant Mathew Clarke). On October 4, 2011, the State received a copy of the exam. (Affidavit of Sergeant Mathew Clarke, #13).

The sexual assault exam indicates that on February 2, 2011, A.N.S. was brought to the exam by her mother, Jamie Sanders. (02/02/10, Lourdes Medical Exam<sup>2</sup>, Page 1 of 4). A.N.S. told Dr. Chou that she was sexually assaulted by her grandfather, the abuse started in April of 2006 and had been repeated numerous times. (Medical Exam, Page 3 of 4). A.N.S. told the doctor the defendant touched her breasts under her clothes

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<sup>1</sup> The Appellant's Motion to Supplement the Record with Larry Stephenson's affidavit was granted on 09/15/11. The State's Motion to Supplement the Record with the Affidavit of Sergeant Mathew Clarke was granted on 02/23/12.

and touched her privates. (Medical Exam, Page 2 of 4). A.N.S. said the defendant never put his penis inside her, but did put his fingers in her vagina. (Medical Exam, Page 2 of 4). A.N.S. said the last time her Grandfather sexually abused her was in August of 2009. (Medical Exam, Page 2 of 4). A.N.S. told the doctor that she told her best friend, Katie, in September of 2009, what her grandfather did to her. (Medical Exam, Page 2 of 4). A.N.S. told the doctor that the defendant never physically hurt her. (Medical Exam, Page 2 of 4). This exam was done approximately six months after the last incident of abuse. (Medical Exam, Page 2 of 4). The doctor concluded that a) no sexual contact occurred, b) sexual contact occurred, but caused no physical injury and therefore no scar, or c) sexual contact occurred, physical injury occurred, but this had healed without any scar formation. (Medical Exam, Page 3 of 4).

## **ARGUMENT**

**1. DEFENSE COUNSEL’S CONDUCT DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL, AND THEREBY DID NOT DEPRIVE THE DEFENDANT OF A FAIR TRIAL AND DUE PROCESS OF LAW.**

Defense counsel’s conduct did not constitute ineffective assistance of counsel, and thereby did not deprive the defendant of a fair trial and due

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<sup>2</sup> 02/02/10, Lourdes Medical Exam hereinafter will be referred to as “Medical Exam.”

process of the law. To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's objectively deficient performance prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert denied*, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 232 (1998). Prejudice occurs when, but for counsel's deficient performance, there is no reasonable probability that the outcome would have differed. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Courts strongly presume that counsel is effective and the defendant must show no legitimate strategic or tactical reason supporting defense counsel's actions. *McFarland*, 127 Wn.2d at 335-36.

**A. Defense counsel was not ineffective when he failed to file a motion under CrR 4.7(3).**

Defendant now states that his attorney was ineffective because he did not file a supplemental motion under CrR 4.7(3), which provides:

**(e) Discretionary Disclosures.**

(1) Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure of the defendant of the relevant material and information not covered by sections (a),(c) and (d).

(2) The court may condition or deny disclosure authorized by this rule if it finds that there is a substantial risk to any

person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness of the disclosures to the defendant.

CrR 4.7(e). A motion under this rule is necessary to get information beyond what the prosecutor is specifically obligated to disclose under the discovery rules, the court in its discretion may require disclosure if the information sought is material and the request is reasonable. *State v. Krenik*, 156 Wn. App. 314, 231 P.3d 252 (2010), *see also*, CrR 4.7(a)(c) and (d).

In the present matter, the State will concede that the prosecutor should have provided the sexual assault exam that was done on A.N.S. Throughout this case, the prosecutor had no idea a sexual assault exam had been done on one of the five victims. (*See* Affidavits of Sergeant Clarke and Larry Stephenson). Such evidence should have been provided under the mandatory discovery obligations under CrR 4.7(a). There would have been no basis for defense counsel to make a motion under CrR 4.7(3). This is not a “backup” measure as Defendant brief states. (Appellant’s brief at 21-22). CrR 4.7(3) is an avenue which allows defendants to request discovery which is beyond what the Prosecutor is obligated to provide. Defense counsel’s lack of a CrR 4.7(3) motion was not ineffective assistance of counsel.

**B. Defense counsel was not ineffective when he failed to file a motion for a bill of particulars.**

Defense counsel was not ineffective when he failed to file a motion for a bill of particulars. The purpose of a bill of particulars is to give the defendant sufficient notice of the charge so that he can competently defend against it. *State v. Devine*, 84 Wn.2d 467, 471, 527 P.2d 72 (1974). The furnishing of a bill of particulars is discretionary with the trial court. *State v. Noltie*, 116 Wn.2d 831, 844, 809 P.2d 190 (1991). A bill of particulars is appropriate when an information does not allege the nature and extent of the crime with which the defendant is accused, so as to enable the defendant to properly prepare his or her defense. *State v. Bergeron*, 105 Wn.2d 1, 18, 711 P.2d 1000 (1985). In the present matter the First Amended Information alleged:

- Count I, Rape of a Child in the First Degree, involved the rape of D.L.S. (DOB 07-31-1999). The charging period was over 17 months, from August 1, 2006, to January 1, 2008. D.L.S. was seven and eight years old during the charged abuse. D.L.S. disclosed the abuse when she was ten years old. (CP 51).

- Count II, Rape of a Child in the Second Degree involved the rape of A.N.S. (DOB 5-30-1997). The charging period was over approximately seven months, from May 30, 2009, to December 31, 2009. A.N.S. was 12 years old during the charged abuse. A.N.S. disclosed the abuse when she was 13 years old. (CP 51).
- Count III, Rape of a Child in the Second Degree involved the rape of E.M.W. (DOB 11-18-1989). The charging period was over approximately 24 months, from November 18, 2001, to November 17, 2003. E.M.W was 12 and 13 years old during the charged abuse, disclosed the abuse at age 20. (CP 51).
- Count IV, Child Molestation in the First Degree involved C.M.S. (DOB 06-06-1996). The charging period was over approximately 22 months from August 1, 2006, to June 1, 2008. C.M.S. was 10 and 11 years old during the charged abuse. She disclosed at 13 years old. (CP 51).

- Count V, Child Molestation in the Third Degree involved M.A.S. (DOB 02-01-1995). The charging period was approximately 30 days from December 1, 2009, to January 1, 2010. She was 14 years old when she was abused and when she disclosed. (CP 51).

The defendant now argues that his defense counsel was ineffective for not demanding a bill of particulars based on the information because: (1) did not allow him to claim an alibi defense, and (2) could face possible double jeopardy.

1) *alibi defense.*

Whether a defendant has been afforded due process depends in part upon the defenses available to him. In cases where the accused child molester virtually has unchecked access to the victim, neither alibi nor misidentification is likely to be a reasonable defense. The true issue is credibility. *State v. Brown*, 55 Wn. App. 738, 748, 780 P.2d 880 (1998), review denied, 114 Wn.2d 1014, 791 P.2d. In *State v. Cozza*, 71 Wn. App. 252, 858 P.2d 270 (1993), the court considered defendant's complaint that the time the alleged child sexual abused occurred was so long it prevented any alibi defense. The court held that the defendant has no due process right to raise an alibi defense. *Id.* at 259. The court reasoned the defendant should not be permitted to use the child's inability

to recall dates as a sword to escape a trial, but that the lack of specificity was a factor the trier of fact could use in determining the child's credibility. *Id.* at 259-60.

The defendant had unbridled access to the victims and set forth a defense of general denial. During his interview with law enforcement, the defendant denied all abuse. (EX. 3 and 4 at 24, 34, 38). At trial, the defendant admitted to being alone with the girls. An alibi defense would never have been a reasonable defense for the defendant, and a bill of particulars would not have been granted.

2) *Double Jeopardy*

The defendant states that by not asking for a bill of particulars this placed him at risk for being tried and convicted in some future trial for the same acts charged in this case. (Appellant's brief at 26). A defendant who is charged with a multiple act information is protected from the threat of double jeopardy when, the evidence is sufficiently specified as to each of the various acts charged within the alleged time frames. *State v. Newman*, 63 Wn. App. 841, 850-851, 822 P.2d 308 (1992). This result inevitable follows whenever the State is permitted to proceed on a multiple acts information and a unanimity instruction is given in lieu of the State's election of specific acts. *Id.* When that situation occurs and

the jury returns a guilty verdict, the State is foreclosed from a later attempt to re prosecute those same charges. *Id.*

In the present case there was one count per victim, but some of the victim's disclosed multiple acts of abuse within the charged period. A unanimity instruction was given to the jury. (CP 199). Double jeopardy is properly protected by a unanimity instruction in these types of cases, not by a bill of particulars. Defense counsel was reasonable in not asking for a bill of particulars for reasons of double jeopardy.

**C. Defense counsel was not ineffective when he failed to sever the counts.**

Defense counsel was not ineffective for not seeking to sever the counts because it would have never been granted even if it had been requested. Two offenses of a similar character may be joined in one trial. CrR 4.3(a). However, offenses properly joined may be severed if the court determines that severance will promote a fair determination of the defendant's guilt or innocence of each offense. *State v. Bythrow*, 114 Wn.2d 713, 717, 790 p.2d 154 (1990). Because Washington Courts favor liberal joinder, a defendant seeking severance bears the burden of demonstrating a trial on both counts would be so prejudicial as to outweigh the judicial economy of one trial. *Id.* at 718. Joinder risks prejudice if the defendant may be embarrassed by presenting separate

defenses, the jury may use the evidence of one crime to infer guilt on the other crime, or the jury may cumulate the evidence of both crimes in order to find guilty. *Id.*

When considering a severance motion, the trial court must consider if any prejudice is sufficiently mitigated by: (1) the strength of the State's case on each count; (2) the clarity of the defenses; (3) instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges if not joined at trial. *State v. Russell*, 125 Wn.2d 24, 63, 882 p.2d 747 (1994).

The State had a strong case on all counts. As is the case in child sex abuse cases, all the evidence the State normally has is the child's statement. In this case, all five girls were extremely credible, were able to articulate their abuse, and there was zero motive to lie. Secondly, the defendant's defense was clear on all counts – he denied all abuse. Thirdly, the court gave clear instructions to the jury on how to regard each count. (CP 175-207).

Lastly, all the abuse would have been admitted, if the charges were not joined, under 404(b). Evidence of prior bad acts may be admitted to show a common scheme or plan. *State v. Lough*, 125 Wn.2d 847, 889 P.2d 487 (1995). There are two instances in which evidence is admissible to prove a common scheme or plan, (1) where several crimes constitute

constituent parts of a plan in which each crime is but a piece of the larger plan, and (2) where an individual devises a plan and uses it repeatedly to perpetrate separate but very similar crimes. *Id.* at 854-55. Proof of such a plan is admissible if the prior acts are (1) proven by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial. *Id.* at 852. Recently, the Washington State Supreme court in *State v. Gresham*, 173 Wn.2d 405, 269 P.3d 207 (2012), upheld the admission of prior acts of sexual misconduct to show common scheme or plan. *Gresham*, was consolidated with *State v. Scherner*. See also, *State v. Sexsmith*, 138 Wn. App. 497, 157 P.3d 901 (2007); *State v. Kennealy*, 151 Wn. App. 861, 214 P.3d 200 (2009).

In the present case, the defendant used the same plan to get access to his victims. Given the clear case law on prior sexual misconduct and common scheme or plan, the defendant's motion to sever would have been denied.

**D. Defense counsel was not ineffective when he did not object on the record to the lustful disposition evidence.**

Defense counsel was not ineffective when he did not object on the record to the lustful disposition evidence, because this evidence was

clearly admissible. Evidence of defendant's prior sexual acts against the same victim is admissible to show the defendant's lustful disposition toward the victim. *State v. Guzman*, 119 Wn. App. 176, 79 P.3d 990 (2003); *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991) (citing *State v. Camarillo*, 115 Wn.2d 60, 70, 794 P.2d 850 (1990)); *State v. Ferguson*, 100 Wn.2d 131, 133-34, 667 P.2d 68 (1983). This includes acts before and after the charging period. *State v. Russell*, 171 Wn.2d 118, 249 P.3d 604 (2011). Furthermore, in closing, the State was very clear as to what acts the State was alleging. (RP 599 – 607).

**E. Defense counsel was not ineffective by not objecting to Carol Harting as an expert witness.**

Generally, an individual is qualified to testify as an expert if his or her testimony is based on scientific, technical, or other specialized knowledge, that would assist the jury in determining a material fact at issue or would assist the jury in understanding the evidence. ER 702. Education and practical experience may qualify a witness as an expert. *State v. Jones*, 71 Wn. App. 798, 814, 863 P.2d 85 (1993). Trial courts are vested with broad discretion in determining the admissibility of expert testimony. *Philippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004).

Ms. Harding testified that she has been a licensed mental health counselor for 23 years. (RP 331). Half of her clients are victims and survivors of abuse, both adults and children. (RP 331 ). Prior to private practice, she was the director of the Sexual Assault Center. (RP 331). Ms. Harding also worked at Child Protective Services and in the juvenile courts. (RP 331). She has a masters in clinical psychology, and had previously been qualified in the courts as an expert on child victims of sexual abuse. (RP 331). Defense counsel asked the court to voir dire Ms. Harding before she was declared an expert witness, and then had no objection. (RP 332).

Expert testimony is admissible if limited to an opinion that delayed reporting is not unusual and that the length of delay correlates with the relationship between the abuser and victim. *State v. Petrich*, 101 Wn.2d 566, 576, 683 P.2d 173 (1984). Testimony that a victim exhibits behavior typical of a group is permissible so long as it does not suggest the guilt of the defendant. *State v. Florczak*, 76 Wn. App. 55, 73, 882 P.2d 199 (1994); *State v. Jones*, 71 Wn. App. 798, 815 FN 6, 863 P.2d 85 (1993).

Here, Ms. Harding's testimony was of a very general nature. (RP 329-46). She did not claim that a delay in reporting proved that the abuse had occurred in this case, nor did she claim that the defendant was part of a group tending toward sexually-abused children.

**F. Defense counsel was not ineffective when he failed to add Joseph Lee to his witness list.**

Defense counsel had twenty-four witnesses on his witness list. (CP 53-58). During the trial, the defendant's half brother, Joseph Lee, was present in the courtroom. (RP 501). Mr. Lee was not on the defense witness list. During the defense case in chief, defense counsel wanted the court to allow Joseph Lee to testify that in September of 2008, he had lunch with E.M.W. and her mother Debbie. (RP 504-08). It was his belief that E.M.W. had come from the defendant's house prior to coming to lunch. (RP 504-08). The court allowed defense counsel to make a record, but did not allow Mr. Lee to testify. (RP 504-08). This was in the sound discretion of the court. Nonetheless, this did not prejudice the defendant, because had Mr. Lee testified, it would not have changed the outcome of the case.

**G. Defense counsel was not ineffective for not objecting to the prior consistent statement testimony offered in rebuttal by the State.**

The State put the court and defense counsel on notice in their motions in limine that should the defendant attack A.N.S.'s credibility by suggesting she recently fabricated her story or had an improper motive, the State would elicit testimony from A.N.S.'s friend, K. Henele, who was told by A.N.S. about the abuse in late 2009. (CP 64-65).

A prior out-of-court statement is hearsay if offered to prove the truth of the matter asserted. ER 801(c). The general rule is that hearsay is admissible. ER 802. A witness's prior consistent statement may be admissible as non hearsay if offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. ER 801(d)(1)(ii). This is because prior consistent statements tend to show that bias or prejudice did not motivate the present testimony. *State v. Harper*, 35 Wn. App. 855, 857, 670 P.2d 296 (1983). If offered to rebut impeachment, the statements must have been made prior to the events which gave rise to the inference of fabrication. *State v. Stark*, 48 Wn. App. 245, 249, 738 P.2d 684 (1987). The Sate has the burden of showing that the statement was made before the alleged motive to lie arose. *State v. Osborn*, 59 Wn. App. 1, 5, 795 P.2d 1174 (1990). A trial courts decision to admit evidence under this rule is discretionary and will be reversed only for a manifest abuse of discretion. *Id.*

When the defendant took the stand in this case, he told the jury that in January of 2010, about a week prior to when the five girls disclosed the abuse, he had yelled at A.N.S. about her grades. (RP 531-32). The defendant testified that he "really tore into her" and that she was "bawling" and "all the kids were present and they all left and did not get my hugs and kisses. It was very solemn." (RP 533). He further testified,

“And the final blow up. A week before I was arrested, I yelled at her.” (RP 535). The defendant testified that A.N.S. was being replaced by his new granddaughter, M.A.S., and that made A.N.S. mad. (RP 535).

The defendant was clearly trying to insinuate that A.N.S. had a motive to lie and fabricated this entire story because of an argument they had one week prior to her disclosing the abuse. The defendant also made sure to point out that C.M.S., M.A.S., and D.L.S. were present when he yelled at A.N.S. The court properly allowed the State to put on testimony that she had told her friend she was being abused by her Grandfather in late 2009. This issue had been discussed at length with the judge and was briefed in the State’s Motion in Limine. (CP 64-65; RP 09-29-2010, 4). A.N.S.’s statement to K. Henley occurred prior to the alleged argument that the defendant testified to. The State was properly allowed to put on her prior consistent statement.

**H. Defense counsel was not ineffective when he failed to include in his post-trial motion evidence he did not know existed.**

On September 24, 2010, the defendant filed his motion to arrest judgment. (CP. 246-52). On September 28, 2010, the State filed a response. (CP 253-62). On September 29, 2010, the defendant’s motion was denied, and the court went to sentencing. (RP 09-29-2010, 2-16). At that time, the State provided defense counsel with a Judgment and

Sentence. (CP 263-77). On page four of the Judgment and Sentence, there was an order for restitution to: Crime Victim's Compensation for \$539.99. (CP 266). At that time defense counsel and the prosecutor did not know what the restitution was for. (See Affidavit of Larry Stephenson and Sergeant Clarke). It was not until Appellate Counsel requested from our office a break down of what the restitution was for that the exam was revealed to the parties. (See Affidavit of Sergeant Clarke). When defense counsel argued his post-trial motions, he was not aware of the exam. This was not ineffective.

**2. THERE WAS NO PROSECUTORIAL MISCONDUCT THAT DENIED THE DEFENDANT A FAIR TRIAL.**

A defendant claiming prosecutorial misconduct on appeal must demonstrate that the prosecutor's conduct at trial was both improper and prejudicial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Once a defendant has demonstrated that the prosecutor's conduct was improper, the courts will evaluate the defendant's claim of prejudice on the merits under two different standards of review depending on whether the defendant objected at trial. *State v. Sakellis*, 164 Wn. App. 170, 184, 269 P.3d 1029 (2011).

First, if the defendant objected to the misconduct, the determination will be whether the misconduct resulted in prejudice that

had a substantial likelihood of affecting the verdict. *State v. Anderson*, 153 Wn. App. 417, 427, 220 P.3d 1273 (2009). If the misconduct did not result in prejudice that had a substantial likelihood of affecting the verdict, the inquiry ends and the claims fails. *Id.* at 429.

Secondly, if the defendant failed to object to the prosecutor's misconduct at trial, a different level of scrutiny is applied to ascertain whether the prosecutor's misconduct was so flagrant and ill-intentioned that it caused an enduring and resulting prejudice incurable by a jury instruction. *State v. Gregory*, 158 Wn.2d 759, 841, 147 P.3d 1201 (2006). This standard requires the defendant to establish that (1) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict, and (2) no curative instruction would have obviated the prejudicial effect on the jury. *Sakellis*, 164 Wn. App. at 185. See, also, *State v. Thorgerson*, 172 Wn.2d 438, 258 P.3d 43 (2011). In the present matter, defense argues that the State committed misconduct by (a) not providing the sexual assault exam done on A.N.S., (b) by calling a rebuttal witness to testify about prior consistent statements, and (c) remarks in closing.

**A. The State did not commit misconduct by not providing the sexual assault exam done on A.N.S., because such action was not a *Brady*<sup>3</sup> Violation**

Defendant argues that he was denied a right to a fair trial because the prosecutor allegedly failed to disclose material exculpatory evidence. Specifically, he argues that the sexual assault exam done on A.N.S. was *Brady* material.

There are three components to a *Brady* violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material, meaning that the evidence must have resulted in prejudice to the accused. *Strickler v. Green*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Prejudice occurs if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.* at 280. Prejudice is determined by analyzing the evidence withheld in light of the entire record.

The sexual assault exam was not material. The State concedes that the sexual assault exam done on A.N.S. was not provided to the defense. What the State does take offense to is the insinuation in Appellant's brief

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<sup>3</sup> *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed. 215 (1963).

that this was purposely “hidden” from the defendant. (Appellant’s brief at 39). Frankly, it would have been to the State’s advantage to have Dr. Chou testify. He would have been allowed to testify as to A.N.S.’s statements that were made pursuant to his medical diagnoses and treatment. ER 803(a)(4). These statements were entirely consistent with A.N.S.’s testimony. Furthermore, Dr. Chous would have been allowed to testify that he has never seen evidence of non-forcible digital penetration and oral sex on a victim seven months after the alleged incident.

The State would have never ordered a child to undergo such an evasive procedure when the allegations involved digital penetration and oral sex approximately seven months prior. There was no allegation that the defendant used force, that the event caused physical pain, or that he used an object. The allegations involved the defendant’s fingers and tongue to penetrate A.N.S. Had the jury been able to hear this testimony, it would not have changed the outcome of the trial; arguably, it would have made the State’s case stronger. This exam was not *Brady* Material.

**B. The State did not commit misconduct by calling a rebuttal witness.**

The State did not commit misconduct by calling a witness at trial. There is no authority cited by the defendant, nor is the State aware of any

which holds it is misconduct for an attorney to call a witness at trial that the trial court has allowed to testify.

This matter was properly briefed by the State in their Motions in Limine. (CP 59-65). The matter was discussed with the trial court and defense counsel. (09-29-2010, RP 4). As such, this matter was not objected to at trial because the court had previously made its ruling. There was no misconduct.

**C. The Prosecutor did not commit error in closing argument.**

A prosecutor's comments during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *State v. Brown*, 132 Wn.2d 529, 551, 940 P.2d 546 (1997). The Prosecutor enjoys reasonable latitude in arguing inferences from the evidence, including inferences as to witness credibility. *State v. Gregory*, 158 Wn.2d 759, 810, 147 P.3d 1201 (2006).

Arguments that appeal to passion or prejudice include arguments intended to 'incite feelings of fear, anger and a desire for revenge' and arguments that are irrelevant, irrational, and inflammatory that prevent calm and dispassionate appraisal of the evidence. *State v. Rice*, 110 Wn.2d 577, 608, 757 P.2d 889 (1988); *State v. Reed*, 102 Wn.2d 140, 145-

46, 684 P.2d 699 (1984) (prosecutor referred to defendant as a liar four times, stated defense had no case, and implied defense witnesses should not be believed because they were from out of town and drove fancy cars)); *U.S. v. McRae*, 593 F.2d 700, 706 (5<sup>th</sup> Cir.1979) (“turn him loose, and we’ll send him down in the elevator with you and his gun,” quoting final argument)).

It is unclear from the defendant’s brief which specific parts of the State’s closing argument they are contesting. First, the defendant states the prosecutor, “improperly asked the men on the jury to think about the impropriety of grown men hanging out with teen girls and what that translated to.” (Appellant’s brief at 36). In regard to this, specifically the State argued:

And then Count V. [M.A.S] This is very specific. December 1<sup>st</sup> to December 31<sup>st</sup>. The abuse occurred on December 31<sup>st</sup>. The morning of December 31<sup>st</sup>. That is the most recent act of abuse.

Now, I want you all to think about something. Especially, you men. When was the last time that you actively made a decision to hang out with a fourteen-year-old girl?

(Defense objects, side bar). Bench conference concluded, proceedings resumed before the jury, as follows:

You parents out there, think about when was the last time that you had a conversation with a fourteen year-old child.

(Defense objects.) . . . .

I mean, it’s hard enough being around your own fourteen-year-old daughter, let alone being around someone else’s. What do you think [M.A.S] and Mr. Trainor over there were doing at the house? Jamming out [to] Justin Bieber?

Exchanging Jonas Brothers CD's? Really? Really? Does that make any sense that you would be actively choosing to spend time with a fourteen-year-old girl? Who has talked to a fourteen-year-old girl lately?

He is a forty-six year old single man. It makes zero sense. But it makes complete sense when you look at the evidence in this case. He was grooming her.

RP 605-607. At trial, M.A.S. testified that while they were watching movies, the defendant began to rub her stomach. (RP 208-09). The testimony of all the girls indicated that most of the abuse began with rubbing. The State's expert witness testified that such type of touching is associated with the concept of grooming. The State was simply arguing the evidence that had been submitted to the jury. Nonetheless, any concerns were cured after the State asked the judge to ready a curative instruction after their closing argument, which stated, "You should disregard any argument made by counsel, which asks you to place yourself in the position of the defendant." (CP 207; RP 615).

Secondly, the Appellant's Brief states, "[T]he prosecutor offered her own opinions about how an innocent person would or should react to these allegations and asked the jury to think about their emotions as opposed to how the defendant acted. (Appellant's brief at 41). Specifically, the State argued:

Oh, and then the interview. Now, I told you, you were not gonna get a confession. I said I'm not going come up here

and give you a confession. But it came pretty darn close. And I want to point out a few things because I'm going to play a part of it.

First of all, he was advised when he first sat down that he was there for allegation of Rape of a Child, at the beginning of the interview. How do you think you would react? (CP 609).

(Defense objects, side bar)..

Bench conference ended, proceedings as follows:

When you watch this interview, generally, think about how one would act when they have been advised about allegation of Rape of a Child. How would one act? Would they talk about where they went to high school? Would they talk about what name their dog is? Would they talk about how long they've worked somewhere? Would they talk about where they grew up? Would they talk about all the work that they do?

Or would they say, why the heck am I here? Who is making these allegations against me? I haven't raped anybody.

RP 609-612. A jury may consider as relevant and material evidence of a defendant's conduct tending to reveal the defendant's consciousness of his guilt or that the defendant's claim lacks truth and honesty. *State v. McGhee*, 57 Wn. App. 457, 461, 788 P.2d 603 (1990). Testimony about the defendant's statements and lack of emotion during a police interview was admissible and relevant non-opinion evidence. *State v. Day*, 51 Wn. App. 544, 552, 754 P.2d 1021 (1988). In the present case, the State played the defendant's entire hour and a half interview with the police. (EX 3 and 4; RP 314).

EX. 4 and 5; RP 314). The State was properly allowed to argue the defendant's conduct during that interview. As above, any issue was cured by the curative instruction given by the court.

Thirdly, the defendant states that, "the prosecutor made facial gestures for the jury to see, an act of misconduct that by itself could result in reversal." (Appellant Brief at 41). Once again, the defendant does not cite to a specific comment. Nonetheless, defense counsel did make a comment at a side bar:

*State:* I'm arguing the facts and the evidence. I'm arguing the interview. How would you react in an interview? You can stand up there and say people react differently.

*Mr. Stephenson:* See? Right now, she is making sure that the jury sees her looking a certain way.

*State:* Larry, come on, now. I'm not doing this on purpose. That's ridiculous.

*Mr. Stephenson:* Well, that's how I see it.

RP 610-611.<sup>4</sup> After that interaction, no further record was made. No record was made regarding any alleged "facial gestures" as is stated in Appellant's brief. No record was made as to how far the side bar was from the jury, or if anyone saw whatever defense counsel was alleging the prosecutor did. Clearly, if defense counsel's comments about the

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<sup>4</sup> Defense counsel incorrectly states in their brief that this interaction happened after defense counsel objected to counsel arguing about the defendant's demeanor during his police interview. A correct reading of the transcript shows that this interaction happened after defense counsel objected to the State's argument regarding grown men hanging out with 14-year-old girls.

prosecutor, “looking a certain way” had any merit, a record would have been made.

Lastly, defendant argues, “And then the prosecutor resorted to distorting the testimony given by the defendant and suggesting to the jury that in order to acquit the defendant they had to believe that the girls were lying, misconduct in and of itself.” (Appellant’s Brief at 41). Once again, defense counsel does not cite to any specific comment or argument from the State’s closing argument. Nonetheless, jurors are the sole judges of the credibility of each witness. (CP 177). The jury was instructed:

In considering a witness’s testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately, the quality of a witness’s memory while testifying, the manner of the witness while testifying; any personal interest the witness might have in the outcome or the issues, any bias or prejudice that the witness may have shown; the reasonableness of the witness’s statements in the context of all the other evidence; and any other factors that affect the evaluation or belief of a witness.

(CP 177-78). The State is properly allowed to argue that these children had no motive to lie, and that they had everything to lose by coming forward. Sadly, most cases that involve child sexual abuse -- the only evidence will be their statement. In this case, as evidenced by the trial transcript, the State had five extremely credible child victims. The State

properly argued the credibility of their disclosure and motive. This is proper argument for closing.

**3. THE TRIAL COURT DID NOT COMMIT ERRORS WHICH DEPRIVED THE DEFENDANT A FAIR TRIAL AND DUE PROCESS OF LAW.**

The trial court did not make numerous errors in its evidentiary rulings. The trial court's acts are discretionary with its rules on evidentiary matters. *City of Kennewick v. Day*, 142 Wn.2d 1, 5, 11 P.3d 304 (2000). An evidentiary ruling will not be disturbed unless the court finds that no reasonable person would take the position adopted by the court. *State v. Lord*, 117 Wn.2d 829, 870, 822 P.2d 177 (1991), cert. Denied, 506 U.S. 856 (1992). A position no reasonable person would take is one that is manifestly unfair, unreasonable, or untenable. *O'Neill v. Dep't of Licensing*, 62 Wn. App. 112, 117, 813 P.2d 166 (1991).

**A. The trial court did not commit error when it restricted the number of photographs the defense could admit into evidence.**

The trial court did not commit error when it restricted the number of photographs defense counsel could submit to the jury. First and foremost, defense counsel did not "designate" any of the photographs for the purposes of this appeal. (CP 140, See EX list No. 9-18). Therefore, these issues cannot be properly reviewed. Nonetheless, the trial transcript and the exhibit list will shed some light on the issue.

This matter was addressed before the court prior to the testimony of E.M.W. (RP 351-54). The photos were shown to E.M.W. during cross-examination. (RP 394-97). Defense counsel moved for admission of Exhibits 9 and 10-18. (RP 397). A side bar was conducted regarding the photos. (RP 397-401). The court admitted Exhibits 9, 10, 14, and 16. (CP 140). All photographs were of E.M.W. (CP 140). Exhibit No. 9 contained three photos of E.M.W. (CP 140). Six photos of E.M.W. were submitted to the jury, and defense counsel was allowed to cross-examine E.M.W. using all the photographs. A reading of the transcript shows that EX 11, 12, 13, 15, and 18 were not admitted because they were duplicative. (RP 400). Defense counsel conceded this point. (RP 400). This was a proper evidentiary ruling pursuant to ER 403.

**B. The court did not error in restricting the number of character witnesses.**

ER 404(a)(1) permits a defendant to introduce evidence of his character if it is pertinent to the crime charged. *State v. Kelly*, 102 Wn.2d 188, 193-95, 685 P.2d 564 (1984). ER 405 defines the acceptable methods of introducing evidence of a defendant's pertinent character trait. *Id.* at 194. Sexual Morality is a pertinent character trait in cases involving sexual offense. *State v. Woods*, 117 Wn. App. 278, 280, 70 P.3d 976 (2003); see also, *State v. Griswold*, 98 Wn. App. 817, 828, 991 P.2d 657

(2000). Such proof must be made through testimony of a character witness who is knowledgeable about the defendant's reputation in the community for the specific character trait at issue. *State v. Callahan*, 87 Wn. App. 925, 934, 943 P.2d 676 (1997). A party seeking to admit reputation testimony must first lay a foundation establishing that the witness is familiar with the person's reputation and that his testimony is based on the community's perception of that person as regards the relevant character trait. *Id.* at 935. The witnesses' personal opinion is not competent testimony nor is an adequate foundation to admit reputation evidence. *State v. Kelly*, 102 Wn.2d at 195. A trial court's decision regarding the adequacy of the foundation necessary to admit evidence for an abuse of discretion. *State v. Callahan*, 87 Wn. App. at 934.

This matter was addressed at length in the State's motion in limine and before the court. (CP 59-60; RP 410-411, 414-425, 432-433). After a lengthy discussion, it was concluded that defense counsel had to first lay a proper foundation with regards to each witness of their knowledge of the defendant's reputation for sexual morality and their situation in the specific community. (RP 425). This 'pre-testimonial voir dire' was done for six witnesses outside the presence of the jury. (RP 426-61). Of those six, the court ruled that two could testify regarding the defendant's reputation for sexual morality, three could not, and defense counsel

withdrew his request for one after it was shown that she was not properly in any community of the defendant's. The trial court's ruling on these issues was proper

**C. The trial court did not commit error in restricting the number and content of defense witnesses.**

The defendant called seven non-character witnesses at trial. It is not clear from the record if the defendant intended to call all twenty-four witnesses on his list. Defense counsel did drop some witnesses from the list. (RP 354). There was a record made about the non-character witnesses and what they would testify to. (CP 50-65; RP 354). Specifically, the court said that a lot of the witnesses would be cumulative evidence, but he would allow them to testify. (RP 357). Nowhere in the record does it state that the defendant was not allowed to put on non-character witnesses that were on his witness list. Most likely those witnesses were not arranged or chose not to testify.

**D. The trial court did not commit error by prohibiting Joseph Lee as a defense witness.**

A trial court's refusal to permit a defense unlisted witness from testifying was not error where the testimony would have been incompetent or immaterial. *State v. Thomas*, 8 Wn.2d 573, 113 P.3d 73 (1941). Joseph Lee was not on the defense witness list. (CP. 53-58). Mr. Lee had

sat through the State's entire case. Mr. Stephenson gave an offer of proof to the court and the State was allowed to voire dire him. (RP 504-508).

Basically, Mr. Lee was going to testify that he had lunch with E.M.W. and her mother in September of 2008. He was going to testify that E.M.W. told him she had come from the defendant's house. Mr. Lee believed that E.M.W. had spent the night at the defendant's house. (RP 506). On defense's cross examination of E.M.W., defense counsel never asked her if she had told Mr. Lee in 2008 that she had "come from Bob's house.". (RP 383-409). Any expected testimony from Mr. Lee was not proper impeachment, and the rest of it was immaterial.

**E. The trial court did not commit error in denying the defendant's post-trial motion.**

The court did not commit error when it denied the defendant's CrR 7.4 and 7.5 motions. A denial of a motion for a new trial will be reversed only for abuse of discretion. *State v. Copeland*, 130 Wn.2d 244, 922 P.2d 1304 (1996). In their motion, the defendant argued (1) reputation evidence, (2) ineffective assistance of counsel (did not sever the counts) (did not object to rebuttal witnesses) and (3) prosecutorial misconduct. At the motion hearing the court stated:

The motion to arrest judgment made by the defense I guess is primarily a motion indicating there was insufficiency of proof of some material element of the crime. I've actually reviewed my notes in this case and I haven't really

forgotten much of it since the trial was begun in August a little over a month ago. I'm confident there was plenty of evidence to support the verdict. And I am not granting the motion to arrest judgment motion for a new trial by the defense based on a couple premises, one, ineffective assistance of counsel because of a lack of requesting a severance of counts and failure to object to rebuttal witness. I guess also reputation evidence. We went through those except for ineffective assistance of counsel. We didn't address that during the trial. Obviously I'm very familiar with defense counsel, and I do not feel there was ineffectiveness of counsel in this case. I didn't hear a matter requesting severance but had I heard it chances were extremely good I wouldn't have granted a severance should that motion have been made.

With regard to object to rebuttal witnesses. Again, we discussed that matter during the trial. I think that was ruled appropriately. With regard to reputation evidence, that was an interesting thing that came up and I think we discussed that outside of the presence of the jury for actually quite a bit and it's actually a little unique and not – it simply doesn't submit itself to the same analysis as other reputation evidence. It's a different reputation evidence. I think we covered it during the trial. I'm not going to grant a new trial. So I will deny defense's motions.

(RP 09/20/2010, 3-4). The court was well aware of the caliber of attorney that represented the defendant, and was able to see firsthand his performance at trial. A severance motion would have never been granted, and the evidence against the defendant was overwhelming which was demonstrated by the quick jury verdict. (CP 229, 231-32).

**4. THERE WAS NO CUMMULATIVE ERROR. THE DEFENDANT WAS AFFORDED A FAIR TRIAL.**

There was no cumulative error in this matter. “The cumulative error doctrine applies only when several trial errors occurred which, standing alone, may not be sufficient to justify a reversal, but when combined together, may deny a defendant a fair trial.” *State v. Hodges*, 118 Wn. App. 668, 673-74, 77 P.3d 375 (2003). Even so, absent prejudicial error, there can be no cumulative error that deprived the defendant of a fair trial. *State v. Saunders*, 120 Wn. App. 800, 826, 86 P.3d 232 (2004). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary. *Matter of Personal Restraint of Lord*, 123 Wn.2d 296, 332, 868 P.2d 835 (1994) *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849, 115 S.Ct. 146, 130 L.Ed.2d 86 (1994).

Here there was no prejudicial error that deprived the defendant of a fair trial; thus, the cumulative error doctrine does not apply.

**CONCLUSION**

Based on the foregoing, the State respectfully requests that the decision of the trial court be affirmed.

**RESPECTFULLY SUBMITTED** this 24th day of April 2012.

**ANDY MILLER**

Prosecutor

A handwritten signature in black ink, appearing to read "Anita Petra", written over the printed name of Anita I. Petra.

**ANITA I. PETRA**, Deputy

Prosecuting Attorney

Bar No. 32535

OFC ID NO. 91004

## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

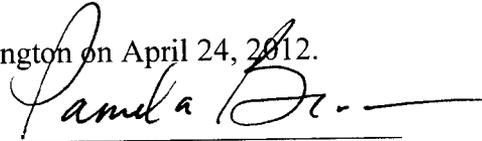
Cassandra Lopez De Arriaga  
Cassandra Lopez de Arriaga Law  
316 Main Street, Ste. E  
Edmonds, WA 98020-3197

E-mail service by agreement  
was made to the following  
parties:  
cassandralopezlaw@gmail.com

Robert R. Trainor  
#342774, T-A14  
Airway Heights Correction Ctr  
P.O. box 2049  
Airway Heights, WA 99001

U.S. Regular Mail, Postage  
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Signed at Kennewick, Washington on April 24, 2012.



Pamela Bradshaw  
Legal Assistant