

81413-9

NO. 25673-1-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

PHILLIP J. BOBENHOUSE,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

1. Instruction 13 improperly added the element, “and/or caused an innocent or irresponsible person to engage in sexual intercourse,” to the crime of first degree child rape as charged in Count 2 of the Second Amended Information. (CP 150; CP 129; Appendix “A”)

2. Instruction 14 improperly added the element, “and/or caused an innocent or irresponsible person to engage in sexual intercourse,” to the crime of first degree child rape as charged in Count 3 of the Second Amended Information. (CP 151; Appendix “B”)

3. Instruction 17 improperly added the element, “and/or caused an innocent or irresponsible person to engage in sexual intercourse,” to the crime of first degree incest as charged in Count 5 of the Second Amended Information. (CP 154; Appendix “C”)

4. The additional language included in the to-convict instructions (13, 14, and 17) was not set forth either in the Second Amended Information or Instructions 9 or 15 (the definitions of the respective offenses of first degree child rape and first degree incest.) (CP 146; CP 152; Appendices “D” and “E”)

5. Instructions 6, 7, and 8, relating to the State’s theory of accomplice liability on Counts 2, 3 and 5, allowed Phillip J. Bobenhouse to be

convicted of a crime/crimes impossible of commission. (CP 143; CP 144; CP 145; Appendices "F", "G" and "H")

6. The age differential, which is an element of the crime of first degree child rape, was not met as to Counts 2 and 3. The persons engaging in sexual intercourse as to those two (2) counts are incapable of committing that offense.

7. Mr. Bobenhouse's constitutional rights under the Sixth Amendment to the United States Constitution and Const. art. I, § 22 were violated due to the variances between the Second Amended Information and the instructions.

8. At least one (1), if not more, of the acts relied upon by the State in support of Counts 1 and 4 occurred outside the charging period.

9. No unanimity instruction was given to the jury. The State failed to elect among multiple acts in closing argument or otherwise.

10. Defense counsel's failure to propose or object to the absence of a unanimity instruction constitutes ineffective assistance of counsel.

11. Mr. Bobenhouse's trial did not commence in time under CrR 3.3.

12. A. The trial court erroneously concluded that Counts 1 and 4 were not the "same criminal conduct."

B. The trial court erroneously concluded that Counts 3 and 5 were not the "same criminal conduct."

13. Mr. Bobenhouse's exceptional sentence violates *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed.2d 403 (2004).

14. The aggravating circumstances which the sentencing court considered were not submitted to the jury as required by RCW 9.94A.537(2).

15. The State failed to comply with the notice provisions of RCW 9.94A.537 in seeking an exceptional sentence.

16. With the exception of the first box checked under the Findings of Fact on Appendix 2.4 of the Judgment and Sentence, Mr. Bobenhouse assigns error to all of the remaining Findings of Fact and the Conclusion of Law as checked on Appendix 2.4. (CP 221-22; Appendix "T")

17. The sentencing court exceeded its authority when it imposed the no-contact order involving the children's former foster parents.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the addition of the language ("and/or caused an innocent or irresponsible person to engage in sexual intercourse") to Instructions 13, 14 and 17 invade the legislative prerogative of defining criminal offenses?

2. Do the to-convict instructions (13, 14 and 17) define a criminal offense?

3. Were Mr. Bobenhouse's constitutional rights under the Sixth Amendment to the United States Constitution and Const. art. I, § 22 vio-

lated by the failure to include the quoted language in the Second Amended Information?

4. If a child is deemed incapable of committing a crime, may an adult be found guilty as an accomplice to what would not otherwise be a criminal offense?

5. Can a person be an accomplice to a crime which is impossible of commission?

6. Were the accomplice liability instructions properly submitted to the jury?

7. Did the State prove, beyond a reasonable doubt, that an offense occurred within the charging period of Counts 1 and 4?

8. Was the trial court required to submit a unanimity instruction to the jury; and, if so, was Mr. Bobenhouse denied a unanimous verdict?

9. Was Mr. Bobenhouse denied effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Const. art. I, § 22?

10. Did a violation of Mr. Bobenhouse's time for trial right occur?

11. Can first degree child rape and first degree incest be considered "same criminal conduct" for purposes of sentencing?

12. Did the exceptional sentence imposed by the trial court violate *Blakely v. Washington, supra* and/or RCW 9.94A.537(2) and (3)?

13. Do the sentencing court's Findings of Fact support an exceptional sentence?

14. Did the State's failure to comply with the notice requirements of RCW 9.94A.537(1) deprive Mr. Bobenhouse of due process under the Fourteenth Amendment to the United States Constitution and Const. art. I, § 3?

15. Following conviction for a sex offense does the sentencing court have authority under RCW 9.94A.700(5) to impose a no-contact order with the former foster parents of the child victim(s)?

16. Should the rule of lenity be applied?

STATEMENT OF THE CASE

An Information was filed on November 21, 2005 charging Mr. Bobenhouse with two (2) counts of first degree child rape and two (2) counts of first degree incest. (CP 1)

Mr. Bobenhouse was arraigned on November 28, 2005. (11/28/05 RP 1, *et seq*)

An affidavit of prejudice was filed against the Honorable William Acey. He stepped down on December 12, 2005. (12/12/05 RP 1, *et seq*)

On January 9, 2006 the Honorable Raymond Lutes disqualified himself at the defendant's request. (01/09/06 RP 1, *et seq*)

A hearing was conducted on January 25, 2006. The prosecuting attorney asserted that the outside date for trial was March 20, 2006. He stated that a ninety (90) day time frame applied and that an extension was

permissible due to the disqualification of a judge. The prosecuting attorney also informed the Court that a competency hearing had been conducted in a prior case involving the children who were the alleged victims in this case. Defense counsel made no objections to any of the prosecuting attorney's statements. (01/25/06 RP 6, ll. 15-21; RP 11, ll. 22-25)

The trial court set jury trial for April 11, 2006. The Court requested a waiver from Mr. Bobenhouse. No waiver was ever filed. A scheduling order was entered on January 31, 2006. (CP 84; 01/25/06 RP 10, ll. 1-6)

Mr. Bobenhouse sent a letter to the Court dated February 1, 2006. The letter was a complaint against his court-appointed attorney. (CP 86)

Mr. Bobenhouse's court-appointed attorney filed a motion to withdraw pending a complaint filed against him with the Washington State Bar Association (WSBA). The motion was filed on February 10, 2006. The Court granted the motion to withdraw on February 21, 2006. (CP 88; 02/21/06 RP 5, ll. 6-12)

An order appointing new counsel for Mr. Bobenhouse was filed on March 14, 2006. (CP 93)

At a hearing conducted on May 31, 2006 the Court and attorneys discussed a continuance and waiver of the trial date to sometime in August. Reference is made to an existing jury trial date of June 7, 2006. (05/31/06 RP 14, ll. 8-23)

No documents were ever filed with the Court Clerk indicating a re-setting of the jury trial from April 11 to June 7.

No record of any proceedings has been located in connection with any continuance of the jury trial from April 11 to June 7.

On June 1, 2006 a motion for a continuance was filed. A scheduling order was subsequently entered on June 13 setting jury trial for August 29, 2006. (CP 95; CP 97)

A Second Amended Information was filed on August 29, 2006. It added an additional count of first degree child rape. (CP 129)

Sergeant White of the Asotin County Sheriff's Office testified at trial. He investigated Mr. Bobenhouse's case based upon a referral from DSHS (CPS) on August 16, 2005. (RP 117, ll. 23-24; RP 119, ll. 9-16)

The referral from DSHS involved Mr. Bobenhouse's son and daughter. The children were reluctant to speak with Sergeant White. He arranged for an interview with Karen Winston, a forensic child interviewer, in Spokane. (RP 120, ll. 7-15; l. 21; RP 351, ll. 20-22)

Mr. Bobenhouse's son was born on June 4, 1996. His daughter was born on October 21, 1997. Mr. Bobenhouse was thirty-seven (37) years old at the time of trial. (RP 146, ll. 14-15; l. 18; RP 148, ll. 1-6; RP 194, ll. 8-9; ll. 13-14; RP 223, ll. 16-18)

The Bobenhouse family was living in Clarkston, Washington between June 4, 2002 and November 11, 2004. Mr. Bobenhouse was ar-

rested on November 10, 2004 in connection with another case. (RP 122, ll. 2-7; RP 223, ll. 20-24; RP 229, ll. 1-7)

Trial testimony indicated:

1. Oral sex between brother and sister;
2. Sexual intercourse between brother and sister;
3. Oral sex between son and father;
4. Father inserting finger in son's anus;
5. Father watching sexual activity between son and daughter;
6. All activity with son was between ages five (5) and seven (7).

(RP 158, ll. 1-13; RP 159, ll. 1-21; RP 160, ll. 18-20; RP 161, ll. 3-9; RP 163, ll. 6-19; RP 165, ll. 6-8; RP 178, ll. 9-19; RP 204, l. 15 to RP 206, l. 9; RP 339, l. 18; RP 341, ll. 16-17; RP 382, ll. 9-10; RP 382, l. 25 to RP 383, l. 4)

Doctor Hendrickson, a pediatrician at Rockwood Clinic, conducted an examination of both children on October 4, 2005. The examinations indicated that the genital areas of both children were normal. He could not say if either child had been sexually abused. (RP 399, ll. 5-7; RP 401, l. 20; RP 403, l. 17; RP 408, ll. 20-23; RP 412, l. 25 to RP 413, l. 1)

Mr. Bobenhouse moved to dismiss various counts of the Second Amended Information after the State rested. The motion was denied. As to Counts 2, 3 and 5 Mr. Bobenhouse challenged the sufficiency of the charging language. (RP 413, l. 18; RP 417, l. 17; RP 426, ll. 18-19; RP 428, l. 23 to RP 430, l. 13)

Mr. Bobenhouse objected to instructions 6, 7 and 8. Instruction 6 relates to accomplice liability. Instruction 7 defines the word “innocent.” Instruction 8 defines the word “irresponsible.” The latter instruction also includes language that a child under eight (8) years of age is presumed incapable of committing a crime. (RP 433, ll. 18-20; RP 435, ll. 3-5)

The trial court did not give a unanimity instruction to the jury. Defense counsel did not request a unanimity instruction.

The prosecuting attorney, in closing argument, addressed multiple acts to support the five (5) counts of the Second Amended Information. No election as to any particular act was made during closing argument. (RP 567, ll. 14-23; RP 568, ll. 9-21; RP 569, l. 23 to RP 570, l. 3)

The jury found Mr. Bobenhouse guilty of all five (5) counts. (CP 159; CP 160; CP 161; CP 162; CP 163)

Prior to the sentencing hearing the State filed a notice of intent to seek an exceptional sentence under RCW 9.94A.535(2)(c). A declaration was also filed in relation to RCW 9.94A.537(1). (CP 166; CP 167)

Mr. Bobenhouse was sentenced on November 1, 2006. Sentencing was pursuant to RCW 9.94A.712. Defense counsel argued a “same criminal conduct” analysis in connection with Counts 1 and 4 and Counts 3 and 5. Defense counsel also argued that any aggravating factors were included within the definition of the crimes themselves. (11/01/06 RP 5, l. 23 to RP 6, l. 15; RP 7, l. 15 to RP 8, l. 2)

The sentencing court declined to find "same criminal conduct." It assigned an offender score of twenty (20) to the first degree child rape convictions and an offender score of seventeen (17) to the first degree incest convictions. Findings of fact and conclusions of law were entered in conjunction with an exceptional sentence. (CP 187; CP 188)

Judgment and Sentence was entered on November 1, 2006. The sentencing court imposed a six hundred (600) month exceptional sentence on Counts 1, 2 and 3. A one hundred and two (102) month sentence was imposed on Counts 4 and 5. The sentence on Counts 4 and 5 ran concurrent with the sentence on Counts 1, 2 and 3. The entire sentence was consecutive to Mr. Bobenhouse's sentence under Asotin County Cause No. 05 1 00123 4. (CP 213; 11/01/06 RP 28, ll. 19-20)

In addition, the sentencing court imposed a lifetime no-contact order as to the children's former foster parents. (11/01/06 RP 25, ll. 9-24)

Mr. Bobenhouse filed his Notice of Appeal on November 16, 2006. (CP 226)

SUMMARY OF ARGUMENT

Instructional error deprived Mr. Bobenhouse of his constitutional right to a fair trial under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

Instructional error included adding an element to the criminal offenses charged under Counts 2, 3, and 5 of the Second Amended Information.

The addition of this element in the instructions violated the essential elements rule.

The addition of this element in the instructions altered the statutory elements of the offense.

The addition of this element in the instructions allowed Mr. Bobenhouse to be convicted of a non-existent crime.

The State's theory that the additional element constituted accomplice liability is specious.

The crime of first degree child rape as charged in Counts 2 and 3 of the Second Amended Information could not be committed due to the lack of a sufficient age differential between the children.

The State presented evidence of multiple acts in support of Counts 1 and 4; as well as Counts 3 and 5. No unanimity instruction was given to the jury. The State failed to elect which act it was relying upon for conviction under the respective counts.

Defense counsel's failure to either propose a unanimity instruction, or to object to its absence, constituted ineffective assistance of counsel.

Mr. Bobenhouse was not brought to trial within the parameters of CrR 3.3.

Counts 1 and 4 constitute the “same criminal conduct.” The sentencing court’s determination that they did not was error.

Counts 3 and 5 constitute the “same criminal conduct.” The sentencing court’s determination that they did not was error.

Mr. Bobenhouse’s exceptional sentence violates *Blakely v. Washington, supra*.

The aggravating circumstances which the sentencing court relied upon to impose the exceptional sentence were not presented to the jury.

The State did not follow the proper procedure with regard to the notice requirement of RCW 9.94A.537.

The multiple offense policy, which authorizes an exceptional sentence under RCW 9.94A.535(2), may not be applicable depending upon the determination of the other issues raised by Mr. Bobenhouse in this appeal.

The sentencing court improperly imposed a no-contact order with the former foster parents of the child victim(s).

Mr. Bobenhouse’s convictions must be reversed.

Mr. Bobenhouse’s convictions under Counts 2, 3 and 5 must be dismissed.

ARGUMENT

I. INSTRUCTIONS

A. COUNTS 2 AND 3

A crime; or not a crime? That is the question!

RCW 9A.44.073(1) defines the crime of first degree child rape as follows:

A person is guilty of rape of a child in the first degree **when the person has sexual intercourse** with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

(Emphasis supplied.)

Counts 1, 2 and 3 of the Second Amended Information correctly set forth the elements of first degree child rape.

Counts 1 and 2 deal with John Doe. Count 3 concerns Jane Doe.

Instruction 9 correctly defines first degree child rape.

Instruction 13, the to-convict instruction for Count 2, adds language which is not included in the Second Amended Information (“and/or caused an innocent or irresponsible person to engage in sexual intercourse with John Doe”).

Instruction 14, the to-convict instruction for Count 3, adds language which is not included in the Second Amended Information (“and/or caused an innocent or irresponsible person to engage in sexual intercourse with Jane Doe”).

The Sixth Amendment to the United States Constitution provides,
in part:

In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation

Const. art. I, § 22 states, in part:

In criminal prosecutions the accused shall have the right to ... demand the nature and cause of the accusation against him [and] to have a copy thereof

The constitutional right enunciated in the Sixth Amendment and Const. art. I, § 22 is known as the “essential elements rule.”

“All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him.” *State v. Kjorsvik*, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). An “**essential element is one whose specification is necessary to establish the very illegality of the behavior;**” *State v. Johnson*, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)

State v. Tinker, 155 Wn.2d 219, 221, 118 P.3d 885 (2005) (Emphasis supplied.); *see also: State v. Greathouse*, 113 Wn. App. 889, 899, 56 P.3d 569 (2002).

Counts 2 and 3 of the Second Amended Information did not include the language which was added to Instructions 13 and 14.

The State added an element to the offense. The State’s theory in adding the additional element to the to-convict instructions was accomplice liability.

Mr. Bobenhouse contends that the State's theory is critically flawed. The State attempts to create a crime where one does not exist.

"It is the function of the Legislature to define the elements of a specific crime." *State v. Wadsworth*, 139 Wn.2d 724, 734, 991 P.2d 80 (2000).

The State informed Mr. Bobenhouse he was charged with first degree child rape of his son under Count 2 and of his daughter under Count 3. Then, at trial, the State accused Mr. Bobenhouse of forcing his son and daughter to have sexual intercourse with one another. This is not the same offense.

Rather, sexual intercourse between a brother and a sister generally constitutes first degree incest when the age differential for child rape is missing.

The prosecuting attorney's accomplice liability argument in effect inserted an uncharged element into the crime. It is an element not included in the definition of the crime.

Jury instructions satisfy the fair trial requirement when, taken as a whole, they properly inform the jury of the law, are not misleading, and permit the parties to argue their theories of the case. If a trial court's decision about a jury instruction is based on a ruling of law, we review it *de novo*.

State v. Morgan, 123 Wn. App. 810, 814-15, 99 P.3d 411 (2004).

Mr. Bobenhouse has located only one case that comes close to what the State attempted in his trial. *State v. B.J.S.*, 72 Wn. App. 368, 864 P.2d 432 (1994).

The *B.J.S.* case involved the offense of child molestation first degree. The defendant and the victims were juveniles. A thirteen (13) year old had two (2) three (3) year olds engage in oral sex. The Court ruled at 372:

These facts establish that the victims were less than 12 years of age, that the perpetrator was more than 36 months older than the victims, and that there was a touching of the sexual parts of a person for which BJS could be legally accountable.

Following the *B.J.S.* case the Legislature amended RCW 9A.44.083, .086, .089 (the child molestation statutes), as well as RCW 9A.44.093 and .096 (sexual misconduct with a minor). *See: LAWS OF 1994, Ch. 271, §§ 303, 304, 305, 306 and 307.*

Interestingly enough, the Legislature did not amend the child rape statutes (RCW 9A.44.073, .076, .079).

“Where a defendant is convicted of a nonexistent crime, the judgment and sentence is invalid on its face.” *Personal Restraint of Hinton*, 152 Wn.2d 853, 857, 100 P.3d 801 (2004).

Mr. Bobenhouse contends that the crime set forth in the to-convict instructions is a nonexistent crime. The State, by adding the additional element, attempted to create a new crime.

[A] court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent omission.

Jenkins v. Bellingham Municipal Court, 95 Wn.2d 574, 579, 627 P.2d 1316 (1981).

The Legislature is presumed to know what it is doing. *See: Price v. Kitsap Transit*, 125 Wn.2d 456, 463, 886 P.2d 556 (1994). It amended various statutes in 1994 in response to the *B.J.S.* decision. It had the opportunity to amend the child rape statutes. It did not do so.

The court is not at liberty to create offenses through judicial construction. *Fasulo v. United States*, 272 U.S. 620, 71 L. Ed. 443, 47 S. Ct. 200 (1926); 22 C.J.S. *Criminal Law* § 17 (1961). Much less can we do so by supplying legislative omissions or correcting legislative oversight.

Jenkins v. Bellingham Municipal Court, *supra* 580-81.

The crime of first degree child rape has the following elements:

1. Sexual intercourse,
2. With a person under twelve (12) years of age,
3. Who is not married to the perpetrator, and
4. The perpetrator is at least twenty-four months older than the victim.

Both John Doe and Jane Doe were under twelve years of age. They were not married to each other nor to Mr. Bobenhouse. They engaged in sexual intercourse with one another.

The crime of first degree child rape can not be committed between John Doe and Jane Doe. John Doe's date of birth is June 4, 1996. Jane Doe's date of birth is October 21, 1997. The age differential is only sixteen and one-half (16 ½) months.

Thus, the State did not establish a necessary element of the offense.

Mr. Bobenhouse concedes that he is twenty-four (24) months older than either John Doe or Jane Doe. However, he is not "the perpetrator." The language of the statute is clear. In order to be guilty of the offense "the person" must have sexual intercourse with another. "The person" in this case is Mr. Bobenhouse. He did not have sexual intercourse with either child as alleged in Counts 2 and 3, or as set forth in the to-convict instructions. Thus, he is not "the perpetrator."

The meaning of a statute is a question of law reviewed *de novo*. *State v. Ammons*, 136 Wn.2d 453, 456, 963 P.2d 812 (1998). The appellate court's paramount duty is "to discern and implement the intent of the legislature." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Where the plain language of the statute is unambiguous, the legislature's intent is evident, and the statute may not be construed otherwise. *Id.*

State v. Thomas, 150 Wn.2d 666, 670, 80 P.3d 168 (2003); *see also*, *State v. Morris*, 123 Wn. App. 467, 473, 98 P.3d 513 (2004).

As previously indicated, the Legislature had the opportunity to amend RCW 9A.44.073. It did not do so.

‘[W]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.’ *United Parcel Serv., Inc. v. Department of Rev.*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984).

In re Swanson, 115 Wn.2d 21, 27, 793 P.2d 962 (1990) (Emphasis supplied.); *see also: State v. Jacobs*, 154 Wn.2d 596, 603, 115 P.3d 281 (2005).

The obvious difference in language utilized by the Legislature in the child rape statutes, as opposed to the child molestation and sexual misconduct with a minor statutes, clearly indicates that it did not intend what the State attempted to accomplish in this case.

We cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language. **We assume the legislature “means exactly what it says.”** *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 964, 977 P.2d 554 (1999).

State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). (Emphasis supplied.)

B. COUNT 5

RCW 9A.64.020 states, in part:

(1)(a) **A person is guilty** of incest in the first degree **if he or she engages in sexual intercourse** with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.

...

(Emphasis supplied.)

Instruction 15 correctly defines first degree incest.

Instruction 17, the to-convict instruction for Count 5, adds language which is not included in the Second Amended Information (“and/or caused an innocent or irresponsible person to engage in sexual intercourse with Jane Doe”).

Mr. Bobenhouse asserts that his argument with regard to the first degree child rape statute is equally applicable to first degree incest as charged in Count 5.

The State again attempts to insert additional language into the statutory elements in order to create a new crime which the Legislature has not authorized. *See: State v. Chino*, 117 Wn. App. 531, 540-41, 72 P.3d 256 (2003) (instructing a jury on uncharged alternatives of an offense is presumed prejudicial unless it affirmatively appears the error was harmless).

Under no set of circumstances can the instructional error in the to-convict instructions be considered harmless. The error allowed Mr. Bobenhouse to be convicted of non-existent crimes.

C. ACCOMPLICE LIABILITY

The State hung its hat on a theory of accomplice liability. The trial court instructed the jury on that theory. Instructions 6, 7 and 8 outline that

theory. Instructions 6, 7, and 8 do not cure the definitional problem in the to-convict instructions. They exacerbate it.

An error infringing upon a defendant's constitutional rights is presumed to be prejudicial, and the State has the burden of proving the error was harmless. ...

... An appellate court will consider such error only when giving or not giving an instruction invades a fundamental constitutional right of the accused and would probably change the result of the case. That determination requires careful attention to the words actually used in the instruction because whether the defendant has been accorded full constitutional rights depends on the way a reasonable juror could have interpreted the instruction.

State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997).

Instruction 6 parallels RCW 9A.08.020(1) and (2)(a).

RCW 9A.08.020 states, in part:

- (1) A person is guilty of a **crime** if it is committed by the conduct of another person for which he is legally accountable.
- (2) A person is legally accountable for the conduct of another person when:
 - (a) Acting with the kind of culpability that is sufficient for **the commission of the crime**, he causes an innocent or irresponsible person to engage in such conduct

(Emphasis supplied.)

Initially, it should be noted that "a crime" must occur. If no crime occurs, then no liability attaches.

Instruction 7 defines the word "innocent." Instruction 8 defines the word "irresponsible."

Instruction 8 also sets forth the fact that a child under eight (8) years of age is incapable of committing a crime.

RCW 9A.04.050 states, in part:

Children under the age of eight years are incapable of committing crime. Children of eight and under twelve years of age are presumed to be incapable of committing crime, but this presumption may be removed by proof that they have sufficient capacity to understand the act or neglect, and to know that it was wrong. ...

The State's theory boiled down to the following:

1. Mr. Bobenhouse was legally accountable for the actions of his children;
2. Mr. Bobenhouse had his children engage in sexual intercourse with one another;
3. Mr. Bobenhouse was more than twenty-four (24) months older than either child;
4. Therefore Mr. Bobenhouse was guilty of first degree child rape and first degree incest as charged in Counts 2, 3 and 5.

Accomplice liability is not a separate crime – it is **predicated on aid to another "in the commission of a crime" and is in essence liability for that crime.** RCW 9A.08.-020(3); *State v. Toomy*, 38 Wn. App. 831, 840, 690 P.2d 1175, *review denied*, 103 Wn.2d 1012 (1984). **Conviction for accomplice liability is improper where there is**

no proof that a principal “actually committed the crime.” *State v. Nikolich*, 137 Wash 62, 66-67, 241 P. 664 (1925); *State v. Taplin*, 9 Wn. App. 545, 547, 513 P.2d 549 (1973).

State v. Peterson, 54 Wn. App. 75, 78, 772 P.2d 513 (1989). (Emphasis supplied.)

Since both children were under eight (8) years of age, and there was not the necessary age differential between them, the crime of first degree child rape could not and was not committed by either child. Thus, accomplice liability cannot be imposed on Mr. Bobenhouse.

The State charged “the crime” of first degree child rape. It was required to prove each and every element of that offense. It did not do so.

The child rape convictions under Counts 2 and 3 must be reversed and dismissed.

Mr. Bobenhouse’s conviction for first degree incest under Count 5 must also be reversed and dismissed. Mr. Bobenhouse never engaged in sexual intercourse with his daughter.

D. UNANIMITY INSTRUCTION

Testimony at trial indicated at least two (2) types of sexual intercourse between Mr. Bobenhouse and his son. These included oral sex and an incident involving insertion of a finger in his son’s anus. (RP 158, ll. 8-13; RP 160, l. 18)

Trial testimony further established multiple incidents of sexual intercourse between the two (2) children.

The State, in closing argument, did not elect between the multiple acts described.

If the State presents evidence of more than one act that could form the basis of one count charged, either the State must tell the jury which act to rely on in its deliberations or the court must instruct the jury to agree on a specific act. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *State v. Petrich*, 101 Wn.2d 566, 570, 683 P.2d 173 (1984)). **Failure to follow one of these options is constitutional error that is not harmless** if a rational juror could have a reasonable doubt as to any one of the alleged acts. *Id.* at 409, 411. Because of its constitutional implications, this issue may be raised for the first time on appeal. RAP 2.5(a)(3); *State v. Fiallo-Lopez*, 78 Wn. App. 717, 725, 899 P.2d 1294 (1995).

State v. Hepton, 113 Wn. App. 673, 684-85, 54 P.3d 233 (2002). (Emphasis supplied.)

Counts 1 and 2 of the Second Amended Information both involved first degree child rape and John Doe. However, Instructions 12 and 13 (the to-convict instructions on Counts 1 and 2) were not identical. The additional language in Instruction 13 takes it outside the testimonial framework of the incidents described by John Doe.

Thus, as to Count 1 there are at least two (2) types of acts described for the jury. As to Count 4, the same types of acts could constitute first degree incest.

As clearly stated in *State v. Hayes*, 81 Wn. App. 425, 431, 914 P.2d 788 (1996):

In sexual abuse cases where multiple counts are alleged to have occurred within the same charging period, **the State need not elect particular acts associated with each count so long as the evidence “clearly delineate[s] specific and distinct incidents of sexual abuse” during the charging periods. The trial court must also instruct the jury that they must be unanimous as to which act constitutes the count charged and that they are to find “separate and distinct acts” for each count when the counts are identically charged.**

(Emphasis supplied.)

It is clear that a unanimity instruction was required.

The State’s failure to elect a specific act with regard to **Count 1** deprived Mr. Bobenhouse of his constitutional right to a unanimous verdict. There is no way to determine whether it was the oral sex or the finger insertion which the jury relied on for this conviction.

The State’s failure to elect a specific act with regard to **Count 4** deprived Mr. Bobenhouse of his constitutional right to a unanimous verdict. There is no way to determine whether it was the oral sex or the finger insertion which the jury relied on for this conviction.

Moreover, John Doe’s testimony indicated that one (1) or more of the multiple acts may have occurred outside of the charging period. The acts occurred between ages five (5) and seven (7). John Doe was five (5) years old on June 4, 2001 and seven years old on June 4, 2003. The one (1) year period of time from June 4, 2001 to June 4, 2002 is not included

in Count 1 of the Second Amended Information. *See: State v. Aho*, 137 Wn.2d 736, 744, 975 P.2d 512 (1999).

Even though John Doe testified that the acts occurred at the Apple-side address in Clarkston, the State did not establish exactly when the family lived at that address. They lived at two (2) different addresses between the dates indicated. (RP 223, ll. 20-24)

A significant evidentiary disparity exists as to the State's charging period.

II. AFFIRMATIVE DEFENSE

As previously discussed, RCW 9A.04.050 declares that children under eight (8) years of age are incapable of committing crime. This is known as the infancy defense.

The purpose of the infancy defense is "to protect from the criminal justice system those individuals of tender years who are less capable than adults of appreciating the wrongfulness of their behavior."

State v. Ramer, 151 Wn.2d 106, 114, 86 P.3d 132 (2004), citing *State v. Q.D.*, 102 Wn.2d 19, 23, 685 P.2d 557 (1984).

Under the facts of this case neither John Doe nor Jane Doe could appreciate the wrongfulness of sexual intercourse between brother and sister.

Sexual intercourse between brother and sister would normally constitute the crime of first degree incest. However, the infancy defense would preclude prosecution of either child.

Mr. Bobenhouse asserts that the infancy defense constitutes an affirmative defense. When affirmative defenses are raised, and/or are the subject matter of a criminal prosecution, certain responsibilities are placed upon either the State or the defendant depending upon who has the burden of proof/persuasion.

Mr. Bobenhouse asserts that the State has the burden of proof to disprove the infancy defense beyond a reasonable doubt based upon *State v. Lively*, 130 Wn.2d 1, 10-11, 921 P.2d 1035 (1996):

McCullum [*State v. McCullum*, 98 Wn.2d 484, 656 P.2d 1064 (1983)] and *Acosta* [*State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984)] provide a two-tiered test to evaluate whether the State or a defendant has the ultimate burden of persuasion. **First, the court must determine whether the defense is an element of the crime or whether the defense negates an element of the crime.** Under the due process provisions of the Fifth and Fourteenth Amendments of the United States Constitution, the State must prove every element of an offense beyond a reasonable doubt. **If a statute indicates an intent to include absence of a defense as an element of the offense, or the defense negates one or more elements of the offense, the State has a constitutional burden to prove the absence of the defense beyond a reasonable doubt.** *McCullum*, 98 Wn.2d at 490; *Acosta*, 101 Wn.2d at 615; *see also Patterson v. New York*, 432 U.S. 197, 214-15, 97 S. Ct. 2319, 53 L. Ed.2d 281 (1977).

Second, if there is no due process requirement, the court must determine whether the Legislature intended, nevertheless, to place the ultimate burden of persuasion on

the State to prove the absence of the defense beyond a reasonable doubt. If the statute does not expressly assign the burden to either the State or the defendant, and provides no indication of the Legislature's intent to overrule common law, the statute will be presumed to follow judicial precedent. *McCullum*, 98 Wn.2d at 493; *see also State v. Calderon*, 102 Wn.2d 348, 351, 684 P.2d 1293 (1984).

(Emphasis supplied.)

The infancy defense basically negates all elements of a crime. It states that a person, under a certain age, cannot commit a crime. It is an absolute bar to prosecution.

Once the age of the child is established, the State has the burden of disproving the infancy defense beyond a reasonable doubt.

Mr. Bobenhouse contends that if the infancy defense is an absolute bar to the prosecution of the principal actors; then it also constitutes an absolute bar to prosecution as an accomplice. If the principal cannot commit a crime; an accomplice cannot commit that crime.

Mr. Bobenhouse previously discussed the insufficiency of evidence concerning the age differential for the offense of first degree child rape. The absence of that element establishes that the State did not prove that offense beyond a reasonable doubt. *See: State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

Insofar as first degree incest is concerned (Count 5 only) even though the elements of the offense are present; the elements are negated by the infancy defense.

RCW 9A.04.100(1) states:

Every person charged with the commission of a crime is presumed innocent unless proved guilty. No person may be convicted of a crime unless each element of such crime is proved by competent evidence beyond a reasonable doubt.

Prior to addressing the remaining issues, Mr. Bobenhouse points out that RCW 9A.28.020(2) provides:

If the conduct in which a person engages otherwise constitutes an attempt to commit a crime, it is no defense to a prosecution of such attempt that the crime charged to have been attempted was, under the attendant circumstances, factually or legally impossible of commission.

Mr. Bobenhouse was not charged with an attempt. He was charged with the allegedly complete crimes of first degree child rape and first degree incest (Counts 2, 3 and 5).

Mr. Bobenhouse contends that the crimes were impossible of commission under the facts and circumstances of his case. He has not located any authority to indicate that the common law defense of impossibility does not apply to an allegedly complete crime.

Moreover, the jury was not given any instructions on attempt. No to-convict instruction and no definitional instructions on attempt were pro-

posed by the State. *See: State v. Aumick*, 126 Wn.2d 422, 429-30, 894 P.2d 1325 (1995).

III. CrR 3.3

CrR 3.3(a)(1) states:

It shall be the responsibility of the court to ensure a trial in accordance with this rule to each person charged with a crime.

(Emphasis supplied.)

Mr. Bobenhouse was timely arraigned in accord with the provisions of CrR 4.1(a)(1). However, a trial date was not set at the arraignment.

CrR 3.3(d)(1) provides, in part:

The court shall, within 15 days of the defendant's actual arraignment in superior court ... set a date for trial which is within the time limits prescribed by this rule and notify counsel for each party of the date set. ... The notice shall set forth the proper date of the defendant's arraignment and the date set for trial.

It does not appear that either the State or the Court complied with CrR 3.3(d)(1).

CrR 3.3(b)(1) states:

A defendant who is detained in jail shall be brought to trial within the longer of

- (i) 60 days after the commencement date specified in this rule, or
- (ii) The time specified under subsection (b)(5).

The commencement date was the date of arraignment. Mr. Bobenhouse was arraigned on November 28, 2005. Sixty (60) days expired on January 27, 2006. *See*: CrR 3.3(c)(1).

The question becomes whether or not any excluded period under CrR 3.3(e) is applicable. If any excluded period is applicable, then a determination needs to be made as to whether or not the April 11, 2006 trial date was within the rule's time parameters.

An Affidavit of Prejudice was filed against Judge Acey. He removed himself from the case on December 12, 2005. Judge Lutes disqualified himself on January 9, 2006.

CrR 3.3(e) provides, in part:

The following periods shall be excluded in computing the time for trial:

...

(9) *Disqualification of Judge.* A five-day period of time commencing with the disqualification of the judge to whom the case is assigned for trial.

Mr. Bobenhouse concedes that an additional ten (10) days should be added to the original sixty (60) day time period. Thus, instead of a termination date of January 27, 2006, time for trial would elapse on February 6, 2006.

The prosecuting attorney, at a hearing held on January 25, 2006, thoroughly misstated the time for trial. He indicated a ninety (90) day

time frame was in effect. It was a sixty (60) day time frame with an additional ten (10) day excluded period.

Defense counsel did not object to the prosecuting attorney's statement.

The trial court asked for a waiver. No waiver was ever supplied. Jury trial was scheduled for April 11, 2006 and a scheduling order was entered on January 31, 2006.

CrR 3.3(d)(3) provides, in part:

A party who objects to the date set upon the ground that is not within the time limits prescribed by this rule must, within 10 days after the notice is mailed or otherwise given, move that the court set a trial within those time limits. ... A party who fails, for any reason, to make such motion shall lose the right to object that a trial commenced on such a date is not within the time limits prescribed by this rule.

It does not appear that either Mr. Bobenhouse or defense counsel objected to the April 11, 2006 trial setting. There were twelve (12) days left in the time for trial period when the Court set the trial date. It would appear that Mr. Bobenhouse lost his right to object.

Nevertheless, the jury trial did not commence on April 11, 2006. Rather, due to defense counsel being allowed to withdraw on February 21, 2006, a new attorney was appointed to represent Mr. Bobenhouse. The order appointing new counsel was not filed until March 14, 2006.

CrR 3.3(c)(2)(vii) states:

Disqualification of Counsel. The disqualification of the defense attorney or prosecuting attorney. The new commencement date shall be the date of the disqualification.

Since defense counsel was disqualified effective February 21, 2006, this constitutes the new commencement date. The sixty (60) day time for trial period under CrR 3.3(b)(1)(i) was revived. Sixty (60) days from February 21, 2006 is April 24, 2006. (Saturday and Sunday excluded).

The April 11 date was within the new time for trial period. However, as previously indicated, the matter did not proceed to trial on April 11.

Mr. Bobenhouse has been unable to ascertain what, if any, document was filed resetting the trial date from April 11 to June 7, 2006.

A motion for continuance was filed on June 1, 2006. A scheduling order was subsequently entered resetting the jury trial to August 29, 2006.

Thus, the period between April 24 and June 1, (thirty-eight (38) days), is neither an excluded period nor a period of time requiring resetting of the commencement date. *See:* CrR 3.3(c)(2) and (e).

CrR 3.3(d)(4) provides:

If a trial date is set outside the time allowed by this rule, but the defendant lost the right to object to that date pursuant to subsection (d)(3), that date shall be treated as the last allowable date for trial, subject to section (g). **A later trial date shall be timely only if the commencement date is reset pursuant to subsection (c)(2) or there is a sub-**

sequent excluded period pursuant to section (e) and subsection (b)(5).

(Emphasis supplied.)

April 11, 2006 was the last allowable date for trial under CrR 3.3(d)(3).

April 24, 2006 was the last allowable date for trial pursuant to the resetting of the commencement date under CrR 3.3(c)(2)(vii).

CrR 3.3(g) has no application to the facts and circumstances of Mr. Bobenhouse's case. This rule grants the State a cure period. The State did not exercise its option under CrR 3.3(g).

CrR 3.3(b)(5) states:

If any period of time is excluded pursuant to section (e), the allowable time for trial shall not expire earlier than 30 days after the end of that excluded period.

CrR 3.3(b)(5) only applies to excluded periods. It does not apply to resetting of a commencement date under CrR 3.3(c)(2). Thus, it has no significance in relation to expiration of the 60 day time for trial on April 24.

On the other hand, if it is applied to the April 11 date, an additional thirty (30) days would take the time for trial to May 11, 2006.

There is no record of any trial setting between April 11 and May 11.

The June 1, 2006 continuance motion was made after expiration of time for trial. Mr. Bobenhouse argues that that motion cannot revive that expiration.

In *State v. Austin*, 59 Wn. App. 186, 200, 796 P.2d 746 (1990) the Court stated:

We hold that CrR 3.3(f)(2), [now CrR 3.3(d)(3)], which allows 10 days for any party objecting to the resetting of a trial date to move for a new trial date, does not apply to a trial setting procedure which occurs fewer than 10 days before the expiration of the speedy trial period.

Mr. Bobenhouse was not required to object to the motion for continuance filed by his attorney on June 1, 2006. Mr. Bobenhouse was not required to object to the rescheduled trial date of August 29, 2006.

The ten (10) day period for objecting under CrR 3.3(d)(3) had already expired. In fact, thirty-eight (38) days had elapsed beyond the time for trial. The case should have been dismissed if a motion had been made.

In *State v. Ross*, 98 Wn. App. 1, 4-5, 981 P.2d 688 (1999) the Court noted:

The right to a speedy trial under this rule is a fundamental right. [Citations omitted.] Although the court is ultimately responsible for ensuring compliance with the speedy trial rule, the State is primarily responsible for bringing the defendant to trial within the speedy trial period. [Citations omitted.]

In bringing a defendant to trial, **the right to a speedy trial imposes upon the prose-**

cution a duty of good faith and due diligence. [Citations omitted.] Thus, **the failure to comply strictly with the speedy trial rule requires outright dismissal, regardless of whether the defendant shows prejudice.** [Citations omitted.]

(Emphasis supplied.)

Neither the Court nor the State met the requirements of the time for trial rule. Mr. Bobenhouse is not required to show prejudice.

CrR 3.3(h) states:

A charge not brought to trial within the time limit determined under this rule shall be dismissed with prejudice. The State shall provide notice of dismissal to the victim ... No case shall be dismissed for time-for-trial reasons except as expressly required by this rule, a statute, or the state or federal constitution.

Dismissal is required under CrR 3.3(h).

Alternatively, the State's mismanagement of the case necessitates dismissal under CrR 8.3(b). *See: State v. Blackwell*, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993).

... [A] criminal defendant also has a due process right to a record of sufficient completeness for review of errors. [Citations omitted.] In light of the fact that the omissions in the record are extensive, and there is virtually no way ... to supplement the record or to prove the specific content of the omitted sections, we decline to deem this issue waived.

State v. Clinkenbeard, 130 Wn. App. 552, 571, 123 P.3d 872 (2005).

Mr. Bobenhouse urges the Court to establish that the State must strictly comply with the provisions of CrR 3.3. Failure to comply constitutes mismanagement sufficient to meet a demand for dismissal under CrR 8.3.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). *Strickland* requires:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984).

State v. Cienfuegos, 144 Wn.2d 222, 226-27, 25 P.3d 1011 (2001).

It is well settled law in the State of Washington that a unanimity instruction is required when the State presents multiple acts to a jury for determination. The State's failure to elect a specific act to support the charged offense compounds the lack of a unanimity instruction.

As in *Cienfuegos*, Mr. Bobenhouse was entitled to a unanimity instruction. In fact, a unanimity instruction is required pursuant to *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984) and *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

It is impossible to determine which act the jury relied upon to support its determination that Mr. Bobenhouse was guilty of first degree child rape as charged in **Count 1**.

It is impossible to determine which act the jury relied upon to support its determination that Mr. Bobenhouse was guilty of first degree incest as charged in **Count 4**.

Due to the fact that this impossibility exists, Mr. Bobenhouse asserts that he has carried his burden of proof. The result of the proceeding would have been different except for the lack of the unanimity instruction. Defense counsel was ineffective.

The unanimity instruction makes certain that jurors unanimously agree that a specific act meets the criteria under the specific count of an information. In the absence of that specificity, speculation as to unanimity prevails.

Speculation and conjecture do not satisfy the State's burden of proof beyond a reasonable doubt.

Mr. Bobenhouse also maintains that defense counsel was ineffective in not moving to dismiss the prosecution of his case for violation of time for trial under CrR 3.3.

Because the asserted error is a violation of a court rule (rather than a constitutional violation), it is governed by the harmless error test. *Templeton* [*State v. Templeton*, 148 Wn.2d 193, 59 P.3d 632 (2002)] at 220. Thus, only if the error was prejudicial in that “within reasonable probabilities, [if] the error [had] not occurred, the outcome of the [motion] would have been materially affected” will reversal be appropriate. *Id.* (second alteration in original) (quoting *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001)).

State v. Robinson, 153 Wn.2d 689, 697, 107 P.3d 90 (2005).

The error was prejudicial. Time for trial had already expired. A motion should have been made. It would have been granted. *See: State v. Thomas*, 95 Wn. App. 730, 737-39, 976 P.2d 1264 (1999) (ineffective assistance of counsel will not implicate dismissal under CrR 3.3 when the defendant waives time for trial in order to obtain a new attorney); *State v. Franulovich*, 18 Wn. App. 290, 293, 597 P.2d 264 (1977), *review denied*, 90 Wn.2d 1001 (1978) (defense attorney may not waive a client’s right to speedy trial where the record reveals that the defendant is a victim of inadequate representation); *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984) (inadequate representation does not exist where the nature of the case precludes adequate trial preparation within the time frame of CrR 3.3).

The *Thomas*, *Franulovich* and *Campbell* cases, though not directly in point, provide guidance to the Court.

Mr. Bobenhouse did not sign a waiver of time for trial. Defense counsel did not ask for a continuance until after the time for trial period had expired. The State did not request a cure period.

Not only the trial court and the State, but also defense counsel dropped the ball in this case. Defense counsel's performance was deficient. It prejudiced Mr. Bobenhouse by allowing the case to go to trial when it was subject to dismissal under CrR 3.3(h).

V. EXCEPTIONAL SENTENCE

A. No Jury Determination

RCW 9.94A.537(1) states:

At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(Emphasis supplied.)

The notice provision of RCW 9.94A.537(1) is constitutionally based.

The Fourteenth Amendment to the United States Constitution provides, in part: "... No ... state ... shall deprive any person of life, liberty, or property, without due process of law"

Const. art. I, § 3 states: "No person shall be deprived of life, liberty, or property, without due process of law."

Mr. Bobenhouse asserts that the notice contemplated by RCW 9.94A.537 requires either inclusion in the charging document, or, alternatively, a separate court filing listing the particular aggravating circumstances upon which the State will rely.

Mr. Bobenhouse submits that his interpretation is supported by RCW 9.94A.537(2) which provides, in part:

The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury's verdict on the aggravating factor must be unanimous, and by special interrogatory. ...

(Emphasis supplied.)

No aggravating circumstances were presented to the jury. No special interrogatory was presented to the jury.

The State's failure to submit the aggravating factors to the jury negates their validity.

Mr. Bobenhouse further asserts that RCW 9.94A.535 adds additional weight to his argument. It states, in part:

... Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

... (3) Aggravating Circumstances - Considered by a Jury - Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. **Such facts should be deter-**

mined by procedures specified in RCW 9.94A.537.

...

(Emphasis supplied.)

All of the sentencing court's Findings of Fact, with the exception of the offender score issue, are contained within RCW 9.94A.535(3).

The State totally failed to comply with the notice requirements of RCW 9.94A.537. The aggravating factors which the sentencing court set forth in its Findings of Fact are null and void due to that noncompliance.

Mr. Bobenhouse argues that the exceptional sentence must be reversed. He is entitled to be resentenced. *See: State v. Ortega*, 131 Wn. App. 591, 594-95, 128 P.3d 146 (2006); *Blakely v. Washington, supra*.

B. Multiple Offense Policy

RCW 9.94A.535(2) provides, in part:

... (2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

...

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

...

The sentencing court's first Finding of Fact deals with Mr. Bobenhouse's multiple current offenses. He concedes that this is a valid aggravating factor and that no jury determination is required. *See: State v. Alkire*, 124 Wn. App. 169, 174, 100 P.3d 837 (2004).

However, in the event the Court reverses any or all of Mr. Bobenhouse's convictions, then his offender score may dramatically change. In that event, resentencing is an absolute requirement. The multiple offense aggravating factor may not apply.

C. Same Criminal Conduct

An appellate court

... will not disturb the trial court's determination of whether two crimes involve the same criminal conduct for sentencing purposes unless there is a clear abuse of discretion or misapplication of law. *State v. Elliott*, 114 Wn.2d 6, 17, 785 P.2d 440, *cert. denied*, 498 U.S. 838 (1990).

State v. Morris, 123 Wn. App. 467, 475, 98 P.3d 513 (2004).

Mr. Bobenhouse asserts that the trial court erroneously determined that Counts 1 and 4 did not constitute the "same criminal conduct."

RCW 9.94A.589(1)(a) contains the definition of "same criminal conduct":

... "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. ...

Mr. Bobenhouse's son was the same victim in Counts 1 and 4. The offenses, as described in testimony, would indicate that the offense charged in Count 4 is the same offense upon which the State relied for the charge of first degree child rape under Count 1.

Mr. Bobenhouse's daughter was the same victim in Counts 3 and 5. The offenses, as described in testimony, would indicate that the offense charged in Count 5 is the same offense upon which the State relied for the charge of first degree child rape under Count 3.

Mr. Bobenhouse contends that the sole issue as to "same criminal conduct" is whether or not first degree child rape and first degree incest involve the same criminal intent.

Mr. Bobenhouse relies upon *State v. Dolen*, 83 Wn. App. 361, 364-65, 921 P.2d 590 (1996) to support his "same criminal conduct" analysis. *See also: State v. Tili*, 139 Wn.2d 107, 123-25, 985 P.2d 365 (1999).

The *Dolen* Court discussed whether or not child rape and child molestation occurring during the same incident constituted "same criminal conduct." The issue was as to same criminal intent. The Court, in its analysis, stated:

... To answer this, we consider whether [the] objective criminal intent changed from one crime to the next. *State v. Vike*, 125 Wn.2d 407, 411, 885 P.2d 824 (1994). This depends, in part, on whether one crime furthered the other. *Vike*, 125 Wn.2d at 411.

In *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993), the court held that

child rape and attempted child rape committed by forced masturbation and fellatio followed by attempted anal intercourse, in quick succession, involve the same criminal intent – sexual intercourse. Here, we hold that [the] crimes, committed through continuous sexual behavior over a short period of time, also involve the same objective criminal intent – present sexual gratification. Furthermore, we believe that the child molestation furthered the child rape. ...

It follows that if the jury convicted ... of both offenses for the same incident, the crimes encompass the same criminal conduct.

First degree child rape and first degree incest involve the same criminal intent – sexual intercourse.

All of the necessary criteria to establish that two (2) crimes constitute “same criminal conduct” are met in Mr. Bobenhouse’s case.

The sentencing court abused its discretion when it ruled otherwise.

D. RCW 9.94A.712

RCW 9.94A.712 states, in part:

(1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) ... rape of a child in the first degree

...

(3)(a) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term.

(b) The maximum term shall consist of the statutory maximum sentence for the offense.

(c)(i) Except as provided in (c)(ii) of this subsection, the minimum term shall be either within the standard range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

...

Mr. Bobenhouse was convicted of three (3) counts of first degree child rape. The trial court was required to sentence him under RCW 9.94A.712.

Nevertheless, depending upon the outcome of this appeal, Mr. Bobenhouse's standard range sentence may change. If the standard range sentence changes, then resentencing will be required under RCW 9.94A.712(3)(c)(i).

Furthermore, in the event Mr. Bobenhouse's first degree child rape convictions are reversed and dismissed, he would no longer be subject to the sentencing provisions of RCW 9.94A.712.

E. RCW 9.94A.700

When a person is sentenced under RCW 9.94A.712, RCW 9.94A.712(6)(a)(i) authorizes a court to impose those conditions set forth in RCW 9.94A.700(5).

RCW 9.94A.700(5) provides, in part:

As a part of any term of community placement imposed under this section, the court may also order one or more of the following special conditions:

...

(b) The offender shall not have direct or indirect contact with the victim of the crime or **a specified class of individuals; ...**

(Emphasis supplied.)

Do former foster parents of a child victim, who was not victimized by a criminal defendant while in foster care, meet the definition of “a specified class of individuals” for purposes of the no contact order imposed by the sentencing court?

Mr. Bobenhouse argues that this particular condition does not relate to the circumstances of the crime(s) of which he was convicted.

As the Court noted in *State v. Llamas-Villa*, 67 Wn. App. 448, 456, 836 P.2d 239 (1992):

A condition is crime-related if it directly relates to the circumstances of the crime. RCW 9.94A.030(11) [now RCW 9.94A.030(13)]. No causal link need be established between the condition imposed and the crime committed, so long as the condition relates to the circumstances of the crime.

The children were placed in foster care following Mr. Bobenhouse’s arrest on an unrelated offense. Mr. Bobenhouse had contact with the children while they were in their first foster home placement.

However, after the children were moved to a second foster home Mr. Bobenhouse had no further contact with them. The foster parents named in the no-contact order are the second set of foster parents.

The children are no longer in foster care. They have been returned to their mother. This particular condition of Mr. Bobenhouse's sentence does not comply with the statutory prerequisites. (RP 220, l. 22 to RP 221, l. 12)

CONCLUSION

Mr. Bobenhouse was convicted of non-existent crimes as a result of erroneous to-convict instructions (13, 14 and 17).

The State's accomplice liability theory fails due to the fact that courts cannot intrude upon the legislative prerogative of defining criminal offenses.

The State's attempt to create a new criminal offense through the to-convict instructions violated Mr. Bobenhouse's constitutional rights under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

"... [T]he so-called rule of lenity ... provides that a statutory ambiguity in a criminal case should be resolved in favor of the defendant." *State v. Harris*, 39 Wn. App. 460, 465, 693 P.2d 750 (1985).

The rule of lenity should be applied to Counts 2, 3 and 5. Mr. Bobenhouse's convictions under these counts should be reversed and the charges dismissed.

The lack of a unanimity instruction deprived Mr. Bobenhouse of his right to a unanimous verdict from the jury as to Counts 1 and 4.

The lack of a unanimity instruction deprived Mr. Bobenhouse of his right to a unanimous verdict from the jury as to Counts 3 and 5.

Mr. Bobenhouse's convictions on these counts should be reversed and the charges dismissed.

Mr. Bobenhouse was not brought to trial within the period provided by CrR 3.3. Violation of the rule requires dismissal of the prosecution under CrR 3.3(h).

In the event all of the convictions are not reversed and dismissed then Mr. Bobenhouse is entitled to be resentenced.

In the event the case is not dismissed for violation of CrR 3.3, then Mr. Bobenhouse is entitled to be resentenced.

Counts 1 and 4 constitute the "same criminal conduct" for purposes of resentencing.

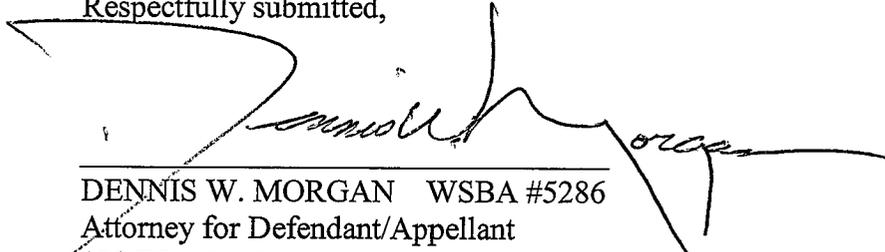
Counts 3 and 5 constitute the "same criminal conduct" for purposes of resentencing.

Unless the multiple offense policy under RCW 9.94A.535(2) applies, all other bases for the exceptional sentence fail due to noncompliance with RCW 9.94A.537(1) and (2).

The trial court had no authority to impose the no contact order involving the children's former foster parents.

DATED this 11th day of June, 2007.

Respectfully submitted,



DENNIS W. MORGAN WSBA #5286
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APPENDIX "A"

INSTRUCTION NO. 13

To convict the Defendant of the crime of Rape of a Child in the First Degree as charged in Count 2, each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about and between the 4th day of June 2002 and the 11th day of November 2004 the Defendant had sexual intercourse with John Doe and/or caused an innocent or irresponsible person to engage in sexual intercourse with John Doe;
- (2) That John Doe was less than twelve years old at the time of the sexual intercourse and not married to the Defendant;
- (3) That the Defendant was at least twenty-four months older than John Doe; and
- (4) That the acts occurred in Asotin County, the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "B"

INSTRUCTION NO. 14

To convict the Defendant of the crime of Rape of a Child in the First Degree as charged in Count 3, each of the following elements must be proved beyond a reasonable doubt:

- (1) That on or about and between the 4th day of June 2002 and the 11th day of November 2004 the Defendant had sexual intercourse with Jane Doe and/or caused an innocent or irresponsible person to engage in sexual intercourse with Jane Doe;
- (2) That Jane Doe was less than twelve years old at the time of the sexual intercourse and not married to the Defendant;
- (3) That the Defendant was at least twenty-four months older than Jane Doe; and
- (4) That the acts occurred in Asotin County, the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "C"

INSTRUCTION NO. 17

To convict the Defendant of the crime of Incest in the First Degree as charged in Count 5, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about and between the 4th day of June 2002 and the 11th day of November 2004 the Defendant engaged in sexual intercourse with Jane Doe and/or caused an innocent or irresponsible person to engage in sexual intercourse with Jane Doe;
- (2) That the Defendant and/or the innocent or irresponsible person who the Defendant caused to have sexual intercourse with Jane Doe was related to Jane Doe as an ancestor and/or a brother of either the whole or the half blood;
- (3) That at the time of the sexual intercourse, the Defendant knew that Jane Doe was so related to him and/or to the innocent or irresponsible person who the Defendant caused to have sexual intercourse with Jane Doe; and
- (4) That the acts occurred in Asotin County, the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

APPENDIX "D"

INSTRUCTION NO. 9

A person commits the crime of rape of a child in the first degree when that person has sexual intercourse with another person who is less than twelve years old and who is not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.

APPENDIX "E"

INSTRUCTION NO. 15

A person commits the crime of incest in the first degree if that person engages in sexual intercourse with a person whom he knows to be related to him, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood.

APPENDIX "F"

INSTRUCTION NO. 6

A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.

A person is legally accountable for the conduct of another person when, acting with the kind of culpability that is sufficient for the commission of a crime, he causes an innocent or irresponsible person to engage in such conduct.

APPENDIX "G"

INSTRUCTION NO. 7

Innocent means free from guilt; acting in good faith and without knowledge of incriminatory circumstances.

APPENDIX "H"

INSTRUCTION NO. 8

Irresponsible means not answerable to a higher authority.

Children under the age of eight years are incapable of committing crime. The law presumes that children who are at least eight but less than twelve years of age are incapable of committing crime.

APPENDIX "T"

SUPERIOR COURT OF WASHINGTON
FOR ASOTIN COUNTY

THE STATE OF WASHINGTON,
Plaintiff,

NO: 05-1-00210-9

v.

FINDINGS OF FACT AND CONCLUSIONS OF
LAW FOR AN EXCEPTIONAL SENTENCE

PHILLIP J. BOBENHOUSE,
Defendant.

APPENDIX 2.4 JUDGMENT AND SENTENCE

An exceptional sentence above below the standard range should be imposed based upon the following Findings of Fact and Conclusions of Law (findings and conclusions apply only if box(es) is/are checked):

I. FINDINGS OF FACT

- (213) Phillip J. Bobenhouse's criminal history, combined with multiple other current offenses, results in an offender score of 20 for purposes of sentencing in Counts One, Two and Three. The result is that there are eleven (11) points in Phillip J. Bobenhouse's score that would go unpunished if the minimum sentence were imposed within the highest sentence range provided for the offenses described in Counts One, Two and Three.
- Phillip J. Bobenhouse's criminal history, combined with multiple other current offenses, results in an offender score of 17 for purposes of sentencing in Counts Four and Five. The result of this offender score is that there are eight (8) points in Phillip J. Bobenhouse's score that would go unpunished if sentence were imposed within the highest sentence range provided for the offenses described in Counts Four and Five.
- (213) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victims.
- (213) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.
- (213) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.
- (213) The current offense involved domestic violence and the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time.

JUDGMENT AND SENTENCE (Felony)
(RCW 9.94A.500, .505)

- (213) The current offense involved domestic violence and the offense occurred within sight or sound of the offender's minor children under the age of eighteen years.
- (213) The current offense involved domestic violence and the offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.
- (213) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.
- (213) The defendant demonstrated or displayed an egregious lack of remorse.

Other: _____

II. CONCLUSIONS OF LAW

- (213) Any one of the above findings, standing on its own and irrespective of any other finding, is sufficient to support the exceptional minimum sentence imposed in Paragraph 4.5 of the Judgment and Sentence in the above-captioned cause.

Other: _____

Dated: Nov. 1, 2006


 JUDGE ROBERT L. ZAGELOW


 Michael G. Sanders
 Deputy Prosecuting Attorney
 WSBA #33881


 Scott D. Gallina
 Attorney for Defendant
 WSBA #20423


 Phillip J. Bobenhouse
 Defendant