

62537-3

62537-3

NO. 62537-3-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

JOSEPH KORTUS,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable John M. Meyer, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Joseph Kortus appeals from his convictions for two counts of Child Molestation in the First Degree and two counts of Incest in the Second Degree following a jury trial. The charges arose out of two incidents in church where Kortus participated in his daughter bouncing up and down apparently masturbating herself on his hand.

Kortus claims that the prosecutor engaged in misconduct for an objection to defense closing. However, the trial court determined that the objection using the term “uncharged offenses” was benign and not misconduct. Kortus also claims misconduct by the prosecutor arguing that Kortus may get a sexual thrill from “spitting in face of other churchgoers, of God...” But, the incidents occurred in church and Kortus smirked at the churchgoer watching him and his daughter. Thus, the argument related to the facts of the case and further, there was no objection made or curative instruction sought.

Kortus claims that the jury instruction on the incest charges improperly required the State to prove that Kortus was his daughter’s descendent. However, the terms related as a descendant properly required the State prove the relationship between the two.

Thus, Kortus’s convictions should be affirmed.

Kortus raises concerns for the first time about conditions of community custody and scrivener's errors in the judgment and sentence. Despite not having raised these issues below, this Court should order removal of the conditions and fix the scrivener's errors.

II. ISSUES

1. Where the trial court determined that an objection made to defense argument using the term uncharged offenses was benign and made in good faith, did the trial court abuse its' discretion in denying a motion for new trial?
2. Where an objection was made by the prosecutor using the term uncharged offenses during defense closing, was the objection prosecutorial misconduct meriting reversal?
3. Where the prosecutor argued that the defendant's conduct with his child in church may be a sexual thrill from "spitting in face of other churchgoers, of God," was the unobjected to argument so flagrant and ill-intentioned to merit a new trial?
4. Where the jury instructions required the State to prove that the defendant "was related to his daughter as a descendant", was there sufficient evidence to support that

relationship based upon the term “related to” and the definition “descendant” given to the jury?

5. Where the trial court set two improper community custody conditions without objection, should the case be remanded with the order to remove those conditions?

6. Where two scrivener’s errors were entered without objection, should the case be remanded with the order to correct the errors?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On August 21, 2007, Joseph Kortus was charged with Rape of a Child in the First Degree, three counts of Child Molestation in the First Degree and one count of Incest in the Second Degree alleged to have occurred between November of 2004, and December of 2006. CP 1-3. The allegations arose from two incidents when Kortus was seen at church with his nine year old daughter sitting on his hand bouncing up and down for ten to fifteen minutes. CP 5-6.

On August 12, 2008, the charges were amended to change the Incent in the First Degree charge to two counts of Incest in the Second Degree. CP 165.

On August 15, 2008, the information was amended to remove the Rape of a Child in the First Degree, remove one count of Child Molestation in the First Degree, and change the dates for the remaining two counts of Child Molestation in the First Degree and Incest in the Second Degree. CP 170-2. Kortus was tried upon these charges.

On August 18, 2009, the case proceeded to trial. 8/18/08 RP 2.¹

On August 22, 2008, the jury returned verdicts finding Kortus guilty of two counts of Child Molestation in the First Degree and two counts of Incest in the Second Degree. CP 198-201.

On October 9, 2008, the trial court sentenced Kortus on the Child Molestation in the First Degree to the mandatory minimum sentence at the middle of the standard range of 78 months with a maximum sentence up to life and the top of the standard range on

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

6/16/08 RP	Child Hearsay Hearing
8/1/08 RP	Motion to Dismiss
8/18/08 RP	Motions in Limine
8/19/08 RP	Trial Day 1 - Opening and Testimony
8/20/08 RP	Trial Day 2 - Testimony
8/21/08 RP	Trial Day 3 - Testimony, Jury Instructions and Closeing
9/14/08 RP	Motion for New Trial
10/9/08 RP	Sentencing.

the Incest in the Second Degree charges of 20 months. CP 228, 230, 10/9/08 RP 24.

One of the terms of community custody ordered was compliance with the Appendix H conditions proposed by the Department of Corrections in the presentence investigation report. CP 231, 237-8. Those conditions included the requirement that Kortus obtain a substance abuse evaluation and comply with recommended treatment and to not possess or peruse any pornographic materials. CP 238. No objection was made at the trial court related to those conditions. 10/9/08 RP 24.

On October 10, 2008, Kortus timely filed a Notice of Appeal. CP 239-40.

2. Statement of Substantive Facts

i. Summary of Trial Testimony

Cassie Jacobson lived in Skagit County and regularly attended Christ the King Church in Mount Vernon. 8/19/08 RP 27. On September 17, 2006, Jacobson attended with her husband in a wheelchair and sat in about the third row back. 8/19/08 RP 29-30. The church had regular chairs that clip together rather than pews. 8/19/08 RP 29. The defendant, Joseph Kortus, and a little girl about

9 to 11 years old arrived after the service had begun. 8/19/08 RP 30-1. They sat in the same row as Jacobson with about four chairs between them with the girl closest to Jacobson. 8/19/08 RP 31-3. The girl was wearing jeans. 8/19/08 RP 32. The girl was antsy and Kortus put his arm around her to stop her from bouncing around. 8/19/08 RP 33.

Once the pastor started talking and everyone sat down, Kortus put his hand under the girl's buttocks. 8/19/08 RP 34. The girl kept squirming around and readjusting herself. 8/19/08 RP 34. At one point the girl stood up, moved Kortus's hand on the chair and sat back down on it. 8/19/08 RP 34. Jacobson described that the girl was bouncing up and down and it appeared to be caused by both the man and the girl. 8/19/08 RP 35. Jacobson was bothered because it did not seem or look right. 8/19/08 RP 35.

After a few minutes, it appeared to Jacobson that the man's hand was outside the girl's clothes, but in contact with her genitals. 8/19/08 RP 35-6. The girl was bouncing around and took her fist and was pounding it on his right thigh. 8/19/08 RP 36. As she was pounding, the child stopped all of a sudden, reached between her legs and pulled Kortus's hand tight to her. 8/19/08 RP 36. The child calmed down and Kortus took his arm out and smirked at Jacobson.

8/19/08 RP 36. Based upon what Jacobson observed, it appeared to her that the girl had climaxed. 8/19/08 RP 63-4. Jacobson described the smirk as follows:

He looked at me - - we made eye contact and he just kind of looked at me like: Look what I just did and nobody else knows. That's what it felt like to me.

8/19/08 RP 36. Kortus had made eye contact with Jacobson more than one time before the smirk. 8/19/08 RP 48. Jacobson said it appeared that Kortus was proud of what had happened and that Jacobson was not going to do anything about it. 8/19/08 RP 49. From the time that Kortus put his hand under the girl until it ended took about 10 to 15 minutes. 8/19/08 RP 36. Based on what she had seen, Jacobson was most definitely concerned about molestation of the child. 8/19/08 RP 59.

Jacobson was appalled and frightened after the incident and didn't know what to do. 8/19/08 RP 37. Jacobson also had her ill husband to take care of, so she left without taking any action. 8/19/08 RP 37. Jacobson thought about it every Sunday and watched for them to come back. 8/19/08 RP 37.

On Sunday, October 29th, Kortus and the girl returned. 8/19/08 RP 38. Jacobson was not sitting nearby but told a friend about what she had seen on the prior occasion. 8/19/08 RP 38.

They went to the pastor's wife, Patti Snodgrass, and told her what Jacobson had seen. 8/19/08 RP 38. Snodgrass stood in an aisle near the man and child during the service so she could see them. 8/19/08 RP 38. Jacobson could not see Kortus and the child during the service from where she was sitting. 8/19/08 RP 38. After the service, Snodgrass told Jacobson that she had seen the same thing. 8/19/08 RP 63

Patti Snodgrass testified that her husband was pastor at Christ the King Church. 8/21/08 RP 3. In August of 2008, at the time of trial her husband had been pastor for four years. 8/21/08 RP 4. Snodgrass was the children's director at the church for three years and managed about 45 teachers and 75 children. 8/21/08 RP 4.

In 2006, Snodgrass was approached by Cassie Jacobson, who was a member of the congregation. 8/21/08 RP 5-6. Jacobson told Snodgrass what she had seen between a man and a little girl at the church. 8/21/08 RP 7. Jacobson told Snodgrass that it appeared to her that a man was molesting his daughter in the worship center. 8/21/08 RP 8. Snodgrass went to observe the little girl and the man pointed out by Jacobson. 8/21/08 RP 8. Snodgrass identified the defendant, Joseph Kortus, as the man. 8/21/08 RP 16. Snodgrass

described that the little girl appeared between 8 and 10 years old and was hyperactive and bored in church. 8/21/08 RP 8.

Snodgrass watched and saw the little girl grab the man's hand and proceeded to have it underneath her. 8/21/08 RP 8. The girl started rocking and jumping and rocking on the hand while looking around. 8/21/08 RP 9. Snodgrass described that it looked like she wanted someone to help her when she looked around. 8/21/08 RP 14. Snodgrass described that the man was looking around and not paying attention to the sermon. 8/21/08 RP 22.

Snodgrass observed while the girl continued to bounce up and down. 8/21/08 RP 14. Snodgrass described it as follows:

She shuddered and I knew what had happened, then her father -- I suppose it's her father -- put his hand on her shoulder and just rubbed her shoulder, just caressing it for a few minutes, for a while, and then he slid his hand down and just laid it on her chest and just held it there.

8/21/08 RP 14. Kortus's hand remained on the child's breast for a period of time. 8/21/08 RP 14.

Snodgrass was in shock about what she had seen. 8/21/08 RP 14. She believed the child had become sexually excited by what had occurred. 8/21/08 RP 26. Snodgrass had to do her job, so she pulled herself together to do so. 8/21/08 RP 15. Snodgrass was sad

for the little girl. 8/21/08 RP 15. Snodgrass spoke with Jacobson after the service and what they had observed appeared the same. 8/21/08 RP 29-30. Later at home, Snodgrass spoke with her husband. 8/21/08 RP 15. She decided to try to identify who the girl and the man were so she could report the incident. 8/21/08 RP 15. Snodgrass tried to see if the child was registered in Sunday school, but the child was not. 8/21/08 RP 16. An usher was instructed to tell Snodgrass if a man and child were seen sitting in the worship center together. 8/21/08 RP 17-8. Snodgrass saw that it was the same man and child. 8/21/08 RP 18. Snodgrass watched for about five minutes but was unable to watch through the whole service. 8/21/08 RP 18. The usher followed them out and got a license plate number for Snodgrass. 8/21/08 RP 18. Snodgrass reported what she had seen to CPS and police. 8/21/08 RP 18-9.

On December 14, 2006, Detective Brent Thompson of the Mount Vernon Police Department was assigned to investigate. 8/19/08 RP 66. The case came in as a CPS referral. 8/19/08 RP 66. Based upon a license plate number received, Thompson located the registered owner of the vehicle, Joseph Kortus. 8/19/08 RP 66-7.

On March 27, 2006, Thompson contacted Kortus at his residence and performed a consent search. 8/19/08 RP 67.

Thompson located a number of pictures. 8/19/08 RP 68. Thompson seized about 37 questionable pictures. 8/19/08 RP 68. Thirteen of those pictures were of the Kortus's daughter in states of undress. 8/19/08 RP 68.

K.H. testified. 8/20/08 RP 4-24. K.H. testified that Joseph Kortus is her father. 8/20/08 RP 4. K.H. went to Christ the King and one other church with Kortus. 8/20/08 RP 5. K.H. testified that some times she would sit on her father's hand at church. 8/20/08 RP 6. K.H. testified that some times she would move around on her father's hand. 8/20/08 RP 6. K.H. identified herself in the pictures that her father had taken at his house. 8/20/08 RP 7-9.

On cross examination, K.H. testified that sometimes it was her idea to sit on her father's hand, but that on the two particular charged dates, her father did nothing to get her to sit on his hand. 8/20/08 RP 11-2, 17-8. K.H. claimed that she would only bounce a little bit on her father's hand. 8/20/08 RP 14. K.H. said she couldn't remember whether rocking on her father's hand felt good. 8/20/08 RP 15-6. But she admitted during a defense interview four months before she had said it felt good. 8/20/08 RP 16.

On redirect examination, K.H. testified that she didn't remember what occurred on any specific dates at the church. 8/20/08 RP 22.

Linda Hermstad, the mother of K.H., testified that K.H. was her daughter with Joseph Kortus. 8/20/08 RP 24-6. The birth certificate of K.H. and testimony of Linda Hermstad established K.H.'s date of birth as August 24, 1997. 8/19/08 RP 26.

Joseph Kortus testified. 8/20/08 RP 33-80. Kortus admitted he was the father of K.H. 8/20/08 RP 33. Kortus testified it was not his idea but K.H.'s idea to attend church. 8/20/08 RP 35. K.H. went mostly for the music. 8/20/08 RP 36. Kortus usually took K.H. to Immaculate Conception church but that they also attended Christ the King church. 8/20/08 RP 35. Between the two churches, they had attended services about 30 times. 8/20/08 RP 57.

On September 17, 2006, they attended Christ the King church because K.H. liked the music there better. 8/20/08 RP 35. On that day, they ate breakfast at the church. 8/20/08 RP 36. Kortus testified at the service K.H. grabbed his hand after the music stopped and sat down on it. 8/20/08 RP 37. Kortus claimed that K.H. squirmed a little. 8/20/08 RP 37. Kortus claimed he did not agree with what the

pastor was saying so he smirked, but not at anyone in particular.
8/20/08 RP 38.

On October 29, 2006, they again attended Christ the King church. 8/20/08 RP 41-2. Kortus again testified that K.H. was the one who had taken his hand and sat on it. 8/20/08 RP 42. Kortus again stated that K.H. had only wiggled on his hand for a minute and did not think it was a big deal. 8/20/08 RP 42-3.

Kortus said that at times when they went to Immaculate Conception church, K.H. had also sat on his hands. 8/20/08 RP 44. Kortus said those are cold rock hard Catholic seats and thought K.H. was sitting on his hand for that reason. 8/20/08 RP 43-4. K.H. also sat on his hand at Christ the King church, although those were cushioned seats. 8/20/08 RP 45. Kortus also explained why he took the photographs of K.H. 8/20/08 RP 45-54.

On cross-examination, Kortus said that K.H. behaved like any other child at church. 8/20/08 RP 56. Kortus admitted telling Detective Thompson when asked about K.H. sitting on his hand: "Oh, yeah, I've wondered why she did that." 8/20/08 RP 56. Kortus also told the detective that: "She rocks back and forth on my hand." 8/20/08 RP 57. Kortus told the detective that these incidents of K.H. sitting on his hand had occurred three times at Immaculate

Conception, two times at Christ the King church and all within the last six months before December of 2006. 8/20/08 RP 58. Kortus said the longest an incident happened was five seconds. 8/20/08 RP 58-9. Kortus told the detective that it seemed kind of strange on one of the incidents. 8/20/08 RP 60. Kortus testified the first three times it happened at Immaculate Conception was not a big deal. 8/20/08 RP 75-6. However, at the Christ the King church: "I'm beginning to wonder a little bit more. 8/20/08 RP 76.

During the initial interview in December of 2006, Kortus was asked if he saw K.H. in the shower. 8/20/08 RP 68. At that time, Kortus did not bring up the fact that he had nude pictures of K.H. He also did not mention that in the taped interview. 8/20/08 RP 68. Kortus did mention the photographs during the interview in March of 2007. 8/20/08 RP 68.

On cross examination, Kortus admitted the date he smirked at the pastor was a few days before he spoke with Detective Thompson in December, 2006. 8/20/08 RP 73. Kortus testified that from going to church for 15 years, "all I hear is just most of the time nonsense from them preacher people." 8/20/08 RP 74.

Defense called John Kortus, Joseph's brother. 8/20/08 RP 80-1. John testified that Kortus frequently took pictures of his daughter

including the ones admitted into evidence. 8/20/08 RP 82. John's six and seven year old daughters were in some of the photographs, including one where their legs were splayed open and one where they were sucking on popsicles. 8/20/08 RP 83-5.

Defense also called Delores Kortus, Joseph's sister-in-law. 8/20/08 RP 88-9. Delores testified about the pictures admitted into evidence. 8/20/08 RP 90. Delores testified that she had seen the pictures when she was at Kortus's house. 8/20/08 RP 91.

On cross examination, Delores said she would not be comfortable showing some of the pictures to others. 8/20/08 RP 95.

Candy Ashbrook interviewed K.H. for the police on December 21, 2006. 8/20/08 RP 98. K.H. told Ashbrook that there had been about five incidents at the church where she sat on Kortus's hand. 8/20/08 RP 98-9. Each incident took a few minutes. 8/21/08 RP 99.

Lana Reichert was the defense investigator who was present during an interview of K.H.. 8/20/08 RP 101. Reichert testified that during the interview K.H. said that she had sat on her father's hand. 8/20/08 RP 102.

On cross-examination, Reichert testified that the date of the incident that she sat on her father's hand was not specified in the response of K.H.. 8/20/08 RP 102-3. Reichert began the interview

by asking if her father had ever done anything at church that made her uncomfortable. 8/20/08 RP 103. K.H. went on to describe the touching incidents at church in general. 8/20/08 RP 103-4.

Reichert was also called by the defense to attempt to impeach Patty Snodgrass based upon a phone interview done nine months before. 8/21/08 RP 43-50.

ii. Relevant Portions of Closing Argument

Two of Kortus's claims deal with an objection by the State and a comment made by the prosecutor. Substantial portions of the transcript are relevant to respond to those claims. Kortus's claim regarding the objection shows that the prosecutor was concerned about suggesting the non-existence of fact that had been excluded by defense motion.

The other thing, more circumstantial evidence, is child molestation is kind of like investing in real estate. Seems kind of strange, doesn't it? It's about location, location, location. Where does it happen? It happens in private. It doesn't happen in public. You heard testimony about what Joe did with [K.H.]. They went camping. Did you heard from [K.H.]: Oh yeah, we would go camping and we slept in the same sleeping bag and did whatever we wanted to? No. You didn't hear anything about that. What about: Yeah, I used to get in his car and he'd drive away and we'd be driving for hours and we'd end up down some logging road and he'd have his way with me.

MS. KAHOLOKULA: Your Honor, I object. This is inappropriate argument for uncharged offenses.

MR. HOFF: Your Honor --

THE COURT: I think it's a fair comment on the evidence. Overruled.

MR. HOFF: Did you hear one shred of evidence from anyone that he ever did anything in private that was inappropriate of a molesting nature? No. It's about location, location, location, and this thing happened in a house of God, during the Sabbath, three rows back among a throng of a hundred, maybe two people. It's just patently absurd. Maybe he's got a church fetish, but would that be asking you to speculate? I submit that if he had a sexual interest in [K.H.], you would have heard from [K.H.], from maybe others, about all kinds of weird things that were being done behind closed doors and in private.

8/21/08 RP 93-5.

The other claim pertains to the prosecutor's remarks during closing that the defendant was "spitting in the face of the other churchgoers, of God." This comment in rebuttal was in response to defense claims of lack of evidence of sexual intent.

She interprets a smirk as pride that the defendant had molested a girl in church, was getting away with it, and there's nothing you can do about it. A smirk. That seems to be an awful lot to conclude from observing a smirk. She testified she only saw one smirk, when actually in her written statement she acknowledged that at the time, very close in time to this actual incident, what she saw was several smirks and made eye contact with him throughout the whole process. That's what she said.

8/21/08 RP 88-9.

But maybe she just saw a girl that was bouncing up and down and maybe was learning to masturbate. I hate to use words like that, but given the nature of the subject matter, we're adults here and I've got to use them. If you were to see in church, in the house of God on the Sabbath, somebody masturbating, that would be an upsetting experience for most reasonable people. That explains the upsetting of these witnesses and it also explains their animus if they misinterpreted what may have been happening as molestation.

8/21/08 RP 90-1.

What I am telling you is that Joe did not have any intention either to titillate himself or to titillate his daughter whenever what happened up there at the [Immaculate] Conception Church and at the -- excuse me, for the purposes of this information, whatever happened up at Christ the King Church happened. That's what it comes down to: What was in his mind. I think I presented to you powerful circumstantial evidence that he was oblivious. Did he think something was wrong eventually? Yes. Did he think at some point he didn't think nothing of it? Yes. He didn't think those or say those at the same time like the prosecutor would have you try to believe. But no, what happened was this started happening at the [Immaculate] Conception Church, the pews are hard, they are wooden, they are cold, and he thought she was just doing this to sit on a warm hand. It wasn't a big deal at that time. It never really was a big deal to him until he's on the hot seat with Detective Thompson. When someone is being interrogated about heinous crimes, you bet he got nervous. You bet he may have said things to minimize. The one rule of being on the hot seat is you want to get off it as soon as possible. And sure he might have minimized the time there, but he ultimately got up on the stand and he said: You know, yeah, it was around a minute. It may have been a minute. But that's what you're left with, is trying to think -- and you have to in order to find him guilty of any of

these charges. You have to think beyond a reasonable doubt that the purpose for this contact was to gratify the sexual pleasures of one or the other. I submit to you that the only evidence that you might consider that might be -- maybe we're talking about hunches down here. (Indicating.) These are hunches down here below reasonable articulable suspicion. Maybe she was masturbating.

At a strange time in people's lives, childhoods are awkward. I can remember a kid in the second grade, he used to sit at the end of his desk and kind of rub up and down. Of course now, in retrospect: Hey, knock it off, kid. That's gross. But as a second grader, it was like: Yeah, it's a little weird, but we don't know what he's doing. We didn't know what he was doing. Kids will do those sorts of things in public until they're told not to. They learn to conform their behavior and learn that maybe if those things are going to happen, maybe they should happen in private. Of course there's a big, broad view that people have about the issue of masturbation. Some people think it's an abomination before God and other think it's a natural thing. You have to be convinced beyond a reasonable doubt that the purpose for what this contact was, was that he wanted to titillate her or she wanted -- or he wanted to titillate himself. There's no evidence whatsoever that he was titillated by this.

8/21/09 RP 103-5.

At the very start of the rebuttal, the prosecutor addressed the claim that defense had contended that there was no sexual intent for Kortus.

So the questions been raised: Why would he do it in church? Why would he do it in front of everybody? You've been asked: Wouldn't a molester do this? Wouldn't a molester do that? And first of all, let me say that I hope you don't know what a molester would or

would not do, and I'm assuming that you don't. But I would also suggest that sometimes the sexual thrill comes from the possibility of getting caught. Here's a man who clearly is not all that interested in the pastor's sermons. Why is he going to church? Are his actions with his daughter a way of not only getting away with a sexual thrill, but also a way of spitting in the face of the other churchgoers, of God, of doing it in church? Would that be some kind of thrill for him? I don't know. Why would he do it? He did get away with it. He got away with it several times before he got caught. Why didn't anybody else notice? Because people aren't looking for that. Clearly it did happen before and other people didn't notice and clearly it happened on December 10th. Even though Patti Snodgrass was looking at him for a few minutes before she went back to her duties that last time in December, he did it then. He said he did. [K.H.] and he both said that happened in December. Nobody saw them. So clearly he learned that he could do it and get away with it.

8/21/08 RP 107-8. No objection was raised by defense.

iii. Motion for New Trial

After closing argument was over defense made a motion for new trial based upon a claim of improper objection of the prosecutor by use of the term "uncharged offenses" during the objection.

8/21/08 RP 112-3.

After brief statements from both counsel, the trial court requested that the court reporter provide a copy of the pages of argument before the objection and indicated it would reserve ruling.

8/21/08 RP 115. However, the trial court also noted that the defense

counsel did not make a motion at the time of the objection. 8/21/08 RP 115.

On September 10, 2008, the trial court heard argument on the motion for new trial based upon the objection at closing. 9/10/08 RP 1-12. Defense counsel noted a lack of case law on the issue of a mistrial motion based upon the appropriateness of an objection or any remedy thereto. 9/10/08 RP 1-2. After hearing from both counsel, the trial court indicated it would issue a written ruling. 9/10/08 RP 12.

On September 12, 2008, the trial court issued a written ruling. CP 219-21. That ruling indicated that the prosecutor's objection was benign, done in flat tones and was "the absolute minimum to apprise the Court of both the nature and basis for her objection." CP 220. The trial court also noted that defense did not make a motion at the time of the objection and failed to request a curative instruction. CP 220. The trial court found that the objection was made in good faith, was not error and was not prosecutorial misconduct. CP 220-1. The trial court found that "The State presented powerful testimony from two independent eyewitnesses, the likes of which are seldom if ever available in charges of this type." CP 221. As a result the trial court

also believed had the objection amounted to error, it would have been harmless. CP 221.

IV. ARGUMENT

- 1. The trial court did not abuse its discretion in determining that the prosecutor's objection to defense closing which used the term "uncharged offenses" did not merit a new trial.**

The trial court heard a motion for new trial based upon the claim of misconduct for the language used in the objection by the prosecutor. This Court should first evaluate the trial court denial of the motion for new trial. In State v. McKenzie, the Supreme Court limited review of an issue of a claim of prosecutorial misconduct raised initially at the trial court for abuse of discretion. State v. McKenzie, 157 Wn.2d 44, 61, 134 P.3d 221 (2006).

Kortus's second assignment of error is that the trial court erred in denying the motion for new trial based upon the prosecutor's use of the term uncharged offenses during an objection to defense closing argument. Appellant's Opening Brief at page 1. The State contends the trial court carefully and properly evaluated the claim and did not abuse its discretion.

Standard of Review. CrR 7.5(a) provides that "[t]he court on motion of a defendant may grant a new trial ... when it affirmatively appears that a substantial

right of the defendant was materially affected.” This court has repeatedly stated that “[t]he granting or denial of a new trial is a matter primarily within the discretion of the trial court and [that the reviewing court] will not disturb its ruling unless there is a clear abuse of discretion.” State v. Wilson, 71 Wn.2d 895, 899, 431 P.2d 221 (1967); State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). An abuse of discretion will be found “only ‘when no reasonable judge would have reached the same conclusion.’ ” Bourgeois, 133 Wn.2d at 406, 945 P.2d 1120 (*quoting Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711, 780 P.2d 260 (1989)). Explaining this deferential standard, the Wilson court recalled “the oft repeated observation that the trial judge,” having “seen and heard” the proceedings “is in a better position to evaluate and adjudicate than can we from a cold, printed record.” 71 Wn.2d at 899, 771 P.2d 711.

State v. McKenzie, 157 Wn.2d 44, 51-52, 134 P.3d 221 (2006).

Discretion is abused if the trial court's decision is manifestly unreasonable or is based on untenable grounds. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). A decision is based “on untenable grounds” or made “for untenable reasons” if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. Id. (*quoting State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995)). A decision is manifestly unreasonable “if the court, despite applying the correct legal standard to the supported facts, adopts a view ‘that no reasonable person

would take.' ” *Id.* (quoting State v. Lewis, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)).

The prosecutor’s objection was made during the course of the defense closing argument about a lack of other instances of conduct alleged against the defendant.

The other thing, more circumstantial evidence, is child molestation is kind of like investing in real estate. Seems kind of strange, doesn't it? It's about location, location, location. Where does it happen? It happens in private. It doesn't happen in public. You heard testimony about what Joe did with [K.H.]. They went camping. Did you heard from [K.H.]: Oh yeah, we would go camping and we slept in the same sleeping bag and did whatever we wanted to? No. You didn't hear anything about that. What about: Yeah, I used to get in his car and he'd drive away and we'd be driving for hours and we'd end up down some logging road and he'd have his way with me.

MS. KAHOLOKULA: Your Honor, I object. This is inappropriate argument for uncharged offenses.

MR. HOFF: Your Honor --

THE COURT: I think it's a fair comment on the evidence. Overruled.

MR. HOFF: Did you hear one shred of evidence from anyone that he ever did anything in private that was inappropriate of a molesting nature? No. It's about location, location, location, and this thing happened in a house of God, during the Sabbath, three rows back among a throng of a hundred, maybe two people. It's just patently absurd.

8/21/08 RP 93-5.

After hearing the motion after closing argument and a motion hearing three weeks later, the trial court issued a written ruling. CP

219-21. That ruling indicated that the prosecutor's objection was benign, done in flat tones and was "the absolute minimum to apprise the Court of both the nature and basis for her objection." CP 220. The trial court noted Kortus did not make a motion at the time of the objection and failed to request a curative instruction. CP 220. The trial court found that the objection was made in good faith, was not error and was not prosecutorial misconduct. CP 220-1. In addition, the trial court found: "The State presented powerful testimony from two independent eyewitnesses, the likes of which are seldom if ever available in charges of this type." CP 221. As a result the trial court also believed even had the objection amounted to error, it would have been harmless. CP 221.

The trial court's factual determinations are supported by substantial evidence in the record consisting of the transcript itself as well as the declaration of the prosecutor in response to the motion for new trial. CP __.² As explained below, the standard regarding prosecutorial misconduct was properly applied by the trial court. Therefore, it cannot be established that the trial court abused its' discretion in denying the motion for new trial.

² Sub. No. 96, Filed 9/3/3008, Declaration of Counsel Re Defendant's Motion for New Trial, Supplemental Designation of Clerk's Papers pending.

A defendant claiming prosecutorial misconduct “bears the burden of establishing the impropriety of the prosecuting attorney’s comments and their prejudicial effect.” State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Comments will be deemed prejudicial only where **“there is a *substantial likelihood* the misconduct affected the jury’s verdict.”** *Id.* (emphasis added). The prejudicial effect of a prosecutor’s improper comments is not determined by looking at the comments in isolation but **by placing the remarks “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.”** *Id.* Where the defense fails to object to an improper comment, the error is considered waived **“unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.”** *Id.*

State v. McKenzie, 157 Wn.2d at 52, 134 P.3d 221 (emphasis added).

Kortus argues based upon numerous cases that that reversal is required because the prosecutor committed prejudicial misconduct. Opening Brief of Appellant at pages 17 to 19 *citing*, State v. Miles, 139 Wn. App. 879, 887, 162 P.3d 1169 (2007), State v. Yoakum, 37 Wn. 2d 137, 143-4, 222 P.2d 181 (1950), State v. Babich, 68 Wn. App. 438, 444-6, 842 P.2d 1053 (1993), State v. Beard, 74 Wn.2d 335, 338-9, 444 P.2d 651 (1968), State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609, *rev. denied*, 164 Wn.2d 1016 (2008). But those

cases involved prosecutors who plainly erred by placing evidence before the jury that they ultimately failed to prove. Because the present case involves a two word phrase from an objection from closing argument, that case law is factually distinguishable.

Kortus requests that this Court “apply by analogy” the reasoning from those cases to the “speaking objection” in this case. Opening Brief of Appellant at page 19. This argument fails on two grounds. First, the request to apply the reasoning by analogy would not be appropriate because the present situation involves an objection, not full fledged questioning of a witness implying the existence of other facts. Objections simply do not carry the same weight as evidence.

Counsel are entitled to make objections. Here the trial court determined that the objection was made in good faith. CP 220. An objection has to present sufficient basis for the court to consider it. “Generally, objections must state specific grounds so that the court is informed and the opposing party has an opportunity to correct the error.” State v. Suarez-Bravo, 72 Wn. App. 359, 431, 864 P.2d 426 (1994); State v. Padilla, 69 Wn. App. 295, 300, 846 P.2d 564 (1993). Some examples of what may be insufficient specificity include, “[t]hat is an improper line of questioning,” Padilla, 69 Wn. App. at 300; “I’m

going to object to this line of questioning,” State v. Carlson, 61 Wn. App. 865, 812 P.2d 536 (1991); objection on the ground that question called for “a comment on the evidence”, State v. Casteneda-Perez, 61 Wn. App. 354, 363, 810 P.2d 74 (1991). See also State v. Guloy, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985) (objection that does not specify the particular ground upon which it is based does not preserve the question for appellate review).

In addition, juries are instructed to disregard the content of objections.

You may hear objections made by the lawyers during trial. Each party has the right to object to questions asked by another lawyer, and may have a duty to do so. These objections should not influence you. Do not make any assumptions or draw any conclusions based on a lawyer’s objections.

CP 184. The objection did not carry the requisite prejudicial effect to support a claim of prosecutorial misconduct. In addition the trial court stated: “I think that is a fair comment on the evidence.” 8/21/08 RP 94. Those words minimized any prejudicial effect because it reminded the jury that their obligation was to consider the evidence before them.

The second reason that the request to apply the reasoning by analogy should be denied is that the situation was not an

improper speaking objection and there were no significant facts provided by the objection. The trial court had previously ruled that speaking objections should not be made. 8/20/08 RP 1. However, any objection must still provide at least a few words of basis for the court to be alerted to the issue. Here the trial court determined that the prosecutor did the minimum necessary to alert the court to the issue. CP 220.

Even if this objection was misconduct, Kortus has the obligation to object to the misconduct and request a limiting instruction at the time. Kortus failed to do so.

Where the defense fails to object to an improper comment, the error is considered waived **“unless the comment is so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury.”** Id.

State v. McKenzie, 157 Wn.2d at 52, 134 P.3d 221 (emphasis added). Kortus tries to claim that he did object and preserved the issue by making the court’s ruling precluding speaking or narrative objections. Opening Brief of Appellant at page 24, noting 8/20/08 RP 1, CP 173 (Motion number 1), 210 (Numbered fact 15). A ruling prohibiting speaking or narrative objection should not be held to apply to all content of objections to place the court on notice of the issue at

hand. The reason an objection is required at the time is it provides the trial court to address the appropriate remedy at the point where the prejudice can be minimized. For the same reason, the objection made after the close of all argument was also untimely. In addition the only remedy requested at that time was mistrial. As such, the situation should be ruled to fall into a situation where Kortus was required to object and request a curative instruction.

Thus, Kortus must establish that the prosecutor's conduct was so flagrant and ill-intentioned so as to merit a new trial. He cannot meet that burden. Although Kortus assigned error to the factual determinations 3, 4, 6, 8 and 9, the defendant did not assign error to the factual determination 5 by the trial court that the objection was made in good faith. As such, Kortus cannot establish that the objection was so "flagrant and ill-intentioned" so as to merit a new trial where he has not objected to a finding that the objection was made in good faith.

The prosecutor's objection was not flagrant and ill-intentioned so as to merit a new trial. The case significantly relied on by Kortus is instructive as to prejudice, ill-intentioned questioning and failure to object. In State v. Miles, 139 Wn. App. 879, 162 P.3d 1169 (2007), the court noted:

Here, on the other hand, the prosecutor cross-examined the two defense witnesses at length and in detail about specific fights, which, if the jury believed the prosecutor's representations, completely undermined the defense theory. While these questions would have been entirely proper had they been the foundation for rebuttal evidence of boxing matches, without this evidence they were a flagrant attempt to place evidence before the jury that appeared to have been otherwise unavailable.

Moreover, we do not fault Miles's counsel for failing to object to the questions when the prosecutor asked them. Until the State rested its rebuttal, Miles had no way of knowing whether the State would prove that Miles had engaged in the fights. And by that time, it was too late to undo the prejudice resulting from the prosecutor's reference to the fights in questions that the jury heard. See Babich, 68 Wn. App. at 446, 842 P.2d 1053.

State v. Miles, 139 Wn. App. 879, 888-889, 162 P.3d 1169 (2007).

The present case was not placement of evidence that was otherwise inadmissible. Since there was no evidence admitted, and the objection was overruled, there was no prejudice. There is no indication the objection was ill-intentioned. And as opposed to Miles, Kortus should not be excused for failing to object because he did have the ability to attempt to remedy the situation with a curative instruction.

Kortus's request to reverse the decision of the trial court and find prosecutorial misconduct meriting reversal must be denied.

2. **Where the defendant's acts were done in church and he smirked at a churchgoer after one incident, argument suggesting that he may get a sexual thrill from "spitting in the face of other churchgoers, of God" was not so flagrant and ill-intentioned so as to merit a mistrial.**

Kortus argues that the prosecutor's reference to spitting in the face of churchgoers and God was an improper appeal to the jury's passions and prejudices that prejudiced the right to a fair trial. The State contends the argument was not misconduct and based upon facts in the record and defense counsel's argument.

The standards applicable to this claim are detailed in State v. Dhaliwal.

At trial, "[c]ounsel are permitted latitude to argue the facts in evidence and reasonable inferences" in their closing arguments. State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985); see also State v. Harvey, 34 Wn. App. 737, 739, 664 P.2d 1281 (1983). They may not, however, make prejudicial statements that are not sustained by the record. State v. Rose, 62 Wn.2d 309, 312, 382 P.2d 513 (1963). ...

A defendant who alleges improper conduct on the part of a prosecutor must first establish the prosecutor's improper conduct and, second, its prejudicial effect. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995); State v. Furman, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993). Any allegedly improper statements should be viewed within the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. State v. Brown, 132 Wn.2d 529, 561, 940 P.2d 546 (1997). Prejudice

on the part of the prosecutor is established only where "there is a substantial likelihood the instances of misconduct affected the jury's verdict." Pirtle, 127 Wn.2d at 672, 904 P.2d 245.

Where there is a failure to object to improper statements, it constitutes a waiver unless the statement is "so flagrant and ill-intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by a curative instruction to the jury." Brown, 132 Wn.2d at 561, 940 P.2d 546. If the prejudice could have been cured by a jury instruction, but the defense did not request one, reversal is not required. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994).

State v. Dhaliwal, 150 Wn.2d 559, 577-578, 79 P.3d 432 (2003). In Dhalilwal, the defendant argued on appeal that the prosecutor made improper references to the Sikh community and religion to imply the Sikh culture was violent. State v. Dhaliwal, 150 Wn.2d at 556-7, 79 P.3d 432. The State contended that remarks were based upon the evidence at trial. State v. Dhaliwal, 150 Wn.2d at 557, 79 P.3d 432. The Supreme Court agreed.

The statements made by the prosecutor here were based on the evidence presented at trial. The prosecutor used witness testimony to draw inferences in his closing argument, which is permissible under Smith. For example, Grewal testified that in the Sikh community using offensive language and threatening to knock a man's turban off his head are signs of disrespect. In closing, the prosecutor made reference to these cultural values that were brought out during Grewal's testimony as an explanation as to possible motive.

State v. Dhaliwal, 150 Wn.2d at 579, 79 P.3d 432, *citing* State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985).

Similar to Dhaliwal under the facts in the present case, the defendant's molestation occurred at church during a sermon, the defendant smirked at another churchgoer and the prosecutor's argument was in response to the defense argument that there was a lack of sexual intent. Thus, the argument was based upon facts in the record and proper based upon the evidence discussed in argument. In addition, the argument was not objected to and was not so flagrant and ill-intentioned to merit reversal.

The case of State v. Belgarde, significantly relied upon by Kortus,³ presents an example of misconduct meriting reversal. In Belgarde, the prosecutor described members of the American Indian Movement (AIM) as " 'a deadly group of madmen,' " " 'militant,' " and " 'butchers, that kill indiscriminately Whites and their own.' " State v. Belgarde, 110 Wn.2d 504, 506-7, 755 P.2d 174 (1988) (emphasis omitted). The prosecutor asked the jury to remember the AIM's involvement in Wounded Knee and analogized the AIM to the Irish Republican Army's Sinn Fein and Libya's

³ Because the argument was based upon the record and not religious imagery or reference, analysis of other state and federal decisions regarding

Kadafi. Id. The Supreme Court held that these statements were testimony disguised as a closing argument, stating that "[t]he prosecutor stepped far outside his proper role ... to give the jury highly inflammatory 'information.' " and despite the lack of objection, merited mistrial. State v. Belgarde, 110 Wn.2d at 509, 755 P.2d 174. The court in Belgarde also described misconduct meriting reversal in other cases.

In Reed, the prosecutor called the defendant a liar, stated defense counsel didn't have a case, referred to the defendant as clearly a "murder two", and asked the jury if they were going to let city lawyers make their decision. This court reversed the conviction in Reed because there existed a "substantial likelihood" the remarks affected the jury's decision. Reed, 102 Wn.2d at 147-48, 684 P.2d 699. The Reed misconduct was mild compared to the prosecutor's arguments in this case. In Charlton, the prosecutor remarked briefly on the defendant's spouse's failure to testify. This court held such reference to be flagrant and ill-intentioned and reversed the conviction in spite of a failure to request a curative instruction. In Clafin, the prosecutor read a poem by a rape victim and the conviction was reversed because no curative instruction could erase such an appeal to passion and prejudice.

State v. Belgarde, 110 Wn.2d 504, 509-510, 755 P.2d 174 (1988) *citing*, State v. Reed, 102 Wn.2d 140, 684 P.2d 699 (1984), State v.

religious references done by Kortus is unnecessary for this Court to make a proper evaluation of the claim of misconduct.

Charlton, 90 Wn.2d 657, 585 P.2d 142 (1978); State v. Claflin, 38 Wn. App. 847, 690 P.2d 1186 (1984).

The underlying factor in all these instances of misconduct is that the argument is based upon facts or appeals to prejudice outside the record. In the present case, the argument was based on matters within the record and in response to defense arguments that the defendant did not have a sexual intent at the time of the incidents.

But I would also suggest that sometimes the sexual thrill comes from the possibility of getting caught. Here's a man who clearly is not all that interested in the pastor's sermons. Why is he going to church? Are his actions with his daughter a way of not only getting away with a sexual thrill, but also a way of spitting in the face of the other churchgoers, of God, of doing it in church? Would that be some kind of thrill for him? I don't know. Why would he do it? He did get away with it. He got away with it several times before he got caught.

9/22/08 RP 107.

Kortus testified that he went to church because K.H. was the one who wanted to go. 8/20/08 RP 35. They went to Christ the King church because K.H. liked the music there better. 8/20/08 RP 36. Kortus testified that from going to church for 15 years, "all I hear is just most of the time nonsense from them preacher people." 8/20/08 RP 74. Kortus also admitted smirking at the message at a sermon in December, 2006, but denied doing so on other occasions. 8/20/08

RP 73. In contrast, Cassie Jacobson testified that on September 17, 2006, Kortus smirked at her after K.H. had apparently climaxed from bouncing on the defendant's hand. 8/19/08 RP 36, 63-4.

The prosecutor's characterization of this as "spitting in the face of churchgoers" was based upon the evidence defendant's actions in church on that day. The reference to spitting is that he was degrading the other churchgoers. Both Cassie Jacobson and Patti Snodgrass were shocked and offended by what they had seen further emphasizing the defendant as figuratively "spitting" in their face and upon their faith. 8/19/08 RP 37, 8/21/09 RP 14. It was at a time of the sermon where the church goers are before God. Kortus's trial counsel also made reference to God during his closing argument. 8/21/08 RP 91, 97 ,105. The argument in part was that it would be unreasonable to believe that a person had done the acts before God. The reason those references, as well as those of the prosecutor were not inappropriate was that they were not an improper reference to matters outside the record to inflame the passions of the jurors.

The argument was not misconduct since it was based upon evidence. Because it was not misconduct, there is no need to

analyze whether the argument was so flagrant and ill-intentioned so as to merit a mistrial.⁴

3. Where the incest instructions described that the defendant and his daughter had to be related as a descendant, there was sufficient evidence that they were so related.

Kortus argues that the jury instructions and the State's argument required the State to prove the victim was Kortus's descendant. Appellant's Opening Brief at page 33. Based upon this argument, Kortus claims there was insufficient evidence to support the incest charge. Kortus does not claim that there was insufficient evidence at trial to support the charge of Incest in the Second Degree under the Washington statute.

Kortus's interpretation of the instruction does not give proper weight to the term "related to" in the instructions. The term "related to" in the instructions causes the term "descendant" to apply when the defendant is the parent of the alleged victim.

Incest in the Second Degree is defined in RCW 9A.64.020.

⁴ The situation would also be covered by a harmless error analysis since there was no prejudice, the objection was overruled, the trial court indicated it was a fair comment on the evidence, the prosecutor made absolutely no reference to any other allegations during trial or closing argument and as the trial court determined there was powerful testimony from two independent State's witnesses. Because the claims should be denied based upon the prosecutorial misconduct analysis, the harmless error analysis is not fully developed herein.

A person is guilty of incest in the second degree if he or she engages in sexual contact 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.

RCW 9A.64.020(2)(a). The statute has the same language as the instructions. The plain meaning of the statute applies in this case.

If the meaning of the statute is plain, then that meaning is given effect. Id. “Plain meaning is discerned from viewing the words of a particular provision in the context of the statute in which they are found, together with related statutory provisions, and the statutory scheme as a whole.” Id.

State v. Mendoza, 165 Wn.2d 913, 921, 205 P.3d 113 (2009) *citing*

Burns v. City of Seattle, 161 Wn.2d 129, 140, 164 P.3d 475 (2007).

The instruction was based upon the standard pattern instruction language and matched the appropriate language of the statute including the term “related to.”

To convict the defendant of the crime of incest in the second degree, as charged in count 3 (4) each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about September 17, 2006 (October 29, 2006), the defendant engaged in sexual contact with [K.H.];
- (2) That the defendant was related to [K.H.] as a descendant;
- (3) That at the time the defendant knew the person with whom he was having sexual intercourse was so related to him; and

(4) That any of these acts occurred in the State of Washington.

...
CP 192-3 (Instructions number 8 and count 9 in parentheses), Washington Pattern Instruction (WPIC) 46.06. Instruction 10 provided: "Descendant means any child of the defendant." CP 194.

"Jury instructions are to be read as a whole and each instruction is read in the context of all others given." State v. Brown, 132 Wn.2d 529, 605, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998). Instructions are sufficient if they properly inform jurors of the applicable law, are not misleading, and permit each party to argue his or her theory of the case. State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980).

State v. Deryke, 110 Wn. App. 815, 819-820, 41 P.3d 1225 (2002) (footnotes inserted) *aff'd* State v. Deryke, 149 Wn.2d 906, 73 P.2d 1000 (2003).

The instructions required the State to prove that K.H. was Kortus's descendant. The note on pattern use to that instruction that describes how to use the instruction supports that position. It reads as follows:

If the victim is a child or grandchild of the defendant, a descriptive word such as "child," "son," or "daughter" can be substituted for the term "descendant." If no such word is substituted, then use WPIC 46.07, Incest—Descendant—Definition, to define the term "descendant."

WPIC 46.06. Thus, the note on uses suggests that the word “daughter” could have been replaced for the word descendant in the instruction. As such, the instruction would have read that the jury was required to find “the defendant was related to [K.H.] as a daughter.” Thus, the pattern instruction committee appears to have the same interpretation as the state regarding the term “related to”.

Kortus’s argument ignores the term “related to” and provided that the instruction required the State to prove that “the defendant was K.H.’s descendant.” That is not what the instruction stated.

The instruction was appropriate and reversal of those convictions must be denied.⁵

4. Although not objected to below, the term of community custody related to substance abuse evaluation and possession or perusal of pornographic materials should be stricken.

At the time of the entry of the judgment and sentence, terms of community custody were imposed without objection. 10/9/08 RP 24, CP 237-8.

⁵ Additionally, this Court could apply a harmless error analysis to these instructions. *State v. Thomas*, 150 Wn.2d 821, 844, 83 P.3d 970 (2004) (applying the analysis of *Neder v. U.S.*, 527, U.S. 1, 15, 119 S.Ct 1827, 144 L.Ed.2d (1999) of whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.) This analysis would apply here. However, because the plain language of the instruction correctly states the law, the State chooses not to fully develop the harmless error analysis.

Community custody conditions are permissible if the evidence in the record supports that “crime-related treatment of counseling services” are needed. RCW 9.94A.750(5)(c). An appellate court reviews whether a community custody condition is crime-related for abuse of discretion. State v. Zimmer, 146 Wn. App. 405, 413, 190 P.3d 121 (2008) *citing*, State v. Motter, 139 Wn. App. 797, 801, 162 P.3d 1190 (2007), *rev. denied*, 163 Wn.2d 1025, 185 P.3d 1194 (2008). Vagueness challenges to community custody conditions may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744-5, 193 P.3d 678 (2008).

One of the terms of community custody ordered in the judgment and sentence was compliance with the Appendix H conditions proposed by the Department of Corrections in the presentence investigation report. CP 231, 237-8. Those conditions included the requirement that Kortus obtain a substance abuse evaluation and comply with recommended treatment if recommended by the supervising community corrections officer and to not possess or peruse any pornographic materials. CP 238. No objection was made at the trial court related to those conditions. 10/9/08 RP 24.

- i. **The condition of a substance abuse evaluation was not related to the crime of convictions.**

The condition of the substance abuse evaluation and compliance with treatment recommendations was not related to the sex offense crimes of conviction. Nothing in the testimony at trial or pre-sentence investigation report indicated that condition was related to the crimes charged. CP 282-9.

The State agrees that this condition should have been stricken from the Appendix H. CP 238 (condition 12).

The State believes that it would be appropriate to remand the case with direction to strike that condition of community custody since there was no factual basis to support the condition at sentencing and no indication of other facts which would remotely indicate the condition was warranted. State v. Lopez, 142 Wn. App. 341, 174 P.3d 1216 (2007) (ordering a community custody condition of a psychiatric evaluation be stricken where there were no findings that supported that a mental illness contributed to the crimes).

Since there would not be an exercise of discretion, it is unnecessary to remand for full resentencing because that would render the prior judgment and sentence void and result in a new final judgment, appealable as a matter of right. See RAP 2.2(a)(1), State

v. Harrison, 148 Wn.2d 550, 562, 61 P.3d 1104 (2003).⁶ Thus, this Court should order the case be remanded to strike the condition as requested.

ii. The pornography condition as described is unconstitutionally vague and should be stricken.

State v. Bahl, 164 Wn.2d 739, 743, 74-5, 193 P.3d 678 (2008), provides that a substantially similar community custody condition to that imposed herein is unconstitutionally vague⁷. The condition herein read as follows:

Do not possess or peruse pornographic materials unless given approval by your sexual deviancy treatment provider and/or supervising Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or supervising Community Corrections Officer.

CP 238 (condition 14).

The Court in Bahl provided as follows:

We conclude that the restriction on accessing or possessing pornographic materials is unconstitutionally vague. The fact that the condition provides that Bahl's community corrections officer can

⁶ In contrast, remand to correct a scrivener's error does not result in a new final judgment and sentence and, accordingly, the court's action to correct the error is not appealable as a matter of right. See RAP 2.2(a)(1); In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005) (*citing* CrR 7.8(a)).

⁷ The pornography condition imposed here was imposed on October 9, 2008, the same date that the Bahl, decision was issued. Thus, the Department of Corrections was obviously not aware of the decision when the presentence report was filed on October 1, 2008. The counsel and the trial court may not have had an opportunity to read the decision prior to sentencing Kortus.

direct what falls within the condition only makes the vagueness problem more apparent, since it virtually acknowledges that on its face it does not provide ascertainable standards for enforcement.

State v. Bahl, 164 Wn.2d 739, 758, 193 P.3d 678 (2008).

The question remains what remedy should be provided given the condition imposed herein. The court in Bahl remanded the case for resentencing without discussion of what should occur at resentencing. Kortus requests that the condition be stricken. The State agrees that in the present case, this Court should grant the remedy requested, strike the condition and remand the case to be remanded to the trial court with that direction.⁸

5. The scrivener's errors in the judgment and sentences should be corrected.

Kortus raises two scrivener's errors regarding the terms of the judgment and sentence. Opening Brief of Appellant at page 38.

The first error pertained to the dates of offense. The judgment and sentence listed incorrect dates in comparison to the information and jury instructions. CP 226, CP 170-2, CP 192-3. The judgment

⁸ The concurrence of Justice J.M. Johnson in Bahl, suggests that on remand the trial court in that case might choose to craft a community placement condition and provided suggestions on language which might survive challenges. State v. Bahl, 164 Wn.2d at 765-8. The reason that the State believes that this remedy is appropriate is that the defendant would still be subject to a sexual deviancy evaluation and treatment under condition (b)(8) which was not contested. CP

and sentence should read that counts 1 and 3 occurred on September 17, 2006, and counts 2 and 4 occurred on October 29, 2006.

The second error pertains to same the same criminal conduct finding. Although the State conceded at sentencing that the molestation and incest was same criminal conduct, the box reflecting that in the judgment and sentence was not checked. 10/9/08 RP 2, CP 227. The offender score and sentencing ranges were correct. 10/9/08 RP 2, 228.

Although these issues were not raised below, they could be raised in a motion pursuant to CrR 7.8(a) and should be granted if so raised. Thus, the case should be remanded to correct the scrivener's errors.⁹

V. CONCLUSION

For the foregoing reasons, the State respectfully asks that this Court affirm the defendant's convictions for Child Molestation in the First Degree and Incest in the Second Degree. Pursuant to the defendant's request for the first time on appeal, this Court should

238 (condition 8). It is highly likely that treatment, if ordered would make use of sexually explicit materials the subject of the certified treatment program.

⁹ Such remand to correct the judgment and sentence should not be considered a re-sentencing as noted in the argument section (4)(i) above.

remand with the order to remove two community custody conditions
and correct scrivener's errors.

DATED this 30th day of June, 2009.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by; [] United States Postal Service; [] ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Jennifer Winkler, addressed as Nielson, Broman & Koch, PLLC, 1908 East Madison Street, Seattle, WA 98122.. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 30th day of June, 2009.


KAREN R. WALLACE, DECLARANT

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