



A. He received a standard range sentence of 162 months of total confinement. Appendix A. He appealed. Appendix B. This Court affirmed the convictions and mandate issued on December 9, 2005. Appendix B. Heidari filed a previous personal restraint petition in this Court, alleging prosecutorial misconduct. That petition was dismissed on April 20, 2007. Appendix C.

D. ARGUMENT.

THIS PETITION MUST BE DISMISSED AS SUCCESSIVE AND UNTIMELY MIXED PETITION.

In this successive petition, Heidari raises two claims: first, that the date of the crime for Count I on the judgment and sentence is incorrect, and second, that the evidence is insufficient to support his conviction for Count IV. Because the first claim is time-barred, his petition is an untimely mixed petition which must be dismissed.

RCW 10.73.140 bars the Court of Appeals from considering a collateral attack when the petitioner has previously filed a personal restraint petition unless the petitioner shows good cause why the ground currently asserted was not raised earlier. This statutory bar includes all collateral attacks, including habeas corpus petitions. In re Personal Restraint of Becker, 143 Wn.2d 491, 496,

20 P.3d 409 (2001). If the petitioner fails to show good cause why the ground asserted was not raised earlier, and the petition is also time-barred, this Court must dismiss the petition. In re Personal Restraint of Turay, 150 Wn.2d 71, 87, 74 P.3d 1194 (2003).

No petition collaterally attacking a judgment and sentence may be filed more than one year after the judgment becomes final, if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. RCW 10.73.090(1); see In re Personal Restraint of Runyan, 121 Wn.2d 432, 444, 449, 853 P.2d 424 (1993). A judgment becomes final on the date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction. RCW 10.73.090(3)(b). The judgment became final in this case on December 9, 2005. This petition was filed more than one year later.

The one-year time limit only applies if the judgment and sentence is "valid on its face." RCW 10.73.090(1). A judgment is valid on its face unless the judgment evidences an error without further elaboration. In re Personal Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000).

Heidari first contends that the date of the crime for Count I on the judgment and sentence, which is March 29, 1995 through

March 28, 1998, is incorrect because the "trial record" proves that the crime occurred before June 15, 1997. He argues that because the trial record shows that the crime was committed before June 15, 1997, the seriousness level assigned to the crime is incorrect.<sup>1</sup> This is a claim that cannot be established on the face of the judgment and sentence. This claim does not fall within any of the exceptions to the time bar provided by RCW 10.73.100. Heidari's claim regarding the applicable date of the crime for Count I is thus time-barred.

Because Heidari's first claim is time-barred, his entire petition is an untimely mixed petition. RCW 10.73.100 provides an exception to the time bar for claims of insufficient evidence, which is the second claim in Heidari's petition. However, RCW 10.73.100 provides that the time limit "does not apply to a petition or motion that is based solely on one or more of the following grounds." In order for a petition to be exempt from the one-year time limit, assuming that the judgment and sentence is valid on its face and rendered by a court of competent jurisdiction, all grounds for relief that are asserted must fall within the exceptions set forth in RCW

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<sup>1</sup> In 1997, the seriousness level for rape of a child in the first degree was raised from XI to XII. Laws of 1997, ch. 340, sec. 1.

10.73.100. If some of the grounds asserted do not fall within those six exceptions, then the petition is "mixed," since it is not based "solely" on the enumerated exceptions. In re Personal Restraint of Stoudmire, 141 Wn.2d 342, 349, 5 P.3d 1240 (2000). A "mixed" petition must be dismissed in its entirety. Id.

Heidari's second claim, that the evidence was insufficient to support his conviction for Count IV, could fall within the exception to the time bar provided by RCW 10.73.100(4). But, because his first claim is time-barred, Heidari's petition is an untimely mixed petition. It is also successive. It should be dismissed pursuant to RCW 10.73.140.

E. CONCLUSION.

This petition should be dismissed.

DATED this 15<sup>th</sup> day of May, 2009.

Respectfully Submitted,

DAN SATTERBERG  
King County Prosecuting  
Attorney

by   
ANN SUMMERS, #21509  
Senior Deputy Prosecuting  
Attorney  
Attorneys for Respondent  
Office ID #91002

W554 King County Courthouse  
516 Third Avenue  
Seattle, WA 98104  
(206) 296-9650

## APPENDIX A

FILED  
02 DEC 11 AM 9:47  
KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA.

HIV

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, )  
 )  
 Plaintiff, ) No. 01-1-10919-3 SEA  
 )  
 Vs. ) JUDGMENT AND SENTENCE  
 ) FELONY  
 )  
 MANSOUR HEIDARI )  
 )  
 Defendant, )

I. HEARING

I.1 The defendant, the defendant's lawyer, GABRIEL BANFI, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: Bocia Zadegar + her mother and father

II. FINDINGS

There being no reason why judgment should not be pronounced, the court finds:

2.1 CURRENT OFFENSE(S): The defendant was found guilty on 10/15/2002 by jury verdict of:

Count No.: I Crime: RAPE OF A CHILD IN THE FIRST DEGREE-DOMESTIC VIOLENCE  
RCW 9A.44.073 Crime Code: 01065  
Date of Crime: 03/29/1995-03/28/1999 Incident No. \_\_\_\_\_

Count No.: IV Crime: CHILD MOLESTATION IN THE SECOND DEGREE-DOMESTIC VIOLENCE  
RCW 9A.44.083 Crime Code: 01073  
Date of Crime: 03/29/1995-03/28/1998 Incident No. \_\_\_\_\_

Count No.: V Crime: CHILD MOLESTATION IN THE THIRD DEGREE-DOMESTIC VIOLENCE  
RCW 9A.44.089 Crime Code: 01075  
Date of Crime: 03/29/2000-03/29/2001 Incident No. \_\_\_\_\_

Count No.: \_\_\_\_\_ Crime: \_\_\_\_\_  
RCW \_\_\_\_\_ Crime Code: \_\_\_\_\_  
Date of Crime: \_\_\_\_\_ Incident No. \_\_\_\_\_

[ ] Additional current offenses are attached in Appendix A

DEC 13 2002  
UNRECORDED COPY TO COUNTY JUDGE  
DEC 11 2002

**SPECIAL VERDICT or FINDING(S):**

- (a)  While armed with a **firearm** in count(s) \_\_\_\_\_ RCW 9.94A.510(3).
- (b)  While armed with a **deadly weapon** other than a firearm in count(s) \_\_\_\_\_ RCW 9.94A.510(4).
- (c)  With a **sexual motivation** in count(s) \_\_\_\_\_ RCW 9.94A.835.
- (d)  A V.U.C.S.A offense committed in a **protected zone** in count(s) \_\_\_\_\_ RCW 69.50.435.
- (e)  **Vehicular homicide**  Violent traffic offense  DUI  Reckless  Disregard.
- (f)  **Vehicular homicide** by DUI with \_\_\_\_\_ prior conviction(s) for offense(s) defined in RCW 41.61.5055, RCW 9.94A.510(7).
- (g)  **Non-parental kidnapping** or unlawful imprisonment with a minor victim. RCW 9A.44.130.
- (h)  **Domestic violence** offense as defined in RCW 10.99.020 for count(s) \_\_\_\_\_.
- (i)  Current offenses **encompassing the same criminal conduct** in this cause are count(s) \_\_\_\_\_ RCW 9.94A.589(1)(a).

2.2 **OTHER CURRENT CONVICTION(S):** Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): \_\_\_\_\_

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):  
 Criminal history is attached in **Appendix B**.  
 One point added for offense(s) committed while under community placement for count(s) \_\_\_\_\_

**2.4 SENTENCING DATA:**

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count I	6	XII	162 TO 216		162 TO 216 MONTHS	LIFE AND/OR \$50,000
Count IV	6	X	98 TO 130		98 TO 130 MONTHS	LIFE AND/OR \$50,000
Count V	6	V	41 TO 54		41 TO 54 MONTHS	5 YRS AND/OR \$10,000
Count						

Additional current offense sentencing data is attached in **Appendix C**.

2.5 **EXCEPTIONAL SENTENCE (RCW 9.94A.535):**

Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) \_\_\_\_\_. Findings of Fact and Conclusions of Law are attached in **Appendix D**. The State  did  did not recommend a similar sentence.

**III. JUDGMENT**

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and **Appendix A**.

The Court **DISMISSES** Count(s) \_\_\_\_\_

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 RESTITUTION AND VICTIM ASSESSMENT:

- Defendant shall pay restitution to the Clerk of this Court as set forth in attached Appendix E.
  - Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(2), sets forth those circumstances in attached Appendix E.
  - Restitution to be determined at future restitution hearing on (Date) \_\_\_\_\_ at \_\_\_\_\_ m.
  - Date to be set.
  - Grd*  Defendant waives presence at future restitution hearing(s).
  - Restitution is not ordered.
- Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of \$500.

4.2 OTHER FINANCIAL OBLIGATIONS: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

- (a)  \$ \_\_\_\_\_, Court costs;  Court costs are waived; (RCW 9.94A.030, 10.01.160)
- (b)  \$100 DNA collection fee;  DNA fee waived (RCW 43.43.754)(crimes committed after 7/1/02);
- (c)  \$ \_\_\_\_\_, Recoupment for attorney's fees to King County Public Defense Programs;  
 Recoupment is waived (RCW 9.94A.030);
- (d)  \$ \_\_\_\_\_, Fine;  \$1,000, Fine for VUCSA;  \$2,000, Fine for subsequent VUCSA;  
 VUCSA fine waived (RCW 69.50.430);
- (e)  \$ \_\_\_\_\_, King County Interlocal Drug Fund;  Drug Fund payment is waived;  
(RCW 9.94A.030)
- (f)  \$ \_\_\_\_\_, State Crime Laboratory Fee;  Laboratory fee waived (RCW 43.43.690);
- (g)  \$ \_\_\_\_\_, Incarceration costs;  Incarceration costs waived (RCW 9.94A.760(2));
- (h)  \$ \_\_\_\_\_, Other costs for: \_\_\_\_\_

4.3 PAYMENT SCHEDULE: Defendant's TOTAL FINANCIAL OBLIGATION is: \$ 500. plus any restitution. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms:  Not less than \$ \_\_\_\_\_ per month;  On a schedule established by the defendant's Community Corrections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. The Defendant shall remain under the Court's jurisdiction and the supervision of the Department of Corrections for up to ten years from the date of sentence or release from confinement to assure payment of financial obligations.

- Court Clerk's trust fees are waived.
- Interest is waived except with respect to restitution.

4.4 **CONFINEMENT OVER ONE YEAR:** Defendant is sentenced to a term of total confinement in the custody of the Department of Corrections as follows, commencing: [ ] immediately; [ ](Date):  
\_\_\_\_\_ by \_\_\_\_\_m.

162 months/days on count I; 41 months/days on count IV; \_\_\_\_\_ months/day on count \_\_\_\_\_

98 months/days on count IV; \_\_\_\_\_ months/days on count \_\_\_\_\_; \_\_\_\_\_ months/day on count \_\_\_\_\_

The above terms for counts I, IV, V are concurrent/consecutive.

The above terms shall run concurrent/consecutive with cause No.(s) \_\_\_\_\_

The above terms shall run consecutive to any previously imposed sentence not referred to in this order.

[ ] In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special WEAPON finding(s) in section 2.1: \_\_\_\_\_

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98)

[ ] The enhancement term(s) for any special WEAPON findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The TOTAL of all terms imposed in this cause is \_\_\_\_\_ months.

Credit is given for  35 days served [ ] days as determined by the King County Jail, solely for confinement under this cause number pursuant to RCW 9.94A505(6).

4.5 **NO CONTACT:** For the maximum term of life years, defendant shall have no contact with \_\_\_\_\_  
Beeta Zadegar

4.6 **DNA TESTING.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in APPENDIX G.

**HIV TESTING:** For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in APPENDIX G.

4.7 (a) [ ] **COMMUNITY PLACEMENT** pursuant to RCW 9.94A.700, for qualifying crimes committed before 7-1-2000, is ordered for \_\_\_\_\_ months or for the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer. [24 months for any serious violent offense, vehicular homicide, vehicular assault, or sex offense prior to 6-6-96; 12 months for any assault 2°, assault of a child 2°, felony violation of RCW 69.50/52, any crime against person defined in RCW 9.94A.411 not otherwise described above.] APPENDIX H for Community Placement conditions is attached and incorporated herein.

(b) [ ] **COMMUNITY CUSTODY** pursuant to RCW 9.94.710 for any **SEX OFFENSE** committed after 6-5-96 but before 7-1-2000, is ordered for a period of 36 months or for the period of earned early release awarded under RCW 9.94A.728, whichever is longer. APPENDIX H for Community Custody Conditions and APPENDIX J for sex offender registration is attached and incorporated herein.

- (c)  **COMMUNITY CUSTODY** - pursuant to RCW 9.94A.715 for qualifying crimes committed after 6-30-2000 is ordered for the following established range:
- Sex Offense, RCW 9.94A.030(38) - 36 to 48 months—when not sentenced under RCW 9.94A.712
  - Serious Violent Offense, RCW 9.94A.030(37) - 24 to 48 months
  - Violent Offense, RCW 9.94A.030(45) - 18 to 36 months
  - Crime Against Person, RCW 9.94A.411 - 9 to 18 months
  - Felony Violation of RCW 69.50/52 - 9 to 12 months
- or for the entire period of earned early release awarded under RCW 9.94A.728, whichever is longer.  
 Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant to RCW 9.94A.737.  
 **APPENDIX H** for Community Custody conditions is attached and incorporated herein.  
 **APPENDIX J** for sex offender registration is attached and incorporated herein.

4.8  **WORK ETHIC CAMP:** The court finds that the defendant is eligible for work ethic camp, is likely to qualify under RCW 9.94A.690 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the defendant shall be released to community custody for any remaining time of total confinement. The defendant shall comply with all mandatory statutory requirements of community custody set forth in RCW 9.94A.700. **Appendix H** for Community Custody Conditions is attached and incorporated herein.

4.9  **ARMED CRIME COMPLIANCE, RCW 9.94A.475, 480.** The State's plea/sentencing agreement is  attached  as follows:

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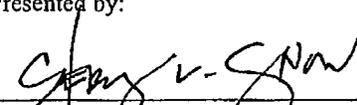


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The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: 11/22/02

  
 JUDGE  
 Print Name: ASDORF

Presented by:  
  
 Deputy Prosecuting Attorney, WSBA# 86751  
 Print Name: Cheryl Snow

Approved as to form:  
  
 Attorney for Defendant, WSBA # 17810  
 Print Name: Gregory J. Bonf

**SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 01-1-10919-3 SEA
	)	
vs.	)	APPENDIX G
	)	ORDER FOR BIOLOGICAL TESTING
MONSOUR HEIDARI	)	AND COUNSELING
	)	
Defendant,	)	
	)	

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**(1) DNA IDENTIFICATION (RCW 43.43.754):**

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

**(2)  HIV TESTING AND COUNSELING (RCW 70.24.340):**

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 296-4848 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: 11/22/02

  
\_\_\_\_\_  
JUDGE, King County Superior Court

**SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

STATE OF WASHINGTON,	)	
	)	
Plaintiff,	)	No. 01-1-10919-3 SEA
	)	
vs.	)	JUDGMENT AND SENTENCE
	)	APPENDIX H
MANSOUR HEIDARI	)	COMMUNITY PLACEMENT OR
	)	COMMUNITY CUSTODY
Defendant,	)	

The Defendant shall comply with the following conditions of community placement or community custody pursuant to RCW 9.94A.700(4), (5):

- 1) Report to and be available for contact with the assigned community corrections officer as directed;
- 2) Work at Department of Corrections-approved education, employment, and/or community service;
- 3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
- 4) Pay supervision fees as determined by the Department of Corrections;
- 5) Receive prior approval for living arrangements and residence location;
- 6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.720(2));
- 7) Notify community corrections officer of any change in address or employment; and
- 8) Remain within geographic boundary, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

**OTHER SPECIAL CONDITIONS:**

The defendant shall not consume any alcohol.  
 Defendant shall have no contact with: Becta Zadegan

Defendant shall remain  within  outside of a specified geographical boundary, to wit:

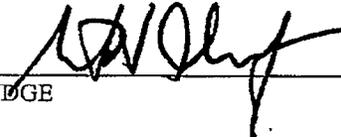
The defendant shall participate in the following crime-related treatment or counseling services: The defendant shall obtain a sexual deviancy evaluation and follow any/all treatment recommendations

The defendant shall comply with the following crime-related prohibitions:  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

\* Other conditions may be imposed by the court or Department during community custody.

Community Placement or Community Custody shall begin upon completion of the term(s) of confinement imposed herein or when the defendant is transferred to Community Custody in lieu of earned early release. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions [RCW 9.94A.720] and may issue warrants and/or detain defendants who violate a condition [RCW 9.94A.740].

Date: 11/22/02

  
 \_\_\_\_\_  
 JUDGE



**COURT CLERK'S RULES**  
**REGLAS DE LA SECRETARÍA DEL TRIBUNAL**

The following are Rules of the Court Clerk concerning your monetary obligations (e.g., restitution, court costs) as ordered by the Court.

A continuación encontrará Ud. las Reglas de la Secretaría del tribunal referentes a sus obligaciones monetarias (por ejemplo, reparaciones, costas judiciales), tal como lo ordenó el/la juez.

1. Mailing Address: King County Superior Court Clerk  
516 Third Avenue, Room E-609  
Dirección para envíos por correo: Seattle, WA 98104

2. Payment Identification: Make sure that your name and the King County Superior Court case number are written on your payment.

Identificación del pago: Ud. debe escribir su nombre y el número del caso del Tribunal superior del condado de King en el pago.

3. Acceptable Forms of Payment: Money order, cashier's check or certified check. (NO PERSONAL CHECKS)

Formas del pago aceptables: Giró postal {"money order"}, cheque de caja {"cashier's check"} o cheque certificado. (NO SE ACEPTAN CHEQUES PERSONALES)

4. Trust Account Service Fee: King County Code 4.76 requires that a fee of \$5.00 on all trust payments (restitution) of \$25.01 or more be paid. The fee will be deducted from your payment.

Tasa de servicio para cuentas fiduciarias: El Código 4.6 del condado de King requiere que se pague una tasa de \$5.00 por todos los pagos recibidos en una cuanta fiduciaria de \$25.01 o más. La tasa se descontará de sus pagos

5. Return Receipts: If you want the Clerk to return a receipt to you, please include a self-addressed, stamped envelope with your payment.

Envío de recibo: Si Ud. quiere que la Secretaría le envíe un recibo, tenga a bien incluir junto con su pago un sobre que lleve su dirección y franqueo.

6. Copies of Balance Sheets: If you need to have a balance sheet showing the total amount that you have paid and the remaining balance due, a fee of \$2.00 is assessed. Please include a self-addressed, stamped envelope. You may write to the address above or go to the office in person.

Copias de los estados de cuenta: Si Ud. necesita tener un estado de cuenta que muestre la suma total que Ud. ha pagado y la que todavía debe, se impone una tasa de \$2.00. Tenga a bien incluir junto con su pago un sobre que lleve su dirección y franqueo. Puede escribir a la dirección susodicha o ir a la oficina personalmente.

FINGERPRINTS



BEST AVAILABLE IMAGE POSSIBLE

RIGHT HAND  
FINGERPRINTS OF:

DEFENDANT'S SIGNATURE:  
DEFENDANT'S ADDRESS:

*Haydari*  
DOC

MONSOUR HEIDARI

DATED: NOV 22 2002

ATTESTED BY: BARBARA MINER,  
SUPERIOR COURT CLERK

BY: *Victoria J. Anderson*  
DEPUTY CLERK

*[Signature]*  
JUDGE, KING COUNTY SUPERIOR COURT  
ROBERT H. ALSDORF

CERTIFICATE

OFFENDER IDENTIFICATION

I, \_\_\_\_\_,  
CLERK OF THIS COURT, CERTIFY THAT  
THE ABOVE IS A TRUE COPY OF THE  
JUDGEMENT AND SENTENCE IN THIS  
ACTION ON RECORD IN MY OFFICE.  
DATED: \_\_\_\_\_

S.I.D. NO. WA20567832  
DOB: NOVEMBER 24, 1953  
SEX: M  
RACE: W

\_\_\_\_\_  
CLERK

BY: \_\_\_\_\_  
DEPUTY CLERK

## APPENDIX B

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

STATE OF WASHINGTON,	)	No. 51539-0-1
	)	
Respondent,	)	
	)	
v.	)	MANDATE
	)	
MANSOUR HEIDARI,	)	King County
	)	
Appellant.	)	Superior Court No. 01-1-10919-3 SEA

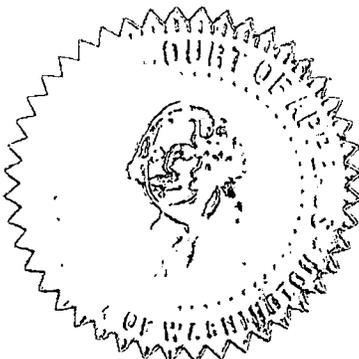
**FILED**  
2005 DEC 14 PM 2:43  
KING COUNTY  
SUPERIOR COURT CLERK  
SEATTLE, WA.

**THE STATE OF WASHINGTON TO:** The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on January 18, 2005, became the decision terminating review of this court in the above entitled case on December 9, 2005. An order denying a petition for review was entered in the Supreme Court on October 5, 2005. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the opinion.

Pursuant to a Commissioner's ruling dated November 2, 2005, costs in the amount of \$4,390.25 are awarded against judgment debtor Mansour Heidari in favor of judgment creditor Washington Office of Public Defense, Indigent Defense Fund and costs in the amount of \$104.11 are awarded against judgment debtor Mansour Heidari in favor of judgment creditor the King County Prosecutor's Office.

c: David B. Koch, NBK  
Catherine M. McDowall, KC  
Jennifer K. Ryan Gilman  
Hon. Robert H. Alsdorf  
Indeterminate Sentencing Review Board



**IN TESTIMONY WHEREOF**, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 9th day of December, 2005.

**RICHARD D. JOHNSON**  
Court Administrator/Clerk of the Court of Appeals,  
State of Washington, Division I.

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

STATE OF WASHINGTON,	)	NO. 51539-0-1
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	UNPUBLISHED OPINION
	)	
MANSOUR HEIDARI,	)	
	)	FILED: January 18, 2005
Appellant.	)	

APPELWICK, J. – Mansour Heidari was convicted of one count of rape of a child in the first degree, one count of child molestation in the second degree, and one count of child molestation in the third degree for sexually abusing his niece, Z.B., over a period of several years. He asserts on appeal that the trial court erred (1) when it admitted testimony from witnesses under the fact of complaint doctrine; (2) by excluding surrebuttal testimony; (3) by providing the jury with a lesser degree instruction; and (4) by permitting prosecutorial misconduct. We affirm.

**FACTS**

In 2001, several months after turning fifteen years old, B.Z. confided in her cousin, S.N., while visiting her at her home in Vancouver, Canada, that she had

been sexually abused. A few months later, B.Z. also confided in S.N.'s mother, H.D.K. H.D.K. informed B.Z.'s mother. B.Z. later related the incidents of abuse to her mother. B.Z.'s mother promptly sought help for her daughter and notified the police. Based on the allegations against him, Heidari was charged with two counts of rape of a child in the first degree, two counts of child molestation in the first degree, and one count of child molestation in the third degree.

B.Z. alleged that Heidari first sexually abused her when she nine or ten years old and in the fourth grade.<sup>1</sup> Heidari next sexually abused her when she was in the fifth grade, an incident that formed the basis for Count I, rape of a child in the first degree. B.Z. also testified about two incidents of sexual abuse when she was in the sixth grade. Those incidents form the basis for Count III and Count IV. Count V is based on an incident of sexual abuse that occurred when B.Z. was in the ninth grade, two to three months before B.Z.'s disclosure of abuse to her cousin, and five to six months before her disclosure to her aunt and mother.

Prior to trial, the state moved to allow fact of complaint testimony from S.N., H.D.K., and B.Z.'s mother. Following Heidari's initial objection, the trial court did not allow the testimony. Later, however, the trial court allowed fact of complaint testimony from all three witnesses.

Count I, rape of a child in the first degree, was alleged to have occurred in the bedroom of Heidari's brother, Mohsen Zadegan, (Mohsen) in Heidari's home.

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<sup>1</sup> This incident was charged as Count II, child molestation in the first degree. The jury acquitted Heidari of this charge.

During Heidari's case-in-chief, Heidari's wife testified that Mohsen's door was always locked and that Mohsen had the key. In rebuttal, B.Z.'s father, Mohamed Zadegan, testified that there was no lock on Mohsen's door. Defense counsel requested surrebuttal to call Mohsen to testify that his door did have a lock and that he did not allow anyone into his room. The trial court denied the request, telling defense counsel that Mohsen should have been called during its case-in-chief.

B.Z. testified that the incidents of abuse upon which Counts III and IV were based occurred when she was in the sixth grade. B.Z. could not recall when in the sixth grade the incidents occurred, and thus did not recall if she was eleven or twelve years old at the time.<sup>2</sup> Observing that RCW 9A.44.083, child molestation in the first degree, requires that the victim be less than twelve years old, the trial court ruled that as a matter of law there was insufficient evidence for the jury to find that B.Z. was less than twelve years old at the time of the offense. The trial court therefore submitted to the jury only an instruction on the lesser offense of child molestation in the second degree. The trial court also deviated from the WPIC jury instructions by omitting the "at least twelve" language from the instructions provided to the jury.

Prior to the verdict, Heidari filed a motion for mistrial, which the trial court denied. The trial court also denied Heidari's post-verdict motion for a new trial.

Heidari appeals.

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<sup>2</sup> Heidari assigns error to both Counts III and IV, but in the body of his brief argues only regarding Count IV. It is clear that the jury instructions on both deviated from the pattern instructions in omitting the "at least twelve" language, so we address both Counts III and IV here.

### **I. Testimony by S.N., H.D.K, and B.Z.'s Mother**

Heidari assigns error to the trial court's admission of testimony from three witnesses under the fact of complaint doctrine.

The admissibility of evidence is a matter placed within the sound discretion of the trial court, and should be reversed only upon a showing of manifest abuse of discretion. State v. Bourgeois, 133 Wn.2d 389, 399, 945 P.2d 1120 (1997). "Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993).

B.Z. alleged that Heidari first sexually abused her when she was nine or ten years old, and that the abuse continued until around March 29, 2001, the time of her fifteenth birthday. She testified that, while visiting her cousin, S.N., in Vancouver in May or June 2001, about two or three months after the last incident of abuse, she disclosed to S.N. that she had been sexually abused. She also confided in S.N.'s mother, H.D.K., on her next visit to Vancouver a few months later. H.D.K. later told B.Z.'s mother. When B.Z.'s mother confronted B.Z. about the allegations, B.Z. told her, also, that she had been sexually abused.

Prior to trial, the State filed a motion to allow S.N., H.D.K., and B.Z.'s mother to testify as to B.Z.'s disclosures of abuse to them. Notwithstanding Heidari's objections, the court ultimately allowed testimony under the fact of complaint doctrine, stating:

Many of the cases, not all of them, but many of the cases in which the issue of fact of complaint and hue and cry are raised, are cases in which there is a charge of a single attack, a sexual assault, a

rape. In those situations, the discussion of hue and cry and the use of the phrase timely complaint do make sense fairly obviously. But, in a case where there is an allegation of a pattern of sexual abuse to a child, a complaint might not occur until the period of substantial time has passed.

Some of the case law does seem to address the question of a timely complaint being what is a reasonable time to respond. And in this case, as in other cases of childhood sexual abuse, the question of what is a reasonable, timely response or complaint period for an alleged victim of child abuse is very much a factual issue that a jury can and should consider.

The jury can and should consider whether or not this complaining witness acted in a timely fashion, acted in a reasonable fashion, or perhaps made a tardy complaint, just tied into some sort of family dispute. And allowing evidence in this case of the apparent timing of the complaint may, in fact, not be harmful to the defense, it may be helpful, because what we have here, what is alleged in fact to be a pattern of some years, a number of years earlier, and only in recent time is there some allegation of misconduct by Mr. Heidari.

So, at this point I am not going to prohibit testimony from either the complaining witness or other witnesses as to the fact of complaint. This does not permit, of course, any of the witnesses who supposedly heard such a complaint to testify about the contents of the complaint or the identity of the alleged perpetrator.

Since the thirteenth century, the hue and cry rule has required victims of rape and other violent crimes to immediately report the crime to authorities following its commission. See Christine Kenmore, Note, The Admissibility of Extrajudicial Rape Complaints, 64 B.U.L. Rev. 199, 204-05 (1984). In State v. Murley, the court explained the rationale behind the hue and cry rule:

*This doctrine rests on the ground that a female naturally complains promptly of offensive sex liberties upon her person and that, on trial, an offended female complainant's omission of any showing as to when she first complained raises the inference that, since there is no showing that she complained timely, it is more likely that she did not complain at all, and therefore that it is more likely that the liberties upon her person, if any, were not offensive and that*

consequently her present charge is fabricated. Thus, formerly, to overcome the inference, it became essential to the state's case-in-chief to prove affirmatively that she made timely hue and cry. 3 Wigmore, op. cit., § 1042; 4 Wigmore, op. cit., § 1134 et seq.; [additional citations omitted].

Modernly, the inference [of consent and later fabrication of charges] affects the woman's credibility generally, and the truth of her present complaint specifically, and consequently, we permit the state to show in its case-in-chief when the woman first made a complaint consistent with the charge.

State v. Murley, 35 Wn.2d 233, 237, 212 P.2d 801 (1949). Following the development of the hearsay rule in the 1800s, under which prior out-of-court statements made by a victim to prove the truth of the matter asserted are inadmissible in court, the hue and cry rule evolved into an exception to hearsay, variously called the "fresh complaint," or the fact of complaint, doctrine. 64 B.U.L. Rev. at 205-06. Washington courts have relied upon the fact of complaint doctrine since the nineteenth century to support the admission of out-of-court disclosures of abuse made by victims of alleged sexual offenses. State v. Hunter, 18 Wn. 670, 672, 52 P. 247 (1898); State v. Griffin, 43 Wn. 591, 595, 86 P. 951 (1906); State v. Myrberg, 56 Wn. 384, 387, 105 P. 622 (1909); State v. Beaudin, 76 Wn. 306, 307, 136 P. 137 (1913); State v. Gay, 82 Wn. 423, 426, 144 P. 711 (1914); State v. Aldrick, 97 Wn. 593, 595, 166 P. 1130 (1917); State v. Dixon, 143 Wn. 262, 265, 255 P. 109 (1927); State v. Smith, 3 Wn.2d 543, 550, 101 P.2d 298 (1940).

Whereas the hue and cry rule permitted into evidence details from a declarant's prior disclosure of a crime, the fact of complaint doctrine allows "only

such evidence as will establish whether or not a complaint was made timely.”

Murley, 35 Wn.2d at 237. Thus, under the fact of complaint doctrine,

the prosecution in a forcible rape case may present evidence of the fact of the victim’s complaint in its case in chief. The details and particulars of the complaint are not admissible. The evidence is not hearsay because it is introduced for the purpose of bolstering the victim’s credibility and is not substantive evidence of the crime.

State v. Bray, 23 Wn. App. 117, 121, 594 P.2d 1363 (1979) citing State v. Ragan, 22 Wn. App., 591, 593 P.2d 815 (1979).

Heidari argued at trial, and argues here on appeal, that because B.Z.’s disclosures to S.N., H.D.K., and her mother were not timely made, they are not admissible under the fact of complaint doctrine. Heidari also asserts that the admission of testimony by S.N., H.D.K and B.Z.’s mother was inadmissible under the fact of complaint doctrine because it prejudiced him and included substantive information.

S.N., H.D.K. and B.Z.’s mother testified to the fact that B.Z. was “really upset,” “crying,” and “shaking” at the time she disclosed to them that she had been abused. This is nonsubstantive testimony. Rather, it describes emotional state of the victim which goes to her credibility while making the report. Even if these details regarding B.Z.’s demeanor at the time of her disclosures were inadmissible under the fact of complaint doctrine, they were admissible under ER 801(d)(1). Under ER 801(d)(1), a statement is not hearsay if “[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is ... (ii) consistent with the declarant’s testimony and is offered to rebut an express or implied charge against the declarant of

recent fabrication or improper influence or motive.” B.Z. testified at trial, and testimony from S.N., H.D.K., and B.Z.’s mother was intended to rebut any inference of fabrication. Accordingly, the testimony from S.N., H.D.K., and B.Z.’s mother was admissible.

## **II. Surebuttal testimony**

Heidari asserts that the trial court abused its discretion when it excluded his surrebuttal testimony.

A trial court’s refusal to admit surrebuttal evidence is reviewed under a manifest abuse of discretion standard. State v. Luvene, 127 Wn.2d 690, 709-10, 903 P.2d 960 (1995). “Testimony which is merely cumulative or confirmatory or which is merely a contradiction by a party who has already so testified does not justify surrebuttal as of right.” Luvene, 127 Wn.2d at 710 (citations omitted).

Count I, Rape of a Child in the First Degree, was alleged to have occurred in the bedroom of Heidari’s brother, Mohsen, in Heidari’s home. During Heidari’s case-in-chief, Heidari’s wife testified that Mohsen’s door was always locked and that Mohsen had the key. In rebuttal, B.Z.’s father, Mohamed Zadegan, testified that there was no lock on Mohsen’s door. Defense counsel requested surrebuttal to call Mohsen to testify that his door did have a lock and that he did not allow anyone into his room. The trial court denied the request, telling defense counsel that Mohsen should have been called during its case-in-chief.

At trial, defense counsel raised the issue of whether or not the door to Mohsen’s room had a lock; it thus was not a new issue raised by the state on rebuttal. Heidari had an opportunity to elicit testimony from Mohsen during his

case-in-chief, regarding if there was a lock on the door to Mohsen's room but failed to do so. Moreover, Mohsen's testimony would have been cumulative with Heidari's wife's testimony that the door to Mohsen's room had a lock. Heidari cites no authority to show that the trial court abused its discretion in refusing Mohsen's surrebuttal testimony. The trial court did not abuse its discretion when it disallowed Mohsen's testimony.

### III. Instruction on Lesser Degree Offense

Heidari assigns error to the trial court's jury instruction on the lesser degree offense of child molestation in the second degree.

A challenged jury instruction is reviewed de novo and evaluated in the context of the instructions as a whole. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). Jury instructions must be supported by substantial evidence. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000). Jury instructions are sufficient if they (1) permit each party to argue his or her theory of the case, (2) are not misleading, and (3) when read as a whole, properly inform the trier of fact of the applicable law. State v. Pesta, 87 Wn. App. 515, 524, 942 P.2d 1013 (1997).

Counts III and IV, two of the state's charges against Heidari, were child rape in the first degree and child molestation in the first degree, respectively.<sup>3</sup> B.Z. testified that the incidents upon which Counts III and IV were based occurred when she was in the sixth grade. B.Z. did not recall whether she was

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<sup>3</sup> Count III was based on an allegation that Heidari anally raped B.Z. in his new BMW in a secluded parking lot. Count IV is based on an allegation that Heidari attempted to push B.Z.'s head toward his penis.

eleven or twelve years old at the time of the incidents of abuse on which Counts III and IV were based. RCW 9A.44.083, child molestation in the first degree, requires that the victim be less than twelve years old. RCW 9A.44.086, child molestation in the second degree, requires that the victim be between twelve and fourteen years old.

Because it was not possible to conclude beyond a reasonable doubt that B.Z. was less than twelve, the trial court ruled that, as a matter of law, there was insufficient evidence to enable the jury to find that B.Z. was less than twelve years old at the time of the offense. Having concluded that Heidari therefore could not be convicted of first degree child molestation, the trial court submitted to the jury only an instruction on the lesser offense of child molestation in the second degree.

Relying upon Fernandez-Medina, Heidari argues that a lesser degree instruction was improper because the state could not prove that the lesser degree offense occurred to the exclusion of the charged offense. Heidari's reliance on Fernandez-Medina is misplaced. In that case, the defendant asserted on appeal that the trial court had erred because it had refused to provide the jury with an instruction on a lesser degree offense as well as an instruction on the charged, higher degree offense.<sup>4</sup> Fernandez-Medina, 141 Wn.2d at 452.

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<sup>4</sup> Fernandez-Medina states the test for whether a trial court may instruct a jury on a lesser degree offense: a trial court may instruct a jury on a lesser degree offense if (1) the statutes for both the charged offense and the proposed inferior degree offense "proscribe but one offense";

Fernandez-Medina also reiterated that under RCW 10.61.003, a defendant may be convicted of the charged crime or of any lesser degree of the crime charged. RCW 10.61.003; Fernandez-Medina, 141 Wn.2d at 453. “[W]hen an offense has been proved against [a defendant], and there exists a reasonable doubt as to which of two or more degrees he is guilty, he shall be convicted only of the lowest.” RCW 10.58.020. The trial court properly determined that the evidence supported only the fact that B.Z. was not yet fourteen at the time of the incidents of sexual abuse on which Counts III and IV were based. Therefore, as a matter of law, the elements of first degree child molestation could not be proven. Only the lesser degree offense remained capable of proof. Instructions on first degree child molestation to the jury were not appropriate. The court did not err in providing the jury with an instruction on the lower degree.

#### **IV. Language of Jury Instruction**

Heidari also asserts that the trial court erred when it deviated from the language in the WPIC jury instructions for child molestation in the second degree in its instructions to the jury. The WPIC provides:

To convict the defendant of the crime of child molestation in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- 
- (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and  
(3) there is evidence that the defendant committed only the inferior offense.  
Fernandez-Medina, 141 Wn.2d at 454 (citations omitted)

- (1) That on or about the \_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_, the defendant had sexual contact with \_\_\_\_\_;
- (2) That \_\_\_\_\_ was at least twelve years old but less than fourteen years old at the time of the sexual contact and was not married to the defendant;
- (3) That the defendant was at least thirty-six months older than \_\_\_\_\_; and
- (4) That the acts occurred in 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 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.

Heidari contends that the court was obligated to adhere verbatim to the language found in the WPIC instructions for second degree child molestation. Heidari does not cite, nor have we found, any authority mandating that the trial court follow the WPIC instructions verbatim.

B.Z.'s testimony indicated that she was either eleven or twelve years old and in the sixth grade at the time of one incident of sexual abuse by Heidari. After concluding that as a matter of law the jury could not convict Heidari of child molestation in the first degree, as charged, the trial court gave a jury instruction on the lesser degree offense, child molestation in the second degree. However, because the state was unable to prove that B.Z. was over the age of twelve, the lower age range for victims under RCW 9A.44.086, child molestation in the second degree, the trial court omitted WPIC 44.23's "at least twelve" language from the jury instructions. Heidari argues that because the victim's age is an

essential element of the crime, the trial court should have dismissed the charges as unproven.

The fact that B.Z. was younger than the lower age specified in the second degree child molestation statute does not mean that Heidari did not commit sexual molestation. State v. Smith, 122 Wn. App. 294, 296, 93 P.3d 206, 206 (2004); see also State v. Dodd, 53 Wn. App. 178, 181, 765 P.2d 1337 (1989). As the state asserts, the “sole purpose” of the “at least twelve” language of the statute is to “differentiate the lower degrees from the higher degrees of child molestation.” The omission of “at least twelve” language did not add to Heidari’s burden in any way; nor did it excuse the state from proving beyond a reasonable doubt that Heidari, by his conduct, met the essential elements of child molestation in the second degree and child rape in the second degree. The omission was merely consistent with removal of the charge of child molestation in the first degree, which would have remained if the evidence supported an age of the victim of less than twelve years.

It was not possible to ascertain with certainty whether B.Z. had reached the age of twelve years at the time Heidari abused her, so no instruction on the charged higher degree offense was provided to the jury. It was clear that B.Z. was under the upper age limit of fourteen for victims establishing second degree offenses. Because there was a reasonable doubt whether B.Z. had attained the age of twelve, the trial court properly provided the jury with an instruction on the lesser degree offense omitting the “at least twelve” language contained in RCW 9A.44.085. Read as a whole, the jury instructions properly informed the jury of

the applicable law, were not misleading, and allowed both parties to argue their theory of the case. The trial court did not abuse its discretion when it omitted the "at least twelve" language from the WPIC instructions in the instructions it provided the jury.

#### **V. Motion for a New Trial**

Heidari also assigns error to the trial court's failure to declare a mistrial based on improper remarks by the prosecutor during closing.

To prevail on a claim of prosecutorial misconduct, a defendant must show both improper conduct and prejudicial effect. State v. Roberts, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). The defendant bears the burden of establishing misconduct, and that the conduct was prejudicial. State v. Finch, 137 Wn.2d 792, 839, 975 P.2d 967 (1999). A new trial is not required unless there is a substantial likelihood that the improper argument affected the verdict. See Finch, 137 Wn.2d at 839.

During closing, the prosecutor made the following statements:

I have never had a case where somebody can't bring in character witnesses to testify on their behalf because you don't do these kinds of acts in front of other people, and you don't tell other people about what you did. You pick on a child. You pick on somebody who is not going to know how to handle the situation. You went for *your moment or opportunity you get them alone, and you commit your crime.*

...

[B.Z.] has no motive to lie. And in regards to that, I want to go back to a couple of arguments regarding this case. It is a credibility call. Plain and simple, your job in this case is to decide if you believe [B.Z.], because in our state, based upon our law, if you believe her, that is enough to support conviction of this man.

...

I want to tell you, there has never been a case where a child is removed from the home, no matter how bad their body is bruised, no matter how bad they have been sexually abused.

Portions of the prosecutor's comments during closing did reflect her own personal experience and were thus improper. In order for this court to reverse Heidari's conviction, however, he must also show that the remarks were prejudicial to him. To establish prejudice, Heidari must demonstrate there is a substantial likelihood the misconduct affected the jury's verdict. Finch, 137 Wn.2d at 839. Heidari fails to show such prejudice. The trial court sustained Heidari's objections to the prosecutor's statements, instructed the prosecutor to refrain from testifying about her own experience, and instructed the jury to disregard the prosecutor's personal opinions. The trial court also gave curative instructions to the jury, foreclosing any possible prejudice. Also, the trial court had advised the jury prior to trial that they would not be permitted to take notes during closing, and, just prior to closing arguments, instructed the jury to "[d]isregard any remark, statement or argument that is not supported by the evidence or by the law as stated by the court." Moreover, it was highly improbable that the prosecutor's comments affected the verdict. The trial court stated at sentencing that "the evidence was very, very strong." As the trial court articulated in addressing its denial of Heidari's motion for a new trial,

*I do not agree with the defense that this is a marginal case. There was substantial evidence that was presented in this case; there was substantial circumstantial corroboration of the ... State's case, in terms of the nature of the alleged victim's testimony; and for*

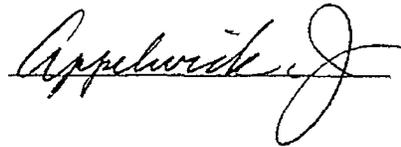
example, her lack of exaggeration at times when[, h]ad she perhaps made up some of the testimony, it would be likely to be the kind of testimony that she would exaggerate.

The trial court did not err in denying Heidari a new trial because he has not shown that he was prejudiced by the prosecutor's comments during closing.

**VI. Cumulative Error**

Heidari also argues that the individual errors he alleges are cumulative and require reversal of his conviction under the cumulative error doctrine. The cumulative error doctrine applies where there have been several trial errors, individually not justifying reversal, that, when combined, deny a defendant a fair trial. State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Where errors have little or no effect on the outcome at trial, the doctrine is inapplicable. See Greiff, 141 Wn.2d at 929. Even if there were errors, they had no effect on the outcome of Heidari's trial. Thus, the doctrine does not apply here.

Affirmed.



WE CONCUR:



## APPENDIX C



RICHARD D. JOHNSON,  
Court Administrator/Clerk

*The Court of Appeals*  
of the  
*State of Washington*  
Seattle  
98101-4170

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CASE #: 59086-3-I  
Personal Restraint Petition of Mansour Heidari

Counsel:

Enclosed please find a copy of the Order Dismissing Personal Restraint Petition entered by this court in the above case today.

Pursuant to RAP 16.14(c), "the decision is subject to review by the Supreme Court only by a motion for discretionary review on the terms and in the manner provided in Rule 13.5(a), (b) and (c)."

This court's file in the above matter has been closed.

Sincerely,



Richard D. Johnson  
Court Administrator/Clerk

law

enclosure

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

IN THE MATTER OF THE	)	
PERSONAL RESTRAINT	)	No. 59086-3-1
OF:	)	
	)	ORDER OF DISMISSAL
MANSOUR HEIDARI,	)	
	)	
_____Petitioner.	)	

Mansour Heidari has filed a personal restraint petition alleging that the prosecutor committed misconduct during closing argument and that Heidari received ineffective assistance of appellate counsel because counsel failed to challenge certain prosecutorial misconduct.<sup>1</sup> To prevail here, Heidari must show that he is unlawfully restrained.<sup>2</sup> To establish unlawful restraint, he must show either (1) actual and substantial prejudice arising from constitutional error, or (2) nonconstitutional error that inherently results in a "complete miscarriage of justice."<sup>3</sup> If Heidari had no prior or alternative means of obtaining state judicial review, he must show only that he is restrained and that the restraint is unlawful.<sup>4</sup> In order to prevail in a personal restraint petition, a petitioner must set out the

<sup>1</sup> On April 5, 2007 Heidari filed a motion to continue time for filing reply. The motion is granted, and the reply accepted.

<sup>2</sup> See In re Pers. Restraint of Cashaw, 123 Wn.2d 138, 148-49, 866 P.2d 8 (1994); RAP 16.4.

<sup>3</sup> In re Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990); In re Pers. Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

<sup>4</sup> In re Pers. Restraint of Garcia, 106 Wn. App. 625, 629, 24 P.3d 1091, 33 P.3d 750 (2001).

facts underlying the challenge and the evidence available to support the factual allegations.<sup>5</sup> Bare assertions and conclusory allegations are insufficient to gain consideration of a personal restraint petition.<sup>6</sup>

Heidari was convicted of one count of first degree rape of a child - domestic violence, one count of second degree child molestation – domestic violence, and one count of third degree child molestation – domestic violence. He raises issues of prosecutorial misconduct and ineffective assistance of counsel.

A defendant alleging prosecutorial misconduct must show a substantial likelihood that the misconduct affected the verdict. In the Matter of the Pers. Restraint Petition of Pirtle, 136 Wn.2d 467, 481-82, 965 P.2d 593 (1998). If the defendant did not object to the comments at trial, the issue of prosecutorial misconduct is waived unless the misconduct was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997).

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<sup>5</sup> In re Rice, 118 Wn.2d 876, 885-86, 828 P.2d 1086 (1992).

<sup>6</sup> Rice, 118 Wn.2d at 886.

On direct appeal, Heidari argued that the prosecutor committed misconduct by stating her own opinion of the facts during closing argument. The court concluded that the prosecutor did make improper comments, but that those comments were not prejudicial because the evidence against Heidari was very strong. In this personal restraint petition, Heidari attempts to raise this issue again, basing it on federal rather than state law. But “[a] claim rejected on its merits on direct appeal will not be reconsidered in a subsequent personal restraint petition unless the petitioner shows that the ends of justice would be served thereby.”<sup>7</sup> Heidari’s proffered distinction between the claim based on state law raised on direct appeal and the claim based on federal law he attempts to raise in this petition only presents a revision of the issue already decided on appeal. “Simply ‘revising’ a previously rejected legal argument ... neither creates a ‘new’ claim nor constitutes good cause to reconsider the original claim.”<sup>8</sup> “Thus, for example, ‘a claim of involuntary confession predicated on alleged psychological coercion does not raise a different ‘ground’ than does one predicated on physical coercion’.”<sup>9</sup> Because Heidari raised the personal opinion argument on direct appeal, and the court rejected it, he cannot raise it again in this personal restraint petition.

Heidari also argues that the prosecutor committed misconduct during closing by commenting on Heidari’s failure to produce surrebuttal testimony from his brother-in-law regarding whether his bedroom door had a lock. This bedroom

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<sup>7</sup> In re Jeffries, 114 Wn.2d 485, 487, 789 P.2d 731 (1990), citing In re Taylor, 105 Wn.2d 683, 687, 717 P.2d 755 (1986).

<sup>8</sup> Jeffries, 114 Wn.2d at 488.

<sup>9</sup> Jeffries, 114 Wn.2d at 488.

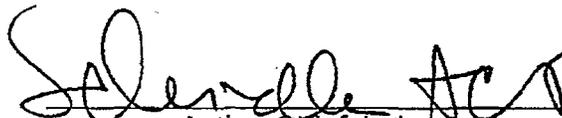
was the scene of one of the crimes. The prosecutor commented that the defense failed to produce the brother-in-law's testimony regarding whether the bedroom door had a lock after he had already argued during a motion to present the testimony that the trial court should not allow the evidence in surrebuttal.

Heidari asserts that the prosecutor's comments left the jury with a false impression and was a flagrant and ill-intentioned violation of his right to a fair trial. But as the trial court stated in denying the motion to present the surrebuttal evidence, the defense was aware of this issue during its case in chief. Defense counsel called another witness to testify regarding the existence of a lock on the door. And any prejudice could have been cured by a jury instruction. Further, Heidari does not claim that the surrebuttal evidence would have addressed the question of whether the lock, if there was one, was locked or unlocked at the time of the crime, so it would have had limited relevance. Given the other strong evidence against Heidari, this incident of alleged misconduct did not prejudice the defense. And because the prosecutorial misconduct issue fails, Heidari's claim of ineffective assistance of counsel is inapposite.

Accordingly, Heidari has not stated grounds upon which relief can be granted by way of a personal restraint petition. Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this 30<sup>th</sup> day of April, 2007.

  
Acting Chief Judge

2007 APR 30 PM 3:25

FILED  
COURT OF APPEALS DIV. 1  
STATE OF WASHINGTON

