

63235-3

63235-3

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

In re Personal Restraint)
Petition of)
)
)
)
)
)
GAIL GABRIEL,)
Petitioner.)
_____)

No. 63235-3-1

STATE'S RESPONSE TO
PERSONAL RESTRAINT
PETITION

2009 JUL 16 PM 4:50
COURT OF APPEALS
STATE OF WASHINGTON
[Signature]

A. AUTHORITY FOR RESTRAINT OF PETITIONER.

Gail Gabriel is restrained pursuant to Judgment and Sentence in King County Superior Court No. 99-1-02573-0 SEA.
See Appendix A.

B. ISSUES PRESENTED.

Whether this personal restraint petition should be dismissed where the new rule of criminal procedure set forth in State v. Borsheim, 140 Wn.2d 357, 165 P.3d 417 (2007), does not apply retroactively to Gabriel's convictions.

C. STATEMENT OF THE CASE.

Gail Gabriel was found guilty by jury verdict of one count of rape of a child in the first degree and three counts of rape of a child in the second degree in 1999. Appendix A. He was sentenced to 318 months of total confinement. Appendix A. He appealed. His convictions were affirmed and mandate issued April 11, 2002. Appendix B. Gabriel has filed at least two prior personal restraint petitions in this Court, Nos. 54713-5-I and 60682-4-I, both of which were dismissed. Appendix C, D. In Court of Appeals No. 54713-5-I, this Court rejected Gabriel's claim that his convictions on Count IV and V constitute double jeopardy. Appendix C.

The facts of the crime were set forth in detail in the Statement of the Case from the Brief of Respondent filed in the direct appeal, attached hereto as Appendix E. In short, Gabriel was convicted of having sexual contact with two preteen runaway girls who stayed at his apartment over a period of four to five days. Gabriel was 29 years old at the time. All but two of the five counts against Gabriel differed from each other as to the crime charged, the victim or the date of the crime. In Count I, Gabriel was charged with rape of a child in the first degree in regard to victim C.H.

occurring between March 27 and March 28, 1999. Appendix F. In Count II, Gabriel was charged with rape of a child in the second degree in regard to victim M.B. occurring between March 27 and March 28, 1999. Appendix F. In Count III, Gabriel was charged with sexual exploitation of a minor in regard to victim M.B. occurring between March 27 and March 29, 1999. Appendix F. In Count IV and V, the only two identical charges, Gabriel was charged with rape of a child in the second degree in regard to victim M.B. occurring between March 24, 1999 and March 26, 1999. Appendix F.

In regard to the evidence relating to the two identical counts, Counts IV and V, the prosecutor outlined in opening statement that over the several days that the victims stayed at Gabriel's apartment, M.B. and Gabriel " continued their sexual relationship on essentially a daily basis." RP 10/20/99 56. C.H. testified to seeing M.B. perform oral sex on Gabriel. RP 10/20/99 76-77. C.H. testified that M.B. and Gabriel were "sexually active" on more than one occasion. RP 10/20/99 76-78. C.H. testified to using a video recorder to record M.B. performing oral sex on Gabriel on a second occasion. RP 10/20/99 84-86. On cross-examination, C.H.

testified that she saw M.B. and Gabriel have sex eight to ten times.

RP 10/20/99 110-11.

In contrast, M.B. denied having any sexual relationship with Gabriel, and claimed they were only friends. RP 10/25/99 17.

M.B. admitted that she had told Detective McLean that she and

Gabriel had a sexual relationship. RP 10/25/09 23. Gabriel

testified and denied having any sexual contact with M.B. or C.H.

RP 10/26/99 95.

The jury, apparently having found C.H.'s testimony to be credible, and M.B. and Gabriel's testimony to be not credible, found Gabriel guilty as to Counts I, II, IV and V, but were unable to reach a verdict as to Count III.¹ Appendix G. That count was dismissed at sentencing. Appendix A.

D. ARGUMENT.

1. CONSIDERATION OF THE MERITS OF THIS
UNTIMELY, SUCCESSIVE PETITION IS NOT BARRED BY
RCW 10.73.090, RCW 10.73.140 or RAP 16.4(d).

No petition collaterally attacking a judgment and sentence
may be filed more than one year after the judgment becomes final,

¹ In regard to evidence of Count III, although C.H. testified to videotaping M.B. and Gabriel engaged in oral sex, no videotape showing that incident was ever found. RP 10/27/99 66-68.

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 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). Gabriel's conviction became final on April 11, 2002. Appendix B. This petition was filed more than six years after his conviction became final.

However, RCW 10.73.100(3) provides that the timebar specified in RCW 10.73.090 does not apply to a petition that is based solely on grounds that the conviction was barred by double jeopardy. Gabriel's petition raises a single claim: that one of his rape in the second degree convictions is barred by double jeopardy. Pursuant to RCW 10.73.100(3), this Court may consider the merits of this untimely claim, although, for reasons explained below, it should be rejected.

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. Similarly,

RAP 16.4(d) provides, in part, that "No more than one petition for similar relief on behalf of the same petitioner will be entertained without good cause shown." This prohibition applies to both this Court and the supreme court. A significant intervening change in the law constitutes good cause for advancing the same grounds in a successive petition. In re Personal Restraint of Johnson, 131 Wn.2d 558, 567, 933 P.2d 1019 (1997). Gabriel raised his double jeopardy claim in a prior personal restraint petition, No. 54713-5-I, that was dismissed by this Court on September 29, 2004.

Appendix C. For the reasons explained below, State v. Borsheim, 140 Wn.2d 357, 165 P.3d 417 (2007), is a significant intervening change in the law in regard to Gabriel's double jeopardy claim, and thus constitutes good cause for this Court to consider the merits of this successive petition, although, for the reasons explained below, the petition should ultimately be dismissed.

2. STATE V. BORSHEIM IS A NEW RULE OF CRIMINAL PROCEDURE THAT DOES NOT APPLY RETROACTIVELY TO CASES THAT WERE FINAL PRIOR TO AUGUST 27, 2007.

Gabriel argues that Count IV or V must be vacated in light of this Court's decision in State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007). Gabriel is incorrect. Borsheim announced a new rule of criminal procedure. New rules of criminal procedure do not

apply retroactively to cases that were final when the new rule was announced. Borsheim does not apply retroactively to Gabriel's case, which was final when that decision was announced.

In Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), the United States Supreme Court set forth a new formulation for determining the retroactive application of new rules. The principles set forth in Teague v. Lane were unanimously applied in Penry v. Lynaugh, 492 U.S. 302, 329-30, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), and have been repeatedly applied by the Court. See e.g. Schiro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) (new rule requiring jury to decide aggravating circumstances in capital case not retroactive to convictions already final); Lambrix v. Singletary, 520 U.S. 518, 117 S.Ct. 1517, 137 L.Ed.2d 771 (1997) (new rule regarding the "weighing" of aggravating and mitigating factors in capital case not retroactive to convictions already final); Gilmore v. Taylor, 508 U.S. 333, 113 S.Ct. 2112, 124 L.Ed.2d 306 (1993) (new rule requiring jury instruction on mitigating mental states not retroactive to convictions already final); Graham v. Collins, 506 U.S. 461, 113 S.Ct. 892, 122 L.Ed.2d 260 (1993) (new rule regarding consideration of mitigating circumstances in capital case not

retroactive to convictions already final). Washington courts have adopted the retroactivity standard set forth in Teague and its progeny. See State v. Evans, 154 Wn.2d 438, 444, 114 P.3d 627 (2005); State v. Markel, 154 Wn.2d 262, 268-69, 111 P.3d 249 (2005); In re St. Pierre, 118 Wn.2d 321, 324-27, 823 P.2d 492 (1992) (noting that "we have attempted from the outset to stay in step with the federal retroactivity analysis.")

Pursuant to Teague, when a court's decision results in a new rule, that rule applies to all cases pending on direct review. Summerlin, 124 S.Ct. at 2522. As to convictions that were already final when the new rule was announced, new substantive rules, such as interpretations of criminal statutes, generally apply retroactively. Id. In contrast, new rules of procedure do not apply retroactively unless the new rule constitutes a "watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." Id. (citing Teague, 489 U.S. at 311). In order to fall within this narrow category the rule must be one "without which the likelihood of an accurate conviction is *seriously* diminished." Id. (emphasis in original) (citing Teague, 489 U.S. at 313).

In State v. Borsheim, the defendant was charged and convicted of four counts of rape of a child in the first degree. 140 Wn. App. at 363. Each count involved the same victim and same time period. Id. at 364. Although the jury had been instructed with the standard pattern instruction that "a separate crime is charged in each count," and that "the verdict on one count should not control your verdict on any other count," this Court held that the instructions nonetheless allowed the jury to convict Borsheim of multiple crimes for a single act, thus violating double jeopardy. Id. at 367. This Court found that the jury instructions were inadequate because they failed to inform the jury that each crime must be based on a "separate and distinct act." Id. at 368. This Court noted that the omission was compounded by the fact that all four counts were confusingly encompassed in a single instruction rather than set out in separate instructions. Id. (In Gabriel's case, each crime was set forth in a separate instruction.)

The rule set forth in Borsheim is a new rule for purposes of the Teague analysis. As defined by the Supreme Court in Teague, a case announces a "new rule" when it:

imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new

rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

489 U.S. at 301. A rule is "dictated" by existing precedent when the application of that precedent is "apparent to all reasonable jurists." Lambrix v. Singletary, 520 U.S. at 527-28 (1997). In making this determination, the court must survey the legal landscape as it existed at the time the petitioner's conviction became final and "determine whether a state court considering [the defendant's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution." Saffle v. Parks, 494 U.S. 484, 488, 11 S.Ct. 1257, 108 L.Ed.2d 415 (1990).

In the present case, it is clear that this Court did not feel compelled by the legal landscape to find that Counts IV and V violated double jeopardy because that very claim was rejected in Gabriel's 2004 personal restraint petition. Appendix C. Prior to Borsheim, no Washington case had held that the standard jury instructions regarding multiple counts, WPIC 3.01², and jury

² WPIC 3.01 reads: "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." This instruction was given in this case as Instruction No. 16. Appendix E.

unanimity, WPIC 4.25³ were not sufficient to protect against a double jeopardy violation where the same crime is charged more than once based on multiple acts.

Indeed, another case held otherwise. In State v. Ellis, 71 Wn. App. 400, 859 P.2d 632 (1993), the defendant was charged with two counts of child molestation and two counts of rape of a child in the first degree. The counts had the same or overlapping charging periods. Id. at 401-02. For Count II, the jury was instructed that the crime had to occur "on a day other than Count I." Id. However, no such differentiation was made for Counts III and IV. Id. Division II of this Court rejected Ellis's double jeopardy claim, stating, "It is our view that the ordinary juror would understand that when two counts charge the very same type of crime, each count requires proof of a different act. Additionally, the trial court affirmatively instructed, in Instruction 4, that a separate crime was charged in each count and, in Instruction 5, that the jury

³ WPIC 4.25 reads: "There are allegations that the defendant committed acts of ___ on multiple occasions. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt." This instruction was given in this case as Instruction No. 15. Appendix E.

was required to unanimously agree that at least one particular act had been proved for each count." Id.

A few cases rejected double jeopardy claims in part because the jury was told in the instructions that each crime had to be based on a "separate and distinct act." State v. Noltie, 116 Wn.2d 831, 809 P.2d 190 (1991); State v. Hayes, 81 Wn. App. 425, 914 P.2d 788 (1996); State v. Newman, 63 Wn. App. 841, 822 P.2d 308 (1992). However, these cases rest their holding on the totality of the circumstances, taking into consideration the evidence presented, the argument of counsel and the instructions as a whole, to find that no double jeopardy violation occurred. None of these cases held that the failure to include the "separate and distinct" language would, in itself, constitute a double jeopardy violation.

The Borsheim decision, requiring reversal based solely on the court's failure to include "separate and distinct" language in the jury instructions, was not dictated by prior precedent such that its application was apparent to all reasonable jurists. It is a new rule.

The new rule set forth in Borsheim is procedural. A rule is substantive if it alters the range of conduct or the class of persons that the law punishes. Summerlin, 124 S.Ct. at 2523. A rule is

procedural if it regulates the manner of determining the defendant's culpability. Id. In Caspari v. Bohlen, 510 U.S. 383, 396-97, 114 S.Ct. 948, 127 L.Ed.2d 236 (1994), the United States Supreme Court found that the Eighth Circuit's application of double jeopardy principles to a non-capital sentencing proceeding was a new rule of criminal procedure that could not be applied to cases that were already final. Likewise, the holding of Borsheim, that jury instructions for multiple identical crimes violate the guarantee against double jeopardy if they do not explicitly instruct the jury that separate crimes must be based on "separate and distinct" acts, is a procedural rule.

As a new rule of criminal procedure, the rule set forth in Borsheim will not be applied retroactively unless it constitutes a "watershed rule of criminal procedure implicating fundamental fairness and accuracy of the criminal proceeding." Summerlin, 124 S.Ct. at 2524. It is not enough that a new rule based on a constitutional right be important. Evans, 154 Wn. 2d at 445. It must be "implicit in the concept of ordered liberty" and "alter our understanding of bedrock procedural elements." Id. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), and Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354,

158 L.Ed.2d 177 (2004), United States Supreme Court cases that significantly altered the way in which sentencings and trials are conducted, were found not to be watershed rules. Evans, 154 Wn.2d at 447; Markel, 154 Wn.2d at 273. Likewise, the new rule set forth in Borsheim is not a watershed rule.

In sum, Borsheim set forth a new rule of criminal procedure that does not constitute a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. As such, Borsheim will not apply retroactively to cases that were already final when it was announced on August 27, 2007.

“Final” for purposes of retroactivity analysis means “a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.” St. Pierre, 118 Wn.2d at 327 (quoting Griffith v. Kentucky, 479 U.S. 314, 321 n. 6 (1987)). Gabriel's case was final for purposes of retroactivity analysis in 2002, when the period for filing a petition for certiorari elapsed. RAP 5.2(a). Because Gabriel's case became final before August 27, 2007, the new rule set forth in Borsheim does not apply retroactively to his case. Gabriel's petition should be dismissed.

E. CONCLUSION.

This petition should be dismissed.

DATED this 15th day of July, 2009.

Respectfully Submitted,

DAN SATTERBERG
King County Prosecuting
Attorney

by 
ANN SUMMERS, #21509
Senior Deputy Prosecuting
Attorney
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APPENDIX A

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DWA/Hiv

STATE OF WASHINGTON)
Plaintiff,)
v.)
ANDY GAIL GABRIEL)
Defendant.)

No. 99-1-02573-0 SEA

JUDGMENT AND SENTENCE

I. HEARING

1.1 The defendant, the defendant's lawyer, DOUGLAS STRATEMEYER and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: Victim Monique Brooks mother D.A.S.

1.2 The state has moved for dismissal of count(s) III

II. FINDINGS

Based on the testimony heard, statements by defendant and/or victims, argument of counsel, the presentence report(s) and case record to date, and there being no reason why judgment should not be pronounced, the court finds:

1.1 CURRENT OFFENSE(S): The defendant was found guilty on (date): 10-27-99 by jury verdict of:

Count No.: I Crime: RAPE OF A CHILD IN THE FIRST DEGREE
RCW 9A.44.073 Crime Code 01064
Date of Crime 03-28-99 Incident No.
Count No.: II Crime: RAPE OF A CHILD IN THE SECOND DEGREE
RCW 9A.44.076 Crime Code 01066
Date of Crime 03-28-99 Incident No.
Count No.: IV Crime: RAPE OF A CHILD IN THE SECOND DEGREE
RCW 9A.44.076 Crime Code 01066
Date of Crime 03-26-99 Incident No.

Additional current offenses are attached in Appendix A.

SPECIAL VERDICT/FINDING(S):

Grid with checkboxes for special verdicts: (a) Firearm, (b) Deadly Weapon, (c) Sexual Motivation, (d) Violation of the Uniform Controlled Substances Act, (e) Vehicular Homicide, (f) Current offenses encompassing.

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):

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99 9 17882 9

FILED JUL - 6 1999

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.360):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
(a)				
(b)				
(c)				
(d)				

- Additional criminal history is attached in **Appendix B**.
- Prior convictions (offenses committed before July 1, 1986) served concurrently and counted as one offense in determining the offender score are (RCW 9.94A.360(6)(c)): _____
- 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	9	XII			240 - 318 MONTHS	LIFE AND/OR \$50,000
Count II	9	XI			210 - 280 MONTHS	LIFE AND/OR \$50,000
Count IV	9	XI			210 - 280 MONTHS	LIFE AND/OR \$50,000

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

2.5 **EXCEPTIONAL SENTENCE:**

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) III

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.142(2), sets forth those circumstances in attached **Appendix E**.
 - Restitution to be determined at future hearing on (Date) Feb 16 2007 at 6:45 am. Date to be set.
 - Defendant waives presence at future restitution hearing(s).
- Defendant shall pay Victim Penalty Assessments pursuant to RCW 7.68.035 in the amount of \$100 if all crime(s) date prior to 6-6-96 and \$500 if any crime date in the Judgment is after 6-5-96.
- Restitution is not ordered.

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;
- (b) \$ _____, Recoupment for attorney's fees to King County Public Defense Programs, 2015 Smith Tower, Seattle, WA 98104; Recoupment is waived (RCW 10.01.160);
- (c) \$ _____, Fine; \$1,000, Fine for VUCSA; \$2,000, Fine for subsequent VUCSA; VUCSA fine waived (RCW 69.50.430);
- (d) \$ _____, King County Interlocal Drug Fund; Drug Fund payment is waived;
- (e) \$ _____, State Crime Laboratory Fee; Laboratory fee waived (RCW 43.43.690);
- (f) \$ _____, Incarceration costs; Incarceration costs waived (9.94A.145(2));
- (g) \$ _____, Other cost for: _____

4.3 **PAYMENT SCHEDULE:** Defendant's **TOTAL FINANCIAL OBLIGATION** is: \$ 500.00. 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. _____
- The Defendant shall remain under the Court's jurisdiction and the supervision of the Department of Corrections for up to ten years from date of sentence or release from confinement to assure payment of financial obligations.

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.

318 months on Count I 280 ~~IV~~ months on Count IV _____ months on Count _____
280 months on Count II 270 ~~IV~~ months on Count V _____ months on Count _____

ENHANCEMENT time due to special deadly weapon/firearm finding of _____ months is included for Counts _____

The terms in Count(s) I + II + IV + V are concurrent consecutive.
The sentence herein shall run concurrently/consecutively with the sentence in cause number(s) _____
_____ but consecutive to any other cause not referred to in this Judgment.

Credit is given for 90 days served or as calculated by the jail for CCN #'s - 1731964 + 1287851
days as determined by the King County Jail solely for conviction under this cause number pursuant to RCW 9.94A.120(15).

4.5 NO CONTACT: For the maximum term of 1 yr years, defendant shall have no contact with Christine Henry, + Monique Bracks
Violation of this no contact order is a criminal offense under chapter 10.99 RCW and will subject a violator to arrest; any assault or reckless endangerment that is a violation of this order is a felony.

4.6 BLOOD TESTING: (sex offense, violent offense, prostitution offense, drug offense associated with the use of hypodermic needles) Appendix G is a blood testing and counseling order that is part of and incorporated by reference into this Judgment and Sentence.

[Handwritten initials/signature]

Community Custody

COMMUNITY PLACEMENT, RCW 9.94A.120(9): Community Placement is ordered for any of the following eligible offenses: any "sex offense", any "serious violent offense", second degree assault, any offense with a deadly weapon finding, any CH. 69.50 or 69.52 RCW offense, for the maximum period of time authorized by law. All standard and mandatory statutory conditions of community placement are ordered.

Appendix H (for additional nonmandatory conditions) is attached and incorporated herein. which is 3/10

4.8 WORK ETHIC CAMP: The court finds that the defendant is eligible for work ethic camp and is likely to qualify under RCW 9.94A.137 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the Department shall convert the period of work ethic camp confinement at a rate of one day of work ethic camp to three days of total standard confinement and 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.120(9)(b).

Appendix K for additional special conditions, RCW 9.94A.120(9)(c), is attached and incorporated herein.

4.9 SEX OFFENDER REGISTRATION (sex offender crime conviction): Appendix J is attached and incorporated by reference into this Judgment and Sentence.

4.10 ARMED CRIME COMPLIANCE, RCW 9.94A.103,105. The state's plea/sentencing agreement is attached
as follows:

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

Date: December 6, 1999

Judge: Jean Dubuque

Print Name: Jean Dubuque

Presented by:

Approved as to form:

[Signature]
Deputy Prosecuting Attorney, Office WSBA ID #91002
Print Name: Jockey C. Kernbach

[Signature]
Attorney for Defendant, WSBA # 21678
Print Name: Douglas A. Stratemeyer

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON

Plaintiff,

v.

ANDY GAIL GABRIEL

Defendant.

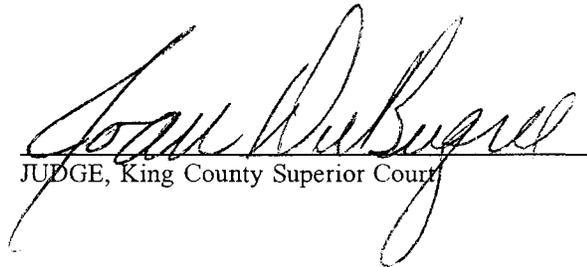
No. 99-1-02573-0 SEA

(FELONY) - APPENDIX A
ADDITIONAL CURRENT OFFENSES

2.1 The defendant is also convicted of these additional current offenses:

Count No.: <u>V</u>	Crime: <u>RAPE OF A CHILD IN THE SECOND DEGREE</u>
RCW <u>9A.44.076</u>	Crime Code <u>01066</u>
Date of Crime <u>03-26-99</u>	Incident No. _____

Date: 12/10/99



JUDGE, King County Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)	
	)	No. 99-1-02573-0 SEA
Plaintiff,)	
	)	(FELONY) - APPENDIX C
v.	)	ADDITIONAL CURRENT OFF
	)	SENTENCING DATA
ANDY GAIL GABRIEL)	
)	
Defendant.)	

2.4 SENTENCING DATA: Additional current offense(s) sentencing information is as follows:

COUNT NO.	OFFENDER SCORE	SERIOUSNESS LEVEL	STANDARD RANGE (not including enhancements)	Plus Enhancement for Firearm (F), or other deadly weapon finding (D) or VURSA (V) in a zone	Total STANDARD RANGE (including enhancements)	MAXIMUM TERM
V	9	XI			210 - 280 MONTHS	LIFE AND/OR \$50,000

Date: 12/6/99

Sam E. Dubuguis

 JUDGE, King County Superior Court

DNA/HIV

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)
)
 Plaintiff,)
)
 v.)
)
 ANDY GAIL GABRIEL)
)
 Defendant.)

No. 99-1-02573-0 SEA
APPENDIX G
ORDER FOR BLOOD TESTING
AND COUNSELING

(1) HIV TESTING AND COUNSELING:

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense committed after March 23, 1988. RCW 70.24.340):

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**.

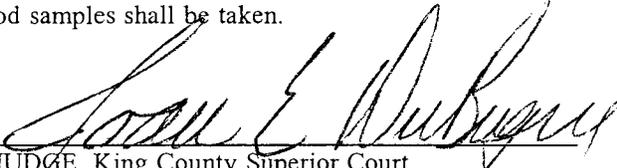
(2) DNA IDENTIFICATION:

(Required for defendant convicted of sexual offense or violent offense. RCW 43.43.754):

The Court orders the defendant to cooperate with the King County Department of Adult Detention and/or the State Department of Corrections in providing a blood 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 arrangement for the test to be conducted **within 15 days**.

If both (1) and (2) are checked, two independent blood samples shall be taken.

Date: 12/6/99


JUDGE, King County Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON

Plaintiff)

v.)

GABRIEL, Gail Marius (Andy)

Defendant)

No. 99-1-02573-0 SEA (all counts)

**JUDGMENT AND SENTENCE
(FELONY) – APPENDIX H
COMMUNITY PLACEMENT/CUSTODY**

14. Have no contact with the victim or any minor-age children without the approval of your Community Corrections Officer.

15. Hold no position of authority or trust involving children.

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

17. Do not change residence without the approval of your Community Corrections Officer.

18. Pay for counseling costs for victims and their families.

19. Within 30 days of sentencing, submit to DNA and HIV testing as required by law.

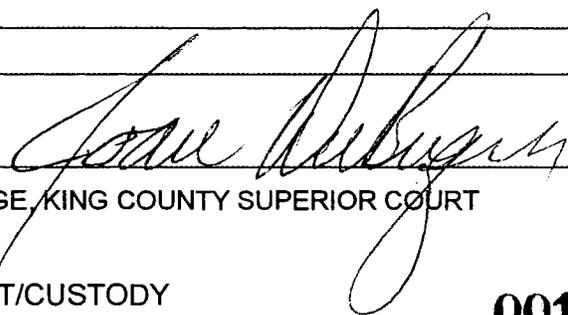
20. Obey all laws.



Date:

December 6, 1999

JUDGE, KING COUNTY SUPERIOR COURT



SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)

Plaintiff,)

v.)

ANDY GAIL GABRIEL)

Defendant.)

No. 99-1-02573-0 SEA

**APPENDIX J
JUDGMENT AND SENTENCE -
SEX OFFENDER NOTICE OF
REGISTRATION REQUIREMENTS**

The defendant having been convicted of a sex offense ((a) Violation of Chapter 9A.44 RCW or RCW 9A.64.020 or RCW 9.68A.090 or that is, under Chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes or (b) a felony with a finding of sexual motivation under RCW 9.94A.127, the defendant is hereby notified of sex offender registration requirements of RCW 9A.44.130-.140 and is ordered to register with the county sheriff in accordance with the following registration requirements.

REGISTRATION REQUIREMENTS

1. The defendant must register with the Sheriff of the county in Washington state where he resides. When registering, the defendant shall provide the county sheriff with the following: (a) name; (b) address; (c) date and place of birth; (d) place of employment; (e) crime for which convicted; (f) date and place of conviction; (g) aliases used; (h) social security number; (i) photograph; and (j) fingerprints. The defendant must register immediately upon completion of being sentenced if not sentenced to begin serving a term of confinement immediately upon completion of being sentenced. Otherwise, he must register within 24 hours of the time of his release if sentenced to the custody of the Department of Corrections, Department of Social and Health Services, a local division of youth services, a local jail, or a juvenile detention facility.
2. If defendant does not now reside in Washington, but subsequently moves to this state, he must register within 24 hours of the time he begins to reside in this state, if at the time of the move he is under the jurisdiction of the Department of Corrections, the Indeterminate Sentence Review Board, or the Department of Social and Health Services. If at the time of defendant's move to this state he is not under the jurisdiction of one of those agencies, then he must register within 30 days of the time defendant begins to reside in this state.
3. If defendant subsequently changes residences within a county in this state, he must notify the county sheriff of that change of residence in writing within 14 days prior to the change of residence. If defendant subsequently moves to a new county within this state, he must register all over again with the sheriff of the new county and must notify the former county sheriff (i.e. the county sheriff of his former residence) of that change of residence in writing, and defendant must complete both acts within 14 days prior to the change of residence.
4. It is a crime to knowingly fail to register in accordance with the above registration requirements.

I have read and understand these sex offender registration requirements.

Andy Gabriel
Defendant

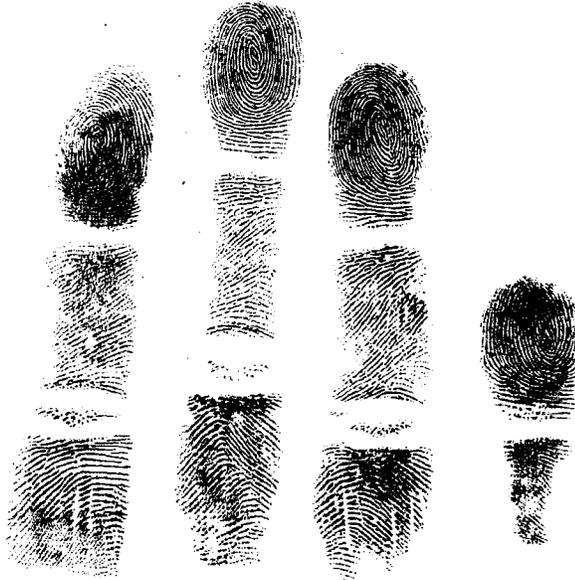
Date: December 6, 1999

Presented by: [Signature]
Deputy Prosecuting Attorney

[Signature]
JUDGE, KING COUNTY SUPERIOR COURT

Approved as to form:
Douglas A. Stabiney
Defense Attorney

FINGERPRINTS



Defendant's Signature: Gail Michels
Right Hand Fingerprints of: D.O.C.

Attested by:
M. Janice Michels, Superior Court Clerk
By: Sara Bowen
Deputy Clerk

Dated: DEC 06 1999
Joan E. Rubenstein
Judge, King County Superior Court

King County Cause # 99-1-02573-1
SFA

CERTIFICATE This is the original certified fingerprint page of
Mr. Gail Gabriely

OFFENDER IDENTIFICATION
CCN 1731964
CCN 1289851
S.T.D. No. _____
Date of Birth January 19, 1969
Sex M
Race B

I, _____,
Clerk of this Court, certify that the above is a true copy
of the Judgment and Sentence in this action on record in
my office.
Dated: _____

Clerk
By: _____
Deputy Clerk

FINGERPRINT



RIGHT HAND
FINGERPRINTS OF:

ANDY GAIL GABRIEL

DATED: DEC 06 1999

DEFENDANT'S SIGNATURE: _____
DEFENDANT'S ADDRESS: _____

Gail G.
K.C.J.

ATTESTED BY:
PAUL L. SHERFEY, SUPERIOR COURT CLERK
BY: _____

DEPUTY CLERK

JUDGE, KING COUNTY SUPERIOR COURT
JOAN E. DUBUQUE

CERTIFICATE

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: _____

CLERK

BY: _____
DEPUTY CLERK

OFFENDER IDENTIFICATION

S.I.D. NO. 1731964
1289851
DATE OF BIRTH: JANUARY 19, 1969
SEX: M
RACE: B

APPENDIX B

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

FILED
02 APR 17 PM 12:37

STATE OF WASHINGTON,

Respondent,

v.

GAIL M. GABRIEL,

Appellant.

No. 45779-9-1

KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA.

MANDATE

King County

Superior Court No. 99-1-02573-0.SEA

APR 23 2002
COMMITMENT ISSUED

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 April 23, 2001, became the decision terminating review of this court in the above entitled case on April 11, 2002. An order denying a motion for reconsideration was entered on May 23, 2001. A ruling denying a motion for discretionary review was entered in the Supreme Court on February 7, 2002. An order denying a petition for review was entered on January 8, 2002. 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 decision.

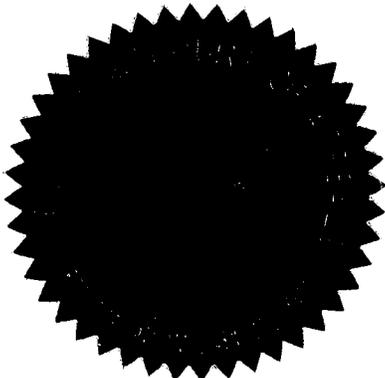
Pursuant to a Commissioner's ruling entered on July 26, 2001, costs in the amount of \$4,460.02 are awarded in favor of judgment creditor WASHINGTON OFFICE OF PUBLIC DEFENSE and costs in the amount of \$93.19 are awarded in favor of judgement creditor KING COUNTY PROSECUTING ATTORNEY against judgment debtor GAIL GABRIEL.

c: King County Prosecuting Attorney
Washington Appellate Project
Hon. Joan Dubuque

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 11th of April, 2002.


RICHARD D. JOHNSON

Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.



A majority of the panel has determined that this opinion will not be printed in the Washington Appellate reports but will be filed for public record pursuant to RCW 2.06.040. IT IS SO ORDERED

Ausan R. Ajid

FILE
IN CLERK'S OFFICE
COURT OF APPEALS
STATE OF WASHINGTON, DIVISION I
DATE APR 23 2001
Ausan R. Ajid
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 45779-9-1
)	
Respondent,	)	DIVISION ONE
)	
v.)	
)	
GAIL M. GABRIEL,	)	UNPUBLISHED
)	
Appellant.	)	FILED: <u>APR 23 2001</u>
)	

COX, J. -- Gail Gabriel appeals his convictions for rape of a child. The evidence was sufficient to support the convictions on counts IV and V. The trial court properly exercised its discretion when it concluded that counts IV and V did not constitute the same criminal conduct. And the claim that the State failed to amend the information and arraign Gabriel on a "substantially different" charge does not constitute manifest error that warrants review. Accordingly, we affirm.

In the early morning of March 24, 1999, C.H. and M.B. left Mediplex Rehabilitation Center without permission. C.H. and M.B. were 11 and 12 years old respectively. They were living at Mediplex due to behavioral problems. M.B. then telephoned Gabriel, and asked whether they could stay with him. Shortly thereafter, Gabriel picked up C.H. and M.B. and drove them to his apartment in West Seattle where the events leading to the rape charges at issue here occurred.

C.H. testified that during the four or five days that she stayed at Gabriel's apartment, she observed Gabriel and M.B. engaged in oral sex more than once. In one instance, C.H. testified that she saw M.B. give Gabriel a "blow job" under a blanket. C.H. also testified that during the last night of their stay at Gabriel's apartment, Gabriel allegedly woke her up and took her to the bedroom where he fingered her vaginal area, and then put his penis halfway inside her vagina. Later, C.H. left and went to a neighbor's apartment where she called 911. The police arrived at the scene and arrested Gabriel.

The State charged Gabriel with one count of rape of a child in the first degree as to C.H., one count of sexual exploitation of a minor as to M.B., and three counts of rape of a child in the second degree as to M.B. At trial, both Gabriel and M.B. testified that they did not have a sexual relationship. A jury found him guilty of all rape charges, but acquitted him on count III, the charge of exploitation of a minor.¹ The trial court imposed concurrent standard range sentences, the longest of which was 318 months.

¹ The counts of the amended information on which Gabriel was convicted state:

Count IV [Rape of a Child in the Second Degree]

That [Gabriel]...during a period of time intervening between March 24, 1999, through March 26, 1999, being at least 36 months older than [M.B.,] had sexual intercourse with [M.B.,] who was 12 years old and was not married to [Gabriel].

Count V [Rape of a Child in the Second Degree]

That [Gabriel]...during a period of time intervening between March 24, 1999, through March 26, 1999, being at least 36 months older than [M.B.,]

Gabriel appeals.

Sufficiency of Evidence

Gabriel does not contest his convictions on counts I or II. He argues that there was insufficient evidence to support his convictions for counts IV and V of rape of a child in the second degree. He claims there was no testimony that two separate acts of sexual intercourse with M.B. occurred during the charging periods for those counts. We disagree.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational jury could find the essential elements of the crime beyond a reasonable doubt.² A claim of insufficiency of evidence admits the truth of the State's evidence and all inferences that can be reasonably drawn from that evidence.³ All reasonable inferences must be drawn in the State's favor and interpreted most strongly against the defendant.⁴ We defer to the trier of fact to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of the witnesses.⁵

had sexual intercourse with [M.B.] who was 12 years old and was not married to [Gabriel].

Clerk's Papers at 80-82.

² State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

³ Salinas, 119 Wn.2d at 201.

⁴ State v. Joy, 121 Wn.2d 333, 338-39, 851 P.2d 654 (1993).

⁵ State v. Boot, 89 Wn. App. 780, 791, 950 P.2d 964, review denied, 135 Wn.2d 1015 (1998).

A person is guilty of second degree rape of a child when:

[T]he person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim.^[6]

RCW 9A.44.010(1)(c) defines sexual intercourse as:

[A]ny act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

The claim here is essentially that C.H.'s testimony was too generic to establish separate acts of rape. Three factors must be met before "generic" testimony of sexual abuse may be sufficient to sustain conviction of multiple counts of a sex crime involving a young victim:

First, the alleged victim must describe the kind of act or acts with sufficient specificity to allow the trier of fact to determine what offense, if any, has been committed. Second, the alleged victim must describe the number of acts committed with sufficient certainty to support each of the counts alleged by the prosecution. Third, the alleged victim must be able to describe the general time period in which the acts occurred. The trier of fact must determine whether the testimony of the alleged victim is credible on these basic points.^[7]

Here, there was testimony showing that at least two acts of sexual intercourse occurred between Gabriel and M.B. during the charging period of March 24 through 26 to support his convictions on counts IV and V.

During the State's direct examination, C.H. testified as follows:

[Prosecutor:] ...Now, during the four or five days that you had stayed [at Gabriel's apartment] did you see the defendant and [M.B.] together?

⁶ RCW 9A.44.076.

⁷ State v. Hayes, 81 Wn. App. 425, 438, 914 P.2d 788, review denied, 130 Wn.2d 1013 (1996).

[C.H.:] Yes.

[Prosecutor:] What would you see them do together?

[C.H.:] Sexually active.

[Prosecutor:] ...Now, when you say sexually active...I'm going...to ask you some detailed questions and they might be a little bit difficult to answer, it might be a little bit embarrassing, but we'll try to make it go again as fast as we can.

When you say you had seen them sexually active, what specifically did you see them doing?

[C.H.:] *Sometimes [M.B.] would be under the blankets giving him a blow job –*

[Defense counsel:] I'll object. The witness is speculating.

[Prosecutor:] I'll ask more specific questions.

[Court:] Yes.

[Prosecutor:] *When you say sometimes she was under the blanket giving him a blow job, what specifically would you see that made you think that that's what was happening?*

[C.H.:] *Her head.*

[Prosecutor:] *Where was her head?*

[C.H.:] *Down there.*

[Prosecutor:] *...When you say down there, do you mean – where do you mean?*

[C.H.:] *His penis.*

[Prosecutor:] *...When you saw that, did you see if she was moving around at all or if she was staying still?*

[C.H.:] *Her head.*

[Prosecutor:] *...What was her head doing?*

[C.H.:] *It was moving like that.*

[Prosecutor:] *...You are kind of motioning kind of in an up-and-down movement?*

[C.H.:] *Yeah.*

[Prosecutor:] All right. Did you see them doing anything else?

[C.H.:] Not really.

[Prosecutor:] *...When you saw that [M.B.] was being sexually active with [Gabriel], while you were staying there at the apartment, do you know how often you would see them doing that sort of thing?*

[C.H.:] *I don't remember.*

[Prosecutor:] *...Do you think that you saw that happening more than one time?*

[C.H.:] *Yeah.*

During cross-examination, C.H. testified as follows:

[Defense counsel:] You remember telling me that the first night you slept in the living room, right, on the telephone?

[C.H.:] Yeah.

[Defense counsel:] And today you said something different, right?

[C.H.:] Yeah.

[Defense counsel:] ...[The prosecutor] asked you several questions today about things that you saw [M.B.] doing with [Gabriel], do you remember that?

[C.H.:] Yeah.

[Defense counsel:] *And some of those things were being sexually active, wasn't it?*

[C.H.:] Yeah.

[Defense counsel:] *Okay. Is that every day?*

[C.H.:] I don't remember.

[Defense counsel:] ...*Would it have been both days you were there?*

[C.H.:] Yeah.

[Defense counsel:] *Okay. And at night?*

[C.H.:] Yeah.

[Defense counsel:] *Would it have been eight to ten times?*

[C.H.:] Yeah.

As a preliminary issue, we reject Gabriel's assertion that C.H.'s testimony on cross may not be considered as substantive evidence. Specifically, he contends that the statement that he and M.B. engaged in oral sex eight to ten times was a prior inconsistent statement admitted only for impeachment purposes.

Under ER 613, prior inconsistent statements are admissible for the limited purpose of attacking the credibility of a witness.⁸ A prior statement is "inconsistent" when it has been compared with, and found different from, the witness' trial testimony.⁹ The theory of attack by prior inconsistent statements is

⁸ 5A K. Tegland, Evidence, Washington Practice, § 613.3 (1999); see also State v. Johnson, 40 Wn. App. 371, 377, 699 P.2d 221 (1985) (a factfinder may consider a prior inconsistent statement admitted to impeach a witness's testimony only for the purpose of evaluating that witness's credibility and not as substantive proof of the underlying facts).

⁹ State v. Williams, 79 Wn. App. 21, 26, 902 P.2d 1258 (1995).

based on the notion that testifying one way on the stand and another way previously raises a doubt as to the truthfulness of both statements.¹⁰ To ensure that prior inconsistent statements are used only as impeachment evidence, trial counsel should request a limiting instruction.¹¹ If no objection to the introduction of a prior inconsistent statement is made and no limiting instruction is sought, the jury may consider the prior statements as substantive evidence.¹²

In this case, defense counsel brought out C.H.'s prior statement regarding Gabriel and M.B. engaging in oral sex under the blanket eight to ten times. Assuming, without deciding, that it was a prior inconsistent statement, Gabriel never requested a limiting instruction. As such, C.H.'s prior statement may be considered as substantive evidence.

Here, we note that the court gave a Petrich¹³ instruction, requiring the jury to find separate and distinct acts for each count. Thus, the question is whether C.H.'s testimony was specific enough as to each charged count. We hold that C.H.'s testimony satisfied the three requirements outlined in Hayes.

First, notwithstanding Gabriel's argument to the contrary, it is clear that C.H.'s testimony on direct regarding Gabriel and C.H. being "sexually active"

¹⁰ Williams, 79 Wn. App. at 26 n.14 (quoting McCormick on Evidence, § 34 at 114).

¹¹ Johnson, 40 Wn. App. at 377.

¹² Cf. State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 110 (1997) (absent a request for a limiting instruction, evidence admitted as relevant for one purpose is deemed relevant for others).

¹³ State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984).

refers to M.B.'s head moving up and down in Gabriel's genital area. That act in turn satisfies the requirement that the acts be described with sufficient specificity to allow the trier of fact to determine what offense has been committed. Second, C.H.'s testimony on direct that she saw Gabriel and M.B. engage in oral sex "more than one time" and on cross that she earlier told defense counsel that she saw them engage in the same conduct "eight to ten times" establishes that Gabriel committed at least two separate acts of rape. Finally, her testimony that these acts occurred while she and M.B. stayed at Gabriel's apartment is sufficient to establish the general time period requirement. In short, C.H.'s testimony described the type of act committed, the number of acts committed, and the general time period. Under Hayes, this is sufficient to sustain separately the convictions on counts IV and V.

Nevertheless, Gabriel argues that this testimony cannot be considered as proof of counts IV and V because it does not specify that the incident of oral sex under the blanket occurred during the charging period of March 24-26. This argument fails.

Generally, a defendant may not be convicted for a crime with which he or she was not charged.¹⁴ In Hayes, this court held that testimony of an incident of sexual intercourse falling four days outside the charging period could sustain a count for rape of a child because time is not an element of the crime and there is

¹⁴ Hayes, 81 Wn. App. at 432.

no alibi defense.¹⁵ The crime at issue here is also rape of a child, of which time is not a material element. Moreover, Gabriel did not assert an alibi defense.¹⁶

The evidence is sufficient to support the convictions.

Same Criminal Conduct

Gabriel next argues that the trial court erred at sentencing in finding that the sexual intercourse involving M.B. in counts IV and V did not constitute the same criminal conduct. We hold that the trial court did not abuse its discretion in counting these convictions separately.

Under RCW 9.94A.400(1)(a), if two or more offenses encompass the same criminal conduct, the court counts the offenses as one crime.¹⁷ Multiple offenses encompass the same criminal conduct if they require the same criminal intent, are committed at the same place and time, and involve the same victim.¹⁸ The absence of any one of these three elements precludes a finding that the offenses constituted the same criminal conduct.¹⁹ The State bears the burden of

¹⁵ Hayes, 81 Wn. App. at 432-33; see also State v. Osborne, 39 Wash. 548, 81 P. 1096 (1905) (rejecting defendant's challenge to his rape conviction on basis that evidence at trial showed that offense was committed one to two weeks prior to the beginning of the charging period).

¹⁶ The trial court's order on omnibus hearing indicates that Gabriel asserted only the defense of "general denial." *Clerk's Papers at 14*. Moreover, a review of the record shows that Gabriel's defense at trial consisted of attacking C.H.'s credibility and denying the charges through his and M.B.'s testimony. There was simply no defense of alibi.

¹⁷ State v. Roose, 90 Wn. App. 513, 515-16, 957 P.2d 232 (1998).

¹⁸ State v. Williams, 135 Wn.2d 365, 367, 957 P.2d 216 (1998).

¹⁹ State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997).

proving that current convictions do not constitute the same criminal conduct.²⁰ To determine whether two crimes have the same criminal intent, we focus on “the extent to which the criminal intent, objectively viewed, changed from one crime to the next...[which,] in turn, [is] measured...by whether one crime furthered the other.”²¹ We review the trial court’s determination of whether multiple offenses constitute the same criminal conduct for purposes of calculating an offender score for abuse of discretion or misapplication of the law.²²

At sentencing, the trial court focused on the “same time” element for purposes of determining whether counts IV and V comprised the same criminal conduct. The trial court stated:

[O]n the legal issue of is this the same criminal conduct, the answer, I think, is clearly no. We had these incidents being testified to as separated not just by minutes, by hours, but by days, and the jury was clearly instructed that they were to consider the specific act involved and they made their decision.

This is not a case where it’s a continuous act over a very short period of time, thus being able to argue that there was the same intent, the same conduct, same victim, same time and same place. Granted, the same place is concerned here, same victim is concerned here, but it’s the other

²⁰ State v. Dolen, 83 Wn. App. 361, 365, 921 P.2d 590 (1996), review denied, 131 Wn.2d 1006 (1997).

²¹ Williams, 135 Wn.2d at 368.

²² State v. Tili, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); State v. Maxfield, 125 Wn.2d 378, 402, 886 P.2d 123 (1994). Gabriel mistakenly relies on State v. McGraw, 127 Wn.2d 281, 285, 898 P.2d 838 (1995) (superceded by RCW 9.94A.360(b)(a)) for the proposition that the appropriate standard of review is de novo. McGraw is inapposite because the issue there was not whether current offenses constituted the same criminal conduct. Rather, the issue was whether the sentencing court had the discretion to count as one offense those prior offenses for which the sentences were served concurrently, but which the original sentencing court did not deem to be the same criminal conduct. McGraw, 127 Wn.2d at 285.

aspects that we have to look at, and I think the cases support the determination that this is not the same criminal conduct for purposes of calculating his offender score.^[23]

The testimony of C.H., particularly on cross, respecting the rape of M.B., supports the trial court's decision that the acts were separated by days instead of by minutes or hours.²⁴ Because the incidents of rape did not occur at the same time, they were not the same criminal conduct. There was no abuse of discretion.

Gabriel mistakenly relies on State v. Dolen²⁵ for the proposition that the acts underlying counts IV and V constitute the same criminal conduct. In Dolen, a jury convicted the defendant of one count of child rape and one count of child molestation based upon evidence of six separate incidents of child sexual abuse.²⁶ The Dolen court observed that the record did not indicate whether the jury convicted the defendant of committing the two offenses in a single incident or in separate incidents. It concluded that if the jury convicted the defendant of both offenses for the same incident, the crimes encompassed the same criminal

²³ Report of Proceedings on December 6, 1999 at 13 (italics ours).

²⁴ See State v. Palmer, 95 Wn. App. 187, 191, 975 P.2d 1038 (1999) (in determining whether multiple rapes constitute "same criminal conduct" for sentencing purposes, rapes committed a few minutes apart are committed at the "same time" when defendant's conduct between the rapes is limited to preparing for the next rape).

²⁵ 83 Wn. App. 361, 921 P.2d 590 (1996).

²⁶ Dolen, 83 Wn. App. at 362-63 (the incidents included placing victim's hand on defendant's penis; inserting penis in victim's mouth; rubbing victim's breasts and vagina; and inserting finger into victim's vagina).

conduct because the victim, time, place, and intent were the same.²⁷ Because the State failed to prove that the defendant committed the crimes in separate incidents, the court vacated the sentences.²⁸

In contrast, C.H.'s testimony demonstrated that the instances of oral sex under the blankets occurred on two separate occasions and were not part of a continuous event. This evidence, coupled with the Petrich instruction, indicates that the jury could not have convicted Gabriel of counts IV and V based on the incidents occurring at the same time.

Fair Trial

For the first time on appeal, Gabriel argues that the addition of the term "on or about" in the to-convict instructions for counts IV and V was a substantive amendment of the information.²⁹ And because the State failed to amend the

²⁷ Dolen, 83 Wn. App. at 364-65.

²⁸ Dolen, 83 Wn. App. at 364.

²⁹ Instruction 12 states in relevant part:

To convict the defendant of the crime of rape of a child in the second degree, as charged in count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That *on or about* between March 24 through March 26, 1999, the defendant had sexual intercourse with [M.B.].

Clerk's Papers at 98 (italics ours).

Instruction 13 states in relevant part:

To convict the defendant of the crime of rape of a child in the second degree, as charged in count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

information to reflect addition of the phrase and rearraign him, Gabriel claims he was deprived of his right to a fair trial. We decline to address this claim.

An error may be raised for the first time on appeal if it involves a manifest error affecting a constitutional right.³⁰ Under State v. Lynn,³¹ analyzing alleged constitutional error raised for the first time on appeal is a four-step process:

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences... Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis.^[32]

Here, failure to amend the information and arraign Gabriel again implicates his constitutional right to a fair trial. But the alleged constitutional violation is not manifest because it did not have practical and identifiable consequences at Gabriel's trial. As stated above, the charging period is not a material element of the crime of rape of a child where there is no alibi defense

(1) That *on or about* between March 24 through March 26, 1999, the defendant had sexual intercourse with [M.B.].

Clerk's Papers at 99 (italics ours).

³⁰ RAP 2.5(a).

³¹ 67 Wn. App. 339, 835 P.2d 251 (1992).

³² Lynn, 67 Wn. App. at 345; see also State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988) (appellant must show constitutional error and how that error actually prejudiced the appellant's rights).

and the alleged act occurs within the statute of limitations.³³ Here, Gabriel did not assert an alibi defense and the two instances of oral sex occurring between March 24-26, 1999 fall well within the seven-year statute of limitations.³⁴ Because the error is not manifest, we do not further address the claim.

Pro Se Issues

Gabriel also argues he was denied effective assistance of counsel. To prevail on this claim, Gabriel must establish (a) that counsel's representation was deficient³⁵ and (b) the deficient performance resulted in prejudice such that "there is a reasonable probability that, but for counsel's error, the result of the trial would have been different."³⁶ A review of this record shows that Gabriel has not met either of the two prongs of the test for ineffective assistance of counsel.

We decline to consider Gabriel's claim that the State's alleged misconduct denied him a fair trial and that there was insufficient evidence to support his convictions. These claims are either conclusory or unsupported either by citation to relevant authority or the record.³⁷

³³ Hayes, 81 Wn. App. at 432 ("where time is not a material element of the charged crime, the language 'on or about' is sufficient to admit proof of the act at any time within the statute of limitations, so long as there is no defense of alibi.")

³⁴ RCW 9A.04.080(1)(c) (limitation period for prosecution for rape of a child in the second degree is seven years or three years after the victim's 18th birthday).

³⁵ State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

³⁶ State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

³⁷ State v. Elliott, 114 Wn.2d 6, 15, 785 P.2d 440, cert. denied, 498 U.S. 838 (1990) (appellate court need not consider claims that are insufficiently argued); State v. Marintorres, 93 Wn. App. 442, 452, 969 P.2d 501 (1999)

Because of the above disposition, we need not consider Gabriel's pro se motions (1) to modify the clerk's ruling denying extension of time to file brief of appellant, and (2) to submit late-filed affidavits that has been referred to us by the commissioner. Likewise, we decline to address Gabriel's claim that his pro se motion to modify the clerk's ruling denying extension of time to file brief of appellant was heard by this court at a secret hearing outside the presence of his counsel. The claim is wholly unsupported by the record.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

Smith, J.

Roberts, J.

(appellate court need not consider pro se arguments that are conclusory or fail to cite authority); State v. Berrysmith, 87 Wn. App. 268, 279, 944 P.2d 397 (1997), review denied, 134 Wn.2d 1008 (1998) (appellate court need not reach pro se argument that is unsupported by authority).

APPENDIX C

RICHARD D. JOHNSON,
Court Administrator/Clerk

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

DIVISION I
One Union Square
600 University Street
(206) 464-7750
TDD: (206) 587-5505

September 29, 2004

Gail Gabriel
#802674
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA, 98520

CASE #: 54713-5-1
Personal Restraint Petition of Gail Gabriel

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

bte

enclosure

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

IN THE MATTER OF THE	)	No. 54713-5-1
PERSONAL RESTRAINT OF:)	
	)	ORDER DISMISSING
GAIL GABRIEL,	)	PERSONAL RESTRAINT
	)	PETITION
_____ Petitioner.)	

Gail Gabriel has filed this personal restraint petition challenging the judgment and sentence entered on his 1999 conviction of one count of rape of a child in the first degree and three counts of rape of a child in the second degree. Gabriel contends his convictions for counts 4 and 5 of rape of a child in the second degree violate his double jeopardy rights under the state and federal constitutions. Gabriel argues that, because his conviction and sentence on those counts were both based on Gabriel having had sexual intercourse with 12-year-old M.B. from March 24, 1999, through March 26, 1999, his convictions for the two counts violate double jeopardy. Gabriel is mistaken.

“The guarantee against double jeopardy protects a defendant from receiving multiple punishments for the same act.” State v. Trujillo, 112 Wn. App. 390, 409, 49 P.3d 935 (2002). When a defendant is convicted of violating a single criminal statute multiple times, the proper inquiry is to determine the criminal conduct or “unit of prosecution” the legislature intended as the specific punishable act. In re Davis, 142 Wn.2d 165, 172, 12 P.3d 603 (2000). “The unit of prosecution for rape is ‘sexual intercourse,’ which the Legislature has defined as complete upon ‘any penetration of the vagina or anus, however slight’” RCW 9A.44.010. State v. Tili, 139 Wn.2d 107, 115, 985 P.2d 365 (1999).

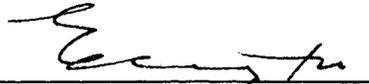
No. 54713-5-1/2

Here, Gabriel's rape convictions for counts 4 and 5 involved more than one unit of prosecution. In Gabriel's direct appeal, State v. Gabriel, No. 45779-9-1, this court rejected a challenge to the sufficiency of the evidence supporting the two counts. In doing so, this court noted that at least two acts of sexual intercourse occurred between Gabriel and the child victim during the charging period and that those criminal acts were committed on separate occasions and were not part of a continuing event. Under the circumstances, there was no double jeopardy violation. Accordingly, under RCW 10.73.090, Gabriel's rape convictions became final upon the date the case was mandated, March 19, 2002. Because Gabriel filed this petition more than one year after that date, the petition is untimely and must be dismissed. See RCW 10.73.090.

Now, therefore, it hereby

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

Done this 29 day of September, 2004.



Acting Chief Judge

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2004 SEP 29 AM 10:43

APPENDIX D

RICHARD D. JOHNSON,
Court Administrator/Clerk

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

DIVISION I
One Union Square
600 University Street
(206) 464-7750
TDD: (206) 587-5505

April 1, 2008

Gail Gabriel
#802674
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA, 98520

CASE #: 60682-4-1
Personal Restraint Petition of Gail Gabriel

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 of:	)	No. 60682-4-1
)	
GAIL GABRIEL,	)	ORDER OF DISMISSAL
)	
_____ Petitioner.)	

Gail Gabriel was convicted by a jury of one count of rape of a child in the first degree and three counts of rape of a child in the second degree. The trial court imposed concurrent standard range sentences, the longest of which was 318 months. This court affirmed Gabriel's convictions on appeal in State v. Gabriel, No. 48779-9-1, and the Washington Supreme Court denied review. The case was mandated on April 11, 2002.

Gabriel now files this personal restraint petition contesting the judgment and sentence entered on his child rape convictions. Gabriel raises several grounds for relief including (1) the trial court erred in giving certain jury instructions and in failing to give certain other instructions, (2) the police searched his apartment in violation of his constitutional rights, (3) the trial court abused its discretion by admitting certain hearsay testimony, (4) the court's method of jury selection was improper, and (5) the evidence was not sufficient to convict him of the child rape charges. The petition, however, is barred

No. 60682-4-1/2

under RCW 10.73.090¹ and In re Pers. Restraint of Stoudmire, 141 Wn.2d 342, 5 P.3d 1240 (2000).

Gabriel does not dispute that his petition was filed beyond the time limit specified in RCW 10.73.090. To excuse compliance with this statute of limitations, the court in Stoudmire held that a petition must be based solely on exceptions to the limitations period set out in RCW 10.73.090 or 10.73.100. Stoudmire, 141 Wn.2d at 349. That court went on to hold that "the one-year time limit in RCW 10.73.090 does not apply to a petition or motion based on the grounds enumerated in RCW 10.73.100 as long as the petition or motion is based solely on those grounds and not additional ones." Stoudmire, 141 Wn.2d at 345-46.

Gabriel does not argue that his claims fit within the limited exceptions of RCW 10.73.090, and the vast majority of his claims clearly do not fall within any other recognized exception. While Gabriel's challenge to the sufficiency of the evidence arguably falls within the exception listed in RCW 10.73.100(4), the "unmixed petition" requirement of RCW 10.73.100(4) has not been satisfied. Since the claims raised are

¹ "(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case 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.

"(2) For the purposes of this section, "collateral attack" means any form of postconviction relief other than a direct appeal. "Collateral attack" includes, but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.

"(3) For the purposes of this section, a judgment becomes final on the last of the following dates:

"(a) The date it is filed with the clerk of the trial court;

"(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or

"(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final."

No. 60682-4-1/3

mixed, the entire petition should be dismissed. In re Pers. Restraint of Hankerson, 149 Wn.2d 695, 702-03, 72 P.3d 703 (2003); Stoudmire, 141 Wn.2d at 345-46. However, "any claim that is not time barred may be refiled without danger of untimeliness." Hankerson, 149 Wn.2d at 702.

Now, therefore, it is hereby

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

Done this 1st day of April, 2008.


Acting Chief Judge

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 APR - 1 AM 9:48

APPENDIX E

dates were not a material issue, and the defendant could fully argue the theory of his case? Did the trial court properly insert the words "on or about" in the to-convict instructions when Washington law permits such language?

B. STATEMENT OF THE CASE

1. PROCEDURE.

Gail M. Gabriel was charged by amended information in count 1 with the crime of rape of a child in the first degree (victim Christina Henry), in count 2 with rape of a child in the second degree (victim Monique Brooks), in count 3 with sexual exploitation of a minor (victim Monique Brooks), in count 4 with rape of a child in the second degree (victim Monique Brooks), and in count 5 with rape of a child in the second degree (victim Monique Brooks). CP 80-82. The defendant was tried by jury before King County Superior Court Judge Joan Dubuque. He was convicted as charged in counts 1, 2, 4, and 5. The jury was unable to agree on the sexual exploitation of a minor charge in count 3. CP 139-142. On December 6, 1999, Judge Dubuque imposed concurrent standard range sentences totalling 318

months (offender score of 9). CP 152-162. The defendant timely appealed. CP 164.

2. FACTS

In March, 1999, Christina Henry, age 11, and Monique Brooks, age 12, were living at the Mediplex Rehabilitation Center at Fairfax Hospital. 3RP 68, 5RP 12-15.¹ The girls were at Mediplex because of behavioral problems, and were roommates. 3RP 69. In the early morning hours of March 24, 1999, the girls left the facility together, without permission, by climbing out a window. 3RP 70-71, 5RP 16.

Christina and Monique went to a nearby Safeway. Monique, who had earlier befriended Gail ("Andy") Gabriel, called the defendant and asked if they could stay with him. 3RP 72, 5RP 16. Christina had never met the defendant. 3RP 72. Shortly after the call,

¹ There are 10 volumes of the Verbatim Report of Proceedings as follows:

Vol. 1	-	October 14, 1999
Vol. 2	-	October 19, 1999
Vol. 3	-	October 20, 1999
Vol. 4	-	October 21, 1999
Vol. 5	-	October 25, 1999
Vol. 6	-	October 26, 1999
Vol. 7	-	October 27, 1999
Vol. 8	-	October 28, 1999
Vol. 9	-	November 8, 1999
Vol. 10	-	December 6, 1999

Gabriel picked the girls up in his blue BMW, and drove them to his apartment in West Seattle. 3RP 73.

When Christina first entered the defendant's apartment, she noticed that on top of the defendant's bar was a large bowl of condoms. 3RP 74. After arriving, Monique slept in the same room as the defendant. 3RP 75. During the four or five days that the girls stayed at the defendant's apartment, Christina observed the defendant engage in multiple acts of oral sex with Monique Brooks. 3RP 76-80. Christina described that Monique would be under the blankets on the defendant's bed giving him a "blow job". 3RP 76-78. She said these acts occurred at least twice. 3RP 78. Christina described seeing Monique with her head in the area of the defendant's penis, and that her head would move up and down. 3RP 77.

Near the end of the time the girls were staying at the apartment, Gabriel played a pornographic videotape for the girls. 3RP 81. The defendant said that the adult on the tape paid money for sex with the girls, who appeared to be teen-agers. 3RP 82. As they were watching the pornographic tape, Gabriel told the girls

that they could learn from it. 3RP 84. Both the girls were drinking liquor from the defendant's bar. 3RP 83-84.

The defendant then asked Christina to use his video camera to tape-record Monique giving him a "blow job". 3RP 84-85. Christina used the video camera to record the sex act. 3RP 85. Monique was not under any blankets on that occasion, and the defendant was partly dressed. 3RP 85-86. Christina observed Monique perform oral sex upon the defendant. 3RP 86. When Christina was using the videotape, Gabriel also asked her to perform oral sex on him. 3RP 87. Christina declined.

That same day, after Christina fell asleep, the defendant woke her up and took her into the bedroom. 3RP 89. Although Christina told the defendant to stop, he removed her pants and panties. 3RP 91-92. He fingered her vaginal area, and then put his penis half way inside her vagina. 3RP 95-96. When Christina tried to push away, the defendant said "After all I've done for you." 3RP 97. He then wanted Christina to perform oral sex upon him, and she did put his penis in her mouth. 3RP 98. During the oral sex, the telephone

rang, and the defendant answered the call. 3RP 99. Christina heard the defendant talking to someone called "Ray Dog" on the telephone, and heard Gabriel say he "had somebody" for them. 3RP 100. Christina was afraid that the defendant was offering her to the man on the telephone. 3RP 100.

After trying to wake up Monique, Christina put her clothes on, left the apartment, went next door, and knocked on the door. 3RP 102. The occupant let her inside, and she called 911. 3RP 102-03.

Seattle Police patrol officers responded and contacted Christina. 4RP 40. She was very withdrawn, quiet, and would not look directly at the officers. 3RP 42. She said she had been drinking rum, and appeared lethargic. 4RP 44. She told police that she and Monique had run away from the Mediplex, and that they had been staying with the defendant. 4RP 45-46.

When police knocked on the defendant's apartment in West Seattle, there was no response. 4RP 49, 65-66. They continued to knock for about 15 minutes, until finally the defendant opened the door. 4RP 49-50. Having learned from Christina that Monique was still in the apartment, they asked the defendant if anybody was

inside. 4RP 52-53. Gabriel claimed that Monique had left before the officers arrived. 4RP 54. The officers were suspicious of this claim because they had been in the area for a considerable time and had not seen anyone leave. 4RP 53-55. They searched behind doors, behind the shower curtain, in closets, and underneath the bed, but could not find anyone. 4RP 53-54, 68-69. They did observe two tripods, a video camera, many videotapes, and a bar with glasses and rum. 4RP 69. The defendant admitted knowing that the girls were runaways and that they had been staying with him for about four days. 4RP 55.

Christina was taken to Harborview Medical Center. 4RP 56. During the examination, Christina told a social worker, Tracy Boyd, that she had run away from a treatment facility four days earlier with Monique. She said Monique had called the defendant to pick them up. 5RP 111. Christina told Ms. Boyd that the defendant had been having sex with Monique a lot during the four days, and that the sex had occurred in front of her. 5RP 111. She also said that the defendant had pulled her pants off, "put his dick inside her about halfway", and made her "suck his dick". 5RP 111-12. Christina

said she had tried to push the defendant off of her, but that he was too big. She said she had run to a neighbor's house and called 911. 5RP 112.

When Seattle Police were informed of what Christina had said to Ms. Boyd, they returned to the defendant's apartment to arrest him. 4RP 57. About 30 minutes had elapsed from the time of their initial visit. 4RP 71-75. The defendant was arrested when he answered the door. 4RP 75. The police again tried to locate Monique inside the apartment. One of the officers noted that a closet door that had previously been shut was in a different position. 4RP 76. He looked in the closet again and found Monique seated on the floor, clasping her knees to her chest, her head covered by a rack of shirts on hangers. 4RP 76-77. After identifying herself, Monique said that she did not like the police and was not going to talk about what happened in the apartment. 4RP 78-79. Police ran her name through the computer and discovered that she was a runaway. 4RP 79. She denied that the defendant had sexually abused or molested her. 4RP 80.

On March 29, 1999, the day following the defendant's arrest, Detective Jennifer McClean

interviewed both Christina Henry and Monique Brooks. In an in-person interview, Christina described in detail the sex acts she and the defendant had engaged in. 6RP 27-31. She also told the detective she had watched pornographic films with the defendant in the apartment, and that she had used the videotape equipment to record Monique and the defendant having oral sex. 6RP 33.

During a telephone interview, Monique Brooks, with some reluctance, told Detective McClean about her "sexual and romantic" relationship with the defendant. 6RP 35-36. She then agreed to have her conversation tape recorded. 6RP 36. When the tape recording began, Monique initially denied having a sexual relationship with Gabriel. 6RP 39-40. She also told the detective that, if necessary, she would lie for the defendant. 6RP 40. After encouraging Monique to tell the truth, Monique told Detective McClean that she had intercourse and oral sex with the defendant when staying at his apartment, and that Gabriel had recorded them having oral sex on Saturday, March 27. 6RP 48-49. She also told Detective McClean that the defendant told her not to tell anyone about what had occurred; that they were

to keep their sexual relationship "on the low". 6RP 49. She said that their sexual relationship had gone on for a couple of months after she first had met him, and involved both intercourse and oral sex. 6RP 49.

At trial, Monique Brooks testified that she never had any kind of sexual relationship with the defendant. 5RP 17. She maintained that they were just friends. 5RP 17. She acknowledged that she had carved, on her bedpost at home, the words "I love Andy". 5RP 19. She also testified that Detective McClean had harassed her, and that she said she had a sexual relationship with the defendant only to get the detective off her back. 5RP 21. She acknowledged that she had initially told the defendant she was 16. 5RP 23-24. She admitted telling Detective McClean that she had lied about her age because she wanted to pursue a relationship with the defendant. 5RP 23. She also admitted that she had told Detective McClean that she had oral sex, as well as intercourse, with the defendant. 5RP 33. She denied that video equipment was used to tape oral sex with the defendant, claiming that she did not remember that she had told Detective McClean that the defendant asked Christina to videotape them performing oral sex.

5RP 41. Only when the audiotape interview was played back for her in court did she acknowledge that she had told Detective McClean that she was willing to lie for the defendant. 5RP 44-46. Only when Monique was confronted with her statements on the audiotaped interview, did she admit she told the detective that Gabriel had said to keep their relationship "on the down-low", meaning not to tell anyone. 5RP 61. It was readily apparent that Monique Brooks had a sexual relationship with the defendant over a considerable period of time, and lied at trial to protect him from criminal liability.

Cynthia Brooks, mother of Monique Brooks, described Monique's behavioral problems. 5RP 66-67. She related how Monique had talked about somebody named Andy, and had put an "A" on her skin, scratching the letter on with a comb tooth on her forearms and ankle. 5RP 69-70. She had also written "I love Andy" on pieces of paper, as well as carving that phrase on a bedframe. 5RP 70. Ms. Brooks had never had any contact with the defendant, nor did she know anything about him. 5RP 72.

On March 30, 1999, Seattle Police served a search warrant on the defendant's apartment in West Seattle. 5RP 87. While serving the search warrant, they met the defendant's brother, Steven Gabriel. He had boxes of videotapes, and was there to move items out of the residence. 5RP 87-90. Steven said that he had received a call from his brother from jail the night before, asking him to clean out his place. 5RP 123. He later changed his story about why he was there, claiming the idea of moving the defendant's property out was his own. 5RP 124.

During the execution of the search warrant, the police seized a camcorder and a camcorder stand, numerous pornographic movies, and a bottle of 151 rum from the bar. 5RP 127-32. They also found a photo album containing a picture of Monique Brooks. 5RP 130. Police also recovered underwear that Monique said that the defendant had purchased for the girls. 6RP 23. Police also located the bowl of condoms that the girls had described. 6RP 25.

The defendant testified that he was just a friend of Monique Brooks, and that he allowed the two runaways to stay at his apartment for a few days. 6RP 86-91.

He denied having sex with either of the girls, and denied asking Christina to videotape him having oral sex with Monique. 6RP 95. He claimed that when the police first came to his apartment he did not know that Monique was hiding inside. 6RP 115.

C. ARGUMENT

1. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT TWO SEPARATE ACTS OF RAPE IN THE SECOND DEGREE COMMITTED DURING THE CHARGING PERIODS FOR COUNTS 4 AND 5.

The defendant claims that there was only sufficient evidence to prove a single act of sexual intercourse between the defendant and Monique Brooks between March 24 to 26, 1999, and therefore that judgment may only be entered on either count 4 or 5, but not both counts. However, because there was sufficient evidence to prove that the defendant engaged in oral sexual intercourse with Monique Brooks on two separate occasions during the charged time period, the trial court properly entered judgment on both counts.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, any rational trier of fact could find the

APPENDIX F

FILED

KING COUNTY WASHINGTON

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

OCT 28 1999

SUPERIOR COURT CLERK
BY DARLA S. DOWELL
DEPUTY

STATE OF WASHINGTON,

Plaintiff,

vs.

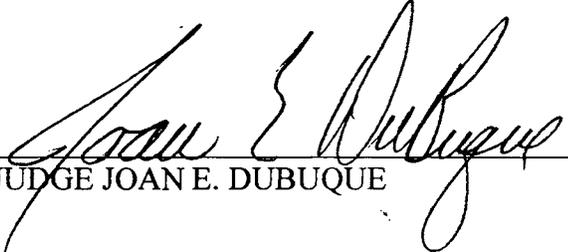
GAIL GABRIEL

Defendant.

NO. 99-1-02573-0SEA

COURT'S INSTRUCTIONS TO THE JURY

October 27, 1999



JUDGE JOAN E. DUBUQUE

00084



No. 1

It is your duty to determine which facts have been proved in this case from the evidence produced in court. It also is your duty to accept the law from the court, regardless of what you personally believe the law is or ought to be. You are to apply the law to the facts and in this way decide the case.

The order in which these instructions are given has no significance as to their relative importance. The attorneys may properly discuss any specific instructions they think are particularly significant. You should consider the instructions as a whole and should not place undue emphasis on any particular instruction or part thereof.

A charge has been made by the prosecuting attorney by filing a document, called an information, informing the defendant of the charge. You are not to consider the filing of the information or its contents as proof of the matters charged.

The only evidence you are to consider consists of the testimony of witnesses and the exhibits admitted into evidence. It has been my duty to rule on the admissibility of evidence. You must not concern yourselves with the reasons for these rulings. You will disregard any evidence that either was not admitted or that was stricken by the court. You will not be provided with a written copy of testimony during your deliberations. Any exhibits admitted into evidence will go to the jury room with you during your deliberations.

00085

In determining whether any proposition has been proved, you should consider all of the evidence introduced by all parties bearing on the question. Every party is entitled to the benefit of the evidence whether produced by that party or by another party.

You are the sole judges of the credibility of the witnesses and of what weight is to be given to the testimony of each. In considering the testimony of any witness, you may take into account the opportunity and ability of the witness to observe, the witness's memory and manner while testifying, any interest, bias or prejudice the witness may have, the reasonableness of the testimony of the witness considered in light of all the evidence, and any other factors that bear on believability and weight.

The attorneys' remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court.

The attorneys have the right and the duty to make any objections that they deem appropriate. These objections should not influence you, and you should make no assumptions because of objections by the attorneys.

The law does not permit a judge to comment on the evidence in any way. A judge comments on the evidence if the judge indicates, by words or conduct, a personal opinion as to the weight or believability of the testimony of a witness or of other evidence.

Although I have not intentionally done so, if it appears to you that I have made a comment during the trial or in giving these instructions, you must disregard the apparent comment entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. The fact that punishment may follow conviction cannot be considered by you except insofar as it may tend to make you careful.

You are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict.

No. 2

As jurors, you have a duty to discuss the case with one another and to deliberate in an effort to reach a unanimous verdict. Each of you must decide the case for yourself, but only after you consider the evidence impartially with your fellow jurors. During your deliberations, you should not hesitate to reexamine your own views and change your opinion if you become convinced that it is wrong. However, you should not change your honest belief as to the weight or effect of the evidence solely because of the opinions of your fellow jurors, or for the mere purpose of returning a verdict.

00088

The defendant has entered a plea of not guilty. That plea puts in issue every element of the crime charged. The State is the plaintiff and has the burden of proving each element of the crime beyond a reasonable doubt. The defendant has no burden of proving that a reasonable doubt exists.

A defendant is presumed innocent. This presumption continues throughout the entire trial unless during your deliberations you find it has been overcome by the evidence beyond a reasonable doubt.

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty.

No. 4

Evidence may be either direct or circumstantial. Direct evidence is that given by a witness who testifies concerning facts that he or she has directly observed or perceived through the senses. Circumstantial evidence is evidence of facts or circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. One is not necessarily more or less valuable than the other.

No. 5

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and weight to be given such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for the opinion, the sources of the witness' information, together with the factors already given you for evaluating the testimony of any other witness.

No. 6

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

00092

No. 7

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

00093

No. 8

A person commits the crime of sexual exploitation of a minor when that person compels, invites, or causes another person, under eighteen years of age, to engage in sexually explicit conduct knowing such conduct would be photographed.

00094

No. 9

To convict the defendant of the crime of rape of a child in the first degree, as charged in count I, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between March 27, and March 28, 1999, the defendant had sexual intercourse with Christina Henry;

(2) That Christina Henry was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least twenty-four months older than Christina Henry; 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 as to count I.

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 as to count I.

00095

To convict the defendant of the crime of rape of a child in the second degree, as charged in count II, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between March 27 through March 28, 1999, the defendant had sexual intercourse with Monique Brooks;

(2) That Monique Brooks was at least twelve years old but was less than fourteen years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least thirty-six months older than Monique Brooks; 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 as to count II.

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 as to count II.

No. 11

To convict the defendant of the crime of sexual exploitation of a minor, as charged in count III, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That between March 27 through March 29, 1999, the defendant compelled, invited, or caused Monique Brooks to engage in sexually explicit conduct;

(2) That Monique Brooks was less than eighteen years old;

(3) That the defendant had knowledge that such conduct would be photographed;

(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 as to count III.

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 as to count III.

00097

No. 12

To convict the defendant of the crime of rape of a child in the second degree, as charged in count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about between March 24 through March 26, 1999, the defendant had sexual intercourse with Monique Brooks;

(2) That Monique Brooks was at least twelve years old but was less than fourteen years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least thirty-six months older than Monique Brooks; 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 as to count IV.

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 as to count IV.

00098

No. 13

To convict the defendant of the crime of rape of a child in the second degree, as charged in count V, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about between March 24 through March 26, 1999, the defendant had sexual intercourse with Monique Brooks;

(2) That Monique Brooks was at least twelve years old but was less than fourteen years old at the time of the sexual intercourse and was not married to the defendant;

(3) That the defendant was at least thirty-six months older than Monique Brooks; 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 as to count V.

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 as to count V.

00099

No. 14

Sexual intercourse means that the sexual organ of the male entered and penetrated the sexual organ of the female and occurs upon any penetration, however slight or any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex or any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

00100

JURY INSTRUCTION NO. 15

There are allegations that the defendant committed acts of sexual intercourse against Monique Brooks on multiple occasions, as charged in counts II, IV, and V. To convict the defendant, one or more particular acts must be proved beyond a reasonable doubt and you must unanimously agree as to which act or acts have been proved beyond a reasonable doubt. You need not unanimously agree that all the acts have been proved beyond a reasonable doubt.

No. 16

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

00102

No. 17

Upon retiring to the jury room for your deliberation of this case, your first duty is to select a foreperson. It is his or her duty to see that discussion is carried on in a sensible and orderly fashion, that the issues submitted for your decision are fully and fairly discussed, and that every juror has an opportunity to be heard and to participate in the deliberations upon each question before the jury.

You will be furnished with all of the exhibits admitted into evidence, these instructions, and a verdict form.

You must fill in the blank provided in the verdict form the words "not guilty" or the word "guilty", according to the decision you reach.

Since this is a criminal case, each of you must agree for you to return a verdict. When all of you have so agreed, fill in the verdict form to express your decision. The foreperson will sign it and notify the bailiff, who will conduct you into court to declare your verdict.

00103

No. 18

You will also be furnished with a special verdict form for count III. If you find the defendant not guilty of count III do not use the special verdict form. If you find the defendant guilty of count III, you will then use the special verdict form and fill in the blank with the answer "yes" or "no" according to the decision you reach. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable doubt as to the question, you must answer "no".

00104

JURY INSTRUCTION NO. 19

Sexual motivation means that one of the purposes for commission of the crime was for the purpose of the perpetrator of the crime's sexual gratification.

APPENDIX G

FILED

KING COUNTY WASHINGTON

OCT 28 1999

SUPERIOR COURT CLERK
BY DARLA S. DOWELL
DEPUTY

NOV 1 1999

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)	
	)	No. 99-1-02573-0 SEA
Plaintiff,)	
	)	VERDICT FORM A
vs.)	
)	
GAIL M. GABREIL)	
)	
Defendant.)	

We, the jury, find the defendant GAIL M. GABREIL
Guilty (write in not guilty or guilty) of the crime
of rape of a child in the first degree as charged in Count I.

Billy David Bravers
Foreperson

66
dm

FILED

KING COUNTY WASHINGTON

OCT 28 1999

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

SUPERIOR COURT CLERK
BY DARLA S. DOWELL

DEPUTY
NOV 1 1999

STATE OF WASHINGTON)
)
 Plaintiff,)
)
 vs.)
)
 GAIL M. GABRIEL)
)
 Defendant.)

No. 99-1-02573-0 SEA

VERDICT FORM A

We, the jury, find the defendant GAIL M. GABRIEL
Guilty (write in not guilty or guilty) of the crime
of rape of a child in the second degree as charged in Count II.

Billy David Brown
Foreman

00141

67
gy

FILED

KING COUNTY WASHINGTON **MUST BE FILED**

OCT 28 1999

SUPERIOR COURT CLERK
BY DARLA S. DOWELL

DEPUTY
No. 99-1-02573-057A

INQUIRY FROM THE JURY
AND COURT'S RESPONSE



SUPERIOR COURT OF WASHINGTON
COUNTY OF KING

State of Washington

Plaintiff,

vs.

Gail Gabriel

Defendant.

JURY INQUIRY:

We cannot, after numerous votes &
long discussion, come to an ~~unanimous~~ unanimous
agreement to count III.

Billy Brown
FOREMAN

10/28/99
DATE AND TIME

1455 hrs

DATE AND TIME RECEIVED: 2:58 10/28/99

COURT'S RESPONSE: (AFTER AFFORDING ALL COUNSEL/PARTIES OPPORTUNITY TO BE HEARD):

JUDGE

DATE AND TIME RETURNED TO JURY: _____

68A
my

..DO NOT DESTROY..

FILED

KING COUNTY WASHINGTON

OCT 28 1999

SUPERIOR COURT CLERK
BY DARLA S. DOWELL

DEPUTY

NOV 1 1999
NOV 1 1999

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)
)
 Plaintiff,)
)
 vs.)
)
 GAIL M. GABRIEL)
)
 Defendant.)

No. 99-1-02573-0 SEA

VERDICT FORM A

We, the jury, find the defendant GAIL M. GABRIEL
Guilty (write in not guilty or guilty) of the crime
of rape of a child in the second degree as charged in Count IV.

Billy David Brown
Foreman

00139

64

FILED

KING COUNTY WASHINGTON

OCT 28 1999

SUPERIOR COURT CLERK
BY DARLA S. DOWELL
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON)
)
 Plaintiff,)
)
 vs.)
)
 GAIL M. GABRIEL)
)
 Defendant.)

No. 99-1-02573-0 SEA

VERDICT FORM A

NOV 1 1999

We, the jury, find the defendant GAIL M. GABRIEL
Guilty (write in not guilty or guilty) of the crime
of rape of a child in the second degree as charged in Count V.

Billy David Snow
Foreman

00142

68
m

CERTIFICATION OF SERVICE

Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Gail Gabriel, at the following address: DOC# 802674, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520 , the petitioner, containing a copy of the State's Response to Personal Restraint Petition in In re Personal Restraint of Gabriel, No. 63235-3-I, in the Court of Appeals of the State of Washington.

I certify under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.

U Brame

Name

Done in Seattle, Washington

7/16/09

Date