

66766-1

66766-1
ORIGINAL

NO. 66766-1-I

IN THE COURT OF APPEAL FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent.

BRIAN STARK

Appellant.

SUPPLEMENTAL GROUNDS ON APPEAL

KING COUNTY SUPERIOR COURT NO. 09-1-05650-8 KNT

Brian Stark

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ASSIGNMENT OF ADDITIONAL ERROR

1. WHETHER MR. STARK'S RIGHT TO AN OPEN PUBLIC TRIAL WAS VIOLATED UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, §§10, 22 OF THE WASHINGTON STATE CONSTITUTION.
2. WHETHER LATE DISCLOSURE OF A "TRAUMA NARRATIVE" AND COUNSELING DURING AN INTERVIEW AT TRIAL WAS GROSSLY UNFAIR; TESTIMONY REGARDING "TRAUMA NARRATIVE" WAS INADMISSIBLE HEARSAY.
3. WHETHER THE FAILURE TO DETERMINE THE RELIABILITY OF CHILD HEARSAY AS REQUIRED BY RCW 9A.44.120 MADE THE ALLEGED VICTIM'S COUNSELING EXERCISES INADMISSIBLE HEARSAY.
4. WHETHER IT WAS ERROR FOR THE TRIAL COURT NOT TO HOLD AN *IN CAMERA* REVIEW OF COUNSELING RECORDS.
5. WHETHER MR. STARK WAS DEPRIVED OF DUE PROCESS WHERE THE JURY WAS ALLOWED TO CONVICT HIM ON ALLEGED SEXUAL ABUSE IN ANOTHER COUNTY ON COUNT I.
6. WHETHER THE TRIAL COURT FAILED TO GIVE A *PETRICH* INSTRUCTIONS ON TWO COUNTS WHICH DEPRIVED MR. STARK OF A UNANIMOUS VERDICT UNDER THE SIXTH AMENDMENT U.S. CONST. AND ARTICLE I, SEC. 22, WASH. CONST.
7. WHETHER THE OVERLAPPING CHARGING PERIODS FOR COUNTS II AND III ALLOWED SENTENCING FOR "SAME CRIMINAL CONDUCT" IN VIOLATION OF THE FIFTH AMENDMENT, U.S. CONSTITUTION.
 - I.
8. WHETHER DOUBLE JEOPARDY WAS ALSO VIOLATED WHERE THE JURY WAS INSTRUCTED THAT SEPARATE ACTS WERE REQUIRED FOR CHILD MOLESTATION 1° AND INCEST 1° BUT DID NOT TELL THE JURY THAT THEY COULD NOT BE THE SAME ACT.
9. WHETHER THE FAILURE TO INQUIRE INTO MISCONDUCT OF A SPECTATOR PERMITTED TO SIT DURING TRIAL WAS ERROR.

10. WHETHER THE PLACEMENT OF A PARTITION BETWEEN MR. STARK AND THE COMPLAINING WITNESS VIOLATED DEFENDANT'S RIGHT TO CONFRONTATION.

11. WHETHER THE PROSECUTOR IMPROPERLY ARGUED THE "REASONABLE DOUBT" INSTRUCTION TO THE JURY IN VIOLATION OF MR. STARK'S RIGHTS TO DUE PROCESS AND A FUNDAMENTALLY FAIR TRIAL PURSUANT TO THE FOURTEENTH AMENDMENTS.

12. WHETHER THE PROSECUTOR IMPROPERLY SHIFTED THE BURDEN OF PROOF WHEN HE ARGUED THAT MR. STARK DID NOT CALL WITNESSES IN VIOLATION OF MR. STARK'S RIGHT TO DUE PROCESS AND A FAIR TRIAL PURSUANT TO THE FOURTEENTH AMENDMENT.

13. WHETHER THE INCEST 1^o CHARGE SHOULD BE DISMISSED FOR FAILURE TO PROVE PENETRATION.

**I. STATEMENT OF PERTINENT FACTS RELATED TO
ADDITIONAL ISSUES ON APPEAL**

**A. Facts Related To Surprise Testimony On "Trauma
Narrative.**

The jury was sworn, openings were given and the State was about to call its first two witnesses, KAILEI JORDAN and her mother, ROBIN JORDAN. It was Thursday at 9:00 am and the prosecutor told the court that the JORDANS had new information - child hearsay during therapy:

They came in this morning at 8:30 and let me know that between May, when they were interviewed by Mr. Meryhew, and this morning, and my understanding is that this took place sometime in July or August, Caitlin (victim), as part of her counseling, was asked to share with two people close to her the details of the abuse that she says she suffered. Robin and Kailei Jordan were the two that she chose to share with that with . . .

I let Mr. Meryhew know about it at about 9:00, and I think that obviously puts us in a difficult position . . .

10/14/10 RP 46-47.

The defense attorney asked to interview the witnesses noting that the new reports were "especially troublesome for me and my efforts to defend my client (in) that something that they told me was that she initially didn't remember details and told them over and over she didn't, and then has given them more and more detail." 10/14/10 RP 47-48. The court suggested use of its courtroom and its court reporter for defense

interviews. 10/14/10 RP 48-50. The prosecutor, DPA TERRY CARLSTROM, protested that, "I guess I don't want to do it in an open courtroom if we can commandeer a conference room in my office . . . You know I think that's the appropriate setting, not an open courtroom." 10/14/10 RP 50.¹

¹ DPA CARLSTROM also indicated that the child hearsay was given within the context of a "trauma narrative", a treatment model. The court in *In re Aiden S.*, __ A.3d ___, WL 1367031, p.8 (Conn.Super., 2011) described "trauma narrative" as follows:

As a result of the progress made with IICAPS, Aiden was stable enough to begin individual therapy with Wellpath, specifically the *Trauma Focused Cognitive Behavioral Therapy* (TFCBT). . .

According to Mr. Kromidas, the TFCBT model works on alleviating or decreasing trauma-related symptoms by helping the child change the way he thinks about past trauma. The skills and knowledge imparted to the child include psychoeducation, which gives the child an understanding of terminology for various types of trauma as well as how common it is. Mr. Kromidas testified that giving children the language and understanding of various types of trauma helps decrease their "emotional reactivity" to the terms by helping them get used to hearing these terms and ideas. Another component of this treatment includes teaching the child relaxation skills. Children learn how to identify and regulate their feelings and how their thoughts, feelings and actions are all connected and influence each other. The children are encouraged to understand that while they cannot change their past, they can change the way they think about past trauma, and work toward thoughts that are less negative and more positive and helpful. Eventually, the child gets to the point of developing a trauma narrative, which is the child's subjective recollection of his experience of trauma. In developing a trauma narrative, the child is empowered to identify his past traumas and then, with the support of his therapist and caregiver, correct what Mr. Kromidas called "cognitive distortions" in which the child feels guilt, shame, self-blame. One of the goals of TFCBT is to help the child not feel guilty for something for which he was not responsible. Finally, the program works toward enhancing future safety should the child encounter similar events.

The court indicated "I wasn't suggesting you necessarily do it in open court" and offered Judge WHITE'S (JAY) courtroom if the prosecutor did not have a conference room in his office.

The court excused the jurors until 10:30 am, the interviews were conducted in another court room (Judge JAY WHITE'S court) without Mr. STARK or the public being present. The parties appeared back in the trial court at 10:30 am. 10/14/10 RP 60-61. The jury was ultimately excused for the weekend and testimony commenced with the JORDANS on Tuesday, October, 19, 2010. 10/19/10 RP 70-125, 125-153. Again, BRIAN STARK was excluded from these proceedings as well as the public. No counseling records nor continuance was requested by the defense.²

² According to the 10/14/10 interview of ROBIN JORDAN by defense counselor MERYHEW (starting at p.38), ROBIN'S first meeting with the counselor named "LORRAINE" was in "late July or August, early August" 2010. (p.40). The counselor met at least twice with ROBIN JORDAN (p.42). At the first meeting the counselor read to ROBIN some notes CAITLIN had written for counseling. (p.38) ROBIN also reported that, at this first meeting with the counselor, she discussed being a witness at trial and that the counselor had someone else on a speaker-phone during the discussion.. (p.39) KAILEI JORDAN thought it was JILL CANO, a victim advocate. To the extent the prosecutor claimed CAITLIN had some sort of privilege with respect to any counseling records, it was waived when CAITLIN allowed the counselor to share her notes and counseling with a third person like ROBIN or KAILEI. The presence of a third person during the communication waives the privilege, unless the third person is necessary for the communication, *State v. Martin*, 137 Wn.2d 774, 787, 975 P.2d 1020 (1999). See *Reed v. Baxter*, 134 F.3d 351, 357-58 (6th Cir.1998)

B. Facts Related To Theory Of "Trauma Narrative."

After the interviews of the JORDANS, the prosecutor explained his concern to the court about new information from the interviews:

What was revealed to us this morning is that as part of this trauma narrative that, I spoke of when we addressed the Court before the interviews were conducted, what Caitlin did is she wrote down the who, what, why, when, where of things that, had happened to her, and that that was read to Kailei and Robin Jordan in a session with the therapist alone a week or two prior to coming in and meeting with Caitlin and the therapist and having Caitlin read that document.

The purpose for that being, obviously, that you don't want the individuals that you are going to be disclosing these awful things to to have a reaction that is less than helpful therapeutically. So it gives the disclosees if you will, an opportunity to mentally process what they're going to hear so that they can control their reactions when they hear it straight from the victim herself.

10/14/10 RP 52.

After this explanation, the trial court asked the prosecutor: "And I suppose it never occurred to the therapist that this might jeopardize some

(holding that the fire chief waived attorney-client privilege when two city council members were present at a meeting with the city attorney because the council members were not acting as clients of the city attorney). Appellant asserts that any privilege was waived when LORRAINE, the counselor, and CAITLIN shared counseling records with third parties including the person on the speaker-phone. The situation in this case is analogous to *State v. Ackerman*, 90 Wn.App. 477, 486-87, 953 P.2d 816 (1998). In *Ackerman* the defendant complained that his sex offender treatment provider should not have been permitted to testify because of privilege. The appellate court found that defendant waived the counselor-patient privilege by signing releases allowing his victim's therapist, his attorney, and CPS access to his counseling file.

of the criminal proceedings in the case?" 10/14/10 RP 52. Apparently, it did not occur to the defense attorney either. The defense attorney did not ask for a continuance to prepare for cross examination on the subject of "trauma narrative," confer or request an expert on the subject, or move to exclude the theory of "trauma narrative." The defense attorney did not ask for copies of the counseling records or for a "ghost copy" of the computer drive CAITLIN WEISS was using to write up reports otherwise lacking in detail and differing from previous reports. The defense attorney did not challenge the additional child hearsay or otherwise pick-up on the court's cue.

It should be noted that the prosecutor made the "trauma narrative" an important part of his case. The alleged victim, CAITLIN WEISS, was specifically asked on direct by DPA TERRY CARLSTROM about her "trauma narrative":

Q. You've never talked to Kailei about it since the time you were interviewed by the police?

A. Well, I told her my trauma narrative from counseling.

Q. Okay. And we'll get to that in a minute.

10/20/10 RP 290.

Indeed, the prosecutor did "get to it" and asked for an explanation of what "trauma narrative" meant to Ms. WEISS and her counselor's purpose in using it:

- Q. And, as part of that counseling, were you asked by your counselor to do this trauma narrative?
- A. Yes.
- Q. And can you tell us what your understanding of what this trauma narrative was supposed to be, is?
- A. Like , what was in it or . . .
- Q. Well, what was -- is it something that you came up with the idea for or did your counselor ask you to do it?
- A. My counselor asked me to do it.
- Q. All right. And why did your counselor ask you to do it?
- A. Because it was important for me to tell my story so that I could get it all out and heal.
- Q. Okay. And so what did you have to do for this trauma narrative?
- A. I had to write a who, what, when, and why and the worst.
- Q. Okay.
- Q. So it's something that you wrote out?
- A. Yeah.
- Q. Now, were you asked to share it with anyone?
- A. Yes.
- Q. Who were you asked to share it with?
- A. Kailei and Robin

10/20/10 RP 292 - 293.

The prosecutor then used the theory of "trauma narrative" to explain a failure to report alleged sexual abuse and to bolster C.W.'s testimony:

- Q. Okay. In June of this year do you recall meeting with Mr. Meryhew and myself to talk some more about what had happened to you?
- A. Yeah.
- Q. And where did that conversation take place?
- A. Here.
- Q. And was that conversation recorded?
- A. Yes.
- Q. Now, you talked to us yesterday about an incident in the Spanaway house, where you described it as Brian dry humping

you when you both had your clothes on, and it occurring in a hallway. Do you remember talking to us about that yesterday?

A. Yes.

Q. Is that something you had talked about to Mr. Sutherland?

A. No.

Q. Is that something you had talked about to the detective and the other prosecutor?

A. No.

Q. Is that something you talked to Mr. Meryhew and me about in June of this year?

A. No.

Q. When did you first talk about that?

A. Yesterday.

Q. Did you talk about that narrative? Did you talk about trauma narrative?

A. I think I did.

Q. Okay. When you were talking either to Mr. Sutherland or the detective and the other prosecutor or Mr. Meryhew and myself why didn't you say anything about that incident?

A. It just probably didn't occur to me. Like it probably didn't - - I probably didn't remember it .

Q. Okay. You have mentioned a trauma narrative and you said something about counseling, have you been in counseling?

A. Yes.

10/20/10 RP 291 - 292.

Thus, the prosecutor questioned C.W. about being in counseling for a year and half, her understanding of "trauma narrative," and why her counselor asked her to write a trauma narrative ("Because it was important for me to tell my story so that I could get it all out and heal." 10/20/10 RP 293). Defense counsel did not object to the theory or presentation of "trauma narrative." Also, as mentioned above, defense counsel did not

obtain records related to counseling and "trauma narrative" or otherwise investigate the disclosure made during trial.

II. ARGUMENT

A. **Mr. STARK'S Right To A Fair And Impartial Trial Under The Sixth And Fourteenth Amendments Of The United States Constitution And Article I, §10, §22 Of The Washington State Constitution, Was Violated When Surprise Testimony Regarding Counseling Was Allowed, Records Were Not Produced And Statements Reported Were Not Investigated.**

The right to a fair and impartial jury is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and article I, section 22 of the Washington Constitution. Washington State has "the long settled policy in [Washington] to construe the rules of criminal discovery liberally in order to serve the purposes underlying CrR 4.7, which are to 'expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process.' " *State v. Dunivin*, 65 Wn.App. 728, 733, 829 P.2d 799 (1992) (quoting *State v. Yates*, 111 Wn.2d 793, 797, 765 P.2d 291 (1988)); *State v. Boyd*, 160 Wn.2d 424, 433, 158 P.3d 54 (2007); *State v. Boehme*, 71 Wn.2d 621, 632-33, 430 P.2d 527 (1967); see also *State v. Norris*, 157 Wn.App. 50, 78-79, 236 P.3d 225 (2010) ("In Washington, full disclosure of the State's evidence has long been the rule.")

In *Boyd*, the Supreme Court reviewed the State's CrR 4.7(a) discovery obligations in a consolidated appeal of criminal cases involving images of child pornography. In one case, the State possessed the defendant's computer hard drive and a number of electronic images of child pornography. *Boyd*, 160 Wn.2d at 429. Defense counsel moved to compel the State to provide a mirror image of the hard drive. The trial court ruled that the discovery only entitled defense counsel and his expert to "reasonable access" to view the materials at a State facility.

The Supreme Court found error, holding that, "[w]here the nature of the case is such that copies are necessary in order that defense counsel can fulfill this critical role, CrR 4.7(a) obliges the prosecutor to provide copies of the evidence as a necessary consequence of the right to effective representation and a fair trial." *Boyd*, 160 Wn.2d at 435.

In this case, there were State witnesses introduced at trial to discuss C.W.'s counseling, "trauma narratives", and details of sexual abuse not previously disclosed. There was a discussion by the prosecutor of his need to examine counseling records and even calling the counselor as a witness. Between Thursday (10/14/10) and Tuesday (10/19/10) the defense counsel failed to obtain copies of all counseling records, interview the counselor and/or otherwise investigate KAILEI and ROBIN

JORDANS' version of events. This counseling and statements made during counseling became central to the State's case.

The failure to produce the counseling records, interview the counselor and otherwise investigate the JORDANS' reports as well as challenge the whole concept of "trauma narrative" render the proceedings unfair, prejudicial and lacking in due process.

Consequently, this court should reverse STARK'S convictions and remand for a new trial on this basis alone.

B. Late Disclosure And Testimony Of A "Trauma Narrative" And Counseling During An Interview At Trial Was Grossly Unfair And Inadmissible Hearsay.

Generally, no witness, lay or expert, may give an opinion, directly or inferentially, on the defendant's innocence or guilt. Such opinions are unfairly prejudicial because they invade the fact finder's exclusive province. *State v. Kirkman*, 159 Wn.2d 918, 927-28, 155 P.3d 125 (2007) (opinion on defendant's guilt violates right to fair trial); see *State v. Farr-Lenzini*, 93 Wn.App. 453, 465, 970 P.2d 313 (1999) (improper opinion on defendant's guilt invades jury's province); *State v. Alexander*, 64 Wn.App. 147, 154, 822 P.2d 1250 (1992) (an expert stating a belief that the child was not lying about sexual abuse was equivalent to the expert "effectively testifying" that the defendant was guilty as charged).

In *State v. Black*, 109 Wn.2d 336, 348 - 349, 745 P.2d 12 (1987), the Washington Supreme court addressed "rape trauma syndrome" as evidence of rape and thus excluded it. In *Black*, the expert testified that the victim suffered from rape trauma syndrome which constituted "in essence" a statement that the defendant was guilty. It should be noted that "rape trauma syndrome" was a treatment method being misused as a diagnostic tool:

The term "rape trauma syndrome" was first coined by Ann Burgess and Lynda Holmstrom in the 1974 article, previously noted, describing symptoms commonly experienced by victims of rape. Burgess & Holmstrom, *Rape Trauma Syndrome*, 131 Am.J. Psychiatry 981 (1974). The authors state at page 982:

Rape trauma syndrome is the acute phase and long-term reorganization process that occurs as a result of forcible rape or attempted forcible rape. This syndrome of behavioral, somatic, and psychological reactions is an acute stress reaction to a life threatening situation.

Black, 109 Wn.2d at 342-343.

The *Black* court doubted the reliability of employing "rape trauma syndrome" to prove that an alleged victim was, in fact, raped.

Because the symptoms associated with "rape trauma syndrome" embrace such a broad spectrum of human behavior, the syndrome provides a highly questionable means of identifying victims of rape. Indeed, the American Psychiatric Association indicates that the stress and trauma associated with rape is merely one type of a larger phenomenon known as "post-traumatic stress disorder" (PTSD). Similar symptoms may be triggered by any psychologically traumatic event that is "generally outside the range of usual human experience", including simple bereavement, chronic illness, marital

conflict, assault, military combat, natural disasters, automobile accidents, bombing, or torture.^(cite omitted)

Black, 109 Wn.2d at 344.

Largely because of these methodological shortcomings, “available studies are inconsistent as to the length of recovery time and the variables affecting the dynamics of rape victimization.” Ruch & Leon, at 239.

Black, 109 Wn.2d at 345.

In sum, the *Black* court excluded "rape trauma syndrome" as evidence of rape. The same should have happened with Mr. STARK'S case. In STARK'S case, "trauma narrative" was beyond the pale of the average juror. The use of "trauma narrative" as evidence that rape had occurred was unsupported by any research or offer of proof. As the *Black* court admonished :

An obvious first step in addressing the needs of rape victims is to obtain accurate information regarding the aftermath of rape.

Unfortunately ... this first step has been more of a stumbling lurch than a measured advance. To date, investigations of how a rape experience affects women over time have been scarce and methodologically poor.... Therefore, these studies provide little, if any, scientifically valid data regarding the effects of a rape experience, although they do provide interesting anecdotal impressions.

State v. Black, 109 Wn.2d 342-343, 344-346, 745 P.2d 12 (1987).

The same is true in Mr. STARK'S case. The use of statements within the context of "trauma narrative" as evidence of rape violates the

long-standing principles of the *Black* case - offering opinions, directly or inferentially, on the defendant's innocence or guilt is unfairly prejudicial because it invades the fact finder's exclusive domain. This case should be reversed and remanded for new trial on these grounds.

C. The Reliability Of Child Hearsay Was Never Determined As Required By RCW 9A.44.120.

In this case, according to the State's 10/11/10 *Trial Memorandum* (p.4), C.W. "made her first attempt to tell her mother what the defendant was doing to her when she was between 7 and 9 years of age." (C.W. testified she made a first report to her mother between 7 and 8 yoa and that "she thought it (the touching) might be in a dream." - 10/19/10 RP 222). These alleged statements were child hearsay governed by RCW 9A.44.120.³

³ RCW 9A.44.120 provides, in pertinent part:

A statement made by a child when under the age of ten describing any act of sexual contact performed with or on the child by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm as defined by RCW 9A .04.110, not otherwise admissible by statute or court rule, is admissible in evidence in dependency proceedings under Title 13 RCW and criminal proceedings, including juvenile offense adjudications, in the courts of the state of Washington if:

(1) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

Under RCW 9A.44.120, to admit hearsay statements related to sexual contact made by a child under the age of 10, the court must find that the statements are reliable. If so, the statement may be admitted if the child testifies at trial or the child is "unavailable as a witness," and there is "corroborative evidence of the act." RCW 9A.44.120(1)(b).

C.W. did testify at trial. However, the court never held a hearing outside the presence of the jury to determine the reliability of the child's statements or made a finding that the time, content, and circumstances of the statements made by C.W. to her mother when she was between 7 and 9

(2) The child either:

(a) Testifies at the proceedings; or

(b) Is unavailable as a witness: PROVIDED, That when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

See also the nine-factor *Ryan* test to determine reliability: factors: (1) whether there is an apparent motive to lie, (2) the general character of the declarant, (3) whether more than one person heard the statements, (4) the spontaneity of the statements, (5) the timing of the declaration and the relationship between the declarant and the witness, (6) whether the statement contained express assertions of past fact, (7) whether the declarant's lack of knowledge could be established through cross examination, (8) the remoteness of the possibility of the declarant's recollection being faulty, and (9) whether the surrounding circumstances suggested the declarant misrepresented the defendant's involvement. *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

years old provided sufficient indicia of reliability. It was error to admit the statements without a hearing and subsequent finding.

D. It Was Error For The Trial Court Not To Hold An *In Camera* Review Of Counseling Records.

Defense counsel advised the court that an *in camera* review of C.W.'s counseling records would be in order after interviews of KAILEI and ROBIN JORDAN, the two friends of C.W. who had new hearsay statements from C.W. made during counseling:

MR. MERYHEW: We're here, ready to roll, and, you know, there's all that going on. But I could not effectively cross-examine those witnesses today before probably about 2:30 or 3:00. And even then that might be a little guarded unless we had a better understanding of the counseling records. And that assumes that the Court told Mr. Carlstrom that he wasn't going to get those records and to forget about it.

Another solution might be for the Court to sign an order right now directing that those records be turned over. I think their materiality, their relevance, their potential for surviving an *in camera* review is about as high as it gets. The showing has been made.

10/14/10 RP 57.

This colloquy on an *in camera* review of counseling records occurred Thursday, 10/14/10. The prosecutor produced the "trauma narrative" by the following Tuesday, 10/19/10. The court never ordered the counseling records or an *in camera* review of the counseling records.

The failure to do an *in camera* review of C.W.'s counseling records deprived Mr. STARK of due process in violation of the Fourteenth

Amendment. After the defense counsel showed the need for an *in camera* review of C.W.'s counseling records the trial court failed to sign the order.

The United States Supreme Court has held that for due process to justify *in camera* review of records that are otherwise deemed privileged or confidential by statute that the defendant must establish "a basis for his claim that it contains material evidence". *Pennsylvania v. Ritchie*, 480 U.S. 39, 58, 107 S. Ct. 989, 94 L. Ed. 2d 46 (1987). There must be a "plausible showing" that the information will be both material and favorable to the defense. *Id.* (quoting *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S. Ct. 3440, 73 L. Ed. 2d 1193 (1982)).

In *Ritchie*, the defendant was prosecuted for sexually abusing his daughter. *Ritchie*, 480 U.S. at 43. He argued that his daughter's children and youth services (CYS) file might contain the names of favorable witnesses or other exculpatory evidence, and therefore, the trial court erred in refusing to conduct an *in camera* review of the CYS file. Even though it was impossible to say whether any information in the CYS records would actually support Ritchie's arguments, the court held that the defendant was entitled to have the file reviewed by the trial court to determine whether it contained information that probably would have changed the outcome of Ritchie's trial. *Id.* at 57-58.

State v. Gregory, 158 Wn.2d 759, 147 P.3d 1201 (2006), involved several rapes. The prosecutor asked R.S. on direct if she had discussed the rape with anyone else and she reported that she had discussed the incident in counseling at a rape crisis center. Gregory objected and outside of the presence of the jury, his counsel argued that the State should not be allowed to present evidence regarding counseling when the defense could not have access to the counseling records. The trial court concluded that the State did not "[go] into the content of the counseling" but rather only mentioned "the fact that she has received counseling." *Gregory*, 158 Wn.2d 792-793.

As noted above, the *Gregory* court specifically noted that the prosecutor did not put the victim's counseling into play, unlike Mr. STARK'S case. Contrary to *Gregory*, the prosecutor in this case clearly acknowledged the importance of the counseling records in relation to the "trauma narrative" evidence he intended to use:

You know, it also potentially raises some additional questions about the extent to which other counseling records may or may not be in play, etc.

10/14/10 RP 55.

The evidence brought forth during the closed courtroom interviews of ROBIN and KAILEI JORDAN justified the need for the defense to review C.W.'s counseling records and supported an *in camera* review.

Cases in other jurisdictions found error when the trial court refused an *in camera* review of counseling records where the defense asserted that the victim had previously made inconsistent statements regarding the offenses; that the victim had made prior statements denying that the abuse occurred or recanting the allegations of abuse; that records from the Alabama Department of Human Resources included statements in which the victim had denied that the appellant had put his mouth on her; and that it believed that the victim's counseling records might include similar exculpatory information. Based on those assertions, the appellant made a sufficient showing regarding the potential relevance and materiality of the records he was requesting, and the trial court abused its discretion when it refused to conduct an *in camera* inspection of those records. *Brooks v. State*, 33 So.3d 1262 (Ala.Crim.App., 2007).

In *State v. Roy*, 194 W.Va. 276, 460 S.E.2d 277 (1995), the West Virginia Supreme Court examined a discovery request for confidential counseling records of a juvenile victim. The Court held that if an accused can show the relevance of such statutorily protected records, they may be discovered and used to impeach a prosecuting witness' credibility. The rationale of the *Roy* case is that statutory protections restricting the disclosure of confidential records information may not operate to

unconstitutionally impede an accused's constitutional right to a criminal defense, including the right to fairly cross-examine witnesses.

Similarly, in *State v. Gagne*, 136 N.H. 101, 105, 612 A.2d 899, 901 (1992) the New Hampshire Supreme Court determined that when a defendant establishes a reasonable probability that confidential records may contain evidence that is material and relevant to the defense, the trial court must conduct an *in camera* review of those records. As stated in *State v. Graham*, 142 N.H. 357, 363, 702 A.2d 322, 325-26 (1997):

The threshold showing necessary to trigger an *in camera* review is not unduly high. The defendant must meaningfully articulate how the information sought is relevant and material to his defense. To do so, he must present a plausible theory of relevance and materiality sufficient to justify review of the protected documents, but he is not required to prove that his theory is true. At a minimum, a defendant must present some specific concern, based on more than bare conjecture, that, in reasonable probability, will be explained by the information sought.

In this case, the prosecutor acknowledged the relevance and importance of the counseling records. The trial court should have had an *in camera* hearing as suggested by defense counsel. The case should be reversed for a new trial so the *in camera* review and discovery of the counseling records can be accomplished.

E. Mr. STARK Was Deprived Of Due Process When The Jury Was Allowed To Convict Him On Alleged Sexual Abuse In Another County On Count I.

Mr. STARK was charged by *Amended Information* as follows:

<u>Count</u>	<u>Charge</u>	<u>Charging Period</u>	<u>County</u>
Count I	Attempted Child Mol. 1°	08/17/99 - 12/31/00	King
Count II	Child Mol. 1°	01/01/04 - 08/16/05	King
Count III	Incest 1°	08/17/03 - 08/17/06	King
Count IV	Child Mol. 3°	08/17/07 - 09/30/07	King

The charging period revolves around C.W.'s date of birth of August 17, 1993. The verdicts on several counts should not stand because the charged offense occurred in Pierce County, not King County, and Mr. STARK was entitled to a jury in the county where the crime allegedly occurred.

The charging period for Count I (Attempted Child Molestation 1°) was from August 17, 1999 through December 31, 2000 in King County. The victim indicated that misconduct happened "a lot more" in Spanaway (i.e., Pierce County):

Q. It sounds like something like this happened again. Is that a fair statement?

A. Yeah.

Q. When was the next time you remember something happening?

A. I can't remember, like, the next incident exactly. I just know that as soon as we moved to Spanaway, it happened a lot more and frequently.

Q. Let's talk about that. . . .

10/19/10 RP 216.

The court had an extended discussion about the instructions with counsel about acts occurring in Spanaway. The prosecutor stated: "So I

would like to ask that the Court interlineate this in the sentence that says this evidence consists of allegations of sexual misconduct occurring outside of King County." DPA TC, 10/25/10 RP 855.

Mr. STARK resided in Pierce County from August, 1999 until March, 2000 and again from July, 2000 until August, 2003. 10/25/10 RP 755-56, 758-59; 10/25/10 RP 645-646 (DANELLE STARK testified that she and defendant moved into together February, 2000, not before).

The alleged victim C.W. did not reside with Mr. STARK until February of 2000 as indicated above. 10/25/10 RP 645-646. Mr. STARK'S convictions could not be based on those periods of time when C.W. did not live with Mr. STARK or where the alleged misconduct occurred in a different county.

The plain language of article I, section 22 confers on a defendant the right "to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed." The term "county" is singular; it is also definite and has been held to refer to only one, particular county: i.e., the county wherein the defendant was alleged to have committed the charged crime. On its face, article I, section 22 does not permit a jury to convict an individual for out-of-county offenses and who is not a resident of that county. Residence in the county where the

charged crime was allegedly committed is a constitutional requirement that must be satisfied for an individual to qualify for jury service.

In *City of Bothell v. Barnhart*, 156 Wn.App. 531, 534-35, 234 P.3d 264 (2010), Division I decided whether a jury in a criminal trial could include members who do not reside in the county in which the charged offense was alleged to have been committed. The court found that article I, section 22 of the Washington Constitution, guaranteed the defendant the right to be tried by a jury of the county in which the offense was charged to have been committed. Thus, a prospective juror had to reside in the county where the offense was alleged to have been committed. The City of Bothell, which is located in both King County and Snohomish County, had charged James Barnhart with committing the offense of stalking in Snohomish County. However, the jury that convicted Barnhart included King County residents, in violation of Barnhart's right to jury trial under article I, section 22. Accordingly, Division I reversed and remanded for a new trial.

Similarly, in this case, Mr. STARK was accused of misconduct in Pierce County but tried in King County. The prosecutor even asked the trial court to adjust the instructions for Count I (Attempted Child Molestation 1^o) accordingly:

Mr. MERYHEW: Well. Your Honor, the State of Washington acts through individual county agents. I haven't agreed to or waived any objection to venue for charges outside of King County. And the Pierce County prosecutor, under case law, could still charge Mr. Stark for the events that happened in Pierce County.

So I think it's important for the State, and I think Mr. Carlstrom would agree, to make clear to the jury that he is only charged by this prosecuting authority on behalf of the State of Washington for incidents that happened in King County.

Is that a fair statement?

Mr. CARLSTROM: If the defendant were to be convicted under an instruction stating the act occurred in the State of Washington, that count would be subject of being overturned on appeal based on a venue objection that, Mr. Meryhew is right, he has not waived at this point 10/25/10 RP 850.

The court finally relented:

THE COURT: All right. So I will just interlineate after the word "county" where it says, "misconduct occurring outside King County - - and there's this comma, misconduct occurring outside of King County, in Spanaway, Washington, and may be considered by you only for the purposed, et cetera." ⁴ 10/25/10 RP 857.

⁴ The court gave Instruction #6 (Appendix #1), a ER 404(b) instruction, to settle the venue problem:

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of allegations of sexual misconduct outside of King County in Spanaway, Washington, and may be considered by you only for the purpose of determining whether the defendant demonstrated a lustful disposition towards C.W. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

However, this instruction tells the King County jury that it can convict on acts in Spanaway, Pierce County. The instruction compounds the

The trial court's attempted resolution of the problem missed the mark. Mr. STARK'S constitutional right under article I, section 22 was clearly violated by allowing King County jurors to determine allegations of misconduct in Pierce County.

F. The Trial Court Failed To Give A *Petrich* Instruction On Two Counts Which Deprived Mr. STARK Of A Unanimous Verdict Under The Sixth Amendment U.S. CONST. And Article I, Sec. 22, WASH. CONST.

A defendant's right to a unanimous verdict is rooted in the Sixth Amendment to the United States Constitution and in Article I, Section 22 of the Washington Constitution. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing Wash. Const. art. I, § 22; U.S. Const., 6th Amend.). When a defendant has committed several criminal acts but is charged with only one count, the prosecution normally has two choices. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). Either the State may elect the act it will rely on or the judge must instruct the jury as to the unanimity requirement. *Petrich*, 101 Wn.2d at 572.

As noted above, Mr. STARK was charged by amended information as follows:

<u>Count</u>	<u>Charge</u>	<u>Charging Period</u>	<u>County</u>
Count I	Attempted Child Mol. 1°	08/17/99 - 12/31/00	King
Count II	Child Mol. 1°	01/01/04 - 08/16/05	King
Count III	Incest 1°	08/17/03 - 08/17/06	King
Count IV	Child Mol. 3°	08/17/07 - 09/30/07	King

The trial court gave a *Petrich* instruction on Child Molestation 1° and Incest 1°, Counts II and III respectively. (Instruction #22, Appendix #1). The trial court failed to give a *Petrich* instruction on Attempted Child Molestation 1° and Child Molestation 3°, Counts I and IV, despite C.W.'s testimony that she was subject to several acts of abuse during those periods of time.

With respect to residences, C.W. testified she first lived at her grandparents' house in Renton and then Auburn at 5 or 6 yoa, then a Benson Hill apartment in Renton at 6 yoa, then a Spanaway house at 7 to 10 yoa, then back with her grandparents in Renton while a family house was being built in Maple Valley, then in Maple Valley at 10 yoa. (10/19/10 RP 201, 202, 204, 206-207).

C.W. also testified to her abuse in relation to those residences. In particular, that the first incident occurred at age six at the Benson Apartments (10/19/10 RP 210) and that "I just know that as soon as we moved to Spanaway, it happened a lot more and frequently." (at the age of 7 to 10 - 10/19/10 RP 215; *see also* 10/19/10 RP 220 - "I can't even count the times, but it was a lot."). C.W. further testified that she was abused by Mr. STARK when she was living in Maple Valley at 10, 11 and/or 12 yoa and at 14 yoa. 10/19/10 RP 231-232, 234.

In sum, the abuse alleged was "a lot" and happened from 6 yoa to 14 yoa between Spanaway (Pierce County) and Renton/Maple Valley (King County). The Attempted Child Molestation 1° charge (Ct. I) allegedly occurred between the period of 08/17/99 to 12/31/00 when C.W. was a 6-7 yoa. The Child Molestation 3° charge (Ct. IV) allegedly occurred during the period of 08/17/07 to 09/30/07 when C.W. was 14 yoa. (10/19/10 RP 203, 210, 216; and 10/19/10 RP 235, 238, 241). Several acts were alleged between two counties.

As noted by the *Petrich* court, in "multiple acts" cases, the jury must unanimously agree as to which incident constituted the crime charged. Where multiple acts relate to one charge, the State must elect the act on which it relies to convict the defendant, or the trial court must provide a unanimity instruction -- a *Petrich* instruction. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984). The failure to do so in multiple acts cases is constitutional error. "The error stems from the possibility that some jurors may have relied on one act or incident and some [jurors a different act], resulting in a lack of unanimity on all of the elements necessary for a valid conviction." *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

In this case, the State failed to make an election in a multiple acts case for all charges, not just Counts II and III. The trial court failed to

instruct the jury on unanimity as to Counts I and IV, Attempted Child Molestation 1° and Child Molestation 3°, which constituted constitutional error. The case should be remanded for proper instruction to a jury.

G. The Overlapping Charging Periods For Counts II and III Allowed Sentencing For "Same Criminal Conduct" In Violation Of The Fifth Amendment, United States Constitution.

Two of the charges, Counts II and III, had overlapping periods:

Count II	Child Mol. 1°	01/01/04 - 08/16/05	King
Count III	Incest 1°	08/17/03 - 08/17/06	King

The charging period for Child Molestation 1° falls within the charging period for Incest 1°, which makes it the "same criminal conduct" for sentencing purposes. Under RCW 9.94A.589, current offenses are not added together to calculate an offender score if they were the same criminal conduct. "Same criminal conduct ... means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). The "same criminal conduct" requires two or more crimes to involve (1) the same criminal intent, (2) the same time and place, and (3) the same victim. *State v. Haddock*, 141 Wn.2d 103, 109-10, 3 P.3d 733 (2000).

In this case, Child Molestation °1 and Incest 1° allegedly occurred at the same time and place with the same victim. As previously mentioned there was no instruction telling the jury that the Child

The prohibition against imposing multiple punishments for the same criminal conduct is implicated here. The convictions should be reversed.

H. Double Jeopardy Was Also Violated Where The Jury Was Instructed That Separate Acts Were Required For Child Molestation 1° And Incest 1° But Did Not Tell The Jury That They Could Not Be The Same Act

Multiple convictions and punishments for the same offense imposed in the same proceeding violate the Fifth Amendment prohibition against double jeopardy. U.S. Const. amend. V; *Ball v. United States*, 470 U.S. 856, 864-65, 105 S.Ct. 1668, 84 L.Ed.2d 740 (1985); *State v. Turner*, 169 Wn.2d 448, 454-55, 238 P.3d 461 (2010); *State v. Womac*, 160 Wn.2d 643, 650-51, 160 P.3d 40 (2007).

Where the State charges multiple counts of the same charging period, the failure to instruct the jury that each conviction must be based upon a separate and distinct act allowed the jury to unanimously find that only one act had been proven beyond a reasonable doubt and to base multiple convictions on that single act in violation of the prohibition against Double Jeopardy. *State v. Berg*, 147 Wn.App. 923, 931, 198 P.3d 529 (2008); *State v. Borsheim*, 140 Wn. App. 357, 366, 165 P.3d 417 (2007); *State v. Kitchen*, 110 Wn.2d 403, 411 756 P.2d 105 (1988); *State v. Petrich*, 101 Wn. 20 566, 683 P.2D 173 (1984).

In this case the *Petrich* instruction (Instruction #22) told the jury that "a separate crime is charged in each count" and "to convict the defendant on Child Molestation in the First Degree, one particular act of molestation must be proved beyond a reasonable doubt. . . ." The trial court instructed the same for Incest 1°. However, the trial court did not instruct the jury that the act constituting Child Molestation 1° could not be the same act constituting the Incest 1°. Accordingly, there was error that should be corrected with a new trial and proper instruction.

I. Failure To Inquire Into Misconduct Of A Spectator At Trial Communicating With State Witnesses During Trial Was Error.

In Mr. STARK'S case the trial court allowed PAT THOMAS to sit through the trial as a spectator. 10/07/10 RP 33-34 (Prosecutor: ". . . I do anticipate that Lori Nielsen's husband, Pat Thomas, who is not on my witness list, may want to attend the trial. I have already had discussions with him about the fact that that's fine if he's not going to be a witness, but that he can't go talking to other witnesses about what he sees and hears should he come in and observe. . .").

Mr. THOMAS is CAITLIN WEISS'S great uncle and the spouse of LORI NEILSON (another State witness). Mr. THOMAS is also a step-father to ASHLEY HUGHES (another State witness). The trial court was advised by letter from NANCY WEISS (another State witness and sister to LORI

Nine pages of phone records were attached to this letter. 12/17/10 RP 4. The court wanted to be sure that the parties "had all the information that I was provided with, so that if you felt it was appropriate to ask for some additional action beyond sentencing today, you would have an opportunity to do that." 12/17/10 RP 4. Defense counsel acknowledged that he had not "had the chance to really fully explore that" and "I don't know whether I should be investigating more." 12/17/10 RP 5, 6.

Despite the admitted failure to investigate defense counsel stated "So a couple more weeks to examine this issue would be my preference, but at this point, your Honor, if - - that's not because I believe I have in my possession evidence of misconduct." 12/17/10 RP 7. And despite defense counsel's admission of failure to investigate, the trial court proceeded to sentencing because "I don't hear a motion to continue the sentencing" and proceeding to sentencing would not "foreclose you from doing further investigation." 12/17/10 RP 7. Defense counsel finally requested a two week continuance which the prosecutor "adamantly opposed" and the trial court ultimately denied. 12/17/10 RP 7. The matter proceeded to sentence.

With respect to communication between witnesses, the court had ordered exclusion of witnesses at trial under ER 615: "At the request of a party the court may order witnesses excluded so that they cannot hear the

testimony of other witnesses, and it may make the order of its own motion." The court had a duty to investigate the allegations of witness tampering and/or improper influencing especially when the complaint was made from the State's own witness.

Courts have inherent authority to investigate claims that a party is engaging in fraudulent behavior or improperly influencing witnesses. E.g. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) (“[A] court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud.”) see also *O'Brien v. State*, 261 Wis. 570, 577, 53 N.W.2d 534 (1952) (“It was not only the right of the court, but its *duty*, to investigate allegations of [witness tampering] in the interest of protecting witnesses from intimidation and maintaining such order as would insure honest testimony in the case.”) (emphasis added).

The federal courts have uniformly held that an evidentiary hearing is the appropriate method for resolving disputed issues of fact in the context of a court's decision whether to impose sanctions on misconduct. E.g., *Rogal v. American Broadcasting Cos., Inc.*, 74 F.3d 40, 45 (3d Cir.1996); *Doe v. Maywood Housing Authority*, 71 F.3d 1294, 1299 (7th Cir.1995); *Didie v. Howes*, 988 F.2d 1097, 1104 (11th Cir.1993); *Chemiakin v. Yefimov*, 932 F.2d 124, 130 (2d Cir.1991); *In re Kunstler*,

914 F.2d 505, 520 (4th Cir.1990); *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 351 n. 11 (D.Conn.1981). Furthermore, a litigant's right to a jury trial is not violated if the court, after determining that the plaintiff has engaged in fraudulent behavior, dismisses the suit as a sanction. *E.g.*, *Gonzalez v. Trinity Marine Group, Inc.*, 117 F.3d 894, 898-99 (5th Cir.1997); *Pope v. Federal Exp. Corp.*, 974 F.2d 982, 984 (8th Cir.1992); *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 592 (9th Cir.1983).

In this case, the court refused to investigate and/or grant a continuance to investigate the issue of improper witness tampering/influencing between witnesses in violation of the court's order and Defendant's right to a fair trial. This court should reverse and remand for such an inquiry.

J. The Placement Of A Partition Between Mr. STARK And The Complaining Witness Violated Defendant's Right To Confrontation.

Another violation of Mr. STARK'S right to due process in violation of the Fourteenth Amendment occurred when the trial court allowed a large board to be placed between the complaining witness. *E.g.* 10/25/10 RP 936 ("Can I ask you, Mr. Carlstrom, to move the board, because it's blocking several people for me.") See also 10/19/10 RP 226 (Exhibit #10 - Tear Sheet) ("MR. CARLSTROM: And, Your Honor, before I resume my

[T]he screen unduly compromised the presumption of innocence fundamental to the right to a fair trial. The presence of the screen in the courtroom, in an obvious and peculiar departure from common practice, could have suggested to the jury that the court believed [the victim] and endorsed her credibility, in violation of [the defendant's] right to a fair trial.

Id. at 11.

In reversing the defendant's conviction, the court concluded:

[T]he inherently prejudicial practice in this case cannot pass close scrutiny, because the court had available another equally effective method of protecting [the victim] while procuring her testimony that would not have been inherently prejudicial to [the defendant's] due process rights. Section 29–1926 ^(finte omitted) specifically provides for various means of obtaining the victim's testimony through pretrial videotaping or closed-circuit video from another room. It does not, actually, make any reference to using a screen in the courtroom.

Id. at 178.

See also *McLaughlin v. State*, 79 So.3d 226 (Fla.App. 4 Dist., 2012) (trial court's placement of a screen between defendant and minor victims while victims testified at defendant's trial on charges of lewd and lascivious molestation on a child under age 12 was inherently prejudicial, and thus violated defendant's due process right to a fair trial).

In this case a large board was placed between witnesses who were testifying and Mr. STARK. Such a situation denied Mr. STARK his right to confrontation. The case should be remanded for a fair trial without a board placed between Mr. STARK and the witnesses.

K. The Prosecutor Improperly Argued The "Reasonable Doubt" Instruction To The Jury In Violation Of Mr. STARK'S Rights To Due Process And A Fundamentally Fair Trial Pursuant To The Fourteenth Amendments.

The State deprived Mr. STARK of due process in violation of the Fourteenth Amendment when the prosecutor improperly defined "reasonable doubt" for the jury during closing arguments.

WPIC 4.01 (Instruction #5 - Appendix #1) was used in this case and, in pertinent part, stated as follows:

A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence. It is such a doubt that would exist in the mind of a reasonable person after fully, fairly and carefully considering all of the evidence or lack of evidence. If after, such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

The prosecutor highlighted the language of WPIC 4.01 in closing argument but added his own twist by arguing the State's burden is met if the jury merely "abidingly" believes the allegations to be true:

Reasonable doubt, ladies and gentlemen, is defined in your instructions as a doubt for which a reason exists that may arise from evidence or lack of evidence. You were told in your instructions that if you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt. And notice what that instruction doesn't say. It doesn't say beyond all doubt. It doesn't say beyond a shadow of a doubt. It doesn't say with 100 percent certainty.

And by telling you these things, ladies and gentlemen, do not take that as me minimizing the reasonable doubt standard, because I'm

not doing that. But we need to recognize the reasonable doubt standard for what it actually is, an abiding belief in the truth of the charge. . .

10/26/10 RP 892-893.

Although the prosecutor claimed he was not minimizing the reasonable doubt standard, and, by extension, the State's burden, he did undermine the reasonable doubt instruction by misstating WPIC 4.01. A jury's "abiding belief in the truth of the charge" does not meet the State's burden if it is not reached after "full, fair and careful consideration of the evidence and lack of evidence." To the contrary, "A reasonable doubt is one for which a reason exists and may arise from the evidence or lack of evidence" and a "reasonable doubt" is such "a doubt that would exist in the mind of a reasonable person after fully, fairly and carefully consideration of all of the evidence or lack of evidence."

An argument stating that an "abiding belief in the truth of the charge" meets the State's burden of proof is simply wrong - there must be "full, fair and careful consideration of the evidence or lack of evidence."

All the "to convict" instructions stated that "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 (II, III, IV). (See third paragraph of Instructions # 11 (Ct. II), #13 (Ct. IV), #17 (Ct. I) and #21 (Ct. III)). However, there is no duty to convict.

Washington's appellate courts have held that there is no duty to convict at least with respect to "reasonable doubt" instructions:

The jury need not engage in any such thought process. By implying that the jury had to find a reason in order to find [the defendant] not guilty, the prosecutor made it seem as though the jury had to find [the defendant] guilty unless it could come up with a reason not to. Because we begin with a presumption of innocence, this implication that the jury had an initial affirmative duty to convict was improper. Furthermore, this argument implied that [the defendant] was responsible for supplying such a reason to the jury in order to avoid conviction.

State v. Anderson, 153 Wn.App. 417, 431, 220 P.3d 1273 (2009).

Thus, a prosecutor's comments discussing the reasonable doubt standard in the context of everyday decision-making have been held improper because they minimized the importance of the reasonable doubt standard and of the jury's role in determining whether the State has met its burden:

By comparing the certainty required to convict with the certainty people often require when they make everyday decisions--both important decisions and relatively minor ones--the prosecutor trivialized and ultimately failed to convey the gravity of the State's burden and the jury's role in assessing its case against Anderson. This was improper.

Anderson, 153 Wn.App. 432.

In this case, the prosecutor's comments were improper because they confused two ideas - the jury's duty to find Mr. STARK not guilty unless the State proved its case against him beyond a reasonable doubt

with the idea that the jury should convict Mr. STARK if it only had an "abiding belief." Thus, the prosecutor's argument to convict with only a "belief" without "fully, fairly and carefully considering all the evidence or lack of evidence" confused and minimized that standard:

But if you believe that the defendant took off her underwear and looked at her vagina, you have proof beyond a reasonable doubt, that he took a substantial step towards committing the crime of Child Molestation in the First Degree, and you have proof beyond a reasonable doubt that he's guilty of Attempted Child Molestation in the First Degree.

If you believe, ladies and gentlemen, Caitlin when she tells you that, when she was ten years old, in early 2004, shortly after the Stark Family moved into the new house, that the defendant took her upstairs in an unfinished house, backed her into the corner, pulled her pants down, and rubbed her vagina, then you have proof beyond a reasonable doubt that he is guilty of Child Molestation in the First Degree.

If you believe, ladies and gentlemen, that one day, when Caitlin was 11 or 12 and was upstairs in her bedroom in the Maple Valley home, that the defendant came in, pulled her pants down, pulled her underpants down, and licked her vagina, then you have proof beyond a reasonable doubt that he is guilty of Incest in the First Degree.

And if you believe, ladies and gentlemen, that two days before the start of ninth grade, when Caitlin was 14 years old, the defendant got on top of her on the couch in the family home, and pulled her pants down and tried to put his penis in her vagina, and touched her vagina with his penis while he was trying to do it, while she struggled to prevent him from doing it, then you have proof beyond a reasonable doubt that he's guilty of the crime of Child Molestation in the Third Degree.

10/26/10 RP 894-895.

In sum, a prosecutor is confined to correctly characterizing the law stated in the court's instructions. *State v. Estill*, 80 Wn.2d 196, 199-200, 492 P.2d 1037 (1972) (statements by the prosecution or defense to the jury upon the law must be confined to the law as set forth in the instructions of the court); *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984) (prosecutor's misstating the law of the case to the jury is a serious irregularity having the grave potential to mislead the jury). A prosecutor restates the court's instruction on the law at its peril. See, e.g., *State v. Fleming*, 83 Wn.App. 209, 213, 921 P.2d 1076 (1996) (it is well established as misconduct for prosecutor to argue that to acquit a defendant, the jury must find that the State's witnesses are lying or mistaken), review denied, 131 Wn.2d 1018, 936 P.2d 417 (1997); *State v. Anderson*, 153 Wn.App. 417, 431, 220 P.3d 1273 (2009) (arguments equating proof beyond a reasonable doubt to everyday decision-making were improper; also improper are "fill in the blank" arguments suggesting that jurors must be able to identify a reason not to convict), review denied, 170 Wn.2d 1002, 245 P.3d 226 (2010); *State v. Warren*, 165 Wn.2d 17, 24, 195 P.3d 940 (2008) (improper for prosecutor to argue that "[r]easonable doubt does not mean give the defendant the benefit of the doubt" and "for [the defense] to ask you to infer everything to the benefit

of the defendant is not reasonable"), cert. denied, --- U.S. ----, 129 S.Ct. 2007, 173 L.Ed.2d 1102 (2009).

The defense respectfully submits that the prosecutor's mischaracterization of "reasonable doubt" in closing argument as merely forming "an abiding belief" without "fully, fairly and carefully considering all the evidence or lack of evidence" was improper. As noted in *Anderson*, "This essentially amounted to an invitation to the jury to render a decision based on a standard less than what is constitutionally required." *Anderson*, 153 Wn.App. 432.

L. The Prosecutor Improperly Shifted The Burden Of Proof When He Argued That Mr. Stark Did Not Call Witnesses In Violation Of Mr. STARK'S Right To Due Process And A Fundamentally Fair Trial Pursuant To The Fourteenth Amendments.

The prosecutor argued in closing what witnesses who failed to appear might have said if called to testify:

Mr. Meryhew says don't let me get away with saying that, well, Mr. Meryhew could have called Jake Wagener and Matt Purvine to come in and talk to you. You know, had the defense not put on a case, that argument might make some sense.

But the fact of the matter is they did put on a case, and these are two young men that if the defense thought they had anything helpful to say, I'm sure they would have put them on. That's not to say that there was any requirement that they do so. But they had the opportunity to do so, and they chose not to, just as the State had the opportunity to put them on and chose not to. All you know about them, ladies and gentlemen, is that Caitlin said she told them.
10/26/10 RP 929.

prosecutor say the defendant belonged to a group of butchers and madmen who killed indiscriminately, but in so doing he also testified as to *facts* outside the record. He told the jury that AIM was a “deadly group of madmen”, “the people are frightened of AIM”, and that AIM is “something to be frightened of when you are an Indian and you live on the reservation”. The defendant described AIM as a group organized to protect Indian rights. The prosecution's statements that AIM is a group of terrorists (which he based on his own memory of the events at Wounded Knee) constituted not argument, but testimony refuting the defendant's description.

State v. Belgarde, 110 Wn.2d 504, 508 - 509, 755 P.2d 174 (1988).

The statements were deliberately placed before the jury, not accidentally. The total strength of the evidence against the accused came down to the credibility of C.W. This argument that witnesses who were not called would have undermined the defense was extremely prejudicial to Mr. STARK who was not convicted just on the evidence presented at trial but on evidence the prosecutor argued might have been.

In sum, the prosecutor shifted the burden of proof to defendant for failing to call witnesses.

M. The Incest 1° Charge Should Be Dismissed For Failure To Prove Penetration.

The trial court deprived Mr. STARK of due process in violation of the Fourteenth Amendment when the state failed to prove the element of penetration for Count III, Incest in 1°.

Incest 1° is defined as

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

RCW 9A.64.020.

The term "sexual intercourse," for purposes of RCW 9A.44 (sex offenses), "has its ordinary meaning and occurs upon any penetration, however slight." RCW 9A.44.010(1)(a); *State v. A.M.*, 163 Wn.App. 414, 420, 260 P.3d 229 (2011). Black's Law Dictionary defines "penetration" as the entry of the penis or some other part of the body or a foreign object into the vagina or other bodily orifice. Black's Law Dictionary 1248 (9th ed. 2009).

The Incest 1^o charge was alleged to have occurred 08/17/03 - 08/17/06, i.e. when C.W. was between 10 - 13 yoa (DOB 08/17/93). However, C.W. never claimed any penetration which is needed for Incest 1^o. C.W. described incidents when she was in the Maple Valley home at age 10 and later. She testified the first incident happened at an estimated age of 11 or 12 when Mr. STARK licked her vagina and another incident "a couple of days before ninth grade" at 14 yoa "where he tried spreading my legs and sticking his penis inside of me, and I just wouldn't let him do it" When specifically asked whether he was able to get his penis in her vagina she responded "no." 10/19/10 RP 231-232, 235, 239.

In sum, there was no proof of penetration and no evidence supporting the Incest 1° charge. Accordingly, this count should be dismissed.

VIII. CONCLUSION

For the reasons stated above, the Court of Appeals should reverse and remand this matter for a new trial.

DATED this 23rd day of April, 2012

Brian Stark

BRIAN STARK - #344634
PRO-SE
Washington Correctional Center
P.O. Box 900
Shelton, WA 98584

APPENDIX #1

[Court Instructions]

FILED

.10 OCT 28 PM 12:08

KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

ORIGINAL

SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

vs.

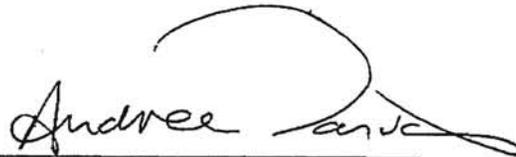
BRIAN T. STARK,

Defendant.

NO. 09-1-05650-8 KNT

COURT'S INSTRUCTIONS TO THE JURY

Dated this 26th day of October, 2010.



Judge Andrea Darvas

It is your duty to decide the facts in this case based upon the evidence presented to you during this trial. It also is your duty to accept the law from my instructions, regardless of what you personally believe the law is or what you personally think it should be. You must apply the law from my instructions to the facts that you decide have been proved, and in this way decide the case.

Keep in mind that a charge is only an accusation. The filing of a charge is not evidence that the charge is true. Your decisions as jurors must be made solely upon the evidence presented during these proceedings.

The evidence that you are to consider during your deliberations consists of the testimony that you have heard from witnesses and the exhibits that I have admitted during the trial. If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict.

Exhibits may have been marked by the court clerk and given a number, but they do not go with you to the jury room during your deliberations unless they have been admitted into evidence. The exhibits that have been admitted will be available to you in the jury room.

One of my duties has been to rule on the admissibility of evidence. Do not be concerned during your deliberations about the reasons for my rulings on the evidence. If I have ruled that any evidence is inadmissible, or if I have asked you to disregard any evidence, then you must not discuss that evidence during your deliberations or consider it in reaching your verdict. Do not speculate whether the evidence would have favored one party or the other.

In order to decide whether any proposition has been proved, you must consider all of the evidence that I have admitted that relates to the proposition. Each party is entitled to the benefit of all of the evidence, whether or not that party introduced it.

You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness. In considering a witness's testimony, you may consider these things: the opportunity of the witness to observe or know the things he or she testifies about; the ability of the witness to observe accurately; the quality of a witness's memory while testifying; the manner of the witness while testifying; any personal interest that the witness might have in the outcome or the issues; any bias or prejudice that the witness may have shown; the reasonableness of the witness's statements in the context of all of the other evidence; and any other factors

that affect your evaluation or belief of a witness or your evaluation of his or her testimony.

The lawyers' remarks, statements, and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits. The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.

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

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

You have nothing whatever to do with any punishment that may be imposed in case of a violation of the law. You may not

consider the fact that punishment may follow conviction except insofar as it may tend to make you careful.

The order of these instructions has no significance as to their relative importance. They are all important. In closing arguments, the lawyers may properly discuss specific instructions. During your deliberations, you must consider the instructions as a whole.

As jurors, you are officers of this court. You must not let your emotions overcome your rational thought process. You must reach your decision based on the facts proved to you and on the law given to you, not on sympathy, prejudice, or personal preference. To assure that all parties receive a fair trial, you must act impartially with an earnest desire to reach a proper 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 to change your opinion based upon further review of the evidence and these instructions. You should not, however, surrender your honest belief about the value or significance of evidence solely because of the opinions of your fellow jurors. Nor should you change your mind just for the purpose of reaching a verdict.

No. 3

The evidence that has been presented to you may be either direct or circumstantial. The term "direct evidence" refers to evidence that is given by a witness who has directly perceived something at issue in this case. The term "circumstantial evidence" refers to evidence from which, based on your common sense and experience, you may reasonably infer something that is at issue in this case.

The law does not distinguish between direct and circumstantial evidence in terms of their weight or value in finding the facts in this case. One is not necessarily more or less valuable than the other.

No. 4

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.

No. 5

The defendant has entered a plea of not guilty. That plea puts in issue every element of each crime charged. The State is the plaintiff and has the burden of proving each element of each 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. It is such a doubt as would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

No. 6

Certain evidence has been admitted in this case for only a limited purpose. This evidence consists of allegations of sexual misconduct occurring outside of King County in Spanaway, Washington, and may be considered by you only for the purpose of determining whether the defendant demonstrated a lustful disposition towards C.W. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

No. 7

A person commits the crime of child molestation in the first degree when the person has sexual contact with a child who is less than twelve years old, who is not married to the person and not in a state registered domestic partnership with the person, and who is at least thirty-six months younger than the person.

No. 8

Sexual contact means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party or a third party.

No. 9

Married means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in court for legal separation or for dissolution of the marriage.

No. 10

A "state registered domestic partner" means a person who is in a domestic partnership registered with the Washington secretary of state.

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

(1) That during a period of time intervening between January 1, 2004, and August 16, 2005, on an occasion separate and distinct from Count III, the defendant had sexual contact with C.W.;

(2) That C.W. was less than twelve years old at the time of the sexual contact and was not married to the defendant and was not in a state registered domestic partnership with the defendant;

(3) That C.W. was at least thirty-six months younger than the defendant; and

(4) That this act 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. 12

A person commits the crime of child molestation in the third degree when the person has sexual contact with a child who is at least fourteen years old but less than sixteen years old, who is not married to and not in a state registered domestic partnership with him or her, and who is at least forty-eight months younger than the person.

To convict the defendant of the crime of Child Molestation in the Third Degree, as charged in Count IV, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That during a period of time intervening between August 17, 2007, through September 30, 2007, the defendant had sexual contact with C.W.;

(2) That C.W. was at least fourteen years old but less than sixteen years old at the time of the sexual contact and was not married to the defendant and was not in a state registered domestic partnership with the defendant;

(3) That C.W. was at least forty-eight months younger than the defendant; and

(4) That this act 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.

No. 14

A person commits the crime of Attempted Child Molestation in the First Degree when, with intent to commit that crime, he or she does any act that is a substantial step toward the commission of that crime.

No. 15

A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

No. 16

A substantial step is conduct that strongly indicates a criminal purpose and that is more than mere preparation.

To convict the defendant of the crime of Attempted Child Molestation 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 during a period of time intervening between August 17, 1999, through December 31, 2000, the defendant did an act that was a substantial step toward the commission of Child Molestation in the First Degree;

(2) That the act was done with the intent to commit Child Molestation in the First Degree; and

(3) That the act occurred in King County, 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.

No. 18

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