

66826-9

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NO. 66826-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

GERALD WILSON,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jay White, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. There was insufficient evidence to support the jury's verdict on two separate counts.

2. There was insufficient evidence to permit the jury to be unanimous as to an individual act of sexual intercourse for each of the two counts.

3. There was insufficient evidence to support either conviction when there was no evidence that the one specific incident for which there was sufficient evidence of intercourse occurred during the time period required for either charge.

4. Appellant was denied due process when the prosecutor argued facts for which there was no evidence, creating the impression that the evidence supported a second incident of intercourse.

5. Appellant was denied due process when the prosecutor argued in closing facts of sexual contact that did not include intercourse to support three counts of rape.

6. Appellant was denied effective assistance of counsel when his attorney (1) failed to object to improper prosecutorial argument, and (2) failed

to object to improper lay witness opinion evidence that was irrelevant and highly prejudicial.

7. The trial court erred by admitting evidence under the "hue and cry" doctrine when the report was not made for more than four years after any even.

8. Cumulative error denied appellant a fair trial.

Issues Pertaining to Assignments of Error

1. Was there sufficient evidence to support convictions on two counts of rape of a child in two different degrees when the instructions required the jury to be unanimous as to a specific incident for each charge, and the evidence supported only one specific incident of sexual intercourse, and no evidence of the child's age when it occurred?

2. Did the prosecutor commit misconduct during closing argument when she argued the jury should convict on three separate occurrences, two of which did not meet the elements of the charged crime?

3. Did the prosecutor deny appellant due process when she argued facts to imply evidence of penetration when the testimony did not support it?

4. Was appellant denied effective assistance of counsel when his lawyer failed to object to the prosecutor's improper argument?

5. Was appellant denied effective assistance of counsel when his lawyer failed to object to prejudicial lay opinion testimony that people believed the complaining witness sitting on the defendant's lap years earlier was "not normal," "weird," and "appeared like a family unit"?

6. Does the "hue and cry" doctrine permit evidence of a "timely" report when it did not occur for more than four years?

7. Did cumulative error deny appellant a fair trial?

B. STATEMENT OF THE CASE

1. Substantive Facts

a. Lexi Birth to Age 8

Alexandria "Lexi" Draper was born June 3, 1991. Both her parents were drug addicts and unable to parent her. RP5 46-48; RP7 63-64.¹ Her

¹ The transcripts are designated: RP1 = 1/20/11; RP2 = 1/24/11; RP3 = 1/25/11; RP4 = 1/26/11; RP5 = 1/27/11; RP6 = 1/31/11; RP7 = 2/1/11; RP8 = 2/3/11; RP9 = 2/4/11; RPS = 3/11/11.

father, Ron Batacan, usually left Lexi with his parents. RP6 51-54; RP7 72.

Lexi's grandparents immigrated with their children from the Philippines. They spoke Tagalog at home. They remained very close with their adult daughters and extended family. RP5 49; RP7 71-72. The daughters arranged many family gatherings. Their non-Filipino husbands sometimes attended, but were less involved. RP5 64-65, RP6 163.

When Lexi's grandmother could no longer care for her. The extended family discussed the best place for her. In September, 1999, at age 8 and beginning third grade, Lexi moved in with her aunt and uncle, Cecile Batacan-Wilson and Gerry Wilson. RP6 58-59.

b. Lexi at the Wilsons'

Cecile and Gerry had been married 11 years. They had no children of their own, but they were trying to conceive. RP6 59. Lexi had no routine at her grandparents' home. Cecile and Gerry set about creating routines: meals together, bedtime rituals, clean clothes, personal hygiene, homework. After school, they'd help her do her homework, talk about the day, have snacks, do a few chores. They

had her read aloud 15 minutes each day. Then Lexi could watch television or play video games. Gerry and Lexi enjoyed playing video games together. RP6 74-75, 178; RP7 89-91.

Cecile was a nurse. Gerry worked at Boeing. They arranged their work schedules so Lexi didn't need a babysitter. Gerry began work early mornings, Cecile got Lexi to school, then Gerry picked her up after school. RP6 76-79.

Cecile encouraged Lexi to participate in lots of school activities. Lexi was a good student. She maintained an A/B average the entire time she lived with the Wilsons. RP6 80, 88, 202-03.

Cecile and Gerry had their own daughter, Breanna, October 4, 2003. Throughout the pregnancy, Lexi was anxious that she wouldn't be loved as much. She asked Cecile why her mom and dad didn't want her. Cecile and Gerry worked to reassure Lexi she was a loved member of their family. Lexi picked out Breanna's middle name, Grace. RP6 91-93, 111; RP7 145-47.

As a nurse, Cecile explained to Lexi in medical terms the differences between male and female anatomy when she was in the 5th or 6th

grade. She explained how the penis becomes erect, about menstrual periods, and how pregnancy occurs. She showed Lexi pictures of the body in her anatomy book. Seeing a penis, Lexi responded, "Ew, that's gross." RP6 114-17, 192-93. Lexi also had sex education in school during these years. RP7 105-06.

As Lexi entered her teen years, problems arose. She wanted to hang out at the mall with friends. Gerry and Cecile wouldn't let her without an adult being present.² She was welcome to bring friends to the house or to sleep over, but she couldn't go to a friend's house overnight. Cecile and Gerry insisted on meeting her friends' parents if she was going there. From the beginning, Cecile and Gerry had agreed Lexi would not date until she was 16. Gerry's niece got pregnant at age 15 and he was very protective. Sometimes Cecile thought Gerry was being too protective, and they argued about that. RP6 85-87, 92-95, 101-03, 159, 193-94; RP7 99.

² Cecile went with her once and followed at a distance so no one would think she was "with" Lexi. RP6 94.

By Lexi's freshman year in high school, she frequently slammed her bedroom door or went into her room and refused to come out. In response, Cecile and Gerry removed the door from her bedroom for a few days. RP6 120-24.

The conflicts with Lexi caused problems between Gerry and Cecile. Lexi wanted to set her own rules. She played Gerry and Cecile off each other. By November, 2005, when Lexi was 14, Cecile asked her sister, Cresencia Jones, to take Lexi for the long Veteran's day weekend. Lexi and Cresencia decided Lexi would live with the Jones family. She never returned to Cecile's and Gerry's home. RP6 153-54, 195-99; RP5 59-60; RP8 11.

When Cecile asked Lexi why she wasn't coming home, Lexi told her that Gerry was too controlling, he restricted her life too much. RP6 159.

c. Lexi at the Joneses'

Bob and Cresencia Jones had three children of their own, ages 15, 13 and 9. Cresencia told Lexi if she lived there, she could see her friends more, go to school dances and football games. Cresencia gave Lexi her own room, moving her younger daughter onto a mattress in Bob and Cresencia's bedroom for

the next four years. RP5 54, 64; RP7 159-60. Cecile, Cresencia, and Lexi attended counseling together to smooth the transition. RP7 166.

Even so, Lexi called Cecile after moving, crying, complaining, saying she felt left out again, that she was not treated like the other children. RP6 226; RP7 169.

Lexi had a greater social life living with the Joneses. She drank at a school dance. When Bob, a Washington State Patrol trooper, smelled the alcohol on her breath, he confronted her with a breathalyzer before she would admit she'd been drinking. Another time Bob found her with marijuana. Lexi could have boys over, although they had to leave by midnight on weekends. Her grades suffered. She managed to graduate from high school with better than a 2.0 GPA. RP5 67, 70, 146-50; RP7 181-82.

In November, 2009, Bob Jones awoke at 4:00 a.m. to find Lexi still entertaining her boyfriend Patrick in the house. Lexi and Pat were planning to go snowboarding the next day. Bob ordered Pat to leave and said not to bother coming back the next day or anymore. RP7 181-82.

Nonetheless, Pat and Lexi did drive the next day to go snowboarding. When the weather was too bad for the lifts, they drove back to town. Rather than go home to the Joneses, Lexi stayed the next two days with Pat. She turned off her cell phone. RP8 22-23.³

Lexi was very upset that Pat couldn't come back to the house. There were other stresses at home. Bob and Cresencia were being "obnoxious parents at the time," getting on Lexi's case about school, chores, and being disrespectful to them. RP7 183-85. Cresencia remembered Lexi was in trouble for curfew and some other things. RP5 119.

d. Report and Investigation

Lexi testified the first time she told anyone she was abused was that night Patrick stayed until 4:00 a.m. "That night was when I had first told him about everything, and I was bawling my eyes out to him." RP7 181-82.

The week after Lexi was in trouble in November, Lexi told Cresencia that uncle Gerry had sexually abused her. RP5 75-76, 119. Lexi said,

³ Patrick testified Lexi did not stay with him these two days. RP5 41-42.

"But I have to go. Talk to you later," and she left again with Patrick. RP7 189.

Cresencia told Bob. Bob and Cresencia both questioned Lexi in the following days. Bob specifically asked Lexi if there was anything unique about Gerry's physique, in particular his penis. Lexi said no. RP5 156; RP7 200.

In January, 2010, Lexi gave a joint interview to the police and prosecutor. Lexi could not describe any specific incident of sexual abuse. As a routine question, Det. Kelley asked if there was anything distinctive about Gerry's body or his penis. Lexi said no. RP6 35; RP7 201.

Although the detective instructed Cresencia not to question Lexi about the abuse, Cresencia could not help herself. Lexi and Cresencia spent hours trying to "remember things." Cresencia encouraged her to write about it, but Lexi didn't. Even after Lexi moved out of the Joneses' home, Cresencia called her often, with "millions of questions." She even suggested therapy to help her "dig out more." RP5 127; RP7 217; RP8 5-7.

During one conversation, Lexi told Cresencia she remembered KY jelly. Cresencia responded, "Awesome, Lex, keep remembering." RP8 8.

Cresencia called Det. Kelley frequently to ask what was happening with the investigation. RP6 21-22. Bob Jones, a narcotics detective, contacted Det. Broggy at the Regional Justice Center. Det. Broggy contacted Det. Kelley's supervisor. RP6 37-39; RP5 151-52.

Lexi had a second interview in February. She told the detective Gerry never used a condom. She had seen his penis in the daytime, in the light, she'd had a good view of it. They asked her whether Gerry was circumcised; she said she was "pretty sure" yes. When they asked her again if there was anything unusual, she told the detective she wished there was a mole on Gerry's penis -- but there wasn't. RP6 33-36; RP8 33-34; RP7 202-03.

Det. Kelley and Lexi prepared a "phone trap" for Gerry. They wrote a script. Lexi called Gerry so Det. Kelley could listen in and record the call. RP6 18-21. RP6 32-35.

Lexi identified herself to Gerry. She said there was a "lot of drama" in her life just then,

her dad was in jail. Gerry said he'd heard about that, he was sorry. Lexi said she'd been seeing a counselor, but was afraid to talk to the counselor about stuff that happened at Gerry and Cecile's house. Gerry said he had no idea what she was talking about. RP7 225-27.

Lexi went on to say she was confused about what happened "once" when she lived at his house. Again he said he had no idea what she was talking about. Lexi said, "Are you kidding? You raped me." Gerry said he had no idea what she was talking about, but he had to get Breanna ready for school. RP7 227; RP6 18-21, 32-34.

Officials interviewed Breanna. They concluded there was no concern that she had been abused. RP6 38.

e. Trial Testimony

Patrick testified that in the summer of 2009 Lexi told him she had been abused. They were in her room for the conversation. The door was open. Her entire family was in the house. Lexi told him she had something serious to tell him. She looked terrified, she was crying. She said she was sexually abused. They talked for an hour or more.

Patrick told her she should tell her aunt and uncle. RP5 35-36, 39-40.⁴

Lexi was 19 at the time of trial. She testified that Gerry had "sexual intercourse" with her "prior to or around" the 5th grade, in 6th grade, in 7th and 8th grade. RP7 70, 128. She repeated they had sexual intercourse or oral sex when she was in the 5th, 6th, 7th and 8th grades. RP8 57-58. Yet in her earlier interview, she had not been sure if anything happened before the 7th grade. RP8 26.

Lexi testified to one specific incident when she was "performing oral" on Gerry. She had just eaten popcorn. He promised he would not ejaculate in her mouth, but he did. She ran into the bathroom and threw up. When the prosecutor asked if she remembered knowing how to perform oral sex, Lexi said she didn't. RP7 122-23.

The prosecutor asked about other specific incidents of sexual intercourse. Lexi described a time when her shirt was off. Gerry took her water paints and painted a dog on her breast, using her

⁴ As noted above, Lexi testified she didn't tell Patrick until November, the night he stayed too late at the house. RP7 181-82.

nipple as the dog's nose. Lexi said she had her pants on, Gerry was completely dressed. RP7 124-25.

She recalled a time straddling Gerry's lap. She did not recall if there was any movement. She did not testify whether they were dressed or undressed. She did not testify to any penetration.

Q. ... What were you and he doing?

A. I don't know how, I don't know how it did -- I don't know how I even got on his lap. Um, things just -- I mean, I must have been, like, I don't know, --

Q. Were your -- was your body moving, or was his body moving that created something that --

A. I don't remember, but it was definitely a sexual -- a sexual thing was happening at that moment. And it was known clearly by both of us.

...
Q. Could you tell, when you were straddling your uncle, if he was aroused at the time?

A. Yes.

RP7 126.

She described a day in the spring time, daylight, nice out, when she and Gerry were in her room "doing what we do." They had no clothes on. She heard Cecile come home earlier than usual. Cecile "marched right upstairs, she never does that." Gerry went into the bathroom and into the shower. Cecile came into Lexi's room and asked

where Gerry was. Lexi felt like they were caught.

- Q. Okay. What did you mean by, "You were doing what you do"?
- A. I can't remember sexually exactly what happened at that time. I have other stories. I can't remember exactly that day what had happened sexually, but I just remember being scared that Cecile had found out
- Q. And where in your room were you?
- A. On my bed.
- Q. Okay. **And do you remember your positions on the bed?**
- A. **Not at all.** ...
- Q. ... -- well, I should ask, do you remember if this was before or after you got your period?
- A. I don't remember.

RP7 119-21 (emphasis added). When asked again about that day, she said she did not remember what she and Gerry were doing when Cecile came home.⁵

At trial, Lexi still did not recall anything specific about Gerry's genitals. When asked, she described that he is circumcised and that he did not shave.

- Q. ... And when you say he doesn't shave, just so we are clear, what are you talking about? Where are you talking about?
- A. His pubic hair.

⁵ Cecile denied any time she came home and ran up the stairs quickly -- as Lexi described the event of "nearly being caught." Cecile invariably went directly to the downstairs bathroom to change out of her nursing uniform, usually contaminated with bodily fluids from her work. RP6 224.

RP7 138-39.

Lexi testified she saw Gerry using Viagra once and got angry with him. She asked why he was using that, insisted he didn't need it. RP7 131-32.⁶ After Cresencia helped her remember about KY jelly, she testified he had used that on his penis. RP7 129-30; RP8 8.⁷

Lexi testified she never experienced any bleeding or injury from sexual intercourse. RP7 210. The State presented no physical or medical evidence of sexual abuse.

Cecile Batacan-Wilson testified that her husband's penis has a very prominent and unique mole or blood vessel on it. It gets larger and even more obvious when his penis is erect. Anyone intimate with him would be aware of it. She identified a photograph of it showing the distinct trait. RP6 210; Exh. 12 (Supp. CP).

⁶ She hadn't mentioned Viagra in her police interview. RP7 202-03. She knew what it was from television ads and talking to Cecile. Gerry had a prescription when he and Cecile were undergoing fertility treatment. RP6 114-16, 181-82.

⁷ Gerry testified there was never any KY jelly or other sexual lubricant in the house. RP8 102-03.

Bob's mother and sister testified they had seen Lexi sitting on Gerry's lap at family gatherings. They thought it was very odd. Bob's mother said she had a "sixth sense" that Gerry and Lexi and baby Breanna were a "family unit." Neither woman ever had a conversation with Gerry. RP5 159-73. Bob testified he thought at family gatherings that Gerry and Lexi's relationship was not "normal." RP5 141-42.

Two of Cecile's and Cresencia's cousins also recalled seeing Lexi sit on Gerry's lap at a family gathering when she was 12 or 13. Neither mentioned it to anyone at the time. One thought maybe it just was a sign of a loving family. RP7 25-26, 57.

Cresencia and Cecile's mother testified that in the Filipino culture, people were very affectionate physically. Her daughters always sat on their father's and uncle's laps, even when they were adults. RP8 70-75.

Gerry Wilson is an aeronautical and astronomical engineer with a commercial pilot's license and flight training. At Boeing, he worked with the flight simulators for the 757 and 767. RP8 76-78.

Gerry Wilson testified he never had sexual contact or sexual intercourse with Lexi. He had never had oral sex with her. He had no contact with her breasts. He testified he had never had any contact with her that could be misinterpreted as sexual contact. He never talked with her about sexuality or about her periods. He never talked to her about birth control, sex, or anything like that. RP8 95, 117, 151-52.

2. Procedural Facts

a. Charges

The State charged Gerald Wilson with three counts:

- Count I: Rape of a Child in the First Degree, June 3, 2002 - June 2, 2003, when AD was less than 12;
- Count II: Rape of a Child in the Second Degree, June 3, 2003 - June 2, 2005, when AD was 12 and 13;
- Count III: Rape of a Child in the Third Degree, June 3, 2005 - October 31, 2006, when AD was 14 and 15.

CP 1-2.

b. Motions in Limine

The defense objected to the State's motion to admit the testimony of Patrick, Lexi's boyfriend, that she told him about the abuse during the summer

of 2009. The State argued it was admissible as "hue and cry." The court permitted it. RP2 6-10.

c. Rebuttal Testimony

After the defense rested, the State recalled Cresencia Jones. Her rebuttal testimony primarily was about her sister, Cecile. The prosecutor asked her:

Q. Did your sister talk to you about the fact that she felt that something was going on between Gerry and Lexi?

A. Yes, she did.

MR. WARNER: Objection.

THE COURT: The objection is sustained. Jury will disregard any speculation about that.

MR. WARNER: Move to strike.

THE COURT: It is stricken. I believe I properly instructed jury accordingly.

MS. WESTON: I'm asking -- not for speculation, I'm asking her if her sister told her.

THE COURT: I allowed some latitude, but I think we are beyond rebuttal.

MS. WESTON: And your Honor, if I just may, this is a statement that her sister --

THE COURT: No, I don't want to hear argument. Let's proceed to any other areas you wish to raise.

MS. WESTON: Okay.

RP8 158.

Q. Okay. Did your sister ever indicate that she would come home early from work?

A. Yes.

Q. Okay. Did she indicate having a particular time she came home early that something wasn't right?

A. Yes.

MR. WARNER: Objection, your Honor.
THE COURT: Sustained.
MR. WARNER: Collateral, move to
strike.
THE COURT: The answer is stricken.
MS. WESTON: Okay.

RP8 159-60.

d. Closing Argument

The court instructed the jury:

No. 5

The State alleges that the defendant committed acts of Rape of a Child on multiple occasions. To convict the defendant on any count of Rape of a Child, one particular act of Rape of a Child must be proved beyond a reasonable doubt, and you must unanimously agree at [sic] to which act has been proved for each count. You need not unanimously agree that the defendant committed all the acts of Rape of a Child.

CP 98. The prosecutor referred the jury to this instruction.

Now, you will look in your instructions there, in the Petritch [sic] instruction, as we call it, which is the instruction that tells you you have to agree on a count of rape for you to be able to find the person guilty. Well, you don't have to agree he raped her ten times when she's in the fifth grade. **You don't have to be unanimous that, "Yes, this defendant raped her before she was twelve." "This defendant raped her before she was thirteen". And, "This defendant raped her between thirteen and fourteen."** You have to unanimously agree that, yes, that rape occurred. That's what you have to agree on. ... Lexi talked to you about some very specific

incidents. She remembers graphically about throwing up popcorn after the defendant came in her mouth. **She remembers the defendant drawing a dog on her boob.** She remembers when her Aunt Cecile came home and she was shaking because **the defendant was on top of her, naked,** and they heard the door. He ran into the shower and Lexi got dressed.

RP8 198-99 (emphases added).

Neither Lexi in her testimony, nor the prosecutor in her argument, placed any of these incidents in any timeframe, at any age, or in any grade.

e. Verdicts & Sentence

The jury found Mr. Wilson not guilty of Count III, rape of a child in the third degree. It found him guilty of Counts I and II, rape of a child in the first and second degree. CP 87-89.

The court imposed on Mr. Wilson the mandatory sentence of life in prison, with a minimum term of 145 months. CP 120-30.

C. ARGUMENT

1. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A UNANIMOUS VERDICT ON TWO SEPARATE INCIDENTS FOR TWO SEPARATE CRIMES OF DIFFERENT DEGREES.

A criminal conviction meets the requirements of due process only if there is sufficient evidence to permit a reasonable person to find the State has

proved every element of the charged offense beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980); In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); U.S. Constitution, amend. 14;⁸ Constitution, art. I, § 3.⁹

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. . . . "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom."

State v. Jensen, 125 Wn. App. 319, 325-26, 104 P.3d 717, review denied, 154 Wn.2d 1011 (2005) (citations omitted).

Here the court defined the elements in the jury instructions. To convict of Count I, rape of a child in the first degree, the State had to prove the defendant had sexual intercourse with Lexi between June 3, 2002 and June 2, 2003 -- when Lexi was less than twelve years old. CP 102; RCW

⁸ "No State shall . . . deprive any person of life, liberty, or property, without due process of law... ." U.S. Const., amend. 14, § 1.

⁹ "No person shall be deprived of life, liberty, or property, without due process of law." Const., art. I, § 3.

9A.44.073. To convict of Count II, rape of a child in the second degree, the State had to prove the defendant had sexual intercourse with Lexi between June 3, 2003, and June 2, 2005, when Lexi was "at least twelve years old but was less than fourteen years old." CP 104; RCW 9A.44.076.

The constitutional right to a jury trial requires the jury to be unanimous as to the specific act the defendant committed for each crime. U.S. Constitution, amends. 6, 14;¹⁰ Constitution, art. I, §§ 21, 22;¹¹ State v. Petrich, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

In cases of child sexual abuse, the State commonly presents evidence of multiple acts to support each charge.

To convict a criminal defendant, a unanimous jury must conclude that the criminal act charged has been committed. In cases where several acts are alleged, any one of which could constitute the crime charged, the jury must unanimously

¹⁰ "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury" U.S. Const., amend. 6.

¹¹ "The right of trial by jury shall remain inviolate... ." Const., art. I, § 21.

"In criminal prosecutions, the accused shall have the right ... to have a speedy public trial by an impartial jury" Const., art. I, § 22.

agree on the act or incident that constitutes the crime. In such "multiple acts" cases, Washington law applies the "either or" rule:

either the State [must] elect the particular criminal act upon which it will rely for conviction, or...the trial court [must] instruct the jury that all of them must agree that the same underlying criminal act has been proven beyond a reasonable doubt.

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

State v. Hayes, 81 Wn. App. 425, 430-31, 914 P.2d 788, review denied, 130 Wn.2d 1013 (1996) (emphasis added; citations omitted); State v. Noltie, 116 Wn.2d 831, 843, 809 P.2d 190 (1991).

Here the "to convict" instructions contained the "separate and distinct" language. CP 102, 104, 106. In addition, the court gave a Petrich instruction. CP 98.

Due process also requires the State to charge and prove the alleged crimes with evidence that is sufficiently specific for the jury to be unanimous as to the separate and distinct charges. The courts require not merely a general statement that the crime occurred, even many times, but some specific description of the individual incident that is each alleged crime.

In State v. Hayes, supra, the Court adopted a test to determine whether "generic" evidence of multiple offenses was sufficient to support multiple charged counts, especially where the complaining witness is a young child.

The challenge is to fairly balance the due process rights of the accused against the inability of the young accuser to give extensive details regarding multiple alleged assaults. We believe the proper balance is struck by requiring, at a minimum, three things. 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.

Hayes, 81 Wn. App. at 438.

In State v. Jensen, supra, 125 Wn. App. at 323-24, the State charged Jensen with four counts of first degree child molestation and two counts of indecent exposure. All counts were charged to have occurred August 1, 2001 to February 19, 2002. All allegations involved his foster granddaughter, A.S., age 10 at the time of the charged events and age 11 at trial. A jury convicted him of three counts of molestation and one count of exposure.

The Court of Appeals carefully reviewed the sufficiency of the evidence for three separate counts of molestation:

A.S. testified to one incident in which Jensen entered her room at night and touched her in her "private spot" between her legs. ... According to A.S., Jensen also entered her room at night two other times; but A.S. did not testify to sexual contact during these visits. A.S. also testified directly about the incident in which Jensen came into her room while she was reading in bed, began tickling her, put his hand under her shirt, and touched her breast. Stines testified that A.S. said Jensen touched her private area "[a] few times." ... Although this evidence supports two counts of first degree child molestation, the question remains whether it supports a third count.

In cases involving a resident child molester, the alleged victim's generic testimony can be used to support multiple counts. ... At a minimum, the alleged victim must be able to describe (1) the kind of act or acts with sufficient

specificity for the jury to determine which offense, if any, has been committed; (2) the number of acts committed with sufficient certainty to support each count alleged by the prosecution; and (3) the general time period in which the acts occurred.

... Here, A.S. testified only that Jensen entered her room at night on two other occasions. Although Stines testified that A.S. told her that Jensen touched her private area "[a] few times," she never mentioned that sexual contact took place during the two other times Jensen entered her room at night. ... Because A.S.'s testimony does not describe the acts with sufficient specificity for the jury to determine which offenses, if any, Jensen committed when he entered her bedroom on the two additional occasions, we must reverse one of Jensen's first degree child molestation convictions.

Jensen, 125 Wn. App. at 327-38 (citations omitted).

In State v. Brown, 55 Wn. App. 738, 780 P.2d 880 (1989), review denied, 114 Wn.2d 1014 (1990), the Court affirmed the convictions, describing the detailed testimony of specific incidents to support two counts of indecent liberties and four counts of statutory rape in the first degree, all occurring within two years when the child was 9 and 10. She was 11 at trial. Id. at 741.

Tammy described the defendant's conduct in clinical detail, including the time of day and room in which it usually occurred, and the physical positions assumed by each. Her testimony sufficiently described a single episode

for each offense, which was repeated as part of a pattern of abuse.

Brown, 55 Wn. App. at 748-49. The State also presented physical evidence seized from the defendant's home, which corroborated some of the child's testimony. Id. at 741.

In State v. Corbett, 158 Wn. App. 576, 242 P.3d 52 (2010), the State charged four counts of rape of a child in the first degree, all occurring between January 1 and August 31, 2005. All incidents involved the same child, age 6-7 at the time of offense, age 10 at trial. The Court of Appeals carefully reviewed the evidence, noting the child testified to four separate incidents with considerable detail.¹²

[T]he entire trial focused on evidence and distinguishing characteristics of four separate and distinct instances of

¹² On two separate occasions, the defendant put a "soft thing" in her mouth as part of a "candy taste game," the "soft thing" felt like regular skin, did not have a fingernail, and she had trouble keeping her mouth around it because it was too big. She thought it was his penis because it happened in the bathroom both times, and when she sat on the toilet his penis was at her eye level. On a separate occasion during a karate lesson, he put the same "soft thing" with frosting on it in her mouth. And yet another time at the final karate lesson, she could see beneath the cotton balls he taped to her eyes and saw his penis. Corbett, 158 Wn. App. at 584.

abuse. Each incident was given a separate descriptive identifying name that both counsel used in referring to the event. During closing arguments, the State clearly connected the trial evidence of four separate incidents to the four separate "to-convict" instructions. The jury instructions in the context of this case clearly conveyed to the jury that there were four counts related to four specific incidents of abuse that they were to consider.

Corbett, 158 Wn. App. at 592-93 (emphasis added).

a. Insufficient Evidence of Sexual Intercourse for Two Incidents

As in Jensen, and unlike Brown and Corbett, the evidence in this case was not sufficient to support two convictions of rape of a child in the first degree and rape of a child in the second degree.

Lexi, age 19 at trial, testified generally that Gerry had "sexual intercourse" with her in each of her grades 5-8. She did not say how often or how many times. She testified he "molested" her "for years" while she lived there. When the prosecutor asked her to be more specific about the "molestation," she replied "every sexual activity."

Q Okay. And again, I'm just trying to be as specific as possible. When you say, "sexual activity," what are you referring to?

A Intercourse, oral, touching, being naked. I mean, an inappropriate relationship.

RP7 114. Thus Lexi's use of language was broader and less precise than the legal definitions for "molestation" and "intercourse."

Lexi specifically described four incidents: (1) oral sex leading to vomiting, RP7 122-23; (2) painting a dog on her chest, RP7 124-25; (3) sitting astraddle Gerry's lap, RP7 126; and (4) being naked when Cecile came home early, RP7 119-21, RP8 27-28.

Of these four incidents, only the first described an act of "sexual intercourse,"¹³ an essential element for each of the crimes charged. Lexi did not testify to penetration or oral sex for any of the other three incidents. Thus there was specific evidence of only one incident of sexual intercourse.

¹³ "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 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." CP 99; RCW 9A.44.010(1).

Thus this Court must vacate and dismiss one of the convictions for insufficient evidence as a matter of law.

b. Insufficient Evidence of Date or Age

Unlike the cases cited above, this case did not involve multiple counts of the same crime.

Here the State charged three counts of rape of a child, but each was a different degree based on Lexi's age at the time it occurred. The jury received three different "to convict" instructions. Each count required proof of "sexual intercourse" during the specified period. The times were statutory elements of the crimes, not merely estimated times of occurrence. CP 102, 104, 106.

Above all, the State offered no evidence of when any of these four incidents occurred.

A defendant charged with multiple counts is adequately protected from any risk of double jeopardy **when the evidence is sufficiently specific as to each of the acts charged.** The State need not elect specific acts that it will rely upon for each charge so long as the jury is instructed as to the unanimity requirement on each count **and different evidence is introduced to support each count.** No double jeopardy violation results when the information, instructions, **testimony, and argument** clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense.

State v. Hayes, 81 Wn. App. at 439-40 (emphases added).

Unlike Brown¹⁴ and Hayes,¹⁵ the prosecutor and witness did not tie any of the alleged incidents to any other event in her life that placed it in time. Unlike Hayes,¹⁶ time is an element of the crimes charged in this case.

There was no evidence of a date or of Lexi's age for any of the four specific incidents she described. Certainly there was no evidence of date or age for the one incident in which she described sexual intercourse. This lack of evidence is not merely a problem with an offense perhaps occurring outside the specific charging period, or the State's evidence not providing a "precise" date of the offense. See, e.g., Hayes, supra, 81 Wn. App. at 441; Brown, supra, 55 Wn. App. at 748.

¹⁴ Events were tied to her grade in school or place of residence, usually by the structure of the prosecutor's questions. 55 Wn. App. at 742 & n.2.

¹⁵ 81 Wn. App. at 428-29, 431-32 (testimony of incidents tied to where she lived at the time and with whom). "[T]here was different evidence to support each count." Id. at 440.

¹⁶ 81 Wn. App. at 433.

In this case, Lexi's age at the time of intercourse is an essential element of the charge. Unlike multiple charges all of which are of the same degree, here the State assumed the burden of proving three individual crimes of different degrees, based solely on the time and child's age.

Because there was no evidence of any date, year, or Lexi's age at the time of the sexual intercourse she testified occurred in the oral sex/vomiting incident, the State failed to prove every element of the crime beyond a reasonable doubt. The insufficient evidence of this element requires this Court reverse and vacate both convictions.

2. PROSECUTORIAL MISCONDUCT DENIED APPELLANT DUE PROCESS AND A FAIR TRIAL.

The prosecuting attorney represents the people and is presumed to act with impartiality "in the interest only of justice." ... Prosecuting attorneys are quasi-judicial officers who have a duty to subdue their courtroom zeal for the sake of fairness to a criminal defendant.

State v. Fisher, 165 Wn.2d 727, 746, 202 P.3d 937 (2009), citing: State v. Reed, 102 Wn.2d 140, 147, 684 P.2d 699 (1984); State v. Case, 49 Wn.2d 66, 70-71, 298 P.2d 500 (1986); State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984).

A defendant prevails on a claim of prosecutorial misconduct if he establishes "that the prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances at trial." State v. Thorgerson, ___ Wn.2d ___, ___ P.3d ___ (No. 83357-5, 8/25/2011), quoting State v. Magers, 164 Wn.2d 174, 191, 189 P.3d 126 (2008).

[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.

Thorgerson, supra. "When reviewing a claim that prosecutorial misconduct requires reversal, the court should review the statements in the context of the entire case." Id.

Prosecutorial misconduct may deprive the defendant of a fair trial and only a fair trial is a constitutional trial. ... In cases of prosecutorial misconduct, the touchstone of due process analysis is the fairness of the trial, i.e., did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause? ... Thus the legal error, if it exists, exists in the fact that petitioner's trial was unfair. ... Therefore, the ultimate inquiry is not whether the error was harmless or not harmless but rather did the impropriety violate the petitioner's due process rights to a fair trial.

Davenport, supra, 100 Wn.2d at 762; Smith v. Phillips, 455 U.S. 209, 71 L. Ed. 2d 78, 102 S. Ct. 940 (1982).

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. State v. Korum, 157 Wn.2d 614, 652, 141 P.3d 13 (2006).

a. Arguing Evidence Outside the Record

[A] prosecutor may never suggest that evidence not presented at trial provides additional grounds for finding a defendant guilty.

State v. Perez-Mejia, 134 Wn. App. 907, 916, 143 P.3d 838 (2006); State v. Russell, 125 Wn.2d 24, 87, 882 P.2d 747 (1994); United States v. Garza, 608 F.2d 659, 663 (5th Cir. 1979).

Here the State's main witness had not given sufficient evidence to support three counts of rape of a child. She had described only a single incident of sexual intercourse. Nonetheless, in closing the prosecutor argued there were three separate incidents on which the jury could base its verdicts: the time of oral sex when Lexi vomited, painting the dog on her chest, and the time Cecile came home early. RP8 199.

The prosecutor went further to argue facts that flatly contradicted Lexi's response to her own question. She claimed Gerry was "on top of" Lexi when Cecile came home early. RP8 199. But when she had asked Lexi if she remembered what positions they were in, Lexi said "not at all." RP7 121.

The State made no effort whatsoever to distinguish for the jury between what may have been inappropriate sexual contact -- i.e., painting a dog on a child's breast -- from the required element of sexual intercourse.¹⁷

Nor did the prosecutor offer any suggestion of how the jury was to identify when any of the incidents occurred, or how old Lexi was at the time -- both essential elements of each charge.

Unfortunately for the State, as shown above, even the evidence for two of these three "incidents" did not include sexual intercourse, an essential element for the charges. Yet the prosecutor's injection of a new fact in her argument likely led to a conviction on insufficient

¹⁷ Contrast: State v. Ellis, 71 Wn. App. at 402 & n.1 (prosecutor explained to jury difference between intercourse and molestation in opening and closing).

evidence for the second of the jury's verdicts. Thus it likely influenced the jury and affected its verdict.

b. The Prosecutor Argued Contrary to the Law and the Instructions.

Statements by the prosecution or defense to the jury upon the law must be confined to the law as set forth in the instructions given by the court.

State v. Davenport, supra, 100 Wn.2d at 760.

In Davenport, the prosecutor argued the jury could find the defendant guilty of residential burglary even if he never entered the residence. The prosecutor argued the jury could find him guilty as an accomplice, although the State had not charged and the court had not instructed on accomplice liability. The jury inquired about accomplice liability. The court referred it back to the instructions. The jury found the defendant guilty as charged. The Supreme Court reversed.

In State v. Ellis, 71 Wn. App. 400, 859 P.2d 632 (1993), the prosecutor carefully identified in closing argument a separate incident for each of four counts charged and argued the jury must be unanimous as to each one. In Ellis, unlike here, the counts all occurred within the same timeframe.

The Court of Appeals held the prosecutor's argument helped clarify for the jury its need to be unanimous to each of the four counts, when the instructions had not been adequate.

Unlike Ellis, supra, the prosecutor here did not clarify matters for the jury. In fact, the prosecutor further confused things in closing argument. She told the jury:

You don't have to be unanimous that, "Yes, this defendant raped her before she was twelve." "This defendant raped her before she was thirteen". And, "This defendant raped her between thirteen and fourteen."

RP8 198-99.

This argument is directly contrary to the law. The law required the jury be unanimous that he raped her on a single specific occasion before she was twelve to convict him of Count I. CP 102. The law required the jury be unanimous that he raped her on a single specific occasion when she was thirteen or fourteen to convict him of Count II. CP 104. Petrich, supra.

Encouraging the jury that it need not be unanimous as to when each alleged rape occurred likely contributed to a wrongful conviction on

insufficient evidence, as shown above. Thus this misconduct was prejudicial.

c. Objectionable Questions in Rebuttal

Here the State called Cresencia Jones to testify in rebuttal. The prosecutor asked her to relay hearsay evidence of what Cecile had told her about what she "felt" and about coming home early once when things "weren't right." Even though the court sustained the defense objections, the questions themselves were misconduct.

In State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992), the Court found prosecutorial misconduct for asking two questions even when the trial court sustained the objections:

[The questions] left the jury with the impression that [the witness] had a great deal of knowledge favorable to the State which, but for the court's rulings, would have been revealed. The pattern of repeatedly asking the same question has the effect of telling the jury the answer to it even when all of defense counsel's objections are sustained.

64 Wn. App. at 155. Given the dearth of evidence to support the charges, these improper questions also were misconduct likely leading to prejudice. As in Alexander, although alone it might not

warrant reversal, combined with the other errors in this case, it supports reversal.

d. Prosecutorial Misconduct was Flagrant, Ill-Intentioned, and Prejudicial.

While the prosecuting attorney was not testifying as a witness under oath, his statements were no less injurious to appellants. The office of prosecuting attorney is quasi judicial. The incumbent is elected by the people to perform the highly responsible duties of the office in the belief that he possesses the high standard of character deemed necessary to the proper performance of his functions; his declarations to the jury are not taken lightly as the words of a mere advocate, but as having the prestige of authority.

State v. O'Donnell, 191 Wash. 511, 514, 71 P.2d 571 (1937).

Certainly the prosecutor was aware of the legal requirement that the jury be unanimous on the same incident for each count. It was stated in the instructions. It is well-known law for any case of child sex abuse. Arguing to the jury that it need not be unanimous was mindful, flagrant and ill-intentioned conduct. See State v. Charlton, 90 Wn.2d 657, 663-64, 585 P.2d 142 (1978) (where prosecutor aware of marital privilege, flagrant and ill-intentioned to argue defendant failed to present wife to testify; conviction reversed).

In the same sense, knowing her witness had not described multiple incidents of sexual intercourse, and had not even described a position from which a jury could infer sexual intercourse occurred, it was mindful, flagrant, and ill-intentioned for the prosecutor to argue Gerry Wilson was "on top of" Lexi when she said Cecile came home early.

Thus although counsel did not object, this misconduct likely affected the jury's verdicts and warrants reversal of these convictions.

3. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS LAWYER DID NOT OBJECT TO LAY WITNESS OPINION TESTIMONY AND PROSECUTORIAL MISCONDUCT.

The right to counsel, and to effective assistance of counsel, goes to the very integrity of the fact-finding process. Burgett v. Texas, 389 U.S. 109, 19 L. Ed. 2d 319, 88 S. Ct. 258 (1967); U.S. Constitution, amends. 6, 14; Constitution, art. I, § 22. Denial of the assistance of counsel constitutes a per se violation of the Sixth Amendment. Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied on as having produced a just result.

Id., 466 U.S. at 686.

Strickland requires two components to establish ineffective assistance of counsel.

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

Strickland, 466 U.S. at 687.

a. Counsel Failed to Object to Improper Prosecutorial Argument.

As shown above, the prosecutor made improper remarks in her closing argument. Counsel's failure to object to telling the jury it need not be unanimous on the individual counts and arguing facts not supported by the evidence permitted this improper argument to go uncorrected. It prejudiced the defense by encouraging the jury to return improper verdicts, which it did.

b. Counsel Failed to Object to Improper Lay Witness Opinions That Were Prejudicial.

ER 701 provides:

OPINION TESTIMONY BY LAY WITNESSES

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

Courts have upheld the admission of lay opinions regarding speed of a vehicle,¹⁸ degree of sobriety in a driving while intoxicated case,¹⁹ the value of one's own property,²⁰ and the identification of a person from a videotape.²¹ State v. Farr-Lenzini, 93 Wn. App. 453, 462, 970 P.2d 313 (1999). But courts have held the admission of other lay opinions to be improper,

¹⁸ State v. Kinard, 39 Wn. App. 871, 874, 696 P.2d 603 (1985).

¹⁹ State v. Lewellyn, 78 Wn. App. 788, 794-95, 895 P.2d 418 (1995).

²⁰ Kinard, 39 Wn.App. at 874.

²¹ State v. Hardy, 76 Wn. App. 188, 190, 884 P.2d 8 (1994), aff'd, 129 Wn.2d 211, 916 P.2d 38 (1996).

such as a person's mental capacity to enter into a lease,²² and a jail nurse's opinion as to a defendant's "diminished capacity" where the nurse lacked personal knowledge as to whether the defendant was on drugs at the time of the crime.²³

[W]hen analyzing the admissibility of lay opinion testimony, we first determine whether the opinion relates to a core element or to a peripheral issue. Where the opinion relates to a core element that the State must prove, there must be a substantial factual basis supporting the opinion. Courts also consider whether there is a rational alternative answer to the question addressed by the witness's opinion. In that circumstance, a lay opinion poses an even greater potential for prejudice.

Id. at 462-63.

In this case, the core issue was whether Mr. Wilson sexually abused Lexi between the ages of 11 and 15. The State offered the opinions of distant relatives -- an uncle, his sister and his mother -- based on each seeing a single incident of her sitting on Mr. Wilson's lap. There was no error in testifying to seeing her on his lap. The error was in having them testify to the significance: that

²² Carr v. Deking, 52 Wn. App. 880, 885-86, 765 P.2d 40 (1988).

²³ State v. Thamert, 45 Wn. App. 143, 148-49, 723 P.2d 1204 (1986).

it was "not normal," that it was "weird," and that "some sixth sense" made her think this grown man, the child, and the infant were a "family unit."

Thus these opinions all implied the relationship between Mr. Wilson and Lexi was something improper and sexual -- the core issue for the jury. These opinions were not based on any "substantial factual basis."

In addition, each had a rational alternative explanation -- the Filipino culture included physical closeness within the family, it was not unusual for even adult women to sit on the laps of their fathers and uncles out of affection, with no sexual implication at all.

In Farr-Lenzini, a case of attempting to elude, the defendant's state of mind was a core issue because the crime has an element of willfulness. The trooper testified: "the person driving that vehicle was attempting to get away from me and knew I was back there and [was] refusing to stop." The factual basis for his opinion was seeing the driver hit the brakes as she entered one intersection and go through a stop sign at another; accelerating hard as she came out of

her turn; and swiveling her head rapidly three times as she checked a third intersection, all in four-and-a-half minutes. The court noted she may have been so absorbed in driving her high performance car on a quiet, dry Sunday morning that she was oblivious to her speed and to any vehicle following her. The Court of Appeals held it was error to admit this opinion. Farr-Lenzini, 93 Wn. App. at 463-64.

Here the issue was whether Mr. Wilson was having repeated sexual intercourse with his young niece. There were no witnesses to any sexual behavior except the niece. Yet to buttress her testimony, three lay witnesses testified that they had observed her years earlier sitting on his lap. They went further and conveyed that there was something abnormal suggesting sexual involvement based on some "sixth sense."

These opinions were prejudicial because they presumed to offer multiple independent adult corroboration of Lexi's testimony that she was in a "sexual relationship" with Mr. Wilson.

These opinions violated ER 701. It was ineffective for defense counsel to fail to object

to them. Since the case turned on Lexi's credibility, it is likely an objection and exclusion of this evidence would have made a difference in the outcome.

4. THE REPORT TO PATRICK WAS TOO LATE TO BE ADMITTED UNDER THE "HUE & CRY" DOCTRINE.

The "hue and cry" doctrine, as adopted in this state, allows the prosecution to present evidence that the victim complained to someone within a reasonable time after the assault. "However, this narrow exception allows only evidence establishing that a complaint was timely made." Alexander, supra, 64 Wn. App. at 151.

In State v. Griffin, 43 Wash. 591, 86 P. 951 (1906), the Court reversed rape and carnal knowledge convictions for admitting "hue and cry" evidence when the report was made eight to eighteen months after the events. That case similarly involved a 15-year-old alleging sexual assault by the husband of the couple with whom she lived.

While under ordinary circumstances the court must submit the complaint with all the attending circumstances to the jury, under proper instructions, yet in cases such as this, where there have been months of inexcusable delay, we think that justice demands that the complaint should be entirely excluded from the consideration of the jury.

Griffin, 43 Wash. at 598-99.

In this case, the complaint was at least four years after the last incident. It was error to admit it. It also was prejudicial. Without Patrick's testimony of this report -- which Lexi herself contradicted -- Lexi's allegation was made at a time when she was in trouble with the Joneses, suggesting a motive to create a diversion with her allegation.

5. CUMULATIVE ERROR DENIED APPELLANT A FAIR TRIAL.

The cumulative error doctrine applies to cases in which "there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 290 (2000); State v. Alexander, supra, 64 Wn. App. at 158.

In Alexander, a case of child molestation, the Court reversed because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial

and in closing. Similarly here, (1) lay witnesses gave opinions of an improper relationship; (2) the prosecutor improperly argued the law did not require the jury to be unanimous; (3) the prosecutor improperly argued a fact for which there was no evidence, that Mr. Wilson had been "on top of" Lexi in one of her reported "incidents;" (4) the prosecutor improperly attempted to introduce inadmissible testimony in rebuttal; and (5) the court admitted improper "hue and cry" evidence.

These combined issues denied Mr. Wilson a fair trial and due process. This Court should reverse his convictions.

D. CONCLUSION

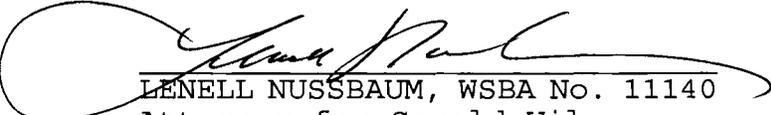
The State failed to present sufficient evidence of more than one incident of sexual intercourse. Thus the evidence was insufficient as a matter of law to support two convictions of rape of a child. The State also failed to present any evidence of when the one specific incident of sexual intercourse occurred, resulting in insufficient evidence as a matter of law to prove either rape of a child in the first degree or in

the second degree. For this reason, this Court should reverse and dismiss both counts.

Should this Court not reverse and dismiss, it should reverse and remand because of cumulative error.

DATED this 19th day of September, 2011.

Respectfully submitted,


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Attorney for Gerald Wilson

CERTIFICATE OF SERVICE

I certify that on September 19, 2011, I caused a true and correct copy of the Brief of Appellant to be served on the following individuals, postage prepaid, addressed as indicated:

King County Prosecutor's Office
Appellate Unit
W-554, King County Courthouse
516 Third Ave.
Seattle, WA 98104

Mr. Gerald W. Wilson
347125
1830 Eagle Crest Way
Clallam Bay, WA 98326

I declare under penalty of perjury under the laws of the state of Washington that the above statements is true and correct to the best of my knowledge.

9.19.2011 - Seattle, WA
Date and Place

Alex Fast
ALEXANDRA FAST

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