

713302

71330-2

NO. 71330-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

ANTON CURTIS JOHNSON,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE WILLIAM DOWNING

---

**BRIEF OF RESPONDENT**

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TABLE OF CONTENTS

Page

A. ISSUES PRESENTED ..... 1

B. STATEMENT OF THE CASE ..... 2

    1. PROCEDURAL FACTS ..... 2

    2. SUBSTANTIVE FACTS ..... 3

C. ARGUMENT ..... 8

    1. SUFFICIENT EVIDENCE SUPPORTED  
    JOHNSON'S CONVICTIONS FOR THREE  
    COUNTS OF RAPE OF A CHILD IN THE THIRD  
    DEGREE ..... 8

        a. Standard Of Review ..... 9

        b. The Evidence Was Sufficient To Prove That  
        Johnson Raped K.K. On Three Separate  
        Occasions During The Charging Period ..... 10

        c. The Prosecutor's Reference To Acts Prior  
        To The Charging Period Does Not Warrant  
        Reversal, Because The Jury Was Properly  
        Instructed As To The Correct Charging  
        Period ..... 17

        d. If Johnson's Convictions On Counts Two  
        And Three Are Reversed, The State Is Not  
        Barred From Charging Johnson With Rape  
        Of A Child In The Second Degree For  
        Previously-Uncharged Acts ..... 22

    2. JOHNSON'S ATTORNEY PROVIDED  
    EFFECTIVE REPRESENTATION ..... 25

        a. Standard Of Review ..... 26

b.	Johnson Has Not Demonstrated Deficient Performance Or Resulting Prejudice.....	27
i.	Alleged hearsay statements .....	28
ii.	Alleged opinions on credibility and guilt.....	34
iii.	Alleged unproved prior acts.....	36
3.	REMAND FOR ENTRY OF AN AMENDED JUDGMENT AND SENTENCE.....	38
D.	<u>CONCLUSION</u> .....	43

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Crawford v. Washington, 541 U.S. 36,  
124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) ..... 10

Strickland v. Washington, 466 U.S. 668,  
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) ..... 26, 27

United States v. Owens, 484 U.S. 554,  
108 S. Ct. 838, 98 L. Ed. 2d 951 (1988) ..... 30

Washington State:

In re Cruz, 157 Wn.2d 83,  
134 P.3d 1166 (2006) ..... 40

In re Davis, 152 Wn.2d 647,  
101 P.3d 1 (2004) ..... 27, 33, 35

Lewis Cnty. v. State, 178 Wn. App. 431,  
315 P.3d 550 (2013) ..... 23

Salas v. Hi-Tech Erectors, 168 Wn.2d 664,  
230 P.3d 583 (2010) ..... 38

State v. Bahl, 164 Wn.2d 739,  
193 P.3d 678 (2008) ..... 38

State v. Barragan, 102 Wn. App. 754,  
9 P.3d 942 (2000) ..... 33

State v. Bobenhouse, 166 Wn.2d 881,  
214 P.3d 907 (2009) ..... 17

State v. Borsheim, 140 Wn. App. 357,  
165 P.3d 417 (2007) ..... 11

<u>State v. Boyd</u> , 174 Wn.2d 470, 275 P.3d 321 (2012).....	41, 42
<u>State v. Brown</u> , 55 Wn. App. 738, 780 P.2d 880 (1989).....	12, 13
<u>State v. Brown</u> , 159 Wn. App. 1, 248 P.3d 518 (2010).....	40
<u>State v. Bruch</u> , No. 90021-3 (Oral Argument Held Sep. 16, 2014) .....	39
<u>State v. Calle</u> , 125 Wn.2d 769, 888 P.2d 155 (1995).....	23
<u>State v. Dye</u> , 178 Wn.2d 541, 309 P.3d 1192 (2013).....	21
<u>State v. Edwards</u> , 131 Wn. App. 611, 128 P.3d 631 (2006).....	28
<u>State v. Elmore</u> , 143 Wn. App. 185, 177 P.3d 172 (2008).....	40
<u>State v. Franklin</u> , 172 Wn.2d 831, 263 P.3d 585 (2011).....	42
<u>State v. Gamble</u> , 168 Wn.2d 161, 225 P.3d 973 (2010).....	24
<u>State v. Garcia</u> , 179 Wn.2d 828, 318 P.3d 266 (2014).....	28
<u>State v. Gonzalez-Hernandez</u> , 122 Wn. App. 53, 92 P.3d 789 (2004).....	28
<u>State v. Grover</u> , 55 Wn. App. 252, 777 P.2d 22 (1989).....	29, 30
<u>State v. Gutierrez</u> , 92 Wn. App. 343, 961 P.2d 974 (1998).....	22

<u>State v. Hayes</u> , 81 Wn. App. 425, 914 P.2d 788 (1996).....	10, 11, 12, 13, 14, 15
<u>State v. Jensen</u> , 125 Wn. App. 319, 104 P.3d 717 (2005).....	16
<u>State v. Johnston</u> , 143 Wn. App. 1, 177 P.3d 1127 (2007).....	36
<u>State v. Kier</u> , 164 Wn.2d 798, 194 P.3d 212 (2008).....	18
<u>State v. Kirkman</u> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	21
<u>State v. Kitchen</u> , 110 Wn.2d 403, 756 P.2d 105 (1988).....	10, 11
<u>State v. Lamar</u> , 180 Wn.2d 576, 327 P.3d 46 (2014).....	21
<u>State v. Lee</u> , 132 Wn.2d 498, 939 P.2d 1223 (1997).....	24, 25
<u>State v. Madison</u> , 53 Wn. App. 754, 770 P.2d 662 (1989).....	27
<u>State v. Montgomery</u> , 163 Wn.2d 577, 183 P.3d 267 (2008).....	20, 34
<u>State v. Ose</u> , 156 Wn.2d 140, 124 P.3d 635 (2005).....	40
<u>State v. Petrich</u> , 101 Wn.2d 566, 683 P.2d 173 (1984).....	10, 11, 17, 18
<u>State v. Piche</u> , 71 Wn.2d 583, 430 P.2d 522 (1967).....	37
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	9

<u>State v. Schaffer</u> , 120 Wn.2d 616, 845 P.2d 281 (1993).....	17
<u>State v. Skuza</u> , 156 Wn. App. 886, 235 P.3d 842 (2010).....	39
<u>State v. Soonalole</u> , 99 Wn. App. 207, 992 P.2d 541 (2000).....	32
<u>State v. Sutherby</u> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	26
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	26, 27, 38
<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	9, 10
<u>State v. Watson</u> , 146 Wn.2d 947, 51 P.3d 66 (2002).....	24
<u>State v. White</u> , 81 Wn.2d 223, 500 P.2d 1242 (1972).....	27
<u>State v. Winkle</u> , 159 Wn. App. 323, 245 P.3d 249 (2011).....	41, 42
<u>State v. Wright</u> , 165 Wn.2d 783, 203 P.3d 1027 (2009).....	23

Constitutional Provisions

Federal:

U.S. Const. amend. V .....	23
----------------------------	----

Washington State:

Const. art. I, § 9.....	23
-------------------------	----

## Statutes

### Washington State:

RCW 9.94A.030 .....	40
RCW 9.94A.501 .....	40
RCW 9.94A.507 .....	2, 39
RCW 9.94A.701 .....	39, 40
RCW 9.94A.729 .....	2, 39, 41
RCW 9A.44.076 .....	22
RCW 9A.44.079 .....	2, 10, 40

## Rules and Regulations

### Federal:

Fed. Rule Evid. 801 .....	30
---------------------------	----

### Washington State:

CrR 4.3.1 .....	24
ER 403 .....	38
ER 801 .....	28, 29, 30
ER 802 .....	28
RAP 2.5 .....	22

**A. ISSUES PRESENTED**

1. Evidence is sufficient to support a conviction if, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found guilt beyond a reasonable doubt. K.K.<sup>1</sup> described in detail one instance of sexual intercourse with the 43-year old defendant, Anton Johnson, and testified that it happened “at least 15 times,” during the charging period, while she was 14 years old. Was the evidence sufficient to support Johnson’s convictions for three counts of rape of a child in the third degree?

2. A defense attorney’s decision of when or whether to object is a matter of trial tactics, and only in egregious circumstances will a failure to object constitute deficient performance. Defense counsel below refrained from objecting to some out of court statements, but those statements were admissible, furthered his theory of the case, and allowed him to undermine the State’s case in closing argument. These tactical decisions did not prejudice Johnson. Did Johnson receive effective representation?

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<sup>1</sup> In an effort to protect her identity, the State refers to the child victim in this case only as “K.K.” The State also refers to K.K.’s younger sister as “T.K.,” and to K.K.’s mother and grandmother by relation only.

3. The trial court sentenced Johnson to a standard range sentence of the statutory maximum of 60 months and a period of community custody equal to any period of release prior to the expiration of the maximum sentence, pursuant to RCW 9.94A.507. Because rape of a child in the third degree is not one of the offenses sentenced under RCW 9.94A.507, the trial court should have specified that Johnson will be transferred to community custody in lieu of earned early release time pursuant to RCW 9.94A.729. The State concedes error and asks that this case be remanded for entry of an amended judgment and sentence, solely to correct the referenced statute.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

The State charged 43-year old Anton Johnson with three counts of rape of a child in the third degree, contrary to RCW 9A.44.079. CP 1-2; 3RP 234.<sup>2</sup> As to each count, the State alleged that Johnson had sexual intercourse with then 14-year old K.K.,

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<sup>2</sup> The verbatim report of proceedings is referred to as follows: Hearing setting trial date: 1RP – Oct. 23, 2013. Trial: 2RP – Oct. 28, 2013; 3RP – Oct. 29, 2013; 4RP – Oct. 30, 2013. Hearing on Motion for new trial: 5RP – Nov. 22, 2013. Sentencing: 6RP – Dec. 13, 2013.

during “a period of time intervening between September 15, 2011 through April 1, 2012.” CP 1–2.

Johnson was tried by jury before Judge William Downing. 2RP; 3RP; 4RP. The jury convicted Johnson on all three counts. CP 16.

After the verdict, Johnson filed a motion for a new trial, or in the alternative, to dismiss counts two and three. CP 30–32; 6RP 5–6. The trial court denied Johnson’s motion and sentenced him to a standard range sentence of three concurrent terms of the statutory maximum of 60 months, followed by a period of community custody “for any period of time the defendant is released from total confinement before the expiration of the maximum sentence.” CP 36–37.

This appeal timely followed.

## **2. SUBSTANTIVE FACTS.**

In 2009, K.K.’s grandmother met and became romantically involved with defendant Anton Johnson. 3RP 194. The couple eventually moved in with K.K.’s mother, in Des Moines. 3RP 117-18, 196. K.K.’s mother had six daughters who also lived with

her, including K.K., who was 11 or 12 years old at the time and in the sixth grade. 3RP 117–18, 243.

After moving in with K.K.'s mother and grandmother in Des Moines, Johnson began paying K.K. special attention. 3RP 245. He would tell her that she was cute and that she was the only one he ever saw doing her homework. 3RP 246. He also told her that he had a secret to tell her, but was afraid how she would take it. 3RP 246. K.K. could tell that Johnson liked her and after a while she started to like him too. 3RP 246.

Johnson talked to K.K. a lot and began holding her hand while they watched TV, under the covers, where nobody could see. 3RP 247. One day, he kissed K.K. when they were in her grandmother's bedroom. 3RP 247–48, 274–75. He began touching her a lot more after that. 3RP 247. For example, one day when she was in the bathroom, he kissed her on the neck and then inserted his finger inside her vagina. 3RP 248–49.

After a time, the family moved to Fir Street in the Central District neighborhood of Seattle. 3RP 119–20, 244. K.K. was in the seventh grade. 3RP 252. While they lived on Fir Street, Johnson told K.K. that he wanted to taste her and performed oral sex on her under the covers, while her sister T.K. was playing with

her phone elsewhere in the room. 3RP 252. Another time, while K.K. was in the seventh grade, Johnson lifted her up onto the kitchen counter, opened her legs, and “put it in” her until she felt a pop and it hurt a lot. 3RP 253.

After Fir Street, the family moved to Brighton Street. 3RP 120, 244. There, when K.K. was fourteen and in the eighth grade, Johnson “had sex” with her for the first time. 3RP 249. He came out of the bathroom while she was lying down on the living room couch watching television. 3RP 250. Johnson turned off the television, rolled K.K. over, and started kissing her. 3RP 250. Then he “put it inside of [her].” 3RP 250. He did not use a condom. 3RP 250. K.K. told Johnson that it hurt and he stopped the penile-vaginal penetration and performed oral-genital contact. 3RP 251.

In late 2011, K.K.’s grandmother underwent surgery and radiation treatment for thyroid cancer. 3RP 199. She had to be confined to her bedroom at the Brighton house to avoid exposing the family to radiation. 3RP 199. During that time, Johnson slept in the living room, or in the den, where K.K. would sometimes spend the night. 3RP 200, 251, 255. While everyone else was asleep, he would wake up K.K. and have sex with her. 3RP 251, 257–58.

Between September 15, 2011 (K.K.'s fourteenth birthday<sup>3</sup>) and April 1, 2012, Johnson had sexual intercourse with K.K. at least 15 times. 3RP 273. Most often, this occurred at night in the den. 3RP 251. When they had sex in the den, it tended to last longer, because everyone was asleep. 3RP 255. At other times, they would quickly have sex in K.K.'s room. 3RP 255.

Johnson told K.K. that he would "pull out" if he ejaculated, so that she wouldn't become pregnant. 3RP 261. Nevertheless, in March of 2012, K.K.'s mother took K.K. to the doctor because she was complaining of stomach pains and feeling nauseated. 3RP 121, 258–59. The doctor told fourteen year-old K.K. that she was pregnant. 3RP 259. K.K. let her mother assume that the father of the child was a boy from school that she was dating, because she knew that her relationship with Johnson was supposed to be a secret. 3RP 122, 256, 264. However, K.K. never had sexual intercourse with her teenage boyfriend, and Johnson was the person who impregnated her. 3RP 256, 260.

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<sup>3</sup> The State agrees with Johnson that September 15, 2011 was K.K.'s fourteenth birthday. K.K. testified that her birthday was September 15 and that she was 16 at the time of trial. 3RP 239. Trial was held in October of 2013. This means that she turned sixteen on September 15, 2013, and would have turned fourteen on September 15, 2011.

K.K.'s mother decided that K.K. would have an abortion. 3RP 262. The procedure was performed on March 9, 2012. 3RP 263, 285. Because she didn't want the father's true identity known, K.K. told clinic staff that she had become pregnant through consensual sex with a teenage partner. 3RP 286–88.<sup>4</sup> After the abortion, K.K. and Johnson never had sex again. 3RP 268.

Approximately 11 months after her abortion, K.K. told her younger sister T.K. that Johnson was the real father. 3RP 153, 268–69.<sup>5</sup> T.K. started crying and immediately called Johnson to tell him that she was going to “kill him.” 3RP 153, 268–69. K.K.'s grandmother observed Johnson standing silently with the phone and asked him what was wrong. 3RP 207. Johnson told her that T.K. had just “cussed [him] out.” 3RP 207. K.K.'s grandmother called K.K.'s mother to ask why T.K. was angry. 3RP 126, 207. K.K.'s mother confronted T.K., who explained that Johnson had “hurt” K.K. and that he was the person who impregnated K.K. 3RP 126, 155. K.K.'s mother asked K.K. if that was true and K.K. confirmed it. 3RP 126.

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<sup>4</sup> Under cross examination, K.K. initially denied telling the clinic that the father was a same-age, consensual partner, but then admitted that she may have said that because she didn't want the father's true identity known. 3RP 287.

<sup>5</sup> This timeline derives from the testimony of Seattle Police Department Officer Eric Beseler, who was dispatched to the 911 call of K.K.'s mother on February 19, 2013. 3RP 175.

K.K.'s mother called the police. 3RP 127–28. Seattle Police Officer Eric Beseler responded and spoke with K.K.'s mother and T.K., while K.K. was away from home. 3RP 178–79. Among other things, T.K. told Beseler that K.K. divulged that she first had sex with Johnson when she was eleven years old. 3RP 182.

After she reported him to the police for having sex with her teenage daughter, Johnson called K.K.'s mother at work. 3RP 129. Johnson admitted “that it did happen” but explained that “she came on to me.” 3RP 129. K.K.'s grandmother separately confronted Johnson, who initially denied having any sexual contact with K.K. 3RP 209–10. After a while, he admitted it, saying, “Do you want to know the truth? It happened.” 3RP 210. He specified that K.K. had performed oral sex on him. 3RP 210.

**C. ARGUMENT**

**1. SUFFICIENT EVIDENCE SUPPORTED JOHNSON'S CONVICTIONS FOR THREE COUNTS OF RAPE OF A CHILD IN THE THIRD DEGREE.**

Johnson argues that his convictions on counts two and three should be reversed because the prosecutor “elected” acts that occurred prior to the charging period, and because the evidence of acts within the charging period was insufficient to support three

counts of child rape. Johnson's argument should be rejected. The jury was properly instructed that it was required to unanimously find separate and distinct acts of rape within the charging period to support a conviction on each count. Johnson's own attorney pointed out to the jury that some acts the prosecutor identified pre-dated the charging period. The State adduced sufficient evidence of more than three separate and distinct acts constituting rape of a child in the third degree that occurred within the charging period.

**a. Standard Of Review.**

Evidence is sufficient to support a criminal conviction if, after viewing the evidence in the light most favorable to the State, a rational fact trier could have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence, as well as all reasonable inferences from the evidence, which must be drawn in favor of the State and against the defendant. Id. An appellate court defers to the trier of fact on all "issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Thomas, 150

Wn.2d 821, 874–75, 83 P.3d 970 (2004), abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

**b. The Evidence Was Sufficient To Prove That Johnson Raped K.K. On Three Separate Occasions During The Charging Period.**

Johnson was charged with rape of a child in the third degree. This crime occurs when a person has sexual intercourse with a child who is at least fourteen years old but less than sixteen years old, who is not married to the person, and who is at least forty-eight months younger than the person. RCW 9A.44.079; CP 24, 26–28.

Evidence is sufficient to support multiple counts child rape if the jury is given a Petrich<sup>6</sup> unanimity instruction and the testimony establishes the type of offense committed, the number of offenses committed, and the general time period in which the offenses occurred. State v. Hayes, 81 Wn. App. 425, 430–38, 914 P.2d 788 (1996). Johnson's convictions should be affirmed because the jury was properly instructed and because K.K. testified that Johnson had sex with her at least 15 times within the charging period.

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<sup>6</sup> State v. Petrich, 101 Wn.2d 566, 683 P.2d 173 (1984), modified in part by State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988).

In order to convict, the jury must unanimously agree that the criminal act charged has been committed. Petrich, 101 Wn.2d at 569. When the State alleges several acts, any of which might constitute the crime charged, the jury must unanimously agree as to the act or incident constituting the crime charged. Id. at 572; Kitchen, 110 Wn.2d at 411. “[I]n sexual abuse cases where multiple identical counts are alleged to have occurred within the same charging period, the trial court must instruct the jury ‘that they are to find ‘separate and distinct acts’ for each count.’” State v. Borsheim, 140 Wn. App. 357, 367, 165 P.3d 417 (2007) (quoting Hayes, 81 Wn. App. at 431) (internal citations omitted).

In the case at bar, the jury was properly instructed as to the need for unanimity on a specific act as to each count. It was properly instructed that a different specific act must be proven as to each count. Both requirements were included in Instruction 6:

There are allegations that the defendant committed acts of rape of a child in the third degree against [K.K.] on multiple occasions. To convict the defendant on Count I, at least one specific act of rape of a child must be proved beyond a reasonable doubt and you must unanimously agree as to which act has been proved beyond a reasonable doubt. To convict the defendant on Count II, a different specific act of rape of a child must be proved beyond a reasonable doubt and you must unanimously agree as to which act was proved beyond a reasonable doubt. To

convict the defendant on Count III, another different specific act of rape of a child must be proved beyond a reasonable doubt and you must unanimously agree as to which act was proved beyond a reasonable doubt.

CP 25 (Instruction 6). These requirements were reiterated in the trial court's "to convict" instructions, which specified that a conviction on each count must be based on a "different occasion." CP 26-28 (Instructions 7, 8, and 9).

When a child victim is repeatedly subjected to sexual abuse by a person who lives with the child, the State may rely upon what courts call "generic testimony" to sustain convictions on multiple counts. Hayes, 81 Wn. App. at 435; see also State v. Brown, 55 Wn. App. 738, 746–49, 780 P.2d 880 (1989). This reliance is justified by the special challenges presented by such "resident molester" cases—a child victim simply cannot be expected to remember the exact dates and differentiating characteristics of serial incidents of sexual abuse, at the hands of a live-in offender. Hayes, 81 Wn. App. at 435–38. To hold otherwise would create an unacceptable scenario: "With the exception of those who happen to select victims with better memories or who are 1–act offenders, the most egregious child molesters effectively would be insulated

from prosecution.” Id. at 436 (quoting Brown, 55 Wn. App. at 749 (citations omitted)).

So-called “generic” child victim testimony is sufficient to sustain multiple convictions for identical sex crimes during a single charging period when three requirements are met:

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 Hayes, the child victim testified that the defendant “put his private part in mine” at least “four times,” some “[t]wo or three times a week” during the approximately 23-month charging period. Id. at 435. She further testified that the acts happened in the defendant’s bed, while he was on top of her; that he used paper towels to clean up afterward; and that the acts occurred while she was living with another witness. Id. at 438–39. Noting that this testimony was sufficient to describe “the type of act committed, the number of acts committed, and the general time period” in which they occurred, this Court held that the generic testimony was specific enough to

sustain convictions on four separate counts of rape of a child. Id. at 439.

The testimony in this case is substantially similar to Hayes and satisfies all three prongs of the Hayes test. K.K. testified that “the first time that we had sex, was at Brighton.” 3RP 249. She was 14 years old. 3RP 249–50. Johnson came out of the bathroom while she was lying down in the living room, sat down on the couch, then rolled her over and “put it inside of [her].” 3RP 250. He did not use a condom and she didn’t think that he ejaculated. 3RP 250. She told him that it hurt so he stopped the intercourse and performed oral-genital contact instead. 3RP 251.

Having described the first time that she and Johnson “had sex,” K.K. went on to testify that the defendant had sexual intercourse with her “[a]t least 15 times,” and that she was “pretty sure it was probably more.” 3RP 249, 273. These acts all occurred within the charging period of September 15, 2011 through April 1, 2012. 3RP 273.<sup>7</sup> It happened at the house on Brighton Street, when she was 14 years old. 3RP 249–50. Most of the times it happened in the den, because that’s where K.K. and Johnson

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<sup>7</sup> Defense counsel elicited on cross-examination that K.K. was unable to remember specific dates when Johnson had sex with her, within that charging period, 3RP 294—but this is precisely the difficulty with “resident molester” cases that led the Hayes court to permit generic testimony.

spent most of their time. 3RP 251. She would sleep in there sometimes, while her grandmother was having radiation treatment. 3RP 251. Johnson would wake up K.K. and then “[they] would just do it.” 3RP 251. When they had sex in the den, it tended to last longer, because everyone was asleep. 3RP 255. Other times, they would quickly have sex in her room. 3RP 255. He would tell her that he would “pull out” if he ejaculated, so that she wouldn’t become pregnant. 3RP 261.

This testimony established the type of act committed, the number of acts committed, and the general time period in which they occurred. Hayes, 81 Wn. App. at 439. The type of act committed was penile-vaginal sexual intercourse;<sup>8</sup> the number of acts committed was at least 15 times; and the general time period in which they occurred was between September 15, 2011, and April 1, 2012, while K.K. was 14 and living on Brighton Street—the charging period in this case. Johnson was at least 48 months older than K.K. during this time. 3RP 234; 4RP 314. A reasonable jury

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<sup>8</sup> The evidence established that K.K.’s descriptions referred to penile-vaginal intercourse. She testified to two earlier incidences of digital penetration and oral-genital contact, as distinct from the first time that she and Johnson actually “had sex.” 3RP 249–54. She testified that Johnson said that he would “pull out” so that she wouldn’t become pregnant. 3RP 261. She also testified (at least with respect to the “first time”) that he didn’t wear a condom. 3RP 250. Taken as a whole, along with all reasonable inferences, this testimony referred to penile-vaginal sexual intercourse.

could have concluded beyond a reasonable doubt that Johnson committed at least three separate acts of rape of a child in the third degree.

The details provided by K.K. contrast with the testimony found insufficient in State v. Jensen, 125 Wn. App. 319, 104 P.3d 717 (2005). There, a child victim testified to two specific instances of molestation, which supported convictions on two counts. Id. at 327. With regard to a third count, however, the child testified only that the defendant entered her room at night on other occasions. Id. A detective testified that the child had reported generally that the defendant touched her private area “[a] few times.” Id. This generic testimony was insufficient to support the third count because the victim never specified that any sexual contact occurred during the other times that the defendant entered her room. Id. at 327–28.

K.K.’s testimony, specifying that Johnson had sex with her on at least 15 occasions, mostly in the den, when Johnson would wake her up at night, was sufficient to support Johnson’s convictions on counts two and three.

**c. The Prosecutor's Reference To Acts Prior To The Charging Period Does Not Warrant Reversal, Because The Jury Was Properly Instructed As To The Correct Charging Period.**

Johnson asserts that the prosecutor's discussion of acts that occurred prior to the charging period mandates reversal, because the jury may have convicted him of acts outside of the charging period. Johnson's argument should be rejected because the jury was properly instructed that it could convict Johnson based only upon acts within the charging period, and because the jury is presumed to follow the instructions of the trial court. Because Johnson's trial counsel clarified for the jury that the prosecutor had discussed acts prior to the charging period, there is no reason to believe that the jury relied on acts outside the charging period.<sup>9</sup>

Johnson initially claims that the prosecutor "elected" acts outside of the charging period during closing argument. In the absence of a Petrich unanimity instruction, the State may elect specific acts on which it relies to convict a defendant. State v. Bobenhouse, 166 Wn.2d 881, 893, 214 P.3d 907 (2009). In this

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<sup>9</sup> Johnson's argument that his convictions as to counts two and three violated his right to notice is unavailing. "A criminal defendant is to be provided with notice of all *charged crimes*." State v. Schaffer, 120 Wn.2d 616, 619, 845 P.2d 281 (1993) (emphasis added). Because Johnson was never charged with, or convicted of, raping K.K. prior to September 15, 2011, his right to notice was not violated.

case, the jury was given a Petrich unanimity instruction, so election of acts by the State was unnecessary. Indeed, the prosecutor did not elect acts during closing argument, but merely “suggest[ed],” “for example,” that the jury consider certain acts in arriving at its verdict. 4RP 332. Such statements do not constitute a clear election. See State v. Kier, 164 Wn.2d 798, 813, 194 P.3d 212 (2008) (prosecutor’s statement in closing argument was insufficient to elect specific victim when court’s instructions did not specify a victim and when jury was instructed to base its verdict on evidence and instructions).

The prosecutor said:

I *suggest* that there is (sic) two ways that you can [comply with the Petrich unanimity requirement] in this case.

[K.K.] told you that between those charging dates they were on Brighton Street, the defendant had sex with her, she believes roughly 15 times. She described to you with specific detail three separate incidents and two of them I just mentioned. The first was that first time in the living room. The second was the time on the counter. The third was a time when he had oral sex with her under the blanket as [T.K.] played with her phone on the bed across the room.

Then she described to you all of the incidents that occurred in the den. She said that she thought that there were 10 or 15 of those. You can either agree, *for example*, that Count I has been proven by your unanimous agreement on the first time that he ever had sex with her.

Count II is proven by your unanimous agreement about the time that [s]he described on the counter.

Count III is described by your unanimous agreement that *at least one time* he had sexual intercourse with her in that den, or you agree with that occasion that [s]he described, which occurred underneath the blanket in the room with [T.K.].

4RP 332 (emphasis added). Here, the prosecutor suggested that the jury consider the first time that Johnson had sex with K.K. in the living room (which was within the charging period); at least one of the times in the den (which were also within the charging period); and then two instances that were outside of the charging period, namely the oral sex that occurred under the covers and the penetration that occurred on the counter. By suggesting these alternatives (which included *at least* one of the “10 or 15 times” in the den), the prosecutor cannot be said to have clearly elected only incidents outside of the charging period.

There is no reason to believe that the jury relied on the prosecutor’s reference to two acts outside of the charging period, because Johnson’s own attorney alerted the jury that those acts pre-dated the charging period. In closing argument, Johnson’s attorney said:

Now, the State has limited its charging documents and its to convict instruction to some very

important dates that [are] contained in instruction number 7, 8, and 9. The dates are all the same for all three, September 15th, 2011, to April 1st, 2012 . . . .

. . . the State's own charging document, essentially, doesn't include Fir Street. It doesn't include Des Moines. It doesn't include anything that happened at those—she testified about them. But you are not to consider them for the purposes of deciding whether or not Anton [Johnson] committed those acts.

The Brighton Street is where they lived at from September of 2011 through April of 2012. That's what you have . . . .

4RP 343–44. The prosecutor did not debate this point in rebuttal.

4RP 349–58. There is no reason to believe that the jury was improperly swayed by the prosecutor when Johnson's own attorney corrected the matter and the State did not contest the point.

Johnson nevertheless argues that the lack of jury interrogatories makes it impossible to know with certainty whether the jury was improperly swayed, and that the lack of jury interrogatories should be construed against the State. This is the precise opposite of what the law holds. In State v. Montgomery, 163 Wn.2d 577, 183 P.3d 267 (2008), rejecting a claim that the jury may have been swayed by improper testimony, the Washington Supreme Court concluded that “[t]here was no written jury inquiry or other evidence that the jury was unfairly influenced, and we should

presume the jury followed the court's instructions absent evidence to the contrary." Id. at 596. The Court has steadfastly adhered to this rule. See State v. Lamar, 180 Wn.2d 576, 586, 327 P.3d 46 (2014); State v. Dye, 178 Wn.2d 541, 556, 309 P.3d 1192 (2013); State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007).

The jurors were instructed in this case that, in order to convict the defendant on three separate counts, they had to unanimously agree upon three different acts committed between September 15, 2011 and April 1, 2012. CP 25–28. The jury was also instructed that, for each act, they would have to find that K.K. was at least fourteen years old at the time of the rape. CP 26–28. The trial court further instructed the jury to disregard any statement by the attorneys that was contrary to its instructions. 2RP 90; CP 19. There is no evidence that the jury did not follow these instructions.

Finally, Johnson asserts that the trial court erred by denying his motion for a new trial or dismissal of counts two and three. He argues that the trial court based its ruling on the improper “framework” articulated by the State in closing argument. 6RP 6. Irrespective of why the trial court denied Johnson's motion, an appellate court is not limited to the reasons articulated by the trial

court and may affirm the trial court on any basis that is supported by the record. State v. Guttierrez, 92 Wn. App. 343, 347, 961 P.2d 974 (1998); RAP 2.5(a). Because the prosecutor did not elect acts outside of the charging period; because defense counsel clarified the charging period for the jury, which the prosecutor did not debate; and because the jury is presumed to follow the instructions of the trial court, Johnson's convictions should be affirmed.

**d. If Johnson's Convictions On Counts Two And Three Are Reversed, The State Is Not Barred From Charging Johnson With Rape Of A Child In The Second Degree For Previously-Uncharged Acts.**

Johnson argues that principles of double jeopardy and mandatory joinder preclude the State not only from re-filing charges of rape of a child in the third degree based on acts within the charging period, but also from charging him with rape of a child in the second degree<sup>10</sup> based on the acts prior to the charging period in this case. The State agrees that if this Court reverses Johnson's convictions on counts two and three, it could not retry Johnson for rape of a child in the third degree based upon acts within the

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<sup>10</sup> "A person is guilty of rape of a child in the second degree when the person has sexual intercourse with another who is at least twelve years old but less than fourteen years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim." RCW 9A.44.076(1).

charging period. However, Johnson is incorrect that double jeopardy and mandatory joinder prohibit the State from charging him with rape of a child in the second degree based upon acts prior to the charging period in this case.

As a threshold matter, the question of whether a subsequent prosecution for rape of a child in the second degree would violate Johnson's rights is hypothetical, not ripe for judicial consideration, and therefore not properly before the Court at this time. See Lewis Cnty. v. State, 178 Wn. App. 431, 440, 315 P.3d 550 (2013) ("If a claim is speculative and hypothetical, it is not ripe."). The State nevertheless addresses Johnson's claim on the merits, below.

"The double jeopardy clauses of the Fifth Amendment and Const. art. I, § 9 protect a defendant against multiple punishments for the same offense." State v. Calle, 125 Wn.2d 769, 772, 888 P.2d 155 (1995) (citations omitted). A reversal for insufficient evidence is equivalent to an acquittal for double jeopardy purposes. State v. Wright, 165 Wn.2d 783, 792, 203 P.3d 1027 (2009). The State agrees that, if this court finds the evidence was insufficient to convict Johnson of two of the three counts of rape of a child in the third degree, the State is precluded from re-filing those charges.

However, Johnson seeks to extend this rule to uncharged acts that occurred before the charging period, and provides no authority to support this proposition. As Johnson himself argues, he was *never charged* with raping K.K. in Des Moines and on Fir Street, because those acts occurred before the charging period, and while the victim was younger than 14. Just because those acts were discussed at trial does not mean that he was charged with their commission. Because charging Johnson with second degree child rape for those acts would not put Johnson twice in jeopardy for the same offense, double jeopardy does not apply.

Mandatory joinder is likewise inapplicable. “Under the mandatory joinder rule, CrR 4.3.1(b)(3), two or more offenses must be joined if they are related[.]” State v. Gamble, 168 Wn.2d 161, 167–68, 225 P.3d 973 (2010). “‘Related offenses’ are two or more offenses within the jurisdiction and venue of the same court that are based on the same conduct.” Id. at 168 (quoting CrR 4.3.1(b)(1)). “‘Same conduct’ is conduct involving a single criminal incident or episode.” Id. (citing State v. Watson, 146 Wn.2d 947, 957, 51 P.3d 66 (2002); State v. Lee, 132 Wn.2d 498, 503, 939 P.2d 1223 (1997)).

“[O]ffenses involving separate incidents do not constitute same conduct.” Lee, 132 Wn.2d at 504. Because Johnson raped K.K. in separate incidents, mandatory joinder would not preclude the State from charging Johnson with rape of a child in the second degree, during a different period of time.

**2. JOHNSON’S ATTORNEY PROVIDED EFFECTIVE REPRESENTATION.**

Johnson asserts that his attorney provided ineffective assistance by failing to object to hearsay, opinions on credibility and guilt, and unproved prior acts. Johnson’s claim fails. The possible objections identified on appeal would have been overruled. To the extent that the proposed objections may have been sustained, counsel had legitimate tactical reasons to not object. Even if counsel lacked legitimate reasons for not objecting, Johnson cannot demonstrate prejudice. The challenged testimony concerns mainly the family members’ repetition of what K.K. told them—yet K.K. testified to the same facts at trial, in far greater detail and with much greater impact. The family’s repetition of her statements merely provided context for Johnson’s later admissions to having sexual contact with K.K., and otherwise served the

defense theory that K.K. and T.K. spread rumors about Johnson in order to have him removed from their life and his relationship with their grandmother.

**a. Standard Of Review.**

A challenge to effective assistance of counsel is reviewed *de novo*. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant bears the burden of proving both: 1) that trial counsel's performance fell below a minimum objective standard of reasonableness (the performance prong); and 2) that the defendant was prejudiced by counsel's deficient performance (the prejudice prong). State v. Thomas, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Regarding the performance prong, “scrutiny of counsel’s performance is highly deferential and courts will indulge in a strong presumption of reasonableness.” Thomas, 109 Wn.2d at 226 (citing Strickland, 466 U.S. at 689). Courts will presume that a failure to object “can be characterized as legitimate trial strategy or tactics,” and the defendant bears the burden of rebutting this

presumption. In re Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004) (citations omitted). This is because “[t]he decision of when or whether to object is a classic example of trial tactics,” and “[o]nly in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal.” State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). The defendant must also show that the proposed objection would likely have been sustained. Davis, 152 Wn.2d at 714.

Regarding the prejudice prong, a defendant must prove that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 694). Trial counsel does not guarantee a successful verdict, and competency is not measured by the result. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

**b. Johnson Has Not Demonstrated Deficient Performance Or Resulting Prejudice.**

Johnson claims that multiple hearsay statements were admitted at trial without appropriate defense objection. Johnson

further asserts that K.K.'s grandmother gave an improper opinion on Johnson's guilt and the credibility of another witness, without objection. Finally, he asserts that counsel was ineffective for opening the door to "unproved prior acts." All of these claims are meritless; they are discussed below in turn.

i. Alleged hearsay statements.

Hearsay is an out of court statement offered to prove the truth of the matter asserted, and is generally inadmissible except as provided by the rules of evidence. ER 801(c); ER 802. Not all out of court statements, however, are hearsay. "Statements not offered to prove the truth of the matter asserted, but rather as a basis for inferring something else, are not hearsay." State v. Garcia, 179 Wn.2d 828, 845, 318 P.3d 266 (2014) (citations omitted).

A statement offered only to show its effect on the listener is not hearsay. State v. Edwards, 131 Wn. App. 611, 614, 128 P.3d 631 (2006). A statement offered only to establish that the statement was made also is not hearsay. State v. Gonzalez-Hernandez, 122 Wn. App. 53, 57, 92 P.3d 789 (2004). Finally, a statement of identification, made after perceiving the person, is not hearsay so long as the declarant testifies at trial and is subject to cross

examination. State v. Grover, 55 Wn. App. 252, 256, 777 P.2d 22 (1989); ER 801(d)(1)(iii).

The statements that Johnson identifies as inadmissible fall into one or more of the above categories. These statements were not offered to prove the truth of the matter asserted—rather, they were offered as a sequence of verbal events, culminating with Johnson's admissions to K.K.'s mother and grandmother that he had sexual contact with K.K. For example, Johnson asserts that his attorney should have objected to K.K.'s mother's testimony that T.K. told her that Johnson impregnated K.K., and that K.K. verified that this was true. Br. of Appellant, at 19 (citing 3RP 126). Yet this testimony was only offered to explain why K.K.'s mother called the police and relayed this information to K.K.'s grandmother, who then confronted Johnson, who admitted to molesting K.K. 3RP 129, 208–10. The family members' testimony about their conversations did not prove that Johnson had sexual contact with K.K., but it did explain why and how Johnson eventually admitted that he did. Because Johnson has not shown that an objection to this testimony would likely have been sustained, Johnson has not established that his attorney was deficient for failing to object.

Several of the statements that Johnson challenges were also statements of identification and therefore not hearsay. ER 801(d). K.K.'s statements to T.K., her mother, and her grandmother, identifying Johnson as the person who impregnated her, were statements of identification. 3RP 126, 153, 209, 268, 270. So too was K.K.'s statement to Johnson, "you got me pregnant," which was overheard by T.K. and testified to by T.K. at trial. 3RP 152. This statement also was not hearsay because its probative value was not its truth, but the fact that K.K. said it *to Johnson*, who apparently did not deny it. Regardless, the family members were all permitted to testify to K.K.'s out of court identification of Johnson because K.K. also testified at trial and was subject to cross examination. 3RP 238–96; see Grover, 55 Wn. App. at 255–57 (under ER 801(d), trial court properly admitted detective's testimony that witness identified defendant, when witness also testified at trial and was subject to cross examination).<sup>11</sup> Because objections

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<sup>11</sup> In Grover, this Court noted that while ER 801(d)(1)(iii) is typically applied to photographic identifications, the defendant provided no authority limiting the rule's application to that context. 55 Wn. App. at 257. This Court also relied on a United States Supreme Court case in which a crime victim's verbal identification of the defendant to an FBI agent was held admissible under Fed. Rule Evid. 801(d)(1)(C), the federal counterpart to ER 801(d)(1)(iii). 55 Wn. App. at 256–57 (citing United States v. Owens, 484 U.S. 554, 108 S. Ct. 838, 98 L. Ed. 2d 951 (1988)). This Court found that Owens was "dispositive." 55 Wn. App. at 257.

would not likely have been sustained, Johnson has not demonstrated deficient performance.

Even if the above statements were technically objectionable, trial counsel also had specific tactical or strategic reasons to refrain from objecting. Counsel's theory of the case was premised on the very fact that these statements were circulated among the family—as part of a story concocted by K.K. and T.K. in order to end Johnson's involvement in their lives, and to stop him from mistreating their grandmother.<sup>12</sup> Counsel stressed in opening statement that “this is the case about the two sisters who got their way, when they got rid of Anton Johnson from their household, because they didn't like him. They didn't like what he was doing to [their grandmother],” 3RP 111; and reiterated in closing argument that the case was fundamentally about a family that disliked Johnson. 4RP 336. He further described K.K. and T.K.'s conversations as two “teenagers” who were “sharing secrets,” and

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<sup>12</sup> While Johnson and K.K.'s grandmother moved out of K.K.'s house in the summer of 2012, approximately eight months before K.K. told her family about the sexual assaults, the family (including Johnson) continued to socialize and even stay together at times. 3RP 130, 267. Johnson also continued to live with K.K.'s grandmother until shortly after T.K. and K.K. told K.K.'s grandmother that Johnson had impregnated K.K. 3RP 210–11.

trying to “top each other’s stories” by coming up with “something more outrageous than [the other].” 4RP 346.<sup>13</sup>

Counsel also used the out of court statements for other legitimate strategic purposes. Having allowed each family member to testify to their version of these conversations, without clarification from the court that some of these statements were admissible for their truth, counsel was able to attack the State’s case as “a family’s account of hearsay upon hearsay,” “phone calls,” and “double hearsay and hearsay.” 4RP 339–40. It is not ineffective to refrain from objecting to inadmissible evidence when that evidence furthers a defendant’s theory of the case. See State v. Soonalole, 99 Wn. App. 207, 216, 992 P.2d 541 (2000) (holding that it was not ineffective for trial counsel to refrain from objecting to out of court statements when counsel used the statements to attack witness’s credibility). If anything, counsel’s express labeling of the State’s case as “hearsay” shows that counsel was aware of this and made a strategic decision to not object. That strategy was more to

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<sup>13</sup> Defense counsel elicited testimony on cross examination in support of this theory. K.K.’s grandmother testified that she and Johnson argued in front of the children. 3RP 218–19. T.K. testified that she “hated” Johnson for arguing with her grandmother, and K.K. testified that she remembered the arguments. 3RP 165 (T.K.), 280 (K.K.). Both sisters also confirmed that they were sharing “secrets” on the day that K.K. told T.K. what Johnson had done, including secrets about older men and sexual activity. 3RP 163 (T.K.), 289 (K.K.).

Johnson's advantage, as his attorney could then more credibly argue that the State's evidence was unreliable because it was hearsay.

Further, even if counsel considered the testimony objectionable, he may have simply wished to avoid emphasizing it with an objection. See Davis, 152 Wn.2d at 714. Counsel may further have refrained from requesting a limiting instruction for the same reason. See State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000) (an appellate court can presume that defense counsel decided not to request a limiting instruction because to do so would reemphasize damaging evidence).

With regard to the prejudice prong, even if Johnson's attorney was deficient for failing to object, there is no reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. The challenged statements essentially concern statements of K.K. and T.K., telling their adult relatives that Johnson impregnated K.K. Yet K.K. testified extensively at trial—in far greater detail than anything that was expressed via hearsay—about what Johnson did to her. 3RP 248–58. Ultimately, because all of the accusations originated with K.K., this case came down to whether the jury believed K.K.'s

account. The in-court repetition of what K.K. and T.K. told their mother and grandmother was meaningless unless the jury found K.K. credible, and was not a determining factor in the verdict—especially given that both K.K.’s mother and grandmother testified that Johnson *admitted* having sexual contact with K.K. 3RP 129, 210. Because that testimony that Johnson challenges was generally, furthered the defense theory, and was insignificant in light of K.K.’s testimony, there was no prejudice.

ii. Alleged opinions on credibility and guilt.

Johnson argues that his attorney was ineffective for not objecting to testimony of K.K.’s grandmother that, when she spoke with K.K. about the sexual assault, she was “not calling her to scold her or to, you know, talk bad to her,” and that she “just wanted to know the truth.” 3RP 209. She further described the conversation as: “So we just talked. I wanted her to know that I love her. I am not mad at her. I believe her.” 3RP 209. Johnson argues that this was an opinion on credibility and guilt.

While “expressions of personal belief, as to the guilt of the defendant . . . or the veracity of witnesses” are improper, Montgomery, 163 Wn.2d at 591, it is far from clear that K.K.’s

grandmother's testimony violated this rule. Rather than an opinion on K.K.'s veracity and Johnson's guilt, these statements are more appropriately characterized as a description of the emotional support that K.K.'s grandmother gave her granddaughter at the time that they spoke. This ambiguity alone would give counsel reason not to risk emphasizing the testimony for the sake of an objection that may have been overruled. See Davis, 152 Wn.2d at 714.

Moreover, this testimony fit with counsel's theory that K.K. and T.K. had told a story to their mother and grandmother in order to expel Johnson from their lives, and to end his relationship with their grandmother. Both of these reasons were legitimate tactical reasons not to object.

Finally, even assuming that counsel should have objected, and that the objection would have been sustained, Johnson has not established that the testimony of K.K.'s grandmother—that she wanted K.K. to know that she loved her and believed her—prejudiced his right to a fair trial. It certainly cannot be said that, but

for a grandmother's testimony that she loved and believed her granddaughter, the outcome of the trial would have been different.

iii. Alleged unproved prior acts.

Finally, Johnson asserts that his attorney was ineffective by opening the door to "unproved prior acts." Johnson refers to his attorney asking Officer Beseler about his interview of T.K., in which T.K. said that she and K.K. were talking about older men being interested in them, when they were at the basketball court. 3RP 180–81. This opened the door for the prosecutor to ask Beseler more broadly about his interview with T.K. 3RP 181–82. This included the statement that T.K. told Beseler that K.K. divulged that "she had began having sex with Anton [Johnson] when she was 11 years old." 3RP 182.

Johnson has not established that his attorney was ineffective for asking Beseler about the statements that T.K. made during her interview. First, "[t]he extent of cross-examination is a matter of judgment and strategy." State v. Johnston, 143 Wn. App. 1, 20, 177 P.3d 1127 (2007). "Experienced lawyers know that what may

appear to be a blunder in tactics at the trial may have been deliberately undertaken with calculated risk[.]” State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). Counsel strategically used T.K.’s statements about her conversations with K.K. on the basketball court during closing argument to support the defense theory and present K.K. and T.K. as “sharing secrets,” “trying to top each other’s stories,” and coming up with “something more outrageous” than the other. 4RP 346.

Even if counsel lacked a legitimate strategic reason to ask Beseler about T.K.’s interview, Johnson has not established prejudice. K.K. testified extensively, graphically, and without objection to sexual abuse occurring when she was twelve years old in both Des Moines and on Fir Street.<sup>14</sup> 3RP 248–49, 252–54. Relative to this testimony, it is unclear what prejudice resulted from a single, sterile sentence in a police report indicating that the abuse

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<sup>14</sup> Johnson does not challenge his attorney’s decision not to object to K.K.’s detailed testimony about sexual abuse occurring in Des Moines and on Fir Street, prior to the charging period. For obvious legitimate tactical reasons, Johnson’s attorney waited until closing argument to highlight this to the jury—to deprive the State of the opportunity to amend the charging period or to attempt to elicit further testimony about specific incidents within the charging period.

started when she was eleven. Because Johnson has not rebutted the strong presumption that his attorney acted reasonably, and because he also has not demonstrated resulting prejudice, his convictions should be affirmed.<sup>15</sup>

### **3. REMAND FOR ENTRY OF AN AMENDED JUDGMENT AND SENTENCE.**

Johnson asserts that his sentence should be reversed and this case remanded for the community custody portion of his sentence to be stricken. The State agrees that the community custody portion of Johnson's sentence was in error,<sup>16</sup> but asks that this case be remanded *solely* for the trial court to specify in an amended judgment and sentence that Johnson will be transferred

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<sup>15</sup> Johnson argues that "where there is a risk of prejudice and no way to know what value the jury placed upon the improperly admitted evidence, a new trial is necessary." Br. of Appellant, at 23 (quoting Salas v. Hi-Tech Erectors, 168 Wn.2d 664, 673, 230 P.3d 583 (2010)). In Salas, the Court held that a party's immigration status should have been excluded under ER 403, and declined to find that the error in admitting this unfairly prejudicial matter was harmless. Id. at 673. Salas is distinguishable because, in the instant case, the burden is on Johnson to demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Thomas, 109 Wn.2d at 226 (citations omitted). Johnson has not met this burden.

<sup>16</sup> Although Johnson did not object to the community custody portion of his sentence below, the lawfulness of a sentence may be raised for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

to community custody for any period of earned early release time, pursuant to RCW 9.94A.729.<sup>17</sup>

The trial court erred by imposing a period of community custody pursuant to RCW 9.94A.507, which does not apply to rape of a child in the third degree.<sup>18</sup> CP 37; see also RCW 9.94A.507 (listing other offenses). Instead, the judgment and sentence should specify that Johnson will be transferred to a period of community custody in lieu of earned early release, as required by RCW 9.94A.729.

Whether RCW 9.94A.729 requires Johnson to be transferred to community custody in lieu of any earned early release time is a question of statutory interpretation. Statutory interpretation is a

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<sup>17</sup> The Washington Supreme Court is currently considering a related issue, in State v. Bruch, No. 90021-3 (Oral Argument Held Sep. 16, 2014):

Whether a sentence for second degree child molestation consisting of 116 months of imprisonment and a term of community custody of 'at least' four months plus any earned early release time accrued at the time of release violates RCW 9.94A.701(9), which requires the community custody term to be reduced whenever the standard range term of imprisonment combined with the term of community custody exceeds the statutory maximum for the crime (in this case 120 months).

Supreme Court Issues – September Term 2014. No. 90021-3, State (respondent) v. Bruch (petitioner). (9/16/14). Available online at [http://www.courts.wa.gov/appellate\\_trial\\_courts/supreme/issues/?fa=atc\\_supreme\\_issues.display&fileID=2014Sep#P225\\_22599](http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2014Sep#P225_22599) (last accessed Sep. 25, 2014).

<sup>18</sup> Johnson claims that the trial court orally imposed 36 months of community-custody. The State disagrees, because the trial court merely observed that a 36-month term of community custody was "applicable." 6RP 14. Regardless, a court's written judgment and sentence controls over an oral ruling. See State v. Skuza, 156 Wn. App. 886, 898, 235 P.3d 842 (2010).

question of law that is reviewed *de novo*. In re Cruz, 157 Wn.2d 83, 87, 134 P.3d 1166 (2006). The primary purpose of statutory interpretation is to ascertain and give effect to the intent of the legislature. Id. To determine legislative intent, the court looks first to the statute's plain meaning. State v. Ose, 156 Wn.2d 140, 144, 124 P.3d 635 (2005). "Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." State v. Elmore, 143 Wn. App. 185, 188, 177 P.3d 172 (2008). Statutes must be construed as a whole to harmonize and give effect to all provisions, whenever possible. State v. Brown, 159 Wn. App. 1, 10, 248 P.3d 518 (2010).

Third degree rape of a child is a violation of RCW 9A.44.079. Violations of RCW 9A.44.079 are sex offenses. RCW 9.94A.030(46)(a)(i). Felony sex offenders are sentenced to community custody. RCW 9.94A.701(1)(a). They must further be supervised by the Department of Corrections (DOC). RCW 9.94A.501(4)(a). The trial court must reduce a period of community custody so that the total sentence does not exceed the statutory maximum. RCW 9.94A.701(9). However, a sex offender shall be

transferred to community custody in lieu of earned early release time. RCW 9.94A.729(5)(a).

The plain intent of the legislature, ascertainable from these provisions, is that sex offenders be sentenced to community custody so that they may be supervised by DOC, and that they be further transferred to community custody in lieu of any period of early release. See State v. Winkle, 159 Wn. App. 323, 330, 245 P.3d 249 (2011) (“In construing the statute as a whole, and giving effect to each provision, we conclude that the legislative intent is to require a sex offender to serve community custody in lieu of earned early release.”).

Johnson argues that a community custody sentence equal to earned early release would be an illegal “variable” sentence. Br. of Appellant, at 25 (citing State v. Boyd, 174 Wn.2d 470, 471–73, 275 P.3d 321 (2012)). Johnson’s reliance on Boyd is unavailing.

In Boyd, the trial court erred by failing to reduce a period of community custody so that the total sentence did not exceed the statutory maximum. Id. at 473. The trial court in that case sentenced the defendant to 54 months of confinement and 12 months of community custody, with a notation that the combined sentence could not exceed the 60-month statutory maximum. Id. at

472. This was unlawful because it shifted responsibility to DOC to reduce the community custody period, while the responsibility to do so actually lies with the trial court. Id. at 473.

The sentence requested by the State in this case does not shift responsibility to DOC to reduce the defendant's community custody sentence. It merely places the defendant on notice that, if he earns any early release time, he will be transferred to community custody as already required by statute.

Further, this Court held in Winkle that a court's decision to impose a period of community custody equal to earned early release time, upon a defendant sentenced to the statutory maximum period of confinement, complies with sentencing statutes and the legislature's intent that sex offenders be transferred to community custody in lieu of early release. 159 Wn. App. at 331. Boyd does not mention, let alone overrule, Winkle.<sup>19</sup>

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<sup>19</sup> Prior to deciding Boyd, the Washington Supreme Court declined to address Winkle's continuing validity in State v. Franklin, 172 Wn.2d 831, 837 n.8, 263 P.3d 585 (2011).

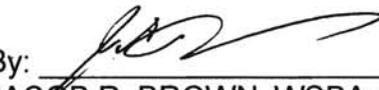
**D. CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Johnson's convictions on counts two and three for rape of a child in the third degree, and to remand this case solely for the trial court to impose a proper term of community custody.

DATED this 27 day of October, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
\_\_\_\_\_  
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila Silverstein, the attorney for the appellant, at Washington Appellate Project, 1511 3rd Ave, Suite 701, Seattle, WA, 98101, containing a copy of the Brief of Respondent, in State v. Anton Curtis Johnson, Cause No. 71330-2, in the Court of Appeals, Division I, for the State of Washington.

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

Dated this 27 day of October, 2014.



Name: Bora Ly  
Done in Seattle, Washington

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