NO. **1032471**

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,
v.
JOSEPH RAYMOND CHEATUM,
Appellant / Petitioner

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

STATE'S ANSWER TO PETITION FOR REVIEW

NORMA J. TILLOTSON
Prosecuting Attorney
for Grays Harbor County

BY: _____
WILLIAM A. LERAAS
Deputy Prosecuting Attorney
WSBA # 15489

OFFICE AND POST OFFICE ADDRESS
Grays Harbor County Prosecuting Attorney
102 West Broadway Room 102
Montesano, WA 98563
(360) 249-3951

T A B L E S

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

COUNTERSTATEMENT OF THE CASE

Petitioner adopts by reference the statement of the case as set forth in his brief filed below; the State does likewise. In the Brief of Respondent filed in the Court of Appeals in the case below the State agreed that petitioner had sufficiently set forth the procedural and factual history of the case.

The State also adopts by reference the facts as found by the Court of Appeals in its opinion below. Additional citations to the record will be made herein as the State feels is necessary.

ACCEPTANCE OF REVIEW

A petition for review will be accepted by the Supreme Court *only if* the decision of the Court of Appeals is in conflict with a decision of the Supreme Court, is in conflict with a published decision of the Court of Appeals, involves a significant question of law under the state or federal or constitution, or if an issue of substantial public interest that should be decided by the Supreme Court is involved. RAP

13.4(b)(1), (2), (3) & (4). As will be demonstrated herein, Petitioner satisfies none of these criteria.

ARGUMENT

1. **This Court should decline to accept review as the information contained all the essential statutory and non-statutory elements of the offense of child molestation in the second degree, provided Petitioner with actual notice of the crime charged and did not relieve the State of its burden to prove each element of the crime beyond a reasonable doubt.**

Child molestation in the second degree is defined in pertinent part as follows:

> A person is guilty of child molestation in the second degree when the person has, . . .sexual contact with another who is at least twelve years old but less than fourteen years old and the perpetrator is at least thirty-six months older than the victim.

RCW 9A.44.086(1). The information in this case charged the Petitioner with child molestation in the second degree as follows:

> That the said defendant, Joseph Raymond Cheatum in the County of Grays Harbor, State of

> Washington, on or between January 1, 2015 and July 16, 2018, being at least 36 months older than M.B.-C., had sexual contact with M.B.-C., *who was at least twelve (12) years old but less than fourteen (14) years old* and was not married to the Defendant, Joseph Raymond Cheatum.

CP 1.

To convict the Petitioner of child molestation in the second degree the jury was told in instruction number 8 that each of the following elements must be proved beyond a reasonable doubt:

> (1) That on or between January 1, 2015 and July 16, 2018 the Defendant had sexual contact with M.B.-C.;
> (2) *That M.B.-C. was at least twelve years old but less than fourteen years old at the time of the sexual contact* and was not married to the Defendant;
> (3) That M.B.-C. was at least thirty-six months younger than the Defendant; and
> (4) That this act occurred in the State of Washington.

CP 128. Furthermore, the instruction defining child molestation in the second degree provided as follows:

> A person commits the crime of Child Molestation in the Second Degree when the person has sexual contact with a child *who is at least twelve years old but less than fourteen years old,* who is not married to the person, and who is at least thirty-six months younger than the person.

Instruction number 3, CP 127.

"The State must prove every element of an offense beyond a reasonable doubt." *State v. Lively,* 130 Wn.2d 1, 11, 921 P.2d 1035 (1996). A charging document must contain all the essential elements of the offense charged. *State v. Kjorsvik,* 117 Wn.2d 93, 97, 812 P.2d 86 (1991). Petitioner argues that the error in the upper end of the charging period in the information was an error in an essential element that relieved the State of its burden to prove each element of the crime of child molestation in the second degree beyond a reasonable doubt and that it did not give Mr. Cheatum "adequate notice" of the charge. Petition, p. 7.

However, the date of the offense is not an essential element of the crime charged. *State v. Brooks,* 195 Wn.2d 91,

97, 455 P.3d 1151 (2020). In *Brooks* defendant was charged with child molestation in the third degree. After Brooks testified and the defense rested the State was allowed to amend the information with regard to the charging period to conform with Brooks's testimony (in which he confessed to the molestation). *Brooks* at 95. In affirming the Supreme Court held that "the date of the offense is simply not an essential element of the crime charged – third degree child molestation." *Brooks* at 97 (citing *State v. Goss,* 186 Wn.2d 372, 379, 376 P.3d 154 (2016) (essential element is one whose specification is necessary to establish the very illegality of the behavior charged)).

State v. Holt, 104 Wn.2d 315, 704 P.2d 1189 (1985) differentiates between a constitutionally deficient information and ones that are merely vague in some respect:

> In *State v. Bonds, supra*, this court distinguished between a constitutionally defective information and one which is merely deficient due to vagueness as to some other matter. The omission

> of *any* statutory element of a crime in the charging document is a *constitutional* defect which may result in dismissal of the criminal charges. Conversely, if the information states each statutory element of a crime, but is vague as to some other matter significant to the defense, a bill of particulars is capable of correcting that defect. *In that event, a defendant is not entitled to challenge the information on appeal if he failed to request the bill of particulars at an earlier time.*

Holt at 320 (citations omitted; emphasis on "any" and "constitutional" in the original, remaining emphasis supplied).

Here, as the date of offense is not an essential element of the offense of second-degree child molestation, Petitioner is basically making a vagueness argument as to the information. As Petitioner did not request a bill of particulars at the trial court level, he has waived this argument for purposes of appeal. *Holt, supra.*

The information in this case, as it relates to count one, was not constitutionally defective. It contained all the essential elements of the crime of second-degree child molestation. The State in this case was not relieved of proving every element of

the crime of child molestation in the second degree beyond a reasonable doubt. The only error was the upper end of the charging period.

The cases cited by petitioner in support of his argument that the decision below is in conflict with other reported cases do not support his argument. First of all, none of them dealt with the issue of the date of the offense. Granted, all of them contain a discussion of the requirement that an information must set forth all the essential elements of the crime, but none of them address the date of the offense (which, as demonstrated *supra,* is not an essential element).

For example, In *State v. Nonog,* 169 Wn.2d 220, 237 P.3d 250 (2010) the defendant was convicted of, among other things, interfering with domestic violence reporting. The defendant argued that the information was constitutionally defective because it did not specify the underlying domestic

violence crime the victim was attempting to report. This Court found the information constitutionally sufficient. *Nonog* at 231.

In *State v. Pry,* 194 Wn.2d 745, 452 P.3d 536 (2019) the defendant was charged by information with rendering criminal assistance, and simply cited to RCW 9A.76.070(1). As this Court put it, the defendant "was charged with 'rendering criminal assistance,' and the information told him this meant that he was charged with 'rendering criminal assistance.'" However, the information did not allege one or more of the various means of committing the crime of rendering criminal assistance as set forth in RCW 9A.76.050, which this Court found to be essential elements, citing to *State v. Budik,* 173 Wn.2d 727, 272 P.3d 816 (2012). Thus, this court found the information to be constitutionally deficient. *Pry* at 763.

And in *State v. Johnson*, 119 Wn.2d 143, 829 P.2d 1078 (1992) this court found the informations constitutionally insufficient for failure to allege the essential element of guilty

knowledge ("unlawfully" does not equate to "knowingly" in a drug delivery charge). *Johnson* at 150.

Petitioner claims that the Court of Appeals decision conflicts with this Court's decision in *Kjorsvik, supra*, but does not say how. The Court of Appeals noted that since the information was not challenged until after the verdict, it "must presume the information was sufficient and read the information in a commonsense manner and liberally construe its language." COA opinion, p. 16 (citations omitted). That being the case, the Court applied the two-part test adopted by this Court in *Kjorsvik,* 117 Wn.2d at 105-06: do the necessary facts appear in any form or by fair construction on the face of the information and, if so, can the defendant nevertheless show actual prejudice? The Court and held that the information in this case satisfied the two-part *Kjorsvik* test:

> Here, the information plainly contains the essential elements of the crime charged because it alleges Cheatum had sexual contact with MBC when MBC was "at least twelve (12) years old but less

> than fourteen (14) years old." CP at 1. This is an accurate statement of the facts supporting the age element of the crime charged, notwithstanding that the information also allege that the conduct occurred "on or between January 1, 205 and July 16, 2018." *Id.* Indeed, these two factual allegations do not conflict with one another – the clause stating MBC's age at the time of the molestation implies a narrower time period at which the criminal conduct could have occurred – and we read the information to apply common sense and to "include facts which are necessarily implied." *Kjorsvik*, 117 Wn.2d at 109. Here, the allegation that MBC was between 12 and 14 at the time of the assault satisfies the first prong of the *Kjorsvik* test.
>
> The second prong asks whether Cheatum "actually received notice" of the charges against him and whether this rendered him unprepared to defend against the charges. *Kjosrvik*, 117 wn.2d at 106. Cheatum makes no attempt to show a lack of notice or any other manner of actual prejudice to his defense. Nor can he, because the information informed him clearly of the charges he faced and the underlying factual allegations. Additionally, the information was accompanied by an affidavit of probable cause alleging that he touched MBC underneath her underwear when MBC was age 13.

COA opinion, pp. 16-17.

The information contained all essential elements of the crime of child molestation in the second degree and gave the Petitioner actual notice of the charges against him. The decision of the Court of Appeals is not in conflict with any decision of this Court nor published opinions of the Court of Appeals. Furthermore, the State would argue that while this ground raises constitutional issues, it does not present a significant question under either the state or federal constitutions, as it presents a question that has been raised and addressed several times by the courts of this state and is one of settled law.

The petition should be denied on this ground.

2. This Court should decline to accept review because the Court of Appeals correctly held that most of the objections made by the defense at trial did not preserve the issues for appeal and, nevertheless, Petitioner failed to demonstrate prejudice.

To preserve an error for consideration on appeal, a party must object to the error before the trial court. *State v. Leavitt*,

49 Wn. App. 348, 357, 743 P.2d 270 (1987), *aff'd,* 11 Wn.2d 66, 758 P.2d 982 (1988). The failure to do so waives the right to appeal the alleged error. *Leavitt* at 357. "[T]o preserve an error for appeal, counsel must call it to the trial court's attention so the trial court has an opportunity to correct it." *In re Det. of Strand,* 139 Wn. App. 904, 910, 162 P.3d 1195 (2007), *aff'd,* 167 Wn.2d 180, 217 P.3d 1159 (2009).

Furthermore, an appellant must make a specific objection in order to preserve an issue for appeal. *State v. Lile,* 193 Wn. App. 179, 205-05, 373 P.3d 247 (2016). "A party may assign error to the appellate court on only the specific ground of evidentiary objection made at trial." *Id.* An objection as to relevance does not preserve an ER 404(b) issue for review. *State v. Kendrick,* 47 Wn. App. 620, 634, 736 P.2d 1079 (1987). Neither does an objection that evidence is prejudicial. *State v. Fredrick,* 45 Wn. App. 916, 922, 729 P.2d 56 (1986).

As the Court of Appeals correctly pointed out, trial counsel never made an objection on 404(b) grounds and thus refused to consider it pursuant to RAP 2.5(a)(3). COA opinion, p. 20.

Petitioner misquotes the Court of Appeals decision when he chastises the court for holding "Cheatum did not object at trial or move to strike or move to strike [sic] . . .", as if this were some general observation about the whole trial. To the contrary, this was specifically related to the confrontation call that Cheatum's wife, Ms. Buckley, refused to make, that he raised for the first time on appeal. The Court of Appeals stated:

> Cheatum did not object at trial or move to strike on Fifth Amendment grounds any of the statements at issue. Cheatum objected to the testimony below on the ground that it was irrelevant, speculative and related to "privileges." VRP at 451. These objections were insufficient to afford the trial court an adequate opportunity to prevent or remedy the error Cheatum now complains of on appeal. Thus, we decline to review his challenge to the confrontation call testimony.

COA opinion, pp 20-21 (footnote omitted).

In fact, contrary to Petitioner's argument that "the Court of Appeals simply ignored the trial court's refusal to sustain the objections," Petition, p. 12, the Court of Appeals addressed each of Petitioner's evidentiary issues in turn. COA opinion, pp 19-22. Petitioner has not shown how any of these holdings are in error.[1]

Petitioner also claims that the Court of Appeals "is of the opinion that if the evidence is not relevant to the issues, it cannot be prejudicial." Petition, p. 13. As with the evidentiary issues, the court below specifically addressed the issue of prejudice. COA opinion, pp. 22-23. Petitioner has not shown how any of these holdings are incorrect.

Once again, Petitioner cites several cases that he claims the decision below conflicts with *but does not explain how.* Petition, p. 6. For instance, *State v. Neal,* 144 Wn.2d 600, 30

[1] The State also addresses a number of the objections made at trial as well as the court's responses in section 3 below.

P.3d 1255 (2002), involved hearsay testimony of a lab technician regarding a lab test. *State v. Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008), was a case in which the prosecutor invited the jury to infer guilt from the defendant's invocation of his right to remain silent. Petitioner cites other cases as well. Simply citing cases in which evidentiary rulings were reversed, without more, is insufficient to support a petition for review.

The petition should be denied on this ground.

3. This Court should decline to accept review because Judge Edwards did not violate the appearance of fairness doctrine, as any objective observer would conclude that the Petitioner received a fair trial before an impartial tribunal.

Under the appearance of fairness doctrine, a judge must not be biased nor give the appearance of bias. *State v. Solis-Diaz*, 187 Wn.2d 535, 539-40, 387 P.3d 703 (2017). Judges enjoy a presumption of "honesty and integrity." *State v. Chambelin*, 161 Wn.2d 30, 38, 162 P.3d 389 (2007). "We presume that a judge acts without bias or prejudice." *In re*

Pers. Restraint of Swenson, 158 Wn. App. 812, 818, 244 P.3d 959 (2010) (citing *Jones v. Halvorson-Berg*, 69 Wn. App. 117, 127, 847 P.2d 945 (1993)). The party asserting a violation of the appearance of fairness doctrine must make a showing of a judge's actual or potential bias sufficient to overcome this presumption. *Solis-Diaz*, 187 Wn.2d at 540. " 'Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties received a fair, impartial, and neutral hearing.' " *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995) (quoting *State v. Ladenberg*, 67 Wn. App. 749, 754-55, 840 P.3d 228 (1992)). There must be evidence of a judge's actual or potential bias. *Bilal*, 77 Wn. App. at 722.

Petitioner cites a number of incidents or rulings by Judge Edwards that indicate bias. He claims that Judge Edwards berated defense counsel in front of the jury for objecting.

Petition, p. 15, referencing 10/05/22 RP 452. The exact exchange was:

DEFENSE: Your honor, this is improper questioning.

COURT: Mr. Fricke, you've made the same objection several times and I've overruled it.

DEFENSE: I know. But I've got to make it each question.

COURT: You have an objection to this line of questioning. [To the witness] You may answer the question.

DEFENSE: So I have a standing objection.

COURT: [To the prosecutor] Complete your question.

10/05/22 RP 452. However inartfully phrased, Judge Edwards was merely recognizing that defense counsel did, in fact, have a standing objection to the State's line of questioning. When Mr. Fricke stated "[s]o I have a standing objection," while the court did not "answer" as if it were a question, neither did the court disagree or correct defense counsel. The record indicates that

the judge and counsel were "on the same page" on the standing objection issue.

Petitioner claims that on another occasion Judge Edwards "expressed dismay" at counsel's objections. Petition, p. 15, referencing 10/05/22 RP 137. The judge did no such thing:

DEFENSE: Your Honor – I object.

COURT: You've already objected, Mr. Fricke. I already overruled it.

DEFENSE: All right.

10/04/22 RP 137. A judge pointing out that he has already overruled a stated objection is hardly expressing dismay.

Petitioner also claims that Judge Edwards "interjected himself into the trial by giving the prosecution theories on how to get certain evidence admitted," Petition, pp. 15-16, referencing 10/04/22 RP 163, although it is difficult to see how the record cited by Petitioner supports this argument:

DEFENSE: Your Honor, it's going – it's based on hearsay, so I would object.

COURT: Overruled. I will allow him to answer.

WITNESS: So based on my training and experience that I have with Mackenzie . . .

DEFENSE: Your Honor, see, that goes to the general nature of it. So I have the same objection as leading to the other objections.

COURT: I don't know how you know that. He hasn't answered the question.

DEFENSE: That's what I'm trying to prevent, Your Honor.

COURT: You may continue your answer.

[Witness continues to answer]

DEFENSE: Your Honor, that calls for speculation.

COURT: Overruled.

10/04/22 RP 163-64.

Petitioner also argues that the court admitted evidence in violation of ER 404(b) without conducting the requisite balancing test, although he does not cite to the record in his petition. Petition, p. 16. It appears that this argument is in reference to testimony that petitioner provided alcohol to

minors and commented on victim MBC's body and clothes. Decision below, p. 21. As the Court of Appeals correctly observed, he did not object to this testimony on the basis of ER 404(b), but only on the ground of relevance. The court therefore declined to rule on the issue pursuant to RAP 2.5. *Id.* This Court should do the same.

Petitioner cites *State v. Ra,* 144 Wn. App. 688, 175 P.3d 609 (2008) in support of his position. Petition, pp. 14-15. None of the examples cited by Petitioner herein indicate bias on the part of Judge Edwards, and the facts in *Ra* were extreme and are in no way comparable to what happened in this case:

> We agree with Ra that the trial court's comments suggesting that Ra was "some distorted character who breeds and lives violently," RP at 829, and scolding him for apparently nodding "as if you are agreeing with me," RP at 847, were inappropriate, "[did] not show proper restraint[,] and should not have been made." Moreover, we find inappropriate the trial court's proposal of theories for the State to use in admitting improper ER 404(b) evidence. A trial court should not enter into the "fray of combat" or assume the role of counsel. Finally, the trial court's evident and

> potentially undue concern for the victim's war record is troubling.

Ra at 705 (citations omitted). Even given the foregoing, the court did not decide the issue of whether the trial court's "appearance of partiality" warranted reversal in and of itself:

> Because we reverse for admitting the gang evidence, we need not consider whether the trial court's appearance of partiality alone would warrant reversal. But on remand, we direct that the case be assigned to another judge.

Id.

Out of approximately 446 transcript pages of testimony and argument, Petitioner cites to three or so innocuous rulings on objections as objective evidence that Petitioner did not receive a trial before a fair, impartial and neutral magistrate.

Petitioner also cites *State v. Post*, 118 Wn.2d 596, 826 P.2d 172 (1992). However, *Post* addressed the appearance of fairness doctrine in the context of a community corrections officer preparing a pre-sentence report, not a judge. It does not apply, nor does it support Petitioner's argument.

The petition should be denied on this ground.

CONCLUSION

Petitioner has not demonstrated how the decision of the Court of Appeals in this case is in conflict with a decision of this Court or with a published Court of Appeals decision, RAP 13.4(b)(1) & (2), or how it presents a significant question under either the state or federal constitution as required by RAP 13.4(b)(3). "Parties raising constitutional issues must present considered arguments to this court." *Johnson,* 119 Wn.2d at 171.

Petitioner cites cases for general legal propositions, but that do not apply based on their facts, and without legal argument. Appellate courts do not consider claims unsupported by argument or citation to legal authority. *Cowiche Canyon Conservancy v. Bosley,* 118 Wn.2d 801, 809, 828 P.2d 549 (1992). The burden is on a petitioner to demonstrate how a

petition for review satisfies the requirements of RAP 13.4(b); not on the State to show that it does not.

The information in this case was constitutionally sufficient. The date of offense is not an essential element of second-degree child molestation as its specification is not necessary to establish the very illegality of the offense. *Brooks, supra*, 195 Wn.2d at 97 (citing *Goss, supra*, 186 Wn.2d at 379). The Court of Appeals correctly applied the two-part *Kjorsvik* test.

The Court of Appeals correctly held that most of the objections made at trial were not preserved for appeal and that the Petitioner failed to demonstrate prejudice; i.e., that any error materially affected the outcome of the trial. COA opinion, p. 22.

The trial judge, Judge Edwards, did not violate the appearance of fairness doctrine.

"The constitution guarantees a defendant a fair trial, not a perfect trial." *State v. Silvers*, 70 Wn.2d 430, 434, 423 P.2d 539 (1967). Mr. Cheatum had a fair trial.

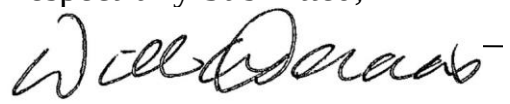
This petition does not satisfy the requirements of RAP 13.4(b).

For all the foregoing reasons, this petition must be denied.

This document contains 3883 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 3rd day of September, 2024.

Respectfully Submitted,



WILLIAM A. LERAAS
Deputy Prosecuting Attorney
WSBA # 15489

WAL /

GRAYS HARBOR COUNTY PROSECUTING ATTORNEY'S OFFICE

September 03, 2024 - 8:17 AM

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