

No. 43745-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent/Cross-Appellant,

vs.

**CHAD CHRISTENSEN,**

Appellant/Cross-Respondent.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent / Cross Appellant's Brief**

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred by failing to include Christensen's 2005 Unlawful Possession of a Firearm in the Second Degree conviction as part of his offender score in this case.
2. The trial court erred when it ruled Christensen's 2005 Unlawful Possession of a Firearm in the Second Degree conviction washed.

## **II. ISSUES**

- A. Did the trial court err when it ruled Christensen's 2005 conviction for Unlawful Possession of a Firearm in the Second Degree washed out and was not part of his offender score?
- B. Was Coleman's trial counsel ineffective in his representation of Coleman?

## **III. STATEMENT OF THE CASE**

EC<sup>1</sup> has four children, AB, who is 11 years-old, IB, who is nine years-old, Jakin, who is six years-old, and Hudson who is four years-old.<sup>2</sup> RP 291.<sup>3</sup> EC was living in Vancouver, Washington, when she became romantically involved with Christensen in August 2010. RP 293-94. EC had known Christensen her entire life. RP 292. EC moved back to Lewis County, Washington, in October 2010 and was living with Christensen in Chehalis while AB and IB

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<sup>1</sup> The State will refer to the victim, her sister and her mother by initials to protect the victim's identity. The other related witnesses, EC's sisters and Christensen's family members will be referred to by their first name for clarity purposes (and this is how they were referred to throughout the trial), no disrespect intended.

<sup>2</sup> The ages of the children are the ages they were at the time of the trial in June 2012.

<sup>3</sup> The verbatim report of proceedings contains six continuously numbered volumes.

lived with EC's parents in Onalaska during the week. RP 296. EC and Christensen moved to Onalaska with the children and were married a week later on December 11, 2010. RP 297, 310-11.

IB was born on September 12, 2002. RP 173. While Christensen was still living in his apartment in Chehalis he molested IB. RP 175-77. IB was lying on the couch in the living room of Christensen's apartment watching television. RP 176. IB was going to be sleeping on the couch that night. RP 175. Christensen came out to the living room and lay down on the couch behind IB. RP 175. Christensen grabbed IB's hand and stuck it down Christensen's pants and into his underwear. RP 175-77. IB's hand touched the skin of Christensen's penis and it felt squishy. RP 176; CP 199. IB was scared and disgusted. RP 177. Christensen took IB's hand out of his pants and IB continued to lay there, in shock. RP 177-78.

The next morning AB woke up and walked into the bathroom and saw IB washing her hands. RP 266. AB asked IB what she was doing. RP 266. IB told AB she was washing her hands. RP 266. AB asked IB why she was washing her hands and IB replied "because Chad (Christensen) made her touch his dick." RP 266. IB was not her normal silly, goofy, crazy self but instead was very serious. RP 267. IB was washing her hands because she "could still feel it." RP

178. AB told IB that they needed to tell their mom what happened. RP 267. IB told EC that Christensen had her touch his penis and it was gross. RP 300-01. IB was crying as she told her mom what had happened. RP 268, 300.

EC was unsure what to think about what IB had told her. RP 302. EC did not want to believe the allegation was true. RP 335. EC confronted Christensen with what IB told her had happened. RP 302. Christensen made an awful face and said he did not do anything to IB. RP 303. Christensen suggested perhaps someone else had inappropriate contact with IB and she was “transposing” that person’s actions on Christensen. RP 303. EC loved and trusted Christensen. RP 302. EC decided to marry Christensen even though IB had told her about the molestation. RP 309. EC’s marriage to Christensen took a turn for the worse in September 2011. RP 311. Christensen and EC had a big fight which ended in Christensen taking off his wedding ring and throwing it before leaving the property. RP 312; 430-32. Christensen told EC that he wanted to come back and apologize to the children for how he acted. RP 313. Christensen talked to IB and told her it was her fault that he could not come back home. RP 183, 313-14.

After thinking about IB's disclosure of Christensen's molestation, considering the consequences of reporting it and what IB would have to go through if the authorities were informed, EC decided it was best for IB if EC reported the matter to Child Protective Services (CPS). RP 315. EC called CPS and reported the incident that occurred in 2010. RP 315. Keith Sand is a social worker who investigates allegation of abuse for CPS. RP 252. Sand received a referral alleging sexual abuse of IB on October 11, 2011. RP 253. Sand went to Onalaska Elementary School and met with IB in the counselor's office. RP 253. IB told Sand she felt safe now because Christensen was gone. RP 255. IB did not want to tell Sand why she felt unsafe and agreed she would like to speak to a female about what had happened. RP 256. IB became uncomfortable, very fidgety and stumbled on her words when speaking about Christensen. RP 256-57. After meeting with IB Sand went and met with EC. RP 316. Sand suggested EC get IB into counseling and gave EC Sandra Ames' phone number RP 316.

Ronnei Jensen is a child abuse investigator for CPS and a child interviewer with Children Justice and Advocacy Center. RP 214. Sand requested Jensen speak with IB. RP 218. Jensen met IB on October 18, 2011. RP 218. Jensen's first impression of IB was that she was an articulate, very verbal, friendly little girl. RP 219. IB

was a normal, happy girl until Jensen asked IB why she wanted to talk to Jensen. RP 222. IB became withdrawn, quiet and reserved. RP 222. IB became more emotional, fidgety, put her head down and at one point had tears in her eyes. RP 223. IB asked Jensen for a piece of paper so she could write down what had happened. RP 224. On the piece of paper IB wrote that Christensen “went in bed with me and I was pretending to fall asleep and he grabbed my hand and took out his weiner [sic] and made my hand touch it and put it down his pants.” Ex. 2.<sup>4</sup>

Chehalis Police Detective Rick Silva interviewed Christensen on November 21, 2011. RP 350, 353; CP 212.<sup>5</sup> Prior to the interview Detective Silva did not discuss the allegations with Christensen. RP 353. Christensen denied the allegation and stated, “I never the whole time I was with [EC], I was never by myself with [IB]. CP 214. Christensen later admits he was on the couch with IB that evening but states nothing happened. CP 217-18.

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<sup>4</sup> State will be designating Exhibit 2 in a supplemental designation of Clerk’s papers.

<sup>5</sup> The stipulation among the parties regarding the transcripts from two interviews that were played for the jury, CP 180-224, has a scrivener’s error. The recorded statement of Christensen done by Detective Silva was Exhibit 7 (not 8 as it is stated in the stipulation) and the recorded statement of IB by Ronnei Jensen was Exhibit 8 (not 7 as it is stated in the stipulation).

The State charged Christensen with one count of Child Molestation in the First Degree. CP 1-3. The State later amended the information to include the special allegation of abuse of a position of trust. CP 34-36. The State also filed a Notice of Aggravating Factor for Purpose of Imposing Exceptional Sentence. CP 36. There were a number of pretrial motions including a child hearsay hearing, CrR 3.5 hearing and motions in limine. RP 1-147, 156-58; CP 63-66.

A jury trial was held in June 2012. RP 149. The trial lasted three days and both the State and Christensen called a number of witnesses to testify. RP 149-500. The State called IB, AB, EC, Jensen, Ames, Sand, Detective Callas, and Detective Silva. RP 173, 214, 231, 252, 258, 264, 290, 352. Christensen testified in his own defense and also called Chelsea Christensen, Janice Braden, Detective Callas and Rebekah Christensen to testify on his behalf. RP 358, 376, 414-15, 418.

There was contradictory testimony elicited from the State's witnesses and Christensen's witnesses. Chelsea, Christensen's sister, testified that EC had told her about IB's allegation of abuse in a phone conversation. RP 357-59. Chelsea stated EC told Chelsea that EC would make Christensen pay for leaving her. RP

363. Chelsea testified EC told her that she was going to try to stop Christensen from getting custody of his daughter. RP 363. EC testified that she never told Chelsea that IB accused Christensen of molesting her. RP 336. EC stated she did not tell Chelsea that she would make Christensen pay or that he should not have custody of his child. RP 347. EC testified she stopped talking to Chelsea in December after Christensen was arrested. RP 349.

Janice is EC's younger sister. RP 374. Janice testified that she used to have a fabulous relationship with EC and spent a lot of time with EC's children. RP 375-76. Janice stated EC told Janice in the fall of 2010, prior to EC's marriage to Christensen, that IB alleged Christensen had inappropriately touched her. RP 377-78. EC testified she did not tell Janice about the molestation. RP 336. EC stated she and Janice had a rocky relationship but acknowledged Janice did spend time with EC's children. 320-322. EC explained that Janice and EC had a fight and stopped speaking around January 2011. RP 319. According to EC, Janice called her a number of names including the family whore and told EC she was a terrible mother and did not deserve her children. RP 322. Janice admitted that she called EC a whore and she was not sorry for saying it. RP 395. Janice also admitted she did not think EC

deserves to be a parent, that EC is a terrible parent, she “screws” people over and gets away with everything. RP 395. Janice testified she chose to leave EC’s house but then later admits she was kicked out of it. RP 398-99.

Janice testified IB told Janice that she made up the allegation against Christensen. RP 379-80. Janice stated AB told her IB had lied about the molestation and it was not true. RP 383. IB testified she did not tell her Aunt Janice that the touching incident was not true. RP 209. IB also denied telling her sister, AB, that the touching incident was not true. RP 209. AB testified IB never told her that IB made up the touching incident or lied. RP 273. IB testified she never spoke to Aunt Janice about the touching incident. RP 273.

Christensen testified in his defense and said he never inappropriately touched AB. RP 427. Christensen admitted he and IB slept on the couch but insisted he slept in the recliner and IB slept on the couch next to him. RP 426.

The jury found Christensen guilty of Child Molestation in the First Degree. CP 115. The jury also found that Christensen used his position of trust to facilitate the commission of the crime. CP

116. The trial court sentenced Christensen to an exceptional sentence of 132 months. CP 148-151.

The State will further supplement the facts as needed throughout its argument.

#### **IV. ARGUMENT**

##### **A. THE TRIAL COURT ERRED WHEN IT CONCLUDED CHRISTENSEN'S 2005 UNLAWFUL POSSESSION OF A FIREARM CONVICTION WASHED AND COULD NOT BE INCLUDED IN HIS OFFENDER SCORE.**

The trial court incorrectly held that Christensen's 2005 conviction for Unlawful Possession of a Firearm in the Second Degree washed. The Unlawful Possession of Firearm in the Second Degree conviction should have been included in Christensen's offender score.

##### **1. Standard Of Review.**

A trial court's calculation of a defendant's offender score is reviewed de novo. *State v. Moerun*, 170 Wn.2d 169, 172, 240 P.3d 1158 (2010).

##### **2. Christensen's 2005 Conviction For Unlawful Possession Of A Firearm In The Second Degree Does Not Wash.**

In a sentencing hearing the State must prove a defendant's prior criminal convictions by a preponderance of the evidence.

*State v. Jackson*, 129 Wn. App. 95, 105, 117 P.3d 1182 (2005), citing *State v. Ross*, 152 Wn.2d 220, 230, 95 P.3d 1225 (2004); *State v. McCorkle*, 137 Wn.2d 490, 495, 973 P.2d 461 (1991). Illegal or erroneous sentences may be challenged for the first time on appeal. *Ross*, 152 Wn.2d at 229 (citations omitted). The remedy for an erroneous sentence is remand for resentencing. *Id.*

A prior conviction for a class C felony conviction “shall not be included in the offender score if, since the last date of release from any confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender ha[s] spent five consecutive years in the community without committing any crime that subsequently results in a conviction.” RCW 9.94A.525(2)(c). A sentencing court may consider information that has been admitted, acknowledged or proven at trial. RCW 9.94A.530(2).

Christensen was convicted of Unlawful Possession of a Firearm in the Second Degree on March 29, 2006. RP 505; CP 132, 150. Unlawful Possession of a Firearm in the Second Degree is a class C felony. RCW 9.41.040(2)(b). The five-year wash-out date was March 29, 2011. See RCW 9.94A.525(2)(c). The amended information filed in Christensen’s case and the to-convict

instruction list the date of the current offense as on or about and between September 12, 2009 and October 12, 2010. CP 34-35, 109. All of the testimony elicited in this case agrees that the touching incident occurred prior to EC's marriage to Christensen. RP 181, 269, 297, 309, 377-78, 419, 428. Christensen and EC were married on December 11, 2010. RP 297, 419.

The Supreme Court has previously held that because the period charged in an information included the effective date of a statutory amendment that altered the available punishment, the defendant was entitled to be sentenced under the most lenient version of the statute to avoid violating the ex post facto clause of both the United States and Washington Constitutions. *State v. Parker*, 132 Wn.2d 182, 191-2, 192 n14, 937 P.2d 575 (1997).<sup>6</sup> However, unlike the current case, "evidence was adduced that Parker had committed the acts at various times throughout the charging period" including evidence showing that Parker committed the acts before the increase in penalties. *Id.* at 185, 191. This factual distinction from Christensen's case is critical. While the jury

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<sup>6</sup> "Use of the increased penalties without requiring the State to prove the acts occurred after the effective dates of the increased penalties would violate the ex post facto clause of both the United States and Washington Constitutions."; "Unlike offender history which is proved at sentencing ..., when the crime was committed is a factual question which must be put to the jury."

in Christensen's case determined that the offense occurred in the charged period, the *only* evidence regarding the timing of the incident proved this occurred prior to the wash-out date. Therefore, in order to find Christensen guilty, the jury was required to find that the offense occurred prior to Christensen's marriage to EC.

This court should find that the uncontroverted testimony was that the molestation occurred prior to the five-year wash-out provision and therefore, pursuant to RCW 9.94A.525(2)(c), the conviction for Child Molestation in the First Degree is a crime committed within the time period that subsequently resulted in a conviction. This court should hold that Christensen's Unlawful Possession of a Firearm in the Second Degree conviction does not wash-out for sentencing purposes. This Court should remand this case for resentencing with a corrected offender score of seven.

**B. CHRISTENSEN RECEIVED EFFECTIVE ASSISTANCE FROM HIS TRIAL COUNSEL THROUGHOUT HIS TRIAL.**

Christensen's trial counsel provided competent and effective legal counsel throughout the course of the trial. Christensen asserts his trial counsel was ineffective for failing to object when the State repeatedly asked IB if she was telling the truth. Brief of Appellant at 15-19. Christensen also claims his trial counsel was ineffective when he failed to object to the State eliciting evidence that

Christensen was arrested. Brief of Appellant 20-25. Christensen's assertion that his counsel was ineffective is false. If, this Court were to find Christensen's trial counsel's performance was deficient, Christensen has not shown that he was prejudiced by his attorney's conduct and his ineffective assistance claim therefore fails.

### **1. Standard Of Review.**

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

### **2. Christensen's Trial Counsel Was Not Ineffective For Failing To Object To The State's Questions Asking IB If She Was Telling The Truth.**

To prevail on an ineffective assistance of counsel claim Christensen must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, citing *State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally

competent assistance.” *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney’s conduct is not deficient “where there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, 153 Wn.2d at 130.

If counsel’s performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice “requires ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

Washington State courts have consistently held that it is the province of the jury to determine credibility of witnesses. *State v. Walden*, 69 Wn. App. 183, 185-86, 847 P.2d 956 (1993). Witnesses are not generally permitted to express their opinion on whether another witness is telling the truth. *Walden*, 69 Wn. App. at 185. In this case Christensen is not arguing that IB improperly commented on another witness’ truthfulness, but that she improperly testified about her own truthfulness. Brief of Appellant 15-20. Christensen

asserts his trial counsel was ineffective for failing to object to this line of questioning by the State. Brief of Appellant 15-20.

A witness is necessarily stating that he or she is telling the truth the moment that witness takes the oath and agrees to tell the truth. In this case there was evidence presented by Christensen at the Child Hearsay hearing through Janice's testimony that IB had been untruthful when she told her mom that Christensen had molested her. RP 116, 119. There was also testimony offered by Rebekah at the Child Hearsay hearing that IB had a tendency to lie. RP 131. Both Janice and Rebekah were on Christensen's witness list for trial and were expected to testify, which they did. RP 158, 374, 415. Christensen now asserts that his trial counsel should have objected to the following exchanges:

Q: When you talked to your sister and mom that morning, did you tell them the truth about what happened?

A: Yes.

RP 180-81.

Q: Do you like going to talk to [Sandra Ames]?

A: Yes.

Q: Have you ever told her things about Chad?

A: Yes.

Q: The things you told your counselor Sandra, were those things you told the truth?

A: Yes.

Q. Were these thing you told Ronnei the truth?

A: Yes.

Q: Have you ever told anyone that you lied or made up anything about Chad?

A: No.

RP 187. There is nothing objectionable about this exchange. The deputy prosecutor is establishing that the witness who is testifying told a number of different people, four, an accurate version of the events that occurred.

Next, during cross-examination, Christensen's trial counsel asked IB if she told her Aunt Janice that the touching incident was not true, which IB denied. RP 209. Christensen's trial attorney also asked if she told AB that the molestation allegation was not true, which again, IB denied. RP 209. During redirect the deputy prosecutor and IB had the following two exchanges:

Q: Did your mom ever tell you what to say about Chad?

A: No.

Q: Has anyone ever told you what to say about Chad?

A: No. They just say tell the truth.

Q. Who told you that?

A: My grandma, my mom and so –

RP 211.

Q: Do you know the difference between a truth and a lie?

A: Yes.

Q: What happens if you tell lies at school?

A: You get in trouble.

Q: What happens if you tell lies at home?

A: I get in trouble.

Q: Do you know what it means to make a promise?

A: To keep it.

Q: So you understand when the judge had you raise your right hand, you were promising to tell the truth?

A: Yes.

Q: You understand that?

A: Yes.

Q. Is everything you told us here today the truth?

A: Yes.

RP 212-13. The first exchange establishes that no one was putting words into the child's mouth. The deputy prosecutor was not asking

if the child was truthful, but if anyone had told her what to testify about. It is important to establish, especially in molestation type allegations, that the victim's words are her own and that another party is not using her as a pawn for their own personal gain. The second exchange establishes that this young child, nine at the time, understand the importance of telling the truth and what was expected of her when she agreed to tell the truth. These exchanges also rebut the assertion made during cross-examination that IB told others that she was lying about the molestation claim.

Christensen's trial counsel was not deficient in his representation of Christensen for failing to object to these questions and answers. The questions were permissible and any objection would have been over-ruled. Further, it is an acceptable trial tactic for the attorney to not object to a witness asserting they are telling the truth because there is no harm to Christensen's defense by such assertions. IB was not testifying that she believed other witnesses' testimony was truthful. The line of cases Christensen cites to in his briefing all deal with situations where a witness is testifying regarding another person's truthfulness. Further, Christensen's assertion that *Reed* supports the statement that, "it is improper for the prosecutor to elicit evidence of any person's personal opinion about the credibility of **himself, herself,** or

another witness” is incorrect. Brief of Appellant 16, *citing State v. Reed*, 102 Wn.2d 140, 145, 684 P.3d 699 (1984) (emphasis added). *Reed* does not state that a person cannot testify that they are being truthful. *Reed*, 102 Wn.2d at 145. *Reed* states that a prosecutor cannot assert his or her personal belief in the accused’s guilt and cannot call the accused a liar. *Id.* This is vastly different than a witness asserting he or she is telling the truth.

Christensen’s trial counsel called a witness to rebut IB’s assertion that she did not tell anyone she was lying about the accusations she made about Christensen. RP 379-80, 383. Christensen received effective assistance from his trial counsel and his conviction should be affirmed.

**3. Christensen’s Trial Counsel Was Not Ineffective For Failing To Object When The Deputy Prosecutor Elicited That Christensen Was Ultimately Arrested.**

Christensen argues to this Court that his trial counsel was ineffective for failing to object to the following question and answer:

Q. Direct your attention to December 7, 2011: Did you make an arrest of the defendant on that day?

A: Yes, I did. He was taken into custody and booked into the Lewis County jail.

RP 353-54. Christensen reasons that the State was eliciting an improper expert opinion for Detective Silva that IB told the truth and Christensen lied and was guilty. Brief of Appellant 22-23. This is an absurd read of the facts, the testimony and law on this point. Christensen attempts to argue the State, by presenting its evidence in chronological order, was somehow attempting to place greater emphasis on the fact that Detective Silva arrested Christensen than merely that was the conclusion of the investigation. Brief of Appellant 23.

Witnesses are not allowed to testify regarding his or her opinion as to the guilt of a defendant. *State v. Black*, 109 Wn.2d 336, 348, 745 P.2d 12 (1987). This prohibition includes direct statements regarding guilt and inferences. *Black*, 109 Wn.2d at 348. "Improper opinion on guilty usually involve an assertion pertaining directly to the defendant." *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). Impermissible opinions on guilt have included an officer who was a canine handler testifying that his dog tracked the defendant's fresh guilt scent and a sexual assault counselor who testified that the alleged victim suffered from rape trauma syndrome. *Black*, 109 Wn.2d at 348-50; *State v. Carlin*, 40 Wn, App. 698, 700, 700 P.2d 323 (1985).

Detective Silva's testimony was not an impermissible opinion of Christensen's guilt. The deputy prosecutor did not ask Detective Silva to opine Christensen's guilt. See RP 353-54. The State did not elicit what facts led Detective Silva to determine Christensen must be placed under arrest or why Detective Silva arrested Christensen. RP 353-54. The answer to those types of questions would have been an impermissible opinion regarding Christensen's guilt. Christensen is on trial for molesting IB, the jury was read the information at the commencement of trial, which is the charging document from the State. RP 160; CP 34-35. The jury necessarily knows by common sense that most criminal charges begin with the arrest of the defendant. There was no reason for trial counsel to object because the answer to the question was not an impermissible opinion regarding Christensen's guilt and was not harmful to his client. Therefore, Christensen's trial counsel's performance was not deficient.

**4. If This Court Finds That Christensen's Trial Counsel's Performance Was Deficient, Christensen Has Not Met His Burden To Show He Was Prejudiced By Trial Counsel's Failure To Object.**

The State maintains that Christensen's trial counsel's performance was not deficient, *arguendo*, if this Court were to find trial counsel's performance deficient; Christensen has not met his

burden to show he was prejudiced. Christensen must show that but for trial counsel's errors in failing to object as raised above, the jury would not have found him guilty. See *Horton*, 116 Wn. App. at 921-22.

Christensen argues to this Court because this case is essentially a he said she said, with no physical evidence, that absent the objectionable testimony it is highly likely that the jury would have acquitted him. Brief of Appellant 26-27. This statement ignores the evidence that the State provided, absent the statements made by IB that she told the truth, that was more than sufficient to convict Christensen.

IB testified about the molestation. RP 176-77. IB told her sister, AB, the very next morning about the touching incident. RP 178. IB and AB told their mother, EC, about the touching that same morning. RP 179. EC confronted Christensen the same day IB told her about the touching incident. RP 302. Christensen even testified that EC questioned him about IB's allegation the day after IB said it happened. RP 428. IB told relatively the same details to Jenson and Ames, many months after the incident. RP 237; Ex. 2; CP 195-99. There was testimony about how IB's affect changed when speaking about the touching incident. RP 222-23, 256-57, 261-62.

The jury determines the credibility of witnesses. *Walden*, 69 Wn. App at 185-86. Christensen presented a number of witnesses, Janice, Chelsea, Rebekah and even testifying himself. Christensen was able to introduce through Janice that IB allegedly told her aunt that she lied about the touching incident. RP 379-80. Janice was able to impeach AB's testimony regarding a statement that AB had made, telling Janice that IB had lied about the allegation. RP 383. The State was able to elicit that Janice and EC were not getting along, that Janice was upset about being cut out of her nieces' and nephews' lives and Janice had called EC a number of names. RP 391-32, 395. Janice denied asking another sibling, Asia Perry, to bring the children over, without EC's knowledge or permission. RP 402. Perry testified that Janice did text her on two different occasions attempting to arrange to see EC's children, without EC's knowledge. RP 447-48. The State also brought to light that when Janice spoke to Detective Silva she never told him that IB told Janice she lied about the touching. RP 400.

Chelsea testified that EC was angry with Christensen for leaving EC and EC threatened revenge. RP 363. The State elicited from Chelsea that she had discussed the case with Christensen, Janice and other family members on multiple occasions. RP 367-

68. Chelsea also admitted she asked Janice to help with Christensen's case. RP 369.

There was ample evidence produced for the jury to find Christensen guilty. Also, the statement from Detective Silva that Christensen was arrested did not prejudice Christensen. The jury is aware Christensen is charged with Child Molestation in the First Degree. The jury was instructed that the charge is merely an accusation and Christensen remains innocent unless or until the State proves beyond a reasonable doubt Christensen is guilty. CP 102. The jury is presumed to follow the jury instructions. *State v. Emery*, 174 Wn.2d 741, 754, 278 P.3d 653 (2012).

Christensen had not met his burden of showing that absent his trial counsel's errors it is highly likely that the jury would have acquitted him. This Court should affirm Christensen's conviction.

**V. CONCLUSION**

This Court should remand Christensen's case for resentencing because the 2005 Unlawful Possession of a Firearm in the Second Degree does not wash-out. Christensen received effective assistance from his trial counsel and this Court should affirm his convictions.

RESPECTFULLY submitted this 3<sup>rd</sup> day of May, 2013.

JONATHAN L. MEYER  
Lewis County Prosecuting Attorney



by: \_\_\_\_\_  
SARA I. BEIGH, WSBA 35564  
Attorney for Plaintiff

# LEWIS COUNTY PROSECUTOR

**May 03, 2013 - 4:09 PM**

## Transmittal Letter

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Court of Appeals Case Number: 43745-7

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