NO. 46905-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

JEREMY THOMAS STEVENS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 13-1-01058-3

BRIEF OF RESPONDENT

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	Wayne C. Fricke Hester Law Group, Inc., P.S. 1008 South Yakima Ave, Suite 302 Tacoma, Washington 98405 Email: wayne@hesterlawgroup.com	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications, *or, if an email address appears to the left, electronically.* I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED July 27, 2015, Port Orchard, WA **Original e-filed at the Court of Appeals; Copy to counsel listed at left.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL COURT CASES

STATE COURT CASES

STATUTORY AUTHORITIES

ADDITIONAL AUTHORITIES

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the State presented sufficient evidence to convict the defendant of two counts of rape of a child in the second degree where the victim connected the rapes to the date of her birthday in sixth grade when she testified that she had turned 11 years old yet simple arithmetic based on trial testimony reveals she was mistaken and actually turned 12 years old in the sixth grade?

2. Whether the crime of rape of a child in the second degree requires the State to provide evidence of penetration in order to prove sexual intercourse occurred?

3. Whether the State provided sufficient evidence to convict the defendant of sexual exploitation of a minor where the defendant repeatedly encouraged the minors to "do stuff" and only ceased in his exhortations when told they had done it and one of the minors testified she was digitally penetrated by the other minor as a result?

4. Whether the State failed to make a proper election as to each charged act of criminal conduct where the to-convict instructions allowed for the statutorily prescribed time limits for the crimes charged but where the State identified each crime charged as related to a specific incident described in trial testimony and the jury was correctly and repeatedly instructed that they must unanimously agree that the specific

acts relied upon by the State were proven beyond a reasonable doubt?

5. Whether the State was relieved of proving the aggravating factor beyond a reasonable doubt where the jury was provided an instruction defining an ongoing pattern of sexual abuse but the special verdict form itself did not include this definition in asking the question?

I. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Jeremy Thomas Stevens was charged by information filed in Kitsap County Superior Court with two counts of rape of a child in the first degree, four counts of rape of a child in the second degree, one count of attempted child molestation in the third degree, and one count of sexual exploitation of a minor. CP 44-52. All of the counts involving rape of a child included a special allegation that the crimes in question involved the aggravating factor of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time. CP 44-52. The jury acquitted Stevens of the two counts of rape of a child in the first degree, one of the rape of a child in the second degree counts and the attempted child molestation in the third degree charge. CP 200-02. He was convicted on all other counts and the jury found that all 3 crimes of rape of a child in the second degree involved an ongoing pattern of sexual abuse contrary to RCW

9.94A.535(3)(g). CP 200-08.

Stevens was sentenced to an exceptional, indeterminate sentence on the rape of a child charges consisting of a minimum term of 320 months and a maximum term of life. CP 245-56. The basis for the exceptional upward sentence was the jury's finding of the aggravating circumstance of an ongoing pattern of sexual abuse. CP 259-60. He was sentenced to 120 months on the sexual exploitation of a minor charge, concurrent with the 320 month minimum terms on the rape of a child in the second degree charges. CP 247. He now appeals his convictions.

B. FACTS[1]

The defendant Jeremy Stevens met Shannon Chapman while both were still in junior high school. RP 221. They remained very close friends well into adulthood. RP 222-23. Shannon had a daughter, SMN, while in high school. RP 228. SMN was born on April 28, 1999. RP 170, 219-20, 352. Stevens first met SMN while she was a baby and he was a teenager. RP 176, 227-28. Shannon later married Sean Chapman and together they had a daughter, SC. RP 146, 219. Owing to the closeness of Mr. Stevens with the Chapmans, over time the defendant developed a "caring uncle type relationship" with SMN. RP 151, 236,

[1] These facts are written consistent with the jury's verdict in this case. Significant discrepancies in the accounts given by the witnesses at trial will be acknowledged either directly in the account itself or indirectly through footnotes.

612.

Mr. Stevens rented a trailer park home in Port Orchard that belonged to the Chapmans and Mr. Chapman's mother.[2] RP 159, 201-02, 223. Stevens often fell behind on his rent payments. RP 204-05. Stevens had a daughter named ES. RP 152. Stevens had periodic weekend visitation with ES and it was during these times that SMN would babysit ES for Stevens while he worked[3]. RP 153, 234. ES was about 10 years younger than SMN. RP 152, 189. During the time period in question, the Chapmans would socialize with the defendant and his family members several times per week. RP 225, 232. The Chapmans considered Mr. Stevens' father, Kerry, and stepmother, Sue, to be like a second set of parents to them. RP 150. There were frequent gatherings held at Kerry and Sue Stevens' home that included the Chapmans and their children, SMN and SC, the defendant and his daughter, ES, as well as the homes other occupants, Jeremy Stevens' sister and brother-in-law, Amanda and John Albaugh. RP 150, 182, 232, 237.

Following her birthday party in 2011, in an incident described in

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[2] This home was referred to as the Bielmeier road residence or Bielmeier residence throughout the trial and was the alleged location of the incidents charged in counts I, II, III, IV, and VI. It was also where the Chapmans and SMN were residing at the time of the trial.

[3] Mr. Chapman testified that SMN began babysitting ES when she was 12, Mrs. Chapman testified that she was about 11. RP 155, 168-69, 233.

more detail below, Jeremy Stevens first had sexual intercourse with SMN at the Bielmeier residence. RP 361-368. Approximately a little more than two weeks later, SMN was invited to spend the night at Stevens' residence in order to babysit his daughter. RP 372-74. Stevens had sex with SMN again that evening and they slept in the same bed together. RP 376-79. Thereafter SMN would regularly babysit ES at Stevens' residence and Stevens would regularly sleep with SMN and have sexual intercourse with her. RP 381-82. These sex acts with SMN continued until sometime in or shortly after August 2012.[4]

The Birthday Incident[5]

In 2011, the Chapmans had a birthday party for SMN at Chuck E Cheese in Silverdale to celebrate her 12th birthday.[6] RP 361. During the

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[4] SMN testified that the defendant had sex with her approximately 12 times per month until the last time the defendant had sex with her just before Thanksgiving in 2012. RP 382, 399, 407. This last instance of alleged sexual intercourse was presented to the jury as the pre-Thanksgiving incident related to the count of rape of a child in the second degree charged in count VI. The jury acquitted on this count but convicted on the act of intercourse related to the August 2012 fair incident.

[5] The eight counts charged against Mr. Stevens involved four separate and specific incidents and that is how they were presented to the jury during closing argument. RP 725-728, 746, 750, 777-778, 782-83. This section describes the actions charged at trial in count I (rape of a child in the first degree) and count III (rape of a child in the second degree). Two different degrees of rape of a child were charged in the alternative to account for this incident because of the uncertainty surrounding SMN's age at the time it occurred based on the trial testimony. The jury acquitted the defendant of count I and convicted him of count III. CP 200-01, RP (8/15/14) 3-4.

[6] SMN testified that this incident happened on her 11th birthday, however, this was contradicted by other statements made by SMN as to what grade she was in when this birthday occurred as well as by her stepfather's testimony as to her age when she first began babysitting for Mr. Stevens. RP 361, *Cf.* RP 410-12 [SMN previously stated it occurred during her birthday in seventh grade, at trial she was insistent it occurred during

party, Mr. Stevens asked SMN if she would like to come over to his house after the party to watch movies and stay overnight. RP 361. She asked her parents if that was alright and they agreed. RP 361. SMN's mother dropped her off at the Bielmeier residence after the party concluded. RP 361-62. SMN and the defendant ate dinner and watched a movie. RP 362. SMN went to bed around nine p.m. in Mr. Stevens' bedroom. RP 363. Mr. Stevens had led SMN to believe that he would be sleeping on the couch. RP 363.

At some point during the night, SMN awoke to find Mr. Stevens in bed with her. RP 364. He was rubbing her upper thigh which was what had awakened her. RP 364. After she awoke he removed the clothes she was wearing, threw them on the floor, and resumed rubbing her leg again.

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her birthday in sixth grade], RP 155, 168-69[SMN 12 years old when she started babysitting], RP 170, 219-20, 352, 414 [SMN's date of birth was 4/28/1999], 171 [SMN in seventh grade during 2011-2012 school year], RP 163, 186 [SMN began to "grow apart" from her parents in 2011, separating herself from them and wanted to spend more time with the defendant than with them]. Both SMN and defense counsel appeared confused as to what age she would have turned on the birthday that fell when she was in sixth grade. *See* RP 410-411. During the August 2014 trial, SMN was going into tenth grade that fall and had never skipped or repeated a grade. RP 170-171. Her father testified that SMN was in seventh grade during the 2011-2012 school year. RP 171. With a birthdate of 4/28/1999, SMN's 12th birthday would have occurred on 4/28/2011 which falls in the 2010-2011 school year when she would have been in sixth grade. So SMN was mistaken that she turned 11 during her sixth grade school year. If the birthday in question was the one she celebrated in her seventh grade year, a proposition that defense counsel attempted unsuccessfully to get her to agree with at trial, that would have occurred in April 2012 and she would have been 13 rather than 12. RP 410-412, 170-171, 352. SMN turned 11 on 4/28/2010 which would have been the 2009-2010 school year and she would have been in the fifth grade. By acquitting the defendant of count I and II but convicting the defendant of counts III and IV, the jury obviously rejected the assertion that she was under 12 years old when those incidents she described occurred. CP 200-02, CP 44-48, RP (8/15/14) 1-12.

RP 364. Stevens removed his shorts and climbed on top of her. RP 365. She told him "no" about three times but he remained undeterred. RP 365-66. He put his penis inside her vagina and had intercourse with her for about 15 minutes. RP 366. Stevens stopped by ejaculating onto a towel and then he left the room. RP 366.

After he left, SMN got up and went into the bathroom and put her clothing back on. RP 367. She returned to the bed and fell asleep after about an hour. RP 367. She awoke the next morning around 8:30 and made herself a bowl of cereal for breakfast. RP 367. SMN's mother picked her up around 10:30 that morning. RP 368. SMN was still shocked at what had happened to her at Mr. Stevens' residence and she was scared to say anything about it to anyone. RP 368.

The Babysitting Incident[7]

About two weeks later, SMN was called upon to babysit Mr. Stevens' daughter, ES. RP 369. She had eaten at Kerry and Sue Stevens' home. RP 370. She drove with Jeremy Stevens from the Stevens' home to Jeremy's Bielmeier road residence. RP 370, 373. She put ES to bed

[7] This describes the actions charged at trial in count II (rape of a child in the first degree) and count IV (rape of a child in the second degree). Two different degrees of rape of a child were charged in the alternative to account for this incident because of the uncertainty surrounding SMN's age at the time it occurred based on the trial testimony. The jury acquitted the defendant of count II and convicted him of count IV.

early and Mr. Stevens got ready for work. RP 370.[8] While Mr. Stevens was at work, SMN did schoolwork on her computer while babysitting ES. RP 371. ES played in her bedroom with her toys and watched a movie. RP 371. Mr. Stevens returned from work around 2:30-3:00 in the afternoon. RP 371. He went into his bedroom and took a shower while SMN continued to babysit ES. RP 371. Stevens then fixed himself something to eat and took a nap. RP 372. SMN's mother came and picked her up from Stevens' residence approximately two hours later. RP 372.

A few days later, SMN again went to babysit ES for Mr. Stevens while he was at work. RP 372-73. She had made plans to spend the night there with her parents' approval. RP 374. When Mr. Stevens returned from work around three p.m., he made dinner for SMN and ES and then they watched a movie together. RP 373-74. SMN went to bed around nine p.m. in Mr. Stevens' bed. RP 375. About two hours later, Mr. Stevens got into bed with SMN. RP 375-76. He was naked. RP 377-78. Stevens began rubbing her thigh and then he inserted a finger into her vagina. RP 376-77. After about five minutes, Stevens removed SMN's clothing and had penile-vaginal sexual intercourse with her. RP 378. Like

[8] SMN's trial testimony concerning this first uneventful babysitting stint was confusing. Initially she says it occurs in the evening but then SMN says Stevens returned from work around 2:30 or 3:00 in the afternoon. RP 370-371.

before, Stevens concluded the intercourse by ejaculating into a towel. RP 378. SMN retrieved her clothes, dressed, and went back to bed. RP 379. Stevens slept with her that night in the same bed. RP 379.

The Fair Incident[9]

In August 2012, Kerry and Sue Stevens' home was the site of a Scentsy wickless wax candle open house. RP 253-56. This was held in conjunction with Shannon Chapman and Amanda Albaugh working at a Scentsy product booth at the county fair the following day. RP 254, 260. SMS, then fourteen years old and a family friend of SMN and the Chapmans, was a guest at the event along with her mother at Shannon's invitation. RP 289, 301. SMN and SMS planned to spend the night at Kerry and Sue Stevens' home that evening so that they could go to the fair with Jeremy and his daughter the following day. RP 258-59. SMS' mother left the Stevens' home around seven p.m., leaving SMS to spend the night along with SMN. RP 303.

Jeremy Stevens arrived at his parents' home around 10 p.m. after umpiring a baseball game.[10] RP 192, 257-58. Shannon Chapman returned

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[9] This describes the actions charged at trial in counts v. (rape of a child in the second degree), VII (attempted child molestation in the third degree), and VIII (sexual exploitation of a minor). The jury acquitted defendant of count VII but convicted on counts v. and VIII.

[10] When the defendant arrived and how long he stayed at his parents residence on this particular evening was subject to a variety of conflicting testimony at the trial. The defendant and his family members testified that either they did not see him that evening

to her own home that evening with SC, leaving SMN and SMS to spend the night at the Stevens' residence. RP 258-59. At some point, Kerry and Sue Stevens retired to bed upstairs. RP 305, 388. Amanda Albaugh and her husband were also sleeping upstairs. RP 388. SMN and SMS were downstairs watching movies along with the defendant. RP 304-05, 388.

SMN and Jeremy Stevens were texting each other and looking at each other. RP 306. SMN then kept looking at SMS. The defendant asked SMS, "What do you know?" RP 306. SMS said she didn't know what he was talking about. RP 306. Stevens then made SMS promise she wouldn't tell anyone because he could have his daughter taken away from him. RP 307. He then told her that he and SMN had spoken about SMN's concern that her first time be with someone that she trusts. RP 307-08.

A little later in the evening, Jeremy Stevens went outside to smoke a cigarette and the girls followed him outside. RP 309, 390. Stevens and SMN began speaking about how SMN had never experienced oral sex being performed on her. RP 309. Stevens then told SMN to get on the ground and he would "eat her out." RP 310. Stevens asked SMS to make out with SMN while he performed oral sex on her in order to keep SMN quiet. RP 310. Stevens took off SMN's shorts and rubbed his tongue on

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or that he showed up briefly very late in the evening to pick up his daughter, ES, and left to return to his own home with ES. *Cf.* RP 304, 385, 387, 544, 547, 549, 579-581, 588, 609, 655-660.

the outside of her vagina. RP 310, 394. SMS kissed SMN while Stevens performed oral sex on her.[11] RP 310-311, 393-95. This went on for about five minutes or so before SMS received a phone call and went inside. RP 312. SMS was on the phone for about 30 minutes and the defendant and SMN were outside during that entire time. RP 312.

SMS went back out in the yard to find Stevens and SMN talking. RP 313. The three of them then returned to the house and the defendant poured himself a drink. RP 313. They sat down on the couch and SMN and Stevens began kissing.[12] RP 314. At some point they stopped kissing and Stevens said he was tired and needed to go to bed. RP 314. He went upstairs leaving the girls on the couch for about three minutes before coming back downstairs and telling them he was too horny to go to sleep. RP 314. Stevens leaned over the couch and began kissing SMN again. RP 315. SMN stopped at some point and told him it was late and they should all go to bed. RP 315. Stevens went back upstairs, leaving the girls downstairs on the couch. RP 315.

About ten minutes later Stevens returned downstairs saying he

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[11] The testimony of SMS and SMN was consistent on this point. Both testified Stevens' performed oral sex on SMN while SMS kissed SMN at defendant's request. SMS's testimony portrayed SMN as a much more willing participant in the conduct that occurred than did SMN's own testimony.

[12] It is at this point where SMS's testimony diverged from SMN's. SMN testified that nothing else occurred between her, the defendant, and/or SMS following the oral intercourse. RP 395-97, 427. The jury's verdict clearly favored SMS's account of what transpired.

wasn't tired, he was still horny and he wanted to be with the girls. RP 315. Stevens told the girls that they should "do stuff." RP 316. SMN and SMS went into the next room and SMN "fingered" SMS while Stevens was on the steps, watching. RP 316. SMS could see him while SMN was doing this to her. RP 316. Stevens came down from the stairs and said, "So you guys did it." RP 316. SMN responded, "Yeah." RP 316.

Stevens and SMN then got on the ground and Stevens said he wanted to have sex with SMN. RP 318. SMS said that would be awkward for her. RP 318. Stevens tried to persuade SMS to join in the sex with himself and SMN. RP 318. He told her, "It's okay. You know, it's just ... it's nothing bad." RP 318. SMS responded that his parents could wake up any time. He told her not to worry about that. Stevens then said, "[SMN] can eat you out while I do this to her." SMS kept saying no. They went back and forth for a little bit with Stevens saying, "Come on," and SMS responding, "No." RP 318. Finally, SMS went into the other room. SMN told Stevens, "We can't do this if [SMS] doesn't want to do it. I'm not going to leave her in there and us in here." RP 319. SMN and Stevens went into the room where SMS was and talked for a little while. RP 320. SMN and Stevens kissed some more before he finally went upstairs to bed. RP 320. SMN and SMS slept downstairs on the couch. RP 320.

The following morning, the defendant drove SMN, SMS, and his daughter, ES, to the fair. RP 321. While at the fair, SMN was upset because Stevens wasn't giving her the attention that she wanted. RP 321. SMS spoke with Stevens about this concern and he told her that he needed to spend the time with his daughter because he didn't get a lot of time with her. RP 321. SMS and SMN left the fair with SMN's parents, Sean and Shannon Chapman. RP 322.

Disclosure and Trial

Between Thanksgiving and Christmas in 2012, SMN told SMS's parents that SMS had smoked cigarettes. RP 159, 238, 323-24. SMS's mother confronted SMS about this and SMS became upset. RP 324. SMS told her mother, "I know a lot of stuff about [SMN] and I don't go tell Sean and Shannon. At least I don't have sex with my 30-year old uncle." RP 324. SMS' mother then called Shannon Chapman on the phone and relayed what she had been told by SMS. RP 241. Shannon contacted Sean and they both went over to Kerry and Sue Stevens' residence to discuss the accusation. RP 161-62, 242-44. Some time after, Sean and Shannon discussed the accusation with SMN. RP 163, 244-45. SMN broke down crying. RP 163, 244-45.

Initially the Chapmans decided not to go to the authorities. RP 167-68, 248. This was out of some concern that it would be better for

SMN if they did not do so as well as a threat they had received from the defendant's father, Kerry Stevens. RP 168, 267, 281. In April 2013, SMN approached her school counselor and disclosed what the defendant had done with her. RP 125-26. At the time, SMN was in the eighth grade. RP 126. The school counselor contacted law enforcement and CPS. RP 125. Law enforcement began an investigation that culminated in Jeremy Stevens being arrested and charged in May 2013. RP 629. When interviewed by a detective, Stevens told the detective that SMN had come on to him. RP 470, 683.

At Stevens' trial, Shannon Chapman testified that on a camping trip in 2012, the defendant got upset because the Chapmans refused to allow SMN to share a tent with him. RP 226, 253. SMS testified that she first recalled an unusual incident involving the defendant at the apartment he lived in prior to moving to the Bielmeier residence. RP 295-300. SMN and SMS spent the night at Mr. Stevens' apartment in his daughter's room. RP 297. At some point during the night he came in to the girls' room and told them that the song they were listening to was sexual in nature. RP 299. While he was in the room, he placed his hand on SMN's thigh. RP 299-300.

During SMN's testimony, numerous electronic communications between the defendant and SMN were introduced. RP 438. Many of the

messages were graphically sexual in nature. RP 453-55. Stevens describes a number of sex acts that he would like to perform on SMN. RP 453-54. In another message Stevens instructed SMN: "And delete these messages as soon as you write them and read them. Your mom has the password." RP 452. The communications were from between January 1, 2012, through November 22, 2012. RP 448, 457. Stevens testified that he did not recall sending the messages but allowed that it was possible that he could have sent them. RP 663, 673-74.

Mr. Stevens testified at trial. RP 625-686. He denied ever having any sexual relationship with SMN or SMS. RP 626. He testified that he had an affair with Shannon Chapman between July 2011 and August 2012.[13] RP 629. He testified that he broke up the relationship and that Shannon Chapman was upset about it. RP 633. Stevens testified that he lived in the Bielmeier residence between October 2011 and May 2013.[14] RP 634. He testified that he only worked at Waste Management in July and August of 2012. RP 635. Mr. Stevens denied spending the night at his parents' home on the evening prior to the fair in August 2012. RP 660.

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[13] Shannon Chapman denied having an affair with the defendant. RP 282-283. She testified she had considered him to be like a brother to her. RP 222.

[14] SMN had testified that all of the instances of sexual contact with the defendant occurred when he lived at the Bielmeier residence with the exception of the fair incident at his parents' residence. RP 408.

He claimed to have stopped by only to pick up his daughter.[15] RP 657-661.

II. ARGUMENT

A. SUFFICIENT EVIDENCE WAS PRESENTED FOR THE JURY TO FIND THAT SMN WAS 12 YEARS OLD INSTEAD OF 11 YEARS OLD WHEN MR. STEVENS FIRST HAD SEX WITH HER.

Stevens argues that there was insufficient evidence to convict the defendant of counts III and IV because the victim testified she was 11 years old and in the sixth grade when the birthday and babysitting incidents occurred. This claim is without merit because not only does simple arithmetic based upon her trial testimony support the notion that she was actually twelve years old but other testimony also existed to support the jury's finding that she was 12 years old when the charged crimes occurred.

Due process requires that the State prove every element of a crime beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed. 2d 435 (2000); U.S. Const.amend. XIV, Wash.Const. art. I, § 3. "[T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be ... to determine whether the record evidence could reasonably support a finding

[15] This version of events was corroborated by his father's testimony. RP 588.

of guilty beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979). "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson*, 443 U.S. at 319 (emphasis in original).

"A claim of insufficient evidence admits the truth of the State's evidence and all reasonable inferences therefrom." *State v. Ehrhardt*, 167 Wn.App. 934, 943, 276 P.3d 332 (2012)(citing *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010)). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Determinations of credibility are for the trier of fact and are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)(citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). The appellate court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992).

SMN testified that she was 11 years old when Mr. Stevens first had sex with her. RP 361. She also insisted it occurred when she was in the

sixth grade. RP 410-11.[16] Based on the testimony presented, both of these facts could not be true.[17] It was not contested that SMN was born on April 28, 1999. RP 170, 352. This means she turned 11 years old in 2010 and 12 years old in 2011. At trial in 2014, she was 15 years old and going into the tenth grade in the fall. RP 220, 352, 354. She had never repeated or skipped a grade. RP 170-71, 220. Based on her birthdate, she would have turned 15 years old in the latter portion of her ninth grade year. It necessarily follows that she turned 14 in eighth grade, 13 in seventh grade, 12 in sixth grade, and 11 in fifth grade. This also comports with her step-father's testimony that she attended seventh grade in the 2011-2012 school year. RP 171. It follows from his testimony regarding her school years and her testimony regarding her age at the time of the trial that she turned 12 years old in the 2010-2011 school year when she was in the sixth grade.

Another point of reference for her age at the time of Mr. Stevens' first sex act with her was when she began babysitting for him. This was because SMN testified that the babysitting incident followed the birthday incident by approximately two weeks time. RP 369-379. SMN's mother

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[16] It is perfectly understandable that SMN would associate her age in sixth grade with 11 years old given that she would have been 11 years old for all but the last month and a half of the school year given because of when her birthday falls within the school year.

[17] Defense counsel appears to have labored under the same mistake. RP 411 [Question he asks SMN asserting that her birthday in seventh grade would have been her 12th birthday].

testified that she believed SMN was about 11 years old when she began babysitting for Mr. Stevens. RP 233, 235. SMN's step-father, on the other hand, testified that he believed she was 12 years old when she began babysitting. RP 155, 168-69.

The defendant's argument here resembles one in an earlier case decided by this court where the defendant did not challenge the adequacy of the *Petrich* instruction but instead argued the evidence's lack of specificity rendered the jury's task impossible. *State v. Brown*, 55 Wn.App. 738, 885, 780 P.2d 880 (1989). The court's discussion is instructive as to the difficulties inherent in identifying reference points to time in child sex abuse cases:

> Particularly when the accused resides with the victim or has virtually unchecked access to the child, and the abuse has occurred on a regular basis and in a consistent manner over a prolonged period of time, the child may have no meaningful reference point of time or detail by which to distinguish one specific act from another. The more frequent and repetitive the abuse, the more likely it becomes that the victim will be unable to recall specific dates and places. Moreover, because the molestation usually occurs outside the presence of witnesses, and often leaves no permanent physical evidence, the state's case rests on the testimony of a victim whose memory may be clouded by a blur of abuse and a desire to forget.
> ...
> In cases where the accused child molester virtually has unchecked access to the victim, neither alibi nor misidentification is likely to be a reasonable defense. The true issue is credibility. Brown's defense was not alibi or misidentification, but complete denial, coupled with an attack on Tammy's credibility. The jury's task was to decide who was telling the truth, the defendant or the

> victim. In light of the fact that the jury *was* instructed that its verdict must be unanimous as to the offense relied on for conviction, we do not think more specificity in testimony was necessary for the jury to reach a proper verdict. Tammy described the defendant's conduct in clinical detail, including the time of day and room in which it usually occurred, and the physical positions assumed by each. Her testimony sufficiently described a single episode for each offense, which was repeated as part of a pattern of abuse.

State v. Brown, 55 Wn.App. 738, 885-86, 780 P.2d 880 (1989)(internal citations omitted). SMN was specific as to what the defendant did to her, her only confusion surrounded her age at the time it started. Moreover, Mr. Stevens' defense relied on complete denial and casting aspersions on SMN's and SMS's credibility. RP 626, 784. The jury's task was to determine who was telling the truth, including the truth about her likely age at the time. In this regard, there was sufficient testimony provided to the jury for it to determine that she was 12 years old when the abuse started.

SMN's age at the time that Mr. Stevens first raped her, based upon the contradictory testimony, was a question of fact for the jury. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992). The State properly charged Mr. Stevens in the alternative with both rape of a child in the first degree and rape of a child in the second degree depending upon which age the jury found SMN to be at the time of the act. CP 44-47, 200-01. The jury's

task was essentially two-fold: first, determine whether it believed SMN beyond a reasonable doubt that the defendant had sexual intercourse with her during the specific incidents described and second, if it did believe SMN's account, decide whether the evidence proved she was 11 or 12 years old at the time.

The jury could have rejected SMN's insistence that the birthday incident occurred when she was in sixth grade and instead relied on her testimony that she was 11 along with her mother's testimony that she began babysitting for the defendant at age 11 to convict the defendant of rape in the child in the first degree. Or the jury could credit SMN's persistent testimony that this occurred in the sixth grade and her father's testimony that she was 12 years old when she started babysitting, along with the fact that the testimony indicated she was in the sixth grade in the 2010-2011 school year when she would have turned 12 years old based upon her birthdate, and concluded that she must have been 12 years old at the time of the rape. The jury opted for the latter result, acquitted Mr. Stevens of the first degree child rape accusations and convicted him of the second degree child rape charges. CP 200-01. It was entirely within the jury's province to do so as the finder of fact.

B. ORAL SEX CONSTITUTES SEXUAL INTERCOURSE REGARDLESS OF WHETHER PENETRATION OCCURS UNDER RCW 9A.44.010(1)(C).

Stevens next claims that evidence of penetration is required to convict someone of rape of a child in the second degree. This claim is without merit because the plain language of the statute clearly states otherwise as does the jury instruction given in the instant case and cited by defendant in his brief. RCW 9A.44.010(c), *cf.* CP 176, App.'s Br. at 12.

The crime of rape of a child in the second degree requires that a defendant have sexual intercourse with a minor who is at least twelve years old but less than fourteen, not be married to the defendant, and that the defendant be more than 36 months older than the minor. RCW 9A.44.076. Sexual intercourse is defined in relevant part in RCW 9A.44.010:

> "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and
>
> (b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and
>
> (c) Also means any sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

RCW 9A.44.010(1). Subparagraph (c) makes clear that sexual contact

between persons involving the sex organs of one person and the mouth of another constitutes sexual intercourse regardless of whether penetration occurs. In the instant case, Mr. Stevens had oral intercourse with SMN by rubbing his tongue on her vagina. RP 394. Because she was less than fourteen but older than twelve and not married to Mr. Stevens, who was in his late twenties, Mr. Stevens' act of performing oral sex upon SMN constituted the rape of a child in the second degree.

C. SUFFICIENT EVIDENCE WAS PRESENTED THAT MR. STEVENS INVITED AND ENCOURAGED A MINOR TO ENGAGE IN SEXUALLY EXPLICIT CONDUCT WITH ANOTHER.

Stevens next claims that there was insufficient evidence of causation to prove that the defendant caused the minor to engage in sexually explicit conduct. This claim is without merit because the testimony presented indicated that one minor had sexual intercourse with the other minor using her finger only after both were told that the defendant was horny, he encouraged them to "do something" and this followed an instance where the defendant had already performed a different sex act on one of the minors in the presence of the other.

SMS testified that Stevens told SMN and SMS that they should

"do stuff" together.[18] RP 316 This followed shortly after an episode in the backyard where Stevens had oral sex with SMN while directing SMS to kiss SMN in order to keep her quiet while he had sex with her. RP 309-12. It was also immediately preceded by Stevens repeatedly telling the girls he was "horny" and "couldn't go to bed." RP 314-15. SMN and SMS went into the adjacent room and SMS testified that "she fingered me while Jeremy was on the steps, watching." RP 316. SMS testified that he was there when it happened and that she could see him while it was occurring. RP 316. Mr. Stevens then said, "So you guys did it." RP 316. SMN answered, "Yeah." RP 316. Immediately following this, he tried to enlist SMS in a threesome by asking her to let SMN perform oral sex on her while he had sexual intercourse with SMN. RP 318.

The sexual exploitation of a minor statute requires that the defendant "aids, invites, employs, authorizes, or causes a minor to engage in sexually explicit conduct, knowing that such conduct will be photographed or part of a live performance." RCW 9.68A.040. The defendant appears to argue that the evidence was insufficient for the jury to find this occurred because SMN denied it occurred and SMS had stated in an interview prior to her trial testimony that the defendant had not been present at the time of the contact. App.'s Br., 13-14. Credibility issues

[18] "...he said that [SMN] and I should do stuff." RP 316.

are for the trier of fact, however, and the defendant had the opportunity to cross-examine SMS and SMN regarding the discrepancy at trial. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992); RP 330-331, 427.

The Supreme Court has held that the sexual exploitation of a minor statute requires that there be some evidence in the record that the defendant "aided (supported or helped), invited (requested or induced), employed (hired or used), authorized (empowered or gave a right) or caused (brought about, induced, or compelled) [the minor] to engage in sexually explicit conduct." *State v. Chester*, 133 Wn.2d 15, 23, 940 P.2d 1374 (1997). Viewing the evidence in the light most favorable to the prosecution, Mr. Stevens clearly invited the sexually explicit conduct that occurred between SMS and SMN. Arguably he caused it as well but it is enough that he requested it. *Chester*, 133 Wn.2d at 23. That he did not specify with precision exactly what he wanted them to do should not alter the analysis where it is clear from the overall context of defendant's prior actions and statements that evening that he desired the minors to do something sexual in nature. RP 309-12, 316.

This court had occasion to examine the sexual exploitation of a minor statute in 2011. *State v. Stribling*, 164 Wn.App. 867, 874, 267 P.3d 403 (2011). In a case where a minor had been invited by the defendant to

take or send nude photographs but she refused to do so, the court held that the statute required that an actual photograph be taken or an actual live performance of the sexually explicit conduct occur. *State v. Stribling*, 164 Wn.App. 867, 876, 267 P.3d 403 (2011). Based on the minor's refusal to send the defendant any nude pictures, this court held there was insufficient evidence to convict the defendant of sexual exploitation of a minor under RCW 9.68A.040(1)(b).

In the instant case, unlike the situation in *Stribling*, SMS testified that sexually explicit conduct occurred while Mr. Stevens observed it happening. RP 316. Again, viewed in the light most favorable to the prosecution, it can't be said that no rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 2781, 61 L.Ed. 2d 560 (1979). There was sufficient evidence that Mr. Stevens invited SMS and SMN to engage in sexually explicit conduct while he observed based upon the jury crediting SMS's testimony over SMN's.

D. THE "TO-CONVICT" INSTRUCTIONS IN COUNTS III, IV, AND V. CORRECTLY STATED THE LAW BECAUSE TIME IS NOT AN ESSENTIAL ELEMENT OF RAPE OF A CHILD AND THE STATE'S ELECTION AND JUDGE'S INSTRUCTION TO THE JURY REGARDING THAT ELECTION WAS PROPER.

Stevens next claims that the "to-convict" instructions for counts III, IV, and v. incorrectly stated the law when they did not specify a specific date within the statutorily authorized time frame for the crime. This claim is without merit because time is not an essential element of rape of a child and the State properly elected four descriptively specific incidents and the jury was properly instructed they had to be unanimous as to the occurrence of the specific incident in order to convict the defendant of crime in that particular instance.

Time is not an element of the crime of rape of a child. *State v. Hayes*, 81 Wn.App. 425, 433, 914 P.2d 788, *review denied*, 130 Wn.2d 1013 (1996). "The State need not fix a precise time for the commission of the offense when it cannot intelligently do so." *State v. Carver*, 37 Wn.App. 122, 126, 678 P.2d 842 (1984)(citing *State v. Pitts*, 62 Wn.2d 294, 299, 382 P.2d 508 (1963)) Specifics regarding date, time, place, and circumstance are factors regarding credibility and are not necessary elements to sustain a conviction. *State v. Hayes*, 81 Wn.App. 425, 437, 914 P.2d 788, *review denied*, 130 Wn.2d 1013 (1996). Instead, the

evidence need only be specific as to the type of act committed, the number of acts committed, and the general time period. *Id.* It is up to the trier of fact to determine whether the testimony of the alleged victim is credible on these basic points. *Hayes*, 81 Wn.App. 425 at 438. "The test is whether the lack of specificity is prejudicial to the defendant." *State v. Carver*, 37 Wn.App. 122, 126, 678 P.2d 842 (1984)(citing *State v. Pitts*, *supra*; *State v. Long*, 19 Wn.App. 900, 903, 578 P.2d 871 (1978)).

To convict a criminal defendant, a unanimous jury must conclude that the criminal act charged has been committed. *State v. Petrich, 101 Wn.2d* 566, 569, 683 P.2d 173 (1984), *modified in part by State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988). In cases where several acts are alleged, any one of which could constitute the crime charged, the jury must unanimously agree on the act or incident that constitutes the crime. *Kitchen*, 110 Wn.2d at 411; *Petrich*, 101 Wn.2d at 572. In such "'multiple acts' cases, Washington law applies the 'either or' rule: "[E]ither the State must elect the particular criminal act upon which it will rely for conviction, or ... the trial court [must] instruct the jury that all of them must agree that the same underlying criminal act has been proven beyond a reasonable doubt."" *State v. Hayes*, 81 Wn.App. 425, 430-31, 914 P.2d 788, *review denied*, 130 Wn.2d 1013 (1996)(alteration in original)(quoting *Kitchen*, 110 Wn.2d at 411).

The trial court's failure to give a *Petrich* instruction when needed is presumed prejudicial. *State v. Bobenhouse*, 166 Wn.2d 881, 893, 214 P3d 907 (2009); *State v. Coleman*, 159 Wn.2d 509, 512, 150 P.3d 126 (2007). In multiple acts cases, "when the State fails to elect which incident it relies upon for the conviction or the trial court fails to instruct the jury that all jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt," the court will find this error harmless "only if no rational trier of fact could have entertained a reasonable doubt that each incident established the crime beyond a reasonable doubt." *State v. Kitchen*, 110 Wn.2d 403, 405-06, 756 P.2d 105 (1988).

The State charged Stevens in counts I and II with rape of a child in the first degree. CP 44-45. The State charged Stevens in counts III and IV with rape of a child in the second degree. CP 46-47. The incident dates for count I and II charged the defendant with committing the crime on or between April 28, 2010 and April 27, 2011. CP 44-45. The incident dates for count III and IV charged the defendant with committing the crime on or between April 28, 2011 and April 27, 2013. CP 46-47. The jury could convict the defendant of counts I and II only if it found that SMN was between 10 and 11 years old at the time of the sexual intercourse. This was done, as explained in detail above, to account for

the discrepancy in testimony regarding SMN's age at the time Mr. Stevens' first raped her.

The State clearly elected the particular criminal acts for which it relied on a conviction: the birthday incident, the babysitting incident, the fair incident, and the pre-Thanksgiving incident. RP 725-728. The jury was given the following instruction by the trial court:

> In alleging the defendant committed the crimes of Rape of a Child in the First Degree and/or Rape of a Child in the Second Degree, the State relies upon evidence regarding a single act constituting each count of Rape of a Child in the First Degree and/or Rape of a Child in the Second Degree. To convict the defendant on any count of Rape of A Child in the First Degree and/or Rape of a Child in the Second Degree you must unanimously agree that this specific act was proved.

CP 174. This instruction was based on 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 4.26 (3d ed. 2014)(WPIC). The prosecutor was explicit when arguing to the jury:

> These four incidents here, okay, these are separate and distinct defined incidents. I want to be clear about what they pertain to. The birthday incident pertains to count 1 or count 3. And again, that's based – if you decide unanimously that the incident occurred, okay, if you decide unanimously that [SMN] was 11 at the time of the incident, you will convict on count 1. If you decide that it occurred, and you decide unanimously that [SMN] was older at the time of the incident, she was 12, you will convict on count 3. So it's 1 or 3. The baby-sitting incident pertains to count 2 or 4, same analysis for that. The fair incident, that pertains to count 5. Pre-Thanksgiving incident, that also

> pertains to count 5. (*Sic*) And this is important, "or." Remember that on these. It's Count 1 or 3 for the birthday incident, Count 2 or 4 for the baby-sitting incident, based on what age you find [SMN] was at the time of the offense.

RP 746-47. He corrected his error regarding the pre-Thanksgiving incident almost immediately, stating:

> So I just changed that. The fair incident pertains to count 5. The pre-Thanksgiving incident pertains to count 6, just to clarify that.

RP 747. The State made a proper election and the prosecutor was specific as to what distinct incidents of the defendants' conduct he wanted the jury to examine for criminal wrongdoing.

The jury had two questions relating to these counts. In the first it asked whether counts III, IV, V, and VI corresponded to a specific incident and/or date, i.e. birthday, babysitting, fair and pre-Thanksgiving. CP 163, RP 797-799. The court correctly answered the jury's instruction with "yes." CP 163, RP 798. They next asked whether count III referred to the April 28, 2011 birthday only. CP 210, RP 8/15/14 4-7. The court responded by telling the jury to refer to the answer provided to the jury previously that answered in the affirmative whether counts corresponded to specific incidents. CP 210, 163.

Ultimately the jury delivered verdicts acquitting on counts I and II, convicting on counts III, IV, and V, acquitting on count VI and VII, and

convicting on count VIII. CP 200-02. This mixed verdict suggests that the jury was able to correctly follow the court's instructions regarding the prosecution's decision to elect specific incidents. Had the jury convicted on counts I, II, III, and IV, then it would appear rather obvious they misunderstood the idea that counts I and II were alternatives to III and IV. That did not happen here. The jury also acquitted the defendant of the specific rape of a child pre-Thanksgiving incident allegation and one of three of the charges associated with the fair incident. It cannot be said on this record that the jury was improperly instructed or hopelessly confused.

Since time is not an essential element to rape of a child, the "to-convict" instructions charging a date range were appropriate, particularly given the conflicting testimony on her age at the time of the first sexual contact. *State v. Hayes*, 81 Wn.App. 425, 433, 914 P.2d 788, *review denied*, 130 Wn.2d 1013 (1996). The State properly elected four specific incidents and the jury was properly instructed it had to be unanimous as to each incident. *State v. Kitchen*, 110 Wn.2d 403, 411, 756 P.2d 105 (1988).

E. SPECIAL VERDICT FORM ASKING JURY TO FIND ONGOING PATTERN OF SEXUAL ABUSE WITH THAT TERM DEFINED IN A SEPARATE INSTRUCTION, IF ERROR, WAS HARMLESS BEYOND A REASONABLE DOUBT

Stevens next claims that the State was relieved of its burden of proof because the special verdict form itself did not set forth the complete definition for ongoing pattern of sexual abuse as stated in RCW 9.94A.535(3)(g). This claim fails because while the jury was not given the language of the statute in the special verdict form it was instructed on the definition in another instruction, however, even if it was error not to include the definitional language in the special verdict form this error was harmless beyond a reasonable doubt based on the facts of this case.

Automatic reversal is required when an omission or misstatement in a jury instruction "relieves the State of its burden to prove every element of a crime." *State v. Fehr*, 185 Wn.App. 505, 514, 341 P.3d 363 (2015)(quoting *State v. Brown*, 147 Wn.2d 330, 339, 58 P.3d 889 (2002)). "In this context, the term "every" means each and every; the error in a jury instruction requires automatic reversal only when the trial court fails to instruct the jury on *all* the essential elements of the offense." *Fehr*, 185 Wn. App. at 514. "Likewise, error in a special verdict form requires automatic reversal only when the trial court fails to instruct the jury on *all* the essential elements of the special verdict." *Fehr*, 185 Wn.App. at 514.

Jury Instruction 30 directed the jury to unanimously answer the special verdict questions associated with those counts no which they found the defendant guilty. CP 199. Jury Instruction 29 gave the following definition:

> An "ongoing pattern of sexual abuse" means multiple incidents of abuse over a prolonged period of time. The term "prolonged period of time" means more than a few weeks.

CP 197. This instruction mirrors 11A *Washington Practice: Washington Pattern Jury Instructions: Criminal* 300.16 (3d ed. 2014)(WPIC). The special verdict form then asked the following question:

> "Did the defendant, Jeremy Thomas Stevens, engage in an ongoing pattern of sexual abuse with the victim SMN?

CP 205-07.

The language omitted in the special verdict form that is found in the statute consists of the following:

> "... manifested by multiple incidents over a prolonged period of time."

See RCW 9.94A.535(g). If this language is considered to be an essential element of the aggravating factor of an ongoing pattern of sexual abuse, then the failure to include it would require automatic reversal. *State v. Fehr*, 185 Wn.App. 505, 514, 341 P.3d 363 (2015). If the court holds that the essential element is engaging in an ongoing pattern of sexual abuse

with the same victim and "manifested by multiple incidents over a prolonged period of time" merely defines what is meant by ongoing pattern then it would examine failure to include the language under the harmless error standard. *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

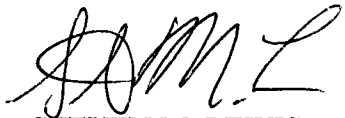
Here the jury's guilty verdicts are instructive as to whether this was harmless error beyond a reasonable doubt. The jury convicted Stevens of raping SMN on or about her 12th birthday on April 28, 2011, then again approximately two weeks later and then again approximately 15 months later in August 2012. In addition to the verdicts, the jury heard testimony that the defendant had sex with her approximately 12 times per month during that time period as well as sent her sexually explicit electronic messages. RP 382, 453-55. The verdicts, in and of themselves, reflect multiple incidents over a 16-month period of time. It is difficult to see how any error here is not harmless beyond a reasonable doubt based on the particular facts of this case as determined by the jury in its verdict.

III. CONCLUSION

For the foregoing reasons, Stevens's conviction and sentence should be affirmed.

DATED July 27, 2015.

Respectfully submitted,
TINA R. ROBINSON
Prosecuting Attorney



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