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ORDER OF THE SUPREME COURT OF WASHINGTON (NOVEMBER 28, 2018)

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES BRADLEY ANDERSON,

Petitioner.

No. 96290-1

Court of Appeals No. 75834-9-I

Before: FAIRHURST, Chief Justice.

Department I of the Court, composed of Chief Justice Fairhurst and Justices Johnson, Owens, Wiggins and Gordon McCloud, considered at its November 27, 2018, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied.

DATED at Olympia, Washington, this 28th day of November, 2018.

For the Court

/s/ Fairhurst
Chief Justice

OPINION OF THE COURT OF APPEALS FOR THE STATE OF WASHINGTON (JULY 30, 2018)

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES BRADLEY ANDERSON,

Appellant.

No. 75834-9-1

Before: BECKER, Judge,
Concurring Judges names are not legible

BECKER, J.—Appellant, tried and convicted on five counts of child rape and molestation, was exposed to double jeopardy by jury instructions that did not prevent the jury from basing two convictions on the same act of oral-genital intercourse. He claims that defense counsel was ineffective for proposing the deficient instructions. We reject this argument because appellant has not shown a reasonable likelihood that the trial outcome would have been different had counsel's error not occurred.

FACTS

The State charged appellant James Anderson with one count of second degree child molestation, two counts of first degree child molestation, one count of second degree child rape, and one count of first degree child rape. The alleged victim, KJ, was 20 years old when the trial occurred in 2016. She testified about a sexual relationship with Anderson that he initiated when she was 9 and he was around 18. At the time, KJ was living in Everett with her grandmother and her grandmother's partner, who was Anderson's father. Anderson often stayed there, and he later resided with them when they lived in Mukilteo. Anderson was often left in charge of KJ and other young children in the house. KJ testified that Anderson secretly had sex with her on a regular basis, including oral sex and vaginal intercourse. KJ described certain instances in detail.

When KJ was 13, she moved back in with her mother and her mother's partner. She told them about her history with Anderson. She was initially unwilling to share details with police. Four years later, after undergoing therapy, KJ decided to talk to a detective.

The defense presented testimony from KJ's grandmother, Anderson's father, and other family members. They denied ever witnessing suspicious interactions between KJ and Anderson. Anderson did not testify. The defense strategy was to cast doubt on KJ's version of events.

In closing, with the aid of a PowerPoint presentation, the prosecutor matched particular incidents described by KJ to each of the five counts. Count 1, second degree child molestation, had a charging per-

iod of May 12, 2008, to May 11, 2010. The State elected "the couch" incident to support this count. KJ testified about a time when she was 11 and she and Anderson had penile-vaginal intercourse on the living room couch in the middle of the day when no one else was home. She did not have any clothes on. She testified, "I was on top, and we were sitting." She recalled that it felt good.

Counts 2, 3, and 4—the first degree rape count and the two counts of first degree molestation—shared the same charging period of May 12, 2005, to May 11, 2008. For count 2, first degree rape, the State elected "the trampoline" incident. KJ testified about a time that she performed oral sex on Anderson in the kitchen of their house while her friends were in the backyard jumping on a trampoline. She was 11.

Count 3, first degree child molestation, was "the teddy bear" incident. KJ testified that one night when she was 10, Anderson appeared by her bedside, naked. He told KJ to call him "teddy bear," and he put her hand on his penis.

Count 4, the second count of first degree molestation, was "the pink nightgown" incident. KJ testified that the first time she and Anderson had penile-vaginal sex, when she was 11, she was wearing a pink nightgown and the sex was painful.

Count 5, second degree child rape, had a charging period of May 12, 2008, to May 11, 2010. The State elected "the garage" incident. KJ testified about a time, when she was 12, that she performed oral sex on Anderson while they were in the garage playing video games.

The jury convicted Anderson as charged. The court imposed a minimum sentence of 280 months' imprisonment. Anderson appeals the judgment and sentence.

TO-CONVICT INSTRUCTION—COUNT 1

The to-convict instruction for count 1, second degree child molestation, required the State to prove that KJ was "at least twelve years old" when the molestation occurred. Neither party objected to this instruction. To support count 1, the State invoked KJ's testimony about having vaginal sex with Anderson on a couch. But KJ testified that she was 11 when that incident occurred.

On appeal, Anderson contends that his conviction for second degree child molestation must be reversed given the discrepancy between KJ's testimony and the age requirement in the to-convict instruction. The State concedes that the conviction on count 1 should be reversed. We accept the State's concession.

The lower age limit of 12 years old, though included in the statute for second degree child molestation, is not an essential element of the crime. *State v. Goss*, 186 Wn.2d 372, 378-82, 378 P.3d 154 (2016). But elements in a to-convict instruction that are not objected to become the law of the case"; the State must prove those elements beyond a reasonable doubt to prevail. *State v. Hickman*, 135 Wn.2d 97, 99, 954 P.2d 900 (1998). In this case, therefore, the State was required to prove that KJ was at least 12 at the time of the molestation.

KJ testified about other sexual encounters with Anderson that occurred when she was 12 or older. But it is not apparent that the jury unanimously agreed

to base the conviction for second degree molestation on one of these other events. Questions sent by the jury during deliberations suggest confusion about whether they were bound by the prosecutors election of the couch incident to support count 1. In response to these inquiries, the court referred the jury to their instructions. The instructions did not advise jurors that they had to agree unanimously on a particular act to support count 1, a requirement in the absence of a valid election by the State. *State v. Petrich*, 101 Wn.2d 566, 572, 683 P.2d 173 (1984).

On this record, we conclude that the State did not meet its obligation, imposed by the to-convict instruction, to prove the lower age limit. We cannot be sure that the jury rejected the State's election of the couch incident, which did not provide sufficient evidence on the age element of the crime, as defined by the to-convict instruction, and we cannot be sure that the jury unanimously agreed on some other act to support count 1. Ambiguities in a jury verdict must be resolved in the defendant's favor. *State v. Kier*, 164 Wn.2d 798, 811, 194 P.3d 212 (2008). The appropriate remedy is to reverse the conviction for second degree molestation and dismiss the charge with prejudice. *Hickman*, 135 Wn.2d at 99.

INEFFECTIVE ASSISTANCE— DOUBLE JEOPARDY

Anderson claims that his right to effective counsel was violated by counsel's proposal of jury instructions that did not protect him from double jeopardy. He must establish both deficient performance and prejudice. *State v. Jones*, 183 Wn.2d 327, 330, 352 P.3d 776 (2015). The first prong requires a showing that counsel's representation fell below an objective standard of reasonableness, considering all circumstances. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Our review is highly deferential; we indulge a strong presumption of reasonableness. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). The prejudice prong requires Anderson to show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Thomas*, 109 Wn.2d at 226. We review ineffective assistance claims de novo. *State v. Fedoruk*, 184 Wn. App. 866, 879, 339 P.3d 233 (2014).

Anderson contends that the jury instructions proposed by his counsel allowed the jury to use the same act to convict him on more than one count; that is, he faced multiple punishments for the same offense, a double jeopardy problem. *State v. Borsheim*, 140 Wn. App. 357, 366, 165 P.3d 417 (2007). Defense counsel proposed instructions that were markedly similar to those submitted by the State.[1] The court adopted a

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[1] *See* Clerk's Papers at 86-101 (defense instructions), 235-60 (State's instructions); *see also* Report of Proceedings at 232, 350 (court observes "I don't know if there are many differences in your packages"; "I don't think there were any material differences in the two packets of instructions").

set identical to the prosecutor's, with one added instruction not relevant here. Defense counsel made no objections to the court's instructions.

Anderson does not challenge the instructions directly. It is doubtful that he could because he proposed them. "Under the invited error doctrine, a defendant may not request that instructions be given to the jury and then complain upon appeal that the instructions are constitutionally infirm." *State v. Aho*, 137 Wn.2d 736, 744-45, 975 P.2d 512 (1999); *State v. Hood*, 196 Wn. App. 127, 131-32, 382 P.3d 710 (2016), review *denied*, 187 Wn.2d 1023 (2017).[2] But review "is not precluded where invited error is the result of ineffectiveness of counsel" *Aho*, 137 Wn.2d at 745. By asserting ineffective assistance instead of challenging the instructions directly, Anderson has avoided application of the invited error doctrine. Review is not precluded, but the result is that we must review his double jeopardy claim according to the standard of review for ineffective assistance rather than the standard of review for instructions that violate a constitutional right. Relief is warranted only if counsel's proposal of deficient instructions was both deficient performance and prejudicial.

We turn to the specifics. Anderson first contends the State invoked the same event to convict him on count 1, second degree child molestation, and count 4, one of the two counts of first degree child molestation, and nothing in the instructions proposed by

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[2] Proposing a deficient instruction invites error, while merely failing to object to the State's deficient instruction does not. *Hood*, 196 Wn. App. at 133-34. Here, the record demonstrates unequivocally that counsel proposed the challenged instructions.

defense counsel prevented this result. Count 1 was based on the aforementioned incident when KJ and Anderson had sex on a couch during the day; she was "on top" and had no clothes on; and the sex "felt good."[3] To prove count 4, the State relied in closing argument on a purportedly different incident of penile-vaginal intercourse during which KJ recalled that they were on a foldout couch, she was wearing a pink nightgown, and the sex was painful.[4] Anderson contends "A close examination of K.J.'s testimony reveals that these were a single incident: the first instance of vaginal intercourse between K.J. and Anderson."

The record does not support Anderson's contention that the State relied on the same act to prove count 1 and count 4. But even assuming it did, and defense counsel was ineffective for contributing to the double jeopardy violation, the remedy would be dismissal of the lesser punished crime. *State v. Villanueva-Gonzalez*, 175 Wn. App. 1, 8, 304 P.3d 906 (2013), *aff'd*, 180 Wn.2d 975, 329 P.3d 78 (2014). The lesser of the two crimes was second degree child molestation, charged in count 1. We have already determined that Anderson's conviction on count 1 will be reversed and dismissed with prejudice. Thus, it is unnecessary to consider whether there was a double jeopardy violation with respect to counts 1 and 4. For the same reason, we do not address whether the instructions allowed the jury to convict Anderson of counts 1 and 5 based on the same act, an argument implied by pages 25-26 of his

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[3] Report of Proceedings at 278, 331, 434.

[4] Report of Proceedings at 436-37.

brief of appellant. Count 1 will be dismissed on a different ground.

Anderson next contends that the deficient instructions allowed the jury to convict him of count 2, first degree child rape, and either count 3 or 4, the counts of first degree molestation, based on the same act of oral-genital intercourse.[5] In the to-convict instructions for counts 3 and 4, jurors were told that count 3 required proof of an occasion "separate and distinct from that alleged" in count 4, and vice versa. Anderson contends that there should have been similar language informing jurors that counts 3 and 4 required proof of an act separate and distinct from that alleged in count 2. Such language was absent from defense counsel's proposed to-convict instructions and those given by the court. Anderson contends that counsel's failure to propose "separate and distinct" language was prejudicial and requires reversal of one of the convictions for first degree child molestation (count 3 or 4), as child molestation is a lesser crime than the rape conviction under count 2.

Child rape and child molestation have different elements. First degree child rape occurs when the defendant has sexual intercourse with a child younger than 12 years old. RCW 9A.44.073(1). "Sexual intercourse" includes oral-genital contact as well as penetration of the vagina or anus. RCW 9A.44.010(1). First degree child molestation occurs when the defendant engages in sexual contact with a child younger than 12. RCW 9A.44.083(1). "Sexual contact" means "any touching of the sexual or other intimate

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[5] Count 5, second degree child rape, is not at issue because it involved a different charging period.

parts of a person done for the purpose of gratifying sexual desire of either party or a third party. RCW 9A.44.010(2). Thus, child rape requires proof of intercourse, which is not an element of child molestation, and child molestation requires proof that the defendant acted for sexual gratification, which is not an element of rape. *State v. Jones*, 71 Wn. App. 798, 825, 863 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994).

Child rape and child molestation can nonetheless be the same in fact, for double jeopardy purposes, when both are proven by the same instance of oral-genital contact. *State v. Land*, 172 Wn. App. 593, 600, 295 P.3d 782, *review denied*, 177 Wn.2d 1016 (2013). "Where the only evidence of sexual intercourse supporting a count of child rape is evidence of penetration, rape is not the same offense as child molestation." *Land*, 172 Wn. App. at 600. "But where the only evidence of sexual intercourse supporting a count of child rape is evidence of sexual contact involving one person's sex organs and the mouth or anus of the other person, that single act of sexual intercourse, if done for sexual gratification, is both the offense of molestation and the offense of rape." *Land*, 172 Wn. App. at 600.

Thus, in *Land*, a potential double jeopardy problem arose when the defendant was charged with child molestation and child rape based on conduct involving the same victim and same charging period; the victim testified that the defendant touched her on her breasts and "'lower part,'" inserted his finger inside her vagina, and "'kissed'" her "'on the lower half"; and the jury was not instructed that it could not convict the defendant of both rape and molestation based on a

single act. Land, 172 Wn. App. at 597-98, 600-01; *see also State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011). In the final analysis, we found no error because it was manifestly apparent from the record that the rape count was supported only by the victim's testimony about digital penetration. Land, 172 Wn. App. at 601-03.

Here, the jury instructions created a potential double jeopardy problem concerning count 2, the first degree rape count, because the State did not elect to support that count with evidence of penetration. Like counts 3 and 4, count 2 involved a charging period of May 12, 2005, to May 11, 2008. The alleged victim was the same (KJ) with respect to all three counts. The instructions provided to jurors did not include penetration as a means of committing rape; "sexual intercourse" was defined as "any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another." When discussing count 2, the rape count, in closing argument, the prosecutor explained that "for purposes of [sexual intercourse], we're talking about when she was giving him oral sex, when she's using her mouth." Under *Land*, an act of oral sex is both the offense of molestation and the offense of rape.

The jury was not instructed that it could not convict Anderson of first degree molestation, as charged in counts 3 and 4, based on the same incident of oral-genital contact used to support count 2, first degree rape. Thus, jurors theoretically could have had in mind the same act for count 2 as they did for either count 3 or 4 (but not 3 and 4, because the jury was instructed that those counts required proof of separate acts). For example, if jurors believed KJ's testimony

about the "trampoline" incident—an incident involving oral sex that occurred when KJ was 11—they could have relied on this event to convict Anderson of both first degree rape (count 2) and first degree molestation (count 3 or 4). KJ's testimony provided evidence to satisfy the elements of both crimes. The jury instructions were deficient insofar as they allowed this possibility. *Borsheim*, 140 Wn. App. at 370. The problem was not averted by the jury instruction that stated, "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." This instruction did not inform jurors that each crime required proof of a separate act. *Mutch*, 171 Wn.2d at 663.

Flawed instructions that permit a jury to convict a defendant of more than one count based on a single act do not necessarily mean that the defendant received multiple punishments for the same offense; "it simply means that the defendant potentially received multiple punishments for the same offense." *Mutch*, 171 Wn.2d at 663. Under the standard of review that applies when instructions are directly challenged as inadequate to prevent double jeopardy, we review the entire record to determine whether a double jeopardy violation was actually effectuated. *Mutch*, 171 Wn.2d at 664. "No double jeopardy violation results when the information, instructions, testimony, and argument clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense." *State v. Haves*, 81 Wn. App. 425, 440, 914 P.2d 788, review denied, 130 Wn.2d 1013 (1996). "While the court may look to the entire trial record when considering a double jeopardy claim, we note that our review is

rigorous and is among the strictest. Considering the evidence, arguments, and instructions, if it is not clear that it was 'manifestly apparent to the jury that the State [was] not seeking to impose multiple punishments for the same offense' and that each count was based on a separate act, there is a double jeopardy violation." *Mutch*, 171 Wn.2d at 664.

Here, the State elected specific incidents to support each count. But the State's elections alone did not eliminate the possibility of a double jeopardy violation. Closing argument cannot be considered in isolation. *Kier*, 164 Wn.2d at 813. Nothing else in the record provides adequate assurance that it was manifestly apparent to jurors that each count was based on a separate act. The information charged five separate counts, yet KJ testified about more than five sexual encounters with Anderson. *Cf. Mutch*, 171 Wn.2d at 665. And, as discussed, nothing in the instructions prevented jurors from rejecting the State's elections and using the same event to convict Anderson of two counts. The jury was correctly instructed that statements by counsel are not evidence. In other words, the instructions, along with the information and evidence, allowed the jury to use the same act of oral-genital intercourse to convict Anderson of both rape and molestation "notwithstanding the State's closing argument." *Kier*, 164 Wn.2d at 814. If Anderson had been able to challenge the adequacy of the jury instructions directly, as was done in *Mutch*, we would find a double jeopardy violation because, unlike in *Mutch*, the instructions did not avoid the possibility that Anderson would be punished twice for the same act. *Cf. Mutch*, 171 Wn.2d at 665, 666.

But this is a claim of ineffective assistance, and our focus must remain on the conduct of trial counsel. We first conclude Anderson has established deficient performance. Reasonable conduct for an attorney includes researching relevant case law. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Proposing detrimental instructions may constitute ineffective assistance. *State v. Woods*, 138 Wn. App. 191, 197-98, 156 P.3d 309 (2007). In this case, defense counsel acted unreasonably by proposing instructions that exposed Anderson to double jeopardy under our decision in *Land*. The record reveals no strategic reason defense counsel might have had to propose instructions that exposed Anderson to double jeopardy. The deficient performance prong of Anderson's ineffective assistance claim is met under these circumstances.

Anderson has not met his burden, however, of demonstrating prejudice. The relief he seeks is the striking of either count 3 or 4. He has shown that the instructions were not enough to eliminate the possibility that the jury used a single act to convict him on count 2 and either count 3 or 4. But if counsel had insisted on proper instructions, is it reasonably probable that the Jury would have convicted him on one count less than it did? Anderson does not answer this question. He does not evaluate the likelihood that the jury followed the State's election of specific incidents to match each count. Because Anderson fails to demonstrate that the result of the proceedings would have been different, his ineffective assistance claim fails on the prejudice prong of *Strickland*.

INEFFECTIVE ASSISTANCE—INVESTIGATION

Anderson also contends that his lawyer was ineffective for not conducting adequate pretrial investigation. This claim pertains to KJ's testimony at trial that she once performed oral sex on Anderson in the kitchen of the Mukilteo house while her friends played on a trampoline in the backyard. This was the basis for count 2, first degree child rape.

After the jury verdict, Anderson moved for a new trial on several grounds. One of his arguments was that KJ's testimony about the trampoline incident was contradicted by evidence he claimed was newly discovered. According to Anderson, KJ's testimony prompted the defense investigator to visit the Mukilteo house. The investigator determined that the kitchen area was visible from the backyard through a sliding glass door. Anderson claims that if this observation had been presented to the jury, it would have undermined KJ's credibility because it was unlikely the sex act described by KJ could have occurred without her friends seeing it. The State countered that KJ disclosed the trampoline incident during pretrial defense interviews. The trial court agreed with the State that the defense had not Identified newly discovered evidence. The court accordingly denied the motion for a new trial.

On appeal, Anderson claims that it was unreasonable for his lawyer to not investigate the trampoline incident more thoroughly before trial. He contends that this error deprived the defense of evidence that KJ's story was not credible. Anderson asserts that defense counsel should have interviewed KJ's

friends who were in the yard that day to determine if they saw anything.

A showing that counsel failed to conduct appropriate investigations can support a claim of ineffective assistance. *Thomas*, 109 Wn.2d at 230; *see also Fedoruk*, 184 Wn. App. at 881 (counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary); Jones, 183 Wn.2d at 340 (failure to interview a particular witness can constitute deficient performance).

Here, the pretrial investigation conducted by defense counsel included interviews with KJ and her grandmother. They drew maps of the Mukilteo house. The drawings do not show where the trampoline was located in the backyard.

It is not apparent that a more thorough investigation would have led to information favorable to the defense. Evidence that the kitchen area was visible from the backyard does not by itself impeach KJ's story. She did not testify that the kitchen area could not be seen from the backyard. She said that she was behind a counter while performing oral sex on Anderson. Thus, KJ's friends could not necessarily *see* what she was doing even if they could *see* into the kitchen area. Another consideration is that had defense counsel interviewed KJ's friends, they might have corroborated, rather than contradicted, KJ's story. Anderson fails to demonstrate that counsel's pretrial investigation was deficient, and he also fails to show a reasonable probability that the result of the proceeding would have been different if counsel had investigated more thoroughly.

COUNSELING RECORDS

Before trial, the court denied Anderson's request to compel production of KJ's counseling records. The court made this ruling without reviewing the records in camera to determine their potential relevance. The court reasoned that even an in camera review would be an unjustified intrusion on KJ's privacy. Later, on a defense motion to limit testimony about KJ's counseling experience, the court ruled that the prosecutor could elicit only that counseling led KJ to report the abuse to police. The prosecutor was prohibited from eliciting "any detail about what went on in counseling or what she told the counselor."

At trial, the prosecutor asked KJ "whose idea" it was "to finally go to the police?" KJ responded, "It was actually therapy." Anderson then moved for a mistrial, outside the jury's presence, arguing that there was no way to effectively cross-examine KJ without access to the counseling records. Anderson did not renew his request for in camera review. The court denied the mistrial motion. When the jurors returned, the court instructed them to disregard KJ's last answer.

Anderson argues on appeal that the trial court erred by failing to review the records in camera. We review for an abuse of discretion. *State v. Gregory*, 158 Wn.2d 759, 791, 147 P.3d 1201 (2006), *overruled on other grounds, State v. W.R.*, 181 Wn.2d 757, 768-69, 336 P.3d 1134 (2014).

For due process to justify in camera review of confidential records, as KJ's counseling records are, the defendant must establish a basis for his claim that the record contains material evidence favorable to the defense. *Pennsylvania v, Ritchie*, 480 U.S. 39,

58 n.15, 107 S. Ct. 989, 94 L.Ed.2d 40 (1987). Evidence is material only if there is a reasonable probability that it would impact the outcome of trial. Ritchie, 480 U.S. at 57. Mere speculation that records contain material evidence is insufficient. *Gregory*, 158 Wn.2d at 792; *see also State v. Kalakosky*, 121 Wn.2d 525, 550, 852 P.2d 1064 (1993) (defendant must make a particularized factual showing that information useful to the defense is likely to be found in the records); *State v. Knutson*, 121 Wn.2d 766, 773, 854 P.2d 617 (1993) (mere possibility that evidence might have affected the trial outcome is insufficient).

Anderson's relevance arguments below were speculative. During the pretrial hearing, Anderson asserted that he needed to *see* "what happened at counseling, if the disclosures were consistent, if there's matters for impeachment, or if what she's telling us is true in terms of that this matter was discussed in counseling at all." He did not articulate, with any particularity, why he needed information in the counseling records.

When KJ testified that "therapy" led to her delayed disclosure, Anderson again argued that he needed access to the records for impeachment purposes. But KJ's remark did not establish a basis for Anderson to claim that her counseling records might contain information inconsistent with her testimony or contain evidence favorable to the defense that was not already known. Before trial, Anderson had the opportunity to have defense counsel interview KJ and ask about her delayed disclosure to police.

In *Ritchie* and in *Gregory*, in camera review was warranted because the defendant established a non-speculative basis to believe the files contained material

evidence. Anderson did not make an equivalent showing. The trial court acted within its discretion by denying in camera review.

COMMUNITY CUSTODY CONDITION

Anderson's sentence includes a community custody provision stating, "Do not frequent areas where minor children are known to congregate, as defined by the supervising Community Corrections Officer." We invalidated an identical condition for vagueness in *State v. Irwin*, 191 Wn. App. 644, 655, 364 P.3d 830 (2015). The State concedes that the condition should be removed from Anderson's sentence or modified to include specific prohibited locations. We accept this concession.

In summary, we remand for dismissal with prejudice of Anderson's conviction for second degree child molestation in count 1 and for revision of the community custody condition. Otherwise, we affirm.

/s/ Becker
Judge

We Concur

Signature not legible

JUDGMENT AND SENTENCE OF THE SUPERIOR COURT OF WASHINGTON (SEPTEMBER 15, 2016)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH

STATE OF WASHINGTON,

Plaintiff,

v.

ANDERSON, JAMES BRADLEY
DOB: 10/02/1985,

Defendant.

No. 15-1-01899-4

Before: Linda C. KRESE, Judge.

Prison

Clerk's action required, firearm rights revoked, ¶ 5.5a

Clerk's action required,

¶¶ 2.1, 4.1, 4.3, 4.5, 5.2, 5.3, 5.8

I. HEARING

1.1 A sentencing hearing was held and the defendant, the defendant's lawyer and the (deputy) prosecuting attorney were present.

II. FINDINGS

2.1 Current Offense(s)

The 'defendant was found guilty on JULY 21, 2016 by jury verdict of:

COUNT: 1.

CRIME: SECOND DEGREE CHILD MOLESTATION
(sexual contact with defendant)
RCW: 9A.44.086
CLASS: CLASS B FELONY
DOV: 03/1/2010
INCIDENT#: EVE 1005647

COUNT: 2.

CRIME: FIRST DEGREE RAPE OF A CHILD
RCW: 9A.44.073
CLASS: CLASS A FELONY
DOV: 03/1/2010
INCIDENT#: EVE 1005647

COUNT: 3.

CRIME: FIRST DEGREE CHILD MOLESTATION
(sexual contact with defendant)
RCW: 9A.44.083
CLASS: CLASS A FELONY
DOV: 05/12/2005-05/12/2008
INCIDENT#: EVE 1005647

COUNT: 4.

CRIME: FIRST DEGREE CHILD MOLESTATION
(sexual contact with defendant)
RCW: 9A.44.083
CLASS: CLASS A FELONY
DOV: 05/12/2005-05/12/2008
INCIDENT#: EVE 1005647

COUNT: 5.

CRIME: SECOND DEGREE RAPE OF A CHILD
RCW: 9A.44.076
CLASS: CLASS A FELONY
DOV: 05/12/2008-05/12/2010
INCIDENT#: EVE 1005647

as charged in the 2nd Amended Information.

The defendant is a sex offender subject to indeterminate sentencing under RCW 9.94A.507.

2.2 Criminal History

Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):

Crime	First Degree Rape of a Child
Date of Sentence	9/15/2016
Sentencing Court	Snohomish County
A or J (Adult or Juvenile)	A
Type of Crime	A

Crime	Second Degree Rape of a Child
Date of Sentence	9/15/2016
Sentencing Court	Snohomish County
A or J (Adult or Juvenile)	A
Type of Crime	A

Crime	First Degree Child Molestation (2 Counts)
Date of Sentence	9/15/2016
Sentencing Court	Snohomish County
A or J (Adult or Juvenile)	A
Type of Crime	A

Crime	Second Degree Rape of a Child
Date of Sentence	9/15/2016
Sentencing Court	Snohomish County
A or J (Adult or Juvenile)	A
Type of Crime	B

2.3 Sentencing Data

Count No	1
Offender Score	12
SRA Level	VII
Standard Range (not including Enhancements)	87-116 Months
Plus Enhancements	
Total Standard Range (including Enhancements))	87-116 Months
Maximum Term	10 Years

Count No	2
Offender Score	12
SRA Level	XII
Standard Range (not including Enhancements)	240-318 Months
Plus Enhancements	
Total Standard Range (including Enhancements))	240-318 Months
Maximum Term	Life

Count No	3
Offender Score	12
SRA Level	X
Standard Range (not	149-198 Months

including Enhancements)	
Plus Enhancements	
Total Standard Range (including Enhancements))	149-198 Months
Maximum Term	Life

Count No	4
Offender Score	12
SRA Level	X
Standard Range (not including Enhancements)	149-198 Months
Plus Enhancements	
Total Standard Range (including Enhancements))	149-198 Months
Maximum Term	Life

Count No	5
Offender Score	12
SRA Level	XI
Standard Range (not including Enhancements)	210-280 Months
Plus Enhancements	
Total Standard Range (including Enhancements))	210-280 Months
Maximum Term	Life

(F) Firearm, (D) Other deadly weapons, (V) VUCSA in a protected zone, (RPh) Robbery of a pharmacy, (VH) Veh. Horn., *See* RCW 46.61.520, (JP) Juvenile Present, (SM) Sexual Motivation, RCW 9.94A.533(8), (SCF) Sexual Conduct with a Child for a Fee, RCW 9.94A.533(9), (CSG) Criminal Street Gang Involving Minor, (AE) Endangerment While Attempting to Elude, (ALF) assault law enforcement with firearm, RCW 9.94A.533(12); (P16) Passenger(s) under age 16.

2.7 Prosecutor's Recommendation.

116 months on Count I
318 months on Count II
198 months on Count III
198 months on Count IV
280 months on Count V

III. JUDGMENT

3.1 The defendant is GUILTY of the counts and charges listed in Paragraph 2.1.

IV. SENTENCE AND ORDER

4.1 Confinement Over One Year

The court sentences the defendant to total confinement as follows:

CONFINEMENT [Maximum Term and Minimum Term]. A term of total confinement as follows: the maximum and minimum terms of confinement shall be served in a facility or institution operated, or utilized under contract, by the State of Washington. RCW 9.94A.507.

- Count 1 minimum term of 105 months AND maximum term of 120 months
- Count II minimum term of 280 months AND maximum term of Life months
- Count III minimum term of 175 months AND maximum term of Life months
- Count IV minimum term of 175 months AND maximum term of Life months
- Count V minimum term of 245 months AND maximum term of Life months

The minimum term of actual total confinement ordered on all counts cumulatively is 280 months.

The maximum term of actual total confinement ordered on all counts cumulatively is LIFE months.

FURTHER PROVISIONS APPLICABLE TO ALL SENTENCES:

All counts shall be served concurrently, except for the portion of those counts for which there is an enhancement as set forth above at ¶¶ 2.3, and the following counts which shall be served consecutively:

4.2 Community Custody

RCW 9.94A.701. The defendant shall serve the following term of community custody (12 months for crimes against a person, drug offenses, or offenses involving the unlawful possession of a firearm by a street gang member or associate; 18 months for violent offenses; and 36 months for serious violent offenses & sex offenses not sentenced pursuant to RCW 9.94A.507 or .670):

COMMUNITY CUSTODY [For Maximum and Minimum Term Sentences] (Sex Offenses Only). RCW 9.94A.507, .709. For each count sentenced under RCW 9.94A.507, the defendant shall serve a term of community custody under the supervision of the Department of Corrections (DOC) and the authority of the Indeterminate Sentence Review Board for any period of time that the defendant is released from total confinement before expiration of the maximum sentence. In addition to other conditions, the defendant shall comply with any conditions imposed by the Indeterminate Sentence Review Board, including electronic monitoring if DOC so recommends. In an emergency, DOC may impose other conditions for a period not to exceed seven working days. Community custody for sex offenders may be extended for up to the statutory maximum term of the sentence.

CONDITIONS APPLICABLE TO ALL COMMUNITY CUSTODY TERMS. The defendant shall report to a DOC office located in the county where the defendant is released not later than 72 hours after release from custody.

While on community custody, the defendant shall (1) report to and be available for contact with the assigned community corrections officer as directed; (2) work at DOC-approved education, employment and/or community restitution; (3) notify DOC of any change in the defendant's address or employment; (4) not possess or consume controlled substances except pursuant to lawfully issued prescriptions; (5) not own, use, or possess firearms or ammunition; (6) pay supervision fees as determined by DOC; (7) perform affirmative acts as required by DOC to confirm compliance with orders of the court; (8) for sex offenses,

submit to electronic monitoring if imposed by DOC; and (9) abide by any additional conditions imposed by DOC under RCW 9.94A.704 and .706. The defendant's residence location and living arrangements are subject to the prior approval of DOC while on community custody. For sex offenders sentenced under RCW 9.94A.709, the court may extend community custody up to the statutory maximum term of the sentence.

The term of community custody begins immediately upon release from confinement or at the time of sentencing if no confinement is ordered. The defendant is subject to the conditions of community custody as of the date of sentencing unless otherwise ordered here: _____. RCW 9.94A.707.

The court orders that during the period of supervision:

- The defendant shall have no contact with K.J. (DOB: 5/12/1996). *See*, ¶ 4.5.
- The defendant shall register as a sex offender as required by law.
- The defendant shall undergo an evaluation for the following: sexual deviancy. The defendant shall fully comply with all recommended treatment.
- The defendant shall comply with Additional Conditions of Community Custody as set forth in Appendix 4.2.

Court Ordered Treatment: If any court orders mental health or substance use disorder treatment, the defendant must notify DOC and the defendant must release treatment information to DOC for the duration of incarceration and supervision. RCW 9.94A.562.

If the defendant committed the above crime(s) while under age 18 and is sentenced to more than 20 years of confinement (RCW 10.95.030):

(i) As long as the defendant's conviction is not for aggravated first degree murder or certain sex crimes, and the defendant has not been convicted of a crime committed after he or she turned 18 or committed a disqualifying serious infraction as defined by DOC in the 12 months before the petition is filed, the defendant may petition the Indeterminate Sentence Review Board (Board) for early release after the defendant has served 20 years.

(ii) If the defendant is released early because the petition was granted or by other action of the Board, the defendant will be subject to community custody under the supervision of the DOC for a period of time determined by the Board, up to the length of the court-imposed term of incarceration. The defendant will be required to comply with any conditions imposed by the Board.

(iii) If the defendant violates the conditions of community custody, the Board may return the defendant to confinement for up to the remainder of the court-imposed term of incarceration.

4.3 Legal Financial Obligations

Defendant shall pay to the clerk of the court:

PVC–$500–Victim assessment–RCW 7.68.035

FRC–$200–Criminal filing fee (mandatory)–RCW 36.18.020(2)(h) RCW 9.94A. 760, .505;

EXT–$100 Biological Sample Fee (Mandatory for offenses committed after 7/1/02; cannot be waived)–RCW 43.43.7541

RESTITUTION. The above total does not include all restitution or other legal financial obligations, which may be set by later order of the court. An agreed restitution order may be entered. RCW 9.94A.753.

Defendant waives any right to be present at any restitution hearing and waives and right to be present at the presentation of an agreed restitution order (sign initial)

All payments shall be made in accordance with the policies of the clerk and on a schedule established by the Department of Corrections or the clerk of the court, commencing immediately, unless the court specifically sets forth the rate here of not less than: $25 per month commencing 60 days after release. RCW 9.94A.760.

The defendant shall report to the clerk of the court or as directed by the clerk to provide financial and other information requested. RCW 9.94A.760(7)(b).

4.4 HIV Testing

The Health Department or designee shall test and counsel the defendant for HIV as soon as possible and the defendant shall fully cooperate in the testing. The defendant, if out of custody, shall report to the HIV/AIDS Program Office at 3020 Rucker, Suite 106, Everett, Washington 98201 within one (1) business

day of entry of this order to arrange for the test. RCW 70.24.340.

4.5 No Contact

The defendant shall not have contact with K.J. (DOB: 5/12/1996) including, but not limited to, personal, verbal, telephonic, written or contact through a third party until LIFE (not to exceed the maximum statutory sentence). EVEN IF THE PERSON WHO THIS ORDER PROTECTS INVITES OR ALLOWS CONTACT, YOU CAN BE ARRESTED AND PROSECUTED. ONLY THE COURT CAN CHANGE THIS ORDER. YOU HAVE THE SOLE RESPONSIBILITY TO AVOID OR REFRAIN FROM VIOLATING THIS ORDER.

A separate post-conviction Domestic Violence No Contact Order, Anti-Harassment No Contact Order, Stalking No Contact Order, or Sexual Assault Protection Order [ ] was filed at the time of entry of the plea of guilty/ guilty verdict [ ] is filed contemporaneously with this Judgment and Sentence. (Entry of a separate order makes a violation of this no contact sentencing provision also punishable as a criminal offense, and the order will be entered into the law enforcement database.)

V. NOTICES AND SIGNATURES

5.1 Collateral Attack on Judgment

If you wish to petition or move for collateral attack on this Judgment and Sentence, including but not limited to any personal restraint petition, state habeas corpus petition, motion to vacate judgment,

motion to withdraw guilty plea, motion for new trial or motion to arrest judgment, you must do so within one year of the final judgment in this matter, except as provided for in RCW 10.73.100. RCW 10.73.090.

5.2 Length of Supervision

If you committed your offense prior to July 1, 2000, you shall remain under the court's jurisdiction and the supervision of the Department of Corrections for a period up to 10 years from the date of sentence or release from confinement, whichever is longer, to assure payment of all legal financial obligations unless the court extends the criminal judgment an additional 10 years. If you committed your offense on or after July 1, 2000, the court shall retain jurisdiction over you, for the purpose of your compliance with payment of the legal financial obligations, until you have completely satisfied your obligation, regardless of the statutory maximum for the crime. RCW 9.94A.760 and RCW 9.94A.505(5). The clerk of the court has authority to collect unpaid legal financial obligations at any time while you remain under the jurisdiction of the court for purposes of your legal financial obligations. RCW 9.94A.760(4) and RCW 9.94A.753(4).

5.3 Notice of Income-Withholding Action

If the court has not ordered an immediate notice of payroll deduction in paragraph 4.1, you are notified that the Department of Corrections or the clerk of court may issue a notice of payroll deduction without notice to you if you are more than 30 days past due in monthly payments in an amount equal to or greater than the amount payable for one month. RCW

9.94A.7602. Other income-withholding action under RCW 9.94A.760 may be taken without further notice. RCW 9.94A.7606.

5.4 Violation of Judgment and Sentence/Community Custody Violation

(a) Any violation of a condition or requirement of sentence is punishable by up to 60 days confinement for each violation. RCW 9.94A.633.

(b) If you have not completed your maximum term of total confinement and you are subject to a violation hearing and DOC finds that you committed the violation, DOC may return you to a state correctional facility to serve up to the remaining portion of your sentence. RCW 9.94A.633.

5.5a Firearms

You may not own, use or possess any firearm and under federal law any firearm or ammunition, unless your right to do so is restored by the court in which you are convicted or the superior court in Washington State where you live, and by a federal court if required. You must immediately surrender any concealed pistol license. (The clerk of the court shall forward a copy of the defendant's driver's license, identification card, or comparable identification to the Department of Licensing along with the date of conviction or commitment.) RCW 9.41.040, 9.41.047.

(Pursuant to RCW 9.41.047(1), the Judge shall read this section to the defendant in open court.)

The defendant is ordered to forfeit any firearm he/she owns or possesses no later than to (name of law enforcement agency). RCW 9.41.098.

5.5b Felony Firearm Offender Registration

If the court decided that you are required to register as a felony firearm offender, the specific requirements are in the "Felony Firearm Offender Registration" attachment.

5.6 Motor Vehicle

If the court found that you used a motor vehicle in the commission of the offense, then the Department of Licensing will revoke your driver's license. The clerk of the court is directed to immediately forward an Abstract of Court Record to the Department of Licensing, which must revoke your driver's license. RCW 46.20.285.

5.7 Certificate of Discharge

(a) If you are under the custody and supervision of the Department of Corrections, the court will not issue a Certificate of Discharge until it has received notice from Department of Corrections and clerk's office that you have completed all requirements of the sentence and satisfied all legal financial obligations. RCW 9.94A.637.

(b) If you are not under the custody and supervision of the Department of Corrections, the court will not issue a Certificate of Discharge until it has received verification from you that you have completed all sentence conditions other than payment of

legal financial obligations and the clerk's office that you have satisfied all legal financial obligations.

5.8 [ ] DOL Notice—Defendant under age 21 only

Count _____ is (a) a violation of RCW chapter 69.41 [Legend drug], 69.50 [VUCSA], or 69.52 [Imitation drugs], and the defendant was under 21 years of age at the time of the offense OR (b) a violation under RCW 9.41.040 [unlawful possession of firearm], and the defendant was under the age of 18 at the time of the offense OR (c) a violation under RCW chapter 66.44 [Alcohol], and the defendant was under the age of 18 at the time of the offense, AND the court finds that the defendant previously committed an offense while armed with a firearm, an unlawful possession of a firearm offense, or an offense in violation of chapter 66.44, 69.41, 69.50, or 69.52 RCW.

Clerk's Action–The clerk shall forward an Abstract of Court Record (ACR) to the DOL, which must revoke the Defendant's driver's license. RCW 46.20.265.

5.9 Sex and Kidnapping Offender Registration

RCW 9A.44.128, 9A.44.130, 10.01.200.

1. General Applicability and Requirements: Because this crime involves a sex offense, or a kidnapping offense involving a minor as defined in RCW 9A.44.128, you will be required to register.

If you are a resident of Washington, you must register with the sheriff of the county of the State Washington where you reside. You must register within three business days of being sentenced unless you are in custody, in which case you must register at the

time of your release with the person designated by the agency that has jurisdiction over you. You must also register within three business days of your release with the sheriff of the county of the State of Washington where you will be residing.

While in custody, if you are approved for partial confinement, you must register when you transfer to partial confinement with the person designated by the agency that has jurisdiction over you. You must also register within three business days from the end of partial confinement or release from confinement with the sheriff of the county where you reside.

If you are not a resident of Washington but you are a student in Washington or you are employed in Washington or you carry on a vocation in Washington, you must register with the sheriff of the county of your school, place of employment, or vocation. You must register within three business days of being sentenced unless you are in custody, in which case you must register at the time of your release with the person designated by the agency that has jurisdiction over you. You must also register within three business days of your release with the sheriff of the county of your school, where you are employed, or where you carry on a vocation.

2. Offenders Who are New Residents, Temporary Residents, or Returning Washington Residents: If you move to Washington or if you leave this state following your sentencing or release from custody but later move back to Washington, you must register within three business days after moving to this state. If you leave this state following your sentencing or release from custody, but later while not a resident of Washington you become employed in Washington, carry

on a vocation in Washington, or attend school in Washington, you must register within three business days after starting school in this state or becoming employed or carrying out a vocation in this state. If you are visiting and intend to reside or be present 10 or more days in Washington, then you must register the location where you plan to stay or your temporary address with the sheriff of each county where you will be staying within three business days of your arrival.

3. Change of Residence Within State: If you change your residence within a county, you must provide, by certified mail, with return receipt requested or in-person, signed written notice of your change of residence to the sheriff within three business days of moving. If you change your residence to a new county within this State, you must register with the sheriff of the new county within three business days of moving. Also within three business days, you must provide, by certified mail, with return receipt requested or in-person, signed written notice of your change of address to the sheriff of the county where you last registered.

4. Leaving the State or Moving to Another State: If you move to another state, or if you work, carry on a vocation, or attend school in another state you must register a new address, fingerprints, and photograph with the new state within three business days after establishing residence, or after beginning to work, carry on a vocation, or attend school in the new state. If you move out of state, you must also send written notice within three business days of moving to the new state or to a foreign country to the county sheriff with whom you last registered in Washington State.

5. Travel Outside the United States: If you intend to travel outside the United States, you must provide signed written notice of the details of your plan to travel out of the country to the sheriff of the county where you are registered. Notice must be provided at least 21 days before you travel. Notice may be provided to the sheriff by certified mail, with return receipt requested, or in person.

If you cancel or postpone this travel, you must notify the sheriff within three days of canceling or postponing your travel or on the departure date you provide in your notice, whichever is earlier.

If you travel routinely across international borders for work, or if you must travel unexpectedly due to a family or work emergency, you must personally notify the sheriff at least 24 hours before you travel. You must explain to the sheriff in writing why it is impractical for you to comply with the notice required by RCW 9A.44.130(3).

6. Notification Requirement When Enrolling in or Employed by a Public or Private Institution of Higher Education or Common School (K-12): You must give notice to the sheriff of the county where you are registered within three business days:

i) before arriving at a school or institution of higher education to attend classes;

ii) before starting work at an institution of higher education; or

iii) after any termination of enrollment or employment at a school or institution of higher education.

7. Registration by a Person Who Does Not Have a Fixed Residence: Even if you do not have a fixed residence, you are required to register. Registration must occur within three business days of release in the county where you are being supervised if you do not have a residence at the time of your release from custody. Within three business days after losing your fixed residence, you must send signed written notice to the sheriff of the county where you last registered. If you enter a different county and stay there for more than 24 hours, you will be required to register with the sheriff of the new county not more than three business days after entering the new county. You must also report weekly in person to the sheriff of the county where you are registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. You must keep an accurate accounting of where you stay during the week and provide it to the county sheriff upon request. The lack of a fixed residence is a factor that may be considered in determining an offender's risk level and shall make you subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

8. Application for a Name Change: If you apply for a name change, you must submit a copy of the application to the county sheriff of the county of your residence and to the state patrol not fewer than five days before the entry of an order granting the name change. If you receive an order changing your name, you must submit a copy of the order to the county sheriff of the county of your residence and to the state patrol within three business days of the entry of the order. RCW 9A.44.130(7).

9. Failure to Register: You are required to register pursuant to the above obligations and if you knowingly fail to do so, or if you change your name without notifying the county sheriff and the state patrol, you may be charged arid convicted of a crime.

5.10 Right to Appeal

If you plead not guilty, you have a right to appeal this conviction. If the sentence" imposed was outside of the standard sentencing range, you also have a right to appeal the sentence. You may also have the right to appeal in other circumstances.

This right must be exercised by filing a notice of appeal with the clerk of this court within 30 days from today. If a notice of appeal is not filed within this time, the right to appeal is IRREVOCABLY WAIVED.

If you are without counsel, the clerk will supply you with an appeal form on your request, and will file the form when you complete it.

If you are unable to pay the costs of the appeal, the court will appoint counsel to represent you, and the Portions of the record necessary for the anneal will be Prepared at public expense

5.11 Voting Rights Statement

I acknowledge that I have lost my right to vote because of this felony conviction. If I am registered to vote, my voter registration will be cancelled.

My right to vote is provisionally restored as long as I am not under the authority of DOC (not serving a sentence of confinement in the custody of DOC and not subject to community custody as defined in RCW

9.94A.030). I must re-register before voting. The provisional right to vote may be revoked if I fail to comply with all the terms of my legal financial obligations or an agreement for the payment of legal financial obligations.

My right to vote may be permanently restored by one of the following for each felony conviction: a) a certificate of discharge issued by the sentencing court, RCW 9.94A.637; b) a court order issued by the sentencing court restoring the right, RCW 9.92.066; c) a final order of discharge issued by the indeterminate sentence review board, RCW 9.96.050; or d) a certificate of restoration issued by the governor, RCW 9.96.020. Voting before the right is restored is a class C felony, RCW 29A.84.660. Registering to vote before the right is restored is a class C felony, RCW 29A.84.140.

5.12 Other

_____.

DONE in Open Court and in the presence of the defendant this 15th day of September, 2016.

/s/ Linda C. Krese
Judge

/s/ Wallace R. Langbhen
WSBA# 37508
Deputy Prosecuting Attorney

/s/ Cassandra Lopez De Arriaga
WSBA# 34318
Attorney for Defendant

/s/ James Bradley Anderson
Defendant

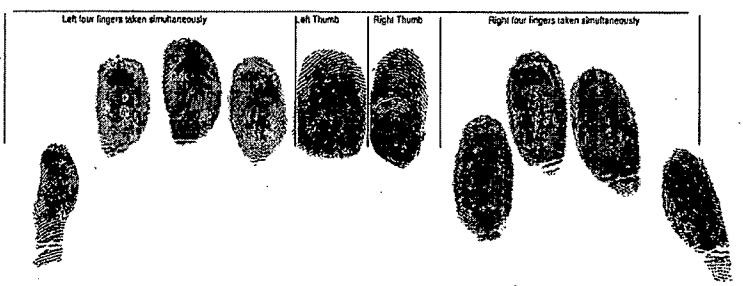
IDENTIFICATION OF DEFENDANT

Date of Birth:	10/02/1985
FBI Number:	753130ND5
Sex:	Male
Height:	5'4"
Weight:	130
Hair:	Brown
Eyes:	Brown

FINGERPRINTS: I attest that I saw the same defendant who appears in court on this document affix his or her fingerprints and signature thereto. Clerk of the court: Sonya Kraski, Deputy Clerk. Dated 9-15-2016

Defendant's Signature: James Anderson

Address: DOC



ORDER OF COMMITMENT

THE STATE OF WASHINGTON to the Sheriff of the County of Snohomish; State of Washington, and to the Secretary of the Department of Corrections, and the Superintendent of the Washington Corrections Center of the State of Washington:

WHEREAS, JAMES BRADLEY ANDERSON, has been duly convicted of the crime(s) of SECOND DEGREE CHILD MOLESTATION (sexual contact with defendant) FIRST DEGREE RAPE OF A CHILD FIRST DEGREE CHILD MOLESTATION (sexual contact with defendant) FIRST DEGREE CHILD MOLESTATION (sexual contact with defendant) SECOND DEGREE RAPE OF A CHILD as charged in the 2nd Amended Information filed in the Superior Court of the State of Washington, in and for the County of Snohomish, and judgment has been pronounced against him/her that he/she be punished therefore by imprisonment in such correctional institution under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections pursuant to RCW 72.02.210, for the term(s) as provided in the judgment which is incorporated by reference, all of which appears of record in this court; a certified copy of said judgment being endorsed hereon and made a part thereof; Now, Therefore,

THIS IS TO COMMAND YOU, the said Sheriff, to detain the said defendant until called for by the officer authorized to transfer to the custody of the Superintendent for the Washington State Department of Corrections or his designee for transport to either the Washington Corrections Center at Shelton,

Washington or Washington Corrections Center for Women at Purdy, Washington and this is to command you, the said Superintendent and Officers in charge of said Washington Corrections Center to receive from the said officers the said defendant for confinement, classification, and placement in such corrections facilities under the supervision of the Department of Corrections, Division of Prisons, as shall be designated by the Secretary of the Department of Corrections.

And these presence shall be authority for the same. HEREIN FAIL NOT.

WITNESS the Honorable LINDA C. KRESE, Judge of the said Superior Court and the seal thereof, this 15th day of September, 2016.

Sonya Kraski
Clerk of the Superior Court

{Signature not legible}

SECOND AMENDED INFORMATION
(JULY 18, 2016)

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF SNOHOMISH JUVENILE DIVISION

STATE OF WASHINGTON,

Plaintiff,

v.

ANDERSON, JAMES BRADLEY
DOB: 10/02/1985.,

Respondent.

Case No.: 15-1-01899-4

Co-Respondent(s):

Comes Now MARK K. ROE, Prosecuting Attorney for the County of Snohomish, State of Washington, and by this, his Information, charges and accuses the above-named Respondent(s), under the age of eighteen (18) years, with the following crime(s) committed in, or committed while the Respondent was a resident in Snohomish County, Washington:

Count 1:
SECOND DEGREE CHILD MOLESTATION
(sexual contact with defendant)
[committed as follows:

That the defendant, on or about a specific date between the 12th day of May 2008 through the 11th day of May 2010, did have sexual contact with K.J. (DOB: 05/1 2/1 996), who was at least twelve years old but less than fourteen years old and not married to the defendant and not in a state registered domestic partnership with the defendant, and the defendant was at least thirty-six months older than K.J. (DOB: 05/12/1996); proscribed by RCW 9A.44.086, a felony.

Count 2:
FIRST DEGREE RAPE OF A CHILD
[committed as follows:

That the defendant, on or about a specific date between the 12th day of May, 2005 through the 11th day of May 2008, did have sexual intercourse with K.J. (DOB: 05/12/1996), who was less than twelve years old and not married to the defendant and not in a domestic partnership with the defendant, and the defendant was at least twenty-four months older than K.J. (DOB: 05/12/1996); proscribed by RCW 9A.44.073, a felony.

Count 3:
FIRST DEGREE CHILD MOLESTATION
(sexual contact with defendant)
[committed as follows:

That the defendant, on or about a specific date between the 12th day of May, 2005 through the 11th day of May 2008, did have sexual contact with K.J. (DOB: 05/12/1996), who was less than twelve years old and not married to the defendant and not in a state registered domestic partnership with the defendant, and the defendant was at least thirty-six months older than K.J. (DOB: 05/12/1996); proscribed by RCW 9A.44.083, a felony.

Count 4:
FIRST DEGREE CHILD MOLESTATION
(sexual contact with defendant)
[committed as follows:

That the defendant, on or about a specific date between the 12th day of May, 2005 through the 11th day of May 2008, in an act separate and distinct from Count 2, did have sexual contact with K.J. (DOB: 05/12/1996), who was less than twelve years-old and not married to the defendant and not in a state registered domestic partnership with the defendant, and the defendant was at least thirty-six months older than K.J. (DOB: 05/12/1996); proscribed by RCW 9A.44.083, a felony.

Count 5:
SECOND DEGREE RAPE OF A CHILD
[committed as follows:

That the defendant, on or about a specific date between the 12th day of May 2008 through the 11th day of May, 2010, did have sexual intercourse with K.J. (DOB: 05/12/1996), who was at least twelve years old but less than fourteen years old and not married to the defendant and not in a state registered domestic partnership with the defendant, and the defendant was at least thirty-six months older than K.J. (DOB: 05/12/1996); proscribed by RCW 9A.44.076, a felony.

Mark K. Roe
Prosecuting Attorney

/s/ Wallace R. Langbehn
#37508
Deputy Prosecuting Attorney

NOTICE OF APPEARANCE, DEMAND JURY TRAIL, AND DEMAND FOR DISCOVERY (NOVEMBER 17, 2015)

IN THE SUPERIOR COURT FOR
SNOHOMISH COUNTY STATE OF WASHINGTON

STATE OF WASHINGTON,

Prosecutor,

v.

JAMES BRADLEY ANDERSON, JR.,

Accused.

Case No.: 15-1-01899-4

TO: The Court Clerk
AND TO: Prosecutor's Office

PLEASE TAKE NOTICE that Cassandra Lopez de Arriaga, WSBA #34318, hereby enters an appearance on behalf of the accused. The accused hereby requests a bill of particulars pursuant to CrR 2.4(e) and 4.1(d) and further makes the following demand for discovery:

1. The names, addresses, and phone numbers of all persons the prosecutor intends to call as witnesses at the time of hearing or trial, together with copies of any notes, written or recorded statements, and the substance of any oral statements made by any of those witnesses or by any third parties communicated

to those witnesses bearing on any issue in this case.

2. Any statements, written or recorded, and the substance of any oral statement made by the defendant or by a codefendant.

3. Any reports or statements, oral or written, by any witness, including expert witnesses, regarding the results of any scientific, chemical, physical, or mental examination, comparison, or tests performed in connection with this case.

4. Any books, papers, documents, photographs, or tangible objects which the prosecutor intends to use in the hearing or trial or which were obtained from or belonged to the defendant, together with synopsis of its alleged connection lo the charges herein;

5. Any record of prior criminal convictions known to the prosecuting authority of the defendant or any persons whom the prosecutor intends to call as witnesses at the hearing or trial;

6. Any evidence of an exculpatory nature pursuant to *Brady v. Maryland*, 373 U.S. 93 (1963), or impeachment evidence pursuant to *United States v. Bagley*, 473 U.S. 667 (1985);

7. Copies of or access to any '911' or other recordings of police communications, including printouts of the Computer Aided Dispatch records relevant to this charge;

8. Any expert witnesses whom the prosecutor will call at the hearing or trial, the subject of

their testimony, and any reports relating to the subject of their testimony that they have submitted to the prosecuting attorney or otherwise relied upon;

9. Any information indicating entrapment of the defendant;

10. Information pertaining to any searches of the defendant or the defendant's property, and any items or fruits seized as a result of the search;

11. The relationship, if any, of witnesses or accusers to the prosecuting authority; and

12. Any electronic surveillance, including wiretapping, of the defendant's premises or conversations to which the defendant was a party and any record thereof.

13. The results of any searches conducted of electronic files belonging to, or relating to, the accused; such files shall include those contained in computer hard drives or other electronic storage media such as floppy disks, e-mail, flash drives, portable hard drives, or other electronic records such as phone records, credit card records, etc.

FURTHERMORE, the accused demands a hearing pursuant to CrRLJ 3.5 to determine the admissibility of any statements attributed to the accused, and the accused objects to the admission at trial of any such statements in that absence of a CrRLJ 3.5 hearing.

YOU ARE HEREBY NOTIFIED that failure to comply with the demands contained herein will result

in the accused moving for appropriate relief, including dismissal, at time of hearing or trial.

RESPECTFULLY Submitted, this date, November 16, 2015.

/s/ Cassandra Lopez de Arriaga
WSBA #34318
Attorney for the Accused

ADDITIONAL DEMAND FOR DISCOVERY (MAY 17, 2016)

IN THE SUPERIOR COURT FOR
SNOHOMISH COUNTY STATE OF WASHINGTON

STATE OF WASHINGTON,

Prosecutor,

v.

JAMES ANDERSON,

Accused.

Case No. 15-1-01899-4

TO: The Court Clerk
AND TO: Prosecutor's Office

The accused hereby requests a bill of particulars pursuant to CrR 2.4(e) and 4.1(d) and further makes the following demand for discovery:

1. Reports, statements or chart notes, oral or written, regarding the results of or mental examination or visits for counseling with Dawson's Place and YWCA.
2. Any record of prior criminal convictions known to the prosecuting authority of the defendant or any persons whom the prosecutor intends to call witnesses at the hearing or trial;

APRIL B. GONZALES

JOHN CLIFFORD H. EWELL

3. Copies of or access to any '911' or other recordings of police communications, including printouts of the Computer Aided Dispatch records showing original call to law enforcement;

4. Any expert witnesses whom the prosecutor will call at the hearing or trial, the subject of their testimony, and any reports relating to the subject of their testimony that they have submitted to the prosecuting attorney or otherwise relied up on;

Admissibility of any statements attributed to the accused, and the accused objects to the admission at trial of any such statements in that absence of a CrRLJ 3.5 hearing.

YOU ARE HEREBY NOTIFIED that failure to comply with the demands contained herein will result in the accused moving for appropriate relief, including dismissal, at time of hearing or trail.

RESPECTFULLY Submitted, this date, May 17, 2016.

/s/ Cassandra Lopez de Arriaga
WSBA #34318
Attorney for the Accused

DEFENDANT MOTION FOR NEW TRAIL PURSUANT CrR 7.5 (AUGUST 10, 2016)

IN THE SUPERIOR COURT FOR SNOHOMISH COUNTY STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

JAMES BRADLEY ANDERSON,

Defendant.

Case No.: 15-1-01899-4

Before: Hon. Linda C. KRESE, Judge.

COMES NOW the Defendant, JAMES BRADLEY ANDERSON, by and through his attorney, CASSANDRA LOPEZ DE ARRIAGA, and moves this Court for a new trial. This motion is based upon the 6th Amendment of the United States Constitution, Article I, Section 22 of the Washington State Constitution, and CrR Rule 7.5.

Respectfully submitted this 5th day of August, 2016

/s/ Cassandra Lopez De Arriaga
WSBA #34318
Attorney for Defendant

STATEMENT OF FACTS

Mr. Anderson's trial began on July 18, 2016 before the Honorable Judge Linda C. Krese. The trial began with motions in limine where several issues were litigated to limit witnesses on both sides from testifying on matters prohibited by evidence rules. After three days of testimony, the jury had four separate questions during their deliberations and at the end of the business day the jury returned guilty verdicts on all counts.

STATEMENT OF THE ISSUES

1. Whether K.J.'S testimony giving new evidence at trial precluded Defense from ability to investigate, properly cross-examine K.J., and provide the Defendant a fair trial.

2. Whether K.J.'s demeanor during trial, and breakdowns in front of the jury constituted an irregularity that prevented the Defendant from receiving a fair trial.

3. Whether the Defense request for mistrial for references to counseling, contrary to the courts' ruling, unfairly prejudiced the jury.

MEMORANDUM OF LAW

THE DEFENDANT WAS NOT AFFORDED A FAIR TRIAL DUE TO EVIDENCE NO PREVIOUSLY PROVIDED AND TRIAL IRREGULARITIES.

Rule 7.5 New Trial states:

The court on motion of a defendant may grant a new trial for any one of the following cause when it affirmatively appears that a substantial right of the defendant was materially affected:

(1) Receipt by the jury of any evidence, paper, document or book not allowed by the court;

(2) Misconduct of the prosecution or jury;

(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at trial;

(4) Accident or surprise;

(5) Irregularity in the proceedings of the court, jury or prosecution, or any order of court, or abuse of discretion, by which the defendant was prevented from having a fair trial;

(6) Error of law occurring at the trial and objected to at the time by the defendant;

(7) That the verdict or decision is contrary to law and the evidence;

(8) The substantial justice has not been done. When the motion is based on matters outside the record, the facts shall be shown by affidavit.

CrR 7.5 lays out eight possible reasons why a trial court would grant a new trial and in essence disregard the decision of the jury. The Legislature has contemplated various circumstances where a defendant's rights would outweigh the verdicts.

One such instance that would allow for a new trial to be granted by the trial court is when newly discovered

evidence material for the defendant. The 6th Amendment of the United States Constitution, Article I, Section 22 of the Washington State Constitution, guarantee the Defendant the right to cross-examine their accusers. To do this effectively defense counsel interviews the alleged victim to gain understanding of her expected testimony at trial. In the present case K.J. was interviewed three times, twice by the investigating detective and once by defense counsel with the assistance of defense investigator.

This case was not just wrought with inconsistent testimony but newly discovered (or "remembered") evidence testified by K.J. Defense counsel questioned her why she had not disclosed in prior interviews with no adequate response other than she just remembered. Those "memories" only disclosed in trial robbed Mr. Anderson the ability for his investigator to seek contrary evidence available to impeach her claims. More importantly those recently disclosed details prevent Mr. Anderson's counsel from being properly prepared to effectively cross-examine K.J.

Additionally, one instance K.J. disclosed (house where they had sex with Cisero present in back yard) defense counsel did not have an opportunity to litigate a motion in limine precluding it's admission under 404(b). No legal analysis was done to allow K.J. to talk about it to the jury.

The Defendant was also prevented from providing evidence to question K.J.'s 4-year gap between the initial disclosure to law enforcement and the first time she ever actually disclose(details of the allegations. Defense counsel brought a pretrial motion to compel counseling records to see what details where discussed in counseling. The court denied the motion Defense

brought a motion in limine to preclude mention of K.J. being in counseling since the defense was unable to question any facts because the defense was denied access. During the trial, Defense Counsel brought a motion for mistrial due to K.J.'s counseling being mentioned b; several witnesses (not in direct response to any question by the State). That motion was also denied.

In *State v. Taylor*, 60 Wn.2d 32 (1962), 371 P.2d 617, the Washington Supreme Court upheld the trial court ordering a new trial because a state's witness mentioned that the defendant "had previously contacted the parole officer of the defendant." In the present case, similar to *Taylor*, counsel made a motion for a mistrial, the Court: "the respondents' counsel has never receded, but, on the contrary, has at all times steadfastly maintained it." While the State did not prompt such comments from K.J. as in Taylor the affirmed a new trial: "It should be noted that the offending remark was not responsive to the prosecutor's question and is not claimed to be misconduct. The court was at pains to point out that neither counsel was to blame for the error."

Comments of prior crimes or bad acts are prohibited unless the court rules admissible. In the present case evidence of a prior bad act was presented to the jury without a court's ruling allowing it. Either of the comments above that of the undisclosed incident, or counseling references, coupled with K.J.'s demeanor (crying, and multiple outbursts of emotion towards the jurors) unfairly influenced the jury. How could it not?

CONCLUSION

Mr. Anderson was not given a fair trial as afforded under both the United States and Washington Constitutions. Accordingly the legislature has granted this trial court the discretion to grant a new trial. We respectfully ask this court who observed all the proceedings to grant a new trial.

Respectfully submitted this 5th day of August, 2016

/s/ Cassandra Lopez De Arriaga
Attorney for Defendant
WSBA #34318

DECLARATION OF DEFENSE INVESTIGATOR JAN MORTENSEN (JULY 29, 2016)

IN THE SUPERIOR COURT FOR SNOHOMISH COUNTY STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

JAMES BRADLEY ANDERSON,

Defendant.

Case No.: 15-1-01899-4

I, JAN MORTENSEN, declare as follows:

1. I have been the defense investigator in the James Anderson case from the outset.
2. In this case I have interviewed K.J., witnesses, sought out new witnesses, and after verdict continued to interview witnesses.
3. On July 29, 2016, based on information from K.J.'s testimony at trial, I went to the former Anderson home: A rambler style home at 127 115th Street SE, Everett, WA.
4. The backyard was fenced by chain-link fence. I walked to the west side of property and from where I was standing the backyard

was mostly visible from the fence, with the exception of the area directly behind the house. I could see children's play equipment, two sheds, and a trampoline (not the Anderson's but new resident). There was outdoor furniture in back yard as well.

5. I was not able to contact the current resident of the home, so I attempted to get information that was in plain view.

6. Comparing K.J.'s hand-drawn layout of home (Attachment "A") (corroborated by Karen Taylor's hand-drawn layout) (Attachment "B") and what I observed, it is reasonable to believe that the backyard could be viewed from the dining room/kitchen area through the sliding glass door.

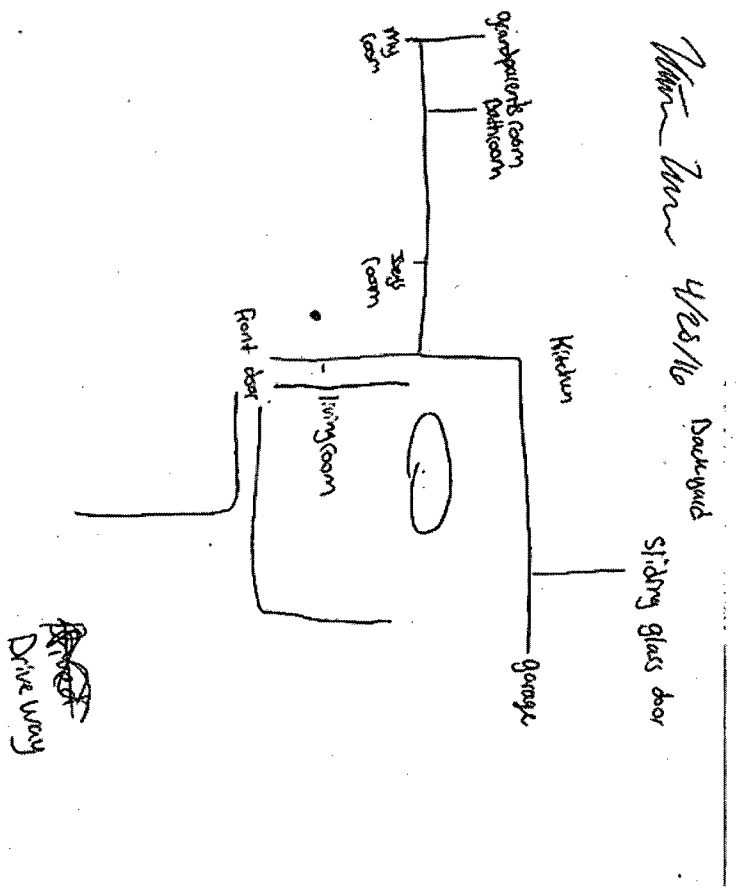
7. Had K.J. disclosed the incident in the kitchen in the defense interview, I most certainly would have asked the names of friends present, attempted to interview those friends, gone to residence and attempted to take photographs from inside the kitchen and the view from outside looking into the kitchen/dining room area.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

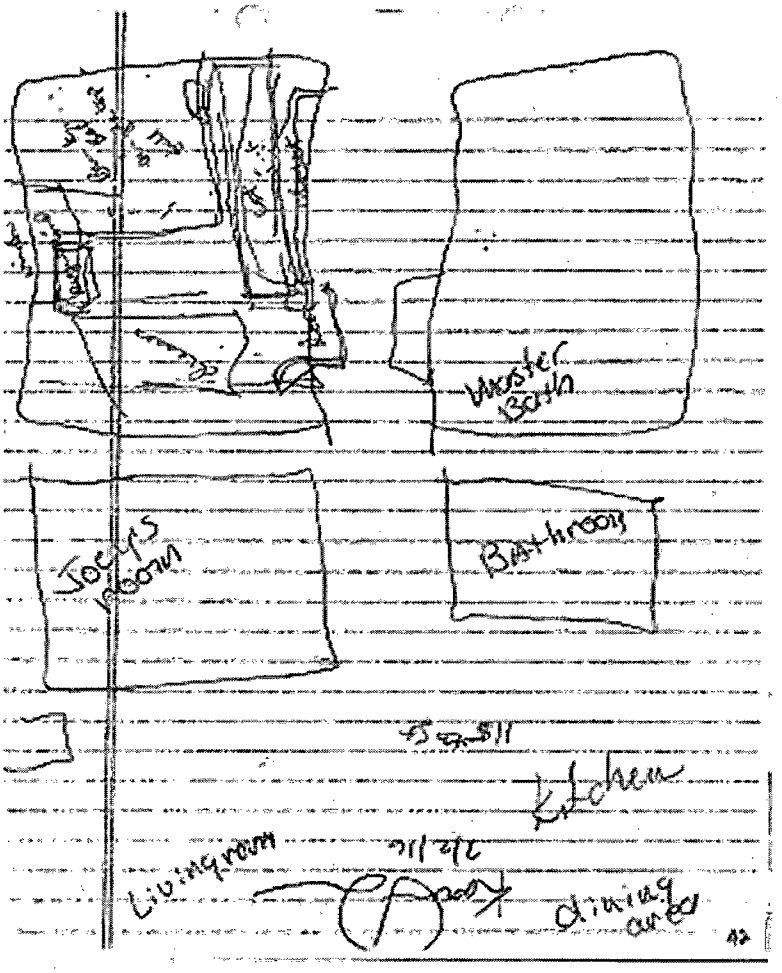
Signed this 29th day of July, 2016 in the Everett (City), Washington.

/s/ Jan Mortensen

ATTACHMENT "A"



ATTACHMENT "B"



ATTORNEY AFFIDAVIT IN SUPPORT OF MOTION FOR NEW TRIAL (JULY 29, 2016)

IN THE SUPERIOR COURT FOR
SNOHOMISH COUNTY STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff,

v.

JAMES BRADLEY. ANDERSON,

Defendant.

Case No.: 15-1-01899-4

I, CASSANDRA LOPEZ DE ARRIAGA, counsel of record for the Defendant, and hereby make this declaration upon personal knowledge and belief.

1. A jury trial in this case began on July 18, 2016, and the jury returned verdicts on July 21, 2016 in late afternoon.
2. The jury returned five guilty verdicts for charges filed in the 2nd Amended complaint.
3. K.J. was interviewed by Detective Barrows on October 14, 2014, the interview was recorded and later transcribed.

4. K.J. was interviewed by Detective Barrows again on April 1, 2016, the interview was recorded and later transcribed.

5. K.J. was interviewed by defense investigator Jan Mortensen on April 25, 2016, the interview was recorded and later transcribed.

6. K.J. testified to new facts during the trial not disclosed in any interview, obstructing defense preparation and ability effectively cross examine her in trial.

7. I asked K.J. at trial "In 2014, in your interview with detective, did you share the house incident?" K.J. responded "no."

8. I asked K.J. at trial "In 2016, in your interview with the detective, did you share the house incident?" K.J. responded "no."

9. I have not been able to research all the new details, nor investigate case law to support a new trial.

10. I was unable to walk K.J. through all the new details, and properly impeach her on prior inconsistent statements due to her emotional state and numerous outbursts.

11. The newly discovered evidence of new sexual assault encounters, coupled by her emotional breakdowns, prevented the defendant from having a new trial.

12. Defense counsel is working diligently to complete defense brief by Monday August 1, 2016.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE.

Signed this 29th day of July, 2016 in the Everett (City), Washington.

/s/ Cassandra Lopez De Arriaga
WSBA# 34318
Attorney for Defendant

SUPREME COURT
PRESS