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No. 38661-9-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON,

Petitioner

v.

DANNY DELGADO,

Respondent

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# PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER

The State of Washington, by and through its attorney, Eric Eisinger, Prosecuting Attorney, and Terry J. Bloor, Deputy Prosecuting Attorney, asks this Court to accept review of the Court of Appeals decision, as designated in part II of this petition.

## II. COURT OF APPEALS DECISION

The State wants review of the decision of the Court of Appeals, dated December 12, 2023, solely ordering a remand for resentencing. A copy of the decision is attached in the Appendix.

## III. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals decision conflict with other decisions regarding the burden of proof and the trial court's requirement to search for facts that the defendant's crimes were mitigated by his youth when the defendant has presented no evidence of mitigation?

2. Does the petition involve an issue of substantial public interest which should be determined by the Supreme Court? Specifically, what is the trial court's obligation to seek out mitigating factors of youth where the defendant has presented no such evidence?

## IV. STATEMENT OF THE CASE

**The defendant began sexually assaulting his half-sister, G.D., when she was around six years old.**

The defendant had been living with his father, Roberto Delgado, stepmother, Gabriela Corrales-Valdez, and the three children they had together, K.D., A.D., and G.D. in their residence in Kennewick, WA., starting when he was about 16 years old. RP[1] at 486, 494, 554. The defendant and his half-brothers would sleep in one bedroom. RP at 496. The girl, K.D., would sleep either in the living room on the sofa or with her parents in their bedroom. RP at 493.

[1] Unless otherwise indicated, "RP" refers to the Verbatim Report of Proceedings from jury trial on 10/11-10/20/2021.

Both parents worked and when they were not home, the defendant would babysit his three half-siblings. RP at 495, 498, 561. At first, the defendant and K.D. had a normal brother-sister relationship. But when the parents were working, he began to take her into her parents' bedroom and sexually assault her. RP at 636, 642. K.D. said sometimes her brothers were playing video games in their room when the sexual assaults happened. RP at 642. A.D. confirmed that there were times when the defendant was babysitting them and K.D. and the defendant would not be in the same room as the boys. RP at 444.

The assaults included putting his penis in the spot where "I go potty," and both giving and receiving oral sex. RP at 636, 638-39. The defendant assaulted her two to three times per week. RP at 661.

The defendant threatened K.D. that if she told, he would kill her parents. RP at 642. K.D. states she had nightmares after the defendant sexually assaulted her. RP at 693. A doctor

stated that K.D.'s symptoms, which included frequently thinking about the defendant and seeing his face when she was walking home or getting something from the refrigerator, sounded like Post-Traumatic Stress Disorder. RP at 418.

K.D. testified that the sexual assaults stopped when the defendant's father kicked him out of the residence, which was when the defendant turned 18. RP at 644. K.D. would have been seven years old in 2016 and she stated the assaults did not happen when she was eight years old. RP at 637.

**K.D. discloses the abuse years later during a trip over Thanksgiving to Los Angeles to her cousin and aunt.**

Despite being threatened, K.D. tried to tell some friends that she was being abused, but they did not know what the word "abuse" meant. RP at 644. Several years after the defendant was kicked out of the residence, the family visited Maria Corrales De Lopez, Gabriela's sister, in Los Angeles, in November 2020. RP at 356, 358. Maria had a daughter, G.L. who was 13 years old. K.D. told G.L. she had a secret, and she did not want to tell the secret to adults. RP at 349-50.

Hesitantly and with tears, she told G.L. the secret. RP at 349. G.L. convinced K.D. to tell the secret to Maria. RP at 350.

It was not easy for K.D. to tell Maria. RP at 359. Tears were running down K.D.'s face. RP at 360. Maria was also present when K.D. told her own mother, Gabriela. RP at 361. K.D. cried when she told her mother and would physically get close to her. RP at 361.

**The verdicts and the sentencing hearing:**

The jury found the defendant guilty as charged of two counts of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree. CP 54-57. The jury also found that the crimes were aggravated by an ongoing pattern of sexual abuse of the same victim manifested by multiple incidents over a prolonged period of time. CP 58, 60.

The defendant filed a Motion and Affidavit in Support of Imposition of Exceptional Sentence Below the Standard Range, arguing in part that "youth is a mitigating factor." CP 62-67. His motion does not state how or why the crimes were

mitigated by the factors of youth: lack of maturity leading to impulsivity, the failure to appreciate the risks of his behavior or being subject to peer pressure. CP 65. The defendant also argued that he should be given an exceptional sentence below the standard range based on "the multiple offense policy." CP 65.

The defendant did not testify at the trial. RP at 865. He also did not participate in the Pre-Sentence Investigation. CP 102. He did not speak at his sentencing. RP at 976. As opposed to the silence of the defendant, the trial court had the evidence produced at trial, the jury verdicts, including the jury's verdict that the crimes were aggravated due to multiple acts over a prolonged period of time.

There were allegations that the defendant and his stepmother had an affair. The trial court concluded that the alleged affair could not be considered because the defendant did not testify in trial, talk to the PSI investigator, or speak at sentencing, the stepmother denied the affair, none of the

children said they saw anything between the two, and her husband only said he found phone records which were shocking to him. RP at 453-56, 507, 584-85, 979.

The trial court stated she was mindful of the defendant's age, and the literature regarding crime and the development of young people but based on the nature and the way the crimes were committed, an exceptional sentence below the standard range was not appropriate. RP at 977, 981. The court noted:

- He groomed K.D. RP at 978
- He threatened K.D. about what would happen if she told. RP at 978.
- He exploited his position of trust within the family to sexually abuse K.D., who was a vulnerable child. RP at 978.
- There is no information that the defendant is amenable to treatment. RP at 979.
- There were multiple occurrences of sexual abuse by the defendant against K.D. RP at 979.

- The defendant stole K.D.'s childhood and in some ways a portion of her adulthood. RP at 981.

The defendant committed the crimes against K.D. when her parents were out of the home and when his half-brothers were occupied with video games or other activities. He was able to conceal the crimes so that neither his father, his stepmother, or his half-brothers saw anything inappropriate between K.D. and him. RP at 449, 477, 546, 562.

The Court also went through the purposes of the Sentencing Reform Act in RCW 9.94A.010 and found that the sentence was proportional to the seriousness of the offense and the defendant's criminal history, that the sentence promoted respect for the law, was commensurate with the punishment imposed on other committing similar offenses, would protect the public, offered the defendant an opportunity to improve himself, and reduced the risk of a re-offense. RP at 980.

The Court had the option of imposing an exceptional sentence above the standard range based on the jury finding this

aggravating circumstance but imposed the top of the standard range. CP 80.

## V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

### A. The Court of Appeals decision conflicts with other decisions regarding the burden of proof and the trial court's requirement to search for facts that the defendant's crimes were mitigated by his youth when the defendant presented no evidence of mitigation.

#### 1. The burden of proof is on the defendant; no other case has held that the trial court must examine sua sponte the mitigating factors of youth.

The Court of Appeals' decision states, "In this case, Delgado failed to provide any additional evidence on the mitigating factors of youth. Nevertheless, this lack of evidence did not relieve the trial court of its obligation." Opinion at 22. This conflicts with cases regarding the burden of proof, whether the trial court should sua sponte seek out mitigating factors of youth, and the duty of the trial court to conduct a meaningful consideration on the mitigating factors *when none are presented*.

The defendant has the burden of proving mitigating factors, including the mitigating factors of youth. *State v. Gregg,* 196 Wn.2d 473, 486, 474 P.3d 539 (2020); *State v. Stewart,* 27 Wn. App. 2d 441, 532 P.3d 211, 215 (2023). No court has imposed a requirement that the trial court look for sua sponte mitigating factors of youth when the defendant does not do so, until this case.

In this case, the defendant did not testify, did not participate in the Pre-Sentence Investigation, and did not speak at sentencing. The trial court concluded, as did the jury, that the offenses happened over a prolonged period of time. The trial court concluded that the defendant groomed and threatened K.D. based on her testimony. The evidence was that the defendant waited until his father and stepmother were gone from the residence, and his half-brothers were occupied, to abuse K.D.

There was no peer pressure, no impetuosity, no lack of considering the consequences. In short, there were no mitigating factors of youth.

This conflicts with other cases in addition to *Gregg* and *Stewart,* supra. In *State v. Anderson,* 200 Wn.2d 266, 285, 516 P.3d 1213 (2022), the court stated, "Instead, a juvenile offender must show that their immaturity, impetuosity, or failure to appreciate risks and consequences—characteristics of youth that suggest a juvenile offender may be less culpable than an adult offender—contributed to the commission of their crime." *State v. Ramos*, 187 Wn.2d 420, 436-37, 387 P.3d 650 (2017) held that placing the burden on the juvenile offender to prove an exceptional sentence is justified.

Once the trial court has determined that youth was not a mitigating factor in the crime, the Sentencing Reform Act, RCW 9.94A, applies. *State v. Rogers,* 17 Wn. App. 2d 466, 476, 487 P.3d 177 (2021). In this case, since there was no proof of mitigating factors of youth, the trial court was correct

to use the standard range guidelines in RCW 9.94A.510; the Court of Appeals' decision is contrary to established caselaw. In holding to the contrary, the Court of Appeals' decision, again, stands alone.

The Court of Appeals' decision cites *Anderson,* supra. The difference between *Anderson* and this case is that in *Anderson* there was some evidence that the defendant's crimes were mitigated by youth. In *Anderson* at sentencing, the trial court had letters saying he was a dependable worker in prison, that he tutored other prisoners, that he was on the President's List at a Community College, that he had two dozen certificates of participation, and completion of various programs, and that a brother testified that he had grown and changed while in prison. *Anderson,* 200 Wn.2d at 273. The defendant testified that he mimicked the behaviors of older guys and that he went along on a drug deal to try to make a reputation in the streets. *Id.* at 273-74. The *Anderson* court upheld the trial court's determination that the defendant had not proven his crimes were impacted by

his youth. *Id.* at 288. Here, the Court of Appeals' decision itself says the defendant failed to provide any evidence of the mitigating factors of youth. Opinion at 22.

The Court of Appeals' decision cites the alleged affair between the stepmother and the defendant as something the trial court did not consider. Opinion at 23. That is inaccurate. The court did consider it and found it lacking. RP at 979. The affair was alleged only by the defense attorney. The defendant did not testify and never said anything about it, including to the lead detective. RP at 603. The stepmother denied it. RP at 584-85. The most the father said was that he was shocked by some records of phone calls from the defendant to his wife. RP at 507. Yet, the Court of Appeals' decision faults the trial court for not making a finding on this nebulous evidence. Opinion at 23. The burden of proof was on the defendant to prove some sexual abuse by his stepmother, and he failed in establishing the allegation.

This decision conflicts with cases unanimously holding that the defendant has the burden to prove mitigating factors, including mitigating factors of youth. The trial court has no duty to search out evidence to establish mitigation. The Court of Appeals decision states the defendant failed to provide evidence on the mitigating factors of youth. This Court should accept review under RAP 13.4(b)(1) or (2).

**B. This Court should also accept review because it presents an issue of substantial public interest which should be determined by the Supreme Court under RAP 13.4(b)(4).**

This Court should also accept review under RAP 13.4(b)(4) as an issue of substantial public interest that should be determined by the Supreme Court. If this Court does not accept review under RAP 13.4(b)(1) or (2), the issue of how a trial court is to consider requests by youthful defendants when there are no mitigating factors, other than youth, has been litigated often.

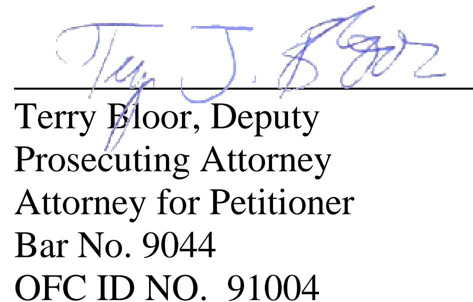
## VI. CONCLUSION

The State seeks discretionary review by this Court in order to reverse the decision of the Court of Appeals concerning the remand for sentencing.

This document contains 2,346 words, excluding the parts of the document exempted from the word count by RAP 18.17.

**RESPECTFULLY SUBMITTED** this 11th day of January, 2024.

**ERIC EISINGER**
Prosecutor



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## CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

| | |
|---|---|
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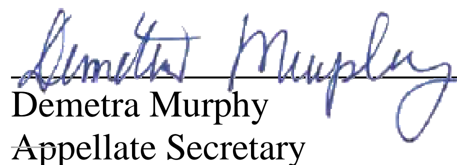
Signed at Kennewick, Washington on January 11, 2024.



Demetra Murphy
Appellate Secretary

# APPENDIX A

Opinion Filed in *Court of Appeals, Division III*, Court of Appeals Number 38661-9-III, on December 12, 2023

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CASE # 386619
State of Washington v. Danny Joseph Delgado
BENTON COUNTY SUPERIOR COURT No. 2110039603

Dear Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file the motion electronically through the court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

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Attach.
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FILED
DECEMBER 12, 2023
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

| | | |
|---|---|---|
| STATE OF WASHINGTON, | ) | |
| | ) | No. 38661-9-III |
| Respondent, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| DANNY JOSEPH DELGADO, | ) | OPINION PUBLISHED IN PART |
| | ) | |
| Appellant. | ) | |

STAAB, J. — Danny Delgado appeals his convictions and sentences for two counts of first degree rape of a child and two counts of first degree child molestation. The crimes were committed when Delgado was 17 and 18 years old. Through counsel he raises one trial issue, three sentencing issues, and one appellate procedural issue. In his statement of additional grounds (SAG) Delgado raises more than 90 additional claims.

In the published portion of our opinion, we reject Delgado's argument that this court's general order, requiring appellate briefs and opinions to use the initials of child witnesses or victims instead of their full names, violates Delgado's right to an open courtroom.

In the unpublished portion of our opinion, we affirm Delgado's convictions but remand for resentencing. Although Delgado failed to provide the court with any additional evidence of mitigating factors at sentencing, this does not relieve the

sentencing court from giving meaningful consideration to the differences between juveniles and adults, applying the facts of this case to those differences, and determining whether the facts present the "'uncommon situation where' the juvenile offender is just as culpable as an adult offender." *State v. Anderson*, 200 Wn.2d 266, 285, 516 P.3d 1213 (2022) (quoting *State v. Ramos*, 187 Wn.2d 420, 435, 387 P.3d 650 (2017)). On remand the sentencing court will retain discretion on whether to accept additional evidence before resentencing Delgado.

Because we remand for resentencing, we decline to address Delgado's other sentencing issues. Finally, we reject the issues raised in Delgado's SAG.

PROCEDURAL ISSUES

In 2012, Division III of this court entered a general order on the use of initials or pseudonyms for child victims or child witnesses. *See* Gen. Ord. 2012-1 of Division III, *In re Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash. Ct. App. June 18, 2012), https://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2012_001&div=III. The preamble found that in light of the increased availability of court documents through electronic sources, additional steps were needed to protect the privacy interest of children. The order requires the use of initials or pseudonyms for child victims and witnesses in all court opinions, orders, and rulings as well as the parties' briefs, motions, and pleadings.

Delgado's opening brief with this court included the full names of the minor witnesses, K.D., A.D., and G.D. The State filed a motion to strike Delgado's brief and substitute initials rather than names of child witnesses. The State claimed Delgado violated this court's general order, which requires the use of initials or pseudonyms for child victims or witnesses. The clerk granted the State's motion and notified Delgado his amended brief was due ten days later.

Delgado filed a motion to modify the clerk's ruling. Delgado argued the State had not established that the use of initials is necessary under the general rules of *Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982).[1] He asked the court to order an *Ishikawa* hearing to determine if the proposed court closure—replacing the child witnesses' full names with their initials—is justified. He contends this court's general order violates article I, section 10 of the Washington Constitution. While this court denied his motion to modify, Delgado raised the issue in his opening brief.

Our general order is similar to RAP 3.4, which provides that in juvenile offender cases, the parties shall use the juvenile's initials instead of the juvenile's name in all briefs and pleadings. The rule goes on to provide that initials shall also be used for "any related individuals" so as to prevent disclosure of the juvenile's identity. RAP 3.4

[1] *Ishikawa* held that courts must consider certain factors and weigh competing interests prior to closure to determine whether a closure is justified.

Similarly, GR 15(c)(2) authorizes courts to redact names when "justified by identified compelling privacy or safety concerns that outweigh the public interest in access to the court record." GR 15(g) provides that when court records are sealed at the trial court level, they shall remain sealed at the appellate court level subject to further order of the appellate court.

Notwithstanding these rules, our federal and state constitutions protect the right to a public trial. *State v. Mansour*, 14 Wn. App. 2d 323, 332, 470 P.3d 543 (2020). An alleged violation of this right may be raised for the first time on appeal and is a question of law reviewed de novo. *Id*. When an open-court challenge is raised, we consider three questions: (1) "whether the proceeding at issue implicates the public trial right," (2) if so, "whether there was a closure," and (3) if so, "whether the closure was justified . . . [under] the framework set forth in *Ishikawa*." *Id*.

We assume without deciding that appellate briefs and opinions implicate the public trial right and focus on the second question: whether the requirement to use initials constitutes a closure. There are two types of court closures—the first occurs "when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave" and the second occurs "where a portion of a trial is held someplace 'inaccessible' to spectators, usually in chambers." *State v. Love*, 183 Wn.2d 598, 606, 354 P.3d 841 (2015) (quoting *State v. Lormor*, 172 Wn.2d 85, 93, 257 P.3d 624 (2011)). Delgado contends that requiring initials instead of names is a form of closure

because it makes information about the case inaccessible to spectators. As the party raising the challenge, Delgado has the burden of showing that a closure has occurred. *Id.* at 605.

Several recent cases have held that the requirement to use a child's initials in certain court documents does not constitute a court closure so long as the child's name is otherwise available to the public through the court record. In *Love*, the defendant argued that the practice of exercising peremptory challenges on paper instead of by spoken objection was a form of court closure because the objections were not readily available to the public. The Supreme Court disagreed and found the practice did not constitute a court closure, noting that the juror sheet showing the peremptory challenges was filed in the public record and available for inspection. *Id*. at 607.

More recently, in *Mansour*, Division One concluded that a trial court's use of a child's initials in jury instructions and various court documents did not constitute a court closure because the child "testified using her full name in open court and was consistently referred to by her full name throughout the proceedings." 14 Wn. App. at 333. Moreover, the child's name was accessible to spectators and available to anyone who watched the proceedings or read the verbatim report of proceedings. *Id*. In concluding that this practice did not constitute a court closure, the *Mansour* court distinguished the

holdings in *Hundtofte v. Encarnacion*,[2] and *Allied Daily Newspapers of Washington v. Eikenberry*,[3] because those cases concerned directives to alter the public record and keep the identity of the child witness from the public. *Mansour*, 14 Wn. App. at 333-34.

Similar to the holdings in *Love* and *Mansour*, our general rule only requires the use of initials in briefs and opinions. It does not require that the child's name be completely withheld from the public. The names of child victims and witnesses are still available to the public by examining the court record. As a result, our general rule does not constitute a court closure and it is unnecessary to apply an *Ishikawa* analysis on a case-by-case basis.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder, having no precedential value, shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

## BACKGROUND

### 1. ALLEGATIONS

When Delgado was about 16 years old, he moved in with his father, stepmother,[4] and their three children, K.D., A.D., and G.D. The family initially lived in a two-bedroom

[2] 181 Wn.2d 1, 330 P.3d 168 (2014).

[3] 121 Wn.2d 205, 848 P.2d 1258 (1993).

[4] Delgado's stepmother is interchangeably referred to as the "mother" and the "stepmother," depending on the relationship.

trailer. Delgado slept with the brothers, A.D. and G.D., in their room. K.D., the sister, would either sleep on a couch in the living room or in her parents' bedroom.

Delgado would sometimes watch K.D., A.D., and G.D. while the parents were at work. At first, K.D. and Delgado had a normal brother-sister relationship. He would go with her to the park or take her and her brothers to Wendy's. However, when K.D. was about 6 years old, Delgado began sexually assaulting her on a regular basis. The abuse occurred primarily in K.D.'s parents' bedroom while the brothers were distracted by video games or their friends. On occasion, Delgado would sexually abuse K.D. while she was sleeping. The assaults occurred at least three times a week over the course of three years. Delgado told K.D. that if she said anything to anyone he would kill her parents.

Eventually, the family moved into a house where K.D. had her own room. They kept the trailer and parked it at the house, and Delgado moved into the trailer. He continued to sexually abuse K.D. during this time.

One night when the father was gone, K.D., G.D., and A.D. saw their mother and Delgado laying down and talking together in the trailer. The children called their father and told him that their mother was in the trailer, and their father came home. After the father returned home, Delgado—who was about 18 years old—was kicked out of the trailer, and the assaults against K.D. stopped. The evidence suggests that at some point Delgado moved back into the trailer for a short time and unsuccessfully attempted to sexually assault K.D.

K.D.'s parents did not learn of the sexual assaults until five years later when K.D. told her cousin, her aunt, and then eventually her mother who told her father. After he learned of the sexual assaults, the father called Delgado to their home to confront him. The mother yelled "Why did you do that?" at Delgado, and the father asked him, "Why did you do that?" and "Why did you do that to your sister?" Rep. of Proc. (RP) at 511. Delgado responded with crying and just said, "Yes." RP at 549.

After the confrontation with the parents, Delgado asked to speak with his stepbrothers, A.D. and G.D. The brothers were in their bedroom together when Delgado entered. According to G.D., Delgado said that he was sorry for what he had done to K.D., using her first name, but said that "he didn't rape her or anything . . . . he just touched her." RP at 469. A.D. testified consistent with G.D. regarding Delgado's statements but said that he did not use K.D.'s first name. A.D. said he thought Delgado was talking about K.D. though.

A short time later, the parents discussed Delgado's abuse of K.D. with her doctor at K.D.'s annual well-child appointment. The doctor reported the allegations to child protective services (CPS), and CPS reported them to law enforcement.

The State subsequently charged Delgado with two counts of first degree rape of a child (counts I and II) and two counts of first degree child molestation (counts III and IV). The time period charged for counts I and III was before Delgado turned 18, and the

time period for counts II and IV was after he turned 18. The State also charged an aggravator of a pattern of sexual abuse for each count.

2. TRIAL & SENTENCING

During the jury trial, Delgado's attorney made a motion to cross-examine K.D.'s mother and Delgado's stepmother on a domestic violence allegation she had made against the father several years prior. Defense counsel argued that the father had denied the allegations and the case had "apparently" gone to trial where he was acquitted. Given this outcome, defense counsel reasoned that the "false allegations to the police" were relevant to the mother's credibility.

The State opposed the motion, arguing that a finding of not guilty did not mean the mother had been untruthful and there had been no finding that she was not credible. The State then read the probable cause statement arising from the incident into the record to inform the trial court of the nature of the allegations. According to the statement, the allegations were made more than seven years prior to Delgado's trial. There had been an altercation between the stepmother and father, and the father had grabbed the mother by her arms and tried to push her into a bedroom. The responding police officer observed bruises and abrasions on the stepmother's arms as well as an abrasion on her right eye and cheek. The stepmother's cousin and her cousin's husband both gave similar accounts of the incident.

After reading the statement, the State further argued that there was no evidence of any credibility impact given the probable cause affidavit and no other information indicating the incident had a negative impact on the stepmother's credibility had been presented. Further, the State maintained that as the incident had occurred more than seven years prior, it was not relevant to the stepmother's present credibility. The trial court denied the motion to introduce collateral evidence of a prior domestic violence allegation.

During closing argument, defense counsel claimed that the stepmother had a motive to lie because she was trying to cover up the fact that she had slept with Delgado when he was "a minor." RP at 921. Defense counsel argued that the stepmother may have been "pulling all the strings and orchestrating the family to take the focus off of her," although defense counsel did not explain how the evidence supported such a theory. RP at 921.

The jury found Delgado guilty on all four counts and also found the aggravator of a pattern of sexual abuse for counts I and III, both of the crimes that occurred before Delgado turned 18.

At sentencing, Delgado requested an exceptional sentence of 60 months to life. The court rejected this request and imposed a sentence of 318 months to life.

Delgado appeals his convictions and sentences.

## ANALYSIS

### 1. CROSS-EXAMINATION OF DELGADO'S STEPMOTHER

Delgado argues that the trial court violated his constitutional right to present a defense by precluding him from cross-examining his stepmother on prior domestic violence allegations she made against the father. We disagree. Delgado has not demonstrated that the excluded evidence was relevant. Even if relevant, the probative value is low and is outweighed by the prejudicial effect.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *State v. Jennings*, 199 Wn.2d 53, 59, 502 P.3d 1255 (2022). "A trial court abuses its discretion if 'no reasonable person would take the view adopted by the trial court.'" *Jennings*, 199 Wn.2d at 59 (internal quotation marks omitted) (quoting *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001)).

Evidence is generally admissible if it is relevant. ER 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. However, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." ER 403.

At the discretion of the trial court, specific instances of prior conduct by a witness may be raised during cross-examination if the conduct is probative of the witness' truthfulness or untruthfulness. ER 608(b). A trial court abuses its discretion in denying a defendant's request to cross-examine a witness where the witness is crucial and the specific instance of misconduct is the only available impeachment. *State v. McSorley*, 128 Wn. App. 598, 611, 116 P.3d 431 (2005). "'The need for cross-examination on misconduct diminishes with the significance of the witness in the state's case.'" *Id*. at 611-12 (quoting *State v. Clark*, 143 Wn.2d 731, 766, 24 P.3d 1006 (2001)).

In addition to ER 608(b), the United States and Washington State Constitutions protect a criminal defendant's right to present a defense. U.S. CONST., amend. VI; WASH. CONST., art. I, § 22. But courts may still "'exclude evidence that is repetitive . . . only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues.'" *Jennings*, 199 Wn.2d at 63 (alterations in original) (internal quotation marks omitted) (quoting *Holmes v. South Carolina*, 547 U.S. 319, 326-27, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006)).

Our Supreme Court has explained that generally the test for determining whether a defendant's Sixth Amendment right to present a defense has been violated is a two-step process. *Id.* at 58. First, this court analyzes the trial court's evidentiary decision to admit the evidence for an abuse of discretion. *Id*. "A trial court abuses its discretion if 'no reasonable person would take the view adopted by the trial court.'" *Id.* at 59 (internal

quotation marks omitted) (quoting *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001)). If we find that the evidentiary decision was an abuse of discretion and prejudicial, we reverse on the evidentiary issue and avoid the constitutional issue. *Id.* at 58-59.

On the other hand, if this court determines that there was no abuse of discretion, it then considers de novo whether the decision to exclude the evidence nevertheless violated the defendant's right to present a defense. *Jennings*, 199 Wn.2d at 58. In doing so, the court should distinguish "between evidence that merely bolsters credibility and evidence that is necessary to present a defense." *Id.* at 66-67.

Delgado's argument fails because the evidence he proposed was not relevant or probative and was being used to attack the credibility of a witness, not present a defense. Evidence of a prior allegedly false allegation by a witness is generally not relevant if it cannot be shown that the allegation was actually false. *State v. Lee*, 188 Wn.2d 473, 490, 396 P.3d 316 (2017). Delgado fails to show that the allegations made by his stepmother against his father were actually false. He argues that the fact that the father was eventually found not guilty on the fourth degree assault charge cuts against the stepmother's credibility and therefore, he should have been permitted to cross-examine the stepmother on the incident.

However, the finding of not guilty was not a finding that the stepmother was lying and had no bearing on her credibility. It simply meant that the State had failed to meet its burden of proving the charge beyond a reasonable doubt. *See State v. Emery*, 174 Wn.2d

741, 760, 278 P.3d 653 (2012) ("The jury's job is not to determine the truth of what happened . . . . Rather, a jury's job is to determine whether the State has proved the charged offenses beyond a reasonable doubt."). And the relevance of the prior allegation was further lessened by the fact that it was made more than seven years prior to trial and six years prior to when the stepmother claimed that K.D. disclosed the abuse.

Moreover, Delgado does not contend that the proffered evidence was necessary to present a defense. Here, Delgado makes no attempt to argue that his inability to cross-examine the stepmother on a prior domestic violence allegation precluded him from presenting his defense to the jury.

The trial court did not abuse its discretion by prohibiting Delgado from cross-examining his stepmother on an unrelated allegation because the evidence was not relevant. For the same reason, the court's evidentiary decision did not violate Delgado's constitutional right to present a defense or cross-examine the witness.

2. SENTENCING

Delgado contends that the sentencing court failed to adequately consider the mitigating factors of his youth when sentencing him. We agree.

At sentencing, the State requested the trial court impose a sentence of 318 months, the top end of the standard range, for counts I and II and 198 months, also the top end of the standard range, for counts III and IV. The State noted that the sentencing court was required to consider Delgado's age with respect to counts I and III because he was below

the age of 18, but noted that the offenses started when Delgado was 17 and continued after he turned 18. The State also said that because of Delgado's age, it was not asking for a sentence beyond the standard range on counts I and III, even though the jury's verdict authorized an exceptional sentence.

Delgado's attorney submitted a motion and affidavit in support of an exceptional sentence below the standard range, requesting 60 months to life, and asserting that youth is a mitigating factor that the court must consider. Citing *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017), counsel noted that studies revealed fundamental differences between adolescent and mature brains in the areas of risk and consequence assessment, impulse control, tendency toward antisocial behaviors, and susceptibility to peer pressure. Additionally, counsel argued that juveniles generally have an underdeveloped sense of responsibility, which "leads to 'recklessness, impulsivity, and heedless risk-taking.'" Clerk's Papers at 65 (quoting *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)).

A presentence investigation report (PSI) was prepared and presented to the court. The report indicated that the victim's mother (and Delgado's stepmother), stated that the victim would not be providing information for the PSI. Delgado also declined to participate in the PSI. The PSI noted Delgado's offender score and the standard range sentence for each offense along with the jury's finding of aggravating circumstances, but did not provide any personal information about Delgado.

At sentencing, Delgado's attorney argued that "regardless of whether the jury believed it or not, my client was also a victim of sexual abuse by his step mother." RP at 973. Otherwise, counsel presented no additional lay or expert testimony or risk assessments to show how the mitigating factors of youth played a part in Delgado's crimes.

The State responded to Delgado's request for an exceptional sentence. While acknowledging the court's obligation to consider Delgado's youth, the State argued that Delgado failed to demonstrate that his crimes were the result of impulsivity. Instead, the State argued that his crimes were calculated, threatening and consistent. The State maintained that Delgado understood the gravity of his conduct as demonstrated by his threats to kill K.D.'s parents if she said anything about the abuse. Finally, the State asserted that there was no evidence that Delgado's family circumstances contributed to the crime and there was no evidence that Delgado was amenable to rehabilitation.

The sentencing court recognized that Delgado was under the age of 18 for counts I and III and "[kept] that in mind as well as the other factors for purposes of this sentencing that the Court [was] required to consider." RP at 977. However, the sentencing court disagreed with defense counsel's assertion that a sentence below the standard range was warranted and balanced this against the State's decision not to request an exceptional sentence on counts I and III, which accounted for Delgado's youth. The sentencing court also noted that Delgado's crimes were not a one-time occurrence but occurred multiple times:

> I don't agree with the defense's assertion that an exceptional sentence below the standard range is warranted in this case, and I am mindful that the age is being considered at least relative to the State's recommendation by not asking for an exceptional sentence outside the standard range for Counts I and III.
>
> And I do agree with the State relative to—I want to make sure I get that correctly. The matter of Forcha-Williams[5] case, 18 Wn. App. 2d 167, cite 172 Division II (2021) is distinguishable from the case here.
>
> Here we have no information the defendant is amenable to treatment. We have some history now shared that the defendant had sexual abuse by a stepmother, but because there was no information in the PSI I am——these are unknown factors for me to consider. The important point as well for distinction between that case and this case is the one-time occurrence whereas here there were multiple occurrences.

RP at 979.

The court then turned to the nature of the crime. The court noted that it had an obligation to ensure the punishment for criminal offenses was proportional to the seriousness of the offense and the offender's criminal history. The court acknowledged that Delgado had no prior criminal history, but given the nature of the offenses, the manner in which they were conducted, and the frequency in which they were conducted, the court found that a sentence at the top end of the range for each count was appropriate.

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[5] *In re Pers. Restraint of Forcha-Williams*, 18 Wn. App. 2d 167, 490 P.3d 255 (2021).

Finally, the court commented:

> The court also would notate that the nature of the consequence of the defendant's actions are that this child will have very—a great deal of difficulty trusting others . . . .
>
> Again, he's stolen her childhood and in some ways a portion of her adulthood. I—I can't disagree that—with the literature and resources that Ms. Kane has cited to relative to youth, but to this Court's mind, and the nature and the way these crimes were conducted, the Court doesn't find those as a basis to provide an exceptional sentence downward.

RP at 981. The court imposed a standard range indeterminate sentence of 318 months to life for the first degree rape of a child convictions, counts I and II, and 198 months for the first degree child molestation convictions, counts III and IV.

As a general principle, a standard range sentence cannot be appealed. RCW 9.94A.585(1); *State v. Stewart*, __ Wn. App. 2d __, 532 P.3d 211, 215 (2023). However, a defendant can appeal the procedure used by the court to impose a sentence. *State v. Garcia-Martinez*, 88 Wn. App. 322, 329-30, 944 P.2d 1104 (1997).

In *Houston-Sconier*, our Supreme Court imposed two procedural requirements for sentencing defendants who committed crimes as a juvenile. "Trial courts must consider mitigating qualities of youth at sentencing and must have discretion to impose any sentence below the otherwise applicable SRA range and/or sentence enhancements." *Houston-Sconiers*, 188 Wn.2d at 21. A sentencing court that fails to follow these procedures abuses its discretion.

Under these procedures, "sentencing courts must 'meaningfully consider how juveniles are different from adults, how those differences apply to the facts of the case, and whether those facts present the uncommon situation where' the juvenile offender is just as culpable as an adult offender." *Anderson*, 200 Wn.2d at 285 (quoting *Ramos*, 187 Wn.2d at 434-35). This requires the court to "'receive and consider relevant mitigation evidence bearing on the circumstances of the offense and the culpability of the offender, including both expert and lay testimony as appropriate.'" *State v. Delbosque*, 195 Wn.2d 106, 121, 456 P.3d 806 (2020) (quoting *Ramos*, 187 Wn.2d at 443). It also requires the court to place more emphasis on mitigation than on retribution. *State v. Haag*, 198 Wn.2d 309, 323, 495 P.3d 241 (2021).

After receiving and considering this evidence, the court must "'do far more than simply recite the differences between juveniles and adults and make conclusory statements that the offender has not shown an exceptional downward sentence is justified.'" *Delbosque*, 195 Wn.2d at 121[6] (quoting *Ramos*, 187 Wn.2d at 443). Instead, "'[t]he sentencing court must thoroughly explain its reasoning, specifically considering

[6] Although *State v. Delbosque* concerned the procedures necessary at a resentencing under the "*Miller*-fix" statute, the same analysis applies to the initial sentencing of a youth. *See Gilbert*, 193 Wn.2d at 175 (noting the holding in *Houston-Sconiers* was not limited to certain types of sentencing hearings); *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

the differences between juveniles and adults identified by the *Miller*[7] Court and how those differences apply to the case presented." *Ramos*, 187 Wn.2d at 444.

The mitigating factors of youth that a court must consider and apply include, but are not limited to:

> the juvenile's immaturity, impetuosity, and failure to appreciate risks and consequences—the nature of the juvenile's surrounding environment and family circumstances, the extent of the juvenile's participation in the crime, the way familial and peer pressures may have affected him or her, how youth impacted any legal defense, and any factors suggesting that the juvenile might be successfully rehabilitated.

*State v. Gilbert*, 193 Wn.2d 169, 176, 438 P.3d 133 (2019). The court should also consider "the convictions at issue, the standard sentencing ranges, and any other relevant factors—and should then determine whether to impose an exceptional sentence, taking care to thoroughly explain its reasoning." *Id.*

While *Houston-Sconiers* requires courts to follow certain procedures in sentencing juvenile offenders, it does not require a certain result. "[N]othing in *Houston-Sconiers* prevents judges from imposing standard adult range sentences on juveniles." *Forcha-Williams*, 200 Wn.2d at 605.

In this case, Delgado argues that the trial court failed to provide meaningful consideration of the mitigating factors of youth, while the State responds that Delgado failed to provide any evidence of these mitigating factors. Our Supreme Court has held

[7] *Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012).

that while the defendant bears the burden of proving that mitigating factors warrant a lower sentence, the failure to do so does not relieve the sentencing court from following the procedures and providing meaningful consideration of each factor, even when the evidence is sparse. *Anderson*, 200 Wn.2d at 285.

Several cases have considered the adequacy of a sentencing court's compliance with the procedures required by *Houston-Sconiers*. In *Anderson*, the resentencing court "conducted a thorough hearing based on a clear understanding of *Miller* and the role the mitigating qualities of youth must play in sentencing a juvenile offender as an adult." 200 Wn.2d at 275. In explaining its decision, the sentencing court discussed its familiarity with juvenile brain development and then fully addressed how each *Miller* factor applied to the facts of the case. *Id.* at 275-77. Ultimately, the sentencing court concluded that the defendant had not presented any evidence to show that his crimes were the result of impetuosity, immaturity, or failure to appreciate risk. *Id.* at 277. The Supreme Court rejected Andersons' argument that the sentencing court placed more emphasis on retribution than on mitigating factors and instead found this analysis sufficient even though Anderson's mitigation and rehabilitation evidence was limited. *Id.* at 290-91.

Recently, Division Two held that because the sentencing court provided meaningful consideration of the mitigating factors of youth, the defendant could not appeal the standard range sentence imposed for offenses committed when he was 17

years old. *Stewart*, 532 P.3d 211 (2023). After presentation of evidence related to sentencing, the court entered lengthy findings of fact, addressing each of the mitigating factors in detail and discussing its discretion to impose an exceptional sentence downward. *Id*. at 214-15. After considering these factors, the sentencing court imposed a standard range sentence. On appeal, the court held that since the sentencing court's procedures were sufficient under *Houston-Sconiers*, there was no abuse of discretion and the defendant could not appeal the length of his sentence. *Id*. at 215.

In this case, Delgado failed to provide any additional evidence on the mitigating factors of youth. Nevertheless, this lack of evidence did not relieve the trial court of its obligation. While the trial court acknowledged Delgado's age at the time he committed counts I and III, and noted that it was "keeping that in mind as well as the other factors for purposes of this sentencing," the court focused on the nature of the crimes and the impact on the victim. RP at 977. While the court's concern is understandable given the allegations, a sentencing court must focus on the mitigating factors of youth and provide a record of how these factors applied to the case.

The sentencing court did not enter written findings of fact. Nor did the court articulate on the record how the mitigating factors of youth applied in this case. There is no analysis on whether Delgado's immaturity, impetuosity, or failure to appreciate risks and consequences contributed to the offense.

Additionally, there is no indication that the court considered Delgado's environment and family circumstances. At sentencing, Delgado suggested that his stepmother was having an inappropriate relationship with him. Delgado's father also suggested improprieties during his testimony. And the stepmother declined to allow the victim to provide a statement for the PSI or sentencing. In response, the court simply said "because there was no information in the PSI I am—these are unknown factors for me to consider." RP at 979. While the PSI failed to include any additional evidence, the court could still consider the evidence produced at trial.

Finally, there is no mention in the record that the court considered how Delgado's youth impacted his legal defense, or any factors suggesting that Delgado was amenable to rehabilitation.

While Delgado's youth does not require a sentence below the standard range, it does require that the sentencing court employ a certain procedure before imposing a standard range sentence. The failure to do so in this case was an abuse of discretion and requires resentencing.

Because we remand for resentencing, we decline to address whether the trial court erred by imposing certain community custody conditions and fees on sentencing.

3. SAG

Delgado was notified by this court that his SAG was limited to 65 pages. In response, Delgado's 65-page SAG raises more than 90 issues, many with several sub-

issues. We have reviewed and will address these issues using the number system provided by Delgado. Delgado attempts to raise additional issues by including them in an exhibit attached to his SAG. We decline to address these additional issues.

*Ineffective Assistance of Counsel*

Delgado raises two issues that appear to be ineffective assistance of counsel claims. Criminal defendants have a constitutionally guaranteed right to effective assistance of counsel. U.S. CONST. amend. VI; WASH. CONST. art. I, § 22; *State v. Lopez*, 190 Wn.2d 104, 115, 410 P.3d 1117 (2018). A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Claims of ineffective assistance of counsel are reviewed de novo. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

A defendant bears the burden of showing (1) defense counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances and, if so, (2) there is a reasonable probability that but for counsel's poor performance, the outcome of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If either element is not satisfied, the inquiry ends. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

Delgado appears to claim defense counsel was ineffective for failing to object to references to K.D. as the "victim" during testimony, despite the trial court's order that

K.D. be referred to by her name during the State's case. The record indicates that there were a few references in the testimony to K.D. as a "victim" over the course of Delgado's seven-day trial. The sole time counsel for the State referred to K.D. as the "victim," she immediately corrected herself and referred to K.D. by her name. Because the references to K.D. as a "victim" were few and far between, defense counsel's decision not to object is not deficient but rather a tactical decision to avoid drawing the jury's attention to the use of the word "victim." Even if defense counsel's conduct was deficient, Delgado cannot show that these four instances prejudiced him in such a way that the outcome would have been different had defense counsel objected. Accordingly, this court should determine that this argument fails.

Delgado also appears to claim that defense counsel was ineffective in stating during jury voir dire that Delgado was "trying to prove his innocence." RP at 249. In a criminal prosecution, a defendant has no burden and does not have to prove their innocence. *State v. Chacon*, 192 Wn.2d 545, 548-49, 431 P.3d 477 (2018). Rather, it is the State's burden to prove the defendant's guilt beyond a reasonable doubt. *Id.* at 549. Accordingly, this statement by defense counsel was a misstatement of the law, and defense counsel was likely deficient for saying it. However, Delgado cannot show prejudice. This remark was a very small part of the entire trial and was not repeated or emphasized. Further, the jury was correctly instructed that it was the burden of the State to prove Delgado's guilt beyond a reasonable doubt and Delgado had no burden to prove

his innocence. This court should presume that the jury followed this instruction. *See State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015) ("Jurors are presumed to follow the court's instructions."). Thus, this court should determine that this argument fails.

*Brady Violation*

Defense counsel noted during trial that the recording of an interview conducted by law enforcement with Delgado had been lost or misplaced. Delgado claims that this was a *Brady*[8] violation by the State. As an initial matter, no *Brady* violation objection was raised below, thus this claim fails unless Delgado can demonstrate a manifest constitutional error. RAP 2.5(a).

A *Brady* violation requires a defendant to demonstrate three elements: "'[(1)] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [(2)] that evidence must have been suppressed by the State, either willfully or inadvertently; and [(3)] prejudice must have ensued.'" *State v. Mullen*, 171 Wn.2d 881, 895, 259 P.3d 158 (2011) (alterations in original) (quoting *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)). There is nothing in the record to suggest that the lost tapes were exculpatory or impeaching and that there was any prejudice to Delgado. Thus, Delgado's *Brady* claim fails.

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[8] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

*Evidentiary Decisions*

Delgado raises arguments regarding the trial court's evidentiary decisions. This court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *Jennings*, 199 Wn.2d at 58.

Delgado argues that the trial court abused its discretion overruling defense counsel's objections in two separate evidentiary decisions. Both occurred during the State's direct examination of K.D.'s aunt whom K.D. had told about the abuse before telling her parents. During the first instance, the State questioned the aunt regarding why K.D. had not told her parents about the abuse:

> Q. And did she tell you why she hadn't told them?
>
> A. The expression that she used, "I don't trust my mom."
>
> Q. And did she say anything else about that?
>
> A. No.
>
> Q. And did you follow up on that statement?
>
> A. Yes.
>
> Q. Okay, and did she further explain to you?
>
> A. A little bit.
>
> Q. And what did she explain?
>
> [DEFENSE COUNSEL]: Objection, hearsay.
>
> [STATE]: Your Honor, the statement isn't being offered for the truth of the matter asserted. It's being offered to explain why the child did not advise her parents.
>
> . . . .

> [DEFENSE COUNSEL]: I believe it's still an exception—I would still argue that it's hearsay, your Honor. I don't see what other purpose it has other than trying to obtain that that was the truth of what she had said.
>
> THE COURT: I'll overrule. You may answer.
>
> THE WITNESS: She was afraid.

RP at 360-61.

Hearsay is an out of court statement offered to prove the truth of the matter asserted. ER 801(c). Here, the State questioned the aunt on why K.D. had not told her parents earlier about the sexual abuse. The purpose of these questions and their responses was to show K.D.'s motive for not telling her parents—that she was not suddenly making up the abuse, but that she had kept silent out of fear for how her mother would respond. Accordingly, the trial court did not abuse its discretion in determining that the statement did not qualify as hearsay.

The second objection was made when the State asked the aunt how the mother reacted when K.D. told her about the abuse. Defense counsel objected on the basis of relevance. The State pointed out that the question was relevant based on arguments made by defense counsel. The trial court overruled the objection and determined that the question was permissible. The aunt then testified that the mother cried and hugged K.D. when K.D. told her about the abuse.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER

401. During opening statement, defense counsel remarked that this case involved the "wild imaginations" of a child, arguing that K.D. had made up the story of abuse. RP at 337-43. If K.D. was, as defense counsel claimed, a child with a wild imagination who made up stories, her mother was likely aware of this and may have reacted to her abuse allegations with distrust. But the mother's reaction, crying and hugging K.D., showed that she believed her daughter. Thus, the testimony was relevant, and the trial court did not abuse its discretion in allowing the question.

*Juror Bias*

Delgado appears to claim that because juror 6 stated that his nephew was a prosecutor in the local office, he was biased. Juror 6 clarified that nothing about that relationship would preclude him from acting as a fair juror in Delgado's case.

This issue is raised for the first time on appeal and will not be considered unless Delgado demonstrates a manifest constitutional error. RAP 2.5(a). A juror demonstrates actual bias where "there is 'the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging.'" *State v. Lawler*, 194 Wn. App. 275, 281, 374 P.3d 278 (2016) (quoting RCW 4.44.170(2)). Here, juror 6's relationship to another deputy prosecutor was insufficient to establish actual bias because juror 6 did not show a state of mind that

precluded juror 6 from trying the issue impartially or without prejudice. Accordingly, this claim fails.

*Additional Issues*

Delgado also raises multiple issues that appear to be requests for this court to weigh in on credibility determinations.[9] "Credibility determinations are reserved for the trier of fact, and an appellate court 'must defer to the [trier of fact] on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence.'" *State v. Rafay*, 168 Wn. App. 734, 843, 285 P.3d 83 (2012) (alteration in original) (quoting *State v. Liden*, 138 Wn. App. 110, 117, 156 P.3d 259 (2007)). Accordingly, we decline to address the credibility issues raised by Delgado.

Delgado claims the trial court's remark to the jury during voir dire that the jury should not convict Delgado unless it had an "abiding belief in the truth of the charge" impermissibly lowered the State's burden to prove his guilt beyond a reasonable doubt. RP at 210. Again, there was no objection to these statements below, therefore Delgado must show a manifest constitutional error to succeed. RAP 2.5(a). In context, the trial court's statement was:

> The defendant is presumed to be innocent. The presumption of innocence continues throughout the entire trial. The presumption means that you must find the defendant not guilty unless you conclude at the end

[9] This paragraph is referring to Delgado's claims numbered 16(e), 16(h), 19(a)-(b), 23, 43, 67, 76, 79, 83, and 84.

> of your deliberations that the evidence has established the defendant's guilt beyond a reasonable doubt.
>
> A reasonable doubt is one for which a reason exists. It may arise from the evidence or lack of evidence. A reasonable doubt is a doubt that would exist in the mind of a reasonable person after fully, fairly, and carefully considering all of the evidence or lack of evidence. If, from such consideration, you have an abiding belief in the truth of the charge, you are satisfied beyond a reasonable doubt.

RP at 209-10. On its own and in context, it is unclear how this statement lowers the State's burden. Rather, the trial court is clearly explaining "reasonable doubt" to the jury in a way that ensures the jury understands the high bar of the reasonable doubt burden. Because it is unclear how this lowered the State's burden, and Delgado fails to provide any explanation, we determine that this argument fails.

Delgado contends he was prejudiced by the State's removal of two jurors from the jury pool due to their prior felony convictions, juror 1 and juror 18. In regard to juror 1, their removal was actually requested by defense counsel. Therefore, any error was invited error and may not be raised on appeal. *State v. Mercado*, 181 Wn. App. 624, 630, 326 P.3d 154 (2014) ("The doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal."). In regard to juror 18, it does not appear from the record that this juror was actually removed. Accordingly, the record is insufficient to address this issue.

Delgado also raises claims that appear to involve facts and evidence not in the record that this court cannot address and would be more properly raised in a personal restraint petition. Accordingly, we decline to address these claims.

Delgado points to a few typos in the report of proceedings where it appears that the court reporter inadvertently switched the names of the persons that were speaking. However, he fails to explain, and it is not apparent from the record, how these mistakes prejudiced him in any way. Thus, these arguments need not be addressed.

Delgado also seems to argue that the trial court should have allowed defense counsel to cross-examine his stepmother on her prior domestic violence allegation against his father. We addressed this issue above.

Several of Delgado's claims are based on assertions that he was "prejudiced," but mere allegations of prejudice do not create legal issues. Delgado also raises several claims, including what appear to be claims of ineffective assistance of counsel and prosecutorial misconduct. But he fails to state the underlying basis for the claims, and the nature of the alleged errors is not otherwise obvious.[10] We decline to address each of

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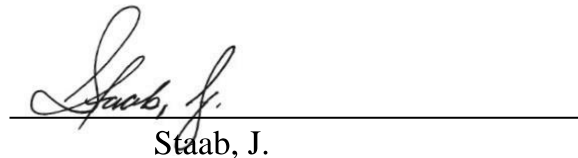
[10] This paragraph is referring to Delgado's claims numbered 3, 4, 5, 7, 8, 9(a)-9(r), 10(b)-(d), 11(a)-(f), 12, 13(a)-(b), 13(d)-(f), 13(i)-(n), 13(p)-(t), 14(a), 14(c)-(g), 15(a)-(h), 16(a)(1)-(2), 16(g), 16(i)-(j), 17, 18(a), 18(f), 18(j)(1)-(k)(1), 18(l), 21, 22, 23(3), 24, 27, 29, 30, 31, 32, 33, 34, 35, 37, 39, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 62, 63, 65, 72, 73, 74, 75, 76, 77, 78, 80, 82, 83, 86, 87, 89, 90, 91, 92, 93, and 94.

these arguments as Delgado fails to "inform the court of the nature and occurrence of alleged errors." RAP 10.10(c).

Delgado raises several issues that were not brought up below and therefore have not been properly preserved for appeal. *See* RAP 2.5.[11]

Ultimately, we determine that each of Delgado's claims in his statement of additional grounds either fail or we decline to address them.

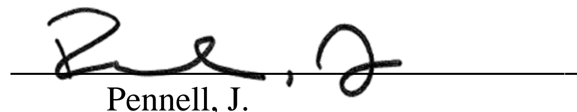
We affirm Delgado's convictions, but remand for resentencing leaving the trial court with discretion on whether to accept additional evidence at resentencing. We decline to review or deny relief on the remaining issues.



Staab, J.

WE CONCUR:

Cooney, J.



Pennell, J.

[11] This paragraph is referring to Delgado's claims numbered 10(e), 14(e), 16(a)(3), 16(b)-(d), 16(f), 16(k), 18(b)-(e), 18(g)-(i), 19(c), 38, 40, 61, 64, 66, 68, 69, 70, 71, 81, 85, 87, and 88.

## BENTON COUNTY PROSECUTOR'S OFFICE

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