NO. 45587-1-II

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**COURT OF APPEALS, DIVISION II**
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT BRUCE MCKAY-ERSKINE, APPELLANT

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Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 12-1-04211-1

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# Brief of Respondent

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**Table of Contents**

## Table of Authorities

### State Cases

## Federal and Other Jurisdictions



## Constitutional Provisions



## Statutes

**Rules and Regulations**

**Other Authorities**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly admitted testimony regarding the defendant's statements to Lavergne and Charles where these statements were relevant, not overly-prejudicial admissions by a party-opponent.

2. Whether, because defendants only have a right to confront witnesses with evidence that is at least minimally relevant, and Erskine-McKay's alleged out-of-court statement was not relevant, the defendant's right to confront witnesses was not implicated or violated by the trial court's exclusion of that statement.

3. Whether, where there was no error committed, the cumulative error doctrine is inapplicable, and the defendant's convictions should be affirmed.

4. Whether the trial court properly imposed the conditions of community custody, with the exception of the provision of condition 25 of Appendix H requiring Defendant to obtain a mental health evaluation, where those conditions were statutorily authorized.

B. STATEMENT OF THE CASE.

1. Procedure

On November 8, 2012, the State charged Robert Bruce McKay-Erskine, hereinafter referred to as "Defendant," by information with three counts of first degree child rape (counts I through III), and two counts of first degree child molestation (counts IV and V). CP 1-3. *See* CP 4. It alleged that all counts were committed against A.B., and that each crime

was aggravated "pursuant to RCW 9.94A.535(3)(n)," by the defendant's use of his "position of trust, confidence, or fiduciary responsibility to facilitate the commission of the [crime]." CP 1-3.

On September 26, 2013, the case was called for trial, and the court heard the State's motions in limine. RP 3-37, 41-43.[1] *See* CP 51-54.

Among those motions, the State sought to admit statements made by Defendant to Katherine Lavergne and Rachel Miller "that the thought of having a toothless child's lips around his penis sound[ed] like a great idea," that "the first sexual encounter a girl should have is with her father," and that "men should be able to make love to their daughters" and "be the first love of their daughters." RP 22-24. *See* CP 7-15.

The State moved to admit them "as statements of intent and motivation" given that the defendant "follow[ed] through on his statements" in his contact with A.B. RP 24-28, 30-32, 34-35. The deputy prosecutor argued that the statements were essentially a blueprint of what the defendant did to A.B. RP 26-27.

The defendant argued that the statements were highly prejudicial and too dissimilar to the facts of the present case to be relevant and admissible. RP 28-30, 32-34.

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[1] The verbatim report of proceedings consists of ten consecutively-paginated volumes, to which citations herein take the form: RP [Page Number], and three additional volumes, cited: [Date of Proceeding] RP [Page Number].

The court found first,

> that, by a preponderance of the evidence, these statements were made.
>
> Secondly, I do feel that they show motive and intent due to the similarity, and as such, they are relevant to this case.
>
> They are undeniably prejudicial, but that prejudice is outweighed but its [sic] probative value where the State has the burden of proving the elements it must prove."

RP 35-36. *See* CP 28-30.

The court then heard Defendant's motions in limine. RP 37-41. *See* RP 209-

On October 3 and 7, 2014, the court heard the State's motion to admit child hearsay statements of A.B. to school counselor Elizabeth Nylund, CPS social worker Rhonda Scott, Rachel Charles, RP 62- During that hearing, the State called A.B., date of birth 04/14/2005, RP 62-90, Pyxey Sharma Erskine-McKay, RP 92-109, Elizabeth Nyland, RP 109-20, Rhonda Scott, RP 120-29, Rachel Charles, RP 129-43, Falena Hasenbuhler, RP 144-71, David Rosso, RP 171-84, Cheryl Hanna-Truscott, RP 187-209, and Cornelia Thomas, RP 215-25. The parties argued the motion, RP 225-32, 235-37 (State's argument), 232-35, 237- (Defendant's argument). The court "f[ou]nd that all seven of the ***Ryan*** factors ha[d] been satisfied," and ruled the statements admissible. RP 237.

The court administered the oath to and instructed the venire, prior to distributing a juror questionnaire, RP 49-62; 10/03/13 RP 3-23. The jury completed questionnaires, which were later sealed on joint motion of the parties. RP 760-63. The parties then selected a jury, 10/08/13 RP 27-197, RP 245-50, 258-59, and the court administered the oath to and instructed that jury. RP 251-53, 261.

The parties gave their opening statements. RP 270. *See* CP 33-35 (PowerPoint presentation used in State's opening statement).

The State then called A.B., date of birth 04/14/2005, RP 270-300, Pyxey Sharma Erskine-McKay, RP 304-45, 349-63, Elizabeth Nyland, RP 363-83, Rhonda Scott, RP 383-95, Falena Hasenbhuler, RP 400-45, David Rosso, RP 445-61, 463-73, Cheryl Hanna-Truscott, RP 473-98, Katherine Lavergne, 10/14/13 RP 5-15, Rachel Charles, also known as Rachel Miller, 10/14/13 RP 15-35, Tacoma Police Detective Keith Miller, 10/14/13 RP 35-43, and Cornelia Thomas, 10/14/13 RP 47-64, 66-72.

The State rested. 10/14/13 RP 72.

The defendant sought to admit testimony of Camber Edwards that Erskine-McKay told her something to the effect of "once I am done with the defendant, I am going to come after you." 10/14/13 RP 44-46. The State moved to exclude this testimony as irrelevant hearsay. 10/14/13 RP

44-46. The court adopted the State's analysis and excluded the testimony. 10/14/13 RP 46-47.

The defendant then called Camber Edwards, 10/14/13 RP 72-85, and rested without testifying. RP 85.

The parties took no exception to the court's jury instructions and the court read those instructions to the jury. 10/14/13 RP 85-86, 88-89. *See* CP 55-93.

The parties gave their closing arguments. RP 704-34 (State's closing argument); RP 735-50 (Defendant's closing argument); RP 750-58 (State's rebuttal). *See* CP 36-50 (PowerPoint presentation used in State's closing argument).

On October 16, 2013, the jury returned verdicts of guilty as charged. RP 769-77; CP 94-98. It also returned special verdicts finding that the defendant "use[d] his position of trust or confidence to facilitate the commission of the crime[s]." RP 770-74; CP 99-103.

On November 15, 2013, the court conducted a sentencing hearing. RP 780-91. The State recommended an exceptional sentence of 378 months to life, and lifetime community custody. RP 783-84. The defense recommended a standard-range sentence of 240 months to life. RP 786. The court sentenced Defendant to the high end of the standard range on all counts: 318 months to life on counts I through three and 198 months to life

on counts IV and V, to be served concurrently. RP 787-88, 790-91; CP 106-21. *See* CP 104-05. It also imposed lifetime community custody, with conditions including those listed in appendix H to the judgment and sentence. CP 106-24.

The defendant filed a timely notice of appeal at his sentencing. CP 127. *See* RP 789-90.

2. Facts

A.B. was born on April 14, 2005, RP 271, and had five sisters and three brothers. RP 274-75. The defendant, who was born June 19, 1977, RP 308, was the biological father of three of her sisters. RP 275-76. He became A.B.'s stepfather when he married her mother, Pyxey Erskine-McKay, on May 1, 2011. RP 317, 334.

In fact, defendant became a "father figure" to A.B. RP 334. The family lived in a Tacoma home, RP 275-76, and the defendant would go grocery shopping, clean the house, cook for A.B. and the family, and even disciplined A.B. RP 334. A.B. appeared to trust the defendant. RP 335.

She was six to seven years old when he first raped her. RP 388; CP 1-3, 94-96.

She testified that the defendant put his "front part in [her] part." RP 284. A.B. indicated that her part was her vagina, and specified that the defendant's front part was inside of her vagina. RP 284-86. She wrote that

when the defendant did this, it felt "scary!!!!!" RP 286-87. This happened more than once, and A.B. thought it happened more than twice. RP 287-88.

A.B. also had to, in her words, "[s]uck [the defendant's] part," which she specified was the "front part" that boys use to pee. RP 288-89. She testified that she had to do this more than once and probably more than five times. RP 289. A.B. testified that when she sucked the defendant's front part something came out and that she had to swallow that something. RP 289-90, 294.

These incidents occurred in the Tacoma house in the defendant's room when her mother was upstairs and the other kids were elsewhere. RP 281-82, 291. A.B. testified that one time one of her brothers knocked on the bedroom door while this was occurring. RP 291. The defendant then told her to pull up her pants, and he pulled up his. RP 292.

A.B. also had to suck the defendant's front part at Rachel's house. RP 293-94. She testified that the defendant told her that sucking his front part made her be good. RP 293-94.

The defendant told A.B. not to tell what he did to her, RP 293, but she eventually told Dave, who was a friend of her mother. RP 295. A.B. testified that Dave then told "the other adults." RP 295. After that, A.B. talked about what happened with a school counselor at Sheridan Elementary, and while getting a medical examination at the Safe and Sound Building. RP 296.

A.B. testified that she did not like talking about what happened to her. RP 297.

A.B.'s mother, Pyxey Erskine-McKay, met the defendant in 1995 while they both were both homeless and staying at a house shared by other homeless young people from the area of University Way in Seattle. RP 308-12. They became involved in a romantic relationship beginning around 2000. RP 312-13. The defendant was married to Devonna McKay at the time, with whom he had had three children, Aria, Neko, and Kiaran. RP 312-13. Erskine-McKay testified that McKay had given her permission to engage in sexual intercourse with the defendant at the time. RP 316. This was apparently part of the group dynamic in the house in which they were staying. RP 316. After the defendant split with McKay, he began a relationship with Katherine Lavergne, with whom he had two children, Aris Lavergne and Colin Lavergne. RP 315-16. After their relationship ended, the defendant began one with Erskine-McKay. RP 316-17. A.B. was three or four at the time. RP 317.

After the summer of 2011, they moved into a Frederickson, Washington house with Rachel Marie Crowder, aka Rachel Marie Charles. RP 319, 10/14/13 RP 18-19. A.B. stayed in a room next to Rachel's with two other girls. RP 321-22. Erskine-McKay and the defendant slept in a room downstairs. RP 323-24.

They stayed in that house from September, through the end of October, 2011, before moving to the two-story house in Tacoma. RP 324-25. 10/14/13 RP 23.

Erskine-McKay and the defendant shared a room downstairs in that Tacoma house and A.B. stayed in a bedroom upstairs. RP 325-28. Her brothers slept in two other bedrooms downstairs and her sisters in two other rooms upstairs in that house. RP 328-29.

Around January to March, 2012, Camber Edwards, a female friend of both Defendant and Erskine-McKay moved in. RP 329-30; 10/14/13 RP 74-75. Edwards began a sexual relationship with the defendant in May, 2012. 10/14/13 RP 77. Erskine-McKay discovered this, and hostility arose as a result. 10/14/13 RP 78. Edwards testified that Erskine-McKay was jealous of her, and the relationship she had with the defendant. 10/14/13 RP 83-84.

That summer, David Rosso and Falena, also known as "Nina," Hasenbuhler moved into the house, as well. RP 335-36, 406-07, 449-50. They were both friends of Erskine-McKay and the defendant. RP 335-36, 347.

Hasenbuhler testified that, after she moved in, she had a conversation with A.B. about sexual intercourse that caused her concern because A.B.'s responses seemed too detailed. RP 414. When Hasenbuhler explained that "stuff comes out" of a penis, A.B. replied, "oh, okay," which caused Hasenbuhler alarm because she thought A.B.'s

response was too quick and lacked the normal follow-up questions. RP 414-15, 430-431, 443-44. Hasenbuhler asked her husband, Rosso, if he could talk to A.B. RP 415, 452. Hasenbuhler testified that this occurred in October, 2012. RP 416.

Rosso spoke with A.B. and then told Hasenbuhler what she had disclosed to him. RP 417, 452-53. Rosso testified that he began his conversation with A.B. as he was walking her home from school. RP 454. He asked her "if anybody had ever touched her in places that they shouldn't have." RP 455. A.B. got "red in the face" and said that the defendant had forced her to "s]uck his wee-wee." RP 456. A.B. told Rosso that the defendant would make her "swallow the stuff that came out" and that she didn't like it. RP 456. She told Rosso that the defendant had told her to keep it a secret and "that it was their special time." RP 457. A.B. told him that the abuse occurred in her mother's bedroom, and that the defendant would lock the door. RP 457. A.B. told him this happened five or six times. RP 459. She described to him one incident in which one of the other kids knocked on the door because it was dinner time and the defendant told her "to hurry up so they can finish." RP 458-59. Rosso testified that A.B. appeared subdued and self-conscious when describing what happened to her. RP 460.

Rosso and Hasenbuhler then spoke to Erskine-McKay, and Erskine-McKay asked them to take A.B. to school so that she could report

what happened. RP 339, 417, 461. Hasenbuhler told her she would do so if A.B.'s agreed. RP 417.

When Hasenbuhler asked A.B. for permission, A.B. told her about one of the incidents. RP 418. She told her that the defendant took her to the room he shared with her mother, locked the door, laid her on the bed, and "forced her to put it in her mouth and swallow what came out." RP 420. A.B. also reported that the defendant had rubbed her vagina with his penis, and inserted it 2.5 to 3 inches inside her vagina. RP 420-21, 433-34. Hasenbuhler testified that while reporting this, A.B.'s body was very "scrunched," which is unusual for her. RP 421-22, 444.

Hasenbuhler took A.B. to the Sheridan Elementary School counselor's office the next day. RP 423-24. Hasenbuhler testified that she was asked to sit outside while A.B. spoke to the school counselor. RP 424-25.

Elizabeth Nyland was the school counselor at Sheridan Elementary. RP 364. She testified that on October 9, 2012, a woman named Falena brought A.B. to her office and told her that A.B. had something to tell her. RP 367. Nyland spoke to A.B. alone. RP 367-68. A.B. told Nyland that the defendant touched her "down there" and pointed to her vagina as she said this. RP 370-71. A.B. told her that sometimes the defendant made her "swallow what comes out of his down there, and that he had tried to put that inside of her down there." RP 371-72. She said that "[s]ometimes instead of trying to put his thing in [her], [the defendant]

tried to put his fingers in [her]." RP 371. A.B. told Nyland that the defendant would lock the door when he did this. A.B. said this happened at Rachel's house and in her mother's bedroom. RP 371. She said that she had to swallow what came out of the defendant's "privates" three or more times and that this type of incident happened more than five times. RP 371.

Nyland testified that A.B. spoke in a matter-of-fact fashion, but did not appear to be enjoying herself while making the disclosure. RP 372-73, 380. In fact, A.B. "wet her pants" while in Nyland's office that day. RP 372-73. A.B. had never wet herself while speaking with Nyland before. RP 374. Nyland prepared a report and forwarded it to CPS[2]. RP 377-78.

CPS Social Worker Rhonda Scott interviewed A.B. at Sheridan Elementary School the following day, October 10, 2012. RP 384, 386. A.B. initially told Scott she was worried that the defendant would "choke her" like he had "choked" her mother. RP 387. A.B. then placed her head in her hands, said, "I don't know if I can say it again," and told Scott that the defendant had "hurt her heart." RP 387. A.B. told Scott that the defendant had "put his thing in mine, or in me." RP 388. When asked what "thing meant," A.B. pointed to her vaginal area. RP 388. She said that she was six or seven years of age when he did this. RP 388. The defendant had told her not to tell, but A.B. told Nina because Nina was a girl. RP 389,

[2] CPS is Child Protective Services. RP 384.

392. Scott described A.B.'s demeanor as "a little serious and forthright." RP 389.

CPS referred the matter to law enforcement and Tacoma Police Detective Keith Miller was assigned to investigate. 10/14/13 RP 37-39. *See* RP 341, 360-61. A forensic interview and medical examination of A.B. was scheduled for October 24, 2012 at the Child Advocacy Center of Mary Bridge Children's Hospital. RP 389-90; 10/14/13 RP 38.

Detective Miller spoke to Erskine-McKay and got her statement. RP 342. He interviewed Falena Hasenbuhler, David Rosso, and Rachel Charles, 10/14/13 RP 41. He also made contact with the defendant. 10/14/13 RP 40.

Although Erskine-McKay took A.B. to the Safe and Sound Building for the forensic interview and medical examination, she was not present for either. RP 342.

Child Forensic Interviewer Cornelia Thomas conducted the forensic interview of A.B. 10/14/13 RP 49, 53-54. That interview was recorded on a DVD, and a copy of that DVD admitted and published at trial as exhibit 20. 10/14/13 RP 55-56, 59-64. During the interview, A.B. wrote down some answers and drew illustrations of what happened. 10/14/13 RP 56-57.

Detective Miller took custody of these writings and illustrations and placed them into property. 10/14/13 RP 40. They were admitted at trial as exhibit 13. 10/14/13 RP 57.

After A.B. completed her forensic interview, Cheryl Hanna-Truscott, a registered nurse at Mary Bridge Children's Hospital Child Abuse Intervention Department (CAID), and clinic nurse Julie Parkhurst greeted her in the exam room. RP 473-75, 81-82. Hanna-Truscott sat down with A.B. to get a patient history from her. RP 484.

A.B., who appeared "slightly anxious," told her that the defendant "did some stuff to [her] in the privates." RP 488. Referring to "a man's private place," A.B. drew a picture of a penis, and said that the defendant "tried to put this part in mine." RP 489. She also reported that the defendant "forced [her] to suck it." RP 489. A.B. added that this wasn't good "because it hurts people's hearts." RP 490. A.B. told Hanna-Truscott that her hands "went up and down on his private." RP 490.

A.B. also told Hanna-Truscott that the defendant's private was on her private, and drew a picture of a vagina. RP 490-91. The defendant asked her, "does that feel good," and A.B. replied, "no, it makes me scared." RP 492.

A.B. wrote on a piece of paper for Hanna-Truscott that the defendant "tried to put his finger in my place," and told her that he "tried to put it in as far as his place." RP 493.

Hanna-Truscott conducted a physical examination of A.B., RP 482, 495. Hanna-Truscott testified that A.B.'s examination was "relatively normal with no signs of acute injury." RP 495, 497-98. She noted that there was "some irregularity" in the hymen, but that she still classified it

as normal. RP 495-96. Hanna-Truscott testified that this was not unusual in children who had reported sexual abuse. RP 495-97.

After the abuse was reported to law enforcement, A.B. spoke to Rachel Charles about what happened. 10/14/13 RP 25. She told her the defendant had touched her. 10/14/13 RP 25-26. A.B. was "almost in tears" when she described this. 10/14/13 RP 25-26.

Erskine-McKay testified that she did not speak to A.B. about the case because she did not want to be seen as influencing it. RP 340. She also never told A.B. what to say. RP 340, 363. In fact, after A.B. completed her physical examination and interview in Tacoma, she went to live with her grandfather in Randle, Washington. RP 342-43, 362.

Katherine Lavergne testified that she met Erskine-McKay in 2003, and moved in with her in 2004 after she had her first child. 10/14/13 RP 7. Lavergne met the defendant while living with Erskine-McKay. 10/14/13 RP 8. Lavergne testified that, in July or August, 2005, the defendant told her that "the thought of putting his penis in a child's mouth without any teeth sounded enticing because the child would treat it as if it were a nipple and suck and chew." 10/14/13 RP 9-10, 26-27, 30-31.

The defendant also told both Lavergne and Rachel Charles that "[a] girl's first sexual experience should be with her father because no one can love them as much as their father." 10/14/13 RP 10, 26, 28-29, 33-35. Lavergne testified that the defendant made this second statement "many, many times." 10/14/13 RP 13, 15.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY ADMITTED TESTIMONY REGARDING THE DEFENDANT'S STATEMENTS TO LAVERGNE AND CHARLES BECAUSE THESE STATEMENTS WERE RELEVANT, NOT OVERLY-PREJUDICIAL ADMISSIONS BY A PARTY-OPPONENT.

ER 402 provides that "relevant evidence" is generally admissible.

"Relevant evidence" is defined as

> evidence having 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.

"[I]t is well established that the State can prove motive even when it is not an element of the crime charged." ***State v. Yarbrough***, 151 Wn. App. 66, 83, 210 P.3d 1029 (2009) (*citing, inter alia,* ***State v. Athan***, 160 Wn.2d 354, 382, 158 P.3d 27 (2007)).

"Motive" is an inducement, which tempts a mind to commit a crime. ***State v. Boot***, 89 Wn. App. 780, 789, 950 P.2d 964 (1998). It "'is what prompts a person to act, or fail to act.'" ***State v. Powell***, 126 Wn.2d 244, 261, 893 P.2d 615 (1995) (*quoting* Black's Law Dictionary 810 (6th rev. ed. (1990)). "[M]otive goes beyond gain and can demonstrate an

impulse, desire or any other moving power which causes an individual to act." ***Powell***, 126 Wn.2d at 259.

"Questions of relevancy and the admissibility of testimonial evidence are within the discretion of the trial court, and [appellate courts] review them only for manifest abuse of discretion." ***State v. Aguirre***, 168 Wn.2d 350, 361, 229 P.3d 669, 675 (2010). A trial court only "abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons." ***Yarbrough***, 151 Wn. App. at 81 (*citing* ***State v. Powell***, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

"An erroneous ruling with respect to such questions requires reversal only if there is a reasonable possibility that the testimony would have changed the outcome of trial." ***Aguirre***, 168 Wn.2d at 361. An appellate court may affirm the trial court's admission of evidence "on any ground the record adequately supports." ***State v. Francisco***, 148 Wn. App. 168, 176, 199 P.3d 478 (2009); ***Mudarri v. State***, 147 Wn. App. 590, 600, 196 P.3d 153 (2008); ***Nast v. Michels***, 107 Wn.2d 300, 308, 730 P.2de 54 (1986) ("an appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court.").

In the present case, the State was required to show "sexual contact" to prove the child molestation charges in counts IV and V. CP 55-93 (instructions 17-18). *See* RCW 9A.44.083(1). To prove sexual contact, the

State was required to show a "touching of the sexual or other intimate parts of a person ***done for the purpose of gratifying sexual desires of either party***." CP 55-93 (instruction no. 16) (emphasis added). *See* RCW 9A.44.010(2).

In other words, the State had to prove that the defendant touched his step-daughter, a six to seven year old girl, *compare* RP 271 *with* CP 1-3, "for the purpose of gratifying sexual desires of either party." CP 55-93. Because the girl in question was scared, not gratified, by the contact, RP 492, the State was required to show that the defendant touched her for the purpose of gratifying *his* sexual desire.

Evidence that the defendant thought "putting his penis in a child's mouth without any teeth sounded enticing," 10/14/13 RP 9-10, 26-27, 30-31, and that "[a] girl's first sexual experience should be with her father," 10/14/13 RP 10, 26, 28-29, 33-35, allowed the State to make this showing.

Hence, such evidence had the "tendency to make the existence of a[] fact that [wa]s of consequence to the determination of the action," i.e., sexual contact, "more probable... than it would be without the evidence." ER 401.

Therefore, that evidence was relevant under ER 401.

While the defendant argues that ***State v. Ramirez***, 46 Wn. App. 223, 270 P.2d 98 (1986), establishes that "intent is not at issue" in a trial

of child molestation where "the defendant denies touching the 'sexual or intimate' parts of the alleged victim," because "'once the act of touching is proven, it follows that the defendant touched for purposes of sexual gratification.'" AOB, p. 18-19 (*quoting* RCW 9A.44.010(2) *and* ***Ramirez***, 46 Wn. App. 223), the holding of ***Ramirez*** is not so broad.

The Court in ***Ramirez*** held only that "[w]here an adult, ***unrelated*** male, ***with no caretaking function***, is proven to have touched the 'sexual or intimate parts' of a little girl, RCW 9A.44.100, the jury ***may*** infer from that proof that the touching was for the purpose of sexual gratification." ***Ramirez***, 46 Wn. App. at 226 (emphasis added).

In the present case, the defendant was not an "unrelated male"; he was the victim's step-father, and he had a clear caretaking function" vis-à-vis A.B. *See* RP 333-35. Moreover, contrary to Defendant's present assertion, because he never testified at trial, *see* RP 72-85, he never "denied doing the acts." AOB, p. 19. Hence, ***Ramirez*** must be distinguished. The jury here would not have been entitled to infer that any touching of A.B.'s "sexual or intimate parts" was for the purpose of sexual gratification," ***Ramirez***, 46 Wn. App. at 226; CP 55-93 (instruction no. 16), RCW 9A.44.010(2). Instead, the State was required to prove this. CP 55-93.

Therefore, the evidence was relevant under ER 401 to prove the sexual contact element of the child molestation charges in counts IV and V.

This evidence was also relevant to the State's proof of the first degree child rape charges in counts I through III. *See* CP 1-3. To prove those charges, the State was required to show that the defendant, a grown man, engaged in sexual intercourse with a six- to seven- year old girl. CP 1-3. Given that few jurors are likely to see a self-evident motive for such behavior, the defendant's statements that the thought "putting his penis in a child's mouth... sounded enticing," 10/14/13 RP 9-10, 26-27, 30-31, and that "[a] girl's first sexual experience should be with her father," 10/14/13 RP 10, 26, 28-29, 33-35, provided evidence of that motive.

Thus, evidence of these statements had the "tendency to make the existence of a[] fact that [wa]s of consequence to the determination of the action," i.e., sexual intercourse, and particularly penile-oral intercourse between the defendant and a child, "more probable... than it would be without the evidence." ER 401.

Therefore, that evidence was relevant under ER 401, and, because relevant, admissible under ER 402.

While this is not the ground upon which it was admitted by the trial court, RP 35-36, this Court may affirm the trial court's admission of

evidence "on any ground the record adequately supports." ***Francisco***, 148 Wn. App. at 176; ***Mudarri***, 147 Wn. App. at 600, 196 P.3d 153; ***Michels***, 107 Wn.2d at 308, and should do so in this case.

Indeed, in making its argument to the trial court, the State relied upon, and the court considered, ***State v. Quigg***, 72 Wn. App. 828, 866 P.2d 655 (1994), *abrogated on other grounds by* ***State v. Smith***, 69 Wn. App. 282, 848 P.2d 754 (1993), *overruled on other grounds by* ***State v. Calle***, 125 Wn.2d 769, 888 P.2d 155 (1995), a non-ER 404(b) decision which is entirely apposite to the present case. RP 25-28.

In ***Quigg***, the defendant "appeal[ed] his jury convictions on two counts each of first degree rape of a child and first degree child molestation," challenging, *inter alia*, the admission at trial of a handwritten story, titled "The Girl Who Wanted To Be, Just Like, Mommy." ***Quigg***, 72 Wn. App. at 831, 837. That "story described in detail some of the same acts [the defendant] allegedly performed on [the victim]." ***Quigg***, 72 Wn. App. at 833. The Court of Appeals found that there was sufficient authentication that the story was written by the defendant and, with respect to its relevance at trial, that "[s]ome of the acts with the little girl in the story were similar to acts [that the victim] detailed in her testimony." ***Quigg***, 72 Wn. App. at 838-39. While the Court "note[d] that in a prosecution for sex crimes, evidence of a defendant's

sexually oriented writings is inflammatory on its face and carries a high probability of prejudice," it held, like the trial court there, "that the remarkable similarities between the story and the alleged crimes outweighed this prejudice." ***Quigg***, 72 Wn. App. at 839. The Court found that "the story was essentially a blueprint of the crime," and hence, that the trial court "did not abuse its discretion in admitting this evidence." *Id.*

A parallel analysis can be made in the present case. Here, as in ***Quigg***, the defendant was charged with multiple counts of first degree child rape and first degree child molestation. CP 1-3. Here, as in ***Quigg***, he made prior statements that described some of the same acts he was alleged to have performed on the victim. *Compare* ***Quigg***, 72 Wn. App. at 833 *with* 10/14/13 RP 9-10, 22-24, 26-27, 30-31. Specifically, he stated that "the thought of putting his penis in a child's mouth without any teeth sounded enticing." 10/14/13 RP 10, 26, 28-29, 33-35; RP 22-24. That statement described exactly what he was alleged to have done to the victim in this case: put his penis in a six to seven-year-old child's mouth and force her to "suck" it. *See, e.g.*, RP 288-29, 489. While the record is unclear whether A.B. had all of her permanent teeth, or if she was in the process of shedding deciduous teeth, and thus, partially "toothless," it is clear that she was six to seven years of age at the time of the incidents in question, and hence, a "child." RP 34. The defendant also stated that "[a] girl's first sexual experience should be with her father," 10/14/13 RP 10,

26, 28-29, 33-35, and, again, this statement described what he was alleged to have done to the victim in this case. Although the defendant is not A.B.'s biological father, A.B. had known him all of her life, and after her mother married the defendant, the defendant became her step-father and, according to the testimony, a "father figure" to A.B. RP 333-34. *See* RP 31.

Thus, here, as in ***Quigg***, the defendant's statements were relevant given the "remarkable similarities between the [statements] and the alleged crimes," and although these statements were undeniably prejudicial, here, as in ***Quigg***, their probative value "outweighed this prejudice." ***Quigg***, 72 Wn. App. at 839.

***State v. Coe***, 101 Wn.2d 772, 684 P.2d 668 (1984), cited by Defendant, AOB, p. 14-15, does not require a different result. ***Coe*** found only that a trial court erred in allowing a prosecutor to cross-examine a defendant regarding "sexually-oriented writings" where those writings "had no bearing on any element of the charges against [the defendant]." ***Coe***, 101 Wn.2d at 779-81. Such is not the case here. Here, under ***Quigg***, the defendant's statements were relevant and admissible because of their "remarkable similarities between the [statements] and the alleged crimes." ***Quigg***, 72 Wn. App. at 839.

Therefore, the trial court could not have abused its discretion in admitting them.

Nor were these statements inadmissible as hearsay. Although hearsay is generally not admissible under ER 802,

> [a] ***statement is not hearsay if—***
> ...
> (2) Admission by Party-Opponent. ***The statement is offered against a party and is (i) the party's own statement***, in either an individual or a representative capacity or (ii) a statement of which the party has manifested an adoption or belief in its truth, or (iii) a statement by a person authorized by the party to make a statement concerning the subject, or (iv) a statement by the party's agent or servant acting within the scope of the authority to make the statement for the party, or (v) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

ER 801(d)(2) (emphasis added). Here, there is no dispute that the statements at issue were the defendant's own statements. *See, e.g.,* 10/14/13 RP 10, 26, 28-29, 33-35. Therefore, these statements could not have been excluded as hearsay.

Rather, because they were relevant under ER 401, not inadmissible under ER 403, and not hearsay under ER 801(d)(2), they were admissible under ER 402. Therefore, the trial court could not have abused its discretion in admitting these statements, *see, e.g.* ***Yarbrough***, 151 Wn. App. at 81, and the defendant's convictions should be affirmed.

Although the defendant argues for the contrary conclusion under ER 404(b), *see* Appellant's Opening Brief (AOB), p. 10-26, that rule is inapplicable to the present case. The defendant contends that the evidence

in question was relevant "only under a theory of propensity" because "the only relevance was to suggest that because [he] expressed a sexual interest in children in the past," he was "more likely to have committed the current crimes." AOB, p. 10. However, the expressions at issue were not prior "crimes, wrongs, or acts." ER 404(b). They were not prior misconduct, or even conduct. They were not evidence that the defendant had ever *done* anything in the past. Thus, they could not have formed the basis for an inference or argument that he acted in conformity with such past behavior in the present case. Rather, these expressions were simply the defendant's own statements of intent or motive, *see* ER 801(a), and hence, not governed by ER 404(b).

ER 404(b) provides that

> [e]vidence of other ***crimes, wrongs, or acts*** is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(emphasis added).

"The rule does not define the terms 'other crimes, wrongs, or acts.'" ***State v. Halstien***, 122 Wn.2d 109, 126, 857 P.2d 270 (1993).

However, "[t]he traditional notion behind the rule is that 'prior ***misconduct***,' including '***acts*** that are merely unpopular or disgraceful,' is

inadmissible to show that the defendant is a 'criminal type' and is likely to have committed the crime for which charged." ***Halstien***, 122 Wn.2d at 126 (*citing* 5 K. Tegland, Wash.Prac., *Evidence* § 114, at 383-84 (3d ed. 1989)) (emphasis added). *See* ***Everybodytalksabout***, 145 Wn.2d at 465-66.

Thus, the Washington State Supreme Court has held that "'***acts***' inadmissible under ER 404(b)" are not limited "to unpopular or disgraceful ***acts***," but "include any ***acts*** used to show the character of a person to prove the person acted in conformity with it on a particular occasion." ***Everybodytalksabout***, 145 Wn.2d at 466 (emphasis added).

However, while the "'acts' inadmissible under ER 404(b)" as propensity evidence "include any acts used... to prove the person acted in conformity with [them] on a particular occasion," ***Everybodytalksabout***, 145 Wn.2d 456, 466, 39 P.3d 294 (2002), they must still be "acts," i.e., some form of prior *conduct* of some sort.

Indeed, each of the cases cited by Defendant in support of his ER 404(b) argument, BOA, p. 10-26, involved some prior "act" that was used as evidence in a present trial. *See, e.g.* ***State v. Fuller***, 169 Wn. App. 797, 828-31, 282 P.3d 126 (2012) (evidence of prior solicitation to commit robbery); ***State v. Saltarelli***, 98 Wn.2d 358, 655 P.2d 697 (1982) (evidence of a prior assault); ***State v. Powell***, 126 Wn.2d 244, 893 P.2d 615 (1995) (evidence of hostile prior relationship); ***State v. Gresham***, 173

Wn.2d 405, 269 P.3d 207 (2012) (evidence prior molestation of four other girls as evidence of a common scheme or plan); ***State v. Sutherby***, 165 Wn.2d 870, 883-87, 204 P.3d 916 (2009) (analysis of failure to move to sever child pornography from child molestation and child rape counts as ineffective assistance of counsel where State "inten[ded] to use the pornography counts to show Sutherby's predisposition to molest children"); ***State v. Fisher***, 165 Wn.2d 727, 749-51, 202 P.3d 937 (2009) (evidence of physical abuse of Defendant's current stepchildren); ***State v. Coe***, 101 Wn.2d 772, 776- , 684 P.2d 668 (1984) (evidence of Defendant's sexual relationship with a prior girlfriend and evidence that Defendant approached a woman "fondling what appeared to be a replica of a penis"); ***State v. Medcalf***, 58 Wn. App. 817, 822-24, 795 P.2d 158 (1990) (evidence of defendant's possession of "X-raped video tapes"); ***State v. Bush***, 164 N.C.App. 254, 595 S.E.2d 715 (2004) (evidence "that defendant had previously bought and owned pornography"); ***State v. Crowder***, 119 Wash. 450, 205 P. 850 (1922) (evidence of prior "acts of intercourse"); ***State v. Ray***, 116 Wn.2d 531, 546-48, 806 P.2d 1220 (1991) (evidence of prior sexual contact with the victim); ***State v. Cox***, 781 N.W.2d 757, 769-71 (2010) ("evidence of prior sexual abuse"); ***State v. Ramirez***, 46 Wn. App. 223, 730 P.2d 98 (1986) (court erred in failing to sever counts where evidence of fondling one child would not have been

admissible in trial of indecent liberties of a different child); ***State v. Wade***, 98 Wn. App. 328, 989 P.2d 576 (1999) ("evidence of [Defendant]'s prior sales of cocaine to prove *intent* to sell the cocaine in his possession as charged"); *and* ***State v. Hieb***, 39 Wn. App. 273, 282-83, 693 P.2d 145 (1984), *rev'd on other grounds*, 107 Wn.2d 97, 727 P.2d 239 (1986)(evidence of prior injuries to the victim).

In this case, there were no prior acts put in evidence. There was no allegation of any prior conduct at all. There was no inference to be had, that because the defendant engaged in past behavior, he possessed a character that made it more likely that he engaged in that behavior here. *See* ER 404(b). There were only statements of a party opponent expressing a desire to engage in a future activity in which he ultimately engaged.

Because (1) these statements were relevant under ER 401 to prove sexual intercourse element of counts I through III and the sexual contact element of counts IV and V, (2) their relevance outweighed their prejudicial effect under ER 403, and (3) they were not hearsay under ER 801(d)(2), they were admissible under ER 402.

Therefore, the trial court could not have abused its discretion in admitting them, *see, e.g.* ***Yarbrough***, 151 Wn. App. at 81, and the defendant's convictions should be affirmed.

2. BECAUSE DEFENDANTS ONLY HAVE A RIGHT TO CONFRONT WITNESSES WITH EVIDENCE THAT IS AT LEAST MINIALLY RELEVANT AND ERSKINE-MCKAY'S OUT-OF-COURT STATEMENT WAS NOT RELEVANT, THE DEFENDANT'S RIGHT TO CONFRONT WITNESSES WAS NOT IMPLICATED OR VIOLATED BY THE TRIAL COURT'S EXCLUSION OF THAT STATEMENT AND HIS CONVICTIONS SHOULD BE AFFIRMED.

"The confrontation clause of the Sixth Amendment guarantees a defendant the opportunity to confront the witnesses against him through cross-examination." ***State v. Fisher***, 165 Wn.2d 727, 752, 202 P.3d 937 (2009) (*citing* ***Delaware v. Van Arsdall***, 475 U.S. 673, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)). *See* Wn. Const. art. I, § 22.

Hence, "[a] defendant has a right to confront the witnesses against him with bias evidence so long as the evidence is at least minimally relevant." ***Fisher***, 165 Wn.2d at 752 (*citing* ***State v. Hudlow***, 99 Wn.2d 1, 16, 659 P.2d 514 (1983)). *See* ***State v. Spencer***, 111 Wn. App. 401. 408, 45 P.3d 209 (2002)(*citing* ***Davis v. Alaska***, 415 U.S. 308, 316-18, 94 S. Ct. 1105, 29 L. Ed. 2d 347 (1974)).

However, "[t]he trial court retains the authority to set boundaries regarding the extent to which defense counsel may delve into the witness' alleged bias 'based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that

is repetitive or only marginally relevant,'" though "[a] defendant enjoys more latitude to expose the bias of a key witness." ***Fisher***, 165 Wn.2d at 752 (*citing* ***Van Arsdall***, 475 U.S. at 679).

"A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion." ***State v. Darden***, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). A trial court only "abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or reasons." ***State v. Yarbrough***, 151 Wn. App. 66, 81 210 P.3d 1029, 1036 (2009) (*citing* ***State v. Powell***, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)); ***Darden***, 145 Wn.2d at 619.

Moreover, an appellate court may "affirm the trial court on any alternative ground that the record adequately supports." ***Mudarri v. State***, 147 Wn. App. 590, 600, 196 P.3d 153 (2008); ***State v. Francisco***, 148 Wn. App. 168, 176, 199 P.3d 478 (2009); ***Nast v. Michels***, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) ("an appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court."). *See* ***State v. Powell***, 126 Wn.2d 244, 258-59, 893 P.2d 615 (1995); ***State v. Ellis***, 21 Wn. App. 123, 124, 584 P.2d 428 (1978).

In the present case, the defendant sought to admit testimony of Camber Edwards that Erskine-McKay told her something to the effect of "once I am done with the defendant, I am going to come after you."

10/14/13 RP 44-46. The trial court excluded this testimony as irrelevant hearsay. 10/14/13 RP 44-47. Because the statement at issue was irrelevant, the trial court could not have abused its discretion in excluding that statement.

ER 402 provides, in pertinent part, that "[e]vidence which is not relevant is not admissible."

"Relevant evidence" is defined as

> evidence having 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.

Here, the evidence sought to be introduced was Erskine-McKay's statement to Edwards that "once I am done with the defendant, I am going to come after you." 10/14/13 RP 44-46.

Assuming *arguendo* this statement was made, it is inherently ambiguous. There is no indication in the statement itself as to what Erskine-McKay was referring when she stated "once [she] is done with the defendant." 10/14/13 RP 44. In fact, here is no indication that whatever she was "do[ing] with the defendant" had anything to do with this case. *See* 10/14/13 RP 44-46. Contrary to Defendant's assertion, it is not entirely clear that this statement was made "around the time the charges

were filed." AOB, p. 26. Indeed, when the trial court asked "[w]hen were the alleged statements made," the defendant's trial attorney replied, "I am not sure." 10/14/13 RP 46. When the trial judge again asked, "[w]hen? When," the defendant's trial attorney again replied, "I am not sure." 10/14/13 RP 46. When further pressed, the defendant's attorney finally surmised, with no greater specificity, that the statement was made "in fall of 2012." 10/14/13 RP 46. Hence, even assuming the statement was made, there is nothing in the record definitively showing that it had anything to do with this case.

However, even assuming *arguendo* that the statement related to this case, it was not relevant. Although the defendant argues that this statement was offered "to show Ms. Erskine-McKay's state of mind" at the time it was made, and that she "was motivated in her testimony by a desire for revenge," AOB, p. 26, 29-30, neither were relevant in this case.

Ms. Erskine-McKay was not the victim in this case, and Edwards was not the defendant. *See* CP 1-3. This was a case involving charges brought against the defendant, not Edwards, based on allegations made by A.B., not Erskine-McKay. Any desire on the part of Erskine-McKay for revenge *against Edwards* was simply not relevant.

While the defendant argues that the statement "suggested [Erskine-McKay's desire for revenge included coming after [him] by raising these

serious allegations," AOB, p. 31, this argument overlooks the fact that Erskine-McKay did not raise these allegations.

A.B. raised these allegations, first with Rosso, RP 417, 452-60, then Hasenbuhler, RP 418-22, then Nyland, RP 370-74, then Scott, RP 387-89, and finally, Thomas, 10/14/13 RP 49, 53-57, and Hanna-Truscott, RP 484-93. Erskine-McKay never spoke to A.B. about the case. RP 340. In fact, A.B. did not even reside with Erskine-McKay at the time of the trial. RP 342-43, 362. A.B. didn't even reside in the same city as Erskine-McKay at the time of her testimony. RP 342-43, 362.

Perhaps most important, Erskine-McKay did not testify as to any abuse suffered by A.B. *See* RP 304-45, 349-63. Therefore, even if she was motivated by a "desire for revenge" against the defendant in this case, AOB, p. 31, that desire could not have materially affected her testimony at trial.

Because Edwards was not the defendant and Erskine-McKay was not the victim and made no allegations against anyone, any desire for revenge against Edwards her statement may have shown did not "hav[e] 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.

Consequently, that statement, whether a statement of a "then existing state of mind," ER 803(a)(3), or not, was not relevant under ER 401, and hence, not admissible under ER 402.

Because a defendant has no right to confront the witnesses with evidence that is not at least relevant, *see, e.g.,* ***Fisher***, 165 Wn.2d at 752, and "[t]he trial court retains the authority to set boundaries regarding the extent to which defense counsel may delve into the witness' alleged bias 'based on concerns about, among other things," an interrogation that is "only marginally relevant.'" ***Fisher***, 165 Wn.2d at 752 ((*citing* ***Van Arsdall***, 475 U.S. at 679), the trial court could not have abused its discretion in excluding the statement at issue here.

Therefore, the defendant's right to confront witnesses was not violated, the court properly excluded the alleged statement of Erskine-McKay, and Defendant's convictions should be affirmed.

However, even if it were assumed that the court abused its discretion in excluding this statement, and that this error resulted in a violation of Defendant's constitutional right to confront witnesses, that error was harmless.

"Any error in excluding [bias] evidence" in violation of a defendant's constitutional right to confront witnesses, "is presumed prejudicial." ***Spencer***, 111 Wn. App. at 408. However, the error is harmless if "no rational jury could have found a reasonable doubt that the defendant would have been convicted even if the error had not taken place." *Id.* In this case, no rational jury could have found such a reasonable doubt, even if the contested statement were in evidence.

Contrary to Defendant's assertion, Erskine-McKay was not "a crucial State witness." AOB, p. 32. She did not observe any of the conduct underlying the charges at issue. *See* RP 304-45, 349-63. She did not hear any of the statements made by A.B. regarding that conduct. RP 340. Therefore, she could not and did not testify as to either. *See* RP 304-45, 349-63.

While the defendant argues that the excluded statement "suggested that, at the time the allegations arose, Ms. Erskine-McKay was strongly motivated by her desire for retribution against [him]," AOB, p. 33, a jury could have inferred that motivation from the other evidence Defendant introduced.

Specifically, Edwards was able to testify that she became involved in a sexual relationship with Erskine-McKay's husband, the defendant, while sharing a house with the couple. 10/14/13 RP 77. Edwards testified that Erskine-McKay discovered this relationship, and testified that Erskine-McKary was "suspicious," "jealous," and hostile towards the defendant and Edwards as a result. 10/14/13 RP 77-78, 81-83. Testimony that Erskine-McKary told Edwards "once I am done with the defendant, I am going to come after you," 10/14/13 RP 44-46, would have added nothing material to an inference that Erskine-McKay was hostile towards, and perhaps motivated by a desire for revenge against, the defendant and Edwards.

Hence, "no rational jury could have found a reasonable doubt that the defendant would have been convicted even if the alleged error had not taken place," and under ***Spencer***, 111 Wn. App. at 408, even assuming *arguendo* that exclusion of Erskine-McKay's statement was error, that error was harmless.

Therefore, the defendant's convictions should be affirmed.

### 3. BECAUSE THERE WAS NO ERROR COMMITTED, THE CUMMULATIVE ERROR DOCTRINE IS INAPPLICABLE, AND THE DEFENDANT'S CONVICTIONS SHOULD BE AFFIRMED.

Under the cumulative error doctrine a court "may reverse a defendant's conviction when the combined effect of errors during trial effectively denied the defendant her [or his] right to a fair trial, even if each error standing alone would be harmless." ***State v. Venegas***, 155 Wn. App. 507, 520, 228 P.3d 813 (2010).

However, the "cumulative error doctrine" is "limited to instances when there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." ***State v. Greiff,*** 141 Wn. 2d 910, 929, 10 P.3d 390 (2000). Hence, "[t]he doctrine does not apply where the errors are few and have little or no effect on the trial's outcome." ***Venegas***, 155 Wn. App. at 520.

As explained in the argument above, *see* §§ C(1)-(2) *supra*, there was no error committed in the present case. Because there was no error, there can be no cumulative error.

Therefore, the cumulative error doctrine is inapplicable, and the defendant's convictions should be affirmed.

4. THE COURT PROPERLY IMPOSED THE CONDITIONS OF COMMUNITY CUSTODY, WITH THE EXCEPTION OF THE PROVISION OF CONDITION 25 OF APPENDIX H REQUIRING DEFENDANT TO OBTAIN A MENTAL HEALTH EVALUATION BECAUSE SUCH CONDITIONS WERE STATUTORILY AUTHORIZED.

"[I]t is solely the legislature's province to fix legal punishments," and thus, community custody conditions "must be authorized by the legislature." ***State v. Kolesnik***, 146 Wn. App. 790, 192 P.3d 937 (2008). *See* ***State v. Barnett***, 139 Wn.2d 462, 464, 987 P.2d 626 (1999).

RCW 9.94A.505(8) provides that, "[a]s a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter." A "crime-related prohibition" is defined as

> an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative

> conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.030(10).

When a court sentences a person to a term of community custody, it must impose the mandatory conditions listed in RCW 9.94A.703(1), and, unless waived by the court, the conditions listed in RCW 9.94A.703(2). The court may also impose certain discretionary conditions, RCW 9.94A.703(3), including ordering the offender to "[p]articipate in crime-related treatment or counseling services," and to "[c]omply with any crime-related prohibitions." RCW 9.94A.703(3)(c) & (f).

"Imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable." ***State v. Bahl***, 164 Wn.2d 739, 753, 193 P.3d 678 (2008); ***State v. C.D.C.***, 145 Wn. App. 621, 625, 186 P.3d 1166 (2008). "Imposition of an unconstitutional condition would... be manifestly unreasonable." ***Bahl***, 164 Wn.2d at 753. Likewise, a sentencing court abuses its discretion when it exceeds its sentencing authority. ***C.D.C.***, 145 Wn. App. at 625.

When a sentencing court imposes an unauthorized condition of community custody, appellate courts may remedy the error by remanding

the matter with instructions to strike the unauthorized condition. ***State v. O'Cain***, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008).

In the present case, the court ordered the defendant in community custody "for the remainder or [his] life," CP 106-121 (§ 4.6), pursuant to RCW 9.94A.507(5), 9A.44.073(2), 9A.44.083(2), and RCW 9A.20.021(1)(a). It imposed conditions of community custody that included those listed in paragraph 4.6(B) of the judgment and sentence, appendix F to the judgment and sentence, and appendix H to the judgment and sentence. CP 106-24.

The defendant now challenges conditions 16 and 25 of appendix H as "not crime-related," and hence, not statutorily authorized. AOB, p. 34-38.

While the defendant did not object to any of the conditions during his sentencing hearing, *see* RP 787-91, this does not necessarily preclude his challenge to the conditions at issue here. *See. e.g.*, ***State v. Jones***, 118 Wn. App. 199, 204, 76 P.3d 258 (2003) (a sentence imposed without statutory authority may be raised for the first time on appeal).

Condition 16 provides

> Do not initiate, or have in any way, physical contact with children under the age of 18 for any reason. ***Do not have any contact with physically or mentally vulnerable individuals.***

CP 123 (underlining in original; emphasis in the form of bold and italicized print added).

The defendant argues that the portion of condition 16 prohibiting him from contact "with physically or mentally vulnerable individuals" was "not crime-related because the circumstances of the crime did not involve physically or mentally vulnerable individuals." AOB, p. 35-36. The record shows otherwise.

"As part of any term of community custody, the court may order an offender to:... (b) ***[r]efrain from direct or indirect contact with*** the victim of the crime or ***a specified class of individuals***." RCW 9.94A.703(3)(b) (emphasis added).

The Washington State Supreme Court has indicated that the provision allowing no contact with a "'specified class of individuals' seems in context to require some relationship to the crime," and that "[i]t is not reasonable... to order even a sex offender not to have contact with a class of individuals who share no relationship to the offender's crime," ***State v. Riles***, 135 Wn.2d 326, 350, 957 P.2d 655 (1998), *overruled in part on other grounds by* ***State v. Valencia***, 169 Wn.2d 782, 239 (2010).

Here, however, contrary to the defendant's assertion, there is clear evidence that the case involved a "physically [and] mentally vulnerable individual[]." CP 123. It involved A.B., a six- to seven-year-old girl who

was, at the time of the offense, dependent upon the defendant, her stepfather, for her care and shelter, RP 31, 333-35, 786-87.

Erskine-McKay testified that although the defendant is not A.B.'s biological father, A.B. had known him all of her life. RP 333-34. After she and the defendant were married, the defendant became not only a stepfather, but a "father figure" to A.B. RP 334. The defendant went grocery shopping for the family, cleaned the house, cooked for A.B. and the family, and disciplined A.B. RP 334. Erskine-McKay testified specifically that A.B. appeared to trust the defendant. RP 335. In fact, given that, according to the testimony, Erskine-McKay, was not a "very attentive mother," and "would leave A[.B.] for extended periods of time," RP 432, A.B. may have been particularly dependent upon her step-father, the defendant, for her care. *See* RP 782.

Even the defendant himself seemed to agree with this in his allocution at sentencing:

> My only real goal in life is to repair a relationship with my children... I am sorry for my apparent failure to protect these children, and I do agree that I did fail in protecting them, and that will be my burden until I die.

RP 787.

Because the victim of the defendant's crimes in this case was the defendant's own stepdaughter, a little girl who depended on him for

everything at the time of the crimes, she was the quintessential "physically [and] mentally vulnerable individual."

Hence, the "class of individuals" specified in condition 16 as "physically or mentally vulnerable individuals," CP 123, bore a strong "relationship to the crime," ***Riles***, 135 Wn.2d at 350, which the defendant committed against a physically and mentally vulnerable individual named A.B.

Thus, that condition was authorized by RCW 9.94A.703(3)(b), and reasonable under ***Riles***, 135 Wn.2d 326, 350. It should therefore, be affirmed here.

Defendant also challenges condition 25, AOB, p. 36-38, which provides as follows:

> ***Obtain a Substance Abuse Evaluation, a Mental Health Evaluation, and a psychosexual evaluation***, and comply with any/all treatment recommendations.

CP 124 (emphasis added). Specifically, he argues that the portion of this condition requiring him to obtain substance abuse and mental health evaluations was "not authorized because it was not crime-related." AOB, p. 36-37.

"As part of any term of community custody, the court may order an offender to:... (c) Participate in crime-related treatment or counseling services." RCW 9.94A.703(3)(c)[3].

RCW 9.94B.080[4] also provides that

> [t]he court may order an offender whose sentence includes community placement or community supervision to undergo a mental status evaluation and to participate in available outpatient mental health treatment, ***if the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense. An order requiring mental status evaluation or treatment must be based on a presentence report*** and, if applicable, mental status evaluations that have been filed with the court to determine the offender's competency or eligibility for a defense of insanity. The court may order additional evaluations at a later date if deemed appropriate.

(emphasis added).

This Court considered (1) the language now codified as RCW 9.94A.703(3)(c) when it was codified as 9.94A.700(5)(c), and (2) the language now codified as RCW 9.94B.080 when it was codified as RCW 9.94A.505(9), and read the language of these provisions with then RCW 9.94A.715(2)(b)[5]. RCW 9.94A.715(2)(b) provided, as the present RCW

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[3] This language, though codified differently, has appeared in the Sentencing Reform Act (SRA) since at least 1988. ***State v. Jones***, 118 Wn. App. 199, 207-08, 76 P.3d 258 (2003).
[4] Notwithstanding that the heading of chapter 9.94B states that the chapter applies to crimes committed prior to July 1, 2000, RCW 9.94B.080 is applicable to crimes committed after 2000. *See* Laws of 2008, ch. 231, § 55.
[5] Repealed by Laws 2008, ch. 231, § 57 and Laws 2009, ch. 28, § 42.

9.94A.703(3)(d) now provides, that a trial court may order an offender to "[p]articipate in rehabilitative programs or otherwise perform affirmative conduct reasonably related to the circumstances of the offense, the offender's risk of reoffending, or the safety of the community." ***State v. Jones***, 118 Wn. App. 199, 208-10, 76 P.3d 258 (2003).

Harmonizing these provisions, this Court first held, "that alcohol counseling," and by extension substance abuse treatment, "'reasonably relates' to the offender's risk of reoffending, and to the safety of the community, ***only if the evidence shows that alcohol [or other substance abuse] contributed to the offense.***" ***Jones***, 118 Wn. App. at 208 (emphasis added).

Second, it held "that mental health treatment and counseling "reasonably relates" to the offender's risk of reoffending, and to the safety of the community, ***only if the court [1] obtains a presentence report or mental status evaluation and [2] finds that the offender was a mentally ill person whose condition influenced the offense.***" *Id.* at 210 (emphasis added).

With respect to the substance abuse evaluation ordered by condition 25, there was evidence in the record that showed that substance abuse contributed to the offense.

Specifically, the court was informed that the defendant made the statements that "the thought of putting his penis in a child's mouth without any teeth sounded enticing," 10/14/13 RP 9-10, 26-27, 30-31, and that "[a] girl's first sexual experience should be with her father," 10/14/13 RP 10, 26, 28-29, 33-35, at a time when he had "ongoing drug issues." RP 23-24. The fact that the defendant then engaged in oral sexual intercourse with his stepdaughter suggests that these drug issues may have "contributed to the offense." ***Jones***, 118 Wn. App. at 208.

Moreover, at sentencing, the trial court had before it a pre-sentence investigation report, dated November 8, 2013, which indicated that the defendant had admitted a history of alcohol, marijuana, methamphetamine, and apparent psilocybin mushroom use, and recommended the provision of condition 25 that Defendant "[o]btain a Substance Abuse Evaluation... and comply with any/all treatment recommendations," CP 124, to reduce his risk of re-offense. CP 132-44 (pre-sentence investigation report)[6]

Hence, "the evidence show[d] that [substance abuse] contributed to the offense[s]" and this provision of condition 25 was "'reasonably

[6] The pre-sentence investigation report, although referred to on the record at sentencing, RP 780, 781, 783, 784, does not appear to have been filed at sentencing. The State has since filed this document and is designating it as part of the clerk's papers with the filing of this brief. *See* RAP 9.6(a).

relate[d]' to the offender's risk of reoffending, and to the safety of the community." ***Jones***, 118 Wn. App. at 208 (emphasis added).

Therefore, it was statutorily authorized by RCW 9.94A.703(3)(c) and should be affirmed.

With respect to the other disputed provision of condition (25), that requiring Defendant to obtain "a Mental Health Evaluation... and comply with any/all treatment recommendations," CP 124, the court did "obtain[] a presentence report" that indicated "that the offender was a mentally ill person whose condition influenced the offense." ***Jones***, 118 Wn. App. at 210 (emphasis added). CP 132-44.

Specifically, the November 8, 2013, pre-sentence investigation report indicated that Defendant had reported several mental health concerns. CP 132-44. Based on those concerns, and to reduce Defendant's risk of re-offense, it recommended imposition of the provision of condition (25) which required Defendant to obtain a mental health evaluation and comply with any treatment recommendations. CP 132-44.

However, the court does not appear to have specifically *found* "that the offender was a mentally ill person whose condition influenced the offense." ***Jones***, 118 Wn. App. at 210. *See* CP 106-24, RP 727-91.

Because this is a requirement under RCW 9.94B.080, ***Jones***, 118 Wn. App. at 210, the provision of condition (25) requiring Defendant to obtain a mental health evaluation was not statutorily authorized.

Therefore, the matter should be remanded only to give the trial court the opportunity to either (1) find that the defendant was a mentally ill person whose condition influenced the offenses of which he was convicted, or (2) strike the words ", a Mental Health Evaluation," from condition (25).

In all other respects, the defendant's convictions and sentence should be affirmed.

## D. CONCLUSION.

Because testimony regarding the defendant's statements to Lavergne and Charles was relevant under ER 401, not unduly prejudical under ER 403, and not hearsay under ER 801(d)(2), it was admissible under ER 402, and the trial court did not err in admitting it here.

Because defendants only have a right to confront witnesses with evidence that is at least minimally relevant, and Erskine-McKay's out-of-court statement was not relevant, the defendant's right to confront witnesses was not implicated or violated by the trial court's exclusion of that statement, and his convictions should be affirmed.

Because there was no error committed, the cumulative error doctrine is inapplicable, and the defendant's convictions should be affirmed.

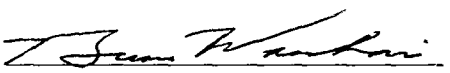
Finally, the trial court properly imposed the conditions of community custody, with the exception of the provision of condition 25 of Appendix H requiring Defendant to obtain a mental health evaluation, because those conditions were statutorily authorized.

Therefore, the matter should be remanded only to give the trial court the opportunity to either (1) find that the defendant was a mentally ill person whose condition influenced the offenses of which he was convicted, or (2) strike the clause ", a Mental Health Evaluation," from condition (25).

In all other respects, the defendant's convictions and sentence should be affirmed.

DATED: October 3, 2014

MARK LINDQUIST
Pierce County
Prosecuting Attorney



Brian Wasankari
Deputy Prosecuting Attorney
WSB # 28945

Certificate of Service:
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10.3.14 _____
Date Signature

# PIERCE COUNTY PROSECUTOR

## October 03, 2014 - 3:03 PM

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