Supreme Court No. 95870-0
COA No. 49707-7-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOHN K.L. AYLWARD,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, John Aylward, appellant below, asks this Court to accept review of the Court of Appeals' decision terminating review that is designated in part B of this petition.

B. DECISION OF THE COURT OF APPEALS

Aylward seeks review of the unpublished opinion of the Court of Appeals in State v. Aylward, cause number 49707-7-II, filed April 10, 2018. A copy of the decision is contained in Appendix A at pages A-1 through A-20.

C. ISSUES PRESENTED FOR REVIEW

1. Did the lower court err when it affirmed the trial court's findings that the search warrant did not violate the particularity requirements of the Fourth Amendment and article I, section 7 of the Washington Constitution?

2. Is the lower court's decision affirming the trial court in conflict with Division One's opinion in ***State v. McKee***, __ Wn.App. ___, 413 P.3d 1049 (March 26, 2018)?

3. Is imposition of a 100-year sentence clearly excessive where the aggravating circumstances are inherent to the underlying offense and where the sentence is 3.77 times the top of Aylward's standard range sentence of 318 months?

4. Where Aylward was convicted of rape of his stepdaughter

D.D., did the trial court exceed its authority by prohibiting Aylward from having any contact with his daughter H.A., who was not a named victim in this matter?

D. STATEMENT OF THE CASE

1. Procedural history:

John Aylward was charged by third amended information filed in Pacific County Superior Court with six counts of rape of a child in the first degree (RCW 9A.44.073), six counts of incest in the first degree (RCW 9A.64.020(1), three counts of sexual exploitation of a minor (RCW 9.68A.040(1)(b), (c), first degree dealing of depictions of minors engaged in sexually explicit conduct (RCW 9.68A.050(1), first degree possession of depictions of minors engaged in sexually explicit conduct (RCW 9.68A.070), and second degree unlawful possession of a firearm (RCW 9.41.040(2)(a)(i). Clerk's Papers (CP) 141-60.

In counts 1 through 6, Aylward was charged with rape of a child in the first degree, with each count involving his seven year old stepdaughter, D.D. CP 141-47. Aylward was charged with first degree incest involving D.D. in counts 7 through 12. CP 148-54. He was charged with sexual exploitation of a minor in counts 13 through 15. CP 154-57. In those counts, the State alleged that he engaged in sexually explicit conduct involving D.D., based on three video clips obtained from a white cell phone depicting acts of sex involving Aylward and D.D. CP 157-58. Aylward was charged in

counts 16 and 17 with dealing in depictions of minors engaged in sexually explicit conduct in the first degree and possessions of depictions of minors, based on images obtained from the phone depicting child pornography. CP 157-58.

In count 18, Aylward was charged with unlawful possession of a firearm in the second degree based on three firearms found in a workroom in Aylward's house during the execution of a search warrant on December 12, 2015. CP 159-60.

Defense counsel moved to suppress the evidence found on a removable 32g mini-SD memory card obtained from a white Samsung Galaxy S3 cell phone during execution of the warrant on December 12, 2015 at Aylward's house in Ocean Park, Washington. Report of Proceedings (RP)[1] (4/25/16) at 11-13. CP 1-7. Counsel moved to suppress the contents of the white Samsung cell phone, the video memory card, and the three guns found during the search. The motion was based on several grounds, including that the warrant authorizing the search was not supported by probable cause and failed to satisfy the particularity requirement of the Fourth Amendment. CP 36-50.

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[1]The Verbatim Report of Proceedings consists of the following sequentially paginated hearings: 1RP (4/15/16); 2RP (4/29/16); 3RP (5/27/16); 4RP (6/10/16); 5RP (7/8/16); 6RP (8/24/16, child hearsay hearing); 7RP (8/26/16, suppression hearing); 8RP (9/7/16, pretrial motions); 9RP (9/9/16, pretrial hearing); 10RP (9/19/16, motion to seal record, waiver of jury); 11RP (9/19/16, non-jury trial, day 1); 12RP (9/20/16, non-jury trial, day 2); and 13RP (10/7/16, sentencing).

Deputy Kendall Biggs of the Pacific County Sheriff's Office testified at a suppression motion hearing on August 24, 2016, that Aylward was investigated for suspicion of child molestation of his stepdaughter D.D., based on an allegation made by his daughter H.A. to a school counselor on December 9, 2015. H.A. told the counselor that she thought her father was sexually molesting D.D. 7RP at 170-01. Deputy Biggs testified that after interviewing H.A. regarding her allegation he prepared an affidavit, and a search warrant was authorized by a District Court judge 7RP at 171.

During the search of Aylward's house, police found a 2-gigabyte memory card located in a hutch in the living room that contained over 17,000 files, of which police viewed approximately 70 files, and which consisted of "hard core" adult pornographic material. CP 42-48. Approximately one-quarter of the 70 files viewed consisted of child pornography. The 2-gigabyte card was larger than that used in cell phones and is the type commonly used in video cameras. The card contained 39 files, of which 33 were wedding photos. Three of the files, however, were of D.D. and Aylward in sexual activity, and one of the videos depiction of sexual abuse by Aylward showed D.D. holding and watching a white cell phone which was displaying pornography while engaging in sexual activity with Aylward. The activity depicted in the video appeared to take place in the master bedroom of Mr. Aylward's house.

Defense counsel argued that the search warrant issued December 10, 2015 was unconstitutionally overbroad. 6RP at 149-159. The warrant authorized seizure of "video or photographs stored on media devise to include but not limited to cell phones, cameras, thumb drives, desktop computers, laptop computers, tablets, video cameras, printed photos DVDs, CDs, VHS tapes, suspected or known to contain sexually explicit material of adults or minors . . . ." CP 42.

Defense counsel argued that in addition to overbreadth, the affidavit contained no information regarding cell phones except an allegation by D.D.'s stepsister H.A. that she was able to see "porn videos" on a white cell phone. and that this was seen "through the corner of her eye." CP 45-48. The warrant does not specifically list a white cellphone, and the warrant and makes no distinction between sexually explicit depictions involving adults or minors and therefore permits seizure of constitutionally protected material---adult pornography---and is therefore invalid under ***State v. Besola***, 184 Wn.2d 605, 359 P.3d 799 (2015). 6RP at 149-50. Defense counsel also argued that under ***Besola***, the material was not severable and therefore all material found pursuant to the warrant, including several firearms found in the house during execution of the warrant and charged in count 18, must be suppressed. 6RP at 153-55.

The State argued that the affidavit and warrant are constitutionally sufficient and that the affidavit itself contains allegations by H.A. that a

white Samsung phone is one of two phones used in the house, and that the white phone contained videos that Aylward would show to D.D. during the molestations. Affidavit for Search Warrant at 5, CP 43-49. 6RP at 157.

The court entered an order on August 26, 2016 which stated in relevant part:

> The search warrant is upheld based upon the State's argument that the defendant's use of the porn video located on the defendant's cell phone was illegal because said video was intended, and, in fact used, to show the minor just prior to the sexual assault(s) by the defendant upon the minor. The issue is not whether the State was seeking adult pornography which is constitutionally protected.

CP 85.

On September 9, 2016, the court entered findings of facts and conclusions of law on the State's motion to admit child hearsay statements pursuant to RCW 9.94A.120, and findings regarding the defense motion to suppress pursuant to CrR 3.5 and CrR 3.6. CP 105-114. Regarding the defense motion to suppress evidence obtained as a result of the warrant executed on December 12, 2015, the findings state in relevant part:

4. The affidavit in support of the search warrant, admitted into evidence as part of the State's reply and incorporated herein by reference, contains facts and circumstances sufficient to establish a reasonable inference that the defendant was involved in criminal activity and that evidence of the criminal activity could be found at the place to be searched.
5. The warrant was properly granted and the defendant has failed to meet his burden of demonstrating the facts were sufficient.
6. There was sufficient information contained with the affidavit to establish a nexus between Mr. Aylward's use of the cellphone to initiate sexual contact with D.D. and as a result

the warrant was properly granted.

7. The firearms were in open view and properly seized.

CP 113.

Following a bench trial, the court found Aylward guilty as charged. Aylward appealed his multiple convictions and exceptional sentence stemming from sexual abuse of his seven-year old stepdaughter, D.D. He challenges the validity of the search warrant by which officers obtained evidence of the abuse, and also argues that the trial court erred by finding numerous aggravating factors, imposing a clearly excessive sentence, and by prohibiting him from contacting his daughter, H.A., for life

By unpublished opinion filed April 10, 2018, the Court of Appeals, Division II, affirmed the convictions and sentence. See unpublished opinion. Aylward now petitions this Court for discretionary review pursuant to RAP 13.4(b).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The considerations that govern the decision to grant review are set forth in RAP 13.4(b). Petitioner believes that this court should accept review of these issues because the decision of the Court of Appeals is in conflict with other decisions of this court and the Court of Appeals (RAP 13.4(b)(1) and (2)).

1. THE SEARCH WARRANT AUTHORIZING UNLIMITED ACCESS TO CELLPHONES, COMPUTERS, AND VIDEO CARD'S PRIVATE INFORMATION VIOLATED THE PARTICULARITY REQUIREMENT OF THE FOURTH AMENDMENT AND THE PROTECTIONS OF ARTICLE I, SECTION 7

The search warrant was not sufficiently particular, and under ***Besola***, *supra*, evidence obtained during the search of Aylward's house on December 12, 2015 must be suppressed.

"The Fourth Amendment requires that search warrants 'particularly decrib[e] the place to be searched, and the persons or things to be seized.' " ***Besola,*** 184 Wn.2d at 610 (quoting U.S. CONST. amend. IV). "The purposes of the search warrant particularity requirement are the prevention of general searches, prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate's authorization, and prevention of the issuance of warrants on loose, vague, or doubtful bases of fact." ***State v. Perrone,*** 119 Wn.2d 538, 545, 834 P.2d 611 (1992). Moreover, "the search of computers or other electronic storage devices gives rise to heightened particularity concerns." ***State v. Keodara***, 191 Wn. App. 305, 314, 364 P.3d 777 (2015), review denied, 185 Wn.2d 1028 (2016).

In ***Besola***, a friend of a co-appellant was arrested, and after her arrest told police she had seen drugs and child pornography at Besola's house. ***Besola***, 184 Wn.2d at 608. Based on the information provided to police by

the arrested friend, a judge issued a search warrant for illegal drugs but declined to issue a search warrant related to child pornography at that time. At the scene, police saw CDs and DVDs with handwritten titles that implied that they contained child pornography. Police obtained an addendum to the search warrant. The warrant listed the name of the crime under investigation--- "Possession of Child Pornography R.C.W. 9.68A.070." The warrant also stated "the following evidence is material to the investigation or prosecution of the above described felony":

> 1. Any and all video tapes, CDs, DVDs, or any other visual and or audio recordings;
> 2. Any and all printed pornographic materials;
> 3. Any photographs, but particularly of minors;
> 4. Any and all computer hard drives or laptop computers and any memory storage devices;
> 5. Any and all documents demonstrating purchase, sale or transfer of pornographic material.

Besola, 184 Wn2d at 608 (boldface omitted). Police seized a number of computers, memory storage devices, CDs, and DVDs, and found child pornography on one computer and on DVDs. Besola and his co-appellant were convicted of possession of depictions of minors engaged in sexually explicit conduct and dealing in such depictions.

On appeal the Court of Appeals affirmed their convictions. Review was granted regained the warrant and 'to convict' instructions." The Court found that the warrant failed to meet the Fourth Amendment's particularity

requirement and therefore was unconstitutionally overbroad. ***Besola***,184 Wn2d at 610. The court noted that the "descriptions of the items to be seized expressly included materials that were legal to possess, such as adult pornography and photographs that did not depict children engaged in sexually explicit conduct." ***Besola,*** 184 Wn.2d at 610-12.

Here, the warrant issued by the Pacific County District Court authorized a search of the house was similarly vague and specially permitted the seizure of material that was legal to possess. The district court warrant authorized the search for:

> video or photographs stored on media devices to include but not limited to cell phones, cameras, thumb drives, desktop computers, laptop computers, tablets, video cameras, printed photos DVDs, CDs, VHS tapes, suspected or known to contain sexually explicit material of adults or minors . . .

CP 42.

The warrant provided an unconstitutional level of discretion to searching officers and thus failed to satisfy the particularity requirement.

Although the affidavit in support of the warrant contains detailed information concerning the suspected crimes and evidence that law enforcement hoped to obtain during a search of a cell phone, there is no indication this affidavit was attached to the warrant, and the warrant contains no language incorporating the affidavit by reference. Therefore, the warrant

stands on its own when assessing particularity. ***State v. Riley***, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993).

As such the warrant contains no guidance for law enforcement as to the scope of the search because it does not contain any specific information from the affidavit regarding Aylward or any specific alleged offense.

The warrant is even less particular than the warrant overturned in ***Besola***. Unlike the ***Besola*** warrant, which listed the crime being investigated, the warrant in this case failed list any crimes whatsoever– and therefore, failing to define the bounds of officers' authority to search, which made the warrant less particular. See ***State v. Higgins***, 136 Wn. App. 87, 93, 147 P.3d 649 (2006 (warrant's overly broad description of suspected crime improperly expanded scope of evidence officers could seek); ***State v. Griffith***, 129 Wn. App. 482, 488-489, 120 P.3d 610 (2005) (in case involving nude photos of 16-year-old girl on defendant's computer, warrant authorizing search for defendant's internet use overly broad where affidavit failed to make connection between suspected criminal activity and internet), review denied, 156 Wn.2d 1037, 134 P.3d 1170 (2006).

In this case, as in Besola, the warrant the warrant lists the "Items Wanted". As in Besola, the description of the "Items Wanted" is overbroad and allowed the police to search and seize lawful data when the warrant could

have been made more particular. The warrant in this case was not carefully tailored to the justification to search and was not limited to data for which there was probable cause. The warrant authorized the police to search all images, videos, documents, text messages, data, Internet usage contained on devices. The language of the search warrant clearly allows search and seizure of data without regard to whether the data is connected to the crime and also gives the police the right to search the contents of the cell phone and seize private information with no temporal or other limitation. As in ***Keodara***, "[t]here was no limit on the topics of information for which the police could search. Nor did the warrant limit the search to information generated close in time to incidents for which the police had probable cause." ***Keodara***, 191 Wash. App. at 316, 364 P.3d 777.

In addition, the affidavit in this case is virtually undisguisable from a warrant that was recently found to be in violation of the particularity requirement of the Fourth Amendment by Division One in ***State v. McKee***, ___ Wn.App. ___, 413 P.3d 1049 (March 26, 2018).

Without additional circumstances from the warrant affidavit, what remains is an extremely broad list of items to be searched. This is insufficient to support a valid warrant. See ***Keodara***, 191 Wn. App. at 309-310, 316-317 (despite listing suspected crimes, warrant authorizing collection of broad

range of items from cell phone violated particularity requirement where list essentially imposed no limit on information to be searched and permitted "phone to be searched for items that had no association with any criminal activity and for which there was no probable cause whatsoever."); ***State v. Higgins,*** 136 Wn. App. 87, 90-94, 147 P.3d 649 (2006). Therefore, the warrant fails to provide necessary guidance in the absence of specific circumstances of this case or reciting a specific crime or crimes.

Because the warrant ultimately authorizes collection of the entirely of cell phone and computer contents for examination of content, it contains virtually no limitations whatsoever on what officers could seize and examine. The police were free to find and seize items entitled to First Amendment protection as well as any other materials legally possessed and electronically stored on the phone. This broadest grant of authority in the warrant was not tied to any particular listed crime or crimes and or made more precise by limiting language. See ***McKee***, __ Wn.App. __, 413 P.3d 1049 (2018) (a search warrant must be definite enough that the executing officer can identify the property sought with reasonable clarity and eliminate the chance that the executing officer will exceed the permissible scope of the search), ***Besola***, 184 Wn.2d at 614-615 (where identification of suspected crime on warrant "does not modify or limit the list of items that can be seized

via the warrant," identified crime does not render warrant sufficiently particular); ***Riley***, 121 Wn.2d at 28 (warrant overbroad and invalid where it authorized "the seizure of broad categories of material and was not limited by reference to any specific criminal activity.").

Here, law enforcement elected to capitalize on the warrant's broad authority for a complete search of the video card found in the drawer in the hutch in the living room and seizure of the white cell phone for examination. See, the Return of Inventory and Receipt for Property, which shows that on December 12, 2015, an officer seized a variety of phones, including a white cell phone. CP 43. The phone and a video camera memory card were subsequently searched using a SanDisk device to read the cards. Affidavit of Probable cause, CP 1-7. This confirms that officers obtained and executed an unconstitutional general warrant rather than using the required specific particularity in its search.

In its ruling, the lower Court distinguishes ***Perrone*** and ***Besola***, stating that the adult pornography that Aylward was showing to D.D. was not sought for the ideas it contained and that he used the material in his abuse of D.D., desensitizing and grooming her. ***State v. Aylward***, Slip op. at 8. It constituted evidence of a crime independent of its content and did not need to meet the heightened standard of scrupulous exactitude. The warrant

authorized seizure only of items that either were illegal to possess, or that corroborated or were involved in the ongoing sexual abuse of D.D. Aylward submits that the lower Court erred, and that as was the case in ***Besola*** and ***McKee***, the search warrant was unnecessarily broad and left too much discretion to law enforcement officers in deciding what to search and it violated Aylward's Fourth Amendment rights. Aylward asks this Court to accept review and reverse the ruling of the Court of Appeals.

2. THE EXCEPTIONAL SENTENCE SHOULD BE REVERSED BECAUSE A PRISON TERM ALMOST FOUR TIMES THE STANDARD RANGE IS CLEARLY EXCESSIVE IN THIS CASE.

A reviewing Court will reverse an exceptional sentence under an abuse of discretion standard if the sentence is clearly excessive. ***State v. Alvarado***, 164 Wn.2d 556, 560-61, 192 P.3d 345 (2008); ***State v. France***, 176 Wn. App. 463, 469, 308 P.3d 812 (2013) review denied 179 Wn.2d 1015 (2014). A "clearly excessive" sentence is one that is clearly unreasonable, for example if it is "exercised on untenable grounds or for untenable reasons, or [represents] an action that no reasonable person would have taken." ***State v. Knutz***, 161 Wn. App. 395, 410, 253 P.3d 437(2011) (internal quotations omitted). An exceptional sentence is clearly excessive if its length, in light of the record, "shocks the conscience." ***State v. Kolesnik***, 146 Wn. App. 790,

805, 192 P.3d 937 (2008) (internal quotations omitted) (holding sentence of twice the standard range, 240 months, appropriate for first degree assault that inflicted life-threatening injuries on a police officer).

The sentence imposed here, 1200 months, is 3.77 times the top of the 240 to 318 month standard range sentence for a class XII offense where the offender has an offender score of nine or more points. See, e.g., ***State v. Hyder***, 159 Wn. App. 234, 244 P.3d 454 (2011) (affirming exceptional sentence as not clearly excessive where sentenced imposed was half statutory maximum).

Mr. Aylward had a limited criminal history; his offender score was a "1." The standard range sentence for first degree rape for Mr. Aylward is 240 to 318 months. Twenty-six and a half years in prison is a substantial sentence—even for crimes as disturbing as those presented here. The court's intention at sentencing to impose a significant sentence is understandable, particularly in light of the video evidence of rape and molestation—which the appellant argues was unconstitutionally obtained and erroneously admitted, as argued in section 1, *supra*. But the trial court nevertheless imposed almost four times the high end of the prison term by sentencing Mr. Aylward to 100 years in prison.

Twenty six and one half years in prison would result in Mr. Aylward's

incarceration until he is 72 years old. His offenses, although horrific and beyond all boundaries of an acceptable society, are not so aggravated as to merit a life term. Imposition of a sentence within the standard range is sufficient to accomplish the goals of punishing Mr. Aylward and protecting D.D. and society in general. The standard sentence range for Aylward's rape of a child conviction was 240-318 months. RCW 9.94A.510. The trial court sentenced him to 1,200 months on each rape of a child count to run concurrently, or 3.77 times the top of the standard sentence range. The lower court merely states that the sentence imposed does not "shock the conscience" given the nature of the crime without elaboration. Aylward submits that the court's affirmation of the sentence is not adequately supported and therefore should be reversed for resentencing within the standard range.

3. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING AN ORDER PROHIBITING LIFETIME CONTACT WITH H.A.

The trial court imposed a blanket order prohibiting Mr. Aylward from having contact with H.A. for life. RP at 629. H.A., who testified at trial, told a school counselor about suspected sexual abuse of D.D. but otherwise was not a crime victim in the strictest sense. The order by the court prohibiting contact fails to comport with the SRA because it is not crime-related. In addition, the

duration of the no contact order constitutes an abuse of the trial court's discretion. "[A] no-contact order imposed for a month or a year is far less draconian than one imposed for several years or life." ***In Re Pers. Restraint of Rainey***, 168 Wn.2d 367, 381, 229 P.3d 686 (2010). The court did not address the need for a lifetime prohibition against contact with H.A.

Division One limited a similarly broad no-contact order in ***State v. Ancira***, 107 Wn. App. 650, 654-55, 27 P.3d 1246 (2001). There, upon conviction for violating a prior no-contact order as to wife, the court entered an order prohibiting contact with the appellant's children, who bore witness to the domestic violence. *Id.* at 652-53. The Court held that the State failed to show that a complete ban on contact with the defendant's non-victim children was necessary to protect their safety or that accommodations such as supervised visits and indirect contact, such as through the mail, were not appropriate. *Id.*

In ***Corbett,*** the Court upheld a no-contact provision barring contact with the defendant's sons where his step-daughter was the victim of the underlying crime. ***State v. Corbett***, 158 Wn. App. 576, 598-601, 242 P.3d 52 (2010). However, in that case the prohibition was limited to a prohibition against unapproved contact with the defendant's sons. *Id.* at 601 n.14. Upon approval from supervisors, the defendant could have contact with them. *Id.*

In this case, the lower court affirmed the order all contact with H.A. for

life. The Court reasoned that although H.A. was not a victim of his crimes, she "was responsible for beginning the police investigation that led to his convictions and testified against him at trial." Slip. op. at 19. The Court analogized H.A. to the wife in ***State v. Warren***, 165 Wn.2d 17, 34, 195 P.3d 940 (2008), in that she is related to the defendant and testified against him. Slip op. at 19. Aylward submits that the facts of this case are more analogous to ***Ancira*** than ***Warren***, and asks this Court to accept review and find that the lifetime prohibition against contact is overbroad based on the authority cited above.

F. CONCLUSION

For the foregoing reasons, this Court should grant review to correct the above-referenced errors in the unpublished opinion of the court below that conflict with prior decisions of this Court and the courts of appeals.

DATED: May 10, 2018.

Respectfully submitted,
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CERTIFICATE OF SERVICE

The undersigned certifies that on May 10, 2018, that this Appellant's Petition for Review was sent by the JIS link to Derek Bryne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on May 10, 2018.

PETER B. TILLER

APPENDIX A

Filed
Washington State
Court of Appeals
Division Two

April 10, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOHN K. L. AYLWARD, Appellant.	No. 49707-7-II UNPUBLISHED OPINION

MELNICK, J. — John K. L. Aylward appeals his multiple convictions and sentence stemming from repetitive sexual abuse of his seven-year-old stepdaughter, D.D. He challenges the validity of the search warrant by which officers obtained evidence of the abuse. He also argues that the trial court erred by finding numerous aggravating factors, imposing a clearly excessive sentence, and forbidding him from contacting his daughter, H.A., for life.

We affirm.

FACTS

I. ABUSE

Aylward married D.A. in 2013 after they had been together for four or five years. D.D., born in 2008, was D.A.'s daughter and knew Aylward as her father.

Aylward had sexual intercourse with D.D. multiple times in her bedroom, his bedroom, a family friend's home, Aylward's van and tattoo shop, and a couch in their home. A memory card in Aylward's cell phone also contained numerous sexually explicit depictions of children.

II. WARRANT

H.A., Aylward's twelve-year-old daughter from a previous marriage, began living with Aylward and D.A in August 2015. In December 2015, H.A. reported to a school counselor that she had concerns that her father might be sexually molesting D.D. She told the counselor that Aylward gave D.D. a phone to view pictures and videos of Aylward and D.A. engaged in sexual activity. H.A. stated she had seen some of the pictures and heard audio of a video D.D. watched. She also stated that D.D. and Aylward would go into the bedroom when D.A. was not home and no one was allowed to disturb them.

A Pacific County deputy sheriff and Child Protective Services investigator followed up on the counselor's report and interviewed H.A. She disclosed concerns about her father's methamphetamine use, his assaults against her, and his sexual misconduct. She expressed concerns about Aylward possibly molesting D.D. She repeated what she had told the counselor.

H.A. described an incident where she saw D.D. come "out from under the sheets and was sprawled out naked on the bed 'like a starfish.'" Clerk's Papers (CP) at 47. She said that Aylward "was under the sheets too, but she saw half his body exposed and said he too was naked." CP at 47

Based on H.A.'s disclosures, Deputy Kendall Biggs applied for a search warrant of Aylward's home and person. A judge issued the warrant, directing officers to search Aylward's home and person, and to seize:

> Video or photographs stored on media devices, to include but not limited to cell phones, cameras, thumb drives, desktop computers, laptop computers, video cameras, printed photos, DVD's, CD's, VHS tapes suspected or known to contain sexually explicit material of adults or minors, glass . . . suspected to be used to smoke methamphetamine, methamphetamine or other white powdery substances suspected of being illegal drugs.

CP at 42.

Before executing the warrant, Biggs ran a criminal history check on Aylward and learned that he had a felony conviction and could not legally possess firearms.

Deputies searched Aylward's residence. They located and seized several firearms in his work room. Officers also seized a white cell phone and a blue memory card. 11RP at 399, 404. An officer described the files on the phone's memory card:

> I observed everything on that card was pornography material. I would classify as extremely pornographic. Thousands upon thousands of files. I observed maybe 70 files. Took me about an hour. I would say a quarter of the files I observed were child pornography, ranging anywhere from ages toddler, two, three years old, up through eight, nine range. Young teenager up to older teenager to where maybe it would be questionable, you know, seventeen, eighteen, nineteen. But some right in that age.

Report of Proceedings (RP) (Sept. 19, 2016, 10:51 A.M.) at 405-06. The blue memory card contained video files of Aylward having sexual intercourse with D.D.

III. PRETRIAL AND TRIAL

The State charged Aylward with six counts of rape of a child in the first degree, six counts of incest in the first degree, three counts of sexual exploitation of a minor, one count of dealing in depictions of minors engaged in sexually explicit content, one count of possession of depictions of minors engaged in sexually explicit conduct in the first degree, and one count of unlawful possession of a firearm in the second degree.

It alleged the following additional aggravating factors for each rape of a child, incest, and sexual exploitation of a minor count: (1) Aylward knew or should have known that the victim was particularly vulnerable or incapable of resistance; (2) Aylward used his position of trust, confidence, or fiduciary responsibility to facilitate the commission of the offense; (3) the offense involved an invasion of the victim's privacy; (4) the offense involved domestic violence and was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple

victims manifested by multiple incidents over a prolonged period of time; and (5) the Aylward committed multiple current offenses and his high offender score resulted in some offenses going unpunished.[1]

Before trial, Aylward moved to suppress all evidence seized from the search of his home. He argued that the search warrant was unconstitutionally overbroad. He primarily relied on *State v. Besola*, 184 Wn.2d 605, 359 P.3d 799 (2015). The court denied the motion and upheld the validity of the warrant.

Aylward waived his right to a jury and the court proceeded with a bench trial. The trial court admitted three videos of Aylward molesting D.D., testimony from H.A., D.D., and D.A. about the abuse, and numerous other witnesses to whom D.D. disclosed the abuse. The court found Aylward guilty on all counts and issued written findings of fact and conclusions of law.

The court found that all of the charged aggravating factors applied and sentenced Aylward to a minimum of 1,200 months and a maximum sentence of life on each rape of a child count.[2] It sentenced him to 60 months on the weapon possession count and 120 months on each other count, all to be served concurrently with the rape of a child sentences. It additionally ordered that he have no contact with D.D. or H.A. for life. At the sentencing hearing, the trial court stated:

> [T]he Court's intent is that based upon even one of these crimes that you have been found guilty of of 1 through 6 . . . that one of those aggravators—excuse me—that if somehow the Court of Appeals finds that this Court erred in some way, either at trial or what I said in sentencing, your crimes were so horrendous that this Court would give the same sentence even if there was only one aggravator on each of those counts.

RP (Oct. 7, 2016) at 630. Aylward appeals.

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[1] RCW 9.94A.535(3)(b), (n), (p), (h)(i), (2)(b).

[2] The trial court calculated the standard range on these counts as 240 to 318 months based on Aylward's offender score of 50 and the crime's seriousness level of XII. RCW 9.94A.510.

ANALYSIS

I. VALIDITY OF SEARCH WARRANT

Aylward contends that the search warrant in this case violated the Fourth Amendment to the United States Constitution because it failed to describe with particularity the materials to be searched and seized. He argues that the warrant permitted seizure of material that was legal to possess and that it provided an unconstitutional level of discretion to searching officers. He further contends that, because the warrant sought material subject to First Amendment protection, it was subject to a heightened standard of particularity that it could not meet.[3] We disagree.

A. LEGAL PRINCIPLES

"The Fourth Amendment requires that search warrants 'particularly decrib[e] the place to be searched, and the persons or things to be seized.'" *Besola*, 184 Wn.2d at 610 (quoting U.S. CONST. amend. IV). "The purposes of the search warrant particularity requirement are the prevention of general searches, prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate's authorization, and prevention of the issuance of warrants on loose, vague, or doubtful bases of fact." *State v. Perrone*, 119 Wn.2d 538, 545, 834

[3] Aylward contends that details from the search warrant affidavit do not increase the warrant's particularity because the affidavit was not attached to the warrant. Br. of Appellant at 25. Generally, "the executing officer's personal knowledge of the place to be searched may 'cure' minor, technical defects in the warrant's place description." *State v. Riley*, 121 Wn.2d 22, 28, 846 P.2d 1365 (1993). However, "where the inadequacy arises not in the warrant's description of the place to be searched but rather in the things to be seized, the officer's personal knowledge of the crime may not cure the defect" because the warrant's purpose is to both limit the executing officer's discretion and inform the persons subject to search what items the officer may seize. *Riley*, 121 Wn.2d at 29. Additionally, "[i]f the affidavit is not attached to the warrant and expressly incorporated therein, it may not cure generalities in the warrant even if some of the executing officers have copies of the affidavit." *Riley*, 121 Wn.2d at 29. We therefore consider the warrant itself and look to the affidavit only insofar as it provides probable cause for issuance of the warrant.

P.2d 611 (1992). We review whether a search warrant contains a sufficiently particularized description de novo. *Perrone*, 119 Wn.2d at 549.

"Warrants 'must enable the searcher to reasonably ascertain and identify the [items] which are authorized to be seized.'" *Besola*, 184 Wn.2d at 610 (internal quotation marks omitted) (quoting *Perrone*, 119 Wn.2d at 546). The warrant must limit the discretion of the executing officer to determine what items to seize. *Besola*, 184 Wn.2d at 610. Additionally, "the search of computers or other electronic storage devices gives rise to heightened particularity concerns." *State v. Keodara*, 191 Wn. App. 305, 314, 364 P.3d 777 (2015), *review denied*, 185 Wn.2d 1028 (2016).

"Warrants for materials protected by the First Amendment require a heightened degree of particularity. In such cases, the particularity requirement must be 'accorded the most scrupulous exactitude.'" *Besola*, 184 Wn.2d at 611 (internal quotation marks omitted) (internal citation omitted) (quoting *Perrone*, 119 Wn.2d at 548). The "scrupulous exactitude" requirement comes from *Stanford v. Texas*. 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965). Per *Stanford*, the particularity requirement "is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain." 379 U.S. at 485. First Amendment protected material triggers this heightened standard only when the basis for its seizure is the *ideas* within that material.

B. PARTICULARITY OF ITEMS TO BE SEARCHED AND SEIZED

In *Perrone*, the defendant was under investigation for dealing in and possession of child pornography. 119 Wn.2d at 542. A search warrant issued for seizure of child or adult pornography as well as drawings of children or adults engaged in sexual activity from the defendant's residence. *Perrone*, 119 Wn.2d at 543. The State conceded that probable cause did not exist to seize adult

pornography, pornographic drawings, and sexual paraphernalia. *Perrone*, 119 Wn.2d at 551. The court also ruled that the description "child pornography" left too much discretion to searching officers and was not sufficiently particularized. *Perrone*, 119 Wn.2d at 553-55.

Besola also addressed an overbroad search warrant in a child pornography investigation. 184 Wn.2d at 607. In *Besola*, officers found CDs and DVDs with labels indicating they contained child pornography. 184 Wn.2d at 608. They requested and received a warrant authorizing seizure of:

> 1. Any and all video tapes, CDs, DVDs, or any other visual and or audio recordings;
>
> 2. Any and all printed pornographic materials;
>
> 3. Any photographs, but particularly of minors;
>
> 4. Any and all computer hard drives or laptop computers and any memory storage devices;
>
> 5. Any and all documents demonstrating purchase, sale or transfer of pornographic material.

Besola, 184 Wn.2d at 608-09. As in *Perrone*, the warrant sought First Amendment-protected material that was legal to own. *Besola*, 184 Wn.2d at 613. The court concluded that the warrant was thus overbroad, because "the descriptions of the items to be seized expressly included materials that were legal to possess, such as adult pornography and photographs that did not depict children engaged in sexually explicit conduct." *Besola*, 184 Wn.2d at 613. The court emphasized that the descriptions could be made more particular by simply using the precise statutory language: "'depictions of a minor engaged in sexually explicit conduct.'" *Besola*, 184 Wn.2d at 613 (quoting RCW 9.68A.050).

In this case, the warrant authorized officers to search Aylward's residence as well as his and D.A.'s persons. It allowed them to seize "video or photographs stored on media devices to

include but not limited to cell phones, cameras, thumb drives, desktop computers, laptop computers, video cameras, printed photos, DVDs, CDs, VHS tapes, suspected or known to contain sexually explicit material of adults or minors," as well as drugs and drug paraphernalia. CP at 42.

The warrant in this case is not as broad as that found unconstitutional in *Besola*. Whereas the *Besola* warrant allowed for seizure of "[a]ny and all video tapes, CDs, DVDs, or any other visual and or audio recordings," as well as "[a]ny photographs," the warrant in this case limited its scope to videos or photographs "suspected or known to contain sexually explicit material of adults or minors." 184 Wn.2d at 608; CP at 42. However, as in *Besola*, the warrant did authorize officers to seize material that was "legal to possess" and protected by the First Amendment: adult pornography.

Perrone and *Besola* both involved only child pornography charges; the state did not allege rape or sexual abuse. 119 Wn.2d at 542; 184 Wn.2d at 609. The warrants in those cases had to meet the "scrupulous exactitude" requirement, as the basis for seizure of the pornographic material was "the ideas which they contain[ed]." *Stanford*, 379 U.S. at 485.

In this case, however, Biggs's affidavit for the search warrant included information from H.A. that D.D. was "allowed to view photos from [Aylward's] phone that are pornographic of [Aylward] and [D.A], including video of the two likely having sex." CP at 47. The affidavit also included H.A.'s concerns that Aylward was sexually abusing D.D., including specific information that Aylward and D.D. were naked under the sheets together and they frequently go into the bedroom together when D.A. is not home and no one is allowed to disturb them.

Unlike *Perrone* and *Besola*, the adult pornography that Aylward was showing to D.D. was not sought for the ideas it contained. Aylward used the material in his abuse of D.D., desensitizing and grooming her. It constituted evidence of a crime independent of its content. It did not need

to meet the heightened standard of scrupulous exactitude. The warrant authorized seizure only of items that either were illegal to possess, or that corroborated or were involved in the ongoing sexual abuse of D.D. The search warrant in this case did not violate the particularity requirement. [4]

II. AGGRAVATING FACTORS

Aylward contends that the aggravating factors the trial court found in this case do not distinguish his crimes from other cases of first degree rape and incest. He challenges the trial court's findings as to the victim's particular vulnerability, Aylward's abuse of a position of trust, that the crimes invaded the victim's privacy, and a pattern of abuse in a domestic violence case. He does not dispute the finding of multiple unpunished offenses.

A. LEGAL PRINCIPLES

RCW 9.94A.535 permits a court to impose a sentence above the standard range if it finds "that there are substantial and compelling reasons justifying an exceptional sentence." A sentence outside the standard range may be reversed if "the reasons supplied by the sentencing court are not supported by the record which was before the judge," if "those reasons do not justify a sentence outside the standard sentence range for that offense," or if "the sentence imposed was clearly excessive or clearly too lenient." RCW 9.94A.585(4).

An appellate court determines the appropriateness of an exceptional sentence by determining whether:

> (1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence; (2) under a de novo standard, the reasons supplied by the sentencing court do not justify a departure

[4] Aylward also argues that "[e]ven if the initial search warrant to search is upheld, the court erred in holding the firearms were properly seized under the 'open view' doctrine." Br. of Appellant at 29. However, his only argument on this point is that, because the warrant was invalid, officers had no right to be in Aylward's home where they saw the illegal firearms. Because we uphold the validity of the warrant, the seizure of Aylward's firearms did not violate the Fourth Amendment.

> from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient.

State v. France, 176 Wn. App. 463, 469, 308 P.3d 812 (2013).

Factors inherent in the crime "'in the sense that they were necessarily considered by the Legislature [in establishing the standard sentence range for the offense] and do not distinguish the defendant's behavior from that inherent in all crimes of that type'" may not be relied upon to justify an exceptional sentence. *State v. Ferguson*, 142 Wn.2d 631, 647, 15 P.3d 1271 (2001) (quoting *State v. Chadderton*, 119 Wn.2d 390, 396, 832 P.2d 481 (1992)). "An exceptional sentence is not justified by mere reference to the very facts which constituted the elements of the offense proven at trial." *Ferguson*, 142 Wn.2d at 648.

When reviewing the legal adequacy of an aggravating factor, we employ a 2-part analysis: "First, a trial court may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range. Second, the asserted aggravating factor must be sufficiently substantial and compelling to distinguish the crime in question from others in the same category." *State v. Grewe*, 117 Wn.2d 211, 215-16, 813 P.2d 1238 (1991). We "review such a determination using a 'matter of law' standard." *Grewe*, 117 Wn.2d at 215.

We review de novo whether each aggravating factor inhered in Aylward's crimes such that the Legislature considered it in establishing the standard range. *Grewe*, 117 Wn.2d at 215. We review whether the facts support an aggravating factor under a clearly erroneous standard. *France*, 176 Wn. App. at 469. In applying this standard, we "'reverse the trial court's findings only if no substantial evidence supports its conclusion. Substantial evidence has been defined as evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.'" *Ferguson*, 142 Wn.2d at 647 n.76 (citation omitted) (internal quotation marks omitted) (quoting *State v. Jeannotte*, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997)).

B. VICTIM'S PARTICULAR VULNERABILITY

Aylward contends that the victim's vulnerability is inherent in the crimes of rape of a child and incest. Thus, he argues, the legislature factored this characteristic into the standard range punishment for these crimes and it cannot constitute an aggravating factor. We disagree.

A defendant's sentence may be aggravated beyond the standard range when "[t]he defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance." RCW 9.94A.535(3)(b). For the victim's vulnerability to justify an exceptional sentence, "the State must show (1) that the defendant knew or should have known (2) of the victim's *particular* vulnerability and (3) that vulnerability must have been a substantial factor in the commission of the crime." *State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006).

"A person is guilty of rape of a child in the first degree when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim." RCW 9A.44.073(1). A person commits incest in the first degree "if he or she engages in sexual intercourse with a person whom he or she knows to be related to him or her, either legitimately or illegitimately, as an ancestor, descendant, brother, or sister of either the whole or the half blood."[5] RCW 9A.64.020(1)(a). "Descendant" is defined to include "stepchildren and adopted children under eighteen years of age." RCW 9A.64.020(3)(a).

[5] Aylward argues particular vulnerability due to age is inherent in the crime of incest in addition to rape of a child. Because he does not elaborate on this argument or argue that incest includes any elements relating to age of the victim, we do not consider it. *See State v. Mason*, 170 Wn. App. 375, 384, 285 P.3d 154 (2012).

State v. Fisher, 108 Wn.2d 419, 423, 739 P.2d 683 (1987), decided that "the victim's particular vulnerability due to extreme youth" justified an exceptional sentence, even though the crime, indecent liberties, included as an element that the victim be less than 14 years old.[6] The defendant in that case argued essentially the same thing Aylward argues in this case:

> [B]ecause an element of this offense is that the victim must be less than 14 years old, the Legislature has already considered the victim's age in determining the presumptive sentencing range for the offense, and, therefore, the sentencing judge cannot rely on the victim's extreme youth in imposing an exceptional sentence.

Fisher, 108 Wn.2d at 423-24. The court ruled that particular vulnerability of the victim due to extreme youth "is not a factor which necessarily would have been considered in setting the presumptive sentencing range." *Fisher*, 108 Wn.2d at 424. It noted that victims of the crime "range widely in age from 0 to 14 years" and that "[t]o prohibit consideration of the age of the victim in a particular case in sentencing would be to assume that all victims of this offense were equally vulnerable regardless of their age." *Fisher*, 108 Wn.2d at 424.

State v. Quigg, 72 Wn. App. 828, 841-42, 866 P.2d 655 (1994), applied *Fisher*'s reasoning to a rape of a child case. Quigg was convicted of rape of a child in the first degree. *Quigg*, 72 Wn. App. at 831. The court relied on *Fisher* to conclude that "[i]t is reasonable for the court to conclude that a victim's age renders him or her particularly vulnerable and *incapable of resistance*." *Quigg*, 72 Wn. App. at 842.

In this case, the trial court found that D.D. was a particularly vulnerable victim and that Aylward was aware of this fact, and that her vulnerability was a substantial and compelling reason for Aylward's crimes. It found that Aylward cultivated a physical, sexual relationship with D.D. when she was 3 or 4 years old, normalizing these acts for her. It found that Aylward had made

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[6] Since *Fisher*, RCW 9A.44.100(1)(b) has been amended to remove the age of the victim as an element. LAWS OF 1988, ch. 145, § 10.

D.D. particularly vulnerable by his own indoctrination of her into his abuse. It also found that D.D. was particularly vulnerable due to her extreme youth, small size in comparison to Aylward, and Aylward's status as D.D.'s father.

Aylward attempts to distinguish *Fisher* and *Quigg* on the grounds that the child victims in those cases were younger than D.D. First, his attempts are factually inaccurate. The child in *Fisher* was five and a half years old: almost exactly the same age D.D. was at the start of the charged period for rape of a child. 108 Wn.2d at 425. The court also found D.D. was particularly vulnerable for numerous reasons other than her age alone. The trial court did not err by concluding that D.D. was a particularly vulnerable victim.

C. POSITION OF TRUST

Aylward contends that it was clearly erroneous for the trial court to base his exceptional sentence on a finding that he used his position of trust to commit his crimes.

A defendant's sentence may be aggravated beyond the standard range when "[t]he defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense." RCW 9.94A.535(3)(n). When analyzing this aggravating factor, "[t]he inquiry is whether the defendant was in a position of trust, and further whether this position of trust was used to facilitate the commission of the offense." *State v. Bedker*, 74 Wn. App. 87, 95, 871 P.2d 673 (1994). "Abuse of position of trust has been expressly extended to apply to sexual offense cases." *Grewe*, 117 Wn.2d at 216.

D.D. knew Aylward as her father and someone she should have been able to trust. Aylward used this position of trust to commit his crimes. The trial court did not err by concluding that Aylward abused a position of trust.

D. INVASION OF PRIVACY

Aylward contends that invasion of the victim's privacy is inherent in the crimes charged and thus cannot be the basis for an aggravating factor in determining his sentence.

The State concedes that this aggravating factor was clearly erroneous as to the three rape of a child and incest counts taking place outside the family home.[7]

RCW 9.94A.535(3)(p) allows for an exceptional sentence above the standard range when the "offense involve[s] an invasion of the victim's privacy."

In *State v. Lough*, the defendant invaded the victim's privacy when he was invited into her home and then drugged and attempted to rape her. 70 Wn. App. 302, 306-07, 335, 853 P.2d 920 (1993). The defendant argued that the rape was not within the victim's zone of privacy because it occurred in her living room, rather than her bedroom. *Lough*, 70 Wn. App. at 336. The court concluded that "[a] victim's sense of violation of her zone of privacy would likely be equal whether she was raped in her bedroom, living room, kitchen or any other portion of her home." *Lough*, 70 Wn. App. at 336. Though the court determined that invasion of privacy is inherent in the crime of burglary, it upheld the aggravating factor as to the defendant's convictions of indecent liberties and attempted rape in the second degree. *Lough*, 70 Wn. App. at 336.

In this case, the trial court found that Aylward "invaded [D.D.'s] body while she was in the most vulnerable and private places possible for a child: her bedroom at her family home, and

[7] Where a reviewing court "overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the exceptional sentence rather than remanding for resentencing." *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003). Here, the trial court stated that Aylward's crimes "were so horrendous that this Court would give the same sentence even if there was only one aggravator on each of [the rape of a child] counts." RP (Oct. 7, 2016) at 630. Accordingly, though we reverse the invasion of privacy aggravators as to the counts taking place outside D.D.'s home, we affirm the exceptional sentence.

that of her mother's bedroom." CP at 285. Like in *Lough*, there is no reason to think that invasion of privacy is inherent in the crimes of rape of a child, incest, or sexual exploitation of a minor. The trial court did not err by concluding this aggravating factor applied as to the counts occurring in D.D.'s home.

E. ONGOING PATTERN OF ABUSE

Aylward contends that, because a pattern of abuse is frequent in child sexual abuse cases, the legislature included punishment for such a pattern in the standard sentence range for such crimes. He argues that the six charged incidents over a two year period in this case do not establish a "pattern" of abuse that distinguishes his case from other child rape cases. He contends that this aggravator cannot be the basis for an exceptional sentence.

RCW 9.94A.535(3)(h)(i) allows for an exceptional sentence when the "current offense involved domestic violence," and "was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time."

Though Aylward provides an extensive list of child rape cases in which defendants were convicted of extensive patterns of abuse toward their victims, he does not offer any substantive argument as to how a pattern of abuse is built into the elements of the crime itself. Nothing in the definition of the crime supports his argument. The relative frequency of these patterns has nothing to do with what the legislature anticipated as the standard sentence range for rape of a child. Indeed, the court upheld findings of a pattern of abuse in several of the cases that Aylward cites and the issue is not discussed in the others. *See, e.g.*, *State v. Overvold*, 64 Wn. App. 440, 444-45, 825 P.2d 729 (1992); *State v. Duvall*, 86 Wn. App. 871, 877, 940 P.2d 671 (1997). The trial court did not err by concluding that this crime included a pattern of abuse.

III. EXCESSIVE SENTENCE

Aylward contends that the trial court abused its discretion by imposing a clearly excessive sentence. He argues that, because his sentence is nearly four times the length of the high end of the standard range for his crime, it "shocks the conscience" and must be reversed. We disagree.

We may reverse an exceptional sentence if we conclude that, "under an abuse of discretion standard, the sentence is clearly excessive." *France*, 176 Wn. App. at 469. "A 'clearly excessive' sentence is one that is clearly unreasonable, 'i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.'" *State v. Knutz*, 161 Wn. App. 395, 410, 253 P.3d 437 (2011) (internal quotation marks omitted) (quoting *State v. Kolesnik*, 146 Wn. App. 790, 805, 192 P.3d 937 (2008)). "When a sentencing court bases an exceptional sentence on proper reasons, we rule that sentence excessive only if its length, in light of the record, 'shocks the conscience.'" *Knutz*, 161 Wn. App. at 410-11 (quoting *Kolesnik*, 146 Wn. App. at 805).

The standard sentence range for Aylward's rape of a child conviction was 240-318 months. RCW 9.94A.510. The trial court sentenced him to 1,200 months on each rape of a child count to run concurrently, or 3.77 times the top of the standard sentence range. The trial court found that Aylward "cultivated a physical, sexual relationship with D.D. when she was 3 or 4 years old" which "normalized these acts for this child" and "continued throughout her life until she was taken from her home." CP at 282. Aylward's exceptional sentence does not "shock the conscience" given the heinous facts of his crimes.

IV. CONTACT WITH H.A.

Aylward contends that the trial court abused its discretion by forbidding him from having contact with his daughter, H.A., for life. He also claims that this order was not within the trial court's authority because it was not "crime-related" under the Sentencing Reform Act of 1981

(SRA). In the event we conclude that the no-contact order was permissible, Aylward argues that we should find that its length was an abuse of discretion. We disagree.

The SRA provides that "[a]s a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions." RCW 9.94A.505(9). A "crime-related prohibition" is an "order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10).

The authority to impose crime-related prohibitions includes the authority to impose no-contact orders regarding witnesses. *State v. Armendariz*, 160 Wn.2d 106, 113, 156 P.3d 201 (2007). "[A] Washington trial court has the discretion to impose a crime-related prohibition up to the statutory maximum for the crime of which the defendant is convicted without resort to aggravating factors of any kind." *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 375, 229 P.3d 686 (2010).

The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. *Armendariz*, 160 Wn.2d at 110. *Rainey* considered the constitutional implications of crime-related prohibitions that affect a fundamental right, such as the right to care, custody, and companionship of one's children. 168 Wn.2d at 374. Although the "extent to which a sentencing condition affects a constitutional right is a legal question subject to strict scrutiny," "imposition of crime-related prohibitions is necessarily fact-specific and . . . the appropriate standard of review remains abuse of discretion." *Rainey*, 168 Wn.2d at 374-75. However, whether the trial court had authority to issue a specific crime-related prohibition, such as a no-contact order, is a matter of statutory interpretation we review de novo. *Armendariz*, 160 Wn.2d at 110. We review whether the trial court had authority to issue a no-contact order with H.A. de novo and, if it did, we review the length of the order for abuse of discretion.

State v. Warren upheld a no-contact order between the defendant and his wife when he was convicted of rape of a child and child molestation of his wife's daughter. 165 Wn.2d 17, 34, 195 P.3d 940 (2008). The defendant argued that the no-contact order was not reasonably crime related because his wife was not the victim of the crimes. *Warren*, 165 Wn.2d at 33. Though it acknowledged reluctance to uphold a no contact order to a person who was not a crime victim, the court concluded that "protecting [the wife was] directly related to the crimes in this case." *Warren*, 165 Wn.2d at 33-34. It based its reasoning on the following facts:

> She is the mother of the two child victims of sexual abuse for which Warren was convicted; Warren attempted to induce her not to cooperate in the prosecution of the crime; and [she] testified against Warren resulting in his conviction of the crime. Warren's criminal history includes convictions for murder and for beating [her]. There is nothing in the record to suggest that [she] objects to the no-contact order.

Warren, 165 Wn.2d at 34.

State v. Ancira overturned a five-year no-contact order between the defendant and his children. 107 Wn. App. 650, 657, 27 P.3d 1246 (2001). In that case, the defendant was convicted of felony violation of a domestic violence no-contact order for violence against his wife. *Ancira*, 107 Wn. App. at 652. The trial court issued the no-contact order on the basis that the children were present for the domestic violence incident and upset by it. *Ancira*, 107 Wn. App. at 653. The court overturned this basis for the no-contact order, concluding that the fundamental right to parent outweighed the government interest in protecting the children from witnessing further domestic violence, given that prohibiting the defendant from contacting his wife only would presumably serve the same purpose. *Ancira*, 107 Wn. App. at 654-55.

Rainey considered the legality of an order prohibiting contact between the defendant and his daughter for life. 168 Wn.2d at 373-74. In that case, the defendant was convicted of kidnapping his three-year-old daughter. *Rainey*, 168 Wn.2d at 371. The court observed that a no-contact order with the victim is a crime-related prohibition. *Rainey*, 168 Wn.2d at 376. It also cited *Armendariz* for the proposition that "the maximum operative length of [crime-related] prohibitions is the statutory maximum for the crime, not the standard sentencing range for incarceration." *Rainey*, 168 Wn.2d at 375.

In this case, Aylward's sentence included that he have no contact with H.A. for life. Although H.A. was not the victim of Aylward's crimes, she was responsible for beginning the police investigation that led to his convictions and testified against him at trial. H.A. is similar to the wife from *Warren* in that she was closely related to the victim, testified against the defendant, and nothing in the record indicates she objects to the order. However, unlike in *Warren*, Aylward has no criminal history for crimes against H.A. and nothing indicates that he attempted to influence her cooperation with the prosecution.[8] This case is distinguishable from *Ancira* on the basis that Aylward's crimes were against his daughters and H.A. was intimately involved in the case; the basis for the order is not simply to prevent her from witnessing violence but for her own protection. The trial court had the authority to issue the no-contact order in this case.

As a class A felony, the maximum sentence for rape of a child in the first degree is life. RCW 9A.44.073(2); 9A.20.021(1)(a). Because "the maximum operative length of [crime-related] prohibitions is the statutory maximum for the crime," the trial court did not abuse its discretion by prohibiting Aylward from having contact with H.A. for life. *Rainey*, 168 Wn.2d at 375.

[8] The record does suggest that Aylward may have mouthed "I love you" to H.A. while she testified, distressing her, but this does not amount to an attempt to influence her cooperation with the State. RP (Sept. 20, 2016) at 483, 585.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for the public record in accordance with RCW 2.06.40, it is so ordered.

Melnick, J.

We concur:

Worswick, J.

Maxa, C.J.

THE TILLER LAW FIRM

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