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Supreme Court No. 100850-3
Court of Appeals No. 83438-0-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID CALHOUN,

Petitioner.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner, David Calhoun, 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

Calhoun seeks review of the unpublished opinion of the Court of Appeals in cause number 83438-0-I, 2022 WL 832002, filed March 21, 2022. A copy of the decision is in the Appendix A at pages A-1 through A-18.

C. ISSUE PRESENTED FOR REVIEW

Should this court grant review where the record shows that the trial court abused its discretion by denying Calhoun's request for new appointed counsel on the first day of trial, where Mr. Calhoun demonstrated that there had been a complete breakdown in the attorney-client relationship that went beyond mere frustration with his counsel following multiple continuances of the trial date?

D. STATEMENT OF THE CASE

1. Procedural history

David Calhoun was charged with one count of first-degree rape of a child and three counts of first-degree child molestation. Clerk's Papers (CP) at 3-4. The offenses were alleged to have occurred between January 22, 2013, and January 21, 2016. CP at 3-4. The State filed an amended information, alleging an alternative charge in Count 1 of first-degree child molestation and amending Count 3 to second degree child molestation. 6Report of Proceedings (RP) at 731; CP at 48-50.

a. Request for new appointed counsel

The case was continued five times prior to trial on November 18, 2019. Agreed continuances were granted on January 28, 2019, May 30, and July 24, 2019. CP at 23, 29. The January 28 and May 30, 2019, continuances were requested because the prosecutor was in trial. RP (1/28/19) at 4; RP (5/30/19) at 5, 9. The State requested the July 24 continuance and said that the prosecutor was in trial in another court and noted that the victim interview was not completed. RP (7/24/19) at 8.

On September 30, 2019, defense counsel requested a continuance citing his unavailability due to being in trial in another case. RP (9/30/19) at 11-15. Mr. Calhoun objected to the continuance and asked for dismissal of the case. RP (9/30/19) at 14-15. His attorney explained that the case involved a second-strike offense with a potential life sentence and that he needed additional time to prepare. 1RP (9/30/19) at 13. The court found that a continuance was necessary for administration of justice, granted the continuance, and set the case for trial on November 13, 2019. RP (9/30/19) at 15; CP at 31.

On November 13, 2019, the case came on for a joint motion to continue the trial. RP (11/13/19) at 18-19. The alleged victim had still not been interviewed. RP (11/13/19) at 18. The court found that a continuance was necessary for administration of justice and continued the trial to an additional four days to November 18, 2019. RP (11/13/19) at 19; CP at 34.

On the first day of trial Mr. Calhoun asked for a continuance and requested that he be appointed new counsel due to violation of his right to speedy trial. 1RP at 1-4. He stated that

he has been in custody for 355 days and said that he had repeatedly asked his attorney to assert his speedy trial rights, and his attorney "has refused to on all accounts, telling me that it just wasn't the time," and that "he pretty much just does whatever he wants to do." 1RP at 5. The court stated the "Time for Trial Rule" allows cases to be continued over a defendant's objection in the administration of justice and when the defendant would not be prejudiced. 1RP at 6.

The court asked why Mr. Calhoun was asking for a continuance when the complaint is that his speedy trial rights were violated. 1RP at 5. Mr. Calhoun stated:

> . . . I've always thought that you had to be pro per or pro se in order to address the Court, and so I've never brought it anybody's attention or understood my rights on how to address the Court. And I—every time I've asked Mr. Quigley to address it for me, it's all been denied.
>
> 1RP at 5.

The court denied the motion for new counsel and continuance. 1RP at 6.

After the court denied the motion for new counsel, Mr. Calhoun again brought up his statutory right to speedy trial. 1RP

at 8-9. The court stated that it was preserved for appeal. Mr. Calhoun again demonstrated the breakdown with his attorney by telling the court:

> THE DEFENDANT: He's a piece of shit, man. I don't want to talk to this guy.
> THE COURT: Sir, stop.
> THE DEFENDANT: I hope that was recorded by the court reporter.
> THE COURT: Yes.

1RP at 9.

The following day Mr. Calhoun apologized to the court for his statements the previous day. 2RP at 23.

2. Trial testimony

In 2005 David Calhoun married Victoria Chittenden, who has a daughter, C.A., and son, J.H., from previous relationships. 4RP at 366, 458, 463, 7RP at 789. Mr. Calhoun and Ms. Chittenden have a son, N.C. 7RP at 789.

The family moved several times during the relevant time period. Ms. Chittenden, Mr. Calhoun, N.C. and C.A. lived in a house on Fawcett Street in Tacoma between August 2013 and February 2015 when C.A. was eight years old. 4RP at 412, 492,

7RP at 795. J.H. originally lived with the family and then went to live with his father in Minnesota. 7RP at 796. N.C., who has muscular dystrophy, is largely confined to a wheelchair. 4RP at 377, 463, 7RP at 797.

While living at the Fawcett Street house, Ms. Chittenden worked as a drug and alcohol counsellor and worked during the day from 8 a.m. and returned home at 6:00 or 6:30 p.m. 4RP at 455, 7RP at 798. Mr. Calhoun worked at nights from about 5:00 p.m. and got home in the morning after C.A. left for school. 4RP at 418, 7RP at 797.

Mr. Calhoun's mother, Angela Kipp, lived in the garage for a few months, which was converted to living space. 7RP at 799-800. During this time Mr. Calhoun's mother also provided childcare. 7RP at 800. Ms. Chittenden said that Mr. Calhoun's mother lived there for about six months, and she occasionally took care of the children. 4RP at 493. Ms. Kipp testified that while Ms. Chittenden and Calhoun at work she would provide childcare for C.A. 7RP at 760. Ms. Kipp did not see any instances where C.A. was trying to avoid contact with Mr. Calhoun or that

she acted like she was afraid of him. 7RP at 761. Ms. Kipp said that she did not remember a time when living at the Fawcett Street house that C.A., N.C. and Mr. Calhoun were left alone to babysit the children. 7RP at 770-71.

Angelina Rasheed, Ms. Calhoun's sister, testified that she saw C.A. with Mr. Calhoun on occasion, and that when she saw them together C.A. seemed happy around Mr. Calhoun and did not seem to be afraid or tried to avoid contact with him. 7RP at 777.

Ms. Chittenden said that during this time C.A. had a good relationship with Mr. Calhoun. 4RP at 495. Mr. Calhoun said that he acted as a parent to C.A. and attended her school activities and sports events. 7RP at 800-01. After N.C. became confined to a wheelchair, a lot of the entire family 's energy went toward his care. 7RP at 802. C.A. would help also help care for N.C. 7RP at 803.

The family moved to a house in Spanaway for about two months when C.A. was ten. 4RP at 413. When C.A. was in sixth grade, the family moved to a second house in Spanaway about

five blocks away from the first house. 7RP at 810, 813. They lived there until the family moved to Minnesota in May 2016, when C.A. was 12, and the children were enrolled in school there. 4RP at 368, 369, 370, 415, 459, 497.

After school ended for the year in June 2016, the family moved to Detroit Lakes, Minnesota so that Ms. Chittenden could be closer to J.H. 7RP at 816. While in Minnesota Mr. Calhoun and Ms. Chittenden separated and in November 2016, Ms. Chittenden, C.A., and N.C. returned to Washington. 4RP at 463, 471, 7RP at 820. C.A. was thirteen when they moved back from Minnesota. 4RP at 432

Mr. Calhoun returned from Minnesota to Washington in December 2016. 7RP at 820-21. He had previously met Brooke Charlton at a recovery meeting in April 2016 and they started dating in January 2017 after he returned from Minnesota. 5RP at 589. After returning to Washington, he moved into an apartment with Ms. Charlton. 8RP at 823.

About two weeks after he returned to Washington Mr. Calhoun was served with a parenting plan regarding N.C. 7RP at

821-22. Although the parenting plan did not address C.A., she accompanied N.C. on overnight visits to Mr. Calhoun's apartment. 4RP at 403, 438, 7RP at 821-22, 825, 826. They had a one-bedroom apartment and N.C. and C.A. would sleep in the living room. 4RP at 440, 7RP at 826.

C.A. said she went to visitations with her brother "to make sure he was safe" and said that they would sleep in the living room. 4RP at 404.

Ms. Chittenden and Mr. Calhoun divorced in 2017. 4RP at 471. Aaron Chittenden moved in with C.A.'s mother in 2016 and they were married in July 2018. 4RP at 532.

C.A. got a cellphone when they lived in Spanaway because she walked home from school with her friends. 4RP at 477. Ms. Chittenden monitored C.A.'s cell phone activity, which she used to text friends and to access Facebook. 4RP at 477-78. In August 2017, when C.A. was 13 years old, Ms. Chittenden found pictures on her phone that that she did not like and then found communication with other people involving sexual content on C.A.'s phone and took the phone away from her. 4RP at 404-05,

433, 479, 502. Ms. Chittenden said that C.A. was very upset and told her that Mr. Calhoun was sexually abusing her. 4RP at 475, 480, 535. C.A. told her mother that there was "something going on" with Mr. Calhoun. 4RP at 405. After C.A. made the allegation, Ms. Chittenden called Mr. Calhoun and he went to her house immediately with Ms. Charlton. 4RP at 406, 480. Ms. Chittenden called and told him that that C.A. said that he had touched her and that she wanted him to come over immediately to get both sides of the story. 7RP at 830. Mr. Calhoun was at a recovery meeting when he received the message at about 8:00 p.m. 4RP at 484. When they got there, C.A. was in her room and did not feel comfortable talking in front of Mr. Calhoun and Ms. Chittenden. 5RP at 596.

Mr. Calhoun denied abusing C.A. and said that she was not telling the truth. 4RP at 481, 7RP at 832.

Mr. Calhoun and Aaron Chittenden went outside, and then Ms. Chittenden left the house and Ms. Charlton spoke with C.A. alone for about 25 minutes. 4RP at 482. Ms. Charlton then came outside and told them what C.A. said. RP at 482, 485. Ms.

Charleton testified that there would be scarring of her anus, based on what C.A. told her about the alleged abuse. 5RP at 616.

After Ms. Carlton came out, Ms. Chittenden went inside the house and then Mr. Calhoun came inside and asked if he could talk to C.A. 4RP at 507. C.A. agreed to talk to him. 4RP at 507. C.A. spoke with Mr. Calhoun alone for about five minutes. 4RP at 483.

Ms. Charlton said that when Mr. Calhoun walked back into the room, C.A. looked at him and said she "I lied" and then said she "No, I don't want to go to the hospital." 5RP at 599, 609-10. Mr. Calhoun denied molesting her and later she said that it did not happen. 4RP at 406, 484.

The following morning C.A. said that that the alleged abuse didn't happen, and that she did not want to get in trouble about the phone messages. 4RP at 484. At trial C.A. said that she recanted because she "didn't want to go through him saying that he denied it." 4RP at 406.

After the confrontation, visitation with N.C. took place at Ms. Chittenden's house. 4RP at 485. After several weeks the

regular visitation schedule resumed and C.A. and N.C. went to his apartment for overnight visits and visits also took place at Ms. Chittenden's house. 7RP at 838, 843. Mr. Calhoun said the C.A. would never leave when he came over to visit at Ms. Chittenden's house. 7RP at 844. Mr. Calhoun said that there were times when N.C. would come over for visits, but C.A. would not come over. 7RP at 844.

C.A. continued to go to Mr. Calhoun's apartment for overnight visits with N.C. even she accused him of sexually abusing her. 4RP at 500. N.C. said that when he went to visit his dad after they returned from Minnesota, he and C.A. would stay at his father's apartment and that C.A. was happy to visit him and did not try to avoid him. 4RP at 580-81.

In October 2018, the children were at their maternal grandfather's house because was N.C. having surgery. 4RP at 539. C.A. was using N.C.'s tablet because Ms. Chittenden had taken away C.A.'s cell phone. 4RP at 486-87, 511. N.C. testified that C.A. was not allowed to use electronic devices, and he allowed his sister to use his tablet when they were staying at their

grandfather's house. 5RP at 574. They both had had their electronic devices taken away, but N.C.'s tablet was returned by their mother while they were staying at their grandfather's house during the surgery so he would have something to do while recovering, but C.A. was not allowed to use the tablet. 4RP at 540. Ms. Chittenden learned that C.A. used N.C.'s tablet and she searched the tablet and saw a conversation by C.A. with others in a group chat in which C.A. wrote that she was sexually abused by Mr. Calhoun. 4RP at 441, 442, 478, 486-87. After reading the messages on the tablet, Ms. Chittenden called the police. 4RP at 542. Tacoma police officer Chris Bain responded to the report at 9:00 p.m. on October 28, 2018, and took a report. 4RP at 524, 7RP at 701.

Ms. Chittenden took C.A. to Mary Bridge Hospital. 4RP at 487, 511.

Tacoma Police Detective Patricia Song testified that Mr. Calhoun's date of birth is November 2, 1974. 6RP at 704. Detective Song said that Ms. Chittenden emailed her screenshots of the conversations, which she photographed. 6RP at 707.

C.A. refused to have a medical examination following the forensic interview at the Child Advocacy Center and a genital examination was not done. 6RP at 710, 711.

Jennifer Schooler, a child forensic interviewer, testified about delayed disclosure in child sex abuse cases. 6RP at 652-54. She stated that delayed disclosure of a week or more took place in 80 percent of her cases. 6RP at 654. Ms. Schooler interviewed C.A. and testified that C.A. was outside ethe age range of children who are susceptible to suggestion. 6RP at 658.

Charity Harris, a registered nurse at Mary Bridge Children's Hospital examined C.A. on October 28, 2018. 7RP at 743. She stated that no exam of C.A.'s anus or vagina was conducted based on the amount of time that passed before the allegations were made. 7RP at 748, 752.

At trial, C.A. testified that when she was eight years old, when the family lived in the house in Tacoma, she was playing Xbox with her brother in his room when he was eight years old. 4RP at 373. Mr. Calhoun yelled down the hallway for her to come to his room, and when she got there her "clothes were taken off,"

but she did not remember how that occurred. 4RP at 375. She said that she was initially wearing jeans and a t shirt. 4RP at 375. She said that Mr. Calhoun put her on her back on the bed and that he started touching her chest and vagina. 4RP at 376. She said that she did not remember if anything went inside her vagina. 4RP at 377. C.A. said that it stopped when N.C. called from the bathroom that he needed help. 4RP at 378. C.A. saw her mom later than day but did not say anything to her about the incident. 4RP at 380. She said that she was scared of what would happen if she said anything. 4RP at 380.

C.A. said that the family moved to Spanaway a few months later. 4RP at 381, 384. She said while living in that house, Mr. Calhoun called her into his room one day after she got home from school. 4RP at 382. She went into her room and he and took off her clothes and touched her. 4RP at 382, 386, 387. She then said that she did not remember what part of her body his hands touched. 4RP at 389. She said that her brother got home from school and Mr. Calhoun left the room and she put her clothes back on. 4RP at 390. She said that after the incident she felt weak and

did not know how to say anything about it. 4RP at 393.

The family moved to a second house in Spanaway, and while in the house Mr. Calhoun sent a text message to C.A. to come to his room. 4RP at 398. She went to his room and said that he took off her clothes started to touch her chest and vagina using his hands. 4RP at 398-99. She said that it stopped when N.C.'s bus arrived. 4RP at 400. She said that she put on her clothes and went to her room. 4RP at 401. She said that she did not tell her mom because he was home and was not working that night and he would deny it. 4RP at 402.

Mr. Calhoun denied touching C.A.'s anus, vagina or chest while they lived at any of the three houses, they lived in. 7RP at 803, 810, 816.

Ms. Charlton testified about an incident at their apartment when C.A and N.C. were over for a visit, and she asked to C.A to take a shower, and when she later went into the bedroom to check on her, she saw C.A. standing in her bra and jeans and Mr. Calhoun was standing next to her. 5RP at 594. Ms. Charlton was shocked and asked if she would do that in front Aaron Chittenden,

and she said "no," and Calhoun said to stop and that she was "making it weird" and "you're making her feel weird" and that there weas nothing wrong with it. 5RP at 594. C.A. grabbed her stuff and went into the bathroom and shut the door. 5RP at 595. Regarding the incident, Mr. Calhoun said that when he went into the bedroom C.A. was wearing jeans and a swim top and denied that she was wearing a bra. 7RP at 829.

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 this issue 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. <u>THIS COURT SHOULD GRANT REVIEW BECAUSE THE TRIAL COURT ERRED BY DENYING CALHOUN'S MOTION FOR APPOINTMENT OF NEW COUNSEL AND WHERE THE TRIAL COURT FAILED TO MAKE AN ADEQUATE INQUIRY WHEN CALHOUN REQUESTED APPOINTMENT OF NEW COUNSEL.</u>

When a client requests different appointed counsel, the court must engage in a penetrating inquiry regarding the proffered reasons for the request. That did not happen when Mr. Calhoun asked for appointment of new counsel. The trial court abused its discretion because it failed to adequately inform itself of the full nature of Mr. Calhoun's dissatisfaction with his counsel.

By the time of the fourth continuance on September 30, 2019, Mr. Calhoun told the court that was not agreement with the request and that he did not want to talk to his attorney any longer. RP (9/30/19) at 12. By November 18, 2019, Mr. Calhoun told the court that his attorney did not listen to him and did whatever he wanted to do. Mr. Calhoun sought new appointed counsel at the beginning of trial on November 18, 2019. 1RP at 3-6. Mr. Calhoun expressed his extreme frustration that his attorney had waived speedy trial over his objection and that he had tried to address this with his attorney, but

who apparently did not pay attention to Mr. Calhoun's requests to enforce his speedy trial rights. 1RP at 4-6. Mr. Calhoun told the court:

> I have been here for 355 days, and I have approached Mr. Quigley on several different occasions to implement my speedy trial rights. He has refused to on all accounts, telling me that it just wasn't the time. The second time he said that the---was that it---he pretty much just does whatever he wants to do.
>
> . . .
>
> I'm in fear for my life. This is my life that we're on trial for, and I don't believe we're going in the same direction, so I'm asking for a change of counsel, Your Honor, and a continuance of some type.

1RP at 5.

The trial court denied Mr. Calhoun's motion and explained the basis for the continuance on September 30 to November 13, 2019, was for the "administration of justice" under CrR 3.3(f)(2), and that a continuance may be granted over a defendant's objection. 1RP at 6.

Whether dissatisfaction with court-appointed counsel justifies the appointment of new counsel is a matter within the trial court's discretion. ***State v. Varga***, 151 Wn.2d, 179, 200, 86 P.3d 139 (2004).

Mr. Calhoun's right to counsel was violated because it was made clear to the trial court that there had been a complete breakdown in the attorney-client relationship. A substitution of counsel may be justified when this relationship - as was plainly evident in this case - is plagued by a complete breakdown such that that the defendant cannot communicate with his counsel. See generally, ***In re Pers. Restraint of Stenson (Stenson II)***, 142 Wn.2d 710, 724-31, 16 P.3d 1 (2001).

It is a matter of discretion whether an indigent defendant's dissatisfaction with his court-appointed counsel justifies the appointment of new counsel. ***State v. DeWeese***, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). The factors that the trial court must consider in deciding a motion to withdraw and substitute appointed counsel include "(1) the reasons given for the dissatisfaction, (2) the court's own evaluation of counsel, and (3) the effect of any substitution upon the scheduled proceedings." ***State v. Stenson***, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997).

The trial court had a duty to inquire into the conflicts of interest between Mr. Calhoun and his attorney. Its failure to do so

deprived Mr. Calhoun of conflict-free counsel at his trial. The trial court had an obligation to make a more detailed investigation into the nature of the conflict between Mr. Calhoun and counsel, thereby honoring Mr. Calhoun's constitutional right to counsel under the Sixth Amendment and article I, section 22. ***State v. Lopez***, 79 Wn. App. 755, 766-67, 904 P.2d 1179 (1995) overruled on other grounds by ***State v. Adel***, 136 Wn.2d 629, 965 P.2d 1072 (1998).

In ***State v. Lopez***, before trial began, the defendant requested new appointed counsel, repeatedly asserting that his current attorney was not helping him at all. 79 Wn. App. at 764. The court stated, "I'm not going to appoint you another attorney," failing to engage in any further inquiry. *Id.* Division 3 held this was error, relying in part on ***State v. Dougherty***, 33 Wn. App. 466, 468, 471, 655 P.2d 1187 (1982), which involved a defendant's request to go pro se based on distrust in defense counsel. ***Lopez***, 79 Wn. App. at 765. The ***Dougherty*** court stated that, in such circumstances, "A penetrating and comprehensive examination by the court of the defendant's allegation will serve as the basis of whether different counsel needs to be appointed for direct representation at trial, or for standby

purposes." 33 Wn. App. at 471. The ***Lopez*** court acknowledged ***Dougherty***' s "language does not apply directly here, since Mr. Lopez was not asking to appear pro se." 79 Wn. App. at 765.

> As a practical matter, however, the circumstances are similar. When a defendant lacks faith in his appointed attorney and the court refuses to permit a substitute, the defendant must choose between continuing with his appointed counsel, or appearing pro se. Because of the potential implications on a defendant's Sixth Amendment rights, a court in this situation should inquire carefully into the defendant's reasons for the distrust.

Id. (citation omitted).

A complete breakdown in the working relationship with counsel, such that new counsel is required, is more than a mere general loss of confidence in counsel. ***State v. Schaller***, 143 Wn. App. 258, 268, 177 P.3d 1139 (2007), review denied, 164 Wn.2d 1015 (2008). Here, the reason Mr. Calhoun stated to the court was that his attorney disregarded his requests to enforce his speedy trial rights. 1RP at 5-6. In response, the court provided no evaluation of counsel's performance and instead addressed the "administration of justice" exception to the speedy trial rule. 1RP at 6.

Under ***Lopez***, the failure to inquire into more specifics was error. The trial court did not specify its reason for denying the request

for new counsel and instead conflated Mr. Calhoun's request for counsel with his request for dismissal and his objection to being tried beyond his calculation of his speedy trial timeline. 1RP at 6. The trial court judge explained that a continuance was granted by another judge under the "administration of justice" exception of CrR 3.3(f)(2) and then denied his request for continuance and request for new counsel. 1RP at 6. Why the trial court did not conduct a detailed investigation into the nature of the conflict between Mr. Calhoun and counsel is a mystery. The court essentially ignored the reason for the request for new counsel and its failure to inquire into the conflict was a failure to inform itself of the facts on which to exercise discretion and was therefore an abuse of discretion. ***Lopez***, 79 Wn. App. at 767.

The Court of Appeals found that ***Lopez*** is distinguishable because "Calhoun's dissatisfaction was based primarily on defense counsel's failure to assert his speedy trial rights." ***Calhoun***, 2022 WL 832002, slip op. at *11. The Court completely overlooked Mr. Calhoun's testimony showing that his frustration goes beyond the speedy trial issue; Mr. Calhoun described his attorney as "a piece of

shit" and said that he did not want t talk to him, and that his attorney "won't work with me" and that he "hasn't worked with me." 1RP at 8, 9. This goes beyond frustration with the speedy trial issue cited by the Court.

The trial court's failure to engage in a penetrating inquiry with respect to Mr. Calhoun's request for new counsel was a failure to inform itself of the facts on which to exercise discretion and was therefore an abuse of discretion. ***Lopez***, 79 Wn. App. at 767.

This case presents the complete breakdown that made substitution of appointed counsel warranted and an abuse of discretion if denied. See ***Varga***, 151 Wn.2d at 200; see also ***Stenson***, 132 Wn.2d at 734. The trial court's decision in denying the request for new counsel was manifestly unreasonable under the circumstances.

Mr. Calhoun's convictions must accordingly be reversed, and this case must be remanded for a new trial and appointment or retention of competent, conflict-free counsel.

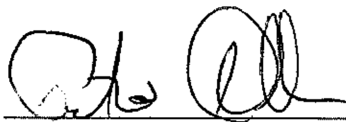
F. CONCLUSION

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.

I certify under RAP 18.17(b), the word count in this document is 4699 words, excluding the parts of the document exempted from the word count by RAP 18.17(b).

DATED: April 19, 2022

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on April 19, 2022, that this Appellant's Petition for Review was sent by the JIS link to Ms. Lea Ennis, Clerk of the Court, Court of Appeals, Division I, and to Kristie Barham, Pierce County Prosecutor, and a copy was mailed by U.S. mail, postage prepaid, to the appellant at the following address:

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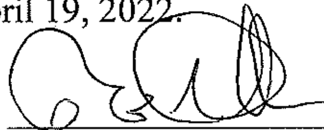
This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on April 19, 2022.



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APPENDIX A

FILED
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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DAVID CHRISTOPHER CALHOUN, Appellant.	No. 83438-0-I DIVISION ONE UNPUBLISHED OPINION

HAZELRIGG, J. — A jury convicted David C. Calhoun of rape of a child in the first degree, child molestation in the first degree, and child molestation in the second degree. Calhoun seeks reversal arguing that defense counsel was ineffective for failing to challenge a potentially biased juror, that the trial court erred in denying his motion for new counsel, that the trial court violated his speedy trial rights, and that insufficient evidence supports his child rape conviction. Calhoun also argues, and the State concedes, that the trial court erroneously imposed Department of Correction community custody supervision fees. We affirm Calhoun's convictions, but remand to strike the supervision fees.

FACTS

In 2005, David Calhoun married C.A.'s mother and became stepfather to C.A., born in 2004. The family lived in Tacoma from August 2013 to February 2015, in Spanaway from February to November 2015, in another house in

Citations and pinpoint citations are based on the Westlaw online version of the cited material.

Spanaway from November 2015 to May 2016, and in Minnesota from May 2016 to November 2016. Calhoun and C.A.'s mother separated in Minnesota, returned to Washington, and divorced in April 2017.

In August 2017, when C.A. was 13 years old, C.A. disclosed to her mother that Calhoun had sexually abused her. C.A.'s mother confronted Calhoun, but did not take further action until 2018, when she discovered that C.A. had disclosed the sexual abuse to other individuals in online messages. C.A.'s mother then notified law enforcement and escorted C.A. to the hospital. C.A. submitted to a forensic interview, but no medical examination took place due to the amount of time that had passed between the sexual assaults and the date she went to the hospital.

The State charged Calhoun in an amended information with rape of a child in the first degree, child molestation in the first degree, and child molestation in the second degree. Calhoun's case was continued five times prior to trial. On January 28, 2019, May 30, 2019, and July 24, 2019, the court granted agreed continuances based on the prosecutor's unavailability for trial and the need to interview witnesses.

On September 30, 2019, defense counsel requested a continuance because he was in trial on another case, anticipated starting another trial immediately after, and would be on vacation for two weeks after that. Defense counsel also explained that he needed additional time to prepare for trial, particularly given that Calhoun faced a possible life sentence.[1] The prosecutor did

[1] The State originally gave notice that Calhoun faced life without the possibility of parole under RCW 9.94A.030(38)(b)(i) based on a 1990 conviction in California for lewd acts with a child under the age of 14 with force. At sentencing, the State informed the court that the information was insufficient to establish factual comparability.

not oppose the motion. Calhoun expressed frustration with the proposed continuance and asserted that the charges against him should be dismissed due to violation of his speedy trial rights. The court stated, "I don't have information in front of me that would suggest that your rights have been violated." Over Calhoun's objection, the trial court granted the continuance.

On November 13, 2019, the State and defense counsel presented a joint motion to continue the trial five additional days so defense counsel could interview C.A. Calhoun signed the proposed order. The trial court granted the motion.

Trial commenced on November 18, 2019, 342 days after Calhoun was arraigned. Calhoun immediately asked for a continuance and that he be appointed new counsel due to violation of his right to speedy trial. Calhoun stated that he had repeatedly asked his attorney to assert his speedy trial rights, but his attorney "refused on all accounts, telling me that it just wasn't the time" and "pretty much does whatever he wants to do." Calhoun also expressed displeasure with defense counsel's advice that he consider accepting the State's plea offer. The trial court, noting that a continuance would cause further delay, asked Calhoun why he wanted a continuance when his complaint was that his speedy trial rights had been violated. Calhoun explained that "what I would like to do is have grounds for dismissal; however, I don't know how to do the paperwork. But if I have somebody that will help me do that, then I believe I have the grounds for dismissal."

The trial court denied Calhoun's motion for new counsel and for a continuance. The court explained that CrR 3.3(f)(2) allows for cases to be continued over a defendant's objection when appropriate in the administration of

justice and when the defendant would not be prejudiced in his defense, as was the case with the September 30 continuance. A few moments later, Calhoun again expressed his dissatisfaction with his attorney, calling him "a piece of shit" and saying "I don't want to talk to this guy." The following day, Calhoun apologized on the record for his "outburst" and thanked the court for "hearing [him] out."

The case then proceeded to jury selection. Several potential jurors, including juror 9, were questioned in open court but outside the presence of the remainder of the jury pool. Upon questioning by the trial court, juror 9 stated that she was employed as a residential rehabilitation counselor at the Special Commitment Center (SCC) on McNeil Island. Juror 9 stated that she did not provide sex offender treatment at SCC. When the trial court asked juror 9 whether "[a]nything about [her] working with folks that have been found to be Sexually Violent Predators [ ] would affect [her] ability to serve as a juror in a case involving allegations of sexual offenses," she responded "No." When asked whether she could separate "what knowledge she may have acquired from working with [her] current population to what [she] would be required to do . . . in the courtroom," juror 9 responded, "I believe I can." Defense counsel then asked juror 9 if the offenders spoke with her about "their offenses, or [if] they talk about what's going on currently, their day-to-day stuff." Juror 9 explained that she primarily works with patients with special needs, such as dementia or hearing impairment, and stated "[w]e don't talk about their offenses or whatever happened in the past." During the remainder of jury selection the following day, defense counsel asked juror 9 if she agreed that the burden of proof is on the State, and she responded, "I do." Neither

party exercised a peremptory challenge against juror 9 or challenged her for cause. Juror 9 was seated on the jury.

At trial, C.A. testified regarding three incidents of sexual abuse by Calhoun. The first incident occurred in the Tacoma house when C.A. was 8 years old. Calhoun summoned C.A. to his bedroom, laid her flat on the bed, and "started touching [her] chest and [her] vagina" with his hands for a "[c]ouple of minutes." The touching stopped when C.A.'s younger brother, who is largely confined to a wheelchair, called for help.

Next, C.A. testified about an incident that occurred at the first Spanaway house when she was 10 years old. Calhoun called C.A. to his bedroom, removed her clothes, bent her over the bed, and "started touching [her] butt" with his "hands and penis." She specified that Calhoun's penis touched the area "where you use your butt to go number two" and that "[i]t felt weird." C.A. remembered her "butt stinging" during the incident and confirmed that it was not stinging before the incident. The prosecutor asked C.A. if she remembered "whether he tried to put his penis inside [her] butt hole," and C.A. said "[y]es." On redirect examination, the prosecutor asked C.A. if it felt like a hand was touching her butt, and she said "[n]o." C.A. again confirmed that "the area where poop comes out" "stung" after the incident.

The third incident C.A. described took place at the second Spanaway house, a couple months before the family moved to Minnesota. Calhoun called C.A. to his bedroom, removed her clothes, placed her on her back, and "started

touching [her] chest and [her] vagina" with his hands. It stopped when her brother's school bus pulled up.

The jury found Calhoun guilty of rape of a child in the first degree, child molestation in the first degree, and child molestation in the second degree. The court imposed an indeterminate sentence of 216 months to life in prison and a lifetime term of community custody supervision upon release from prison. Although the court found Calhoun indigent and waived non-mandatory legal financial obligations (LFOs), Calhoun's judgment and sentence required him to "[p]ay supervision fees as determined by the Department of Corrections."

Calhoun timely appealed.

ANALYSIS

I. Ineffective Assistance of Counsel

Calhoun argues that defense counsel rendered constitutionally ineffective assistance by failing to ensure he received a trial by a fair and impartial jury. We disagree.

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings. Strickland v. Washington, 466 U.S. 668, 684–86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish a claim of ineffective assistance of counsel, a defendant must establish (1) that their attorney's representation fell below an objective standard of reasonableness and (2) resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been

different. State v. McFarland, 127 Wn.2d 322, 334–35, 899 P.2d 1251 (1995). If a defendant fails to establish either element, the inquiry ends. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). "The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." State v. Kyllo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

Calhoun argues that counsel performed deficiently by failing to make anything other than a superficial and cursory inquiry regarding the extent of juror 9's daily exposure to offenders committed to the SCC as sexually violent predators and her opinions formed as a result of that contact with that population. He points out that defense counsel never followed up during general voir dire to ask juror 9 whether she could be fair and impartial in a case involving allegations of child rape and child molestation. Calhoun claims that no tactic or strategy could explain this failure, and that "the presence of a juror with a very strong potential for actual bias" requires reversal.

A criminal defendant has a constitutional right to an unbiased jury trial. State v. Irby, 187 Wn. App. 183, 192–93, 347 P.3d 1103 (2015). "Seating a biased juror violates this right." State v. Guevara Diaz, 11 Wn. App. 2d 843, 851, 456 P.3d 869 (2020). A juror may be challenged for cause based on either actual or implied bias.[2] RCW 4.44.170. "Actual bias" is defined as "the existence of a state

[2] Under RCW 4.44.180, a juror holds "implied bias" if related by family to a party, possesses some economic relationship to a party, served as a juror in a case involving identical facts, or has

of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging." RCW 4.44.170(2). To sustain a challenge based on actual bias, "'the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.'" State v. Lawler, 194 Wn. App. 275, 281, 374 P.3d 278 (2016) (quoting RCW 4.44.190).

Here, the record shows that the trial court thoroughly questioned juror 9 to determine whether her personal experiences as an SCC counselor might affect her ability to be fair and impartial. In response, juror 9 unequivocally responded that nothing about her job would affect her ability to serve as a juror in a case involving sex offenses and that she believed she could separate knowledge she acquired working with SCC residents from what would be required of her as a juror in the courtroom. And when defense counsel followed up by asking whether SCC residents discuss their offenses with her, juror 9 explained that she works with offenders with special needs and that they do not discuss what happened in the past. Based on this exchange, it was objectively reasonable for defense counsel to conclude that juror 9 could be fair and impartial towards Calhoun. Therefore, defense counsel did not render deficient performance by making the tactical decision not to question or challenge juror 9 further.

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an "interest" in the subject matter of the case. Calhoun does not argue that juror 9 manifested "implied bias."

II. Motion for New Counsel

Calhoun argues that the trial court erred in denying his motion to appoint new counsel. We review a trial court's refusal to appoint new counsel for an abuse of discretion. State v. Lindsey, 177 Wn. App. 233, 248, 311 P.3d 61 (2013). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. Id. at 249.

The constitutional right to effective assistance of counsel does not provide indigent defendants with an absolute right to select a particular advocate. State v. Varga, 151 Wn.2d 179, 200, 86 P.3d 139 (2004). A defendant dissatisfied with appointed counsel "must show good cause to warrant substitution of counsel, such as a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." State v. Stenson (Stenson I), 132 Wn.2d 668, 734, 940 P.2d 1239 (1997). The trial court must consider the reasons given for the dissatisfaction, the court's own evaluation of counsel, and the effect of any substitution upon the scheduled proceedings. Id. at 734. "A disagreement over defense theories and trial strategy does not by itself constitute an irreconcilable conflict entitling the defendant to substitute counsel, because decisions on those matters are properly entrusted to defense counsel, not the defendant." State v. Thompson, 169 Wn. App. 436, 439, 290 P.3d 996 (2012) (citing In re Pers. Restraint of Stenson (Stenson II), 142 Wn.2d 710, 734, 16 P.3d 1 (2001)). "Counsel and defendant must be at such odds as to prevent presentation of an adequate defense." State v. Schaller, 143 Wn. App. 258, 268, 177 P.3d 1139 (2007). Upon review, we consider (1) the extent of the conflict, (2)

the adequacy of the trial court's inquiry into the conflict, and (3) the timeliness of the motion. (Stenson II), 142 Wn.2d at 723–24.

Calhoun argues that his right to counsel was violated because he made it clear to the trial court that there had been a complete breakdown in the attorney-client relationship. In particular, Calhoun contends that the trial court failed to conduct an adequate inquiry into the nature and extent of the conflict and breakdown before summarily denying his motion.

A trial court conducts an adequate inquiry by allowing the defendant to express their concerns fully. Schaller, 143 Wn. App. at 271. The court "'may need to evaluate the depth of any conflict between the defendant and counsel, the extent of any breakdown in communication, how much time may be necessary for a new attorney to prepare, and any delay or inconvenience that may result from substitution.'" State v. Thompson, 169 Wn. App. 436, 462, 90 P.3d 996 (2012) (quoting United States v. Adelzo-Gonzales, 268 F.3d 772, 777 (9th Cir. 2001)). However, "[f]ormal inquiry is not always essential where the defendant otherwise states [their] reasons for dissatisfaction on the record." Schaller, 143 Wn. App. at 271.

Calhoun supports his claim by citing to State v. Lopez, 79 Wn. App. 755, 904 P.2d 1179 (1995). In Lopez, the defendant told the trial court that "I want a different attorney because this one isn't helping me at all." Id. at 764. The trial court summarily denied the request without inquiring into the defendant's reasons for his dissatisfaction. Id. The Lopez court held that the trial court abused its discretion by "failing to inform itself of the facts on which to exercise its discretion."

Id. at 767. Here, in contrast, the record indicates that Calhoun's dissatisfaction was based primarily on defense counsel's failure to assert his speedy trial rights. Accordingly, Lopez is distinguishable and does not control our review here.

The trial court asked Calhoun why he wanted a continuance to appoint new counsel when his complaint was that his speedy trial rights had been violated. Calhoun responded that he wanted the trial court to appoint counsel who would move to dismiss the charges against him based on the alleged speedy trial violation. When the trial court denied the motion, Calhoun again attempted to argue that his speedy trial rights had been violated, and the court explained that the issue would be preserved for appeal. Under these circumstances, the trial court's inquiry provided a sufficient basis for reaching an informed decision. Although Calhoun disagreed with defense counsel's decision not to move for dismissal based on violation of speedy trial rights, we cannot say that the disagreement resulted in "the complete denial of counsel." Stenson II, 142 Wn.2d at 722. The court did not abuse its discretion in denying Calhoun's motion for new counsel.

III. Speedy Trial

Calhoun first argues that the trial court violated the time-for-trial rule in CrR 3.3 by granting multiple continuances without a valid basis. A trial court's application of CrR 3.3 is reviewed de novo. State v. Ollivier, 178 Wn.2d 813, 826, 312 P.3d 1 (2013). We review a trial court's decision to grant a continuance for an abuse of discretion. Id. at 822–23.

The time-for-trial rule "is not a constitutional mandate." State v. Terrovona, 105 Wn.2d 632, 651, 716 P.2d 295 (1986). A defendant held in custody pending trial must be tried within 60 days of arraignment. CrR 3.3(b)(1)(i). Continuances granted by the trial court are excluded from the computation of time. CrR 3.3(e)(3). The trial court may grant a continuance based on "written agreement of the parties, which must be signed by the defendant" or "[o]n motion of the court or a party" where a continuance "is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(1), (2). The court must "state on the record or in writing the reasons for the continuance." CrR 3.3(f)(2). Moving for a continuance "by or on behalf of any party waives that party's objection to the requested delay." CrR 3.3(f)(2). A trial court does not necessarily abuse its discretion by granting defense counsel's request for more time to prepare for trial to ensure effective representation and a fair trial, even over defendant's objection. State v. Saunders, 153 Wn. App. 209, 217, 220 P.3d 1238 (2009).

Calhoun argues that the trial court abused its discretion by continuing his case past May 30 and July 24, 2019 based on the prosecutor's unavailability for trial and the need to interview witnesses. "In exercising its discretion to grant or deny a continuance, the trial court is to consider all relevant factors." State v. Heredia-Juarez, 119 Wn. App. 150, 155, 79 P.3d 987 (2003). "When a prosecutor is unavailable due to involvement in another trial, a trial court generally has discretion to grant the State a continuance unless there is substantial prejudice to the defendant in the presentation of his defense." State v. Chichester, 141 Wn.

App. 446, 454, 170 P.3d 583 (2007). Calhoun contends that the court should have conducted a more thorough inquiry to determine whether the prosecutor would really be unavailable or why the interviews had not been completed. But Calhoun did not object to either continuance. Nor has he articulated prejudice to his defense as a result of the delay.

Calhoun further argues that the trial court abused its discretion by granting defense counsel's September 30, 2019 request for a continuance over his strenuous objection. He contends the reasons for the delay (being in trial on other cases, a scheduled vacation, and trial preparation) were not sufficiently compelling, given that his case was not particularly complex and did not involve forensic evidence. But trial preparation and scheduling conflicts, including reasonably scheduled vacations, are valid reasons for granting continuances. State v. Flinn, 154 Wn.2d 193, 200, 110 P.3d 748 (2005). Calhoun analogizes his case to Saunders, 153 Wn. App. 209. In Saunders, the trial court abused its discretion by granting three continuances pursuant to CrR 3.3(f)(2) "without adequate basis or reason articulated by the State or defense counsel." Id. at 220. Here, unlike Saunders, the record shows that the parties articulated a valid reason for each continuance. The court did not violate Calhoun's CrR 3.3 speedy trial rights.

Calhoun also argues that the 11-month delay violated his constitutional right to a speedy trial. We review an alleged violation of a defendant's Sixth Amendment right to a speedy trial de novo. Ollivier, 178 Wn.2d at 826. If a defendant's

constitutional speedy trial right is violated, the remedy is dismissal of the charges with prejudice. State v. Iniguez, 167 Wn.2d 273, 282, 217 P.3d 768 (2009).

Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution provide criminal defendants with the right to a speedy trial. "[T]he affirmative burden is on the state, not on the defendant, to see that a trial is held with reasonable dispatch." State v. Ross, 8 Wn. App. 2d 928, 941, 441 P.3d 1254 (2019) (alterations in original) (quoting State v. Sterling, 23 Wn. App. 171, 173, 596 P.2d 1082 (1979)). To determine whether a constitutional speedy trial violation occurred, we employ the balancing test set out in Barker v. Wingo, 407 U.S. 514, 92 S. Ct. 2182, 33 L. Ed. 2d 101 (1972). In order to trigger the Barker analysis, the defendant must show presumptively prejudicial delay. Id. at 530. "[W]hether a delay is presumptively prejudicial is necessarily a fact-specific inquiry dependent on the circumstances of each case." Iniguez, 167 Wn.2d at 291. If a defendant meets this threshold test, the court then considers four nonexclusive factors to determine if the delay constitutes a constitutional violation: (1) the length of the delay, (2) the reason for the delay, (3) whether and to what extent the defendant asserted their speedy trial rights, and (4) whether the delay caused prejudice to the defendant. Barker, 407 U.S. at 530–32.

Here, even assuming that the 342-day delay between arraignment and trial exceeds the bare minimum needed to trigger a Barker analysis, we conclude that no constitutional speedy trial violation occurred. First, the delay was not exceptionally long. See Ollivier, 178 Wn.2d at 828–29 (describing a number of

speedy trial challenges involving delays ranging from 21 months to 6 years as not "exceptionally long."). Second, defense counsel and the State articulated valid reasons for each continuance. Third, Calhoun objected to only one of the five continuances. Fourth, Calhoun has not established prejudice. "Prejudice is judged by looking at the effect on the interests protected by the right to a speedy trial: (1) to prevent harsh pretrial incarceration, (2) to minimize the defendant's anxiety and worry, and (3) to limit impairment to the defense." Iniguez, 167 Wn.2d at 295. Because prejudice is difficult to prove, we presume it intensifies over time. Id. The 11-month delay does not rise to the level of particularized prejudice needed to justify dismissal of the charges, and Calhoun's defense was not impaired by the passage of time. Calhoun's constitutional right to a speedy trial was not violated.

IV. Sufficiency of the Evidence

Calhoun challenges the sufficiency of the evidence to support his conviction for rape of a child in the first degree. The record does not support Calhoun's claim.

Due process requires the State to prove beyond a reasonable doubt every essential element of a crime. State v. Marohl, 170 Wn.2d 691, 698, 246 P.3d 177 (2010). Our review on a challenge to the sufficiency of the evidence in a criminal case is highly deferential to the jury's decision. State v. Davis, 182 Wn.2d 222, 227, 340 P.3d 820 (2014). A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences that may be drawn from it. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Credibility determinations are solely for the trier of fact and cannot be reviewed on appeal. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "Evidence is sufficient

to support a guilty verdict if any rational trier of fact, viewing the evidence in the light most favorable to the State, could find the elements of the charged crime beyond a reasonable doubt." State v. Cardenas-Flores, 189 Wn.2d 243, 265, 401 P.3d 19 (2017).

"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 the perpetrator is at least twenty-four months older than the victim." RCW 9A.44.073(1). The term "sexual intercourse" is defined as having "its ordinary meaning" and includes "any penetration of the vagina or anus however slight." RCW 9A.44.010"(14)(a), (b). Proof that the defendant penetrated the victim's buttocks, but not the anus, is insufficient to sustain a conviction for rape of a child in the first degree. State v. A.M., 163 Wn. App. 414, 421, 260 P.3d 229 (2011).

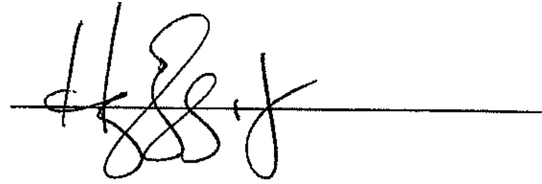
Calhoun, relying on A.M., contends that reversal is required because the State failed to prove that he actually penetrated C.A.'s anus. In A.M., the victim testified that the defendant "stuck his wiener in my poop-butt" and "it felt bad." Id. at 417. However, when the prosecutor asked for details regarding the extent of the contact, the victim said it "just touched the outside part where it's almost inside." Id. at 417–18. Because the victim's testimony established that the defendant's penis touched the buttocks but not the anus, and penetration of the buttocks alone is insufficient to constitute "sexual intercourse," the A.M. court concluded that the State had not proved that penetration occurred beyond a reasonable doubt. Id. at 421.

Here, unlike A.M., C.A. testified that Calhoun's penis touched "the area where you use your butt to go number two" and that he "tried to put his penis inside [her] butt hole." C.A. specified that "the area where poop comes out" was "stinging" during the incident and confirmed that it was not stinging before the incident. Viewed in the light most favorable to the State, this evidence was sufficient to establish the penetration definition of the sexual intercourse element of rape of a child in the first degree.

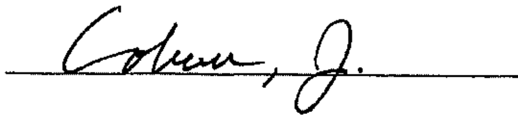
V. Community Custody Supervision Fees

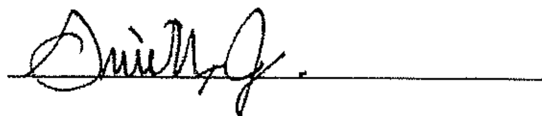
Finally, Calhoun contends that the trial court waived all discretionary LFOs, but that the judgment and sentence erroneously requires him to pay community custody supervision fees to the Department of Corrections. The State concedes that this condition should be stricken because Calhoun was indigent, and the sentencing court clearly intended to impose only mandatory LFOs. See State v. Dillon, 12 Wn. App. 2d 133, 152, 456 P.3d 1199 (2020) (striking supervision fees imposed on an indigent defendant where "[t]he record demonstrate[d] that the trial court intended to impose only mandatory LFOs."); accord State v. Bowman, 198 Wn.2d 609, 629, 498 P.3d 478 (2021). We accept the State's concession and direct the trial court to strike the community custody supervision fees from Calhoun's judgment and sentence.

We affirm Calhoun's convictions, but remand to the trial court to amend his judgment and sentence.



WE CONCUR:





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