No. 101963-7

SUPREME COURT OF THE STATE OF WASHINGTON

In re	)	
	)	**COA No: 38468-3**
STATE OF WASHINGTON,	)	
	)	**Spokane Sup. Ct.**
Respondent,	)	**No. 2019-1-10793-32**
vs.	)	
	)	
SCOTT MANINA,	)	
	)	
Appellant.	)	
	)	

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Scott Manina, by and through his attorney of record, Robert Cossey with Robert Cossey and Associates, asks this court to accept review of the Court of Appeals decision terminating review designated in Part II of this Petition.

II. COURT OF APPEALS DECISION

Mr. Manina requests review of the Court of Appeals decision on April 4, 2023, terminating appellate review and denying relief requested for one count of Rape of a Child in the First Degree and two counts of Child Molestation in the First Degree. As of the filing of this petition, there has not been a Motion for Reconsideration to the Court of Appeals filed, and the time standards for the same have expired.

The Court of Appeals issued their decision (the Decision) on April 4, 2023, which is set forth in the Appendix at 1 through 27.

III. ISSUES PRESENTED FOR REVIEW BY SUPREME COURT

ISSUE No. 1: The presumption of innocence is a principle fundamental to America's history and tradition. "Freakish" criminal laws that eliminate traditional *mens rea* elements and shift the burden to defendants to prove their innocence are contrary to this fundamental principle. Washington is *the only* state where Rape of a Child, is a strict liability crime. The accused is presumed guilty unless they can prove no penetration (no matter how slight) occurred. **Does this presumption of guilt deprive defendants of their liberty without due process of law?**

ISSUE No. 2: This Court has held Rape of a Child statutes have no mens rea and are therefore strict liability crimes. But in interpreting the statute, this Court did not consider the foregoing constitutional issues, which seriously call into question the constitutionality of the statutes. Statutes are interpreted to avoid constitutional deficiencies. **Should this**

Court overrule its holding Rape of a Child is a strict liability crime without any *mens rea* element?

ISSUE No. 3: **Did the Court of Appeals erred in analyzing the claim of insufficient evidence with bias and embellishment of the "facts".**

IV. STATEMENT OF THE CASE

Scott Manina was born October 19, 1960. RP 135; CP 125. He has three older siblings who were all raised primarily by Mr. Manina's mother. CP 125. He maintained a limited relationship with his father throughout his childhood, visiting a few times per year. Id. Mr. Manina graduated high school and worked several different jobs up until the time he enrolled in the Navy at the age of 25. CP 126. Subsequent to his honorable discharge, Mr. Manina began working for the Navy in the civilian post. Id. Mr. Manina moved to Spokane in 1992. CP 127. He was employed in aircraft maintenance from 1992 until

his arrest for the charges. Id. His most recent employment for Empire Airlines spanned over fifteen years. Id.

Mr. Manina married Rebecca Manina in 2002. CP 126. They had three children, Ryan Manina (adopted by Mr. Manina after marriage to Rebecca), Sam Manina, and S.I.M. Id. Their marriage consisted of many ups and downs described by Mr. Manina as loving at times and in turmoil at others. Id. Despite the issues between Mr. Manina and Ms. Manina, Mr. Manina remained involved in his children's lives and was very bonded with all three children. Id.

Ms. Manina filed for divorce in February 2018. RP 154. In March 2018 Mr. Manina moved out of the family home and into his recreational vehicle. RP 160. Despite Mr. Manina owning four rental properties at the time, none of them were available for him to reside in. RP 161. He resided in the recreational vehicle in a park in Colbert, Washington. Id. The parties entered a parenting plan with substantial time for Mr. Manina. Id. He then was able to move into a rental home once it

was available, the home on Hoffman[1], in Spokane, Washington in May 2018. CP 122. The children continued to visit on the same schedule as outlined above. RP 163.

S.I.M was the youngest child of Mr. and Ms. Manina. RP 148. She was always treated as the baby of the family, the princess, and got what she wanted. Id. She was very obedient and a good student. Id. She was engaged in sports, softball and volleyball were the two she enjoyed most. RP 149. She had long, thick hair and required assistance washing her hair so Mr. Manina would wash S.I.M.'s hair and Ms. Manina would wash S.I.M.'s body during their marriage. RP 151. Ms. Manina showed S.I.M. how to wash her hair and body after Mr. Manina moved out of the house. RP 59.

During the time Mr. Manina was residing in the recreational vehicle in Colbert, Washington the children would come to visit for overnight and weekend visits. RP 60-1. The

[1] The Verbatim Report of Proceedings references the rental home incorrectly on "Hofmann" throughout the record. For accuracy, Appellant will reference the rental home with the correct spelling of "Hoffman".

recreational vehicle park had a shower facility as well as the small shower in the recreational vehicle owned by Mr. Manina. RP 62. During visits, the older boys, Ryan and Sammy would shower at the facility located in the recreational vehicle park. Id. S.I.M. was not allowed to shower there because Mr. Manina explained she was too young to go in by herself. Id. There was no place for Mr. Manina to sit and wait for S.I.M. to complete a shower, so he insisted she shower in the recreational vehicle. RP 63.

The hot water supply in the recreational vehicle ran out very quickly so S.I.M. would have to wash her hair first. RP 67. Mr. Manina would then assist S.I.M. in bathing with a washcloth while standing outside of the shower stall. RP 69. All parts of her body would be washed, always with a washcloth, and once completed she would dry herself off and change her clothes. RP 70-2.

S.I.M. also suffered from frequent issues with what she described as rawness in her vagina to which she would apply

Vaseline to ease the symptoms. RP 76. She was not taught by her mother how to apply the Vaseline until after Mr. Manina moved out of the family home. Id. However, S.I.M. would need to use the Vaseline while visiting with Mr. Manina. Id. Mr. Manina would apply the Vaseline by having S.I.M. lay on her back, lift her legs, and spread them to expose the vagina to apply the ointment. RP 76-9. S.I.M. testified the amount of Vaseline and the application to what she considered the inside of her vagina was the same as she would apply. RP 80.

The home on Hoffman where Mr. Manina moved to subsequent to the recreational vehicle had an issue with the faucet in the shower which was difficult for S.I.M. to turn on. RP 85; RP 378. S.I.M. testified Mr. Manina would assist her to turn on the faucet after she had undressed and was ready to enter the shower. RP 87. Mr. Manina turned on the shower and turned around to hug S.I.M. Id. He had his chest to her chest and placed his arms around her back. RP 88. Mr. Manina left the bathroom and S.I.M. continued to take her shower. Id.

S.I.M. stated he would have a conversation with her about her day, or other topics of a similar nature. RP 89. Once he left the bathroom, he did not return. Id.

S.I.M. testified to a time wherein she had a bacterial infection in her vagina. RP 90. She had received medical treatment and diagnosis for a vaginitis from Northwest OB-GYN. RP 411. The first time she was seen was in March 2019. RP 403. She was prescribed a cream to apply to her vagina. RP 413.

S.I.M. was seen for a second appointment on April 2, 2019. RP 416. Mr. Manina was present for the visit along with Ms. Manina and S.I.M. RP 418. Both parents were involved in asking questions as to what as occurring with S.I.M. RP 422. S.I.M. was diagnosed with a bacterial infection called Gardnerella. RP 424. She was prescribed a new cream which was to be applied with an applicator. Id. The purpose was to have the cream put inside the vagina. RP 425. The medical professional explained how to use the cream to S.I.M. Id.

However, when attempting to apply the cream internally as instructed, S.I.M. had difficulty seeing and requested assistance from Mr. Manina, who pulled a mirror down off the wall so she could see. RP 94-5. Mr. Manina waited to make sure S.I.M. was able to successfully apply the cream and watched the application from more than an arm's length away. RP 96. S.I.M. had difficulty applying the medication and was changed to an oral medication. RP 427.

S.I.M. began again having issues with an infection when Ms. Manina called Northwest OB-GYN to schedule an appointment for June 28, 2019. RP 442. S.I.M. again was seen at the clinic on July 2, 2019, based on the appointment Ms. Manina made on June 28th. RP 429. During that appointment, Ms. Manina requested S.I.M. to speak with the doctor privately. RP 444. The result was a Child Protective Services (CPS) referral by the medical provider. RP 447. Additionally, testing was performed, and the results were communicated to Ms. Manina on July 9, 2019. Id. The results were positive for

bacterial vaginitis, and a subsequent appointment was scheduled for August 15, 2019. RP 447-8. S.I.M. was again diagnosed with a bacterial infection, but it was not Gardnerella as previously diagnosed. RP 448.

CPS was initiated by the evaluating doctor on July 2, 2019, for a report of sexual abuse. RP 480. This call was screened out pursuant to CPS standards and guidelines. Id. A second call was received by CPS from another family member of S.I.M. on July 9, 2019, alleging neglect on the part of Ms. Manina and Mr. Manina. RP 479. This matter was not screened out and was assigned to a social worker for investigation. RP 478. Haley Hanson was assigned to the matter on July 10, 2019. Id. A third intake was received on July 10, 2019, by Ms. Manina alleging sexual abuse which was screened out. RP 483. A fourth intake was called by Haley Hanson on July 17, 2019, for allegations of sexual abuse of S.I.M. which was a new allegation from the investigation as to neglect. Id.

The new allegation triggered law enforcement involvement and a physical exam was completed on S.I.M. on July 19, 2019. RP 494. A forensic exam was also scheduled for July 29, 2019, but did not occur. RP 507. One was completed on September 16, 2019. Id. Based on that evaluation law enforcement sent the information to the prosecutor's office for filing of charges against Mr. Manina on September 18, 2019. RP 558. A sexual assault protection order was entered on October 9, 2019, prohibiting any contact between Mr. Manina and S.I.M. CP 12-5.

The matter proceeded to trial in July 2021, beginning July 13, 2021, RP 2, concluding on July 21, 2021. RP 502. The State began opening arguments on July 14, 2021, by telling the jury "…Scott Manina, had a sexual attraction to his own 11- and 12-year-old daughter…" Supp RP 3. During closing arguments, the State argued the touching of S.I.M.'s lower back was an intimate area and requested the jury find Mr. Manina guilty of touching his daughter's back as molestation. RP 689-

90. Mr. Manina did not testify in his defense. RP 658. The jury found Mr. Manina guilty of one count of child rape in the first degree, RP 769-70, two counts of child molestation in the first degree, RP 770, and one count of child molestation in the second degree. Id. The jury answered yes to both special verdict forms as well, the first that defendant used his position of trust to facilitate the crimes, and that the defendant and S.I.M. were members of the same household. Id. All jurors confirmed this was their decision. RP 771-2.

Mr. Manina was sentenced to 87 months of confinement for count IV, 240 months indeterminate for count I, and 149 months indeterminate for both counts II and III. CP 153-4.

Mr. Manina filed an appeal to the Court of Appeals, Division III timely and the matter was finally decided on April 4, 2023. App. at 1. The Court of Appeals reversed Mr. Manina's conviction for Child Molestation in the second degree as outlined in Count IV as there was no touch as required by

RCW 9A.44.010(13) and dismissed this charge on appeal. App. at 21.

The Court of Appeals opined S.I.M.'s testimony she felt her father's finger inside was sufficient to prove the penetration element. App. at 16. Further, the Court of Appeals opined the exception for a medically recognized treatment was instructed to the jury and that since Mr. Manina did not testify at trial he could not support the exception based on the record. App. at16-17.

The Court of Appeals then addressed the child molestation counts in the first degree, counts II and III in regard to the sexual gratification required by the statute for the defendant to be guilty. App. at 17-20. The court opined the jury could infer sexual gratification without any testimony regarding the same. *Id.* The Court of Appeals upheld the convictions for Counts I, II, and III and remanded for the dismissal of Count IV. App. at 27.

V. ARGUMENT ABOUT WHY REVIEW SHOULD BE GRANTED

Unless interpreted to not be a strict liability offense, the offense of felony Rape of a Child of violates due process. *The presumption of innocence is fundamental and strict liability crimes are highly disfavored.*

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453, 15 S. Ct. 394 (1895). Relatedly, it is fundamental that "wrongdoing must be conscious to be criminal." *Morissette v. United States*, 342 U.S. 246, 252, 72 S. Ct. 240, 96 L. Ed. 288 (1952). For these reasons, even where a statute appears to not contain any mental element, this does not mean there is not any. *Elonis v. United States*, 575 U.S. 723, 135 S. Ct. 2001, 2009, 192 L. Ed. 2d 1 (2015). Unless it can be absolutely shown the legislature intended to exclude a traditional mental element, the courts will imply one. See, e.g.,

State v. Anderson, 141 Wn.2d 357, 366-67, 5 P.3d 1247 (2000). This makes sense because otherwise innocent conduct may be criminalized.

Notwithstanding the foregoing principles, this Court has held the crime of rape of a child contains no mens rea element; it requires no proof of intent. *State v. Chhom*, 128 Wn.2d 739, 911 P.2d 1014, 1996 Wash. LEXIS 34 (Wash. 1996), overruled in part, *State v. Johnson*, 173 Wn.2d 895, 270 P.3d 591, 2012 Wash. LEXIS 161 (Wash. 2012). The State need only prove "a person is guilty of rape of a child in the first degree when the person has sexual intercourse (defined as penetration, of the vagina … however slight RCW 9A.44.010(14)) 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. The Court of Appeals decision found the definition of vagina not only the female sexual organ to include the labia minora, as defined by this Court, but also now the labia majora.

For the innocent to avoid conviction, they bear the burden of proving, by a preponderance of the evidence, they did not touch the person anywhere near a female's private area. In other words, instead of a presumption of innocence, there is a presumption of guilt.

If interpreted to have no mental element and to be a strict liability crime, the rape of a child statutes are unconstitutional.

This burden-shifting scheme deprives persons of their liberty without due process of law. A state has authority to allocate the burdens of proof and persuasion for a criminal offense, but this allocation violates due process if "it offends some principle of justice so rooted in the traditions and conscience of our people to be ranked as fundamental." *Patterson v. New York*, 432 U.S. 197, 202, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (internal quotation omitted). "The presumption of innocence unquestionably fits that bill." *Nelson v. Colorado*, 581 U.S. 128, 137 S. Ct. 1249, 1256 n.9, 197 L. Ed. 2d 611 (2017). For this reason, "there are obviously

constitutional limits beyond which the States may not go . . ." *Patterson*, 432 U.S. at 210.

History and tradition provide guidance on when the constitutional line is crossed:

> Where a State's particular way of defining a crime has a long history, or is in widespread use, it is unlikely that a defendant will be able to demonstrate that the State has shifted the burden of proof as to what is an inherent element of the offense, or has defined as a single crime multiple offenses that are inherently separate. Conversely, a freakish definition of the elements of a crime that finds no analogue in history or in the criminal law of other jurisdictions will lighten the defendant's burden.

Schad v. Arizona, 501 U.S. 624, 640, 111 S. Ct. 2491, 115 L. Ed. 2d 555 (1991) (plurality); see Schad, 501 U.S. 650 (Scalia, J. concurring) ("It is precisely the historical practices that define what is "due.")

It appears Washington places more emphasis on ensuring "attempt" requires an intent element rather than on ensuring the base crime of rape of a child is anything other than strict liability. See, *State v. Chhom*, 128 Wn.2d 739, 911 P.2d 1014,

1996 Wash. LEXIS 34 (Wash. 1996), overruled in part, *State v. Johnson*, 173 Wn.2d 895, 270 P.3d 591, 2012 Wash. LEXIS 161 (Wash. 2012).

That nearly every rape offense in this country has a mens rea requirement is unsurprising. The FBI Uniform Crime Reporting (UCR) Program has a more narrowed definition of rape than does Washington state: rape is penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. See, App. at 43. Washington's rape of a child laws are truly "freakish." *Schad*, 501 U.S. 640 (plurality). It is contrary to the practice of every other state. It is contrary to the tradition, as shown by the model FBI UCR definition, of requiring the State prove a mens rea element in rape of a child crimes. These are strong indications Washington's rape of a child in the first-degree statute violates due process.

A rather recent federal district court decision addressing the constitutionality of an Arizona law is instructive. *May v. Ryan*, 245 F. Supp. 3d 1145 (D. Ariz. 2017). There, the court held that Arizona's child molestation law violated a defendant's right to due process. *Id.* at 1162-65. Arizona had eliminated the requirement that the State prove sexual motivation, effectively criminalizing broad swaths of innocent conduct (such as changing a baby's diaper). *Id.* at 1155-56. Defendants could avoid conviction if they affirmatively proved, by a preponderance of the evidence, that their touching lacked sexual motivation. *Id.* at 1156. The federal court ruled this violated due process. The court recognized that due process limits states in placing burdens on defendants. *Id.* at 1157-58. The Arizona law constitutionally shifted the burden of proof to defendants to prove their innocence. *Id.* at 1158-59. The court recognized that proof of sexual intent had traditionally been part of the offense of child molestation. *Id.* at 1159-61. Arizona's law was "freakish." *Id.* at 1161-62.

The court standardized "[s]hifting what used to be an element to a defense is not fatal if what remains of the stripped-down crime still may be criminalized and is reasonably what the state set out to punish," but that was not true for the Arizona offense. *Id.* at 1163. Formulized, if the 'affirmative' defense is to disprove a positive—and that positive is the only wrongful quality about the conduct as a whole—it is a nearly conclusive sign that the state is unconstitutionally shifting the burden of proof for an essential element of a crime. *Id.* at 1164.

Stripped of mens rea, there is no baseline wrongful intent in the person's conduct of touching the private area of a female. To conclude otherwise criminalizes the innocent behavior of a parent in caring for their child or a prepubescent teenager from having sex with a person twenty-four months (or thirty-six months if second degree) their junior. A genuine "sufficiency" review of the statutes on rape of a child are a logical absurdity. With the burden of production (if not persuasion) spotlighting on a defendant, they may only argue the jury's verdict was

against the great weight and preponderance of the evidence not that the evidence was "insufficient" to support it. A defendant must battle a reasonable person's inherent biases regarding the words – child rape and child molestation. Like the child molestation statute at issue in May, Washington's rape of a child statutes are unconstitutional.

Furthering the propulsion of constitutionality issues is a person's constitutional right to remain silent without inference of guilt imposed on the defendant. The Fifth Amendment of the Constitution of the United States provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." Article I, § 9 of the Constitution of the State of Washington provides "[n]o person shall be compelled in any criminal case to give evidence against himself…" Our cases establish the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary

enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357-358, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). The prohibition of vagueness in criminal statutes is a well-recognized necessity, harmonic with ordinary concepts of fair play and the settled rules of law, and a statute that ignores it "violates the first essential of due process." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

With the addition of stacking an unconstitutional statute with a violation of a person's fifth amendment right to remain silent, a person who opts not to testify to prove their innocence is barred from ever having a fair trial.

To avoid the foregoing constitutional deficiencies, the rape of a child statutes must each contain a mental element.

This Court construes criminal statutes to avoid constitutional deficiencies. *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704, 706 (2010). Because interpreting the Rape of a Child statutes as strict liability crimes raise grave constitutional concerns about the validity of the statutes, this Court should

grant review and overrule its decisions holding Rape of a Child is a strict liability crime.

As stated earlier, Washington is the only jurisdiction with strict liability for Rape of a Child. It is a Class A felony with a minimum punishment of 240 months and a maximum punishment of life in prison. RCW 9.94A.507, .535(3)(n). This Court interpreted the Rape of a Child statute to have no mens rea in *Chhome*. This result is wrong.

The Court of Appeals erred in analyzing the claim of insufficient evidence with bias and embellishment of the "facts".

The Court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *United States v. Nevils*, 598 F.3d 1158, 1163-64 (9th Cir. 2010). This is a two-step inquiry. First, a reviewing court must consider the evidence presented at trial in the light most favorable to the prosecution. *Id*. In so doing, the court "may not usurp the role of the finder of fact by

considering how it would have resolved the conflicts, made the inferences, or considered the evidence at trial." Id. Second, after viewing the evidence in the light most favorable to the prosecution, the reviewing court must determine whether this evidence, so viewed, is adequate to allow "any rational trier of fact [to find] the essential elements of the crime beyond a reasonable doubt." Id. (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). At the second step, a court must not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt, but only whether "any" rational trier of fact could have made that finding. Id.

We struggle in the abstract with what assay to employ when adjudging what reasonable inferences we may deduce from established facts. Therefore, we first comb for definitions and synonyms for our key word “inference.” Our state high court has defined an “inference” as a logical deduction or conclusion from an established fact. *State v. Aten*, 130 Wn.2d

640, 658, 927 P.2d 210 (1996) refers to a "reasonable and logical" inference, again suggesting that a permissible inference must be logical. A foreign court wrote that a "reasonable inference" may be defined as a process of reasoning whereby, from facts admitted or established by the evidence or from common knowledge or experience, a trier of fact may reasonably conclude that a further fact is established. West's Encyclopedia of American Law 396 (2d ed. 2005) partly defines "inference":

Inferences are deductions or conclusions that with reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

Based on these definitions, we must summon logic, common sense, and experience in surmising additional or circumstantial facts from already established or direct facts. We hope that our experience coincides with common sense and our common sense abides logic. *State v. Jameison*, 4 Wn. App. 2d

184, 197, 421 P.3d 463, 470-71 (2018) (internal citations omitted).

In the Court of Appeals' analysis, it perverts the facts. Moreover, it adds biases no inference would support. In the perversion of facts, illogical and unreasonable context is added. For example, the appellate decision at p. 5 says, "[SIM]'s pediatrician suspected someone touched [SIM] inappropriately because girls of [SIM]'s age, who had yet to start periods, generally did not contract bacterial vaginitis." Julian's testimony makes no statement or inference to make this conclusion true. See, VR at p. 415, ll. 12 – 17, and p. 436, ll. 10 – 16. For an additional example, the appellate decision at p. 6 says, "The practitioner would not advise a father of an 11- to 12-year-old girl to apply the cream." Any reliance on this statement in and of itself fails contextually when taken with surrounding testimony. See, VR, at p. 426. The inference of the appellate court in its conclusion "[f]athers do not wash a ten-year-old daughter, when the daughter is physically capable of

doing so herself" is a gender bias at best. Suppose the trial testimony spoke of a mother washing her ten-year-old daughter, or either parent washing a ten-year-old son, it may be inferred no criminal action occurred. What one finds normal in their home may not be what others find normal in their home.

While pulling evidence from the testimony to evaluate the sufficiency of evidence to support the findings, the appellate court fails to consider Manina's caretaking argument based on his lack of citing to the record to prove caretaking. The two concepts employed by the appellate court are diametrically opposed.

There is evidence in trial testimony that a reasonable mind would infer mean caretaking. For example, on VR at p. 38, ll. 10 – 12, S.I.M. says, "yes" to being asked if the Vaseline was used in medical way; on p. 39, ll. 2 – 5, S.I.M. responds, "yes" to the question of "[w]as it painful?" and "[d]id Vaseline help?"; on p. 429, Julian testifies nonprescription ointments

could be used for pain and dryness. Therefore, it could be inferred Manina used ointment on S.I.M. in a caretaking role.

The above are only a few examples. The trial testimony verbatim is replete with examples. It goes without saying that no constitution provides for an innocent person to be imprisoned.

This Court should grant review.

Whether the Rape of a Child statutes violate due process and create violations of the right to remain silent present significant constitutional questions worthy of this Court's review. RAP 13.4(b)(3). It is an issue that will continue to recur and is therefore a matter of public interest. RAP 13.4(b)(4). Likewise, whether the Rape of a Child statutes should be read to criminalize innocent behavior is an issue of substantial public interest likely to reoccur in the future. RAP 13.4(b)(4). This Court should grant review.

Similarly, this court should grant review based on the Court of Appeals decision wherein bias is rampant throughout the

ruling: contextually as well as in its willingness or unwillingness to review depending on what analysis is being conducted. Additionally, the Court of Appeals has conflated facts and issues to bolster their decision to affirm the convictions of Manina. RAP 13.4(b)(4) provides the remedy by allowing the Supreme Court to grant review based on the substantial public interest in how the Court of Appeals analyzes cases before the tribunal.

VI. CONCLUSION

Mr. Manina requests the Supreme Court of Washington grant review in this matter based on the foregoing legal analysis.

WORD COUNT CERTIFICATION

I certify this document consists of 4,930 words exclusive of the cover page, tables, this certification, and the signature blocks contained therein.

Respectfully submitted this 4th day of May, 2023

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Appendix

FILED
APRIL 4, 2023
In the Office of the Clerk of Court
WA State Court of Appeals Division III

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

STATE OF WASHINGTON, Respondent, v. SCOTT S. MANINA, Appellant.	)	No. 38468-3-III UNPUBLISHED OPINION

FEARING, J. — Scott Manina appeals convictions for rape, first degree child molestation, and second degree child molestation. Because sufficient evidence sustains his conviction for rape and his two convictions for first degree child molestation, we affirm those three convictions. We reverse his second degree child molestation conviction for lack of evidence. We reject Manina's alternate contentions of prosecutorial misconduct and ineffective assistance of counsel.

FACTS

Because Scott Manina challenges the sufficiency of the evidence to sustain his convictions, we purloin the facts from trial testimony. We relay those facts in the light most favorable to the State.

This prosecution arises from Scott Manina's sexual contact with his daughter. Scott and Rebecca Manina married in 2002 and divorced in 2018. We refer to Scott Manina as Manina and Rebecca Manini as Rebecca. Rebecca entered the marriage while pregnant with one child from a previous relationship. We give this child the pseudonym

"Ralph." The couple begot another son and a daughter, on whom we bestow the pseudonyms "Steven" and "Jane." Jane, the alleged victim of the crimes, was born on March 30, 2007. By the time of the first sexual assaults, at age ten, she had received no sex education at school.

In March 2018, when Scott and Rebecca Manina separated, Manina vacated the family home and moved into a recreational vehicle. Manina parked the recreational vehicle at a recreational vehicle park. Although Manina owned rental homes in Spokane at that time, tenants occupied all of those homes. Two months later, Manina moved into one of his rental homes. All three children occasionally visited him and stayed overnight at both the recreational vehicle and the rental home.

During March and April of 2018, when Scott Manina occupied the recreational vehicle, Jane suffered from rawness in her vagina. On instruction from her mother, Jane applied Vaseline to soothe the irritated area. Rebecca Manina taught Jane to apply the Vaseline by herself. Rebecca notified Manina of Jane's need to apply Vaseline to treat the rawness.

When Jane needed to spread the Vaseline while visiting Scott Manina at the recreational vehicle, he insisted on applying the ointment to her vagina. At Manina's instructions, Jane laid on her back on Manina's bed, she lifted her legs, and he spread the legs. Manina positioned himself in front of Jane such that he stood in between her legs at

the edge of the bed. Manina placed Vaseline on his finger and inserted his finger with the Vaseline into Jane's vagina.

At trial, Jane testified:

> Q (By Mr. Martin) Well, do you differentiate on your own body between the outside of your vagina and the inside of your vagina?
> A What?
> Q Are those two different places for you?
> A Yeah.
> Q Okay. When your father was applying the Vaseline like you just described, would he put it on the inside, put it on the outside or something else?
> A Inside.
> Q And is that how you, yourself, would use it when you were trying to treat yourself by putting it inside?
> A Yeah.

Report of Proceedings (RP) (July 14, 2021) at 80-81. Jane added:

> Q How—and this is going to sound like a weird question. Just do your best. How did you know his finger was on the inside of your vagina when he was putting the Vaseline on you?
> A I could feel it.

RP (July 14, 2021) at 83. According to Jane, her father took longer to apply the Vaseline than she did.

When the three children visited Scott Manina at the recreational vehicle, he directed his sons to shower using the park's shower facilities. Manina required that Jane, who turned 11 years of age at the end of March 2018, shower in the recreational vehicle. Manina insisted on helping Jane bathe, although Jane needed no assistance. While washing Jane with a washcloth, Manina touched her "bottom," "privates," and "breasts."

RP (July 14, 2021) at 70. When he reached Jane's breasts and vagina, he "grab[ed] [them] a little." RP (July 14, 2021) at 72. Jane felt her father's hands through the washcloth when he washed her vagina. Manina spent more time washing the vaginal region than other body parts. Manina's behavior rendered Jane "uncomfortable." RP (July 14, 2021) at 70, 77.

At the rental home, Jane needed Scott Manina to turn on the shower water because of a stuck faucet. Manina turned the water on only after Jane undressed. If Jane remained dressed when Manina responded to her request for help, he left the bathroom and waited for her to undress before assisting her. Manina did not allow Jane to cover herself with a towel or robe while she waited. On one or more occasions after he turned the water on, and before he left the bathroom, Manina gave Jane a hug while she was naked. He wrapped his arms around her neck and moved his hands down to her "bottom." Manina left his hand on the bottom until Jane broke contact.

Jane suffered from bacterial vaginitis, a bacterial infection in the vagina that causes irritation. Women who have yet to menstruate or are not sexually active rarely contract bacterial vaginitis. In September 2018, Jane told her mother of an odor emanating from her vagina. Rebecca took Jane to a pediatrician, whose testing confirmed bacterial vaginitis and a yeast infection. The pediatrician prescribed an antibacterial cream for external application on Jane's labia majora, the outer part of her

vagina, and demonstrated to Jane how to spread the cream. Jane applied the cream on her own while under Rebecca's care.

Jane's pediatrician suspected someone touched Jane inappropriately because girls of Jane's age, who had yet to start periods, generally did not contract bacterial vaginitis. The pediatrician recommended Rebecca Manina call Partners with Families and Children (Partners), who works with Child Protection Services (CPS). When Rebecca told Scott Manina that the pediatrician recommended contacting Partners, he said no.

When Jane notified Scott Manina she needed to apply the external antibacterial cream to her vagina, the father insisted on spreading the cream despite Jane stating she could do so on her own. Although the cream was intended only for external application, Manina applied it to both the inside and outside of his daughter's vagina. Manina employed the same process to smear the prescription cream as he used to apply the Vaseline. Jane did not wear underwear or pants when Manina dispersed the medicated cream. The father applied the cream "internally" with his finger, which rendered Jane uncomfortable. RP (July 14, 2021) at 94.

Jane experienced bacterial vaginitis again in early 2019, so Rebecca Manina scheduled a gynecologist appointment for Jane for March 19, 2019. Nurse practitioner Jennifer Julian examined Jane and diagnosed bacterial vaginitis. Julian also prescribed an antibacterial cream for external use and showed Jane how to apply it.

Jane engaged in a follow-up appointment with Jennifer Julian on April 2, 2019. Both Rebecca and Scott Manina attended and accompanied Jane into the examination room. Julian concluded Jane still struggled with bacterial vaginitis, so the gynecologist nurse practitioner prescribed a different antibacterial cream intended for internal application and showed Jane how to insert the cream with an applicator. Julian did not recommend that either parent apply the antibacterial cream. The practitioner would not advise a father of an 11- to 12-year-old girl to apply the cream.

On one occasion in the spring of 2019, Scott Manina allowed Jane, then age 12, to apply the internal cream on her own, but he held a mirror in front of Jane to assist in the application. Jane saw her father's reflection in the mirror. She felt discomfort when she noticed him looking at her vagina.

Scott Manina treated Jane differently from his sons, Ralph and Steve. Manina, to Jane's discomfort, showed physical affection to her. The father often wrapped his arm around Jane and placed his hand on her leg. Manina punished Jane less severely than her brothers.

According to Ralph, the father treated Jane like the princess of the house. On one occasion, Scott Manina shattered his sons' light sabers because one boy accidently struck Jane with the saber. The father did not want his princess harmed. The father would always sit next to Jane when the children visited. He would lay by Jane on the couch with his arm around her. On one occasion, Ralph observed his father caressing his

sister's thigh.

Jane returned to nurse practitioner Jennifer Julian on April 16, 2019. Only Rebecca attended this appointment with Jane. Jane reported difficulty in applying the internal cream, so the gynecologist prescribed an oral medication as a replacement.

On July 2, 2019, Jane, with her mother, went to Jennifer Julian's office again because of continuing bacterial vaginitis. Midwife Mashid Aghasadeghi examined Jane on this visit. After examining Jane, Aghasadeghi, a mandatory reporter, told Rebecca Manina that she intended to call CPS because of information shared by Jane. Aghasadeghi made the call.

Before the report to CPS, clinical psychologist Michelle Estelle assisted Jane in adjusting to her parents' divorce. Estelle also then counseled Scott Manina. After hearing about the allegations of abuse, Estelle ceased seeing Manina, but continued to counsel Jane.

In July 2019, CPS referred Jane to pediatric nurse practitioner Teresa Forshag to review "possible grooming behavior and possible sex abuse by the father." RP (July 19, 2021) at 284. At trial, Teresa Forshag lectured on the anatomy of a vagina. Forshag described the labia majora as the "fleshy" lips "on the outside" of the vagina and the labia minora as the "thinner" lips on the "inside" of the vagina. RP (July 19, 2021) at 276-77. Forshag indicated that women who have started their period and who have become sexually active are more susceptible to contracting bacteria vaginitis than women who

have yet to menstruate or become active.

PROCEDURE

The State of Washington charged Scott Manina with one count of first degree rape of a child, two counts of first degree child molestation, and one count of second degree child molestation. The State alleged rape occurred between March 1, 2018 and May 31, 2018, when Manina, in the recreational vehicle, inserted his finger into Jane's vagina. The first count of child molestation allegedly occurred between March 1, 2018 and May 31, 2018, and the second charge of child molestation transpired between June 1, 2018 and March 29, 2019. The State alleged second degree child molestation occurred between March 30, 2019 and July 18, 2019.

During the State's opening statement, the State's attorney intoned:

> [B]y the time that you've heard all the evidence in this case, you'll see that that evidence shows that the defendant, Scott Manina, had a sexual attraction to his own 11 and 12 year old daughter that he took every chance he could to express his affection toward her, and once he and his wife Rebecca Manina split, that he took every opportunity he could get to put his hands on his own daughter, on her private areas, on areas that she should have been able to keep away from him, from his sight and from his touch.

Supplemental Report of Proceedings (Supp. RP) at 3. The prosecuting attorney also commented about Manina purportedly lurking behind the shower curtain while Jane showered.

During trial, the trial court entertained testimony from Theresa Forshag, outside the presence of the jury, to determine admissibility of some of the evidence. The State

wished to solicit testimony from Forshag as to the history of abuse shared by Jane. Scott Manina's counsel conducted a voir dire examination of Forshag before the court ruled on the testimony's admissibility. The following exchange occurred:

> Q How were the statements that [Jane] made to you, the ones you just related to us, relevant to you in terms of providing care for her?
> A So those kinds of behaviors by a parent are very concerning for grooming kinds of behaviors. So that makes me worry about safety for the child.

RP (July 19, 2021) at 297.

During trial, the following exchange occurred between psychologist Michelle Estelle and the prosecution:

> Q Have you ever done any kind of research into grooming behavior that a person who might commit sexual assault on his daughter might use–
> A Mm-hmm.
> Q —to make the sexual assaults easier to accomplish?
> A Yes, I'm aware.
> Q And getting a child used to physical touch so it's not as shocking to them is a type of grooming behavior; is that true?
> A That is true.
> Q And children who are taught to follow orders I guess without much question, also, be a type of grooming behavior, yes?
> A It could be.
> Q Would you agree in terms of grooming that a child who has been groomed may actually appear to enjoy spending time with their abuser?
> A I'm not an expert in that area. So I mean, I would probably not be the best person to ask that specific question.

RP (July 20, 2021) at 636-37.

The trial court, in an incomplete sentence, instructed the jury on the medical purpose exception to sexual intercourse. Jury instruction 10 read:

> "Sexual intercourse" means any penetration of the vagina, however slight, by an object, including a body part, when committed on one person by another, whether such persons are of the same or opposite sex. Except when such penetration is accomplished for medically recognized treatment or diagnostic purposes.

Clerk's Papers (CP) at 105. The trial court also instructed the jury that statements by lawyers are not evidence.

In his closing argument, the prosecutor stated:

> You heard from [Jane's] counselor a little bit about what she was talking about with grooming, and that is one of the things she testified can be a sign of trying to make a child used to being touched in a way maybe she shouldn't be touched.

RP (July 21, 2021) at 698.

The jury convicted Scott Manina on all four charges.

LAW AND ANALYSIS

On appeal, Scott Manina asserts that insufficient evidence supported each of his convictions such that we should reverse and dismiss all charges. In the alternative, he contends that the prosecutor committed misconduct when introducing evidence and arguing about grooming. We address these assignments of error in such order.

Sufficiency of Evidence

We delineate familiar principles for reviewing the sufficiency of evidence for a criminal conviction. We view the evidence in the light most favorable to the State and ask whether any rational trier of fact could have found the essential elements of the

charged crime beyond a reasonable doubt. *State v. Embry*, 171 Wn. App. 714, 742, 287 P.3d 648 (2012). Sufficiency challenges admit the truth of the State's evidence and all reasonable inferences drawn from it. *State v. Embry*, 171 Wn. App. 714, 742 (2012). This court does not review the trier of fact's determinations on credibility and defers to the trier of fact with respect to conflicting testimony and the persuasiveness of evidence. *State v. Embry*, 171 Wn. App. 714, 742 (2012).

Rape of a Child
Vaginal Penetration

We address the sufficiency of evidence of each conviction separately beginning with rape of a child in the recreational vehicle. Scott Manina asserts two contentions when challenging his conviction for rape. He contends the State failed to provide sufficient evidence establishing the element of penetration of Jane. He also argues that he fulfilled the medical exception to the crime.

According to Scott Manina, the State did not prove the penetration element of first degree rape of a child because the trial court never defined the word "vagina" for the jury. According to Manina, the definition of "vagina" found in *State v. Delgado*, 109 Wn. App. 61, 66, 33 P.3d 753 (2001), *rev'd in part*, 148 Wn.2d 723, 63 P.3d 792 (2003) includes the labia minora, but does not include the labia majora. Manina then emphasizes the testimony of Theresa Forshag distinguishing between the labia majora and minora and highlights that Forshag never averred that Jane told her that Manina invaded inside

the labia minora. Manina recognizes that Jane testified that he inserted his finger "inside" her, but maintains Jane lacked schooling as to the various parts of the vagina or sex education such that we cannot be certain that she testified to penetration of the labia minora.

We fault the reasoning of Scott Manina. The inclusion of the labia minora in the definition of "vagina" in one Washington decision does not exclude the addition of the labia majora within the definition. The jury did not need to rely solely on Theresa Forshag's testimony as to the report by Jane. The jury could also rely on Jane's testimony to convict Manina. When arguing that Jane lacked an education sufficient to describe penetration inside the vagina, Manina fails to view the evidence in a light favorable to the State.

We quote relevant statutes. Under RCW 9A.44.073(1):

> 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.

(Emphasis added.) RCW 9A.44.010(14) declares, in relevant part:

> "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and
> (b) Also means any *penetration of the vagina* or anus *however slight*, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes.

(Emphasis added.)

We surmise that an exploration of the meaning of the word "vagina" or a survey of the geography of the female sex organ leads to an unnecessary detour. Regardless of whether the word encompasses the labia majora, sufficient evidence supports the conviction of rape. We explore the meaning of "vagina" anyway to thoroughly address Scott Manina's contentions.

Scott Manina insists that the evidence at most established penetration of Jane's labia majora. The labia majora consists of two rounded folds of adipose tissue extending downward and backward from the mons pubis. *Kackley v. State*, 63 Md. App. 532, 493 A.2d 364, 366 (1985). Within the labia majora are two flat, reddish folds of tissue that encase the clitoris clinically known as the labia minora. *Kackley v. State*, 493 A.2d 364, 366 (1985). The labia minora constitutes the two thin inner folds of skin within the vestibule of the vagina enclosed within the cleft of the labia majora. *State v. Montgomery*, 95 Wn. App. 192, 200-01, 974 P.2d 904(1999).

Rape, under the Washington code, encompasses the "vagina" or anus. The Washington criminal code not define "vagina." Two Washington decisions hold that, for purposes of RCW 9A.44, "vagina" means "all of the components of the female sexual organ" and "the labia minora are part of the definition of vagina." *State v. Delgado*, 109 Wn. App. 61, 66 (2003); *State v. Montgomery*, 95 Wn. App. 192, 200 (1999). Scott Manina seizes on the mention of the "labia minora" in the definition to contend that the statutory word "vagina" excludes the labia majora. We disagree. Manina reads only half

of the decisional definition of "vagina." The definition also includes "all of the components of the female sexual organ." According to other decisions, "vagina" means all of the components of the female sexual organ and not just the passage leading from the opening of the vulva to the cervix of the uterus. *State v. Weaville*, 162 Wn. App. 801, 813, 256 P.3d 426 (2011); *State v. Montgomery*, 95 Wn. App. 192, 200 (1999). In *State v. Montgomery* and *State v. Delgado*, this court did not answer whether the labia majora also constituted part of the vagina.

Other Washington cases indirectly explore the meaning of "vagina" for purposes of Washington's rape crime. The crime of rape seeks to distinguish between penetration and mere contact with the sexual organ, which does not suffice. *State v. Snyder*, 199 Wash. 298, 301, 91 P.2d 570 (1939). Penetration need not be perfect. *State v. Snyder*, 199 Wash. 298, 301 (1939). The slightest penetration of the body of the female suffices. *State v. Snyder*, 199 Wash. 298, 301 (1939). The accused need not enter the vagina or rupture the hymen; the entering of the vulva or labia is sufficient. *State v. Snyder*, 199 Wash. 298, 301 (1939). This latter principle does not distinguish between the labia minora and majora.

In *State v. Snyder*, 199 Wash. 298 (1939), the Supreme Court affirmed a conviction based on the child's testimony that only the lips of her sexual organ had been penetrated. We note, however, that, in 1939, the Washington statute did not employ the

word "vagina," and only read that "sexual penetration, however slight" constituted "sexual intercourse." REM. REV. STAT. § 2437.

One foreign decision confirms that the entry of the labia majora qualifies for rape, although the relevant state statute, like the former Washington statute, defined "rape" as "penetration, however slight" without mentioning the vagina. *Kackley v. State*, 493 A.2d 364, 366 (1985). Invasion of the labia majora, however slight, is sufficient to establish penetration. *Kackley v. State*, 493 A.2d 364, 366 (1985).

We add other principles to our review of the sufficient evidence of rape by Scott Manina of Jane. The victim's testimony may supply the proof of penetration. *Kackley v. State*, 493 A.2d 364, 367 (1985). The victim need not supply sordid detail to effectively establish that penetration occurred during the course of a sexual assault. *Kackley v. State*, 493 A.2d 364, 367 (1985). The courts are normally satisfied with descriptions which in light of all surrounding facts, provide a reasonable basis from which to infer that penetration has occurred. *Kackley v. State*, 493 A.2d 364, 367 (1985).

Whether sexual penetration occurred is a question of fact to be determined by the jury. *People v. Janusz*, 2020 IL App (2d) 190017, 162 N.E.3d 1027, 1038, 443 Ill. Dec. 876. The Illinois statute prohibits penetration of the "sex organ," but a state court ruled that a victim's testimony that the defendant "touched" and "poked" her vagina was evidence from which a reasonable jury could infer sexual penetration by the defendant's finger. *People v. Foster*, 2020 IL App (2d) 170683, ¶¶ 32-36, 156 N.E.3d 1118 , 441 Ill.

Dec. 369. In *People v. Janusz*, 162 N.E.3d 1027, the court held the testimony sufficient when the child testified that the defendant touched her "inside" and "outside" with his hand. In *People v. Gonzalez*, 2019 IL App. (1st), 142 N.E.3d 253, 436 Ill. Dec. 369, the victim testified that the defendant "pushed" in her vagina.

Scott Manina directed Jane to lay on the bed, to lift her legs into the air, and to spread the legs. Jane expressly stated that she knew the difference between the outside and the inside of her vagina. She added that she felt her father's finger inside. Even if Jane lacked full understanding of the female genitalia, this testimony sufficed.

Rape of a Child
Medical Exception

Scott Manina next argues that, even if the State proved penetration, the statutory exception for medical treatment shielded him from criminal responsibility for the charge of first degree rape of a child. The rape statute excuses Manina's fingering the vagina if done "for medically recognized treatment or diagnostic purposes." RCW 9A.44.010(14)(b).

Scott Manina asserts that his former wife Rebecca never informed him about the need for Jane to apply Vaseline or medicated cream, that he did not know Jane could spread the creams without assistance, that he saw his child in pain, and that he was a family man who attended church. He characterizes his touching of Jane's genitalia as caretaking. He does not cite the record for these factual assertions. He provides no

analysis beyond this recap of purported facts. We deem being a family man and church attendance unimportant to a charge of rape, but the trial testimony did not support such practices or that he sought to attend to his daughter's pain. Manina did not testify.

The trial court instructed the jury on the medical exception. Scott Manina may argue that the State, under the undisputed testimony, failed to disprove the exception, but we disagree. Jane could apply and insert the Vaseline and cream without assistance. Manina volunteered to administer the cream. From this and other testimony, a reasonable jury could conclude that Manina did not assist for medicinal purposes.

First Degree Child Molestation

Scott Manina argues that the evidence failed to establishment the elements of sexual contact and sexual gratification for purposes of both the first degree and second degree child molestation convictions. RCW 9A.44.083(1) reads:

> A person is guilty of child molestation in the *first degree* when the person has, or knowingly causes another person under the age of eighteen to have, *sexual contact* with another who is *less than twelve years old* and the perpetrator is at least thirty-six months older than the victim.

(Emphasis added.) RCW 9A.44.086(1) declares:

> A person is guilty of child molestation in the *second degree* when the person has, or knowingly causes another person under the age of eighteen to have, *sexual contact* with another who is *at least twelve years* old but less than fourteen years old and the perpetrator is at least thirty-six months older than the victim.

(Emphasis added.) RCW 9A.44.010(13) provides:

> "Sexual contact" means any *touching* of the sexual or other *intimate parts* of a person done for the purpose of *gratifying sexual desire* of either party or a third party.

(Emphasis added.)

Although courts sometimes conflate the two elements of sexual contact for purposes of child molestation, the discrete elements are: (1) touching of a sexual or other intimate body part, and (2) touching for the purpose of sexual gratification. *In re Welfare of Adams*, 24 Wn. App. 517, 519, 601 P.2d 995 (1979). As to the first element, if a contact is directly to the genital organs or breasts, the court on appeal may resolve the question of a sexual part of the body as a matter of law. *In re Welfare of Adams*, 24 Wn. App. 517, 519 (1979). Nevertheless, the State, to convict, need not establish the accused's touching of an erogenous part such as the vagina, penis, or breast. RCW 9A.44.010(13) mentions both sexual parts and intimate parts. The term "intimate parts" is broader in connotation than the term "sexual parts." *In re Welfare of Adams*, 24 Wn. App. 517, 519 (1979). Contact is "intimate" within the meaning of the statute if a person of common intelligence could fairly be expected to know that, under the circumstances, the parts touched were intimate and therefore the touching was improper. *State v. Jackson*, 145 Wn. App. 814, 819, 187 P.3d 321 (2008). A jury may determine that parts of the body in close proximity to the primary erogenous areas are intimate parts. *State v. Harstad*, 153 Wn. App. 10, 21, 218 P.3d 624 (2009).

Whether an area other than genitalia and breasts are intimate is a question to be resolved by the trier of the facts. *State v. Jackson*, 145 Wn. App. 814, 819 (2008); *In re Welfare of Adams*, 24 Wn. App. 517, 520-21 (1979). In determining whether sexual contact occurred, this court considers the totality of the facts and circumstances presented. *State v. Harstad*, 153 Wn. App. 10, 21, (2009). In *In re Welfare of Adams*, this court ruled that, under the totality of the circumstances, hips could be considered intimate parts for purposes of the child molestation statute.

The State identified the first count of first degree child molestation, count II in the information, as the washing of the vagina in the recreational vehicle shower between March 1, 2018 and May 31, 2018. As to this charge, Scott Manina focuses his attack on the lack of sexual gratification, rather than touching of a sexual or intimate part. Manina characterizes his conduct of washing Jane's body as reasonable caretaking that lacked any motivation for sexual gratification.

The evidence is not as simple as suggested by Scott Manina. Manina allowed his sons, but not Jane, to shower in the recreational vehicle park facilities. **Fathers do not wash a ten-year-old daughter**, when the daughter is physically capable of doing so herself. Manina directed Jane to spread her legs while she washed her legs. Manina washed Jane's buttocks, vagina, and breasts. The father grabbed Jane's vagina and breasts, in addition to washing her intimate parts. Manina lingered in the shower and

took more time than was necessary to wash Jane's body. The jury could rationally infer Manina performed these actions for his own sexual gratification.

Count III in the information alleged first degree child molestation resulting from the conduct of Scott Manina in the rental home between June 1, 2018 and March 29, 2019. According to Jane, Manina placed his hands on her bottom. Manina emphasizes the lack of the caress of an intimate area and his speaking to Jane about her day in school while assisting her in the shower. He impliedly argues that he did not touch an intimate or sexual part.

Scott Manina ignores powerful evidence of touching of an intimate part and sexual gratification. Assuming the bottom or buttocks does not constitute a sexual part, the buttocks qualifies as an intimate part as established by thighs being intimate parts. The jury could also find sexual gratification. After Manina started the shower water, he did not need to linger in the bathroom. Instead, he insisted that Jane disrobe before he began the water. Manina embraced Jane as she was naked. He cupped her bottom. Jane needed to retreat to be released from his hold.

Second Degree Child Molestation

The single difference between first degree child molestation and second degree child molestation concerns the age of the victim. The victim must be below the age of twelve years for first degree molestation. Conversely, the victim must be at least twelve years of age for second degree molestation.

The State based count IV, second degree child molestation, on conduct occurring in Scott Manina's rental home between March 30, 2019 and July 18, 2019. On April 2, 2019, Manina allowed Jane to spread the antibacterial cream on her own. Nevertheless, he held a mirror to purportedly assist her in the application.

Scott Manina argues that insufficient evidence supports his conviction for second degree child molestation because he did not engage in any touching during the mirror incident or at any time after Jane reached the age of twelve. We agree.

The State suggests that on the occasion of the use of the mirror, Scott Manina applied some of the cream. The record does not support this factual assertion. To repeat, RCW 9A.44.010(13) demands touching of intimate parts for the sexual gratification.

In *State v. Brooks*, 45 Wn. App. 824, 727 P.2d 988 (1986), Chuck Brooks argued that, because the definition of "sexual contact" for purposes of RCW 9A.44 identifies that a touching must occur, and because no direct evidence established that such touching took place, his conviction for indecent liberties could not be sustained. This court recognized that the statute does not require direct contact. Semen was found on the child's body. In Scott Manina's prosecution, law enforcement and health care providers found none of Manina's bodily fluids on Jane.

Prosecutorial Misconduct

Scott Manina complains that the trial deputy prosecutor engaged in prosecutorial misconduct. Manina assigns error to the State's eliciting inadmissible grooming

testimony and giving improper opening and closing arguments that inferred Manina engaged in grooming behaviors. He contends that, because some of the examples of grooming described by Jane, Ralph, and Theresa Forshag resembled his conduct, the jury likely drew an unwarranted inference of guilt.

The defendant bears the burden of proving prejudicial prosecutorial misconduct. *State v. Furman*, 122 Wn.2d 440, 455, 858 P.2d 1092 (1993). If the defendant establishes improper conduct, the prosecutorial misconduct does not merit reversal unless this court discerns a substantial likelihood the misconduct affected the jury's verdict. *State v. Stenson*, 132 Wn.2d 668, 718-19, 940 P.2d 1239 (1997); *State v. Molina*, 16 Wn. App. 2d 908, 918, 485 P.3d 963 (2021), *review denied*, 198 Wn.2d 1008, 493 P.3d 731 (2021).

Scott Manina's trial counsel did not object to the introduction of the evidence being challenged on appeal as prosecutorial misconduct. A defendant's failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error, unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *State v. Stenson*, 132 Wn.2d 668, 719 (1997); *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995).

Scott Manina contends that grooming testimony constituted inadmissible profile testimony. "As a general rule, profile testimony that does nothing more than identify a person as a member of a group more likely to commit the charged crime is inadmissible

owing to its relative lack of probative value compared to the danger of its unfair prejudice." *State v. Braham*, 67 Wn. App. 930, 936, 841 P.2d 785 (1992). Nevertheless, although grooming testimony is discouraged, it is not absolutely barred. *In re Personal Restraint of Phelps*, 190 Wn.2d 155, 170, 410 P.3d 1142 (2018). A court must analyze, on a case-by-case basis, the admissibility of grooming evidence. *In re Personal Restraint of Phelps*, 190 Wn.2d 155, 167 (2018).

Although Scott Manina contends the State elicited improper grooming testimony from Jane, he supplies no citation to the record identifying such testimony. Nor does he analyze any purported grooming testimony from Jane.

Scott Manina complains that Ralph's testimony accused him of grooming. According to Ralph, the father treated Jane like the princess of the house. On one occasion, Manina destroyed his sons' light sabers because one boy accidently struck Jane with the saber. The father always sat next to Jane when the children visited. He would lay by Jane on the couch with his arm around her. On one occasion, Ralph observed his father caressing his sister's thigh.

We do not discern Ralph's testimony as grooming in nature. The evidence posed relevance to the father's intent to molest Jane and sought to rebut Scott Manina's claim that he engaged only in reasonable caretaking. ER 404(b). Ralph did not use the word groom. He did not suggest his father catered to Jane leading up to his molestations.

Scott Manina characterizes testimony given by Rebecca Manina, when Rebecca explained that Manina punished Jane less harshly than her brothers, as grooming testimony. For the same reason that we disagree with Ralph's testimony being grooming in nature, we also conclude Rebecca's testimony to lack this character.

Scott Manina next highlights two excerpts from Theresa Forshag's testimony. The first excerpt reads:

> I was referred to the child due to concerns for possible grooming behavior and possible sex abuse by the father. I note several sentences into this that I have a CPS intake and the number. It's not clear to me whether I–how far in advance I had that, but I did have it at the time that I wrote the report.

RP (July 19, 2021) at 284. In this passage, Forshag did not opine that Manina engaged in grooming. Instead, Forshag identified her purpose for treating Jane. She never later opined that grooming occurred.

Scott Manina also complains of testimony from Teresa Forshag that the history given to her by Jane helped her to consider grooming behavior. Nevertheless, this testimony occurred during a voir dire examination outside the presence of the jury.

Scott Manina objects to the following exchange between the prosecution and counselor Michelle Estelle:

> Q Have you ever done any kind of research into grooming behavior that a person who might commit sexual assault on his daughter might use—
> A Mm-hmm.
> Q —to make the sexual assaults easier to accomplish?
> A Yes, I'm aware.

> Q And getting a child used to physical touch so it's not as shocking to them is a type of grooming behavior; is that true?
> A That is true.
> Q And children who are taught to follow orders I guess without much question, also, be a type of grooming behavior, yes?
> A It could be.
> Q Would you agree in terms of grooming that a child who has been groomed may actually appear to enjoy spending time with their abuser?
> A I'm not an expert in that area. So I mean, I would probably not be the best person to ask that specific question.

RP (July 20, 2021) at 636-37. We decline to hold this passage to be prosecutorial misconduct. To repeat, some grooming testimony is permissible such that the State's questioning about grooming likely does not rise to the level of flagrant misconduct, let alone improper conduct. Although Estelle mentioned that some adults may engage in innocent touching in order to prepare a child for sexual contact, she did not confirm the opinion that the State desired her to confirm. Estelle did not opine that Manina engaged in such conduct.

Scott Manina next complains about references to grooming behavior in the State's opening and closing statements. Statements made in opening and closing arguments are not evidence, and the jury was instructed on this. *In re Personal Restraint of Phelps*, 190 Wn.2d 155, 172 (2018).

Under the guise of an assignment of prosecutorial misconduct, Scott Manina contends the State admitted evidence of "lustful disposition." He cites the Washington Supreme Court's recent decision in *State v. Crossguns*, 199 Wn.2d 282, 294, 505 P.3d

529 (2022) for the proposition that the State may no longer accuse the defendant of a lustful disposition. In *Crossguns*, the Supreme Court instructed the State to discontinue the use of the label, but the court did not preclude admission of this type of evidence under ER 404(b).

We reject Scott Manina's attempt to gain a new trial based on *State v. Crossguns* for several reasons. Manina did not object at trial to admission of the evidence that he now suggests implied a lustful disposition. Also, the State never employed the term lust, disposition, or lustful disposition when presenting and reviewing the case for the jury. Testimony of Manina's special treatment and other touching of Jane was admissible to show motive and intent to rebut Manina assertion that his touching was proper caretaking by a father.

We agree with Scott Manina that, contrary to the State's opening statement, the State never provided testimony of Manina lurking behind the shower curtain. Nevertheless, during an opening statement, a prosecutor may state what the State's evidence is expected to show. *State v. Magers*, 164 Wn.2d 174, 191, 189 P.3d 126 (2008) (plurality opinion). Opening statements are reviewed permissively because, perhaps obviously, the evidence has yet to be presented. *State v. Campbell*, 103 Wn.2d 1, 15-16, 691 P.3d 929 (1984). We have no reason to disbelieve that the State's attorney expected such testimony at trial.

Scott Manina also contends that his trial counsel performed ineffectively when failing to object to grooming testimony or to the argument by the State's attorney regarding grooming and a lustful disposition. Based on our analysis that the State's attorney did not commit misconduct, we conclude defense trial counsel did not perform inadequately.

Scott Manina argues that he suffered cumulative error. Since we hold that no error occurred, we do not discuss the cumulative error doctrine.

CONCLUSION

We reverse Scott Manina's conviction for second degree child molestation and remand for dismissal of the one charge. We affirm Manina's conviction for child rape and his two convictions for first degree child molestation.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.
Fearing, C.J.

WE CONCUR:

Siddoway, J.
Siddoway, J.

Lawrence-Berrey, J.
Lawrence-Berrey, J.

CONSTITUTION ANNOTATED
Analysis and Interpretation of the U.S. Constitution

Constitution of the United States

Fifth Amendment

Fifth Amendment Explained

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the universe for our liberties, do ordain this constitution.

ARTICLE I
DECLARATION OF RIGHTS

SECTION 1 POLITICAL POWER. All political power is inherent in the people, and governments derive their just powers from the consent of the governed, and are established to protect and maintain individual rights.

SECTION 2 SUPREME LAW OF THE LAND. The Constitution of the United States is the supreme law of the land.

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 4 RIGHT OF PETITION AND ASSEMBLAGE. The right of petition and of the people peaceably to assemble for the common good shall never be abridged.

SECTION 5 FREEDOM OF SPEECH. Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right.

SECTION 6 OATHS - MODE OF ADMINISTERING. The mode of administering an oath, or affirmation, shall be such as may be most consistent with and binding upon the conscience of the person to whom such oath, or affirmation, may be administered.

SECTION 7 INVASION OF PRIVATE AFFAIRS OR HOME PROHIBITED. No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

SECTION 8 IRREVOCABLE PRIVILEGE, FRANCHISE OR IMMUNITY PROHIBITED. No law granting irrevocably any privilege, franchise or immunity, shall be passed by the legislature.

SECTION 9 RIGHTS OF ACCUSED PERSONS. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

SECTION 10 ADMINISTRATION OF JUSTICE. Justice in all cases shall be administered openly, and without unnecessary delay.

SECTION 11 RELIGIOUS FREEDOM. Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment: PROVIDED, HOWEVER, That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional, and mental institutions, or by a county's or public hospital district's hospital, health care facility, or hospice, as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony. [**AMENDMENT 88**, 1993 House Joint Resolution No. 4200, p 3062. Approved November 2, 1993.]

Amendment 34 (1957) — Art. 1 Section 11 RELIGIOUS FREEDOM — *Absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual, and no one shall be molested or disturbed in person or property on account of religion; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace and safety of the state. No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment:* Provided, however, *That this article shall not be so construed as to forbid the employment by the state of a chaplain for such of the state custodial, correctional and mental institutions as in the discretion of the legislature may seem justified. No religious qualification shall be required for any public office or employment, nor shall any person be incompetent as a witness or juror, in consequence of his opinion on matters of religion, nor be questioned in any court of justice touching his religious belief to affect the weight of his testimony.* [AMENDMENT 34, 1957 Senate Joint Resolution No. 14, p 1299. Approved November 4, 1958.]

RCW 9.94A.507 Sentencing of sex offenders. (1) An offender who is not a persistent offender shall be sentenced under this section if the offender:

(a) Is convicted of:

(i) Rape in the first degree, rape in the second degree, rape of a child in the first degree, child molestation in the first degree, rape of a child in the second degree, or indecent liberties by forcible compulsion;

(ii) Any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the first degree, assault of a child in the second degree, or burglary in the first degree; or

(iii) An attempt to commit any crime listed in this subsection (1)(a); or

(b) Has a prior conviction for an offense listed in *RCW 9.94A.030(31)(b), and is convicted of any sex offense other than failure to register.

(2) An offender convicted of rape of a child in the first or second degree or child molestation in the first degree who was seventeen years of age or younger at the time of the offense shall not be sentenced under this section.

(3)(a) Upon a finding that the offender is subject to sentencing under this section, the court shall impose a sentence to a maximum term and a minimum term.

(b) The maximum term shall consist of the statutory maximum sentence for the offense.

(c)(i) Except as provided in (c)(ii) of this subsection, the minimum term shall be either within the standard sentence range for the offense, or outside the standard sentence range pursuant to RCW 9.94A.535, if the offender is otherwise eligible for such a sentence.

(ii) If the offense that caused the offender to be sentenced under this section was rape of a child in the first degree, rape of a child in the second degree, or child molestation in the first degree, and there has been a finding that the offense was predatory under RCW 9.94A.836, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section was rape in the first degree, rape in the second degree, indecent liberties by forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding that the victim was under the age of fifteen at the time of the offense under RCW 9.94A.837, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater. If the offense that caused the offender to be sentenced under this section is rape in the first degree, rape in the second degree with forcible compulsion, indecent liberties with forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding under RCW 9.94A.838 that the victim was, at the time of the offense, developmentally disabled, mentally disordered, or a frail elder or vulnerable adult, the minimum sentence shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever is greater.

(d) The minimum terms in (c)(ii) of this subsection do not apply to a juvenile tried as an adult pursuant to RCW 13.04.030(1)(e) (i) or

(v). The minimum term for such a juvenile shall be imposed under (c)(i) of this subsection.

(4) A person sentenced under subsection (3) of this section shall serve the sentence in a facility or institution operated, or utilized under contract, by the state.

(5) When a court sentences a person to the custody of the department under this section, the court shall, in addition to the other terms of the sentence, sentence the offender to community custody under the supervision of the department and the authority of the board for any period of time the person is released from total confinement before the expiration of the maximum sentence.

(6)(a) As part of any sentence under this section, the court shall also require the offender to comply with any conditions imposed by the board under RCW 9.95.420 through 9.95.435.

(b) An offender released by the board under RCW 9.95.420 is subject to the supervision of the department until the expiration of the maximum term of the sentence. The department shall monitor the offender's compliance with conditions of community custody imposed by the court, department, or board, and promptly report any violations to the board. Any violation of conditions of community custody established or modified by the board are subject to the provisions of RCW 9.95.425 through 9.95.440. [2008 c 231 § 33. Prior: 2006 c 124 § 3; (2006 c 124 § 2 expired July 1, 2006); 2006 c 122 § 5; (2006 c 122 § 4 expired July 1, 2006); 2005 c 436 § 2; 2004 c 176 § 3; prior: 2001 2nd sp.s. c 12 § 303. Formerly RCW 9.94A.712.]

Reviser's note: *(1) The reference to RCW 9.94A.030(31)(b) was apparently in error.

(2) This section was recodified pursuant to the direction found in section 56(4), chapter 231, Laws of 2008.

(3) 2005 c 436 § 6 (an expiration date section) was repealed by 2006 c 131 § 2.

Intent—Application—Application of repealers—Effective date—2008 c 231: See notes following RCW 9.94A.701.

Severability—2008 c 231: See note following RCW 9.94A.500.

Expiration date—2006 c 124 § 2: "Section 2 of this act expires July 1, 2006." [2006 c 124 § 4.]

Effective date—2006 c 124: See note following RCW 9.94A.030.

Effective date—2006 c 122 §§ 5 and 7: "Sections 5 and 7 of this act take effect July 1, 2006." [2006 c 122 § 9.]

Expiration date—2006 c 122 §§ 4 and 6: "Sections 4 and 6 of this act expire July 1, 2006." [2006 c 122 § 8.]

Effective date—2006 c 122 §§ 1-4 and 6: See note following RCW 9.94A.836.

Severability—Effective date—2004 c 176: See notes following RCW 9.94A.515.

Intent—Severability—Effective dates—2001 2nd sp.s. c 12: See notes following RCW 71.09.250.

Application—2001 2nd sp.s. c 12 §§ 301-363: See note following RCW 9.94A.030.

RCW 9.94A.535 Departures from the guidelines. The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

(1) Mitigating Circumstances - Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(i) The defendant was making a good faith effort to obtain or provide medical assistance for someone who is experiencing a drug-related overdose.

(j) The current offense involved domestic violence, as defined in RCW 10.99.020, and the defendant suffered a continuing pattern of coercion, control, or abuse by the victim of the offense and the offense is a response to that coercion, control, or abuse.

(k) The defendant was convicted of vehicular homicide, by the operation of a vehicle in a reckless manner and has committed no other previous serious traffic offenses as defined in RCW 9.94A.030, and the

sentence is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(2) Aggravating Circumstances - Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances - Considered by a Jury - Imposed by the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present:

(i) The offense 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;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

(z)(i)(A) The current offense is theft in the first degree, theft in the second degree, possession of stolen property in the first degree, or possession of stolen property in the second degree; (B) the stolen property involved is metal property; and (C) the property damage to the victim caused in the course of the theft of metal property is more than three times the value of the stolen metal property, or the theft of the metal property creates a public hazard.

(ii) For purposes of this subsection, "metal property" means commercial metal property, private metal property, or nonferrous metal property, as defined in RCW 19.290.010.

(aa) The defendant committed the offense with the intent to directly or indirectly cause any benefit, aggrandizement, gain, profit, or other advantage to or for a criminal street gang as defined in RCW 9.94A.030, its reputation, influence, or membership.

(bb) The current offense involved paying to view, over the internet in violation of RCW 9.68A.075, depictions of a minor engaged in an act of sexually explicit conduct as defined in RCW 9.68A.011(4)(a) through (g).

(cc) The offense was intentionally committed because the defendant perceived the victim to be homeless, as defined in RCW 9.94A.030.

(dd) The current offense involved a felony crime against persons, except for assault in the third degree pursuant to RCW 9A.36.031(1)(k), that occurs in a courtroom, jury room, judge's chamber, or any waiting area or corridor immediately adjacent to a courtroom, jury room, or judge's chamber. This subsection shall apply only: (i) During the times when a courtroom, jury room, or judge's chamber is being used for judicial purposes during court proceedings; and (ii) if signage was posted in compliance with RCW 2.28.200 at the time of the offense.

(ee) During the commission of the current offense, the defendant was driving in the opposite direction of the normal flow of traffic on a multiple lane highway, as defined by RCW 46.04.350, with a posted speed limit of forty-five miles per hour or greater.

(ff) The current offense involved the assault of a utility employee of any publicly or privately owned utility company or agency, who is at the time of the act engaged in official duties, including: (i) The maintenance or repair of utility poles, lines, conduits, pipes, or other infrastructure; or (ii) connecting, disconnecting, or

recording utility meters. [2019 c 219 § 1; 2016 c 6 § 2; 2013 2nd sp.s. c 35 § 37. Prior: 2013 c 256 § 2; 2013 c 84 § 26; 2011 c 87 § 1; prior: 2010 c 274 § 402; 2010 c 227 § 10; 2010 c 9 § 4; prior: 2008 c 276 § 303; 2008 c 233 § 9; 2007 c 377 § 10; 2005 c 68 § 3; 2003 c 267 § 4; 2002 c 169 § 1; 2001 2nd sp.s. c 12 § 314; 2000 c 28 § 8; 1999 c 330 § 1; 1997 c 52 § 4; prior: 1996 c 248 § 2; 1996 c 121 § 1; 1995 c 316 § 2; 1990 c 3 § 603; 1989 c 408 § 1; 1987 c 131 § 2; 1986 c 257 § 27; 1984 c 209 § 24; 1983 c 115 § 10. Formerly RCW 9.94A.390.]

Intent—2010 c 274: See note following RCW 10.31.100.

Intent—2010 c 9: See note following RCW 69.50.315.

Severability—Part headings, subheadings not law—2008 c 276: See notes following RCW 36.28A.200.

Intent—Severability—Effective date—2005 c 68: See notes following RCW 9.94A.537.

Intent—Severability—Effective dates—2001 2nd sp.s. c 12: See notes following RCW 71.09.250.

Application—2001 2nd sp.s. c 12 §§ 301-363: See note following RCW 9.94A.030.

Technical correction bill—2000 c 28: See note following RCW 9.94A.015.

Effective date—1996 c 121: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect immediately [March 21, 1996]." [1996 c 121 § 2.]

Effective date—Application—1990 c 3 §§ 601 through 605: See note following RCW 9.94A.835.

Severability—1986 c 257: See note following RCW 9A.56.010.

Effective date—1986 c 257 §§ 17 through 35: See note following RCW 9.94A.030.

Effective dates—1984 c 209: See note following RCW 9.94A.030.

RCW 9A.44.010 Definitions. As used in this chapter:

(1) "Abuse of a supervisory position" means:

(a) To use a direct or indirect threat or promise to exercise authority to the detriment or benefit of a minor; or

(b) To exploit a significant relationship in order to obtain the consent of a minor.

(2) "Consent" means that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.

(3) "Forcible compulsion" means physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.

(4) "Frail elder or vulnerable adult" means a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself. "Frail elder or vulnerable adult" also includes a person who has been placed under a guardianship under RCW 11.130.265 or a conservatorship under RCW 11.130.360, a person over eighteen years of age who has a developmental disability under chapter 71A.10 RCW, a person admitted to a long-term care facility that is licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and a person receiving services from a home health, hospice, or home care agency licensed or required to be licensed under chapter 70.127 RCW.

(5) "Health care provider" for purposes of RCW 9A.44.050 and 9A.44.100 means a person who is, holds himself or herself out to be, or provides services as if he or she were: (a) A member of a health care profession under chapter 18.130 RCW; or (b) registered under chapter 18.19 RCW or licensed under chapter 18.225 RCW, regardless of whether the health care provider is licensed, certified, or registered by the state.

(6) "Married" means one who is legally married to another, but does not include a person who is living separate and apart from his or her spouse and who has filed in an appropriate court for legal separation or for dissolution of his or her marriage.

(7) "Mental incapacity" is that condition existing at the time of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse whether that condition is produced by illness, defect, the influence of a substance or from some other cause.

(8) "Person with a chemical dependency" for purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person who is "chemically dependent" as defined in *RCW 70.96A.020.

(9) "Person with a developmental disability," for purposes of RCW 9A.44.050(1)(c) and 9A.44.100(1)(c), means a person with a developmental disability as defined in RCW 71A.10.020.

(10) "Person with a mental disorder" for the purposes of RCW 9A.44.050(1)(e) and 9A.44.100(1)(e) means a person with a "mental disorder" as defined in RCW 71.05.020.

(11) "Person with supervisory authority," for purposes of RCW 9A.44.050(1) (c) or (e) and 9A.44.100(1) (c) or (e), means any proprietor or employee of any public or private care or treatment facility who directly supervises developmentally disabled, mentally disordered, or chemically dependent persons at the facility.

(12) "Physically helpless" means a person who is unconscious or for any other reason is physically unable to communicate unwillingness to an act.

(13) "Sexual contact" means any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party.

(14) "Sexual intercourse" (a) has its ordinary meaning and occurs upon any penetration, however slight, and

(b) Also means any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex, except when such penetration is accomplished for medically recognized treatment or diagnostic purposes, and

(c) Also means any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another whether such persons are of the same or opposite sex.

(15) "Significant relationship" means a situation in which the perpetrator is:

(a) A person who undertakes the responsibility, professionally or voluntarily, to provide education, health, welfare, or organized recreational activities principally for minors;

(b) A person who in the course of his or her employment supervises minors; or

(c) A person who provides welfare, health or residential assistance, personal care, or organized recreational activities to frail elders or vulnerable adults, including a provider, employee, temporary employee, volunteer, or independent contractor who supplies services to long-term care facilities licensed or required to be licensed under chapter 18.20, 18.51, 72.36, or 70.128 RCW, and home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW, but not including a consensual sexual partner.

(16) "Treatment" for purposes of RCW 9A.44.050 and 9A.44.100 means the active delivery of professional services by a health care provider which the health care provider holds himself or herself out to be qualified to provide. [2020 c 312 § 707; 2007 c 20 § 3; 2005 c 262 § 1; 2001 c 251 § 28. Prior: 1997 c 392 § 513; 1997 c 112 § 37; 1994 c 271 § 302; 1993 c 477 § 1; 1988 c 146 § 3; 1988 c 145 § 1; 1981 c 123 § 1; 1975 1st ex.s. c 14 § 1. Formerly RCW 9.79.140.]

Reviser's note: *(1) RCW 70.96A.020 was repealed by 2016 sp.s. c 29 § 301.

(2) The definitions in this section have been alphabetized pursuant to RCW 1.08.015(2)(k).

Effective dates—2020 c 312: See note following RCW 11.130.915.

Effective date—2007 c 20: See note following RCW 9A.44.050.

Severability—2001 c 251: See RCW 18.225.900.

Short title—Findings—Construction—Conflict with federal requirements—Part headings and captions not law—1997 c 392: See notes following RCW 74.39A.009.

Intent—1994 c 271: "The legislature hereby reaffirms its desire to protect the children of Washington from sexual abuse and further

reaffirms its condemnation of child sexual abuse that takes the form of causing one child to engage in sexual contact with another child for the sexual gratification of the one causing such activities to take place." [1994 c 271 § 301.]

Purpose—Severability—1994 c 271: See notes following RCW 9A.28.020.

Severability—Effective dates—1988 c 146: See notes following RCW 9A.44.050.

Effective date—1988 c 145: "This act shall take effect July 1, 1988." [1988 c 145 § 26.]

Savings—Application—1988 c 145: "This act shall not have the effect of terminating or in any way modifying any liability, civil or criminal, which is already in existence on July 1, 1988, and shall apply only to offenses committed on or after July 1, 1988." [1988 c 145 § 25.]

RCW 9A.44.073 Rape of a child in the first degree. (1) 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.

(2) Rape of a child in the first degree is a class A felony. [2021 c 142 § 2; 1988 c 145 § 2.]

Effective date—2021 c 142: See note following RCW 9A.44.050.

Effective date—Savings—Application—1988 c 145: See notes following RCW 9A.44.010.

Rape

Definition

In 2013, the FBI Uniform Crime Reporting (UCR) Program began collecting rape data under a revised definition within the Summary Reporting System. Previously, offense data for forcible rape were collected under the legacy UCR definition: the carnal knowledge of a female forcibly and against her will. Beginning with the 2013 data year, the term "forcible" was removed from the offense title, and the definition was changed. The revised UCR definition of rape is penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. Attempts or assaults to commit rape are also included in the statistics presented here; however, statutory rape and incest are excluded.

In 2016, the FBI Director approved the recommendation to discontinue the reporting of rape data using the UCR legacy definition beginning in 2017. However, to maintain the 20-year trend in Table 1, national estimates for rape under the legacy definition are provided along with estimates under the revised definition for 2017.

Data collection

The UCR Program counts one offense for each victim of a rape, attempted rape, or assault with intent to rape, regardless of the victim's age. Non-consensual sexual relations involving a familial member is considered rape, not incest. All other crimes of a sexual nature are considered to be Part II offenses; as such, the UCR Program collects only arrest data for those crimes. The offense of statutory rape, in which no force is used but the female victim is under the age of consent, is included in the arrest total for the sex offenses category.

Overview

There were an estimated 139,815 rapes (revised definition) reported to law enforcement in 2019. This estimate was 2.7 percent lower than the 2018 estimate and 10.8 percent higher than the 2015 estimate. (See Tables 1 and 1A.)

Expanded data

Expanded offense data are the details of the various offenses that the UCR Program collects beyond the count of how many crimes law enforcement agencies report. These details may include the type of weapon used in a crime, type or value of items stolen, and so forth. In addition, expanded data include trends (for example, 2-year comparisons) and rates per 100,000 inhabitants.

Expanded information regarding rape is available in the following tables:

Trends (2-year): Tables 12, 13, 14, and 15

Rates (per 100,000 inhabitants): Tables 16, 17, 18, and 19

What you won't find on this page

Clearance and arrest data for rape.

ROBERT COSSEY & ASSOCIATES

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