71822-3

71822-3

NO. 71822-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ERIC SCHNEIDER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TIMOTHY A. BRADSHAW

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DONNA L. WISE
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Table of Cases

Statutes

Rules and Regulations

A. ISSUES PRESENTED

1. Is the record on appeal sufficient for review where two recordings of interviews considered by the trial court in determining the admissibility of evidence of prior bad acts have been lost, but transcripts of both are part of the record?

2. Was the evidence sufficient to support convictions of three counts of child rape and one count of incest, where the victim of this resident child molester testified to multiple rapes during each charging period?

3. In admitting evidence of markedly similar acts of child rape of a prior victim as proof of a common scheme or plan in this child rape case, did the trial court apply the correct legal analysis and properly exercise its discretion?

4. Did the trial court properly exclude evidence that the victim of these crimes at some point believed that she had been abused by another housemate years before this abuse began, when the court concluded that the evidence had only marginal relevance and that its value was outweighed by undue prejudice and the danger of confusion of the issues, given the necessity for a satellite trial on the subject?

5. Did the trial court properly sustain an objection to a question by defense counsel designed to elicit evidence that had been excluded by the trial court?

6. Did the defendant waive any objection to imposition of court costs at sentencing, and if not, was his ability to pay $887 in costs established in the record?

B. IDENTIFICATION OF CHILD VICTIMS OF SEX ABUSE

The State requests that when this court issues its opinion, the victims of sex abuse who testified in this case be identified by initials or pseudonyms. Throughout Schneider's brief he identifies these victims and their relatives by full names,[1] but their full names are irrelevant to analysis of the issues and the use of their names will cause the victims substantial harm.

General orders of Divisions 2 and 3 of this Court would require use of initials or pseudonyms in place of the names of the victims in this case, in the interest of protecting their privacy.[2] Those general orders direct the parties to use initials or

---

[1] It is unclear why he has chosen to use a spelling of A.S.'s name that is not used in the trial transcripts. A.S.'s testimony began with her spelling her name as it is spelled in the transcripts. RP 927. There is no reason to reject that spelling.

[2] Division II, General Order 2011-1, In re the Use of Initials or Pseudonyms for Child Witnesses in Sex Crimes Cases, 8/23/11; Division III, General Order In re the Use of Initials or Pseudonyms for Child Victims or Child Witnesses, 6/18/12.

pseudonyms in all pleadings and briefs and direct the Court to use initials or pseudonyms in all orders and opinions. Id. The Supreme Court also uses pseudonyms or initials in cases involving child and adult victims of sex abuse. E.g., State v. Bobenhouse, 166 Wn.2d 881, 886, 214 P.3d 907 (2009)(pseudonyms for children); State v. Gresham, 173 Wn.2d 405, 414-18, 269 P.3d 207 (2012)(initials for children); State v. Lynch, 178 Wn.2d 487, 489, 309 P.3d 482 (2013)(initials for adult).

The details of the sexual abuse these victims experienced as children are described in the Brief of Appellant and will be presented to anyone who enters the name of either victim in the search engine at the home page of the Washington Courts website. If this Court identifies the victims by name, for the remainder of their lives any employer or acquaintance who performs even a cursory internet search (like Google) will learn about these rapes. The use of full names in the trial court does not have the same consequence, as the general public will not obtain trial court documents as the result of a general internet search (or a search on the Washington Courts website).

The only result of identifying the victims by using their full names is to cause them embarrassment or other harm. The State

will use initials as necessary to identify the victims, and first names for their relatives who must be identified. The State urges this Court to use either initials or pseudonyms to identify these victims in any orders or opinions, and to avoid using the full names of their relatives for the same reasons.

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Eric Schneider was charged with two counts of rape of a child in the second degree, one count of rape of a child in the third degree, and one count of incest in the first degree, all relating to his repeated rapes of his stepdaughter, J.S., over a course of years. CP 1-12. The Honorable Timothy Bradshaw presided over a jury trial. RP 84.[3] The jury found Schneider guilty as charged on all counts. CP 39-42.

On the convictions for child rape in the second degree, the court imposed indeterminate sentences, with concurrent minimum terms of 280 months (the high end of the standard range) and maximum terms of life. CP 56, 60. On the conviction of child rape

[3] The Report of Proceedings is in 11 volumes. The first 10 volumes are consecutively paginated and referred to in this brief simply by page number. The final volume will be referred to by the date of the hearings included (March 3 and December 9, 2014).

in the third degree, the standard range was 60 months, limited by the maximum term for that offense, and that term was imposed. RP 1329; CP 56-59. As to the conviction of incest in the first degree, the court imposed a determinate sentence of 102 months, the high end of the standard range on that count. CP 56-59.

2. SUBSTANTIVE FACTS

The facts included in this section of this brief are facts that were presented to the jury. Additional facts relevant to the issues on appeal are included in the relevant sections of the brief.

Schneider married J.S.'s mother, Elizabeth, in December 2005, when J.S. was 10 years old. RP 593, 714-15. At some point after the marriage, Schneider began sexually abusing J.S., first by anally raping her. RP 717-19. The rapes were regular, starting about once a week and increasing to about three times a week by the time she was 12 and 13. RP 720, 742, 790-91.

After a father-daughter dance, Schneider for the first time vaginally raped J.S. RP 721-22. He also raped her in her mouth. RP 722, 826. Sometimes he raped her with adult sex toys. RP 724, 766-70.

Sometimes the rapes occurred in her parents' bedroom, sometimes they occurred in J.S.'s bedroom, and less often they occurred in the living room. RP 727, 742. Sometimes he raped her in the shower and urinated on her afterward. RP 740-41. Some of the rapes occurred in a car. RP 742.

When J.S. was older and realized there was a danger of pregnancy, Schneider told J.S. not to worry about that because he was "fixed" and could not have children; he never used a condom. RP 734. J.S. accurately reported that Schneider is circumcised. RP 709, 734-35.

The rapes became more frequent and more violent as J.S. got older. RP 724. When J.S. was 14 and 15 years old, the rapes occurred three to four times a week. RP 742, 790-91. Schneider told J.S. that if she ever told about the abuse, he would kill her. RP 724-25.

Sometimes, Schneider put a belt around J.S.'s throat and partially choked her as he raped her. RP 723. Schneider also raped J.S. with a gun. RP 724, 777. On one occasion he used a knife to incise his initials in the area of her pubis, causing bleeding but not permanent scarring. RP 777.

Schneider made J.S. wear Elizabeth's lingerie and stiletto heels during the sexual assaults. RP 722-23. Schneider asked J.S. to watch pornography with him so she could learn to do other sexual things that would please him. RP 725.

The last rape occurred about two weeks before J.S. told her mother about the abuse, after Schneider and Elizabeth had separated. RP 727, 735, 742. J.S. reported the abuse to her mother on October 24, 2011. RP 570-76, 738-39. This was about seven months after J.S.'s 16th birthday. RP 712. J.S. reported the rapes during a sexual assault examination; no physical evidence of the rapes was observed, as is common in such examinations of teenage girls. RP 888-901.

When Schneider was arrested, he had pictures of J.S. in his wallet and in his truck, but no pictures of Elizabeth or her male children. RP 661-62, 669-72; Ex. 6, 8, 10. Schneider also had a concealed weapons permit, and .40 caliber ammunition that could be used in a handgun was found in his truck. RP 692-93.

Forensic examination of the data on J.S.'s cell phone revealed this text sent from Schneider on October 6, 2011: "How about a quick 'n and out?" RP 1149-50; Ex. 43. J.S. responded "Um sure my room?" and Schneider replied, "Yes," then sent the

message "Let me kno wen." RP 1150; Ex. 43. The examiner also found seven messages that were forwarded from Schneider to J.S. that had subject lines that indicated they had links to pornographic content. RP 1154-57.

Evidence relating to Schneider's prior rapes of another young girl, A.S, was admitted solely to establish a common scheme or plan. CP 23 (instruction 7).

Schneider married A.S.'s older sister Jessica, and fathered Jessica's three oldest children. RP 928, 931, 995. When A.S. was about 11 years old, Schneider and Jessica moved to Spokane, and A.S. visited them there in anticipation of the birth of Jessica's third daughter. RP 932, 963; Ex. 26.

While A.S. was visiting, Schneider forcibly raped her twice; both rapes occurred in Schneider's home. RP 936, 938. During the first rape, Schneider put his hands around A.S.'s throat, preventing her escape. RP 936. Then he vaginally raped her, refusing to stop although A.S. struggled and complained of the pain. RP 936. He told her if she told anyone, he would kill Jessica or Jessica's daughters. RP 936-37. A.S. did not tell. RP 938.

The second time Schneider raped A.S. in Spokane, he asked her to dress in Jessica's lingerie and heels, but A.S. refused.

RP 938. Schneider vaginally raped A.S. and again threatened to hurt Jessica if A.S. told anyone. RP 938-39.

Several months later, Jessica had left Schneider and moved to Oregon, and A.S. visited Jessica there. RP 940-41, 963, 1005; Ex. 27. After A.S. arrived, Schneider came and stayed with Jessica. RP 942-43. When A.S. got very dirty during a family outing, Schneider insisted that he would take A.S. to Jessica's apartment to change. RP 944, 1006-08. There he raped her again. RP 944-45. When A.S. returned to Jessica, A.S. was crying but said she was just homesick – she did not think Jessica would believe Schneider had raped A.S. RP 948, 1008-10.

Schneider never used condoms, but A.S. was not worried about becoming pregnant, because Schneider had told A.S. that he had had a vasectomy. RP 945-46. A.S. observed that Schneider was circumcised. RP 949.

In 2003, A.S. first disclosed that she had been raped by Schneider, when she learned that Schneider had physical custody of one of Jessica's daughters. RP 950-51, 954. After A.S. disclosed that Schneider had raped her, A.S.'s mother took her to the police station in the town where they lived in California. RP 953. A.S. gave a statement then and made another statement

about the rapes to police in Oregon, years later. RP 954. Neither Spokane nor Oregon police initiated charges against Schneider. RP 981-82.

A.S. and J.S. do not know one another. RP 742, 991.

The defense presented two witnesses who interviewed J.S. before she disclosed the rapes to her mother. One was Torr Lindberg, a male counselor who J.S. saw one time, while her father waited in the car – J.S. volunteered to Lindberg that she had not been sexually abused by Schneider. RP 729, 1214-20. The second was Schneider's former civil lawyer, who interviewed J.S. in the course of a custody dispute that Schneider was having with Jessica. RP 1227, 1236. Elizabeth was with J.S. during the interview, during which J.S. denied that she was being sexually abused by Schneider. RP 1231-32, 1236.

D. ARGUMENT

1. THE RECORD IS SUFFICIENT TO PERMIT REVIEW.

Schneider contends that his right to due process of law has been violated because the record reviewed by the trial court in the course of making its pretrial ruling regarding admissibility of prior bad acts was not preserved in its entirety. The items that are not

available are duplicative, however, and Schneider has not established how their unavailability precludes appellate review.

Schneider has identified two items as missing from the record: a video recording of an interview of A.S. on December 3, 2003, and an audio recording that included one or two defense interviews of J.S. App. Br. at 38-39. The content of both of those recordings was preserved. The 2003 interview of A.S. was also presented to the judge as an audio recording and as a transcript of that interview, both of which are included in the record. CP 110-11; Ex. 1-B, 2-A.[4] The defense interviews of J.S. also were presented to the judge as transcripts of those interviews and both of those transcripts are part of the record. CP 111-12; Ex. 1-F, 1-H.

A defendant is "constitutionally entitled to a 'record of sufficient completeness' to permit effective appellate review of his or her claims." State v. Tilton, 149 Wn.2d 775, 781, 72 P.3d 735 (2003) (citations omitted). A "record of sufficient completeness" does not necessarily require even a complete verbatim transcript. Id. (citing Mayer v. City of Chicago, 404 U.S. 189, 194, 92 S. Ct. 410, 30 L. Ed. 2d 372 (1971) (quoting Coppedge v. United States, 369 U.S. 438, 446, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962)). The

[4] Each exhibit that is identified with both a number and letter is a post-trial exhibit. CP 110-12.

record must allow counsel to determine which issues to raise on appeal and provide an "equivalent report of the events at trial" from which the issues arise. Id. (quoting Draper v. Washington, 372 U.S. 487, 495, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963)).

In most cases when a report of proceedings is lost, a reconstructed record will be sufficient for effective review. Tilton, 149 Wn.2d at 785. A record that is not complete is not reversible error unless the defendant demonstrates prejudice. State v. Burton, 165 Wn. App. 866, 883, 269 P.3d 337 (2012).

Appellate courts have found trial records sufficient for review even where there were significant gaps in the reports of trial testimony. Burton, 165 Wn. App. at 885 (garbled transcript sufficient with clarifying affidavits); State v. Johnson, 147 Wn. App. 276, 282-83, 194 P.3d 1009 (2008) (many short gaps in record did not hamper review); State v. Classen, 143 Wn. App. 45, 54-58, 176 P.3d 582 (2008) (3 days of testimony reconstructed). The Supreme Court found a narrative report of proceedings sufficient to reconstruct the pretrial testimony of an interrogating detective in a death penalty case in State v. Brown, 132 Wn.2d 529, 593, 940 P.2d 546 (1997).

The record that exists in the case at bar is at least equivalent to the record that is normally available for appellate review – a transcript of the proceedings. Transcripts of each of the two missing recordings are part of the record. CP 111-12; Ex. 1-B, 1-F, 1-H. As to the interview of A.S., this Court has an audio recording as well as the transcript. CP 111; Ex. 2-A.

The arguments proffered by Schneider would render the record in every appeal insufficient. He claims that the record is insufficient because this court is unable to visually observe the demeanor of A.S. in the interview for which an audio recording and a transcript are available, and is unable to hear the tone of voice of J.S. in a defense interview. But appellate courts are almost never able to make these observations. Those observations may play a role in making a credibility determination, but credibility determinations are solely for the fact-finder, here the trial judge.

As to A.S.'s interview, Schneider claims that the many notations of "unintelligible" or "no response heard" demonstrate the importance of the video recording, but that argument fails for two reasons. First, Schneider points to no place in the transcript in which those notations are of significance to his claims. Trial counsel noted only one location in which he could hear a response

that was not in the transcript, but that response was established at trial, so the record of that response has been established.[5] Second, the audio recording is available to decipher responses that may be decipherable.[6] The trial court did say that watching the video was important to its decision regarding admissibility of the prior bad acts, but at the same time, the court pointed out that it was duplicative. RP 240. To the extent it was important to the court's determination of A.S.'s credibility, the record is significantly greater than is available in virtually any case in which testimony is reviewed – the record includes a transcript and an audio recording.

Schneider does not assert that there is any gap or deficiency in the transcript of the defense interview with J.S. He asserts only that her tone of voice was important to evaluate J.S.'s assertion that she now believed that she had not been sexually abused by a previous housemate. However, Schneider cites no point in any argument related to whether J.S.'s earlier reports of prior abuse would be admissible where the parties or the court mentions J.S.'s

---

[5] At RP 187-89, the defense attorney asserted that when A.S. was asked if she saw Schneider's penis, the transcript indicated "no response heard" but he thought he heard a response. At RP 987 and RP 990, the response was established ("uh-uh").

[6] Schneider identifies no response decipherable on the audio recording but not included in the transcript. This Court can conclude that there are none of significance.

tone of voice as she made that statement. The trial court was not asked to consider J.S.'s statements or demeanor in those interviews for purposes of its ruling as prior reports of abuse, and there is no indication that the court did so. Thus, the recording was not a material part of the record that formed a basis of that ruling.

The record includes all of the statements considered by the trial court in making its pretrial rulings. Schneider has not established that he has been prejudiced by the loss of one video recording (for which there also is an audio recording and a transcript) and one audio recording (for which there are transcripts). The record is sufficient for appellate review.

2. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S GUILTY VERDICT ON EVERY COUNT.

Schneider claims there was insufficient evidence to support his conviction on any count, because the evidence did not include "a specific description of the individual incident that is each alleged crime." App. Br. at 30-31. This argument should be rejected, as it has been in other cases where resident child abusers have repeatedly abused children. Schneider concedes that J.S. testified "she and Eric [Schneider] had sexual intercourse three times a

week when she was 12-13, more than once a week when 14-15, and less often after age 16." App. Br. at 29. J.S.'s testimony explicitly described many ways in which Schneider raped her during the relevant charging periods, and the number of times that those rapes occurred. That testimony was sufficient to support all of the verdicts in this case.

When there is a claim that evidence is insufficient to support a conviction, the evidence is reviewed in a light most favorable to the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). An insufficient evidence claim "admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. A conviction will be affirmed if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Id.

The trier of fact resolves conflicting testimony and weighs the persuasiveness of the evidence. State v. Carver, 113 Wn.2d 591, 604, 781 P.2d 1308, 789 P.2d 306 (1989). The trier of fact is the sole arbiter of credibility. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The trier of fact may rely on circumstantial evidence alone, and circumstantial evidence is as trustworthy as direct evidence. State v. Gosby, 85 Wn.2d 758, 765-67, 539 P.2d

680 (1975). Thus, the appellate courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992).

Counts 1 and 2 each charged Schneider with rape of a child in the second degree, occurring between June 1, 2007,[7] and February 28, 2009, naming J.S. as the victim. CP 1-2. A person is guilty of rape of a child in the second degree when he has sexual intercourse with a child who is at least 12 years old but less than 14, when the perpetrator is at least 36 months older than the child and is not married to the child. RCW 9A.44.076. Based on her date of birth, J.S. was 12 and 13 years old during this charging period. RP 712.

Count 3 charged Schneider with rape of a child in the third degree, occurring between March 1, 2009, and February 28, 2011, naming J.S. as the victim. CP 2. A person is guilty of rape of a child in the third degree when he has sexual intercourse with a child who is at least 14 years old but less than 16, when the perpetrator is at least 48 months older than the child and is not married to the

[7] The beginning of the charging period corresponds with the date when J.S.'s family moved to King County. RP 595.

child. RCW 9A.44.079. J.S. was 14 and 15 years old during this charging period. RP 712.

Count 4 charged Schneider with incest in the first degree, occurring between March 1, 2011, and October 14, 2011, naming J.S. as the victim. A person is guilty of incest in the first degree if he has sexual intercourse with a person he knows to be his stepchild. RCW 9A.64.020. J.S. was 16 years old during this charging period. RP 712.

The jury was instructed that it must be unanimous as to a particular incident to convict on any count. CP 29, 32, 35. As to the two counts of rape of a child in the second degree, the instructions stated that each conviction must be based on a separate and distinct occasion from the other count. CP 27, 30.

Schneider married J.S.'s mother, Elizabeth, in December 2005, when J.S. was 10 years old. RP 593. They moved into a house together, with Elizabeth's children. RP 585, 593, 598. The marriage spanned the charging periods of all of the charges. RP 593, 600, 727. There was no dispute that Schneider was more than 15 years older than J.S. RP 714, 993-97.

J.S. testified that after Schneider married her mother, Schneider began sexually abusing J.S. RP 717-19. At first, he

anally raped her with his penis. RP 717-19. Schneider later began vaginally raping J.S. with his penis. RP 721-22. Schneider also raped J.S. with adult sex toys and with a handgun. RP 724, 766-70, 777. The rapes occurred in many different locations: sometimes in her parents' bedroom, sometimes in J.S.'s bedroom, and less often in the living room. RP 727, 742. Sometimes Schneider raped J.S. in the shower and urinated on her afterward. RP 740-41. Sometimes the rapes occurred in a car. RP 742.

J.S. testified that the rapes occurred on a regular basis, starting about once a week and increasing to about three times a week by the time J.S. was 12 and 13 years old. RP 720, 742, 790-91. The rapes became more frequent as J.S. got older. RP 742. When J.S. was 14 and 15, Schneider was raping her three to four times a week. Id. The rapes continued after she turned 16. Id.

For purposes of analysis of the sufficiency of the evidence, the truth of this testimony is admitted. Salinas, 119 Wn.2d at 201. Schneider's argument that this evidence was insufficient to support conviction on even one count of child rape is entirely without merit.

Schneider concedes that J.S. testified that she and Schneider had intercourse three times a week when J.S. was 12 to

13 years old, more than once a week when she was 14 to 15, and that it continued after she was 16 years old. App. Br. at 29. Schneider asserts that this testimony is insufficient to support any of the convictions because J.S. did not provide details of particular rapes that occurred during each of the charging periods, preventing unanimous verdicts as to specific incidents.

Schneider's argument was rejected by Division 2 in State v. Brown, 55 Wn. App. 738, 746-49, 780 P.2d 880 (1989). The court in Brown recognized the complications of prosecuting a child molester who resides with the victim, termed a "resident child molester." Id. at 749. The court observed:

> Particularly when the accused resides with the victim or has virtually unchecked access to the child, and the abuse has occurred on a regular basis and in a consistent manner over a prolonged period of time, the child may have no meaningful reference point of time or detail by which to distinguish one specific act from another. The more frequent and repetitive the abuse, the more likely it becomes that the victim will be unable to recall specific dates and places. Moreover, because the molestation usually occurs outside the presence of witnesses, and often leaves no permanent physical evidence, the state's case rests on the testimony of a victim whose memory may be clouded by a blur of abuse and a desire to forget.

Id. at 746-47 (citations omitted).

The Brown court noted that "the crux" of Brown's argument, which it rejected, was that the victim "testified to a series of identical

acts which were not distinguished by any individualizing characteristics." Id. at 747-48. Brown was convicted of four counts of statutory rape (the former title of rape of a child, former RCW 9A.44.090) and two counts of indecent liberties, all within the identical charging period, based on the victim's testimony describing the defendant's usual conduct (the positions assumed by each and the rooms in which the abuse occurred) and describing the frequency of particular acts during the charging period in general terms. Id. at 740-42. The nature of the testimony was very similar to the testimony in this case.

The jury in Brown was given a unanimity instruction, and the Court of Appeals held that, in light of that instruction, more specificity in the testimony was not necessary. Id. at 748. The court noted that more specificity might be required if an alibi or misidentification defense was raised, but that these defenses are seldom reasonable defenses when the accused child molester has virtually unchecked access to the victim. Id. at 748 & n. 8.

In Brown, as in the case at bar, the defense was not alibi or misidentification – it was a challenge to the credibility of the victim. Id. The Brown court noted that if the generic testimony in that case was found inadequate, "[w]ith the exception of those who happen to

select victims with better memories or who are one act offenders, the most egregious child molesters effectively would be insulated from prosecution." Id. at 749 (citing People v. Obremski, 255 Cal. Rptr. 715, 719, 207 Cal. App. 3d 1346 (1989)).

Seven years after Brown, this Court agreed with its holding that generic testimony may support convictions of multiple counts of sexual abuse. State v. Hayes, 81 Wn. App. 425, 914 P.2d 788 (1996). The court in Hayes adopted the analysis of the California Supreme Court: to support conviction of multiple counts based on generic testimony, "evidence need only be specific as to the type of act committed, the number of acts committed, and the general time period." Id. at 437-38 (citing People v. Jones, 51 Cal.3d 294, 792 P.2d 643, 270 Cal. Rptr. 611, 623 (1990)).

The court in Hayes was compelled to analyze the sufficiency of generic testimony because it concluded there were not specific descriptions of enough individual incidents in that case to support all counts. Hayes, 81 Wn. App. 435. The court rejected Schneider's argument that there must be "a specific description of the individual incident that is each alleged crime." App. Br. at 31.

The specificity prong of the Hayes analysis requires the alleged victim "describe the kind of act or acts with sufficient

specificity to allow the trier of fact to determine what offense, if any, has been committed." Id. at 438. The court held that testimony that "he put his private part in mine" satisfied that prong. Id. The court added that testimony about the defendant's "usual course of conduct" (where it happened, details of the behavior) added to the specificity prong. Id. The court described the specificity required as evidence of "the type of act committed." Id. at 437. The court endorsed the analysis of the California Supreme Court, cautioning that "specifics regarding date, time, place and circumstance are factors regarding credibility and are not necessary elements that need to be proved to sustain a conviction." Id.

The specificity prong of this analysis was satisfied here by the testimony of J.S. that Schneider raped her vaginally and anally, with his penis and with other objects, and they had oral intercourse. RP 718, 721-22, 724, 765-70, 777. All of these acts constitute "sexual intercourse" for purposes of the charged crimes.[8] J.S. told nurse Joanne Mettler that when she said "had sex," J.S. meant "entering me." RP 894. There was no suggestion that J.S. was

[8] For purposes of all three crimes, "sexual intercourse" is defined as: having its ordinary meaning and occurring on any penetration; including penetration of the vagina or anus by an object; and including sexual contact between the sex organs of one person and the mouth or anus of another. CP 25 (instruction 9); RCW 9A.44.010(1); 9A.64.020(3)(c).

referring to any act other than sexual intercourse when she said Schneider raped her.

The second prong of the Hayes analysis requires that the alleged victim "describe the number of acts committed with sufficient certainty to support each of the counts." Id. The court held that testimony that Hayes had intercourse with the victim at least four times, and up to two or three times a week, satisfied this prong as to the four counts alleged. Id. at 439. The testimony of the victim in Hayes that these incidents occurred with a two-year time frame satisfied the third prong of the analysis, establishing "the general time period in which the acts occurred." Id. at 438-39.

Schneider concedes that J.S. testified that there was sexual intercourse three times a week when J.S. was 12 and 13, and that it continued repeatedly when she was 14, 15, and 16. App. Br. at 29; RP 720, 742. Thus, J.S. testified to many incidents that occurred that constituted the crimes charged within the relevant charging periods.

Schneider's claim that State v. Edwards[9] controls this case is without merit. In Edwards the court found that the child testified to

[9] Edwards is reported at 171 Wn. App. 379, 294 P.3d 708 (2012). Schneider cites to an earlier opinion that was withdrawn and is no longer available electronically or in the Washington Appellate Reporter volume.

only one clear incident of child molestation in the first degree during the charging period and reversed a conviction on a second count. 171 Wn. App. 402-03. Child molestation in the first degree requires sexual contact, which must be contact with intimate parts for the purpose of sexual gratification. RCW 9A.44.010(2), 9A.44.083. The victim had testified to details of only one incident in which the defendant rubbed her vagina under her underwear, however, and of more incidents in which "most of the time" he touched her "front private." Edwards, 171 Wn. App. 403. Further, there was no testimony putting the other acts within the charging period. Id. The court concluded that there was not sufficient evidence that a second act of child molestation occurred during the charging period. Id. By contrast, J.S.'s testimony was quite clear that multiple acts constituting child rape occurred during each of the charging periods.

State v. Jensen,[10] on which Schneider also relies, is distinguishable for the same reason. The victim in that case described two incidents of child molestation in detail, but as to two other incidents, she testified only that the defendant came into her room and did mention any sexual contact. 125 Wn. App. 324, 327.

[10] 125 Wn. App. 319, 104 P.3d 717 (2005).

The court endorsed the holding of Hayes that in cases involving a resident child molester, a victim's generic testimony can be used to support multiple counts. Id. at 327. It concluded that the testimony that the defendant came into the victim's room at night was not sufficient for the jury to determine whether additional acts of child molestation occurred on those occasions. Id. at 328.

Schneider relies on State v. Corbett, 158 Wn. App. 576, 242 P.3d 52 (2010), for the proposition that young children do sometimes describe specific incidents of sexual abuse in detail.[11] In Corbett the jury was not instructed that it must find separate and distinct acts supporting each count; the clarity of the separate incidents was a factor in the court's conclusion that any error was not prejudicial. Id. at 591-93. That some children may describe distinctly different incidents does not preclude prosecution when the child cannot, such as with a long-term, resident child molester. As other courts have recognized, this would mean "the most egregious offenders effectively would be insulated from prosecution." Hayes, 81 Wn. App. 436 (quoting Brown, 55 Wn. App. at 749 (citing Obremski, 255 Cal. Rptr. at 719)).

[11] State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012), is cited for the same proposition. While the State concedes some children do describe specific incidents in detail, it is worth noting that neither defendant in the two cases consolidated in Gresham was a resident child molester. Id. at 414-15, 417-18.

3. THE TRIAL COURT DID NOT ERR IN ADMITTING EVIDENCE OF SCHNEIDER'S RAPES OF A.S. AS EVIDENCE OF A COMMON SCHEME OR PLAN.

Schneider contends that the trial court abused its discretion in granting the State's request to present evidence that Schneider repeatedly raped A.S. a few years before these rapes, during Schneider's previous marriage to A.S.'s sister, Jessica. That claim should be rejected. The trial court reviewed the two girls' statements, carefully applied the correct legal standards, and concluded that the rapes of A.S. were admissible as evidence of a common scheme or plan. RP 239-51; CP 93-96. Schneider has not established that this was an abuse of discretion.

ER 404(b) provides that other bad acts of a defendant are not admissible to show a criminal propensity but may be admissible for other purposes. Evidence of prior bad acts may be admissible to prove a common scheme or plan, corroborating the charged crimes. State v. Lough, 125 Wn.2d 847, 852, 889 P.2d 487 (1995). To admit evidence of other bad acts, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove

an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. Id. at 853.

The Supreme Court analyzed the admissibility of evidence of prior sexual abuse of other victims as proof of a common scheme or plan in State v. DeVincentis, 150 Wn.2d 11, 17-25, 74 P.3d 119 (2003). It held that when the issue in a case is whether the crime occurred, "the existence of a design to fulfill sexual compulsions evidenced by a pattern of past behavior is probative." Id. at 17-18.

The court in DeVincentis emphasized that the prior acts must have substantial similarities to the acts that are alleged at trial. Id. at 20. It held: "When the existence of the criminal act is at issue, evidence of substantially similar features between a prior act and the disputed act is relevant." Id. However, the common features need not show a unique method of committing the crime. Id. at 20-21. "Sufficient similarity is reached only when the trial court determines that the 'various acts are naturally to be explained as caused by a general plan....'" Id. at 21 (quoting Lough, 125 Wn.2d at 860).

A trial court's ruling on admissibility of prior bad acts under ER 404(b) "will not be disturbed absent a manifest abuse of discretion such that no reasonable judge would have ruled as the

trial court did." State v. Mason, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007) (citing State v. Thang, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)).

The trial court found that Schneider's rapes of A.S. had been proven and were relevant to prove a common scheme or plan, tending to establish that these crimes occurred. CP 94-95. The court's analysis appears in both written findings and extensive oral findings that were incorporated in the written findings. CP 93-96; RP 239-51. The court applied the presumption against admitting prior bad acts, placing the burden of persuasion on the proponent of the evidence.[12] CP 95; RP 239. The court did not abuse its discretion in concluding that the strong probative value of this evidence was not substantially outweighed by unfair prejudice. CP 95: RP 249.

a. The Prior Acts Were Proven.

The trial court found by a preponderance of the evidence that Schneider raped A.S. on multiple occasions. CP 95; RP 242. Schneider has not challenged this finding.

[12] The trial court did exclude evidence of other prior acts – Schneider's alleged physical abuse of J.S.'s brothers. RP 292, 881.

b. The Purpose Of The Evidence Was Identified.

The trial court identified the purpose of the evidence of Schneider's abuse of A.S. as proof of a common scheme or plan. CP 94-95; RP 243. Schneider does not dispute that the court correctly identified the purpose for which the evidence was offered.

c. The Court Determined That The Evidence Was Relevant.

The trial court concluded that the evidence of Schneider's rapes of A.S. constituted evidence of a common scheme or plan and evidence of the manifestation of a plan or design to fulfill sexual compulsions. CP 95; RP 243-49. The court concluded that this was relevant to proof of the charged crimes. CP 95; RP 249.

Similarities between the defendant's behavior in the prior course of conduct and in the course of the current crimes are the core of the DeVincentis analysis of admissibility of evidence of common scheme or plan. "Because the issue is whether the crime occurred, the existence of a design to fulfill sexual compulsions evidenced by a pattern of past behavior is probative." DeVincentis, 150 Wn.2d at 17-18. The prior acts are "evidence of a single plan used repeatedly to commit separate, but very similar, crimes. Id. at 19. The court noted that the acts must have "such a *concurrence*

of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." Id. (quoting Lough, 125 Wn.2d at 856) (emphasis in original).

In DeVincentis, the victims of the prior and current sexual abuse were both 10 to 13 years old when the abuse occurred. Id. at 22. The acts at issue were 15 years apart. Id. at 13-15. The trial court described DeVincentis's scheme as one involving bringing girls that he knew to his home, an apparently safe but actually isolated location, so he could "pursue his compulsion to have sexual contact with these ... prepubescent or pubescent girls." Id. at 22. Other similarities the Supreme Court cited included the defendant wearing bikini underwear around the house, asking for a massage, then directing the girls to a secluded spot (such as a bedroom), and directing that clothes be taken off. Id. Finally, in both instances, he had the girls masturbate him to climax. Id. Based on these similarities, the Supreme Court held that the trial court did not abuse its discretion in admitting the prior bad acts. Id. at 22-24.

The trial court here found that the assaults against A.S. and J.S. were "markedly similar acts of misconduct against similarly

situated victims under similar circumstances." CP 94-95; RP 248-49. It relied on a lengthy list of similarities:

Finding 5(a): Schneider gained access to each girl through his significant other, which made the girls especially vulnerable because they could not escape and because the family members could be threatened. CP 94; RP 246. This finding is not disputed.[13]

Finding 5(b): The girls were of a similar age when they were assaulted. The similarity was noted in the written findings as both girls being between 11 and 13 when the defendant first assaulted them. CP 94. In the oral findings, the court simply noted the rapes occurred when A.S. was 11 through 13, and J.S. was that age as well, both prepubescent. RP 245-46.

Schneider claims this finding is not supported by the evidence as to either girl. Findings of fact will be sustained if they are supported by substantial evidence: evidence of sufficient quantity to persuade a fair-minded, rational person. In re Davis, 152 Wn.2d 647, 679-80, 101 P.3d 1 (2004). The party challenging the finding bears the burden of proving that it is not supported by substantial evidence in the record. Id. at 680. The credibility

[13] All of the unchallenged findings are verities on appeal. Davis, 152 Wn.2d at 679.

determinations of the trial court are not reviewable, even if there may be another reasonable interpretation of the evidence. Id.

As to A.S., Schneider claims that this finding is unsupported by the record because A.S. actually turned 13 on the date she stated the first rape occurred. App. Br. at 44. That is consistent with the court's finding. Oddly, Schneider's authority for this claim is the previous section of his brief, including footnote 21 -- in that section, Schneider has argued that the date of the first rape A.S. reported was her 12th birthday -- that also would be consistent with the court's finding. App. Br. at 44 n. 21.

As to J.S., Schneider points to a 2010 interview, where J.S. reported that the abuse began when she was 7 years old. Ex. 1-G at 3. However, in an interview in 2012, also considered by the court, J.S. reported that she met Schneider when she was about 10. Ex. 1-F, p. 2. The rapes began after he moved in with her mother; the rapes began when she was 10 to 12 years old. Id. Moreover, whenever the rapes began, there is no dispute that J.S. consistently said that the rapes were occurring when she was 12 and continued until just before she reported them, when she was 16. Ex. 1-G, p. 10-11, 66; Ex. 1-F, p. 2, 6-7, 11, 36. Whether the

rapes began when she was 7 or when she was 10, she was prepubescent at the time.

With respect to J.S.'s exact age when the abuse began, the error alleged is not significant to the court's ruling. Even if a finding of fact is erroneous, if it does not materially affect the conclusions of law it is not prejudicial and does not warrant reversal. State v. Caldera, 66 Wn. App. 548, 551, 832 P.2d 139 (1992); In re Bailey's Estate, 178 Wash. 173, 176, 34 P.2d 448 (1934).

Schneider's challenge to the court's finding as to the dates of the charged crimes also does not identify prejudicial error. App. Br. at 43. The court did not cite to the dates of the charges in its oral ruling as to prior bad acts, and the obviously incorrect starting date in its written findings appears to be a scrivener's error, as there was no debate as to that date. CP 94. The starting date of the charging period was a prefatory finding and not material to the court's ruling; this scrivener's error is not a basis for reversal.

Schneider also challenges the accuracy of the calendar years in the court's finding that evidence of the rapes of A.S. was offered on the issue of common scheme or plan. App. Br. at 43. This claim also does not identify prejudicial error. The court found that the rapes of A.S. occurred in 2001 and 2002. CP 94.

Schneider asserts that the correct years reported by A.S. in the materials reviewed were 2000 and 2001, although A.S.'s reference to calendar years varied. App. Br. at 44 n. 21. The one year differential in the calendar years was not material to the court's ruling. There is no doubt as to the evidence being offered.

To the extent that the dates cited by the court in its written findings varied somewhat from the record, which was often conflicting, Schneider has not argued that these variations were material to the trial court's conclusions of law. To the extent that there were errors in these dates, the errors were not material and are harmless error.

Finding 5(c): Among other places, Schneider sexually assaulted each victim in the bedroom he shared with his then current wife, providing him access. CP 94. In its oral finding, the court went further, noting that the rapes usually occurred "in the house, when the victims had nowhere else to go," either in the victim's bedroom or Schneider's. RP 247. This finding parallels the finding in DeVincentis that the defendant's scheme included obtaining access to the girls where they were isolated. 150 Wn.2d at 22.

Schneider does not challenge the finding that each victim was assaulted at least once in Schneider's bedroom. He asserts that commission of the assaults in Schneider's bedroom did not provide Schneider access. App. Br. at 45. The meaning of the court's finding is clarified by its oral finding that the location of the rapes in the house where Schneider lived provided him access to them in a place where they were isolated from assistance or escape. RP 247. All of the rapes of A.S. occurred in a residence where Schneider lived. Ex. 1-B at 56-58, 63-64, 68. Most of the rapes of J.S. also occurred in Schneider's home. Ex. 1-F at 26, 68; 1-G at 18, 35-37, 64. This finding that Schneider obtained access to both victims via isolation was supported by substantial evidence.

Finding 5(d): Schneider sought to obtain the silence of each victim with threats. CP 94; RP 247. Schneider does not dispute that the record supports the court's finding that he threatened A.S., telling A.S. that he would kill her sister (Schneider's wife) if she told; he also threatened to kill A.S.'s nieces. Ex. 1-A at 15, 24; 1-B at 58; 1-C at 5.

Schneider contends that Finding 5(d) was not supported by the record because "in the early years, J.S. was not threatened."

App. Br. at 45. That assertion does not contradict the court's finding.

Moreover, Schneider's characterization of the record is not accurate. The record reflects J.S.'s 2010 statement that Schneider threatened that if she ever told anyone he would hurt her, lock her up in a house, beat her up, and hurt her in any way he could think of. Ex. 1-G at 6-7. There was no suggestion that these threats did not occur "in the early years," when Schneider suggests the assaults were part of a "special loving relationship." App. Br. at 45. The record also includes J.S.'s 2012 statement that Schneider told her that if she ever told anyone he would kill her. Ex. 1-F at 22. Neither the question nor the answer limited the timing of those threats. Id. J.S. did report that the incident where J.S. frightened her by raping her with a gun occurred later in the course of the assaults. Id.

Finding 5(e): Schneider used force and violence at times on each victim; pain further excited him. CP 94; RP 246, 250. The court observed that as to both victims, Schneider choked them (manually or with a belt) during some of the rapes. RP 250. Schneider does not challenge this finding.

Finding 5(f): Schneider did not use condoms when vaginally raping either victim. CP 95; RP 247. Schneider does not challenge this finding.

Finding 5(g): Schneider assured both victims they would not get pregnant because he had been "fixed." CP 95; RP 247. Schneider does not challenge this finding.

Finding 5(h): Both victims noted that Schneider was circumcised. CP 95; RP 248. Schneider does not challenge this finding.

Finding 5(i): Schneider asked both victims to wear his wife's lingerie and/or high heels for him. CP 95; RP 247-48. Schneider does not challenge this finding.

Finding 5(j): Schneider videotaped his sexual assaults with both victims. CP 95; RP 248. Both victims reported that Schneider videotaped at least one of the rapes. Ex. 1-A at 5 (A.S.); Ex. 1-E at 10 (A.S.); Ex. 1-F at 54 (J.S.).

Schneider's challenge to this finding is simply his assertion that the victims' reports of being videotaped were not credible, because he contends that A.S. did not report this detail until years after her initial report and because no videotapes of these assaults were recovered. App. Br. at 45-46. However, credibility

determinations are for the trial court. The trial court noted that A.S. was "remarkably detailed" in talking about seeing the red light of a camera hidden in a clothing basket. RP 248. The girls' statements provide substantial evidence in support of the findings.

The trial court concluded that these similarities in the sexual assaults on J.S. and A.S. went well beyond the "markedly similar acts" deemed sufficient in DeVincentis and were admissible as evidence of a common scheme or plan and manifestation of a plan/ design to fulfill sexual compulsions. CP 95; RP 248-49.

Schneider argues that the trial court misinterpreted the law relevant to admissibility of a common scheme or plan, and that similarities are irrelevant unless they are related to a distinct method of obtaining intercourse. However, the basis for this argument is the analysis in State v. Dewey, 93 Wn. App. 50, 966 P.2d 414 (1998). App. Br. at 52, 56, 57. The Supreme Court explicitly rejected the holding of Dewey in DeVincentis. DeVincentis, 150 Wn.2d at 18-22.

The Supreme Court concluded that Dewey reflected a misreading of Lough, supra, because Lough required a similarity of the acts, not uniqueness. DeVincentis, 150 Wn.2d at 21. The DeVincentis court noted that Dewey confused the common scheme

or plan exception with the modus operandi exception. Id. While the court in DeVincentis cited the trial court's reliance on the defendant's scheme to get girls into his home to assault them, it also cited similarities in the sexual assaults that occurred, including the nature of the sex act. Id. at 22. The trial court here properly relied on the analysis of DeVincentis in reaching its conclusion.

In State v. Scherner, the Supreme Court affirmed admission of evidence of abuse of four prior victims, based on these similarities: the girls were of similar age when Scherner began molesting them, Scherner was a trusted relative or friend of each, in each case the abuse was in bed, and each involved one of two types of sexual acts. 153 Wn. App. 621, 657, 225 P.3d 248 (2009), aff'd sub nom. State v. Gresham, 173 Wn.2d 405, 269 P.3d 207 (2012). The Court of Appeals held that the proponent of the evidence need not show a specific design or system that included the crime charged; the prior bad acts must show a "pattern or plan with marked similarities to the facts in the case before it." Id. (quoting DeVincentis, 150 Wn.2d at 13). The Supreme Court affirmed the holding of the Court of Appeals in Scherner that there was no abuse of discretion in admission of this evidence. Gresham, 173 Wn.2d at 423. The Supreme Court held that

although two of the prior incidents occurred while the girls were on trips with Scherner, and the other two girls had been abused in Scherner's home,[14] the trial court did not abuse its discretion in concluding that these were "merely individual manifestations of a common plan." Id. The court declined to retreat from the DeVincentis holding that the relevant commonality need not be a unique method of committing the crime, or distinct from common means of committing the charged crime. Id.

State v. Slocum, on which Schneider relies, holds only that the similarities must be more than simply a design to molest children. 183 Wn. App. 438, 453, 333 P.3d 541 (2014). It concluded that there was a sufficient similarity to admit evidence of that defendant's prior misconduct with one victim because of similarities in the conduct. Id. at 455. It held that two other instances that had no similarities except the ages of the victims were not admissible. Id. at 454-56.

Other courts of appeal that have upheld use of evidence of common scheme or plan evidence also rely on similarities in the entire course of conduct. E.g., State v. Kennealy, 151 Wn. App.

[14] Schneider relies on Gresham for the proposition that there must be conduct "created by design" but cites only the abuse that occurred on trips, App. Br. at 48, ignoring the court's holding that abuse of two other victims that was unrelated to trips also was admissible as proof of a common scheme or plan.

861, 887-90, 214 P.3d 200 (2009) (acts of prior misconduct with four other victims admissible); State v. Sexsmith, 138 Wn. App. 497, 504-06, 157 P.3d 901 (2007) (evidence showed common scheme or plan where defendant was in a position of authority over both victims, who were the same age, and isolated them and forced them to perform similar sex acts).

d. The Court Balanced The Probative Value Of The Evidence Against Unfair Prejudice.

The trial court performed the required balancing of the probative value of the prior bad acts evidence and the possibility of unfair prejudice. It concluded that the probative value of the prior assaults of A.S. was "exceptionally strong because of all the commonalities between the events" and the probative value substantially outweighed the prejudicial effect. CP 95; RP 249.

Trial courts have been directed to "give special consideration to the probative value" of evidence of prior sex abuse, especially when corroborating evidence is not available. DeVincentis, 150 Wn.2d at 25. The trial court here noted the lack of physical evidence in this case, stating that the primary evidence was the statements of the two girls. RP 249. The trial court cited Justice Chambers' concurrence in DeVincentis explaining that evidence of

prior abuse is particularly relevant in cases like this, where identity is not an issue. RP 242-43, 249; see DeVincentis, 150 Wn.2d at 26 (J. Chambers, concurring).

Generally, prior similar sex abuse is "very probative" of a common scheme or plan and the need for that proof is particularly great in child sex abuse cases. Kennealy, 151 Wn. App. at 890 (quoting State v. Krause, 82 Wn. App. 688, 696, 919 P.2d 123 (1996)). The DeVincentis court approved[15] that trial court's consideration of the analysis of Kennealy:

> The evidence is strongly probative because of the secrecy surrounding child sex abuse, victim vulnerability, the frequent absence of physical evidence of sexual abuse, the public opprobrium connected to such an accusation, a victim's unwillingness to testify, and a lack of confidence in a jury's ability to determine a child witness's credibility.

Kennealy, 151 Wn. App. at 890 (citing Krause, 82 Wn. App. at 696, and Sexsmith, 138 Wn. App. at 506).

Schneider misconstrues State v. Gunderson[16] in asserting that it set a higher standard for the balancing required when analyzing the admissibility of prior bad acts. That case did not address evidence offered to prove a common scheme or plan; it did not adopt a new general rule. Gunderson addressed the

---

[15] 150 Wn.2d at 23.

[16] 181 Wn.2d 916, 337 P.3d 1090 (2014).

admissibility of prior acts of domestic violence against the same victim who was the victim of the current offense, where the purpose of the evidence of prior acts was to impeach the victim's testimony at trial. Id. at 924-25. Its holding is not relevant here.

e. No Error Has Been Established.

The trial court properly exercised its discretion in admitting the evidence of Schneider's rapes of A.S. The court relied on the legal standards that Schneider agrees are controlling, the four-part analysis adopted in Lough and more fully explained in DeVincentis. RP 240. Its application of those standards was a reasonable exercise of its discretion.

When evidence of prior bad acts is admitted as proof of a common scheme or plan, the defendant is entitled to a limiting instruction upon request. Gresham, 173 Wn.2d at 423. The trial court here gave the limiting instruction that was requested by Schneider. CP 23 (instruction 7); RP 1244.

Schneider has not established error.

4. THE TRIAL COURT DID NOT ERR IN EXCLUDING EVIDENCE THAT J.S. HAD REPORTED SHE WAS ABUSED WHEN SHE WAS FIVE YEARS OLD.

Schneider claims that the trial court abused its discretion in excluding evidence that J.S. had reported that when she was 5 years old, she was abused by a former housemate. This claim should be rejected because that report was irrelevant sexual background of the victim and would have necessitated a mini-trial on the issue of whether that abuse had occurred.

a. Relevant Facts.

On September 14, 2011, J.S. had a counseling session with Torr Lindberg. RP 1214. There is no testimony establishing who made the appointment: Schneider asserts that J.S. asked for to see a counselor about abuse by a former housemate (Burke) when J.S. was 5 years old, but includes no citation to the record. App. Br. at 15. Lindberg did not know who made the appointment. RP 1214. Schneider drove J.S. to the session and waited outside. RP 729, 1220.

Lindberg testified that he tried to learn whether there had been any sexual abuse of J.S. in the years she knew Schneider but that Schneider was not the focus of the session. RP 1217. He

testified that J.S. volunteered that she had not been molested by Schneider. RP 1218.

J.S. testified that she did not tell Lindberg what Schneider had been doing because she was scared because Schneider was waiting outside. RP 728. Defense counsel asked J.S. whether there was "discussion about any kind of sexual matters?" and J.S. responded: "We did talk about my past, but I didn't go there to talk about [Schneider] or anything pertaining to my present life." RP 825.

Lindberg's notes from that session include the following: "Client describes regular sexual abuse around age five. Stepdad would put younger sibs to bed and ask her to stay up with him and touch him. Moved out when mom discovered. No abuse reported after that time." RP 127.

On October 27, 2011, days after her initial report of Schneider's abuse, J.S. reported to Det. Paredes that Schneider told her that he was having intercourse with her so that she "could move on" from what the former housemate (Burke) had done to her. Ex. 1-G at 5.

On November 3, 2011, during a sexual assault examination, J.S. reported that she had been sexually assaulted before by a

former housemate (Burke). Ex. 25 at 2. J.S. said that Schneider told her she should not tell the police because it was so long ago. Id. She said Burke would have her watch pornography before they had sex, that it occurred on the couch, and that Burke "would go as far as he could given that she was five years old." Ex. 25 at 3.

On December 20, 2012, during a defense interview, J.S. said she was not sure if she had been abused by Burke when she was five. Ex. 1-F at 3. After counseling that occurred after she reported Schneider's abuse, and talking with her mother, J.S. said she believed it was Schneider who first said she had been sexually abused by Burke. Ex. 1-F at 4, 49-50. At this point, J.S. could not remember being abused by Burke, and thought it was unlikely that Burke would have done that. Id.

The trial court excluded J.S.'s statements referring to abuse by Burke, finding it inadmissible under ER 403, because it would result in a satellite trial, and the confusion and unfair prejudice it would cause outweighed any marginal relevance. RP 276-77, 293, 760-61, 881. The court observed that this would be other suspect evidence and require evidence regarding any investigation into that possible abuse. RP 760-61.

b. The Trial Court Properly Exercised Its Discretion In Excluding This Evidence.

The court's decision to exclude testimony about the reports of prior abuse was an evidentiary ruling. Evidentiary rulings will be reversed only for an abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). Discretion is abused only if its exercise is manifestly unreasonable or is based on untenable grounds or reasons. Id.

The trial court properly concluded that the reports of abuse were irrelevant, and that the dangers of unfair prejudice and confusion of the jury warranted exclusion. RP 276-77, 293, 760-61. Irrelevant evidence is inadmissible. ER 402. Evidence may be excluded under ER 403 if it will result in confusion of the issues at trial. The trial court decided that admission of the evidence would result in a mini-trial concerning that abuse. RP 277. Because any relevance of the reports of prior abuse depended on whether the abuse occurred, the nature of the abuse, and how it was discovered, and on whether it was Schneider who told J.S. that she had been abused, the court's ruling was a proper exercise of discretion.

On appeal, Schneider offers three reasons that the reports of prior abuse were relevant to J.S.'s credibility. First, he asserts that the evidence showed that J.S. reported sexual abuse before, which caused her mother to give up Burke, and Elizabeth was going to give Schneider custody of J.S. in the divorce. App. Br. at 61. This assertion is not supported by a citation to the record, and the State has found nothing in the record to support the claim that J.S. reported that abuse when she was 5 years old. The only reference to the revelation of that abuse is in Lindberg's notes: "Moved out when mom discovered." RP 127.

J.S.'s concern that Schneider might get custody of her in the divorce was explored in her testimony. She testified that she told her mother about the rapes after Schneider had moved out and they were getting a divorce; it was going to come to a custody battle, so J.S. told Elizabeth before that happened. RP 727; 797. J.S. testified that Schneider told her that she would live with him. RP 797. Anyone would understand that the 16-year-old knew that charges that Schneider had raped her would prevent her placement with him. Because this motive to report abuse was explored at trial, there was no need to refer the prior abuse.

Schneider also asserts the report of prior abuse is relevant to show that J.S. had a basis of knowledge of sexual abuse, aside from the abuse by Schneider. App. Br. at 61. This claim assumes the truth of the report of prior abuse. The truth of that allegation would have to be litigated to establish its relevance, particularly in light of J.S.'s current belief that it was Schneider who told her she had been abused before and then used that as an excuse for his sexual assaults.

In any event, there is no reason to believe that when J.S. reported Schneider's assaults, at 16 years old, she was unfamiliar with the details of sexual intercourse, or unfamiliar with the nature of pornography. There was no suggestion at trial that the only source of such knowledge could be Schneider's abuse.

Finally, Schneider claims that the reports of abuse were relevant to show that J.S. had changed her belief about what happened based on her mother's influence, not on what J.S. experienced or remembered. App. Br. at 61. As to this theory, the probative value of the evidence also depends upon whether the prior abuse occurred, whether J.S. had any memory of the abuse in 2011 when she reported that it had occurred eleven years earlier, and whether it was actually Schneider who told J.S. that she had

been abused by someone else.[17] Further, J.S. said that her counseling sessions after she reported being raped by Schneider also contributed to her uncertainty about whether the prior abuse occurred, and exploring the nature of those counseling sessions would confuse the issues, likely resulting in litigation about the validity of the counseling, and an unwarranted invasion of J.S.'s privacy. It is also irrelevant to the current trial that J.S. may have relied on her mother to help her understand whether she had been abused as a 5-year-old, when J.S. could not remember.

Schneider asserts that exclusion of J.S.'s report of abuse (by Burke) eliminated context for the testimony that J.S. told Lindberg that she had not been sexually abused "since that time," suggesting that Lindberg suspected Schneider abused J.S. App. Br. at 61-62. But the phrase "since that time" was not used in the testimony. RP 1217-18. Lindberg clearly testified that Schneider was not the focus of the session and that it was J.S. who volunteered that Schneider was not molesting her. RP 1218. Despite the court's ruling excluding reference to prior abuse, defense counsel managed to obtain testimony from both Lindberg and J.S. indicating

[17] Schneider's claim that Elizabeth told him that J.S. had been abused by Burke is supported by citations to the record that are simply assertions by defense counsel. App. Br. at 15 (citing CP 68, RP 291). There is no statement to that effect in the record by anyone with personal knowledge.

that the subject of the session was prior sexual abuse. RP 1217, 1221-22 (Lindberg testified that the volunteered denial of abuse was natural, in context); RP 825 (asked if they discussed sexual matters, J.S. responded that they did talk about "my past" but not Schneider's abuse).

Even if the court's ruling as to the reports of prior abuse were error, it was harmless. Evidentiary error is reversible only if "within reasonable possibilities, the outcome of the trial would have been materially affected had the error not occurred." State v. Brockob, 159 Wn.2d 311, 351, 150 P.3d 59 (2006) (quoting State v. Bourgeois, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)). Given the minimal probative value of J.S.'s reports of possible abuse that occurred years before J.S. met Schneider, admitting that evidence would not have changed the outcome.

c. The Exclusion Of This Irrelevant Evidence Did Not Violate Schneider's Constitutional Rights.

Schneider claims that exclusion of this testimony deprived him of the ability to put on a defense and of his right to confrontation. This argument is without merit. The defendant does not have the right to admit otherwise inadmissible evidence simply by invoking a claim of a constitutional violation.

The right to present evidence in one's defense is a fundamental element of due process. State v. Hudlow, 99 Wn.2d 1, 14-15, 659 P.2d 514 (1983). But the defendant's right to present evidence is not unlimited. Id. at 15. A defendant has no right to present irrelevant or inadmissible evidence. Id.; State v. Finch, 137 Wn.2d 792, 824-25, 975 P.2d 967 (1999); State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009).

Even when the claim is of a violation of the right to confrontation, the trial court's ruling limiting cross-examination will be reversed only upon a finding of manifest abuse of discretion. State v. Fisher, 165 Wn.2d 727, 752, 202 P.3d 937 (2009). A trial court has wide latitude to limit cross-examination about matters remote from the charged crimes. Id. at 753.

The only point identified by Schneider that was significant to J.S.'s credibility was whether she had a bias because she wanted her mother to obtain custody in the divorce from Schneider. However, that potential bias was explored completely in J.S.'s testimony – she admitted that was why she disclosed the abuse when she did. RP 727, 797. No more detail was necessary to convey the point. Fisher, 165 Wn.2d at 752-53. A court may set boundaries on defense counsel's efforts to delve into alleged bias

"based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." Id. at 753 (quoting Delaware v. Van Arsdall, 475 U.S. 673, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986)). The court's limitations in this case fell well within these boundaries.

State v. Jones[18] does not support Schneider's argument. In Jones, the defendant was charged with rape and proffered testimony that the sexual intercourse had occurred during a sex party at which the victim engaged in consensual intercourse with three males. 168 Wn.2d at 717. The Supreme Court found error in exclusion of evidence relating to the sex party because it deprived Jones of his ability to testify to his version of the incident, which was very highly probative. Id. at 721-23. Here, by contrast, Schneider argues only that the statements were relevant to the credibility of J.S., and they had at most marginal probative value.

Schneider claims that he was denied the ability to meaningfully cross-examine J.S., citing State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002). But in Darden, the trial court erred in preventing cross-examination of a police officer about the location

[18] 168 Wn.2d 713, 230 P.3d 576 (2010).

of his observation post, from which the officer testified that he observed Darden's drug dealing. 145 Wn.2d at 615-17. It does not justify a conclusion that a witness may be cross-examined about her sexual history to establish that she understands the nature of sexual intercourse, or to establish that she understands that a report of sexual abuse will influence a custody decision.

Even if the court's limitation was constitutional error, it was harmless beyond a reasonable doubt, as the excluded evidence added nothing of probative value to the evidence that was admitted at trial regarding the charged crimes or the credibility of J.S.

5. THE TRIAL COURT DID NOT ERR IN EXCLUDING TESTIMONY OF SCHNEIDER'S CIVIL LAWYER THAT J.S. HAD BEEN ADVISED THAT A.S. HAD ALLEGED THAT SCHNEIDER SEXUALLY ABUSED A.S.

Schneider called his former civil lawyer, Annetta Spicer, to testify that she interviewed J.S. in the course of a civil proceeding in 2010, and that when Spicer asked if J.S. had been sexually molested by Schneider, J.S. said she had not. CP 72. The State objected, but the court allowed that testimony. RP 201-05, 281, 1224-36. Schneider now contends that the trial court abused its discretion in sustaining an objection to his question to Spicer,

whether J.S. "was made aware of . . . the allegation of [A.S.]?" RP 1232. This claim has not preserved and is meritless.

a. Relevant Facts.

Annetta Spicer represented Schneider in a civil proceeding in Oregon related to Schneider's former marriage to A.S.'s sister, Jessica. RP 1227. Jessica testified that in that child custody proceeding, she filed a declaration that Schneider had sexually molested her sister. RP 1023, 1027, 1030-31. Jessica's petition for custody includes the statement that Schneider is known to be violent and is accused of child molestation and rape. Ex. 45 at 3, 6. The name of the alleged victim is not included and there is no further detail about that accusation. Ex. 45.

Jessica's petition did state that "the girls have expressed not wanting to see him due to him walking around naked and taping them while dressing." Ex. 45 at 3. This is a reference to the daughters from Schneider's marriage to Jessica, who are listed as the subject of the petition, which requests full custody of those three girls. Ex. 45 at 1-2; Ex. 1-A at 37. (Ex. 45 was not admitted.)

Spicer testified that when she saw that declaration, it triggered her conversation with J.S. RP 1230, 1234. She had the

conversation with J.S.'s mother in the room, and with Schneider waiting down the hall. RP 1236.

Spicer testified that, prompted by the declaration, she asked J.S. "very specific questions about sex abuse and about uncomfortable contact," including whether she had ever been touched in private places by Schneider. RP 1231. Spicer stated that J.S. said nothing had ever happened and J.S. had no issues with him. RP 1231-32. Spicer had no notes of her 10 to 15 minute interview that occurred four years before trial. RP 1234.

At the conclusion of direct examination, defense counsel asked, "Did this, did your questions, was she made aware of the, of the allegation of [A.S.]?" RP 1232. The witness answered before the prosecutor could voice his objection, but that objection was sustained and the question was stricken. RP 1233. Defense counsel did not offer any argument that the question was appropriate or the answer admissible. RP 1233.

b. The Answer To This Question Was Irrelevant And The Objection Was Properly Sustained.

The trial court sustained this objection, as it had sustained objections to a number of additional questions attempting to elicit Spicer's opinion that Schneider had not abused either J.S. or A.S.

RP 1228-31. The State had moved in limine to preclude Spicer from opining that she believed J.S. was being truthful or her opinion as to the credibility of A.S. CP 229; RP 201. Defense counsel represented, "that's not going to happen." RP 201. When it permitted Spicer's testimony, the court specified that the witness would not be permitted to state "what she believed, who was being truthful, and who was being coerced or not." RP 281.

Despite that ruling, defense counsel elicited Spicer's training in the area of sexual assault. RP 1226. He also elicited that she was a mandatory reporter and that she had made required reports of abuse several times during her career, including reporting her own clients. RP 1226-27. In attempting to elicit that the document referred to allegations of rape by A.S., counsel was attempting to draw the inference that Spicer did not believe that allegation and that she believed J.S.'s denial of abuse. Defense counsel elicited the things Spicer looked for in determining the credibility of a child's denial of abuse. RP 1232. In responding, Spicer listed several things that would indicate a child being interviewed had been abused and said "this child indicated no, nothing that would raise any questions in my mind about the questions that I was asking her." RP 1232. This was a clear violation of the court's order

prohibiting the witness's opinion as to truthfulness. The very next question was the question about an allegation by A.S. RP 1232. The prosecutor objected in order to avoid any opinion being elicited as to the veracity of A.S.'s allegations, whether that opinion was attributed to J.S. or to Spicer.

In any event, the only thing that Spicer knew about A.S.'s allegations was that A.S. accused Schneider of "sexual molestation and rape." Ex. 45 at 3, 6. Spicer testified that Ex. 45 was the sole basis of her interview of J.S. RP 1230, 1234. There is no citation to the record to support Schneider's claim that Spicer told J.S. anything else about "what [A.S.] claimed [Schneider] had done to her." App. Br. at 62. Thus, Schneider's argument that this evidence detracted from the probative value of the similarities of the girls' description of abuse is entirely without merit. It would be misleading to argue that it did detract from the corroborative value of the similarities described by the two girls, when Spicer had no knowledge of the details of A.S.'s allegations that she could have conveyed to J.S.

c. Schneider Has Not Established That The Prosecutor's Reference To The Striking Of This Testimony Was Prosecutorial Misconduct.

Schneider argues that the prosecutor knowingly used false evidence to obtain the conviction because the prosecutor knew that Spicer told J.S. about what Schneider had done to A.S. but argued that J.S. did not know. Because Spicer did not know the details of A.S.'s allegations, and could not have told J.S. about them, this argument is frivolous. Schneider does not claim that the prosecutor's statements in closing inaccurately stated the evidence.

As a preliminary matter, Schneider did not raise this constitutional claim in the trial court. RAP 2.5(a) bars consideration of this issue. A claim of error may be raised for the first time on appeal only if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). No such error has been identified.

The prosecutor's argument was a fair response to defense counsel's closing remarks, which misled the jurors by arguing that as a result of Spicer's interview, J.S. knew what A.S.'s allegations were. RP 1294. There was no evidence that Spicer told J.S. anything about abuse reported by A.S. – that answer was stricken. RP 1233. Beyond that, there is no evidence that Spicer knew what

A.S.'s allegations were – the document Spicer had did not provide any detail beyond "sexual molestation and rape." RP 1294; Ex. 45. A.S. testified that she did not talk about the details of Schneider's rapes to anyone other than in the two law enforcement interviews (2003 and June 2010) and the defense interview in this case in 2014. RP 990. There is no suggestion that Spicer had access to the contents of the single law enforcement interview that occurred before her April 2010 interview with J.S.

In rebuttal, the prosecutor pointed out that defense counsel's question to Spicer about J.S.'s knowledge of A.S.'s allegations was stricken. RP 1300. This was correct. RP 1233. His argument that J.S. did not know the details of the rapes reported by A.S. is an accurate reflection of the record. There was nothing improper in that argument and even if it had been improper, the prosecutor is permitted to respond to misleading defense arguments. State v. Weber, 159 Wn.2d 252, 276, 149 P.3d 646 (2006). Schneider has not established that the argument was so prejudicial it could not have been cured – it was an accurate reflection of the record, and defense counsel at trial did not find it sufficiently prejudicial to make object on that basis. The absence of an objection by defense counsel "*strongly suggests* to a court that the argument or event in

question did not appear critically prejudicial to an appellant in the context of trial." State v. McKenzie, 157 Wn.2d 44, 53 n.2, 134 P.3d 221 (2006) (emphasis in original) (quoting State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990)).

Schneider does not dispute that J.S. did not know A.S. RP 742, 991. In his lengthy cross-examination of J.S., he did not ask whether she had heard the details of A.S.'s rape allegations at any point. RP 743-838, 850-52.[19] The defense theory was the reverse: that A.S. had changed her description of the abuse that she suffered because she had learned details of Schneider's abuse of J.S. RP 979, 1031, 1293.

Schneider offers no authority for the proposition that a closing argument constitutes "false evidence." The standard on review of trial irregularities is whether the misconduct prejudiced the jury and as a result deny the defendant a fair trial guaranteed by the due process clause. State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984). The correction of a misleading closing argument by the defense does not fall within this category of error.

[19] In closing argument, defense counsel argued that when J.S. said "you lied about Oregon" in her letter to Schneider (Ex. 4), she was referring to the rapes of A.S. RP 1294. Defense counsel did not ask the meaning of that reference in cross-examination, perhaps because it is likely that J.S. was referring not to sexual abuse, but to her belief that Schneider had murdered men in Oregon. RP 1345.

6. THE TRIAL COURT DID NOT ERR IN IMPOSING COURT COSTS.

Schneider claims for the first time on appeal that he is not employable, is indigent, and the trial court's imposition of $887.50 was in violation of RCW 10.01.160 because the court did not conduct an inquiry into Schneider's ability to pay before concluding that he was able to do so. This Court should decline to consider this issue, because any error was invited and because the issue was not preserved. As to the merits of the claim, the record supports the judge's conclusion that Schneider would have the ability to pay $887 at some time in the future.

A defendant who invites error may not claim on appeal that he is entitled to reversal based on that error. State v. Studd, 137 Wn.2d 533, 546, 973 P.2d 1049 (1999). The invited error doctrine bars relief regardless of whether counsel intentionally or inadvertently encouraged the error. Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2002). At sentencing, defense counsel asserted that Schneider was a "productive member of the community" and claimed that at a bail hearing Schneider had presented evidence that he worked throughout his adult life. RP 1347-48; see RP 11 (bail hearing). Counsel did not suggest

that Schneider was disabled. Id. Schneider did not dispute this characterization. RP 1348. These representations indicated that Schneider would be financially able to pay the $887 in court costs in addition to the $600 in mandatory fines imposed.[20] CP 58. He should not now be permitted to challenge the finding that he encouraged the court to make.

Even if the error was not invited, this court should decline to review it under RAP 2.5(a)(3). Because Schneider alleges only a statutory violation, he is not entitled to review for the first time on appeal. State v. Blazina, 182 Wn.2d 827, 832, 344 P.3d 680 (2015). While the Supreme Court in Blazina exercised its discretion to address the findings necessary to impose discretionary legal financial obligations, that was in the context of establishing a framework that would avoid over-burdening indigent defendants with such obligations. In this case, Schneider retained two attorneys for trial and retained appellate counsel. RP 8, 1350. He posted $500,000 bond to obtain his release from custody pending trial – he posted that bond 17 days after he was denied reduction of the bond amount. CP 193-94; RP 14. He had over $6500 in cash in his pocket when he was arrested – at the bail hearing counsel

[20] The State presented a request for restitution totaling $511.48. RP 1345. There is no indication that any restitution ever was ordered.

asserted the cash belonged to Schneider's girlfriend, but in his trial memorandum, counsel asserted it was Schneider's cash wages. RP 11; CP 89.

This sentencing occurred a year after the lower court opinion in State v. Blazina, 174 Wn. App. 906, 301 P.3d 492 (2013), which held that a defendant must object to imposition of costs in the trial court to obtain review. Trial counsel confirmed that the court was imposing costs and chose not to object, most likely because he believed that an objection was not warranted. RP 1351. This is not a case that cries out for review.

Even if this court considers the merits of this claim, it should conclude that based on the information before it, including the defense representation of Schneider's steady employment, and the information given to the court that Schneider had retained counsel for the appeal, the trial court properly concluded that Schneider had either the present or future ability to pay the court costs of $887.

Schneider asserts that because the trial court authorized the preparation of trial transcripts at public expense, for purposes of direct appeal, the predicate finding of indigency should control. However, the court was not informed of the details of the declaration before imposition of the sentence and was not asked to

review that paperwork for purposes of sentencing; he did not review it until sentencing was completed. RP 1350. The court was informed that Schneider did not need counsel to be appointed for the appeal. RP 1350. Further, the inability of a defendant to immediately pay the costs of preparation of a lengthy trial transcript does not establish that he does not have the ability to pay $887 in costs at some time in the future.

E. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Schneider's convictions and sentence.

DATED this 1st day of September, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
DONNA L. WISE, WSBA #13224
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Lenell R. Nussbaum, the attorney for the appellant, at lenell@nussbaumdefense.com, containing a copy of the Brief of Respondent, in State v. Eric Steven Schneider, Cause No. 71822-3, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 1st day of September, 2015.

Rina Kim

Name: Rina Kim
Done in Seattle, Washington