No. 32927-5-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS L. PADGETT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

Travis L. Padgett was convicted of various identically charged counts of rape of a child, incest, and child molestation. However, the "to convict" instructions for the numerous identically charged offenses failed to make clear that proof of any one incident could not support a finding of guilt for more than one count, in violation of the prohibition against double jeopardy.

Mr. Padgett was also convicted two counts of distribution of methamphetamine to a minor, H.M. and K.S., even though no drugs or drug paraphernalia were found during a search of his house. As to H.M., in the absence of testimony by a person with appropriate expertise in drug identification, insufficient evidence was presented to prove the substance described by H.M. was methamphetamine. As to K.S., the State introduced testimony regarding a drug test report as a business record in the absence of an adequate foundation and in violation of the Confrontation Clause of the Sixth Amendment.

Special verdicts that the sex offenses were part of an ongoing pattern of abuse over a "prolonged period of time" were fatally flawed where the court defined a "prolonged period of time" as meaning "more than a few weeks," an impermissible comment on the evidence that

relieved the State of its burden of proof. A special verdict that the sex offenses against H.M. were aggravated domestic violence offenses fails because the State did not prove each alternative means alleged. Further, when imposing the exceptional sentence, the court entered thirty-two judicial findings of fact, in addition to the judicial finding that the special verdicts constituted "substantial and compelling reasons" for the sentence, in violation of Mr. Padgett's right a due process and a jury finding of every fact essential to punishment.

B. ASSIGNMENTS OF ERROR

1. Insufficient evidence was presented to establish the substance Mr. Padgett purportedly gave to H.M. was methamphetamine, an essential element of distribution of a controlled substance to a minor, H.M., as charged, in violation of the Fourteenth Amendment and Article I, section 3.

2. Insufficient evidence was presented to establish the methamphetamine purportedly found in K.S.'s system was provided to her by Mr. Padgett, an essential element of distribution of a controlled substance to a minor, as charged, in violation of the Fourteenth Amendment and Article I, section 3.

3. The trial court erroneously admitted testimony regarding a drug test report as a business record, in the absence of adequate foundation testimony regarding the identity of the person who collected the sample, the person who performed the test, the test procedure, or the mode of preparation of the report of the test results, in violation of RCW 5.45.020.

4. The drug test report prepared by an unidentified, non-testifying technician was admitted in violation of Mr. Padgett's Sixth Amendment right to confrontation.

5. Jury instructions No. 2, 11, 12, 16, and 18 exposed Mr. Padgett to multiple punishments for the same offense, in violation of the Fifth Amendment and Article I, section 9.

6. Jury instructions No. 2, 14, 15, 17, 19 exposed Mr. Padgett to multiple punishments for the same offense, in violation of the Fifth Amendment and Article I, section 9.

7. Jury instructions No. 2, 11, 33, 35 exposed Mr. Padgett to multiple punishments for the same offense, in violation of the Fifth Amendment and Article I, section 9.

8. Jury instructions No. 2, 32, 34, 36 exposed Mr. Padgett to multiple punishments for the same offense, in violation of the Fifth Amendment and Article I, section 9.

9. Jury instructions No. 40 and 41 were an improper judicial comment on the evidence, in violation of Article IV, section 16.

10. Jury instructions No. 40 and 41 impermissibly relieved the State of its burden of proving every element of the aggravating factor beyond a reasonable doubt, in violation of the Fourteenth Amendment and Article I, section 3.

11. Insufficient evidence was presented to establish each alternative means of committing aggravated domestic violence by a pattern of "psychological, physical, or sexual abuse," as charged, in violation of the Sixth and Fourteenth Amendments and Article I, sections 3 and 21.

12. The trial court erroneously imposed discretionary costs in the amount of $1150 without taking into account Mr. Padgett's financial resources and the nature of the burden that payment of costs would impose, in violation of RCW 10.01.160(3).

13. In the absence of supporting evidence in the record, the court's boiler-plate findings "that the defendant has the means to pay

for the cost of incarceration" and "the defendant has the means to pay for any costs of medical care" were clearly erroneous.

14. The Felony Judgment and Sentence erroneously includes a special finding that "based upon special verdicts," the numerous counts did not encompass the same criminal conduct, in the absence of such special verdicts.

15. The Warrant of Commitment erroneously indicates that Mr. Padgett was convicted of Count 14, when he was acquitted of that count.

16. The trial court impermissibly engaged in judicial fact-finding when it entered Finding of Fact 1 - 32 in support of the exceptional sentence, in violation of the Sixth and Fourteenth Amendments and Article I, sections 21 and 22.

17. The trial court impermissibly engaged in judicial fact-finding when it found aggravated domestic violence was a "substantial and compelling reason[] justifying an exceptional sentence," in violation of the Sixth and Fourteenth Amendments and Article I, sections 21 and 22.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires the State to prove beyond a reasonable doubt every essential element of the crime charged. An essential element of the offense of distribution of a controlled substance to a minor, H.M., as charged in Count 8, was the substance was methamphetamine. In the absence of evidence to prove beyond a reasonable doubt that the substance described by H.M. was methamphetamine, was Mr. Padgett's right to due process violated when he was convicted of distribution of methamphetamine to H.M.?

2. Due process requires the State to prove beyond a reasonable doubt every essential element of the crime charged. An essential element of the offense of distribution of a controlled substance to a minor, K.S., as charged in Count 9, was the methamphetamine found in K.S.'s system was provided by Mr. Padgett. In the absence of evidence to prove beyond a reasonable doubt that Mr. Padgett provided methamphetamine to K.S., was Mr. Padgett's right to due process violated when he was convicted of distribution of methamphetamine to K.S.?

3. A business record may be admitted through the testimony of a custodian of the record only when the custodian testifies, *inter alia*, to

the mode of the record's preparation. RCW 5.45.020. Where a physician testified regarding a report containing the results of a drug test, but he did not conduct the test or prepare the report, he did not identify the person who collected the sample or the person who conducted the test, he did not provide meaningful information as to the testing procedure, and he did not testify regarding the mode of preparation of the report, did the trial court abuse its discretion in admitting the testimony regarding the test results as a business record?

4. The Confrontation Clause of the Sixth Amendment bars admission of testimonial statements unless the declaring witness is subject to cross-examination under oath. Did admission of a drug test result offered to prove K.S. had methamphetamine in her system without testimony from the person who prepared the report deny Mr. Padgett his right to confrontation of witnesses against him?

5. The prohibition against double jeopardy protects an individual from multiple punishments for the same offense. Mr. Padgett was charged with three counts of rape of a child, H.M., all alleged to have occurred during the same time period, three counts of incest, all alleged to have occurred during the same time period, two counts of child molestation, both alleged to have occurred during the same time

period, and two counts of rape of a child, J.J., both alleged to have occurred during the same time period. The court's instructions failed to instruct the jury proof of any one incident could not support a finding of guilt on more than one count. Did the incomplete jury instructions permit the jury to convict Mr. Padgett multiple times for a single incident, in violation of double jeopardy?

6. A trial court may not comment on the evidence. Here, when instructing on the aggravating circumstance that "the crime was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time," the judge instructed the jurors that "prolonged period of time" meant "more than a few weeks." When instructing on the aggravating circumstance that "the crime is an aggravated domestic violence offense," the court instructed, "an 'ongoing pattern of abuse' means multiple incidents of abuse over a prolonged period of time" and, again, that "prolonged period of time" meant "more than a few weeks." Did these instructions constitute an improper judicial comment on the evidence?

7. Due process requires the State to prove beyond a reasonable doubt every essential element of an aggravating circumstance. An

essential element of the aggravating circumstance of aggravated domestic violence requires the State to prove beyond a reasonable doubt multiple incidents occurred over a prolonged period of time. Where the court repeatedly instructed the jurors that a "prolonged period of time" meant "more than a few weeks," did these instructions relieve the State of its burden of proof, in violation of Mr. Padgett's right to due process?

8. When an aggravating circumstance may be committed by alternative means and the State fails to elect which means it is relying for an enhanced sentence, a defendant's right to jury unanimity and to due process requires substantial evidence to support all means presented to the jury. Where the State failed to elect which of three means it was relying on for the aggravating circumstance of aggravated domestic violence based on an ongoing pattern of "psychological, physical, or sexual abuse," and the jury was instructed on all three alternative means but did not present substantial evidence to support all means, did these instructions relieve the State of its burden of proof, in violation of Mr. Padgett's right to due process?

9. A court may not order a defendant to pay discretionary costs unless it conducts an individualized inquiry and determines the

defendant can or will be able to pay the costs, taking into account the financial resources of the defendant and the nature of the burden that payment of costs will impose. Where the court imposed discretionary costs in the amount of $1150 without making the requisite inquiry into Mr. Padgett's present or future ability to pay those costs, must this matter be remanded for a new sentencing hearing

10. In the absence of any evidence regarding Mr. Padgett's current or future ability to pay costs, was the court's boilerplate finding that he had the means to pay for the cost of incarceration and medical care clearly erroneous?

11. Is remand required for entry of a corrected Felony Judgment and Sentence when the judgment erroneously indicates special verdicts were entered on "same criminal conduct"?

12. Is remand required for entry of a corrected Warrant of Commitment when the warrant erroneously includes Count 14, when Mr. Padgett was acquitted of that charge?

13. The constitutional right to jury trial and proof beyond a reasonable doubt prohibit a court from imposing an exceptional sentence without a jury determination beyond a reasonable doubt of the facts essential to the punishment. Where the court entered thirty-two

judicial findings of fact without a jury finding of those facts beyond a reasonable doubt, must this matter be remanded for a new sentencing hearing?

14. The constitutional right to jury trial and proof beyond a reasonable doubt prohibit a court from imposing an exceptional sentence without a jury determination beyond a reasonable doubt of the facts essential to the punishment. Where the court found the special verdict of aggravated domestic violence constituted a "substantial and compelling reason" to impose an exceptional sentence above the standard range, was this a judicial fact-finding in violation of Mr. Padgett's right to trial by jury?

D. STATEMENT OF THE CASE

In July 2012, Travis L. Padgett gained custody of his fourteen-year-old son, H.M., following accusations by H.M. that his mother and step-father were physically and verbally abusive to him. 10/15/13 RP 734; 10/16/13 RP 833; 10/18/13 RP 1136. In January 2013, H.M. called his mother and stated he wanted to run away and Mr. Padgett was using drugs. 10/18/13 RP 1142-43, 1145. His mother called the police for a child welfare check and Officer Bradley Althouser went to Mr. Padgett's home. 10/14/13 RP 540-41, 543; 10/18/13 RP 1145. Mr.

Padgett was not home but H.M. answered the door. 10/14/13 RP 544. According to Officer Althouser, H.M. reported "sometimes his dad abuses him. He tries to get him to do meth, and he has women over to the house, stuff that makes him uncomfortable." 10/14/13 RP 549.

The following morning, H.M.'s school resource officer took him to the police station where he was interviewed by Detective Curtis Oja. 10/14/13 RP 547, 555-56, 558, 581. In the interview, H.M. reported he was sexually abused by Mr. Padgett, Mr. Padgett smoked and ingested methamphetamine, and he gave H.M. drugs "on a regular basis." 10/14/13 RP 625-27. Detective Oja obtained a court order for H.M. to place a one-party consent recorded telephone call to Mr. Padgett. 10/14/13 RP 589-90. H.M. made three successive calls, in which he accused Mr. Padgett of using drugs and having sex with him. 10/14/13 RP 601-02; Ex. 2, 42. Mr. Padgett vehemently denied the accusations and ended each call by hanging up. 10/14/13 RP 602; Ex. 2, 42. About one hour later, Mr. Padgett went to the police station believing H.M. had been picked up as a run-away, and he was arrested. 10/14/13 RP 631, 636. According to Detective Oja, Mr. Padgett was "totally surprised" by the arrest. 10/14/13 RP 632.

Detective Oja and Detective Michael Durbin executed a search warrant for Mr. Padgett's home. 10/14/13 RP 602. No one answered their knock on the front door, but when they entered the home, fourteen-year-old K.S. was discovered in the basement. 10/14/13 RP 607, 649-50. K.S. stated she and Mr. Padgett used methamphetamine five or six hours prior to the search. 10/14/13 RP 659-60, 665. In the basement, where Mr. Padgett had a bedroom, an office, and a utility area, they found numerous sex toys, including lubricant, male enhancement drugs, and pornographic videos. 10/14/13 RP 609-12, 614-17, 674-75. No drugs or drug paraphernalia were in the home. 10/14/13 RP 628-29. Several days later, Detective Oja interviewed J.J., a friend of H.M., who reported he spent many weekends at Mr. Padgett's home and he was "involved in the some of the acts as well." 10/14/13 RP 585-86.

Mr. Padgett was charged with three counts of rape of child in the third degree regarding H.M., all alleged to have occurred during the same charging period, three counts of incest in the first degree, all alleged to have occurred in the same charging period, communication with a minor for immoral purposes regarding K.S., one count of distribution of methamphetamine to a minor regarding H.M., one count

of distribution of methamphetamine to a minor regarding K.S., two counts of child molestation in the third degree regarding J.J., both alleged to have occurred during the same charging period, two counts of rape of a child in the third degree regarding J.J., both alleged to have occurred in the same charging period, and one count of child molestation in the third degree regarding J.J., alleged to have occurred on or about August 1, 2012. CP 14-19.

At trial, H.M. testified Mr. Padgett regularly initiated sexual relations with him, and H.M.'s friend, J.J., eventually joined in the sexual activities with Mr. Padgett, Mr. Padgett's girlfriend, and H.M. 10/15/13 RP 751, 754, 757-58, 760, 762-63, 765-67, 770, 772, 796-801, 805, 818. In addition, H.M. testified that Mr. Padgett gave him methamphetamine on various occasions. 10/15/13 RP 780, 782, 784, 787, 801-03, 806. However, there was no evidence that H.M. had any particular experience from which he could accurately identify methamphetamine.

Donna Howell, a nurse at Yakima Regional Hospital, examined H.M. after Mr. Padgett was arrested. 10/17/13 RP 1049, 1050, 1054. H.M. reported he had sexual relations with Mr. Padgett and with older women who came to the house, and Mr. Padgett gave him "weed, meth

and alcohol." 10/17/13 RP 1051-52, 1055. Even so, Ms. Howell apparently did not request a drug screen test for H.M.

Fifteen-year old J.J. testified that he spent most weekends at Mr. Padgett's home after H.M. moved in. 10/17/13 RP 922, 927, 930. Nothing remarkable occurred for the first five or six weekends, but at some point in time he watched pornographic videos, he observed Mr. Padgett and H.M. engage in oral and anal sex, and he eventually participated. 10/17/13 RP 931-32, 933, 934, 974-75. J.J. denied observing any drugs or drug use at Mr. Padgett's house. 10/17/13 RP 951, 982.

Deidre Demel, a nurse at Yakima Regional Hospital, examined J.J. 10/17/13 RP 1062-63. Contrary to J.J.'s sworn testimony, Ms. Demel stated that J.J. reported H.M. and Mr. Padgett used drugs and alcohol. 10/17/13 RP 1059-60, 1062-63.

Fifteen-year old D.B., a friend of H.M., testified that he went over to Mr. Padgett's house several times, and H.M. gave him beer one time and showed him a pornographic video, but he never observed any drugs at the house. 10/18/13 RP 1080, 1082, 1088, 1089, 1091.

K.S. testified that she went to Mr. Padgett's house to get methamphetamine. 10/18/13 RP 1094. She stated that she smoked

methamphetamine with Mr. Padgett in H.M.'s presence, and she had taken methamphetamine shortly before the detectives executed the search warrant. 10/18/13 RP 1099-1100.

Trish McDougall, a nurse at Memorial Hospital, saw K.S. when a police officer brought her to the hospital. 10/17/13 RP 901-02, 903, 906. According to Ms. McDougall, K.S. reported that she performed oral sex on "Travis," she used methamphetamine the previous day, and she had a history of cocaine and marijuana use. 10/17/13 RP 919. Dr. Wyatt Rivas ordered a drug test. 10/21/13 RP 1189. Over defense objection, Dr. Rivas testified that the drug test came back positive for methamphetamine and marijuana. 10/21/13 RP 1191. He explained that methamphetamine stays in one's system for several days and marijuana stays in one's system for seven to ten days but a drug test cannot determine when a drug was ingested. 10/21/13 RP 1192-93.

Shannon McIntosh testified she had known Mr. Padgett for approximately twenty years. 10/22/13 RP 1241. She served eight years in prison for conspiracy to distribute methamphetamine, but following her release in 2008, she successfully completed parole and remained clean since that time. 10/22/13 RP 1241-42. She reconnected with Mr.

Padgett and she never saw drugs or drug use at Mr. Padgett's house. 10/22/13 RP 1243-44.

Cristobel Guillen, a friend of Mr. Padgett and president of the Association of Washington State Hispanics, testified that Mr. Padgett did some contract work providing technical support for the association. 10/22/13 RP 1264, 1265-66. Due to Mr. Padgett's history of drug use, he required Mr. Padgett to participate in random urinalysis testing, all of which were clean. 10/22/13 RP 1267, 1278-79. He never observed any inappropriate behavior between Mr. Padgett and H.M. 10/22/13 RP 1270, 1271-72, 1276.

Mr. Padgett testified and categorically denied having sexual contact with H.M., J.J., or K.S. 10/22/13 RP 1321, 1327, 1331, 1334, 1335-36, 1343. He acknowledged he had a past history of methamphetamine abuse but he had been drug free for five or six years by the time of trial. 10/22/13 RP 1314, 1330.

Mr. Padgett was convicted of all charges except the one count of child molestation in the third degree regarding J.J., alleged to have occurred on August 1, 2012. CP 219-32. The jury returned special verdicts that the sex offenses against H.M. were part of an ongoing

pattern of sexual abuse manifested by multiple incidents over a prolonged period of time and the current offenses involved aggravated domestic violence. CP 233-38. The jury also returned a special verdict that the offenses against J.J. were part of an ongoing patter of sexual abuse manifested by multiple incidents over a prolonged period of time. CP 239-42.

Mr. Padgett was sentenced to an exceptional sentence of 360 months. CP 468.

Additional facts are discussed in the relevant argument sections below.

E. ARGUMENT

1. Insufficient evidence was produced to prove beyond a reasonable doubt Mr. Padgett gave methamphetamine to H.M. or K.S., essential elements of distribution of methamphetamine to a minor, as charged.

a. The State must prove beyond a reasonable doubt every essential element of the crime charged.

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Cantu*, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). A criminal defendant's fundamental right to due process is violated

when a conviction is based upon insufficient evidence. *Winship*, 397 U.S. at 358; U.S. Const. amend. XIV; Wash. Const. art. I, sec. 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). Evidence is sufficient to support a conviction only if, "after 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." *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970); *State v. Drum*, 168 Wn.2d 23, 34-35, 225 P.3d 237 (2010).

b. The State failed to prove beyond a reasonable doubt Mr. Padgett gave methamphetamine to H.M.

In Count 8, Mr. Padgett was charged with distribution of methamphetamine to H.M. CP 17. The "to convict" instruction included the elements that Mr. Padgett gave a controlled substance to H.M. and that he knew the substance was methamphetamine. CP 191.

To prove Count 8, the prosecutor relied exclusively on the testimony of H.M. and his reports to others that Mr. Padgett provided him methamphetamine. 10/14/13 RP 549, 627; 10/15/13 RP 780, 782,784, 787, 806; 10/17/13 RP 1052. However, the prosecutor did not produce any scientific evidence to support H.M.'s identification of the

substance he ingested, no witness with expertise testified regarding how methamphetamine is ingested or its effects, H.M. did not testify that he had any particular expertise to identify methamphetamine, and no drug test was introduced to indicate whether H.M. had methamphetamine in his system. Moreover, although H.M. claimed Mr. Padgett regularly smoked methamphetamine and used intravenous drugs, including the night before he was arrested, absolutely no drugs or drug paraphernalia were found during the search of Mr. Padgett's home. 10/14/13 RP 627-29, 815. This absence of drugs was corroborated by the testimony of H.M.'s friends, J.J., T.J., and D.B., all of whom testified that they never saw drugs, drug paraphernalia, or drug use in Mr. Padgett's home. 10/17/13 RP 951, 982; 10/17/13 RP 1004; 10/18/13 RP 1091.

In different circumstances, courts have found that a chemical analysis is not always necessary to identify a drug. *State v. Colquitt*, 133 Wn. App. 789, 796-97, 137 P.3d 892 (2006). Lay testimony may suffice when combined with additional circumstantial evidence.

> Circumstantial evidence and lay testimony may be sufficient to establish the identity of a drug in a criminal case. Further, a witness who demonstrates an expertise "acquired either by education or experience" in this area may give an opinion as to the identity of a substance.

> The opinion need not be based upon expert chemical analysis.

State v. Hernandez, 85 Wn. App. 672, 675-76, 935 P.2d 623 (1997) (internal citations omitted).

In *Hernandez*, three consolidated appeals challenging convictions for delivery of a controlled substance, the court found sufficient evidence of identification of drugs based on testimony from officers regarding their expertise in identifying drugs, their familiarity with drug prices, their observations of behavior consistent with drug sales, the drug-using behavior of the persons contacting defendants, the defendants' presence in known drug areas, and the defendants' possession of money in amounts consistent with drug sales. *Id*. at 678–82.

In *Colquitt*, citing the considerations set forth in *Hernandez*, the court reversed the defendant's conviction for unlawful possession of cocaine, based on the testimony of an officer who found a small plastic bag containing several items that "appeared to be 'rock cocaine'" and which field tested positive for cocaine. 133 Wn. App. at 792. The court stated:

> But the problem here is the paucity of information supporting the officer's identification of the white, rock-like items. The evidence here only demonstrates that the

> officer's visual identification of the items was based on his conjecture, at best. The record is devoid of evidence of the officer's experience and training that would allow him to properly identify the items as cocaine.

Id. at 800-01 (internal citation omitted). *See also State v. Emmett*, 77 Wn.2d 520, 524, 463 P.2d 609 (1970) (reversing conviction for unlawful possession of narcotics, where there was "no description of the drugs by reference to appearance, color, taste or odor, much less a chemical analysis thereof.").

The present case has a similar paucity of information. The only "evidence" that Mr. Padgett provided methamphetamine to H.M. was H.M.'s own non-expert testimony. No circumstantial evidence supported H.M.'s assertion; no drugs or drug paraphernalia were found in Mr. Padgett's home and no drug test indicated H.M. had drugs in his system, much less methamphetamine allegedly provided by his father. In addition, there was no evidence that H.M. had any particular experience from which he could accurately identify methamphetamine. Rather, he testified that on one occasion Mr. Padgett gave him a cup with "white like little rocks," he licked the bottom of the cup and "it tasted really gross," after which he was full of energy" and on other occasions he smoked "meth." 10/15/13 RP 782-83, 806. Yet, the State presented no evidence from a knowledgeable source that

methamphetamine is smoked or orally ingested, that it tastes "really gross," or that it makes a person feel "full of energy." Without more, the evidence was insufficient to establish beyond a reasonable doubt that H.M. accurately identified the substance as methamphetamine.

c. The State failed to prove beyond a reasonable doubt Mr. Padgett gave methamphetamine to K.S.

In Count 9, Mr. Padgett was charged with distribution of a controlled substance, methamphetamine, to K.S. CP 17. The "to convict" instruction included the element that Mr. Padgett gave a controlled substance to K.S. CP 192.

To prove Count 9, the prosecutor relied on the testimony of K.S. and the results of a drug test in which she allegedly tested positive for methamphetamine and marijuana.[1] K.S. was alone in Mr. Padgett's home when the search warrant was executed. 10/14/13 RP 650. She reported that she went to Mr. Padgett's home "because he had meth," and that she smoked methamphetamine with Mr. Padgett several hours prior to the search. 10/18/13 RP 1094, 1100. Again, however, absolutely no evidence supported her allegation that Mr. Padgett provided the drug to her; Mr. Padgett had no opportunity to hide or

[1] The erroneous admission of the test results is discussed in Section (D)(2), *infra*.

destroy evidence prior to his arrest and no drugs or drug paraphernalia were found in his house. 10/14/13 RP 632; 10/21/13 RP 1191. In addition, K.S. acknowledged that she had a history of drug use, and the evidence established that methamphetamine stays in one's system for several days and a drug test cannot determine when the drug was ingested. 10/21/13 RP 1189, 1192. Without more, the evidence was insufficient to establish beyond a reasonable doubt that the methamphetamine allegedly ingested by K.S. was provided to her by Mr. Padgett.

d. The proper remedy is reversal of Mr. Padgett's convictions for distribution of methamphetamine to H.M. and K.S.

The State may contend that the allegations of H.M. and K.S. corroborate each other. However, two unsubstantiated allegations do not constitute proof beyond a reasonable doubt.

Mr. Padgett's conviction for distribution of methamphetamine to H.M. was based on insufficient evidence that the substance he allegedly gave H.M. was actually methamphetamine, as charged. His conviction for distribution of methamphetamine to K.S. was based on insufficient evidence the methamphetamine alleged found in her system was provided to her by Mr. Padgett. Convictions based on insufficient

evidence cannot stand. *State v. Veliz*, 176 Wn. App. 849, 865, 298 P.3d 75 (2013). To retry Mr. Padgett for the same conduct would violate the prohibition against double jeopardy. *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1979); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). In the absence of sufficient evidence, Mr. Padgett's convictions for distribution of methamphetamine to H.M. and K.S. must be reversed and the charge dismissed with prejudice.

2. The testimony of a physician regarding test results generated by an unidentified non-testifying laboratory technician was improperly admitted as a business record and in violation of the right to confrontation.

a. The business records exception to the rule against hearsay requires the testifying witness to provide foundation testimony regarding the mode of the record's preparation.

Business records may be admitted as an exception to the hearsay rule in only limited circumstances. ER 803(a)(6) provides:

> (a) Specific Exceptions. The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (6) *Records of Regularly Conducted Activity.* [Reserved. See RCW 5.45.]

The Uniform Business Records as Evidence Act (UBRA), RCW 5.45.020 provides:

> A record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, conditions or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

The business record exception is strictly construed. *State v. Finkley*, 6 Wn. App. 278, 280, 492 P.2d 222 (1972). "Its effect is to limit a party's opportunity to cross-examine and confront at trial the individual who prepared the record. Such a right cannot be regarded lightly." *Id*. Moreover, "[w]hile the UBRA is a statutory exception to hearsay rules, it does not create an exception for the foundational requirements of identification and authentication." *State v. DeVries*, 149 Wn.2d 842, 847, 72 P.3d 748 (2003) (citing 5C Karl B. Tegland, *Washington Practice: Evidence law and Practice* § 803.42, at 23 (4th ed. 1999)). A court's decision to admit evidence as a business record is reviewed for abuse of discretion. *State v. Ziegler*, 114 Wn.2d 553, 538, 789 P.2d 79 (1990).

b. The results of a drug test performed by an unidentified, non-testifying laboratory technician were erroneously admitted in the absence of a proper foundation.

Over defense objection, the court admitted the urine drug test results of K.S. as a business record. 10/21/14RP 1181-82. However, the State failed to lay a proper foundation for admission of testimony regarding the test results. The State did not introduce a copy of the test results but elicited testimony regarding the results through Dr. Rivas, even though he did not collect the urine sample, he did not identify the person who did collect the sample, he did not submit the sample to the laboratory, he did not identify the non-testifying technician who tested the sample, and he did not demonstrate a meaningful familiarity with the testing procedure. Dr. Rivas testified:

> Q. All right. How do you obtain a sample that's used for the drug screen? What do you do? What kind of sample is it?
> A. So it's a urine sample. The nurse helps the patient collect it, and then it's labeled with the patient's information. Then it's sent to the laboratory where it's run through an analyzer and processed. Then the results are given to us by way of computer.
> Q. All right. And what laboratory is it sent to? Is it in the hospital or outside of the hospital?
> A. It's in the hospital.
> Q. And can you describe that laboratory and the professionals who are associated with the work.
> A. So there's various like laboratory technicians. There's microbiologists. There is a pathologist that's in

> the laboratory. There's folks in the blood bank, folks in the chemistry department, which I think their title is medical laboratory technician. They're the ones that would actually run the drug screen. Again, it's done in a machine, an analyzer of sorts, that detects the various drug levels in the sample.

10/21/13 RP 1190-91.

In *State v. Nation*, the defendant was convicted of possession of methamphetamine and marijuana based on testimony from a forensic scientist who supervised the chemistry section of the Washington State Patrol Crime Laboratory. 110 Wn. App. 651, 656, 41 P.3d 1204 (2002). The scientist, Kevin Fortney, supervised technician Arnold Melnikoff, who performed the tests, and he testified that he could identify the substances based on the non-testifying technician's notes. *Id*. In addition, Mr. Fortney:

> gave further foundation testimony that a technician writes notes of test observations, places those notes in a case file, and then generates a report. That report is subjected to technical peer review by another analyst or by Mr. Fortney himself. The report is then sent back to the submitting agency along with the evidence. As custodian of the office files, Mr. Fortney personally obtained Mr. Melnikoff's notes from the files and recognized the handwriting and methodology to be Mr. Melnikoff's. Mr. Fortney said the peer review is an example of how forensic scientists use the notes and observations of other forensic scientists to formulate their own opinions.
>
> Over standing defense objection based on hearsay, the court then allowed Mr. Fortney to use Mr.

> Melnikoff's notes to explain the types of testing and analyses performed and the results of each test. Mr. Fortney then gave his own opinion based upon this data that the substances involved were without a doubt marijuana and methamphetamine.

Id. On appeal, the court reversed the convictions on the grounds the scientist's testimony was improperly admitted, and stated:

> The notes and report of the nontestifying expert, Mr. Melnikoff, were not admitted into evidence. And, there is no evidence in the record as to the particular person from whom the tester, Mr. Melnikoff, received the substances. Mr. Fornay gave no such testimony. The deficiency ... carries through to Mr. Fortnay, whose opinion testimony stemmed solely from Mr. Melnikoff's work.

Id. at 666. Similarly here, the technician's report was not admitted into evidence, the person who collected and presumably submitted the sample was not identified, and Dr. Rivas's testimony regarding the nature of the substance was based entirely on the non-testifying technician's report.

The court relied on *State v. Garrett*, where a physician from a sexual assault unit testified regarding the result of a test performed by a non-testifying emergency room physician at the same hospital. 76 Wn. App. 719, 721, 887 P.2d 488 (1995). The *Garrett* court found the test result was a business record based on the physician's foundational testimony that the results were part of the patient's medical file, the

testifying physician was familiar with the testing procedures used by the non-testifying physician, and she routinely relied on emergency room medical reports for treating patients at the sexual assault unit. *Id.* at 722-23.

By contrast, in *State v. Hopkins*, the court excluded a doctor's testimony regarding a report prepared by a non-testifying nurse practitioner, and stated:

> the State failed to establish the necessary prerequisites for the business record exception. Dr. Hall did not testify how reports were made or whether they were produced in the regular course of business. While the State is undoubtedly correct that medical records can be admitted under the business records exception, the State is not excused from laying the appropriate foundation.

134 Wn. App. 780, 789, 142 P.3d 1104 (2006).

Similarly here, although Dr. Rivas testified drug tests are regularly conducted by the hospital, his testimony contained absolutely no information regarding the identity or qualifications of non-testifying technician, and he demonstrated only a very general understanding of the test methodology. In the absence of a proper foundation, the trial court abused its discretion in admitting Dr. Rivas's testimony regarding the test results as a business record.

c. Admission of the results of a drug test report in lieu of testimony from the technician who conducted the test violated Mr. Padgett's Sixth Amendment right to confrontation.

The Confrontation Clause of the Sixth Amendment requires live testimony by a witness, under oath, with the opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 50-51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). The "principal evil" at which the Confrontation Clause is directed is the use of an *ex parte* statement, such as an affidavit or letter, made for the purpose of establishing or proving some fact. *Id*. at 50-51. If an out-of-court statement is testimonial, it may not be admitted against a defendant at trial unless the person who made the statement is unavailable and the defendant has had a prior opportunity to confront the witness. *Bullcoming v. New Mexico*, __ U.S.__, 131 S.Ct. 2705, 2713, 180 L.Ed.2d 610 (2010). Affidavits or other statements "that declarants would reasonably expect to be used prosecutorially" fall with the "core class" of testimonial statements that are inadmissible absent confrontation. *Crawford*, 541 U.S. at 50-52. So too, statements are testimonial when the purpose of the statement "is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

> The text of the Amendment contemplates two classes of witnesses—those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. ... [T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation.

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 313-14, 129 S.Ct. 314, 174 L.Ed.2d 314 (2009).

The report offered here falls within this non-existent third class. K.S. was brought to the hospital by police officers investigating her allegations against Mr. Padgett. 10/17/13 RP 906. Based on the police involvement and K.S.'s statements to the nurse, Dr. Rivas was well-aware that any drug test he ordered would become evidence in a criminal investigation.

In *Bullcoming*, a forensic laboratory report regarding the result of a test of the defendant's blood-alcohol level was introduced at the defendant's trial for driving while intoxicated. 131 S.Ct. at 2709. The report included the results of the test, as well as an affirmation that the sample was received intact, the analyst followed the procedures set forth on the back of the report, and a certification from an examiner who reviewed the analyst's report attesting that the analyst was qualified and followed established procedures. *Id*. at 2710-11.

The analyst who prepared the report did not testify. *Id*. at 2709. Rather, the report was introduced through the testimony of a different analyst who was familiar with the laboratory's protocols, even though he had not participated in the test on the defendant's sample. *Id*. at 2709-10. The Court ruled the "surrogate testimony" by the different analyst violated the defendant's "right to be confronted with the analyst who made the certification unless that analyst is unavailable at trial, and the accused had an opportunity, pretrial, to cross-examine that particular scientist." *Id*. at 2710.

So too here, the "surrogate testimony" of Dr. Rivas reporting the results generated by an unidentified non-testifying technician violated Mr. Padgett's constitutional right to confrontation.

d. <u>The improperly admitted testimony was prejudicial and requires reversal of Mr. Padgett's convictions for distribution of methamphetamine to H.M. and K.S.</u>

As discussed in Section (D)(1), *supra*, no evidence corroborated K.S.'s allegation that Mr. Padgett provided the methamphetamine purportedly found in her system. According to Detective Oja, Mr. Padgett was "totally surprised" when he was arrested and he therefore had no opportunity to hide or destroy evidence. 10/14/13 RP 632.

Erroneously admitted evidence requires reversal where the error materially affected the outcome. *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997); *State v. Acosta*, 123 Wn. App. 424, 438, 98 P.3d 503 (2004). Given the complete lack of evidence to connect Mr. Padgett to methamphetamine, the erroneous introduction of the drug test results as a business record was highly prejudicial. Reversal is required.

In addition, violation of a constitutional right, such as a fair trial, requires reversal unless the State proves beyond a reasonable doubt the error did not contribute to the verdict. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). Where, as here, there is a violation of the right to confrontation, the reviewing court must determine whether it is possible the fact-finder relied on the testimonial evidence when reaching its verdict. *United States v. Alvarado-Valdez*, 521 F.3d 337, 342 (5th Cir. 2008).

The State cannot meet its burden here. The test results were the only evidence produced by a person who presumably had expertise that K.S. has ingested methamphetamine. Given the complete absence of drugs or drug paraphernalia in Mr. Padgett's house, this evidence was

necessarily relied upon by the jury in reaching its verdicts on the two drug-related offenses. Reversal of the drug-related offenses is required.

3. The "to convict" jury instructions for numerous identically charged offenses failed to make clear that proof of any one incident could not support a finding of guilt on more than one count, in violation of the prohibition against double jeopardy.

a. The prohibition against double jeopardy requires jury instructions make manifestly apparent that proof of one incident cannot support a finding of guilt on more than one count when there are multiple identically charged offenses.

The double jeopardy clauses of the Fifth Amendment to the United States Constitution and of Article I, section 9 of the Washington Constitution protect a defendant from multiple punishments for the same offense. *Whalen v. United States*, 445 U.S. 684, 688-89, 100 S. Ct. 1432, 63 L.Ed.2d 715 (1980); *State v. Kier*, 164 Wn.2d 798, 803, 194 P.3d 212 (2008). Jury instructions must make the applicable law "manifestly apparent to the average juror." *State v. LeFaber*, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). Thus, when a person is charged with violating the same statutory provision a number of times, the jury instructions must very clearly require each conviction be predicated on a separate and distinct act and make manifestly apparent that proof of one act cannot support a finding of guilt on more than one count, to

avoid violation of the prohibition against double jeopardy. *State v. Borsheim*, 140 Wn. App. 357, 366, 165 P.3d 417 (2007); *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991).

A double jeopardy challenge is of constitutional magnitude and may be raised for the first time on appeal and is reviewed *de novo*. *State v. Mutch*, 171 Wn.2d 646, 661-62, 254 P.3d 803 (2011); *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006).

b. The jury instructions did not make manifestly apparent that proof of one incident could not support a finding of guilt for more than one count.

The jury instructions for the multiple identically charged sex offenses failed to make manifestly apparent that each conviction must be predicated on both a separate and distinct act *and* that proof of one act cannot support a finding of guilt on more than one count. In Counts 1, 3, and 5, Mr. Padgett was charged with third degree rape of a child regarding H.M., over the same time period. CP 14-16. In Counts 2, 4, and 6, Mr. Padgett was charged with first degree incest over the same time period. CP 15-17. In Counts 10 and 12, Mr. Padgett was charged with third degree child molestation regarding J.J., over the same time period. CP 18. In Counts 11 and 13, Mr. Padgett was charged with third degree rape of a child regarding J.J., over the same time period. CP 18.

The jury was provided a separate "to convict" instructions for each count. The "to convict" instructions for Counts 1, 3, and 5 were identical to each other, as were the "to convict" instructions for Count 2, 4, and 6, the "to convict" instructions for Counts 10 and 12, and the "to convict" instructions for Counts 11 and 13. CP 176, 179-83, 195, 197-99 (Instructions No. 12, 15-19, 31, 33-35). In addition, for each of the crimes alleged, the jury was instructed that "one particular act, a separate and distinct act" of the crime must be proved beyond a reasonable doubt. CP 175, 176, 178-183, 195-199 (Instructions No. 11, 12, 14-19, 31-35). However, the jury was not instructed that the separate and distinct act could not support more than one count.

These instructions were inadequate to protect Mr. Padgett's double jeopardy rights. In *Borsheim*, the defendant was convicted of four identically charged counts of rape of a child in the first degree. 140 Wn. App. at 363. The jury was provided a unanimity instruction, but it was not further specifically instructed either that a conviction on each count must be based on a separate and distinct act or that proof of one incident cannot support a finding of guilt on more than one count. *Id*. at 365. On appeal, this Court reversed the convictions, and noted that the unanimity instruction did not cure the double jeopardy violation,

because it did not require a finding beyond a reasonable doubt of a separate and distinct act for each count on which a conviction was rendered. *Id*. at 367.

In *Mutch*, the defendant was convicted of five identically charged counts of rape in the second degree. 171 Wn.2d at 662. Again, the jury was provided a unanimity instruction but it was not specifically instructed that each count represented an act distinct form all other charged counts. *Id*. The Court found the instructions were deficient but nonetheless affirmed the convictions, ruling the case presented the "rare circumstance" where it was "manifestly apparent" the jury based its five guilty verdicts on five separate acts; the victim testified to five separate episodes of rape, the defendant admitted he engaged in multiple sexual acts with the victim, the State discussed five separate episodes in closing arguments, the jury was provided five separate "to convict" instructions, and the defense did not deny the sexual acts, but contended they were consensual. *Id*. at 665. *See also State v. Ellis*, 71 Wn. App. 400, 402, 859 P.2d 632 (1992) ("to convict" instruction on identically charged Count 2 provided a conviction must be based on an act committed "on a day other than Count 1"); *State v. Hayes*, 81 Wn. App. 425, 431 n.9, 914 P.2d 788 (1996) ("to convict" instruction

provided convictions on the identically charged counts must be based on "an occasion separate and distinct from that charged in [the remaining counts]").

The court and parties in the present case discussed *Mutch* at the instruction conference. 10/23/13 RP 1374, 1407-108. With that case in mind, the instructions included the language "one particular act, a separate and distinct act" for each court. CP 175, 176, 178-83, 186, 195-200 (Instructions No. 11, 12, 14-19, 22, 31-36. This language, however, is inadequate under *Mutch*, by failing to make manifestly apparent that a separate and distinct act can support a conviction on a single count only and that each charge represents an act separate and distinct from all other counts.

The State purported to elect the specific act it was relying upon for each count. 10/24/13 RP 1504, 1506-12, 1516-18. However, closing argument cannot be considered in isolation and the jury was specifically instructed to base its verdict on the evidence and instructions, and not on the arguments of counsel. CP 164 (Instruction No. 1). *See Kier*, 164 Wn.2d at 813.

Significantly, the jury found Mr. Padgett not guilty of Count 14, the one count of child molestation of J.J. that was not identically

charged. In Counts 10, 12, and 14, Mr. Padgett was charged with child molestation in the third degree regarding J.J., and the "to convict" instructions for Counts 10 and 12 required the jury to find "[t]hat on, about, during or between August 1, 2012 and January 31, 2013, the defendant had sexual contact with J.J." CP 195, 198 (Instructions No. 31, 34). For Count 14, however, the "to convict" instruction required the jury to find "[t]hat on or about August 1, 2012, the defendant had sexual contact with J.J." CP 200 (Instruction No. 36). The jury inquired, "Re: Instruction No. 36, Item (1) – should the date 'August 1, 2012' be 'August 1, 2012 to January 31, 2013' or is 'August 1, 2012' correct?" CP 218. The court responded, "Instruction No. 36 is correct." CP 218. The jury returned guilty verdicts on Counts 10 and 12 but returned a not guilty verdict on Count 14. CP 228, 230, 232.

Other than Count 14, which resulted in a not guilty verdict, the jury instructions and verdict forms made no distinctions between any events and consequently do not represent unanimous findings of a separate and distinct act to support each separate and distinct count.

c. <u>The double jeopardy violation requires vacation of the redundant convictions</u>.

Where multiple convictions are predicated on a single offense, the proper remedy is to vacate all but one conviction and remand for

sentencing on the remaining count. *Mutch*, 171 Wn.2d at 664. Accordingly, two of the convictions for third degree rape of a child regarding H.M., two of the convictions for incest, and one of the convictions for third degree rape of a child regarding J.J., must be vacated and this matter must be remanded for sentencing on one count of each offense.

4. The court's instructions that a "prolonged period of time" meant "more than a few weeks" was an impermissible comment on the evidence and relieved the State of its burden of proof.

Article IV, section 16 of the Washington Constitution provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." A comment on the evidence "invades a fundamental right" and may be challenged for the first time on appeal. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997). A judicial comment on the evidence is presumed prejudicial and is harmless only if the record affirmatively demonstrates no prejudice could have occurred. *State v. Levy*, 156 Wn.2d 709, 725, 132 P.3d 1076 (2006).

In addition, a court may not instruct the jury in a way that relieves the State of its burden of proving each element of an aggravating factor beyond a reasonable doubt. *State v. Aumick*, 126

Wn.2d 422, 429, 894 P.2d 1325 (1995); *Blakely v. Washington*, 542 U.S. 296, 301, 313-14, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); U.S. Const. amends. VI, XIV; Const. art. I, § 3.

The State alleged Counts 1 through 6 were committed as part of an ongoing pattern of abuse over a prolonged period of time and constituted aggravated domestic violence. CP 204, 208-12 (Instruction Nos. 39, 43-47). The State alleged Counts 10 through 13 also were committed as part of an ongoing pattern of abuse over a prolonged period of time. CP 213-216 (Instruction No. 48-51). The phrase "prolonged period of time" is not defined by statute and is a factual question to be determined by the jury. *State v. Epefanio*, 156 Wn. App. 378, 392, 234 P.3d 253 (2010). Here, however, the court instructed the jury the phrase meant "more than a few weeks," thereby implying that any time period greater than "a few weeks" necessarily qualified as a "prolonged period of time." CP 205, 206 (Instruction No. 40, 41). This definition was taken directly from Washington Pattern Jury Instructions – Criminal (WPIC) 300.16 and 300.17.

In *State v. Brush*, the Court held the definition of "prolonged period of time" in WPIC 300.17 represented an incorrect interpretation of case law. 183 Wn.2d 550, 557-58, 353 P.3d 213 (2015). The Court

noted WPIC 300.17 purported to follow *State v. Barnett*,[2] where the Court of Appeals reversed an exceptional sentence based on a pattern of abuse occurring over two weeks, and stated, "[t]wo weeks is not a prolonged period of time." *Id*. at 558. The Court concluded that, although *Barnett* ruled two weeks was not a prolonged period of time, it did not hold that a pattern of abuse occurring for more than two weeks was necessarily sufficient to prove the aggravator. *Id*.

The Court further held WPIC 300.17 constituted an improper comment on the evidence and relieved the State of its burden of proof by implying that any abuse for more two weeks necessarily occurred over "prolonged period of time. *Id*. at 559. Accordingly, the Court reversed Mr. Brush's exceptional sentence and remanded with instructions to, if requested, impanel a jury to determine whether the evidence established a "prolonged period of time" under proper instructions. *Id*. at 560, 561.

The definition of "prolonged period of time" here is identical to that given in *Brush*. Therefore, Mr. Padgett's exceptional sentences on based on the improper instructions must be reversed and remanded.

[2] 104 Wn. App. 191, 203, 16 P.3d 74 (2001),

5. The State failed to prove each alternative means of committing aggravated domestic violence, as charged, in violation of Mr. Padgett's constitutional right to due process.

a. Due process requires that substantial evidence support each alternative means of committing an aggravating circumstance presented to the jury.

The constitutional right to due process requires the State to prove beyond a reasonable doubt every essential element of a crime charged. U.S. Const. amend. XIV; Wash. Const. art. I, sec. 3, 21, 22; *Winship*, 397 U.S. at 364; *State v. Smith*, 159 Wn.2d 778, 783, 155 P.3d 873 (2007). A defendant similarly has the constitutional right to jury unanimity on any aggravating circumstance that elevates the punishment for the underlying offense. U.S. Const. amend. VI; Wash. Const. art. I, sec. 21; *Blakely*, 542 U.S. at 313-14; *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 1347 L.Ed.2d 435 (2000).

An "alternative means" case involves "a charge under a statute which contains several alternative ways of committing one crime." *State v. Crane*, 116 Wn.2d 315, 326, 804 P.2d 10 (1991). In an alternative means case, where a single offense may be committed in more than one way, there must be jury unanimity as the means by which the crime was committed unless substantial evidence supports each alternative means. *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d

105 (1988). Where substantial evidence supports each of the alternative means submitted to the jury, jury unanimity is presumed. *State v. Ortega-Martinez,* 124 Wn.2d 702, 707-08, 881 P.2d 231 (1994). Where the evidence is not sufficient to support each alternative means, however, the conviction must be reversed absent a statement of unanimity in the form of a special verdict. *Ortega-Martinez,* 124 Wn.2d at 708.

b. The State failed to present substantial evidence to prove each alternative means of committing aggravated domestic violence, as set forth in the jury instructions.

The State alleged Counts 1 through 6 involved the aggravating circumstance of aggravated domestic violence. CP 204, 208-12 (Instruction Nos. 39, 43-47). The jury was instructed that aggravated domestic violence was established upon proof beyond a reasonable doubt of two elements: 1) "That the victim and the defendant were family or household members," and 2) "that the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time." CP 206 (Instruction No. 41).

The terms "psychological," "physical," and "sexual abuse" were not separately defined and the State did not elect which form of abuse it

was relying upon. In closing argument, the prosecutor reviewed the jury instructions for aggravated domestic violence, and stated, "Then it goes on to further provide information that the offense was part of an ongoing pattern of psychological, physical or sexual abuse." 10/24/13 RP 1492. In rebuttal argument, the prosecutor stated, "You have the additional aggravator with [H.M.] as a child of the defendant and a member of the household, the ongoing physical, psychological and sexual abuse involvement with the defendant." 10/24/13 RP 1562.

The jury was provided a Special Verdict form that did not to require the jury to be unanimous as what form of abuse it relied upon to find aggravated domestic violence, but, rather, merely asked the jury to determine whether the aggravating circumstance existed. CP 233-38 (Special Verdict Forms 1-6).

The jury instruction on aggravated domestic violence mirrored the statutory language. RCW 9.94A.535(3)(h)(i). Where the Legislature uses different terms, it is presumed to intend those terms to have different meanings. *State v. Roggenkamp*, 153 Wn.2d 614, 625-26, 106 P.3d 196 (2005). Accordingly, the Legislature is presumed to intend that sexual abuse be separate and distinct from both physical abuse and psychological abuse. Yet, the State did not present any evidence that

Mr. Padgett physically or psychologically abused H.M., separate and distinct from its allegations of sexual abuse.

"The analysis of whether the legislature intended a crime to have alternative means of commission focuses on the act that constitutes the offense." *State v. Huynh*, 175 Wn. App. 896, 904, 307 P.3d 788 (2013). For example, in *State v. Fernandez*, the defendants were convicted of operating a drug house, in violation of RCW 69.50.402(a)(6), which prohibited maintaining a dwelling where people either to use drugs or to sell or store drugs. 89 Wn. App. 292, 299-300, 948 P.2d 872 (1997). The State did not elect which alternative means it was relying upon for a conviction. Therefore, even though there was sufficient evidence to find the defendants maintained a house to sell or store drugs, the Court reversed the convictions because there was insufficient evidence to find the defendants maintained the house for drug use. *Id*. at 300. The Court ruled:

> The State did not elect between the alternative means, and the general verdict form does not reveal which prong the jury used to convict. Because it may have convicted the defendants under the unsupported use prong, we must reverse the defendants' convictions and remand for retrial on the drug house charges.

Id.

Similarly, in *State v. Gillespie*, the defendant was convicted of theft, when he was charged in the alternative of theft by deception and theft by embezzlement, in violation of RCW 9A.56.020(1)(a) and (b). 41 Wn. App. 640, 642, 705 P.2d 808 (1985). Even though the State proved theft by deception, the Court reversed the conviction due to the lack of substantial evidence of the alternative means of theft by embezzlement. 41 Wn. App. at 645-46.

Here, as in *Fernandez* and *Gillespie*, the State did not produce substantial evidence of each of the three alternative means of committing aggravating domestic violence presented to the jury. In the absence of either a particularized statement of unanimity or substantial evidence to support each alternative means of committing the offense, the exceptional sentence above the standard range based on that aggravator must be reversed. *See State v. Kinchen*, 92 Wn. App. 442, 452, 963 P.2d 928 (1998).

6. The legal financial obligations and the boilerplate finding that Mr. Padgett had the ability to pay the costs of confinement and medical care must be stricken when the court failed to consider his financial resources and the nature of the burden such costs would impose, in violation of RCW 10.01.160(3).

RCW 10.01.160(3) provides:

> The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

The term "shall," as used in this statute, imposes a mandatory duty of the sentencing court. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Formal findings supporting the trial court's decision to impose legal financial obligations (LFOs) are not required, but the record must minimally establish that the sentencing judge actually considered the defendant's individual financial circumstances and make an individualized determination he has the ability or likely future ability to pay. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011).

At sentencing in the present case, the trial court ordered Mr. Padgett to pay $1,750 in LFOs, which included discretionary costs of $200 for a filing fee, $600 for a court appointed attorney, $250 for a

jury fee, and $100 for a domestic violence assessment. CP 471. In addition, the trial court ordered Mr. Padgett to pay the costs of incarceration and medical care while incarcerated. *Id*. Boilerplate language in the Judgment and Sentence provided, "[T]he court finds that the defendant has the means to pay for the costs of incarceration," and "[T]he court finds that the defendant has the means to pay for any costs of medical care incurred by Yakima County on behalf of the defendant." *Id*. However, nothing in the record suggests that the court actually considered Mr. Padgett's financial circumstances before imposing the costs, or determined whether Mr. Padgett would be able to pay the discretionary LFOs in the future. In fact, the court made no inquiry into Mr. Padgett's financial circumstances whatsoever.

Although Mr. Padgett did not object to the imposition of the LFOs, appellate courts have discretion to accept review of a challenge to costs. As the Court noted in *Blazina*, "[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." 182 Wn.2d at 835.

Where, as here, the court fails to comply with a sentencing statute, remand is required unless the record clearly indicates the court would have imposed the same conditions regardless. *State v.*

Chambers, 176 Wn.2d 573, 589, 293 P.3d 1185 (2013) (citing *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997)). The record does not clearly show the trial court would have found Mr. Padgett had or would have the ability to pay the LFOs. Instead, the court appeared to impose them as a matter of course, without any individualized consideration of Mr. Padgett's financial circumstances. Accordingly, this matter should be remanded for a determination of Mr. Padgett's present or likely future ability to pay the discretionary LFOs. *See Blazina*, 182 Wn.2d at 839.

7. Errors in the Judgment and Sentence and Warrant of Commitment require remand.

The Judgment and Sentence erroneously indicates there were special verdicts that the numerous counts did not encompass the same criminal conduct, when in fact, there were no such special verdicts. CP 467. In addition, the Warrant of Commitment erroneously indicates Mr. Padgett was convicted of Count 14, when in fact, he was acquitted of that charge.

Pursuant to CrR 7.8(a) and RAP 7.2(e), clerical errors in judgments, orders, or other parts of the record may be corrected by the court at any time on its own initiative or on the motion of any party. Accordingly, this court should remand to correct the above errors in the

Judgment and Sentence and Warrant of Commitment. *See In re Pers. Restraint of Mayer,* 128 Wn. App. 694, 701, 117 P.3d 353 (2005) (remedy for clerical or scrivener's errors in judgment and sentence forms is remand to the trial court for correction); *State v. Moten*, 95 Wn. App. 927, 929, 935, 976 P.2d 1286 (1999) (remand appropriate to correct scrivener's errors referring to wrong statute on Judgment and Sentence).

8. The judicial findings of fact to support the exceptional sentence above the standard range violated Mr. Padgett's right to trial by jury.

a. The court acted without authority when it entered thirty-two judicial findings of fact that were not reflected in the jury's special verdicts.

The constitutional right to due process and to trial by jury guarantees a jury finding beyond a reasonable doubt every fact essential to punishment, regardless of whether the fact is labeled an element or a sentencing factor. *Blakely,* 542 U.S. at 298; *Apprendi*, 530 U.S. at 490; U.S. Const. amend. VI, XIV; Const. art. I, sec. 21, 22. The State must submit to a jury any fact upon which it seeks to increase punishment. *Alleyne v. United States*, __ U.S. __, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013); *State v. Dyson,* 2015 WL 4653226, at *5-6

(Wash. Ct. App. Aug. 6, 2015). Thus, an exceptional sentence cannot be based on facts found by the judge.

The jury found Counts 1-6 were aggravated domestic violence offenses and Counts 10-13 were part of an on-going pattern of sexual abuse. CP 233-242. However, after the present appeal was filed, the trial court entered written Findings of Fact and Conclusions of Law for Exceptional Sentence, which included thirty-two judicial findings of fact that were not reflected in the jury verdicts, contrary to *Blakely*. 8/26/15 RP 5-6; CP 492-94.

The list of aggravating circumstances a court may consider to impose an exceptional sentence without a finding by a jury is exclusive. RCW 9.94A.535(2); *Mutch*, 171 Wn.2d at 656. None of the thirty-two findings fall within the list. Accordingly, the court acted without authority when it imposed the exceptional sentence based on those findings.

b. <u>The court further acted without authority when it entered the judicial fact finding that "substantial and compelling reasons" justified the exceptional sentence</u>.

A jury finding of an aggravating circumstance does not, in itself, increase the standard range. The standard range is only increased when the jury finding is combined with the judicial finding of substantial and

compelling reasons. RCW 9.94A.537(6). Therefore, both the aggravating circumstance and the fact of substantial and compelling reasons must be submitted to a jury to comply with *Blakely*.

The phrase "substantial and compelling reasons" is not defined in the SRA. By judicial construct, substantial and compelling reasons must "take into account factors other than those which are necessarily considered in computing the presumptive range for the offense." *State v. Fisher*, 108 Wn.2d 419, 423, 739 P.2d 683 (1987) (quoting *State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986)).

The exceptional sentence provisions of the SRA were adopted from Minnesota. *Nordby*, 106 Wn.2d at 521 n.1 (citing D. Boerner, *Sentencing in Washington* § 9.3, at 9-6 (1985)). Accordingly, Minnesota decisions regarding substantial and compelling reasons are "especially persuasive authority for Washington courts." *Id*. In *State v. Jones*, the Minnesota Supreme Court stated, "[s]ubstantial and compelling circumstances are those demonstrating that the defendant's conduct in the offense of conviction was *significantly* more or less serious than that typically involved in the commission of the crime in question." 745 N.W.2d 845, 848 (Minn. 2008) (internal citations omitted). Thus, a finding of "substantial and compelling reasons"

necessarily requires an assessment of the evidence and a factual determination that the case before the court is atypical. As such, a finding of "substantial and compelling reasons" is inherently a factual finding, which can only be made by a jury.

In *Blakely*, the Court stated:

> Whether the judge's authority to impose an enhanced sentence depends on finding a specified fact (as in *Apprendi*), one of several specified facts (as in *Ring*[3]), or *any* aggravating fact (as here), it remains the case that the jury's verdict alone does not authorize the sentence. The judge acquires that authority only upon finding some additional fact.

542 U.S. at 305. The Court added in a footnote:

> Nor does it matter that the judge must, after finding aggravating facts, make a judgment that they present a compelling ground for departure. He cannot make that judgment without finding some facts to support it beyond the bare elements of the offense. Whether the judicially determined facts *require* a sentence enhancement or merely *allow* it, the verdict alone does not authorize the sentence.

Id. at 305 n.8. However, this statement and footnote are *dicta* only, as the question of whether a judicial finding of substantial and compelling reasons violated a defendant's jury trial right was not before the Court.

Mr. Padgett recognizes that the above *dicta* have been interpreted as casting the "substantial and compelling reasons" finding

[3] *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

as a question of law that may be decided by the court. *See, e.g.*, *State v. Suleiman*, 158 Wn.2d 280, 290-91, 143 P.3d 795 (2006) ("[A]fter *Blakely*, ... [t]he trial judge was left only with the legal conclusion of whether the facts alleged and found were sufficiently substantial and compelling to warrant an exceptional sentence."); *State v. Hughes*, 154 Wn.2d 118, 137, 110 P.3d 192 (2005) ("*Blakely* left intact the trial judge's authority to determine whether facts alleged and found are sufficiently substantial and compelling to warrant imposing an exceptional sentence under RCW 9.94A.535. That decision is a legal judgment which, unlike factual determinations, can still be made by the trial court."). This is incorrect.

A "question of law" is defined as:

> **1.** An issue to be decided by the judge, concerning the application or interpretation of the law <a jury cannot decide questions of law, which are reserved for the court>. See *legal issue* under issue (1). **2.** A question that the law itself has authoritatively answered, so that the court may not answer it as a matter of discretion <the enforceability of an arbitration clause is a question of law>. **3.** An issue about what the law is on a particular point; an issue in which parties argue about, and the court must decide, what the true rule of law is <both parties appealed on the question of law>. See *issue of law* under issue (1). **4.** An issue that, although it may turn on a factual point, is reserved for the court and excluded from the jury; an issue that is exclusively within the province of the judge and not the jury <whether a

> contractual ambiguity exists is a question of law>. — Also termed *legal question*; *law question.*

Black's Law Dictionary (10th ed. 2014). A "question of fact" is defined as:

> **1.** An issue that has not been predetermined and authoritatively answered by the law. • An example is whether a particular criminal defendant is guilty of an offense or whether a contractor has delayed unreasonably in constructing a building. **2.** An issue that does not involve what the law is on a given point. **3.** A disputed issue to be resolved by the jury in a jury trial or by the judge in a bench trial. — Also termed *fact question.* See fact-finder. **4.** An issue capable of being answered by way of demonstration, as opposed to a question of unverifiable opinion.

Black's Law Dictionary (10th ed. 2014).

A finding of "substantial and compelling reasons" falls within the definition of "question of fact," rather than "question of law." The finding does not involve an issue concerning the application or interpretation of the law, a question of law that has been authoritatively answered, or an issue about what the law is on a particular point. The fact that the Legislature delegated to courts the authority to make the finding neither negates nor outweighs the constitutional right to a jury finding beyond a reasonable doubt of every fact essential to the imposition of an exceptional sentence.

In *State v. Alvarado*, in the context of a standard range sentence is "clearly too lenient," the Court noted that a jury fact-finding is not necessary "when a sentencing provision allows an exceptional sentence to flow *automatically* from the existence of free crimes." 164 Wn.2d 556, 568, 192 P.3d 345 (2008) (emphasis in original); *accord Mutch*, 171 Wn.2d at 657. However, a finding of "substantial and compelling reasons" does not flow automatically from a jury fact-finding of the existence of an aggravating circumstance. Rather, that finding requires a factual determination similar to that involved in the aggravated circumstances of deliberate cruelty or egregious lack of remorse, both of which must be found by a jury. RCW 9.94A.535(3)(a), (q).

The judicial fact finding that substantial and compelling reasons justified the exceptional sentences violated Mr. Padgett's constitutional right to a jury determination beyond a reasonable doubt of every fact necessary for imposition of a sentence above the standard range. The exceptional sentences must be reversed.

F. CONCLUSION

For the foregoing reasons, Mr. Padgett requests this Court alternatively 1) reverse his convictions for drug-related offenses due to insufficient and/or wrongly admitted evidence, 2) vacate two

convictions for first degree rape of a child regarding H.M., two convictions for incest, and one count of first degree rape of a child regarding J.J. due to violation of the prohibition against double jeopardy, 3) reverse the exceptional sentences due to instructional error, as well as violation of the prohibition against double jeopardy and the right to trial by jury, 4) correct errors in the Judgment and Sentence and Warrant of Commitment, 5) and strike the financial obligations and obligation to pay for the cost of confinement and of medical care.

DATED this 30th day of November 2015.

Respectfully submitted,

s/ Sarah M. Hrobsky

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

STATE OF WASHINGTON, Respondent, v. TRAVIS PADGETT, Appellant.	)))))))))	NO. 32927-5-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30TH DAY OF NOVEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT**TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] TAMARA HANLON [tamara.hanlon@co.yakima.wa.us] YAKIMA CO PROSECUTOR'S OFFICE 128 N 2ND STREET, ROOM 211 YAKIMA, WA 98901-2639	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X] TRAVIS PADGETT 370308 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 2049 AIRWAY HEIGHTS, WA 99001	(X) ( ) ( )	U.S. MAIL HAND DELIVERY E-MAIL BY AGREEMENT VIA COA PORTAL

SIGNED IN SEATTLE, WASHINGTON THIS 30TH DAY OF NOVEMBER, 2015.

X_____

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THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON, Respondent, v. TRAVIS L. PADGETT, Appellant.	)))))))	No. 329275 STATEMENT OF ADDITIONAL AUTHORITY (RAP 10.8)

Pursuant to RAP 10.8, Travis Padgett, appellant herein, submits the following statement of additional authority for consideration in the above-captioned matter in support of his argument that a judicial determination whether an aggravating circumstance is a "substantial and compelling reason" for an exceptional sentence is a judicial fact-finding that violates a defendant's Sixth Amendment right to trial by jury:

> *Hurst v. Florida*, No. 14-7505, 2016 WL 112683 (U.S. Jan. 12, 2016) (Sixth Amendment violated by Florida's two-step capital punishment scheme that provided a jury's recommendation of life or death was advisory only and authorized the judge to make the final determination after making findings about the existence of mitigating and aggravating circumstances and whether the mitigating

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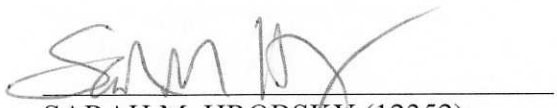
circumstances were sufficient to outweigh the aggravating circumstances).

DATED this 19th day of January 2016.

Respectfully submitted,



SARAH M. HROBSKY (12352)
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Attorney for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 32927-5-III
v.	)	
	)	
TRAVIS PADGETT,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 20TH DAY OF JANUARY, 2016, I CAUSED THE ORIGINAL **STATEMENT OF ADDITIONAL AUTHORITY** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF JANUARY, 2016.

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