NO. 32927-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Appellant,

v.

TRAVIS L. PADGETT,

Respondent.

AMENDED BRIEF OF RESPONDENT

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A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. The issues raised by the assignments of error can be summarized as follows;

1. Whether the State presented sufficient evidence to prove beyond a reasonable doubt that the appellant delivered methamphetamine to H.M. and K.S., both of who were minors at the time?

2. Whether the trial court erred in permitting the testimony of Dr. Rivas regarding the results of the drug screen test for his patient K.S.?

3. Whether the State presented a proper foundation regarding the admission of the drug screen test ordered by Dr. Rivas for his patient K.S.?

4. Whether the admission of the drug screen test ordered by Dr. Rivas for his patient K.S. as part of her treatment at the Hospital violated appellant's six amendment right to confrontation?

5. Whether the "to-convict" jury instructions for the multiple counts of sexual assault provided sufficient guidance to the jury for them to find separate and distinct conduct for the jury to be unanimous as to the act so as not to be double jeopardy violation?

6. Although there was an improper jury instruction regarding the definition of "prolonged period of time" which was a comment on the evidence, nevertheless was the error harmless?

7. Whether the court should consider the trial court's determination of the appellant's ability to pay legal financial obligation for the first time on appeal?

8. Whether the trial court erred in its entry of findings of fact and conclusions of law regarding the exceptional sentence.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The State presented sufficient evidence to prove beyond a reasonable doubt that the appellant delivered methamphetamine to H.M. and K.S., both of who were minors at the time.

2. The trial court did not err in permitting the testimony of Dr. Rivas regarding the results of the drug screen test for his patient K.S.

3. The State presented a proper foundation regarding the admission of the drug screen test ordered by Dr. Rivas for his patient K.S.

4. The admission of the drug screen test ordered by Dr. Rivas for his patient K.S. as part of her treatment at the Hospital did not violate appellant's six amendment right to confrontation.

5. The "to-convict" jury instructions for the multiple counts of sexual assault provided sufficient guidance to the jury for them to find separate and distinct conduct for the jury to be unanimous as to the act so as not to be a double jeopardy violation.

6. Although there was an improper jury instruction regarding the definition of "prolonged period of time" which was a comment on the evidence, the error was nevertheless harmless.

7. The court should not consider the trial court's determination of the appellant's ability to pay legal financial obligation for the first time on appeal.

8. Whether the trial court erred in its entry of findings of

fact and conclusions of law regarding the exceptional sentence.

II. STATEMENT OF THE CASE

The appellant, Travis L. Padgett, was charged by amended information, in Yakima County Cause No. 13-1-00110-7, with the following crimes: Count 1, Third Degree Rape of a Child – Domestic Violence, allegedly having occurred on, about, during or between May 11, 2012 to January 17, 2013, involving H.M.P.M.; Count 2, First Degree Incest – Domestic Violence, allegedly having occurred on, about, during or between May 11, 2012 to January 17, 2013, involving H.M.P.M ; Count 3, Third Degree Rape of a Child – Domestic Violence, allegedly having occurred on, about, during or between May 11, 2012, to January 17, 2013, involving H.M.P.M; Count 4, First Degree Incest – Domestic Violence, allegedly having occurred on, about, during or between May 11, 2012, to January 17, 2013, involving H.M.P.M ; Count 5, Third Degree Rape of a Child – Domestic Violence, allegedly having occurred on, about, during or between May 11, 2013 to January 17, 2013, involving H.M.P.M; Count 6, First Degree Incest – Domestic Violence, allegedly having occurred on, about, during or between May 11, 2012 to January 17, 2013, involving H.M.P.M; Count 7, Communicate with Minor for Immoral Purposes, allegedly having occurred on or about January 16, 2013, involving K.M.S;

Count 8 , Distribute a Controlled Substance, Methamphetamine, to a Minor – Domestic Violence, allegedly having occurred on, about, during or between May 1, 2013, to January 17, 2013, distributed to H.M.P.M.; Count 9, Distribute a Controlled Substance, Methamphetamine, to a Minor – Domestic Violence, allegedly having occurred on, about, during or between May 1, 2013, to January 17, 2013, distributed to K.M.S.; Count 10, Third Degree Child Molestation, allegedly having occurred on, about, during or between August 1, 2012 and January 31, 2013, involving J.J.; Count 11, Third Degree Rape of a Child, allegedly having occurred on, about during or between August1, 2012 and January 31, 2013, involving J.J.; Count 12, Third Degree Child Molestation, allegedly having occurred on, about during or between August 1, 2012 and January 31, 2013, involving J.J.; Count 13, Third Degree Rape of a Child, allegedly having occurred on, about, during or between August 1, 2012 and January 31, 2013, involving J.J.; Count 14, Third Degree Child Molestation, allegedly having occurred on, about, during or between August 1, 2012 and January 31, 2013, involving J.J. (CP 14-19).

The presentation of the evidence commenced on October 14, 2013, to which the following facts were presented:

In July of 2012, Mr. Padgett was given custody of his then fourteen-year-old son, H.M., who began to live with him at his home at 209 South 18th Avenue, Yakima, Washington. (10/15/13 RP 733-35; 10/18/13 RP 1136). H.M. attended a local Yakima school, and was in the eighth grade. At that time he was 14 years old, and his date of birth was 12-23-97. (10/15/13 RP 751-52).

During the period of time between July 2012 and January 2013, many women came to the house, including Rhonda Pedersen who kept her clothing in an upstairs bedroom. (10/15/13 RP 737-38). H.M. testified that an incident of a sexual nature occurred when they had gone camping. (10/15/13 RP 738). H.M., Travis Padgett, and Rhonda Pedersen went camping. They arrived at the campsite during the nighttime and had to set up their tent using flashlights. (10/15/13 RP 739). They had asked H.M. to step out of the tent, and later invited him back in, at which point in time they were naked. (10/15/13 RP 740). H.M. testified that Travis and Rhonda were engaged in oral sex and told him to join them. H.M. undress and Travis told Rhonda to touch his private. (10/15/13 RP 741). Rhonda touch H.M.'s private part and then Travis told H.M. to stick his penis in his [Travis's] butt. (10/15/13 RP 742). This request made H.M. very uncomfortable and scared, and H.M. went and laid back down in his own sleeping bag. (10/15/13 RP 742-43).

During the beginning of H.M.'s period of living Travis Padgett, Padgett kept his drug use a secret. But as time passed, H.M. began to know that Padgett used meth. (10/15/13 RP 742-43). At the start of the school year in September, 2012, H.M. started off with a good attendance record, but that change as the sexual abuse began to take place. (10/15/13 RP 752).

Approximately three days after the camping trip, Travis Padgett started to touching H.M. while they were sleeping in the same bed. (10/15/13 RP 753-54). The touching by Travis Padgett was on H.M.'s butt and penis. (10/15/13 RP 754).

The next sexual abuse incident was when Travis Padgett used a strap-on dildo to penetrate H.M.'s butt. H.M. did not like that, so Travis Padgett then stuck his penis into H.M.'s butt. (10/15/13 RP 757-58). At about this time Travis Padgett started to introduce H.M. to drugs. (10/15/13 RP 758). Travis Padgett had attached a smaller dildo to the strap-on when he used it on H.M. It made H.M. feel like he was going to pee or poop. (10/15/13 RP 759). H.M. described how, during this incident, Travis Padgett would also stick his penis into H.M.'s butt while they were in the bedroom. (10/15/13 RP 759-60).

H.M. testified that the frequency of the sexual incidents began to be an every day event. (10/15/13 RP 763). The sexual incidents began to include H.M. shoving his penis into Travis Padgett. (10/15/13 RP 763-64).

H.M. observed women, including Rhonda Pedersen, using the strap-on dildo on Travis Padgett while he was on his back with his legs up or in a dog position. (10/15/13 RP 758). These incidents also included times when Rhonda would use the strap-on and H.M. would use his penis on Travis Padgett. H.M. described how the bed would become drenched with come and stuff. (10/15/13 RP 764).

H.M. further testified that during the start of any sexual activity, Travis Padgett would play porn on his computer that had a projector attached to it. The videos included "She-Males" and other porn. (10/15/13 RP 765). During this activity Travis Padgett would tell H.M. to suck his penis, which H.M. did. (10/15/13 RP 766). This then lead to H.M. sticking his penis into Padgett. (10/15/13 RP 766).

H.M. testified that later, his friend J.J. became involved in the sexual activity. (10/15/13 RP 767). On one occasion, Padgett was downstairs with a women and he invited the two boys downstairs also. The boy eventually went downstairs. (10/15/13 RP 769-70). The incident seemed awkward to H.M. so he and J.J. left. (10/15/13 RP 771-72). Later, H.M., J.J., and Travis Padgett would engage in sexual activity. H.M. described the activity as Travis Padgett would suck J.J.'s penis, while H.M. would be behind Travis Padgett using his penis or the strap-on. (10/15/13 RP 772).

H.M. further testified that the first time Travis Padgett gave him methamphetamine was at a motel in Toppenish, where Travis had rented a suite. Travis Padgett brought a cup and at the bottom of the cup there were little white rocks. (10/15/13 RP 780). H.M. licked the bottom of the cup and described the effects: He felt like he wasn't ever tired, like he was full of energy, not losing any energy. (10/15/13 RP 782). During motel stay, H.M. would stick his penis into Travis Padgett. This took place all night. The effect of the substance given to H.M. that time was that H.M. stayed up all night until 9:00 a.m. the next morning. H.M. described this activity with meth occurring at other times at home. (10/15/13 RP 783-84).

On another occasion, Travis Padgett told H.M. to come into his office. When H.M. went into the office, Travis Padgett would have meth and gave it to H.M. Travis Padgett then instructed H.M. to but on some porn, which he did. Rhonda then came downstairs and went into the office, where she and Padgett did drugs. After taking the meth, H.M. stayed up all night, engaging in sex with Padgett. (10/15/13 RP 785). H.M. described the sexual activity that occurred that time as Padgett sucking his penis, and H.M. putting his penis in Padgett's butt hole. Also, Rhonda would suck Padgett's penis and H.M. would shove his penis into Padgett. (10/15/13 RP 785).

H.M. described a time when he felt there was something wrong with his body that he needed medical attention. H.M. testified that he had warts or bumps on his penis, so he went to Planned Parenthood. They told H.M. that he had herpes, and they gave him a prescription for it. (10/15/13 RP 785-86). Padgett failed to obtain the medication for H.M. to treat the herpes infection. (10/15/13 RP 786). The only treatment Padgett had was for H.M. to rub jalapeno peppers all over his penis. (10/15/13 RP 786).

On another occasion H.M. recalled that Padgett put a penis pump on H.M.'s penis and pumped it up until it started to hurt H.M. Padgett told H.M. to suck his penis, and if he didn't, that he would pump it up more. After Padgett pumped it up a few times, H.M. gave in and sucked Padgett's penis. (10/15/13 RP 800).

H.M. testified that the last time that he had sex with Padgett was after the Seahawks playoff football game against the Atlanta Falcons. (10/15/13 RP 808, 819).

H.M. testified that he missed a lot of school. He had run away from his father's home a couple of times. He experienced depression, feeling like he was just being used for sexual purposes, and that Padgett did not really treat H.M. like his son. The felt like he was treated like a prostitute. H.M. testified that he got fed up with it and ended up telling his school resource officer. (10/15/13 RP 809, 815).

H.M. testified that on the night before the sexual abuse was reported to the school resource officer, Padgett had come home with a girl named K., and the two proceed to go downstairs and shut the door. H.M. called his mother. (10/15/13 RP 814). The next morning he reported the sexual abuse to his school resource office, which in turn the case was referred to Yakima Police detectives. (10/15/13 RP 815). Officer Thorn, the school resource officer, took H.M. to Planned Parenthood, where his signed a waiver for release of information. Then Officer Thorn took H.M. to the hospital to see a nurse and a doctor. (10/15/13 RP 785).

Nurse Donna Howell, a registered nurse at Yakima Regional Hospital, was assigned to care for H.M., on January 18, 2013, at 5:30 p.m. (10/17/13 RP 1048-50). Nurse Howell took information relevant to a history of the complaint from H.M. H.M. related that he had been sexually abused by his father. (10/17/13 RP 1051-52). H.M. also reported that his dad had given him weed, meth and alcohol. (10/17/13 RP 1052). H.M. reported that he had contacted herpes after having intercourse, resulting in a lesion on his penis that had healed by the time of the exam. (10/17/13 RP 1052). Also during the examination, Nurse Howell had that his rectal area had been shaved. (10/17/13 RP 1053). When answering questions regarding the sexual assault, H.M. told Nurse Howell that there had been ejaculation in the rectum, that he was forced, and that he felt threatened.

Also, that he had been restrained and that his hair had been grabbed. (10/17/13 RP 1055). H.M. also told Nurse Howell that during several of the sexual assaults, he had some sort of drug or alcohol on board. (10/17/13 RP 1056). The only injury complained about was that his rectum was sore after sex. (10/17/13 RP 1056). It was also noted in the chart that the last time that he had intercourse was three to five days prior to the examination. (10/17/13 RP 1056).

J.J. testified that he was 15 years old and that his birthdate was 01-25-98. (10/17/13 RP 922). J.J. stated that he knew H.M. and that he knew his dad, Travis Padgett. Also that H.M. had moved in with his dad. (10/17/13 RP 927-28). J.J. stated that when he first started going over to the home of Padgett, he and H.M. would play on the computer and hand out. (10/17/13 RP 928). Padgett would also be around the home. (10/17/13 RP 929). J.J. would visit H.M. almost every weekend. This started to occur in the fall of 2012. (10/17/13 RP 930). At first there were no problems. J.J. had been over to visit H.M. about five of six times before there was a problem. (10/17/13 RP 930-31). The problem started when they were downstairs on Padgett's bed. (10/17/13 RP 931).

J.J. described the activity downstairs as H.M. and Padgett would give each other blow jobs and H.M. would do Padgett in the butt. (10/17/13 RP 932). It started off with them watching porn from the computer

projected onto the wall. J.J. described the porn as She-Male porn. (10/17/13 RP 932). H.M., J.J. and Padgett would all be watching the porn together. It progress to them watching porn with their clothes off while in bed. J.J. joined in after a week or two. (10/17/13 RP 933). H.M. and Padgett asked J.J. to join them, telling him that it was natural. (10/17/13 RP 934). At first J.J. was reluctant, but after two weeks he too joined them. (10/17/13 RP 934-35).

J.J. testified that he would do the same acts as H.M. J.J. stated that Padgett would touch him on his penis with his hand, moving it down while H.M. would be doing him in the butt with his penis. (10/17/13 RP 936-37). J.J. and H.M. would switch places and J.J. would doing Padgett in the butt with his penis. (10/17/13 RP 937). This activity went on for a while, but stopped when Padgett was going to jail and J.J.'s grandmother did let him go over there anymore. (10/17/13 RP 937).

J.J. described the second time that he went downstairs with J.J. and Padgett as blow jobs and boning in the butt. Padgett would put his penis in J.J.'s mouth. At the same time H.M. would be putting his penis in Padgett's butt. (10/17/13 RP 9341-42). They would then switch off, J.J. would put his penis in Padgett's butt. (10/17/13 RP 942).

J.J. then was asked to describe the third time sexual activity occurred. J.J. stated that once it became nighttime, they would all go

downstairs. (10/17/13 RP 943). They would take their clothes off. (10/17/13 RP 944-45). The third time involved blow jobs and penis in the butt of Padgett. That third time no one put their penis in J.J.'s mouth, but J.J. would put his penis in Padgett's butt. (10/17/13 RP 945).

The last time that J.J. was involved with any sexual activity occurred after they had painted bathrooms. They went downstairs at night, and J.J. would again put his penis in Padgett's butt, and H.M. gave Padgett a blow job or H.M. would be putting his penis in Padgett's butt. J.J. also stated that on that occasion he kissed him. (10/17/13 RP 946). J.J. stated that this activity happened five times in total. (10/17/13 RP 930).

On another occasion a women Padgett's age was apart of the sexual activity. Padgett would have his mouth on her vagina and H.M. and J.J. would take turns putting their penises in Padgett's butt. (10/17/13 RP 949). J.J. stated that the woman's name was Rhonda, and that she would often be over at the house. (10/17/13 RP 949). J.J. also described seeing Rhonda putting on the strap-on dildo and putting into Padgett's butt. (10/17/13 RP 952).

Eventually J.J. told his grandmother what had been happening, which lead him to being taken to the hospital and being interviewed by Detective Curtis Oja. (10/17/13 RP 958-59). While at the hospital he gave

information was to what had occurred to the nurse and the doctor. (10/17/13 RP 959).

Registered Nurse Deidre Demel testified that she is employed by Yakima Valley Memorial Hospital in the emergency department. (10/17/13 RP 1058-59). On January 22, 2013 Nurse Demel was assigned to care for J.J. (10/17/13 RP 1060). The exam started at 5:52 p.m. J.J. had come in with his grandmother, and Nurse Demel took patient history from J.J. (10/17/13 RP 1061). J.J. reported that he had had some encounters with a man and his son that were sexual in nature and he had some concerns. (10/17/13 RP 1061). J.J. described an incident that involved Padgett placing his mouth on J.J.'s private area. (10/17/13 RP 1063). J.J. stated to Nurse Demel that he was uncomfortable about the drugs and the alcohol that H.M. and his father were doing. (10/17/13 RP 1063). At the conclusion of the examination Nurse Demel provided information for counseling. (10/17/13 RP 1065).

K.S. testified that she was 15 years old, and that her date of birth was June 8, 1998. (10/18/13 RP 1092-93). K.S. stated that she has known Travis Padgett for about a year, and had met his son H.M. while she was over at the house. K.S.stated that she had gone to Padgett's because he had methamphetamine. (10/18/13 RP 1094-95). She had stayed with Padgett for two days, along with her friend Tanya Reyes. (10/18/13 RP 1095).

K.S. stated that Padgett had given her meth on more than one occasion. K.S. also stated that she had oral sex with Padgett. (10/18/13 RP 1096). She was 14 years old at the time of this sexual encounter with Padgett. She had told Padgett that she her name was K.R. and that she was 17 years old. (10/18/13 RP 1099).

K.S. further testified that she was together in the basement with Padgett, H.M. and April. They were there smoking meth. (10/18/13 RP 1100). K.S. also stated that she originally met Padgett through her friend Larissa, who dealt meth to him. (10/18/13 RP 1104).

While K.S. was staying at the Padgett's house, the police arrived. K.S. stated that she was in the basement when they came into the house. She acknowledged that she had used meth about a half an hour prior to their arrival. (10/18/13 RP 1094-95). She was contacted by Detective Durbin of the Yakima Police Department. (10/18/13 RP 1098).

K.S. testified that when she was taken to the hospital for the medical examination, she was still really high. Her face was all scabbed up, and her lips were bleeding and picked at. (10/18/13 RP 1117).

Detective Michael Durbin testified that he is a detective with the Yakima Police Department, assigned to the special assault unit. (10/14/13 RP 643-645). That on January 17, 2013, he assisted Det. Oja with the Travis Padgett investigation. That following the arrest of Padgett, he had obtained

the house keys from one of the arresting officer, Officer Michelle Johnson. (10/14/13 RP 648). YPD had obtained a search warrant to search the residence. Along with other officers, he went to the Padgett residence. (10/14/13 RP 648). After knocking and announcing their presence and authority to enter, officers encountered K.S. in the basement of the house. (10/14/13 RP 650).

Detective Durbin took ahold of K.S. and directed her upstairs. Detective Durbin sat her down and sat next to her and began to talk to her. (10/14/13 RP 651). Detective Durbin spoke to her for approximately 15 to 20 minutes. (10/14/13 RP 651). K.S. was then transported to the Yakima Police Department Special Assault Unit office for further questioning. (10/14/13 RP 652). After speaking with K.S. at the police department, Detective Durbin arranged for her to be transported to Yakima Valley Memorial Hospital for an examination. (10/14/13 RP 655).

Detective Durban made several observation regarding K.S. He testified that it appeared that she had life experience that far exceeded her age. Descriptions of acts and things, and in general terms, that he thought that a normal 14-year old would find shocking or troubling she said with ease or with a matter of fact-ness. She seemed very experienced sexually, and that it appeared that sex was not an intimate thing but more of a form of business or a commodity, which Detective Durbin found shocking.

(10/14/13 RP 662). Detective Durbin further testified that K.S. had told him that she and Padgett had ingested methamphetamine within hours of the service of their search warrant. (10/14/13 RP 665).

Registered Nurse Trish McDougall testified that she was working at Memorial Hospital on January 18, 2013, when K.S. came into the hospital. Nurse McDougall treated K.S. when she came into the hospital. (10/17/13 RP 901-03). Nurse McDougall obtained a history from K.S. relevant to her seeking treatment at the hospital. (10/17/13 RP 905). K.S. reported to Nurse McDougall that she had had oral sex done on her by someone that she had met, a man named Travis. K,S, stated to Nurse McDougall that it happened the day before. (10/17/13 RP 907). No rape kit samples were taken during the exam since between the time of the act and her report of the incident, she had showered and changed her clothes. Nurse McDougall testified that she when a person showers and changes clothes, there is no evidence to collect as far as swabs. (10/17/13 RP 908-09). Nurse McDougal testified that when a patient comes into the hospital such as K.S., it is standard to run a drug screen test. (10/17/13 RP 910). In taking the patient's history, Nurse McDougall asked K.S. about her history of drug use. Nurse McDougall testified that K.S. stated that she used meth, cocaine and marijuana. K.S. reported using meth within the previous six hours. (10/17/13 RP 919).

Additionally, Nurse McDougall testified that it is important to see the results of the drug screen in to determine if the patient if symptomatic, and also so they can make referrals for rehab like detox or drug treatment facilities. (10/17/13 RP 913).

Prior to the testimony of Dr. Rivas, outside the presence of the jury, the court heard argument regarding the admissibility of his testimony, as well as the admissibility of testimony regarding the laboratory testing and urine drug screening under the business records exception to the hearsay rule. (10/21/13 RP 1176-82).

Dr. Wyatt Rivas, an emergency medicine physician from Memorial Hospital testified concerning his treatment of K.S. on January 18, 2013. (10/21/13 RP 1186-87). Dr. Rivas first contacted her early in the morning of January 18, 2013, at 12:48 a.m. (10/21/13 RP 1187). Dr. Rivas described her as being a young, Caucasian female, wearing pajama like pants. She provided a date of birth making her 4 years old. (10/21/13 RP 1188).

Dr. Rivas explained the importance of patient history as reported by the patient. He testified that history is very important, one of the most important things a physician will get from the patient. (10/21/13 RP 1188). Dr. Rivas stated that often times you can make a diagnosis just by history alone. So that it is important to let a patient tell their story, what they're

feeling, what their complaints are. A history is one of the most important things apart from the physical exam. (10/21/13 RP 1188).

The history that Dr. Rivas obtained from K.S. was that on the 16th of January, 2013, two days prior to the examination, a man named Travis, had performed oral sex on her. She described him as being in his 30's or 40 years old. (10/21/13 RP 1188-89). K.S. did not provide details as far as how it was initiated, just that it happened. (10/21/13 RP 1189). Regarding K.S.'s history of drug use, she reported to Dr. Rivas that she had used methamphetamine the day before, January 17, 2013. She further reported to Dr. Rivas that she had used marijuana in the past week and used cocaine before and mushrooms before, so multiple drugs in the pas but most recently meth and marijuana. (10/21/13 RP 1189).

Dr. Rivas further testified that as part of his treatment of K.S., he will order certain profiles, including HIV, Hepatitis, pregnancy test, a serum HCG and a drug screen. (10/21/13 RP 1189-90). Dr. Rivas testified that he ordered those tests for various reasons. He was presented with a 14-year old female who was reporting a lot of high-risk behaviors that she was participating in, and reported that she had used four illicit drugs in the past year. (10/21/13 RP 1190). Dr. Rivas wanted to ascertain what was his her system at that point in time. (10/21/13 RP 1190).

Dr. Rivas explained the process in which a urine sample is collected and tested at Memorial Hospital. He explained that the nurse helps collect the urine sample, it is then labeled with the patient's information. Then, it is sent to the laboratory where it is run through an analyzer and processed. The results are given to him by way of computer. (10/21/13 RP 1190). Dr. Rivas described the process in which urine is analyzed. He explained that the hospital laboratory employs various laboratory technicians. There are microbiologists, pathologists, as well as medical technicians in the chemistry department that perform the drug screen. (10/21/13 RP 1190-91). Dr. Rivas further explained that the urine is run thorough a machine that analyzes the urine, and detects the various drug levels in the sample. (10/21/13 RP 1191). Dr. Rivas testified that the drug screen tests are done once a day, almost immediately after a patient comes into the hospital. That it takes the laboratory 30 to 40 minutes to complete the test, and dozens of drug screens tests are done from the emergency room every day. (10/21/13 RP 1191). During a patient's visit to the ER, the information from the drug screen is obtained and reviewed with the patient. (10/21/13 RP 1191).

Without further objection, Dr. Rivas testified that K.S. tested positive for methamphetamines and cannabinoids or marijuana. That the other values that were tested, such as alcohol, opiates, narcotics, cocaine, benzodiazepine, barbiturates, were all negative. (10/21/13 RP 1190). With

regard to the reported oral sexual intercourse, Dr. Rivas testified that K.S. had reported that she had showered and had changed clothes that she had been wearing at the time. (10/21/13 RP 1191-92).

Detective Curtis Oja testified that the Travis Padgett's date of birth was July 5, 1970, and that he was not married to either H.M. or J.J. (10/21/13 RP 1220).

III. ARGUMENT.

A. Sufficient evidence supports Padgett's convictions for delivery of methamphetamine to minors.

1. Standard of Review.

Evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The appellate court draws all reasonable inferences in favor of the State and interprets them "most strongly against the defendant." Id at 201.

A reviewing court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the

evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107, review denied, 141 Wn.2d 1023 (2000). Circumstantial and direct evidence are equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

2. Argument.

To convict Padgett of delivery of a controlled substance to a minor, the State had to prove a reasonable doubt that the substance Padgett gave to H.M. and K.S. was methamphetamine, a controlled substance. RCW 69.50.401(1); RCW 69.50.406; State v. Colquitt, 133 Wn. App. 789, 800, 137 P.3d 892 (2006). Lay testimony and circumstantial evidence may be sufficient to prove the identity of the substance; a laboratory test identifying the substance is not required. Id. At 796, 800-01 (citing State v. Hernandez, 85 Wn. App. 672, 675, 935 P.2d 623 (1997)).

In Colquitt, the court listed sic non-exclusive factors to evaluate whether the State proved the identity of the substance:

1. Testimony by witnesses who have a significant amount of experience with the drug in question, so that their identification of the drug as the same as the drug in their past experience is highly credible;
2. Corroborating testimony by officers or other experts as to the identification of the substance;

3. References made to the drug by the defendant and others, either by the drug's name or a slang term commonly used to connote the drug;
4. Prior involvement by the defendant in drug trafficking;
5. Behavior characteristic of use or possession of the particular controlled substance;
6. Sensory identification of the substance if the substance is sufficiently unique.

Colquitt, 133 Wn. App. at 801.

Applying these factors, the Colquitt court found insufficient an officer's allegation that the substance "appeared to be rock cocaine," combined with a positive field test. Supra at 801-02. No evidence of the officer's training or experience supported his conclusion as to the identity of the substance in the stipulated trial. Supra at 802.

By contrast, in In Re Personal Restraint of Delmarter, 124 Wn. App. 154, 101 P.3d 11 (2004), a case analyzed in Colquitt, the positive field tests and the defendant's admission that the substances were heroin and cocaine were sufficient to uphold his convictions for heroin and cocaine. Id. At 163-64.

In the present case, the State presented sufficient circumstantial evidence to prove the substance was methamphetamine. First, the substance

that was given to H.M., was spoken of as "meth." The effects of the substance given to H.M. by Padgett were described by H.M. as having the feeling like he wasn't ever tired, like he was full of energy, not losing any energy. (10/15/13 RP 782). The drug also caused H.M. stayed up all night until 9:00 a.m. the next morning. H.M. described this activity with meth occurring at other times at home. (10/15/13 RP 783-84). Also, H.M. described the manner in with his father used the substance, that of intravenous injection. (10/15/13 RP 782). H.M. further described how they would smoke the meth either in tinfoil or in a tube sticking out of a ball. H.M. described that it felt like he was not smoking anything. (10/15/13 RP 806). Furthermore, the facts regarding the delivery to K.S. are circumstantial evidence of the identity of the substance provided to H.M.

As regards to the identity of the substance given to K.S., she reported to both Dr. Rivas and to Nurse McDougall, that she was experience with the use of several drugs, to include methamphetamine, cocaine, mushrooms and marijuana. (10/17/13 RP 919; 10/21/13 RP 1189). K.S. stated that she had gone to Padgett's house because she knew he had meth. (10/18/13 RP 1094-95). K.S. further testified that she was together in the basement with Padgett, H.M. and April. They were there smoking meth. (10/18/13 RP 1100). K.S. also stated that she originally met Padgett through her friend Larissa, who dealt meth to him. (10/18/13 RP 1104). Detective Durban

made several observation regarding K.S. He testified that it appeared that she had life experience that far exceeded her age. Descriptions of acts and things, and in general terms, that he thought that a normal 14-year old would find shocking or troubling she said with ease or with a matter of fact-ness. She seemed very experienced sexually, and that it appeared that sex was not an intimate thing but more of a form of business or a commodity, which Detective Durbin found shocking. (10/14/13 RP 662). Detective Durbin further testified that K.S. had told him that she and Padgett had ingested methamphetamine within hours of the service of their search warrant. (10/14/13 RP 665). Along with the positive drug test screen for methamphetamine from the hospital through the testimony of Dr. Rivas, there was more than sufficient evidence presented to the jury regarding the identity of the substance as methamphetamine.

B. The testimony of Dr. Rivas regarding the drug screen results of K.S. that he ordered as part of her treatment was properly admitted as a business record and was nontestimonial under a confrontation right analysis.

1. The State presented a proper foundation regarding the admission of the drug screen test ordered by Dr. Rivas for his patient K.S

Medical records are admissible as an exception to the hearsay rule under the business records exception under ER 803(a)(6). In State v. Garrett, 76 Wn. App. 719, 887 P.2d 488 (1995), the court held that under

the Uniform Business Records as Evidence Act, "[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, condition 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. RCW 5.45.020." Id. at 721-22.

The Garrett further stated that "the trial court's decision to admit business records is reviewed only for a manifest abuse of discretion. *State v. Ziegler,* 114 Wn.2d 533, 538, 789 P.2d 79 (1990); *State v. Alexander*, 64 Wn. App. 147, 156, 822 P.2d 1250 (1992)." Id. At 722.

In State v. Ziegler, 114 Wn.2d 533, 789 P.2d 79 (1990), the court was presented with a very similar situation as to this case. At trial in Ziegler, Dr. Bradley Gerrish, a partner to the treating physical Dr. Bishop, testified from the medical file of the victim, that a laboratory report showed that the victim had contracted Chlamydia, a sexually transmitted disease. The trial court admitted the test results over defense objection. The Ziegler court held that "the UBRA, RCW 5.45.020, makes evidence that would otherwise be hearsay competent testimony. The UBRA contemplates that business records are presumptively reliable if made in the regular course of business and there was no apparent motive to falsify." Ziegler, supra at 537-38.

The Ziegler court further set for the requirements for the admission of such records, "[t]he UBRA contains five requirements for admissibility designed to ensure reliability. To be admissible in evidence a business record must (1) be in record for, (2) be of an act, condition or event, (3) be made in the regular course of business, (4) be made at or near the time of the act, condition or event, and (5) the court must be satisfied that the sources of information, method, and time of preparation justify the admittance of the evidence." Id at 538.

The testimony of both Dr. Rivas and Nurse McDougall, established the requirements of the UBRA. The official medical record of K.S. was in record form. The record was of the medical examination while she was at Yakima Valley Memorial Hospital. The record, as well as the drug screen test, was made in the regular course of business used to provide treatment to K.S. The drug screen test was made at the time of the treatment. And Dr. Rivas testified as to its preparation and his reliance upon the information to treat K.S.

The Ziegler court found that the purpose of the UBRA, "[a]s applied to hospital records, compliance with the act obviates the necessity, expense, inconvenience, and sometimes impossibility of calling as witnesses the attendants, nurses, physicians, X ray technicians, laboratory and other hospital employees who collaborated to make the hospital record of the

patient. It is not necessary to examine the person who actually created the record so long as it is produced by one who has the custody of the record as a regular part of his work or has supervision of its creation."

Thus, in this case, the trial court did not manifestly abuse its discretion by admitted the drug screen test of K.S.

2. The admission of the drug screen test ordered by Dr.Rivas for his patient K.S. as part of her treatment at the Hospital did not violate Padgett's Sixth Amendment right to confrontation.

The appellant asserts that the trial court violated his Sixth Amendment right to confrontation by the admission of the drug screen test results conducted by Dr. Rivas in his treatment of K.S. at Yakima Valley Memorial Hospital. The cites cases that deal with laboratory testing that were created for purposes of litigation.

In State v. Doerflinger, 170 Wn. App. 650, 285 P.3d 217 (2012), the court held that the radiologist's findings of a nasal facture sustained during an assault and testified to by his treating physician at trial. The court held that they were nontestimonial, in that "[t]hey were prepared not to establish Clark's culpability, but to determine the extent of Palmer's injuries. Nor where they prepared in the form of an extrajudicial sworn or certified statement to be used as a substitute for testimony in court." Doerflinger, supra at 660. The further pointed out that in *Melendez-Diaz* held that

"medical reports created for treatment purposes …. Would not be testimonial under our decision today." Id. at 661.

Clearly the drug screen was ordered by Dr. Rivas as a routine practice under circumstances of his examination and treatment of K.S., and thus there are clearly nontestimonial and their admission did not violate the appellant's Sixth Amendment right to confrontation.

C. The "to-convict" jury instructions for the multiple counts of sexual assault provided more than sufficient guidance to the jury for them to find separate and distinct conduct for the jury to be unanimous as to the act and the jury instructions made the relevant legal standard manifestly apparent to the average juror.

1. The jury instructions clearly made it "manifestly apparent" that proof of each count had to be separate and distinct.

The appellant alleges that the jury instructions for multiple counts of sexual assault against H.M. and J.J. violated his right against double jeopardy. His main point is that although each count had language that "one particular act, a separate and distinct act" must be proved beyond a reasonable doubt, the jury was not instructed that "the separate and distinct act could not support more than one count." (Brief of Appellant, page 37). The language that the appellant would require is redundant to the language of "one particular act, a separate and distinct act."

In State v. Borsheim, 140 Wn. App. 357, 165 P.3d 417 (2007), the court reiterated the requirement that "in sexual abuse cases where multiple identical counts are alleged to have occurred with the same charging period, the trial court must instruct the jury "that they are to find 'separate and distinct acts' for each count." Id. at 367. The Borsheim court noted the problems with the jury instructions in that case as

> [the instructions] did not, however, convey the need to base each charged count on a "separate and distinct" underlying event. Similarly, although instruction 4 states that "a separate crime is charged in each count," neither this instruction nor any other informed the jury that each "crime" required proof of a different act. Finally, instruction 9, the "to convict" instruction, states that each of the elements of the crime must be proved "as to each count." However, this instruction does not state that the first such element, "sexual intercourse with [B.G.]," requires a finding of a "separate and distinct" act of sexual intercourse for each count on which a conviction is rendered.

Borsheim, supra at 367.

The jury instructions in the present case do not have those same infirmities. The jury was instructed in separate "to-convict" instructions for each count. (CP 176, 179, 180, 181, 182, 183, 197, 198, 199, 200). Also, each count had language that "one particular act, a separate and distinct act" must be proved beyond a reasonable doubt, as to each of the counts listed above. Also, the jury had a separate instruction which stated:

> The State of Washington alleges that the defendant committed acts of [crime listed] on multiple occasions. To convict the defendant on any count of [crime listed], one particular act, a

> separate and distinct act, of [crime listed] must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all the acts of [crime listed].

CP 175, 178, 196. A separate instruction for the crimes of third degree rape of a child, first degree incest, and third degree child molestation was provided to the jury.

In State v. Mutch, 171 Wn.2d 646, 254 P.3d 803 (2011), the court found that the jury instructions in that was were faulty since "they failed to include sufficiently distinctive "to convict" instructions or an instruction that each count must be based on separate and distinct criminal act." Id. at 662. Although finding the instructions lacking, the Mutch court conducted a further analysis, stating

> "[t]his court has established that '[i]n reviewing allegations of double jeopardy, an appellate court may review the entire record to establish what was before the court.' . . . . [w]hile the court may look to the entire trial record when considering a double jeopardy claim, we note that our review is rigorous and is among the strictest. Considering the evidence, arguments and instructions, if it is not clear that it was "*manifestly apparent* to the jury that the State [was] not seeking to impose multiple punishments for the same offense" and that each count was based on a separate act, there is a double jeopardy violation.

Mutch, supra at 664.

Contrary to the appellant's argument, State's trial counsel clearly delineated the separate and distinct act in which each count was based upon. The State made an election as to each count. (10/24/13 RP 1504, 1506-12,

1516-18). Thus there was not double jeopardy violation. (See also State v. Chenoweth, 185 Wn.2d 218, ___ P.3d ___ (2016), "[w]e have held – for purposes of a double jeopardy analysis and in examining whether multiple offenses constitute the same criminal conduct – that rape of a child and incest are separate crimes because they involve distinct criminal intents.).

C. The court's instructions that a "prolonged period of time" meant "more than a few weeks" was an impermissible comment on the evidence, but the error was harmless.

1. The State concedes that the jury instruction was erroneous, however, no prejudice resulted in its use.

In State v. Brush, 183 Wn.2d 550, 353 P.3d 213 (2015), the Supreme Court held that his instruction that included the language "the term 'prolonged period of time' means more than a few weeks" was an impermissible comment on the evidence and it incorrectly stated the law. The court further stated that "[j]udicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." Brush, supra at 559.

Under the circumstances of the present case, this court can conclude that the appellant suffered no prejudice here. The Supreme Court was specifically troubled in Brush by the fact that Brush's prior abuse of his

victim had occurred over a span of time "just longer than a few weeks" prior to her murder. Brush, supra at 559. In light of this period of time, the Brush court concluded that a "straightforward application of the jury instruction would likely lead a jury to conclude that the abuse in this case met the give definition of a 'prolonged period of time.'" Id. Accordingly, the Supreme Court concluded that the State could not meet its high burden of showing an absence of prejudice. Id. The pattern of abuse in the present case took place of a period of 5 months. The first instance of sexual abuse was arguably in September, 2012, and last in January, 2013. (10/15/13 RP 752-754, 808, 819). Since the jury convicted the appellant as to the various counts of sexual abuse over that five month period, clearly that met the definition of a "prolonged period of time."

2. The State presented substantial evidence to support each alternative of aggravated domestic violence.

Contrary to the appellant's argument, the State presented sufficient evidence to support the jury's finding that the offense was "part of an ongoing pattern of psychological, physical or sexual abuse." The appellant argues that the Legislature intended that the sexual abuse be separate and distinct from both physical abuse and psychological abuse, citing State v. Roggenkamp, 153 Wn.2d 614, 625-26, 106 P.3d 196 (2005). Roggenkamp does not support the argument that there must be separate and distinct facts

to support the alternative mean. In State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994), the court held that

> The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury. If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous find as to the means.

Ortega-Martinez, supra at 707-08. There is no requirement that the acts be separate and distinct within any means. There was sufficient evidence of all three means. The acts themselves were sexual abuse, which encompassed both a physical component and a psychological component. H.M. described the psychological impact of the abuse. (10/15/13 RP 809, 815; 10/17/13 RP 1055).

D. The court's determination of the defendant's ability to pay legal financial obligation should not be considered for the first time on appeal.

The appellant relies on State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015) to support discretionary review of legal financial obligations (LFOs) and concedes that this issue was never raised below. (Brief of Appellant at 50). It is commonly accepted that a party may not raise a new argument on appeal that was not raised before the trial court. State v. Strine, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013); RAP 2.5(a). Post-*Blazina*

courts have held that failure to object to the imposition of LFOs at sentencing waives the issue on appeal unless the appellate court utilizes its discretion to permit review of the issue. State v. Lyle, 188 Wn. App. 848, 853, 355 P.3d 327 (2015). This Court recently identified several reasons to decline to address issues not raised at the trial court level which are compelling.

> Good sense lies behind the requirement that arguments be first asserted at trial. The prerequisite affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. There is great potential for abuse when a party does not raise an issue below because a party so situated could simply lie back, not allowing the trial court to avoid the potential prejudice, gamble on the verdict, and then seek a new trial on appeal.

State v. Stoddard, 192 Wn. App. 222, 366 P.3d 474 (2016). Even the *Blazina* Court recognized that: "A defendant who makes no objection to the imposition of discretionary LFOs at sentencing is not automatically entitled to review." 182 Wn.2d at 832. The appellant did not challenge LFOs below, and he should not be allowed to do so now.

E. The trial court should be directed to correct the clerical errors in the Judgment and Sentence.

The State concedes the clerical errors should be corrected.

F. The trial court's findings of fact and conclusions of law was required by RCW 9.94A.535 and by the Supreme Court's ruling in State v. Friedlund.

In State v. Friedlund, 182 Wn.2d 388, 341 P.3d 280 (2015), the Supreme Court stated emphatically that

> [T]he entry of written findings is essential when a court imposes an exceptional sentence. Because the record does not contain written findings in either of the pending cases, we remand both Friedlund and Volk for the entry of written findings.
>
> …….
>
> The SRA permits a court to impose sentences that deviate from the standard sentence range "if it fins, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535. When a trial court imposes an exceptional sentence, the SRA requires the court to "set forth the reasons for its decision in *written findings of fact and conclusions of law."* Id. (emphasis added). This requirement, word for word, has been part of the SRA from its inception. See Laws of 1981, ch. 137, Sec. 12(3). The written findings must then be sent to the Washington State Sentencing Guidelines Commission along with the trial court's judgment and sentence. CrR 7.2(d) ("If the sentence imposed departs from the applicable standard sentence range, the court's written findings of fact and conclusions of law shall also be supplied to the Commission.").

Friedlund, supra at 393- 94.

Thus, by statute and decisional law, the court is to make the determination as to whether the facts are substantial and compelling reason justifying an exceptional sentence.

IV. CONCLUSION

For the reasons set forth above this court should affirm the conviction and sentence. Further, this court should direct the trial court to correct the clerical errors.

Respectfully submitted this 13th day of May, 2016,

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DECLARATION OF SERVICE

I, Kenneth L. Ramm, state that on May 13, 2016, I emailed a copy, by agreement of the parties, of the Appellant's Amended Brief, to Sarah M. Hrobsky at wapofficemail@washapp.org.

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

DATED this 13th day of May, 2016 at Yakima, Washington.

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