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WASHINGTON STATE
SUPREME COURT

Supreme Court No. 94306-1
COA No. 32927-5-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TRAVIS L. PADGETT,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Travis Padgett was the appellant in COA No. 32927-5-III

B. COURT OF APPEALS DECISION

Mr. Padgett seeks review of the decision issued March 2, 2107 (Appendix A) affirming his convictions and sentence.

C. ISSUES PRESENTED ON REVIEW

1. Whether 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.

2. Whether jury instructions No. 2, 14, 15, 17, 19 similarly exposed Mr. Padgett to multiple punishments for the same offense.

3. Whether jury instructions No. 2, 11, 33, 35 similarly exposed Mr. Padgett to multiple punishments for the same offense.

4. Whether jury instructions No. 2, 32, 34, 36 similarly exposed Mr. Padgett to multiple punishments for the same offense.

5. Whether jury instructions No. 40 and 41 were an improper judicial comment on the evidence, violative of Article IV, section 16.

6. Whether 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.

7. Whether 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.

8. Whether 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.

9. Whether, where the Court of Appeals found that jury instructions No. 40 and 41 did impermissibly relieve 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, this Court should take review and decide the aggravating factor questions that the Court of Appeals left unresolved, and determine if Mr. Padgett’s exceptional sentence must be reversed, even if not all of the aggravating factors are stricken.

D. STATEMENT OF THE CASE

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

Mr. Padgett testified and categorically denied having sexual contact with H.M., J.J., or K.S. 10/22/13 RP 1321 -1343. He acknowledged he had a past history of methamphetamine abuse but he had been drug free for six years. 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 found the crimes as to H.M. were part of ongoing abuse manifested by multiple incidents

over a prolonged period of time and the current offenses involved aggravated domestic violence. CP 233-38. The jury found as to J.J. that the crimes were part of an ongoing pattern 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 sections below and in the Court of Appeals decision. Appendix A.

E. ARGUMENT

(1). Contrary to Borsheim and Berg and this Court's clear case law in Mutch that exceptions to those cases' clear rule of reversal are only possible in rare circumstances, 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. Review is warranted under RAP 13.4(b)(3) and (1),(2).

Review is warranted under RAP 13.4(b)(3) and (1),(2) where the issue of Double Jeopardy instructional error presents a significant question of Constitutional law, and the Court of Appeals decision is in conflict with the Court of Appeals cases of *State v. Berg*, 147 Wn. App. 923, 198 P.3d 529 (2008); *State v. Borsheim*, 140 Wn. App. 357, 165 P.3d 417 (2007), and the Supreme Court decisions of *State v. Mutch*,

171 Wn.2d 646, 254 P.3d 803 (2011), and *State v. Pena Fuentes*, 179 Wn.2d 808, 318 P.3d 257 (2014).

b. 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).

c. 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 from 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 count. 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 Court of Appeals was wrong when it relied on the fact that 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). The closing argument in this case did not adequately distinguish between the acts so as to avoid a Double Jeopardy violation. *See Kier*, 164 Wn.2d at 813; *see also State v. Pena Fuentes*, 179 Wn.2d 808, 825-26, 318 P.3d 257 (2014) (no violation where prosecutor “made a point to clearly distinguish between the acts.”).

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.

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.

(2). The Court of Appeals agreed that the instructions regarding a “prolonged period of time” were an impermissible comment on the evidence, and this Court should assess the propriety of the remaining aggravating factors, because it cannot, under all the circumstances, be sure that the sentencing court would have issued the same sentence.

Review is warranted under RAP 13.4(b)(1),(2), (3), (4). Review is warranted for the following reasons. As to the exceptional sentence, the Court of Appeals did hold that the special verdicts that the sex offenses were part of an ongoing pattern of abuse over a “prolonged period of time” were fatally flawed by a Comment on the Evidence under Article IV, section 16 of the Washington Constitution. CP 205, 206 (Instruction No. 40, 41); *State v. Brush*, 183 Wn.2d 550, 557-58, 353 P.3d 213 (2015); Decision (Appendix A, at pp. 20-21).

Here, the Court did not reverse the sentence, however, holding that the sentencing court would have imposed the same sentence based on the multiple offense policy and the defendant’s “high offender score.” Decision, Appendix A (at pp. 21-23).

But Mr. Padgett argues that the special verdict that the sex offenses against H.M. were *also* aggravated domestic violence offenses

fails too, because the State did not prove each alternative means alleged. And 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 to due process and a jury finding of every fact essential to punishment.

First, Mr. Padgett contends that review is warranted under RAP 13.4(b)(1) and (2), because the Court of Appeals’ refusal to reverse the exceptional sentence was contrary to the rule that comments on the evidence are constitutional error under Article IV, section 16, and as set forth in numerous cases from this Court including *State v. Brush, infra*.

Second, the Court of Appeals should have reversed the exceptional sentence because of the comment on the evidence, or at least reached the defendant's additional challenge to the jury-found aggravating factor of aggravated domestic violence.

In fact, a full appraisal of the bases the court believed it properly had before it simply does not allow the conclusion that no errors as to an aggravating circumstance can be deemed harmless to the sentence, in this case. The Courts of Appeals have stated that exceptional

sentences must be reversed unless it is clear that the same sentence would have been imposed. Decision (Appendix A, at p. 22).

However, if multiple factors are invalidated, or if the Court placed emphasis on an invalid factor, this Court should reverse. *See, e.g., State v. Henshaw*, 62 Wn. App. 135, 140, 813 P.2d 146 (1991) (remand is necessary where sentencing court placed considerable weight on invalid factors, even if other factors were valid).

Here, one or more, indeed several bases can be invalidated -- the “comment on the evidence” error was gravely prejudicial because it allowed the court to have available to consider, for purposes of its exceptional sentence, an aggravating factor produced by the court's oversight of the state constitutional rule of Article IV, section 16, that judges shall not comment on matters of fact. Of course, to begin with, because they are constitutional error, “[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.” *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006) (as quoted in *State v. Brush*, at 559-60). In such constitutional circumstances, the State must meet the “high burden

of showing from the record that “no prejudice could have resulted.”

Brush, at 559-60.

Review is warranted under RAP 13.4(b)(3), and also (4), where the matter of improper exceptional sentences and the prejudice caused by aggravating factors that the prosecutor places before the jury and the Court, while later disavowing many of them at sentencing as unnecessary, is a matter of substantial public interest.

Therefore, Mr. Padgett argues, the additional error in imposing the exceptional sentence caused harm – the existence of boilerplate-style language in the prosecution-drafted Findings, asserting that the exceptional sentence would be justified based on any factor, or under the court-found factor of the multiple offense policy because of Mr. Padgett’s criminal conviction score -- should not preclude this Court from examining all of the challenged aggravating factors and reversing the over-length sentence if one, or more of them, was improper.

This is particularly true in the special circumstances of Mr. Padgett’s case, where the assertion by the Respondent that the exceptional sentence was justified by any one factor stands in marked contrast to that very same Respondent State of Washington’s act of charging the series of crimes that would inevitably lead, upon

conviction, to an offender score that could mathematically support an exceptional sentence based on the multiple offense policy.

First, one conviction has been *reversed* by the Court of Appeals. Second, if the State did not desire the several aggravators to be pointed to as making an exceptional sentence compelling in this case, it would not have alleged them. The Respondent cannot now be heard to claim the sentence is insulated from reversal on ground that both jury-found aggravators, each heavily litigated below, were in fact mere “surplusage.”

(3). 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.

Due process requires the State to prove beyond a reasonable doubt every element of a crime charged. U.S. Const. amend. XIV; Wash. Const. art. I, sec. 3, 21, 22; *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Smith*, 159 Wn.2d 778, 783, 155 P.3d 873 (2007). Where substantial evidence supports each of the alternative means, lack of express unanimity is excused. *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). Here, 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).

(4). The judicial findings of fact to support the exceptional sentence above the standard range violated Mr. Padgett’s right to trial by jury.

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 v. Washington*, 542 U.S. 296, 298, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 1347 L.Ed.2d 435 (2000); 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 sentence based on those findings. A finding of “substantial and compelling reasons” is inherently a factual finding, which can only be made by a jury. *See Blakely*, 542 U.S. at 305.

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 accept review, and reverse his judgment and sentence.

DATED this 23 day of March, 2017.

Respectfully submitted,

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Appendix A

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

STATE OF WASHINGTON,)	
)	No. 32927-5-III
Respondent,)	
)	
v.)	
)	UNPUBLISHED OPINION
TRAVIS LEE PADGETT,)	
)	
Appellant.)	

SIDDOWAY, J. — Travis Padgett was given an exceptional aggravated sentence of 360 months of confinement after a jury found him guilty of 11 sexual crimes committed against 3 young teenagers, including his own 14-year-old son, and of delivery of methamphetamine to 2 of the teens. He makes 19 assignments of error in his brief and in a pro se statement of additional grounds.

The evidence that Mr. Padgett delivered methamphetamine to his son is insufficient, so we reverse that conviction. We also remand for the trial court to address two clerical errors and one oversight committed at sentencing. We otherwise affirm.

FACTS AND PROCEDURAL BACKGROUND

The underlying facts are known to the parties and disturbing details are irrelevant to this appeal. In January 2013, 6 months after Travis Padgett was awarded custody of

his then 14-year-old son, Henry M.,¹ Henry contacted his mother to say that Mr. Padgett was using drugs and he wanted to run away. Henry's mother contacted Yakima police, and a patrol officer put Henry in touch with his school resource officer. Given the seriousness of what Henry reported to the resource officer about not only drug use, but sexual abuse, she promptly took Henry to speak with Curtis Oja, a detective with the department's special assault unit.

In an hour-long interview, Henry told Detective Oja about his father's drug use and about Henry's sexual contact with his father and his father's female guests. Based on Henry's disclosures, the detective obtained a search warrant for Mr. Padgett's home that officers executed that evening.

In the course of the search, police officers found sex toys and devices in an ottoman and utility room, along with a wadded up shower curtain. Attached to the four bedposts of Mr. Padgett's bed were industrial hooks, later testified to being used for bondage. Officers found no evidence of drugs or drug use.

Officers executing the search warrant also encountered a 14-year-old girl, Candace S., in the home. Candace had met Mr. Padgett through her friend, who Candace said was Mr. Padgett's methamphetamine dealer. Candace had been at Mr. Padgett's home for

¹ "Henry M.," "Jack J.," and "Candace S." are pseudonyms for the juvenile victims of Mr. Padgett's crimes. See General Order of Division III, *In re Use of Initials or Pseudonyms for Child Victims or Child Witnesses* (Wash. Ct. App.), http://www.courts.wa.gov/appellate_trial_courts/.

two days, had engaged in oral sex during that time with Mr. Padgett and an adult female friend, and had ingested methamphetamine provided by Mr. Padgett within a half hour before the search warrant was executed. She agreed to travel to the police department to be interviewed by Detective Michael Durbin, and based on their interview, the detective had another officer transport her to the hospital for a sexual assault examination.

Several days after the search, Detective Oja was contacted by a family member of Jack. J, a friend of Henry's. The family member learned of Mr. Padgett's arrest and—knowing Jack spent time at the Padgett home—was concerned he might have been sexually assaulted. Detective Oja interviewed Jack on January 22, 2013.

The State filed initial charges against Mr. Padgett the next day. Trial was delayed by the granting of four continuances, all made or joined in by defense counsel, but over Mr. Padgett's personal objections.

A little over 2 months before a continued trial date of October 7, 2013, the State amended its information to include the following 14 charges, involving the following victims:

Crimes against Henry:	Three counts of third degree rape of a child (counts 1, 3, and 5); Three counts of first degree incest (counts 2, 4, and 6); and One count of distributing a controlled substance to a minor (count 8).
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Crimes against Candace: One count of communicating with a minor for immoral purposes (count 7); and
One count of distributing a controlled substance to a minor (count 9).

Crimes against Jack: Three counts of third degree child molestation (counts 10, 12, and 14);
Two counts of third degree rape (counts 11 and 13).

Clerk's Papers (CP) at 14-19.

Three days before trial was finally set to begin, Mr. Padgett's defense lawyer moved for a further continuance based in part on receiving, only a week before, results of court-ordered testing of a DNA² sample from Mr. Padgett and the shower curtain collected in the search of Mr. Padgett's home. The testing had been requested and ordered in August. The trial court denied a further continuance.

During trial, both Henry and Jack testified to multiple sexual encounters they had with Mr. Padgett. Henry testified to many more incidents than the number of counts charged, telling the jury that his father had sex with him "pretty much every day." Report of Proceedings (RP)³ at 763.

Henry also testified to using methamphetamine provided by his father. He

² Deoxyribonucleic acid.

³ Except as otherwise indicated, citations to the report of proceedings and "RP" are to the consecutively-numbered 10 volumes of proceedings that begin with pretrial motions on October 7, 2013, and conclude with the sentencing hearing on November 21, 2014.

testified that Mr. Padgett first gave it to him in a cup, telling him to lick the bottom of the cup, which was the meth, and that it “tasted really gross.” RP at 780-82. Henry described feeling “full of energy” after licking the rocks, and testified that he stayed up until 9:00 a.m., engaging in sexual contact with his father. RP at 783. He told jurors that on later occasions, he smoked methamphetamine with his father, using what he described as “a tube sticking out of a ball,” but “it didn’t really feel like you were smoking anything.” RP at 806.

The State offered expert testimony on DNA testing of three dildos collected during the search of Mr. Padgett’s home, each of which contained DNA that was a match for Mr. Padgett. One was a potential match for Henry.

Trial evidence of the crimes committed against Candace included her testimony and that of Dr. Wyatt Rivas, the emergency room physician who treated her when she was brought to the hospital by police officers. He testified that she reported a history of drug use including methamphetamine, marijuana, mushrooms, and cocaine. Over a defense objection, he testified that he ordered a drug screen of a urine sample that tested positive for methamphetamine. The technician who conducted the urine sample did not testify.

To the extent the 14 counts involved a charge of the same crime against the same victim (*e.g.*, the instructions on counts 1, 3, and 5, charging the third degree rape of Henry) the to-convict instructions given the jury were, for the most part, identical. In

closing argument, the prosecutor identified for jurors the conduct being alleged as the basis for each count.

The jury returned guilty verdicts on all counts except count 14. On counts 1 through 6 (rape and incest involving Henry), the jury returned special verdicts finding that each crime (1) was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years, and (2) was an aggravated domestic violence offense. On counts 10 through 13 (molestation and rape involving Jack), the jury returned special verdicts making the same ongoing pattern of sexual abuse of a minor finding made on counts 1 through 6.

The trial court imposed an exceptional sentence of 360 months. It later entered written findings and conclusions in which it found that “any one aggravating factor found by the jury and/or the operation of the multiple offense policy” provided substantial and compelling reasons to justify the exceptional sentence. CP at 497.

Finally, the trial court imposed a total of \$1,750 in legal financial obligations (LFOs).⁴ Mr. Padgett made no objection. While the judgment and sentence included a boilerplate finding that Mr. Padgett had the ability to pay the LFOs, the court did not inquire on the record into Mr. Padgett’s existing or projected financial circumstances.

⁴ They comprised a \$500 crime penalty assessment, a \$100 DNA collection fee, a \$200 criminal filing fee, a \$600 court appointed attorney recoupment fee, a \$100 domestic violence assessment, and a \$250 jury fee.

Mr. Padgett appeals.

ANALYSIS

Mr. Padgett makes 17 assignments of error on appeal, which can be grouped into eight categories: he argues (1) insufficient evidence supports the two convictions for delivery of a controlled substance, (2) evidence of Candace's drug screen was non-admissible hearsay that did not qualify for the business record exception and its admission violated his constitutional confrontation rights, (3) because identical to-convict instructions were used for multiple counts, he was exposed to double jeopardy, (4) the trial court's instructions on the "ongoing pattern of sexual abuse against a minor" aggravating factor was an unlawful comment on the evidence and relieved the State of its burden of proof, (5) aggravated domestic violence is an alternate means factor and the State failed to present sufficient evidence to establish each means, (6) the trial court entered an unsupported finding of ability to pay LFOs, (7) the felony judgment and sentence and warrant of commitment contain clerical errors, and (8) the trial court engaged in impermissible judicial fact-finding in imposing an exceptional sentence. We address Mr. Padgett's arguments in the categories and in the order set forth above.

I. Sufficiency of evidence: delivery of a controlled substance

Mr. Padgett claims there was insufficient evidence for the jury to find beyond a reasonable doubt that he gave methamphetamine to Henry and Candace. In Henry's case, he contends that no expert testimony identified the substance provided and Henry was too

inexperienced to reliably identify the substance as methamphetamine. In Candace's case, he contends there was insufficient evidence the methamphetamine she consumed in the days before the search was provided by him. In connection with both arguments, he points out that no drugs or evidence of drug use was found in the search of his home and that Jack and two other of Henry's friends testified they never saw drugs or drug use in the home.

When presented with an evidence sufficiency challenge, we examine "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* We defer to the trier of fact on issues involving conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence. *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

In *State v. Colquitt*, 133 Wn. App. 789, 801, 137 P.3d 892 (2006), this court provided nonexclusive examples of evidence that should be considered in determining whether the State has met its burden of establishing that the substance delivered by a defendant was a controlled 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; and (6) sensory identification of the substance if the substance is sufficiently unique.

Mr. Padgett claims the evidence in this case is comparable to that in *Colquitt*, which was found to be insufficient. Mr. Colquitt was convicted of possession of cocaine based on substance identification evidence consisting of the arresting officer's statement that the substance appeared to be rock cocaine and a field test that was positive for cocaine. *Id.* at 794. Without evidence that the officer had any experience and training enabling him to reliably identify the drug, the appellate court characterized the officer's identification as appearing to be pure conjecture. *Id.* at 800-02.

The State counters that this case is more like *In re Personal Restraint of Delmarter*, 124 Wn. App. 154, 101 P.3d 111 (2004), in which the court held that a positive field test by an officer, and a defendant's admission that the substances were heroin and cocaine were sufficient to uphold the defendant's convictions for possession of those substances.

We agree with Mr. Padgett that the State's evidence identifying the substance provided to Henry as methamphetamine is more like the evidence in *Colquitt*. Unlike in *Delmarter*, Mr. Padgett never confessed to giving Henry methamphetamine nor was any of the substance he provided available to be field tested. The State offered only Henry's

testimony that the substance was “meth”; that the first meth provided looked “white like little rocks,” tasted “gross,” and acted as a stimulant, causing him to stay awake all night; that he had seen Mr. Padgett use the drug intravenously; and that he had smoked the substance, wrapped in tinfoil, using a tube sticking out of a ball. RP at 780, 782. Absent evidence that Henry had any prior experience enabling him to recognize methamphetamine or expert testimony that his observations of the substance’s appearance, use, and effects were consistent with methamphetamine, the State’s evidence is insufficient to establish the substance provided by Mr. Padgett was methamphetamine. Mr. Padgett’s conviction on that count must be reversed.

By contrast, Candace’s testimony about her drug use and her friendship with Mr. Padgett’s meth dealer, her reference to “all the rehabs” she had attended, and the history she provided to Dr. Rivas, established a basis on which she could reliably identify the drug provided to her as methamphetamine.⁵ RP at 1094. Mr. Padgett’s challenge to his conviction for delivery of the substance to Candace focuses on what he contends was the State’s failure to prove that he provided the drug to her. But Candace testified as follows at trial:

Q. . . . [W]hy were you at Travis’?

A. Because he had meth.

Q. . . . [H]e had meth. Did Travis give you meth?

⁵ The drug screen (whose admission we uphold below) is not necessary to establish Candace’s ability to recognize the drug, but corroborates her testimony that she smoked methamphetamine with Mr. Padgett before police arrived to execute the warrant.

A. Yeah.

RP at 1094. After establishing the time frame, the questioning continued:

Q. . . . [Y]ou said that you went there because he had meth. Just for the record, when you say meth, is that methamphetamine?

A. Yeah.

Q. Was there any other reason why you were there?

A. No.

RP at 1095. After testifying that she had been at Mr. Padgett's home for two days when officers arrived to execute the search warrant, she answered the following questions:

Q. . . . Now, when the defendant, Mr. Padgett, gave you the meth, was that on one time or more than one time when you were there?

A. More than one time.

Q. Do you know how many times he gave you meth?

A. No.

RP at 1095-96. Finally, she was asked about when she last used meth before the officers arrived to execute the search warrant:

Q. . . . Had you had any meth before the police came over?

A. Oh, yeah.

Q. All right. And do you know about how much longer it was when the last meth was?

A. Like a half an hour maybe.

RP at 1098.

Viewing this testimony in the light most favorable to the State, and deferring to the jurors' determinations about credibility and the persuasiveness of the evidence, the State did not need to support Candace's testimony with other evidence. Her testimony was sufficient to establish that Mr. Padgett provided her with methamphetamine.

II. Admission of Candace's drug screen

Before calling emergency physician Rivas as a witness, the State, outside the presence of the jury, asked the court to rule on the admissibility of the drug screen he ordered, which tested positive for methamphetamine. The State represented that Dr. Rivas would lay the foundation to admit the drug screen as a business record. The defense objected that the record was a hospital record, not Dr. Rivas's record, and that the proper custodian was the person who created the record, not the doctor. The defense also complained that the drug screen was "testimonial." CP at 1180. The trial court ruled the drug screen admissible subject to the State laying the proper foundation for the business record exception, citing *State v. Garrett*⁶ for support.

Hearsay is inadmissible unless it falls within an exception. ER 802. The Uniform Business Records as Evidence Act, RCW 5.45.020, provides an exception for business records because they "are presumptively reliable if made in the regular course of business and there was no apparent motive to falsify." *State v. Ziegler*, 114 Wn.2d 533, 538, 789 P.2d 79 (1990). For evidence to be admissible under the act, the business record must

(1) be in record form, (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.

⁶ 76 Wn. App. 719, 887 P.2d 488 (1995).

Id. A trial court's decision admitting or excluding such records "is given much weight and will not be reversed unless there has been a manifest abuse of discretion." *Cantrill v. Am. Mail Line*, 42 Wn.2d 590, 608, 257 P.2d 179 (1953).

Our Supreme Court held in 1953 that "[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." *Id.* "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." *Id.* In later cases, our Supreme Court has held that a physician can lay the foundation for laboratory tests where they are included in a medical file in the custody of the physician's clinic, clinic personnel ordered the tests and rely on the lab's test results in treating patients, and the physician is familiar with the laboratory and its testing procedures. *Ziegler*, 114 Wn.2d at 539-40. This court has rejected any requirement that the foundation for a medical record be laid by someone who supervises the individual who contributed a record to a patient's medical file. *Garrett*, 76 Wn. App. at 725. In *Garrett*, the appellate court held that a patient's treating physician could lay the foundation to admit records of an emergency room visit at which the treating physician was not present. *Id.* Because the medical reports were signed and

dated by the individuals who made them, the time of their preparation relative to the events recorded was demonstrated. *Id.*

Here, Dr. Rivas testified that he treated Candace early in the morning on January 18, 2013. He testified that he ordered a drug screen after learning she had used methamphetamine the prior day, marijuana in the past week, and two other illicit drugs in the past year, explaining, "I wanted to ascertain what was in her system at that point." RP at 1190. He testified that drug screens are done in the regular course of business and are ordered from the emergency room "dozens of times a day." RP at 1191. He explained the process for collecting the patient's urine sample used for a drug screen, and how it is transmitted to the hospital's laboratory where it is run through "a machine, an analyzer of sorts, that detects the various drug levels in the sample." *Id.* He testified that the process is completed, with results back, within 30 to 40 minutes.

The medical chart from which Dr. Rivas testified does not appear to have been offered as an exhibit,⁷ but he mentioned twice that he had the medical chart with him on the witness stand and testified that Candace's drug screen was positive for

⁷ No objection was made at trial to the failure to offer the record itself into evidence, nor does Mr. Padgett attempt to raise an issue on that score for the first time on appeal. *See* RAP 2.5(a).

methamphetamines and marijuana. The foundation was sufficient to establish the business record exception.⁸

Mr. Padgett next contends the trial court violated his constitutional confrontation rights when it admitted evidence of the drug test without the testimony of the technician who conducted the test, but he fails to demonstrate that the drug screen results were testimonial. “Only testimonial statements ‘cause the declarant to be a “witness” within the meaning of the Confrontation Clause.’” *State v. Wilcoxon*, 185 Wn.2d 324, 331, 373 P.3d 224, cert. denied, ___ U.S. ___, 137 S. Ct. 580, 196 L. Ed. 2d 455 (2016) (quoting *Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006)). Various formulations of what makes a statement “testimonial” exist; a relatively recent one is that “a statement is testimonial when ‘the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.’” *State v. Lui*, 179 Wn.2d 457, 473, 315 P.3d 493 (2014), review granted, 186 Wn.2d 1008, 380 P.3d 504 (2016) (quoting *Davis*, 547 U.S. at 822). The United

⁸ Mr. Padgett cites *State v. Nation*, 110 Wn. App. 651, 41 P.3d 1204 (2002) and *State v. Hopkins*, 134 Wn. App. 780, 142 P.3d 1104 (2006) in support of an argument that the technician who conducts a drug screen must be identified and testify for its result to be admissible under Washington statutes and court rules. Neither case is on point. In *Nation*, an expert’s opinion testimony was excluded because the foundation required by ER 703 was not established and the record urged to be a business record failed to comply with requirements of a criminal rule, CrR 6.13(b). In *Hopkins*, the required foundation as to how the record was made—a matter that the appellate court viewed as “potentially very significant”—was lacking. 134 Wn. App. at 789.

States Supreme Court noted in a footnote in *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 n.2, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009), that medical reports created for the purpose of treatment are nontestimonial.

Nonetheless, citing *Melendez-Diaz* and *Bullcoming v. New Mexico*, 564 U.S. 647, 131 S. Ct. 2705, 180 L. Ed. 2d 610 (2011)—both of which involved forensic analyses by state crime laboratories—Mr. Padgett argues that Dr. Rivas “was well aware” that any drug test he ordered would become evidence in a criminal investigation, making the results testimonial. Br. of Appellant at 32. But Dr. Rivas never testified that he ordered the drug screen at the behest of police, or because he personally intended for it to be available for a prosecution purpose, or even, as Mr. Padgett argues, that he knew it would be used for prosecuting a delivery of a controlled substance charge. Rather, Dr. Rivas testified that because he was dealing with “a 14-year-old girl who is giving a lot of these sort of high-risk behaviors that she’s participating in . . . I wanted to ascertain what was in her system at that point.” RP at 1190. Dr. Rivas’s only testimony to his understanding about why police had brought Candace to the hospital was that police were contacted after she revealed to her 17-year-old boyfriend that a man who “was like 30’s, 40 years old, had performed oral sex on her.” RP at 1189.⁹

⁹ The only evidence of a police role in the drug screen was Detective Durbin’s testimony, unsupported by other evidence, that he ordered officers to take Candace to the hospital not only for a sexual assault examination but also for a drug screen. There was no evidence that Dr. Rivas was aware of the detective’s intent.

The results of the drug test were not testimonial, and the trial court did not violate Mr. Padgett's confrontation right by admitting them.

III. Double jeopardy

Where a defendant is charged with multiple counts of the same crime, vague jury instructions, coupled with evidence and argument that fail to make it manifestly apparent that the State is not seeking to impose multiple punishments for a single offense, violate federal and state constitutional guarantees against double jeopardy. *See* U.S. CONST. amend. V; WASH. CONST. art. I, § 9. "A double jeopardy claim is of constitutional proportions and may be raised for the first time on appeal." *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011).

When reviewing this type of claimed violation of the constitutional guarantee against double jeopardy, we engage in a two-step, de novo review. We first consider whether the jury instructions given were flawed and could have permitted the jury to convict a defendant of multiple counts based on a single act. *Id.* at 661-63. If the instructions are flawed, we then examine the entire trial record (the evidence, the arguments, and the instructions)—and do so rigorously, in favor of the defendant—to ascertain whether there are potentially redundant convictions. *Id.* at 664. "[I]f 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." *Id.* (second alteration in original)

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(quoting *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008), *overruled on other grounds by State v. Mutch*, 171 Wn.2d 646 (2011)).

Three instructions given to the jury in this case are relevant. The first, based on 11 WASHINGTON PRACTICE: PATTERN JURY INSTRUCTIONS: CRIMINAL 3.01, at 80 (3d ed. 2008) (WPIC), provided:

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other counts.

CP at 166 (Jury Instruction 2). It is settled law that this instruction alone is insufficient to safeguard against a violation of double jeopardy, because it does not explain to jurors that each “crime” requires proof of a different act. *Mutch*, 171 Wn.2d at 663 (citing *State v. Borsheim*, 140 Wn. App. 357, 367, 165 P.3d 417 (2007)). The court in *Mutch* suggested that the separate act requirement can be explained to jurors by “sufficiently distinctive ‘to convict’ instructions or an instruction that each count must be based on a separate and distinct criminal act.” *Id.* at 662.

In Mr. Padgett’s trial, a series of jury instructions informed the jury of the separate act requirement, *e.g.*:

The State of Washington alleges that the defendant committed acts of Third Degree Rape of a Child on multiple occasions. To convict the defendant on any count of Third Degree Rape of a Child, one particular act, a separate and distinct act, of Third Degree Rape of a Child 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 Third Degree Rape of a Child.

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CP at 175 (Jury Instruction 11); *see also* CP at 178, 196 (parallel instructions for the first degree incest and third degree molestation counts).

The “to-convict” instructions for third degree rape, first degree incest, and third degree molestation repeated the requirement of a “particular” and “separate and distinct act,” *e.g.*:

To convict the defendant on any count of Third Degree Rape of a Child, one particular act, a separate and distinct act of Third Degree Rape of a Child must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved.

CP at 176, 180, 182, 197, 199 (Jury Instructions 12, 16, 18, 33, 35); *see also* CP at 179, 181, 183, 195, 198, 200 (parallel instructions for the first degree incest and third degree molestation counts).

Mr. Padgett argues that these instructions, even collectively, “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.” Br. of Appellant at 36. We disagree. No reasonable juror reading the instructions given in this case could believe, for example, that he or she could find Mr. Padgett guilty of all of counts 1, 2, and 3 based on proof of a single act of third degree rape of a child. The court’s instructions protected Mr. Padgett against multiple convictions for a single act.

Were we not satisfied that the jury instructions were sufficient to protect against double jeopardy, rigorous review of the entire trial record would satisfy us that there could be no double jeopardy violation. In closing argument, the prosecutor not only identified the factual basis for each count, but cautioned jurors repeatedly about the need to unanimously agree on the specific act charged with respect to each count. *See State v. Peña Fuentes*, 179 Wn.2d 808, 318 P.3d 257 (2014) (finding no double jeopardy violation where, in closing, the State identified separate, specific acts supporting each count, and the defendant did not challenge the number of incidents or whether they overlapped). Mr. Padgett has not been punished multiple times for the same criminal act.

*IV. Instruction from former WPIC 300.17, addressing
“prolonged period of time”*

The State’s charging documents included special allegations that Mr. Padgett’s sexual offenses were “part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.” CP at 14-19. On the basis of that aggravating circumstance, if found by the jury, the trial court was authorized to impose an exceptional sentence. RCW 9.94A.535(3)(g). The charging documents also included special allegations that Mr. Padgett’s sexual offenses against Henry were aggravated domestic violence offenses under RCW 9.94A.535(3)(h)(i), which similarly required the jury to determine whether the offenses were part of such a pattern manifested by multiple incidents over a

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“prolonged period of time”—a finding that would similarly provide a basis for exceptional sentencing.

The court’s instructions to the jury included an instruction derived from a former version of WPIC 300.17 that told jurors “[t]he term ‘prolonged period of time’ means more than a few weeks.” CP at 205 (Jury Instruction 40). In *State v. Brush*, 183 Wn.2d 550, 557, 353 P.3d 213 (2015), our Supreme Court held that whether or not a period of time qualifies as “prolonged” is a question of fact, and that to instruct the jury that “‘prolonged period of time’ means more than a few weeks” unlawfully comments on the evidence in violation of the Washington Constitution. Given the court’s unlawful instruction, Mr. Padgett asks us to reverse his exceptional sentence and remand with instructions to (if requested) impanel a jury to determine whether the evidence established a prolonged period of time under proper instructions.

Remand is not required in this case, however, because the trial court identified an independently sufficient basis for imposing an exceptional sentence. We may uphold an exceptional sentence if any of the sentencing court’s reasons for imposing the sentence are valid. *State v. Gaines*, 122 Wn.2d 502, 512, 859 P.2d 36 (1993). Reversal is only required if it is not clear whether the sentencing court would have imposed the same sentence based on valid factors alone. *Id.*

The court’s findings in support of the exceptional sentence included the following:

33. The Defendant's offender score on each count is in excess of 9:
Count 1: (29); Count 2: (29); Count 3: (29); Count 4: (29); Count 5:
(29); Count 6: (29); Count 7: Gross Misdemeanor; Count 8: [(11)];
Count 9: (11); Count 10: (29); Count 11: (29); Count 12: (29); Count
13: (29).

CP at 494-95.

Its conclusions of law included the following:

2. The Court has the authority to enter an exceptional sentence based upon consecutive sentences on counts.
.....
4. The Defendant's high offender score based upon multiple current offenses would result in some of the offenses going unpunished.
5. The Court has the authority to impose an aggravated sentence without a finding of fact by the jury under this circumstance.

CP at 495.

Based on its findings and conclusions, the court ordered "that any one aggravating factor found by the jury *and/or the operation of the multiple offense policy pursuant to RCW 9.94A.535(g)*^[10] is sufficient to justify the exceptional sentences entered by the Court." CP at 497 (emphasis added). We need not vacate the exceptional sentence, since

¹⁰ Given the findings and conclusions, it is evident that the court's reference to RCW 9.94A.535(g) is a scrivener's error. RCW 9.94A.535(1)(g) provides mitigating circumstances where the operation of the multiple offense policy results in a sentence that is clearly *excessive*. We infer that the court meant to cite RCW 9.94A.535(2)(c), which provides for an exceptional sentence imposed by the court where the defendant's multiple offenses and high offender score would result in some current offenses going unpunished. A sentencing court's finding of this basis for an exceptional sentence does not violate the right to a jury trial. *State v. Alvarado*, 164 Wn.2d 556, 567, 192 P.3d 345 (2008).

We direct the court to clarify the basis for the exceptional sentence at the time of resentencing.

it is clear the court would have imposed the same sentence on the basis of the multiple offense policy had it not been imposed on the basis of aggravating circumstances whose proof could have been affected by the court's unlawful comment on the evidence.

V. Alleged alternative means of committing aggravated domestic violence

Since we uphold the exceptional sentence on the basis of the multiple offense policy provided by RCW 9.94A.535(2)(c), we need not address Mr. Padgett's argument that the State failed to prove each of what he contends are "alternative means" of committing aggravated domestic violence.

VI. LFOs

Mr. Padgett argues that the trial court erred when it imposed LFOs without conducting an individualized inquiry into his ability to pay. As a preliminary matter, we consider whether to accept review of the issue. Mr. Padgett made no objection to the trial court's finding that he had the present and future ability to pay and thereby failed to preserve a claim of error. RAP 2.5(a); *State v. Blazina*, 182 Wn.2d 827, 833, 344 P.3d 680 (2015) ("[u]npreserved LFO errors do not command review as a matter of right"). A majority of the panel favors exercising our discretion under RAP 2.5(a) to review the issue.

Under RCW 10.01.160(3), "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them."

Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Blazina, 182 Wn.2d at 838. This statutory inquiry is required only for discretionary LFOs. *State v. Clark*, 191 Wn. App. 369, 373, 362 P.3d 309 (2015) (citing *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013)), *remanded to superior court*, _____ Wn.2d _____, 388 P.3d 487 (2017).

Of the LFOs imposed, only \$950 worth were discretionary: a \$600 court appointed attorney recoupment (RCW 9.94A.760), a \$100 domestic violence assessment (RCW 10.99.080), and a \$250 jury fee.¹¹ RCW 7.68.035; RCW 43.43.7541; RCW 36.18.020(h). The trial court entered only a boilerplate finding that Mr. Padgett had the ability to pay the LFOs. Because such a finding is insufficient under *Blazina*, we direct the trial court to conduct the proper inquiry at the resentencing.

VII. Clerical errors

Mr. Padgett identifies two clerical errors that he requests be corrected. The first is

¹¹ It is unclear whether the jury fee is mandatory or discretionary. *See State v. Clark*, 195 Wn. App. 868, 872 & n.1, 381 P.3d 198 (2016), *remanded to superior court*, No. 93740-1 (Wash. Feb. 8, 2017). As the parties do not address its character, we assume for purposes of this opinion that it is discretionary.

in the judgment and sentence, which states:

2.2 Special Findings: The Court makes the following special findings, based upon special verdicts:

Counts 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, 12 and 13, do not encompass the same criminal conduct and **do not count as one crime** in determining offender score, pursuant to RCW 9.94A.589.

CP at 467. Mr. Padgett points out, and the State concedes, that the record does not contain a special verdict finding that each of the above listed counts encompass different criminal conduct.

The second error Mr. Padgett identifies is in the warrant of commitment, which states that Mr. Padgett was convicted of count 14. As the State again concedes, the jury did not find Mr. Padgett guilty on count 14.

We accept the State's concessions and direct the trial court to correct the clerical errors at the time of resentencing.

VIII. Alleged Blakely error in finding substantial and compelling reasons for an exceptional sentence

Finally, Mr. Padgett argues the trial court violated his right to a jury trial by concluding that substantial and compelling reasons justified an exceptional sentence and making supporting findings.

The United States Supreme Court has established that “[o]ther than . . . a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”

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Apprendi v. New Jersey, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000);
Blakely v. Washington, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

The Washington Supreme Court has found that “*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.” *State v. Hughes*, 154 Wn.2d 118, 137, 110 P.3d 192 (2005), *overruled on other grounds by Washington v. Recuenco*, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006); *State v. Suleiman*, 158 Wn.2d 280, 291, 143 P.3d 795 (2006).

RCW 9.94A.535 provides: “Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law.” In *State v. Friedlund*, 182 Wn.2d 388, 394, 341 P.3d 280 (2015) our Supreme Court held that in order to support the trial court’s conclusion of substantial and compelling reasons for an exceptional sentence, the written findings provision of the Sentencing Reform Act of 1981, chapter 9.94A RCW, “requires exactly that—*written findings*.”

Decisions by our Supreme Court are binding on all lower courts in the state. *1000 Virginia Ltd. P’ship v. Vertecs Corp.*, 158 Wn.2d 566, 578, 146 P.3d 423 (2006). It would be error for us to fail to follow our Supreme Court’s directly controlling authority. Mr. Padgett can seek review by the Supreme Court.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds (SAG), Mr. Padgett raises two, both of which complain of the trial court's denial of his trial lawyer's motion to continue his October 2013 trial. Mr. Padgett individually objected to the several continuances requested by his trial lawyer, but now argues that the last continuance his lawyer requested was necessary (1) to conduct an independent DNA analysis on the saliva sample taken from him two months before trial, and (2) to gather more evidence, such as a drug or hair follicle test, to show that Mr. Padgett was not using drugs.

Mr. Padgett argues the State violated CrR 4.7(h)(2) by producing the DNA results so close to the time of trial (too late for independent testing) and the trial court should have granted his lawyer's motion for a continuance as a sanction for the State's asserted violation of the criminal rule. He does not identify where, in the record, his lawyer ever asked that the continuance be imposed as a sanction for violation of the rule. If no such request was ever made, the issue is unpreserved. RAP 2.5(a). Assuming a request for such a sanction was made and denied, Mr. Padgett must show not only an abuse of discretion by the court, but also actual prejudice. "Absent some showing of actual prejudice, we will not interfere with the trial court's exercise of discretion in denying sanctions pursuant to CrR 4.7(h)(7)(i)." *State v. Bradfield*, 29 Wn. App. 679, 682, 630 P.2d 494 (1981).

Mr. Padgett does not show prejudice. The DNA evidence about which he complains showed he used three dildos that he conceded were his, and that he told jurors were used by him and his girlfriend. As his trial lawyer stated in opposing the request for a saliva sample, “I still don’t see that Mr. Padgett’s DNA is relevant. It’s the victims [sic] that is relevant.” RP (Aug. 2, 2013) at 36.

The only prejudicial information found by the crime lab was a mixture of DNA on one of the dildos that it concluded included Henry as a possible contributor. While this evidence corroborates Henry’s testimony, it was hardly important to the State’s case. The defense argued that it actually detracted from the State’s case, because Mr. Padgett testified that he caught Henry and Jack playing with the dildo (hence Henry’s DNA), and if there had been as much sexual contact as Henry claimed, one might have expected his DNA to be on more than one of Mr. Padgett’s sex toys. Ultimately the case came down to whether the jury found Mr. Padgett or Henry and Jack to be more credible—and the jury believed Henry and Jack.

As far as the follicle drug test is concerned, Mr. Padgett offers no excuse for why that test could not have been conducted long before his lawyer’s final, October 4, 2013 request for a further trial continuance—and to be relevant, it probably needed to be. Mr. Padgett does not establish that such a test, if conducted after October 4, would have produced evidence to show that Mr. Padgett was not using drugs at the time of the crimes

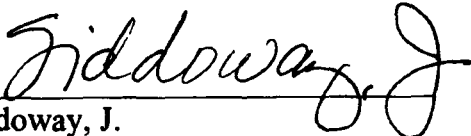
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charged, which occurred between May 2011 and January 31, 2013—at least eight months before. Again, no prejudice is shown.

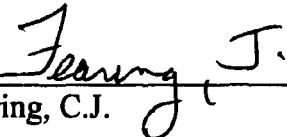
Because Mr. Padgett does not show prejudice, we need not address whether denying a fifth continuance was a proper exercise of the court's discretion.

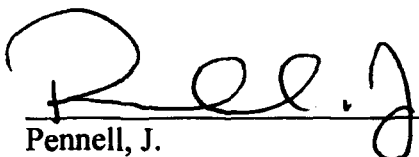
We vacate Mr. Padgett's conviction for delivery of methamphetamine to Henry (count 8), affirm his remaining convictions, and remand for resentencing consistent with this opinion.¹²

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


Siddoway, J.

WE CONCUR:


Fearing, C.J.


Pennell, J.

¹² Mr. Padgett moved this court to waive costs if he did not prevail on appeal. Because he has prevailed in part, the issue is moot.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF MARCH, 2017, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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128 N 2 ND STREET, ROOM 211	COA PORTAL
YAKIMA, WA 98901-2639	

SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF MARCH, 2017.

X _____ 

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