Supreme Court No. 98926-5
(COA No. 52358-2-II)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NATHAN CHAVEZ,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Nathan Chavez, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review under RAP 13.3 and RAP 13.4.

B. COURT OF APPEALS DECISION

Mr. Chavez seeks review of the Court of Appeals decision dated July 21, 2020, attached as an appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Was Mr. Chavez deprived his right to a fair trial when the trial court allowed the jury to hear highly prejudicial and irrelevant prior act evidence?

2. Where there is no evidence the legislature intended the free crimes doctrine to apply where an offender score exceeds the standard range only because of statutory multipliers, did the court exceed its authority by imposing an exceptional sentence based on this factor?

D. STATEMENT OF THE CASE

When Mr. Chavez was a teen, he socialized with other teenagers that included Lacey Lovell.[1] RP 369.[2] They usually met up at a friend's house who had a trampoline, where they watched television, played games, and listened to music. RP 370.

One day, Mr. Chavez arrived at the house when only Ms. Lovell was present, waiting in her car. RP 370. They decided to go four-wheel driving on the off-road trails nearby. RP 371. After they drove for a while, Ms. Lovell stated they had sexual intercourse. RP 374. Ms. Lovell said Mr. Chavez made no threats, but she felt compelled to engage in sexual intercourse with Mr. Chavez. RP 373. Mr. Chavez stated they were romantic but denied intercourse. RP 505.

Thirteen years later, the prosecution asked the court to allow the jury at Mr. Chavez's trial for rape of a child in the third degree, child molestation in the third degree, and tampering with a witness to hear this evidence. CP 296. The

[1] For consistency, this petition uses the same psuedonyms as the Court of Appeals used for the child witnesses in its opinion. *See* App. 2.

[2] The record is largely sequential, except for one volume. When referring to the non-sequential volume, citations will include the date of the proceedings. All other citations will be to the page number only.

prosecution asserted this prior incident demonstrated Mr. Chavez engaged in a common scheme or plan to "obtain his objective of sexual intercourse with a child." CP 297. This plan included paying special attention to the complainants, before supplying them with alcohol, and then separating them from their friends. *Id.* The prosecutor argued the sexual acts "consistently" took place in his vehicle in secluded areas. *Id.* Over objection, the court permitted the prosecution to use this evidence, finding it satisfied ER 404(b). RP 8, 13. The court also found the probative value did not outweigh the prejudicial effect of the propensity evidence. RP 12.

In its decision, the Court of Appeals held that it was dubious that the prior act evidence was admissible. App. 21. However, it found the error harmless. App. 21. In this petition, Mr. Chavez asks this Court to take review of this issue.

The prosecution charged Mr. Chavez with four counts of rape of a child in the third degree, one count of child molestation in the third degree, and one count of tampering with a witness. CP 223-27. The two complainants alleged Mr. Chavez had

sexual intercourse with them when they were fourteen and when he was an adult. *Id.*

Heather W. met Mr. Chavez at church. RP 85. She stated she reached out to him about babysitting his children. RP 89. They talked briefly about babysitting before their conversations became flirtatious. RP 90. On New Year's Eve, Heather W. left a party to meet with Mr. Chavez. RP 97. She said they drove his white Toyota sports car to a cul-de-sac where they ultimately had sexual intercourse. RP 99, 100. Heather W. stated they had intercourse two more times. The first took place in her bedroom. RP 108, 112. The third time took place at his house. RP 116-17, 125. A fourth incident took place in the back of Jesse's truck when a group of people was returning from a bonfire party. RP 181-82. Heather W. had too much to drink to remember this incident. RP 133. Two other witnesses alleged Mr. Chavez molested Heather W. while she was intoxicated and while both she and Mr. Chavez were in the back of the truck. RP 191, 333.

The government also asserted Mr. Chavez engaged in sexual intercourse with Mattie C. when she was fourteen. CP 226. Mattie C. alleged the first encounter occurred when she

returned with Mr. Chavez from a gathering at an area outside of Sequim. RP 212, 220. Mr. Chavez drove Mattie C. back to town. RP 216. She claimed that in the time between when they left Slab Camp and when everyone met in town a short time later, sexual intercourse occurred between her and Mr. Chavez. RP 220. She stated a second incident happened when she went off-road driving with Mr. Chavez. RP 229.

The jury convicted Mr. Chavez of three counts of rape of a child in the third degree, child molestation in the third degree, and tampering with a witness. RP 789-90. The jury acquitted him of one count of rape of a child. *Id.* The court imposed a sentence of 137 months, in addition to the maximum allowed community supervision. CP 67-68. The Court of Appeals found the trial court erred in sentencing Mr. Chavez and ordered this matter remanded for a new sentencing hearing. App. 1-2. However, at the resentencing hearing, the Court of Appeals held that the trial court could employ the "free crimes" doctrine to impose an exceptional sentence. App. 30.

E. ARGUMENT

1. **This Court should grant review of whether the trial court's error in allowing irrelevant and highly prejudicial prior act evidence to be heard by the jury prevented Mr. Chavez from receiving a fair trial.**

Mr. Chavez asks this Court to decide whether this error prevented Mr. Chavez from receiving a fair trial. The Court of Appeals' decision conflicts with cases from this Court, which view admission of prior act evidence in a sex crime case as its highest level and only admissible when its purpose is clear. Because the Court of Appeals applied a lower standard, review should be granted.

At trial, the court abused its discretion when it allowed the prosecution to introduce evidence of a sexual encounter Mr. Chavez had with a person near to his age when he was in high school, about ten years before the charged allegations. Mr. Chavez committed no crime when he engaged in this sexual encounter.

Further, the similarities between the incident and the charged crimes were not so substantial they could be described as a common scheme or plan. Without sufficient evidence of a

non-propensity purpose, the prejudicial effect of the evidence required its exclusion.

This error deprived Mr. Chavez of his right to a fair trial. To restore Mr. Chavez's right to a fair trial, he asks this Court to grant review.

a. Exclusion of unduly prejudicial evidence is particularly critical in sex offense cases.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). This Court has held that "ER 404(b) is a categorical bar to admission of evidence for the purpose of proving a person's character and showing that the person acted in conformity with that character." *State v. Gresham*, 173 Wn.2d 405, 420, 269 P.3d 207 (2012). "ER 404(b) forbids such inference because it depends on the defendant's propensity to commit a certain crime." *State v. Wade*, 98 Wn. App. 328, 336, 989 P.2d 576 (1999).

Even relevant evidence is excludable if its probative value substantially outweighs the danger of unfair prejudice. *State v. Saltarelli*, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). "A careful and methodical consideration of relevance, and an intelligent weighing of potential prejudice against probative value is particularly important in sex cases, where the prejudice potential of prior acts is at its highest." *Id.* at 363. In cases where the charge involves a sexual act against a child, evidence of uncharged sex acts against another child strongly creates "the impression of a general propensity for pedophilia." *State v. Ramirez*, 46 Wn. App. 223, 227, 730 P.2d 98 (1986).

"A trial court must always begin with the presumption that evidence of prior bad acts is inadmissible." *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). When determining admissibility under ER 404(b), the trial court must find the alleged misconduct occurred by a preponderance of the evidence; identify the purpose for admission; determine whether the evidence is relevant to prove an element of the crime charged, and weigh the probative value against its prejudicial

effect. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007).

In considering whether evidence is admissible under ER 404(b), doubtful or close cases should be resolved in favor of the accused. *Wade*, 98 Wn. App. at 334. The prosecution has the burden of demonstrating the prior misconduct evidence is admissible under ER 404(b); *DeVincentis*, 150 Wn.2d at 17.

"If the trial court properly analyzes the ER 404 (b) issue, its ruling is reviewed for an abuse of discretion." *State v. Dawkins*, 71 Wn. App. 902, 909, 863 P.2d 124 (1993). A trial court abuses its discretion when it applies the wrong legal standard, bases its ruling on an erroneous view of the law, or otherwise fails to adhere to the requirements of an evidentiary rule. *State v. Quismundo*, 164 Wn.2d 499, 504, 192 P.3d 342 (2008). Further, a court's decision is manifestly unreasonable if it is "outside the range of acceptable choices, given the facts and the applicable legal standard." *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

b. The prior act when Mr. Chavez was in high school was not part of an overarching plan, but a distinct act

involving random similarities with some of the crimes charged.

The prosecution alerted the court it intended to introduce evidence of an incident from when Mr. Chavez was in high school, alleging, "the Defendant followed a consistent plan with each in order to obtain his objective of sexual intercourse with a child." CP 297. The prosecutor argued Mr. Chavez's common scheme or plan "begins with compliments and paying special attention to the victim followed by supplying the alcohol for the invariable party." *Id.* After getting the child intoxicated, "he proceeds to separate them from the pack to have sexual intercourse." *Id.* The prosecutor also argued that "[c]onsistently he violates these children in his vehicle or the vehicle of another and he tends to gravitate to Slab Camp, Hurricane Ridge, or secluded wooded areas where they are less likely to get caught." *Id.*

To be admissible, evidence of prior sexual misconduct offered to show a common plan or scheme must be sufficiently similar to the crime with which the defendant is charged and not too remote in time. *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995). A common scheme or plan exists where an

accused devises a plan and repeats it to perpetrate separate but very similar crimes. *Id.* at 855. The commonalities with a prior occurrence need not be unique, but they must be "markedly and substantially similar" indicating, "the defendant has developed a plan and has again put that particular plan into action." *Gresham*, 173 Wn.2d at 422. Prior opportunistic crimes do not qualify. *State v. Slocum*, 183 Wn. App. 438, 442, 456, 333 P.3d 541 (2014).

The court allowed the prosecution to use this prior act as evidence of a common scheme or plan. RP 13. The court found the evidence adhered to a plan and was "clearly relevant" and the evidence established "a plan or design to rape." RP 11-12. The court also found the probative value outweighed any unfair prejudice. *Id.*

What happened between Mr. Chavez and Ms. Lovell ten years earlier was not similar to the charged crimes. Mr. Chavez and Ms. Lovell were teenagers in high school. RP 369. Unlike the witnesses in this case, the age difference between Mr. Chavez and M. Lovell did not make their encounter illegal. RCW 9A.44.079. And while the conduct may have occurred after Mr.

Chavez and Ms. Lovell went driving his four-wheel-drive truck, this did not make it so similar to the other incidents to be able to describe it as a common scheme or plan to have "sexual intercourse with a child." *See Slocum*, 183 Wn. App. at 455.

It also did not resemble any of the charged incidents. There was not a significant age difference between Mr. Chavez and Ms. Lovell. And while the prosecution argued there was a common scheme by Mr. Chavez to isolate the complainants from their friends at parties, most of the incidents described at his trial did not occur that way.

None of the incidents involving Heather W. involved such a scheme. Instead, she alleged she snuck out of a New Year's party the first time, saw him at her house on the second occasion, and left her home for their third encounter. The last encounter took place in the back of a truck with other persons around.

And while the incidents involving Mattie C. may have occurred during drives from where a group got together for a party, this similarity is not so great that it can be described as a common scheme or plan. At best, it was a crime of opportunity,

distinguishable from those cases "where the defendant had a design for getting a victim physically isolated from possible witnesses." *Slocum*, 183 Wn. App. at 455. "The fact that a defendant molests victims when no one is close enough to see what is going on is too unlike a strategy for isolating a victim; it is not evidence of a plan." *Id.*

Whatever happened between Mr. Chavez and Ms. Lovell occurred ten years before these charges. This is a significant lapse in time, which this Court should conclude eroded the commonality between the acts. *Lough*, 125 Wn.2d at 860. In addition, these acts did not have the "high level of similarity" required to qualify as a common scheme or plan. *DeVincentis*, 150 Wn.2d at 19. Further, the interaction did not demonstrate "conduct created by design," and was instead an opportunistic act. *State v. Sexsmith*, 138 Wn. App. 497, 505, 157 P.3d 901 (2007), *review denied*, 163 Wn.2d 1014 (2008).

And when the similarities do not rise to the level of a common scheme or plan, but rather demonstrates more than one opportunistic act, reversal is required. *Slocum*, 183 Wn. App. at 455. In *Slocum*, the prosecution sought to admit evidence

Slocum sexually abused the complainant's mother and aunt when they were young. *Id.* at 445-46. The trial court allowed the testimony as evidence of Slocum's "plan or design to molest children." *Id.* at 452. Admission of several of the prior incidents was manifestly unreasonable because there were insufficient similarities to the charged crime. *Id.* at 455-56. W.N. was much younger than her mother and aunt when the touching began, and W.N. alleged ongoing molestation over several years, instead of isolated incidents of her mother and aunt. *Id.* at 454. The prosecution argued the molestation always occurred when Slocum was alone with the girls and could be assured of privacy. *Id.* But the "fact that a defendant molests victims when no one is close enough to see what is going on is too unlike a strategy for isolating a victim; it is not evidence of a plan." *Id.*

What happened between Mr. Chavez and Ms. Lovell was not rape of a child. They were both in high school. RP 369. She was sixteen and not fourteen like the witnesses in this case. RP 368. Nothing suggests Mr. Chavez pursued Ms. Lovell or took any other steps to isolate her from her friends. RP 370. They found themselves alone at a friend's house and decided to go

four-wheel driving. *Id.* Mr. Chavez did not supply Ms. Lovell with alcohol or otherwise try to reduce her inhibitions. And while Ms. Lovell testified Mr. Chavez's advances were not welcome, even this differed from the testimony of the other witnesses, who did not believe they were forced to have intercourse with Mr. Chavez. RP 160, 233.

The trial court erred in admitting this evidence. And while the Court of Appeals found this admissibility of this evidence dubious, it did not reverse Mr. Chavez's conviction, finding the error harmless. App. 22. Mr. Chavez now seeks review by this Court.

c. This Court should take review of whether this improperly admitted evidence deprived Mr. Chavez of a fair trial.

This Court should accept review of the Court of Appeals' decision finding the error harmless was made in error. In determining whether improper admission of prior act evidence requires reversal, the Court of Appeals examined the strength of the other evidence. This is the wrong inquiry. Instead, this Court instructs that the inquiry is not whether there is a reasonable probability the outcome of the trial would have been

different without the inadmissible evidence. *State v. Gower*. 179 Wn.2d 851, 857, 321 P.3d 1178 (2014).

The improperly admitted evidence provided a cornerstone for the prosecution's case that Mr. Chavez had a common scheme or plan to have sex with children. With no eyewitnesses to most of the incidents and multiple accounts of the remaining one, this case centered on credibility. *Gower*, 179 Wn.2d at 858. Framing Mr. Chavez, who testified, as a child rapist since he was a teenager made him appear to be a long-term danger to the community and uncut his credibility. This error deprived Mr. Chavez of his ability to defend himself because it made him look like a lifelong serial rapist. Allowing the government to focus on this prior act made it impossible for Mr. Chavez to challenge the veracity of the charges. For this reason, review should be granted.

2. **This Court should grant review of whether the "free crimes" doctrine could be used to warrant an exceptional sentence.**

The Court of Appeals reversed Mr. Chavez's sentence because the government presented insufficient evidence of the aggravating factor it presented, but remanded to determine

whether the current sentence could be imposed under the "free crimes" doctrine. Before this matter is remanded for a new sentencing hearing, this Court should take review of whether the "free crimes" doctrine can be applied where a defendant has no prior history and where the court relies on the multiple scoring rule to impose an exceptional sentence.

When Mr. Chavez was convicted, he had no scorable history. CP 64. All of his points come from current offenses. CP 65. And rather than scoring each current offense as a single point, the legislature determined Mr. Chavez's sex offense convictions should triple score. RCW 9.94A.525(17). Without this triple scoring, Mr. Chavez's offender score would still be within the sentencing grid, with a range of 46-60 months. RCW 9.94A.510. Using the multiplier means Mr. Chavez was punished for his offenses, which were factored in when determining his offender score.

	Offender Score									
	0	1	2	3	4	5	6	7	8	9+
LEVEL VI	13 m 12 +- 14	17.5 m 15-20	24 m 21-27	30 m 26-24	36 m 31-41	42 m 36-48	53 m 46-60	58.5 m 57-60	60 - 60	60 - 60

While this opinion does not seem to indicate this procedure is improper, another unpublished opinion held otherwise. In *State v. Phelps*, the Court of Appeals recognized that a trial court must weigh the use of multipliers for the "free crimes" aggravating factor because the use of a multiplier to increase a person's offender score means the offenses are being counted in a person's offender score. 2 Wn. App.2d 1051; 2018 WL 1151975, *4 (2018) (unpublished, cited as non-binding authority under GR 14.1); *see also State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013).

In *Phelps*, the Court of Appeals reversed an exceptional sentence imposed based on the "free crimes" aggravator where the defendant's offender score for taking a motor vehicle without permission was elevated to 19, largely because his prior six convictions for similar offenses counted as three points each. *Phelps*, 2018 WL 1151975 at *3. Without the multiplier, his offender score was 6. The current offenses were punished because it was the nature of those offenses that triggered the multiplier, leaving Phelps with an offender score of 19. *Id.* at *4.

This can be contrasted with *France*, where the defendant was convicted of nine counts of felony harassment and had six prior convictions, giving him an offender score of 15. 176 Wn. App. at 466. The court imposed an exceptional sentence based on two aggravating factors: an officer of the court was a victim and some of the current offenses were not punished under the standard range. *Id.* at 472-73. The Court of Appeals upheld this exceptional sentence, in part because no multipliers increased the offender score and the standard range accounted for only three of the nine offenses of conviction. *Id.*

Here, the trial court misconstrued the nature of the unpunished offenses, incorrectly believing offenses would go unpunished because Mr. Chavez's offender score exceeded nine. This misperception was based on the court's failure to understand the multiplying effect of sex offenses and the legislature's decision to increase the standard range where a person is convicted of multiple current sex offenses. But Mr. Chavez's crimes are not unpunished. Instead, with the multiple scoring aggravators, a man with no prior history is faced with a sentenct at the top of the range. This cannot be what the

legislature intended and this Court should accept review to settle the conflict between these cases and make clear the legislature did not intend for the "free crimes" doctrine to be so applied.

F. CONCLUSION

Based on the preceding, Mr. Chavez respectfully requests that review be granted pursuant to RAP 13.4 (b).

DATED this 20th day of August 2020.

Respectfully submitted,

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APPENDIX

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Filed
Washington State
Court of Appeals
Division Two

July 21, 2020

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

STATE OF WASHINGTON, Respondent, v. NATHAN A. CHAVEZ, Appellant.	))))))))))	No. 52358-2-II UNPUBLISHED OPINION

SIDDOWAY, J. — Nathan Chavez was convicted following a jury trial of four counts of third degree rape of a child, one count of third degree child molestation, and one count of witness tampering. He challenges the convictions, the exceptional aggravated sentence imposed by the trial court, and a community custody condition restricting his contact with minors that will affect postrelease contact with his children.

It is questionable whether evidence of an act of prior sexual misconduct by Mr. Chavez was admissible under ER 404(b) as evidence of a common scheme or plan, but any error was harmless. We affirm the convictions.

With respect to Mr. Chavez's challenge to the exceptional sentence, we agree with Mr. Chavez that there was insufficient evidence that he used a position of trust to facilitate the commission of some of the rapes. But the trial court also announced a "free crimes" rationale for imposing an exceptional sentence, and the same exceptional

sentence could properly have been imposed for free crimes reasons alone. Since the court's intention was not clear, we remand for resentencing.

Because resentencing is required, Mr. Chavez can use the occasion of his resentencing to raise his objection to the community custody condition.

FACTS AND PROCEDURAL BACKGROUND

In February 2017, the State charged Nathan Chavez with seven counts of child rape and one count of third degree child molestation. Following amendments, he was charged by the time of trial with four sex offenses committed against one victim, Heather W., and two sex offenses committed against a second victim, Mattie C. We substitute pseudonymous first names and an initial for the girls' surnames, consistent with a general order of this court.[1] The charges involving Heather included a special allegation that Mr. Chavez used his position of trust to facilitate the commission of the offenses. A seventh charge was for tampering with a witness: Heather's and Mattie's friend, David Buckley.

[1] See General Order of Division II, *In re the Use of Initials or Pseudonyms for Child Witnesses in Sex Crime Cases* (Wash. Ct. App. Aug. 23, 2011) http://www.courts.wa.gov/appellate_trial_courts/?fa=atc.genorders_orddisp&ordnumber=2011-1&div=II.

ALLEGED OFFENSES AND ASSOCIATED COUNTS

The State's trial evidence supported the following history of the offenses that, in argument, the State associated with the indicated counts:

Count I: A rape of Heather W. between December 31, 2014 and January 1, 2015, referred to by the prosecutor as "the New Year's count"[2]

Heather began attending Cornerstone Baptist Church in late November or December 2014. She has a November birthday and was born in 2000, so she had just turned 14 years old. She was in the eighth grade. Mr. Chavez attended the same church. Occasionally Mr. Chavez spoke to Heather about the services and how she was doing. Mr. Chavez was then 28 years old.

Heather got Mr. Chavez's telephone number from a mutual friend and texted him about the possibility of babysitting his children. Although the children's birthdates do not appear in the record, Mr. Chavez and his wife had two toddlers and possibly an infant at the time. Mr. Chavez said he would like to get to know Heather before she could babysit. They continued texting and their messages became flirtatious. Mr. Chavez told Heather she was pretty, or beautiful, which made her feel good.

After Heather had known Mr. Chavez for about a month, he proposed that she leave church sometime so they could go somewhere and talk. They acted on the plan on

[2] Report of Proceedings (RP) at 713-14.

the night of the church's 2014/2015 New Year's Eve party. Heather left the party at around 10:00 or 11:00 p.m. and met Mr. Chavez down the road. He drove to a dead end road, where they initially talked, until Mr. Chavez unbuckled his seat belt, moved toward Heather, put his arms around her and started kissing her. Heather did not try to stop him. Mr. Chavez undressed Heather and eventually moved on top of her in the passenger seat and had sexual intercourse.

They dressed and Mr. Chavez drove Heather back to the church party. Heather told only one friend about what happened because she did not want anyone to know about it and did not want Mr. Chavez to get in trouble.

Count II: A rape of Heather W. between December 31, 2014 and May 31, 2015, referred to by the prosecutor as the "[*Heather's*] *house charge"*[3]

On the second occasion on which Mr. Chavez raped Heather, he came to her home when her mother was absent and tapped on her window. She had just gotten out of the shower and was surprised to find him outside her window. He said he missed her and needed to see her and she let him in, happy to see him but nervous because she did not know when her mother would be home. Mr. Chavez kissed Heather, undressed himself, took off Heather's towel, and again had sexual intercourse with her. He then dressed and left through the window.

[3] RP at 714.

Count III: A rape of Heather W. between December 31, 2014 and May 31, 2015, referred to by the prosecutor as "the incident at his house"[4]

Heather testified that on a third occasion, Mr. Chavez suggested that they meet up and said he would pick her up at her house. Heather told her mother she was going for a run and met Mr. Chavez down the street.

Mr. Chavez took Heather to the guest apartment that his wife rented from Betty Goad, where he and his family lived. According to Heather, Mr. Chavez took her to his and his wife's bedroom and undressed her and himself. They had sexual intercourse.

Heather felt nervous at the Chavez home and would later testify, "[T]hat's when like it kinda changed"—seeing things that belonged to Mr. Chavez's wife and children made her realize she "was just this young girl engaging with this older man that was married and had kids." Report of Proceedings (RP) at 124. She questioned why she "was letting it happen." *Id.* After they dressed, Mr. Chavez took Heather back to the corner where he picked her up. Once again, she only confided in the friend in whom she had confided before, because she knew what she was doing was wrong, was embarrassed, and did not want anyone to know about it.

After the sexual relationship ended, Mr. Chavez stopped talking to Heather for a while, but he showed up at the coffee shop where she worked a few times, sometimes

[4] RP at 727.

with his children. He usually gave her a large tip—from $10 to $80. Heather quit attending the Cornerstone church after a few months.

Count IV: The child molestation of Heather, between January 1, 2016 and August 31, 2016

In or about May of the next year, after Heather's sexual relationship with Mr. Chavez was over and when Heather was 15 and in ninth grade, she attended a carnival with friends. After the carnival, her friend David Buckley, his good friend Jesse, who was Mr. Chavez's younger brother (Jesse would have been about 17),[5] and a third male friend, stopped at Heather's house to pick up Heather and her female cousin to "hang out and drink." RP at 130. They went to a house that belonged to a third Chavez brother, Isaac, and drank beer and vodka. Mr. Chavez was also there and was drinking. Heather had a lot to drink and could not remember parts of the night, including how she got home.

Jesse drove everyone home between midnight and two in the morning. Four passengers rode in the bed of his truck, under a canopy: Mr. Buckley, Heather, her cousin, and Mr. Chavez. Heather's cousin and Mr. Buckley both testified that Mr. Chavez pulled Heather's pants down and had his hands on her. Heather's cousin believed Mr. Chavez was touching Heather's vagina; Mr. Buckley described Mr. Chavez

[5] Jesse testified at trial that he was born in May 1999, and is the youngest of his siblings; Mr. Chavez is the oldest. Our references to "Mr. Chavez" in this opinion are to the defendant; for clarity, we refer to his younger brothers by their first names. We intend no disrespect.

as "[m]assaging her butt." RP at 331. According to Mr. Buckley, Mr. Chavez climbed on top of Heather, unzipped his pants and said, with a laugh, "whiskey dick," which Mr. Buckley took to mean Mr. Chavez "couldn't get hard." RP at 333. According to Heather's cousin, she, Mr. Buckley, and Heather told Mr. Chavez to stop. Mr. Buckley agreed that Heather was trying to stop Mr. Chavez "to her extent," but she "was very intoxicated." RP at 332. When Mr. Chavez did not stop, Mr. Buckley banged on the window of the truck's cab and yelled at Jesse to pull over and get his brother out of the truck. Jesse pulled over, Mr. Chavez got out of the truck, and Jesse took his remaining passengers home.

Count V: A rape of Mattie C. between September 28, 2016 and October 31, 2016, referred to by the prosecutor as the "incident at Slab Camp"[6]

In the fall of 2016, Mattie attended a pep dance in the school cafeteria after an early season high school football game and went to a party thereafter. With a November 2001 birthdate, she was 14 years old at the time, and in the ninth grade.

Jesse Chavez drove her, Mr. Buckley, and three other male friends to the after party. The party took place at Slab Camp, which was described as "a place up in the woods, in Sequim, where . . . people go to drink and have fires." RP at 212. Before they

[6] RP at 720.

went to Slab Camp, they stopped at a Walmart store and met up with Mr. Chavez. Mr. Chavez, then 29 years old, was in a truck with two of Mattie's female schoolmates.

While at Slab Camp, Mattie drank alcohol that she got out of the bed of Mr. Chavez's truck. Others, including Mr. Chavez, were drinking, smoking marijuana, and having a fire. After about an hour, the party ended and almost everyone got in Jesse's truck, but Mattie understood that there was no room for her, so she relied on Mr. Chavez for a ride home. She was Mr. Chavez's only passenger. As they drove, Mr. Chavez complimented Mattie on her appearance and put his hand on her leg. According to her, Mr. Chavez knew she was 14. He told her he was 20.

Mr. Chavez followed Jesse's truck for a while, but lost sight of him. Mr. Chavez pulled over in a field with no streetlights and said he was going to text and see where Jesse was. While they were stopped, Mattie claims that Mr. Chavez "scooped [her] out of the seat onto his lap." RP at 219. According to Mattie, Mr. Chavez kissed her, undressed her, and put her back in the passenger seat. He then climbed over the center console and had sexual intercourse with her. She said it made her feel "[g]ood, I guess" having sex with Mr. Chavez; "It was just the appeal of like an older guy." RP at 220.

Mattie claims that they put their clothes back on and drove to a church parking lot where they met Jesse. Mattie later told a friend that Mr. Chavez "tried to have sex with" her but did not tell her what really happened, knowing that her friend would tell people. RP at 221.

Count VI: A rape of Mattie C. between September 28, 2016 and November 25, 2016, referred to by the prosecutor as the "friend's house event"[7]

About a week after the Slab Camp after-party, Mr. Chavez texted Mattie and asked if she wanted to go to a party with him. She agreed, and Jesse gave her a ride to a party at the home of a friend of the Chavez brothers.

At the party, Mattie and Mr. Chavez drank alcohol and talked. After about an hour, she left with Mr. Chavez and they drove to Port Williams. They parked near a boat ramp, talked, listened to music, and Mattie drank vodka. While there, a sheriff's deputy arrived and Mr. Chavez told Mattie to put the bottle of vodka under her seat. The deputy and Mr. Chavez spoke for a few minutes; Mattie remembered the deputy had an accent. After that, Mr. Chavez took Mattie "four-by-fouring," which she described as "[r]ock climbing with your truck." RP at 229. After, Mr. Chavez parked in the woods, turned off the lights, and had sexual intercourse with her. They then put their clothes back on and Mr. Chavez took Mattie home.

Count VII: Tampering with witness David Buckley on or about September 26, 2017

On September 26, 2017, after police had interviewed Mr. Buckley about what he saw Mr. Chavez do during the incident charged as child molestation in count IV, Jesse presented Mr. Buckley with a gift of a new iPhone. Jesse had previously given Mr.

[7] RP at 723.

Buckley "small things here and there," but Mr. Buckley described the iPhone gift as much more expensive and "kinda weird." RP at 344, 354.

After Jesse presented the gift to Mr. Buckley, the two went to Jesse's house where Mr. Buckley could use the home's WiFi to set up the phone. Mr. Chavez was there. According to Mr. Buckley, Mr. Chavez eventually came over to him and asked if he was still friends with Heather and her cousin. Mr. Buckley replied, "[N]ot really, sort of." RP at 350. Mr. Buckley later testified that Mr. Chavez "asked if [I] could talk to them and get them to maybe quit lying, as he would put it." *Id.* Mr. Chavez also said something like, "[Y]ou can help me, I can help you." *Id.*

IN LIMINE RULING ON ER 404(b) EVIDENCE

Within a few months after filing the charges, the State provided notice of its intent to introduce ER 404(b) evidence of an allegation of sexual misconduct by Mr. Chavez committed against a woman about 10 years before the charged offenses. The woman, Lacy Lovell, had come forward after reading about the charges against Mr. Chavez in the newspaper. She told law enforcement that when she was 16 years old, she was at a friend's home with Mr. Chavez, who she believed was then 18, when he asked if she wanted to take a drive in his truck. Mr. Chavez took Ms. Lovell somewhere in the woods. Mr. Chavez wanted to have sex with Ms. Lovell. Although she did not want to, Mr. Chavez was "nagging" her and "'wouldn't let up.'" Clerk's Papers (CP) at 309.

Ms. Lovell felt helpless and believed Mr. Chavez would not take her home if she did not have sex with him. Eventually they had sex.

Ms. Lovell told her sister and mother what happened not long thereafter, but she did not report it to the police until February 2017 when she heard about this case. The State argued that evidence of the incident was admissible as evidence of a common scheme or plan under ER 404(b). It argued that like the charged offenses, Mr. Chavez used a vehicle to take the victim to a secluded area before raping her. The court ruled the evidence admissible.

TRIAL

At Mr. Chavez's jury trial, the State's support for the testimony provided by Heather and Mattie included evidence from Betty Goad, who owned the furnished one bedroom guest apartment, rented to Mr. Chavez's wife, where Mr. Chavez committed the rape that the State characterized in argument as count III. Ms. Goad identified photographs of the apartment and testified to its small size and the fact that when it was being lived in by the Chavezes, they put bunk beds in the living room area for their two little girls. This was consistent with Heather's testimony that when Mr. Chavez took her to where he lived, before entering his and his wife's bedroom, Heather saw his children's bed and toys in the living room.

The evidence included Heather's cousin's and Mr. Buckley's testimony that Mr. Chavez pulled down Heather's pants and touched her sexually when she was being driven home, postcarnival, in May 2016.

It included the testimony of Mattie's mother, who, before allowing her daughter to go to the pep rally after-party and the party to which Mr. Chavez invited Mattie the following week, insisted on confirming that there would be adult supervision. She testified that Mr. Chavez called her on both occasions and told her that he was 22 years old and would be present.

It included the testimony of Clallam County Sheriff's Deputy Brandon Stoppani that consistent with Mattie's testimony, he encountered Mr. Chavez and a slender girl in her early teens parked in Marilyn Nelson Park on the night of September 28, 2016. He was on patrol, enforcing a county ordinance that did not permit parking in the area after dark. He called in the registration of Mr. Chavez's vehicle before approaching it, and in speaking with Mr. Chavez, realized Mr. Chavez formerly worked with the deputy's wife. The deputy described the young teenager as appearing happy, and he recalled that she commented on his English accent. He was not concerned about the safety of the girl. He assumed—given the age difference between her and Mr. Chavez—that she was Mr. Chavez's daughter.

The State called Ms. Lovell to testify to her accusation that Mr. Chavez had pressured her into having sex 13 years earlier. The trial court prefaced her testimony

with a limiting instruction that the jury should consider her evidence "only for the purpose of showing a common scheme or plan." RP at 365. Ms. Lovell acknowledged that Mr. Chavez did not physically force her to have sex, hit her, or hurt her, and that she never told Mr. Chavez, "no." RP at 381. But she testified that she was a virgin and she was "really upset" as the sex was occurring and wanted it to be over. RP at 375.

Finally, the State called Jesse as a witness. He admitted that when interviewed by detectives in February 2017, he told them that on the postcarnival drive home in May 2016, Mr. Buckley told him to pull over "because Nathan was being weird." RP at 274. He also told the detectives that when Mr. Buckley said that Mr. Chavez was being weird, Jesse thought that something sexual was going on with Heather.

At the close of the State's evidence, the defense moved to dismiss the special allegation of abuse of trust in counts I through IV. The State relied on Mr. Chavez's position as a trustee of the church for the special allegation. The defense argued the State had presented minimal evidence of Mr. Chavez's role as trustee, and Heather's testimony when cross-examined established that none of her dealings with Mr. Chavez were related to his position in the church. The trial court denied the motion.

Mr. Chavez and Jesse testified in Mr. Chavez's defense. Mr. Chavez denied that he had ever had sexual contact with Heather, Mattie, or Ms. Lovell. He testified that in 2015, he was elected to be a church trustee, which involved counting donations on

Sunday. He stated that being trustee did not involve interacting with parishioners, preaching, leading bible studies, or leading youth group.

Mr. Chavez testified that he did not attend the 2014/2015 New Year's Eve party at the church and celebrated instead at McDonald's with his wife and some friends. He stated that Heather texted him that night, but he did not meet up with her. He also stated that Heather texted him on another occasion to ask if he needed a babysitter and he told her to talk to his wife.

He testified he knew where Heather lived because he had given her a ride home from church. He denied ever having knocked on her window or entered her home.

He testified that Heather had probably been to his and his wife's apartment because he and his brothers often bring friends to each other's houses. He did not specifically remember Heather being at his home but testified he was never alone with her there.

As for the child molestation that allegedly occurred as Jesse drove guests home from the postcarnival party at Isaac's house, Mr. Chavez testified that he recalled a party at Isaac's that was attended by Heather, her cousin, and Mr. Buckley. He denied giving alcohol to anyone at the party. He testified that Heather's cousin was "hammered" and when the party ended, Heather was persistent that he should leave with her group. RP at 479. He testified that while riding in the bed of the truck, Heather was very drunk and was reaching out to Mr. Buckley. He stated it was he, Mr. Chavez, who yelled for Jesse

to stop the truck and drop him off, because he "didn't want to be with these drunk kids." RP at 482. He claims that after Jesse stopped at his request, he got out of the truck and walked home.

Mr. Chavez testified that he went to high school with Ms. Lovell, and they had a relationship when he was a senior and she was a freshman. Mr. Chavez remembered being parked in his truck in front of the home of the friend identified by Ms. Lovell and that they might have been "making out." RP at 505. He testified they were going to have sex but did not, because other people were there and it was not the right time. Mr. Chavez said he did not take her on the drive she described and they did not have sex that day.

When called as a defense witness, Jesse supported Mr. Chavez's testimony that in driving home from the postcarnival party, he pulled over because Mr. Buckley told him Mr. Chavez wanted to get out. Jesse admitted under cross-examination that a year before trial he told police he believed Mr. Chavez "was trying to be sexual with [Heather]," meaning that Mr. Chavez was trying to pull Heather's pants down and touch her vagina. RP at 617. In redirect examination, Jesse testified that he did not see it happen and he had since "learned things about the girls and everything, so [his] thoughts have changed on it." RP at 649.

The jury found Mr. Chavez not guilty of count V (the alleged rape of Mattie following the bonfire at Slab Camp), but guilty of the remaining charges. The jury also

found Mr. Chavez abused a position of trust in committing counts I, II, and III, but not count IV.

The State's sentencing memorandum asked the court to impose an exceptional aggravated sentence by running consecutively the sentences on counts I, II, and III—the counts the jury found were facilitated by Mr. Chavez's use of a position of trust—and running those concurrently with the remaining sentences. The result would be a total period of confinement of 180 months. The State pointed out that an exceptional aggravated sentence was also justified on "free crimes" grounds, because three of the rape counts, standing alone, would support the 60 month maximum sentence for a class C felony.

Among community custody conditions requested by the State was one prohibiting Mr. Chavez from contacting or communicating with minors under the age of 16 years old, unless authorized by his community corrections officer and therapist and accompanied/supervised by an approved chaperone.

Mr. Chavez opposed the imposition of an exceptional sentence and asked that the prohibition on communication with minors be amended so he could have contact with his biological children.

The trial court agreed to impose an exceptional sentence, but selected different crimes to run consecutively, one for each victim: count I (Heather), count VI (Mattie) and count VII (Mr. Buckley or the judicial system). The court signed findings of fact and

conclusions of law in support of the exceptional sentence that had been proposed by the State. It modified the community custody condition dealing with contact with minors by adding the language, "While incarcerated, the Defendant may communicate and visit with his biological children." CP at 50.

Mr. Chavez appeals.

ANALYSIS

Mr. Chavez makes nine assignments of error that we analyze as raising seven issues: (1) whether the court abused its discretion in admitting the testimony of Ms. Lovell, and whether, if there was error, it was harmless; (2) whether there was insufficient evidence of tampering with a witness; (3) with respect to the abuse of trust aggravator, whether it was supported by sufficient evidence, whether in finding sufficient evidence, the trial court relied on facts not found by the jury, and whether it was an abuse of discretion to rely on abuse of trust to impose an exceptional sentence; (4) whether the convictions for counts II and III constitute double jeopardy; (5) whether the court erred in relying on the "free crimes" doctrine to impose an exceptional sentence; (6) whether findings of fact in support of the exceptional sentence were not based on jury findings; and (7) whether the court violated Mr. Chavez's fundamental right to parent by prohibiting him from having contact with his children on his release from prison. We address the issues in the order stated.

I. EVEN IF IT WAS AN ABUSE OF DISCRETION TO ADMIT MS. LOVELL'S TESTIMONY, ANY ERROR WAS HARMLESS

Mr. Chavez contends the court erred when it allowed Ms. Lovell's testimony as evidence of a common scheme or plan.

"ER 404(b) prohibits the use of evidence of other crimes, wrongs, or acts to prove the character of a person in order to show action in conformity therewith." *State v. Slocum*, 183 Wn. App. 438, 448, 333 P.3d 541 (2014). The rule permits the use of such evidence for other purposes, however, among them being to prove a common scheme or plan. *State v. Sutherby*, 165 Wn.2d 870, 887, 204 P.3d 916 (2009). Before admitting evidence of other crimes or wrongs that jurors might misuse as demonstrating criminal propensity, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the permitted purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect. *Slocum*, 183 Wn. App. at 448 (citing *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012)).

To establish a common scheme or plan for ER 404(b) purposes, "the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual

manifestations." *State v. Lough*, 125 Wn.2d 847, 860, 889 P.2d 487 (1995). "Random similarities are not enough," and "the degree of similarity . . . must be substantial." *State v. DeVincentis*, 150 Wn.2d 11, 18, 20, 74 P.3d 119 (2003).

Appellate review of a trial court's evidentiary rulings is for an abuse of discretion. *Slocum*, 183 Wn. App. at 449. "'A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.'" *Id.* (quoting *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009)).

In the State's written submission addressing its intent to offer Ms. Lovell's evidence, the State characterized the common scheme or plan as:

> Begin[ning] with compliments and paying special attention to the victim followed by supplying the alcohol for the invariable party. After the child is intoxicated, [Mr. Chavez] proceeds to separate them from the pack to have sexual intercourse. Consistently he violates these children in his vehicle or the vehicle of another and he tends to gravitate to . . . secluded wooden areas where they are less likely to get caught.

CP at 297. Its offer of proof did not say, nor did Ms. Lovell testify, that she was groomed with prior compliments and special attention. Nor did she claim to have been provided with alcohol or taken to a party. In this case, Heather did not claim she was provided with alcohol before any of the rapes. And only one of the rapes of Heather took place in a vehicle.

Later, when the motion was argued, the State characterized the common scheme or plan as:

> [H]e isolates them, takes them up into a wooded area and then has sex with them, makes them feel as if they cannot leave. [Ms. Lovell] was under age at the time and it is very similar to what we have in the other allegation.

RP at 8. Unlike Ms. Lovell, who acceded to Mr. Chavez's persistence because she felt left with no choice, Heather and Mattie both testified that the sexual relations were consensual. Neither testified that she acceded to sex because she felt isolated and that she could not leave. And Ms. Lovell was 16, the age of consent, at the time Mr. Chavez took advantage of her.

Given these differences, the only commonality in the evidence found by the trial court, but a commonality it viewed as sufficient, was that "it establishes a plan or design, to rape." RP at 12. In *Slocum*, this court held that proof of a common plan "to molest children" did not qualify for the "common scheme or plan" exception to ER 404(b). 183 Wn. App. at 452-53.

The most substantial similarity between Ms. Lovell's account and a crime charged in this case is that in Ms. Lovell's case, as with the rape of Mattie charged as count VI, the women accepted Mr. Chavez's invitation to go four-by-fouring, and the sex took place thereafter, in the isolated off-road area at the end of the ride. In Mattie's case, however, the four-by-fouring took place a week after she testified to having consensual sex with Mr. Chavez, had then accepted his invitation to meet him at a party, left the

party with him, traveled to a boat ramp area where they continued to drink, and went four-by-fouring only after Mr. Chavez was told by a deputy sheriff to move on. And unlike Ms. Lovell, Mattie testified that the sex was consensual.

We are dubious that the degree of similarity was substantial, as argued by the State. Given the abuse of discretion standard, however, we resolve this assignment of error on the basis that any error was harmless. We do not discount Ms. Lovell's testimony about how upset she was by a sexual encounter she did not want and the enduring indignation that prompted her to come forward to support the victims in this case. Still, given that she was of the age of consent, her evidence presented what jurors would have to evaluate as a more ambiguous situation—particularly given her candid admission that despite the distress she experienced as the sex occurred, it was not forcible and she did not verbally object.

A defendant charged with child rape can deny that sex took place. But if it is proved that sex *did* take place between a 28- or 29-year-old man and a 14-year-old girl to whom he was not married, the crime has been proved. *See* RCW 9A.44.079.

Here, the two victims testified that sex did take place. And there was corroborating evidence for the testimony of the two victims, who had no apparent motive to lie. Mr. Buckley and Heather's cousin witnessed Mr. Chavez's molestation of Heather charged in count IV, and the molestation on that occasion tended to support her claim that she and Mr. Chavez had a sexual relationship in the past. Deputy Stoppani corroborated

Mattie's testimony that Mr. Chavez parked with her at the boat ramp before the rape charged as count VI, and Mr. Chavez offered no explanation at trial for having parked after dark with a slender girl in her early teens. The evidence of witness tampering, discussed below, implies consciousness of guilt. And while Jesse was a reluctant witness against his brother, he confirmed that Mr. Chavez, while age 28 or 29, was partying with high school students, and provided rides home to both Heather and Mattie. Jesse also confirmed that following the alleged molestation of Heather in the bed of his truck, he pulled over at Mr. Buckley's request and left Mr. Chavez on the roadside.

Under the applicable nonconstitutional harmless error test, the question is whether within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. *Slocum*, 183 Wn. App. at 456 (citing *Gresham*, 173 Wn.2d at 433). There is no reason to believe that the outcome of the trial would have been different had Ms. Lovell not testified.

II. THE EVIDENCE OF WITNESS TAMPERING WAS SUFFICIENT

Mr. Chavez contends the State presented insufficient evidence to support his conviction for witness tampering.

The test for sufficiency of the evidence is "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). All reasonable inferences from the evidence are drawn in favor of the State and are interpreted strongly against the defendant. *Id.*

Under RCW 9A.72.120,

> (1) A person is guilty of tampering with a witness if he or she attempts to induce a witness or person he or she has reason to believe is about to be called as a witness in any official proceeding or a person whom he or she has reason to believe may have information relevant to a criminal investigation or the abuse or neglect of a minor child to:
>
> (a) Testify falsely or, without right or privilege to do so, to withhold any testimony. . . .

Mr. Chavez likens his case to *State v. Rempel*, 114 Wn.2d 77, 83, 785 P.2d 1134 (1990), in which part of the reasoning by which the Supreme Court found insufficient evidence of witness tampering was that the defendant's "literal words [did] not contain a request to withhold testimony" and contained "no express threat nor any promise of reward." *Id*. Rempel, who was found guilty of the attempted rape of a woman with whom he had been friends for years, had called the victim after charges were filed, apologized, asked that she "'drop the charges,'" and told her "'it'" was going to ruin his life. *Id.* The court concluded that the entire context, including the parties' prior relationship and the reaction of the victim (who was unconcerned about the calls, which were not going to affect her actions), "negates any inference that the request to 'drop the charge' was in fact an inducement to withhold testimony from a later trial." *Id.* at 84. Rather, the defendant's request "reflect[ed] a lay person's perception that the complaining witness can cause a prosecution to be discontinued." *Id.* at 83. The court

made clear that "an attempt to induce a witness to withhold testimony does not depend only upon the literal meaning of the words used," and "[t]he State is entitled to rely on the inferential meaning of the words and the context in which they were used." *Id.* at 83-84.

Here, Jesse presented Mr. Buckley with the surprisingly generous gift of an iPhone, followed shortly by Mr. Chavez approaching Mr. Buckley to ask that he talk to Heather and her cousin and get them to "quit lying," followed by words to the effect of, "[Y]ou can help me, I can help you." RP at 350. Nothing about the context negates the inference, which can be reasonably drawn, that Mr. Buckley was being asked to withhold and cause his friends to withhold testimony. The evidence was sufficient.

III. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE ABUSE OF TRUST AGGRAVATOR

Mr. Chavez challenges his exceptional sentence, under which his sentences for three counts run consecutively. He contends that the abuse of trust aggravator was not supported by the evidence; that in finding sufficient evidence for abuse of trust, the trial court relied on facts not found by the jury, and that it was an abuse of discretion for the trial court to rely on abuse of trust to impose an exceptional sentence. Because we agree with the evidence sufficiency challenge, we need not address the second and third contentions.

Generally, sentences for multiple current offenses, other than serious violent offenses, run concurrently. RCW 9.94A.589(1)(a)-(b). Consecutive sentences for

multiple current offenses that are not serious violent offenses are thus exceptional. *State v. Newlun*, 142 Wn. App. 730, 735 n.3, 176 P.3d 529 (2008). An exceptional sentence for convictions not involving serious violent offenses may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. RCW 9.94A.589(1)(a).

One of the trial court's grounds for imposing the exceptional sentence was the jury's special verdicts on counts I through III, finding that the defendant used his position of trust to facilitate the commission of the crime, an aggravating factor authorized by RCW 9.94A.535(3)(n). Whether the State proved a special allegation to support an exceptional sentence "'is a factual inquiry, the [jury's] reasons will be upheld unless they are clearly erroneous.'" *State v. Hale*, 146 Wn. App. 299, 307, 189 P.3d 829 (2008) (alteration in original) (quoting *State v. Fowler*, 145 Wn.2d 400, 405, 38 P.3d 335 (2002)). Substantial evidence for this purpose is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises. *State v. Jeannotte*, 133 Wn.2d 847, 856, 947 P.2d 1192 (1997).

Here, when the defense moved to dismiss the aggravator at the close of the State's case, it argued that the State's only evidence that Mr. Chavez used a position of trust was a corporate filing identifying Mr. Chavez as a church officer. It pointed out that when cross-examined, Heather's testimony was that

> Mr. Chavez never escorted her to a pew, was never Bible study [sic], never counseled her, never preached to her, never did anything that would

> constitute a position of trust. She even said on cross examination that he was just like any other church member that went to that church.

RP at 459-60. The court denied the motion, observing that the State can prove the aggravator by demonstrating a trust relationship with an organization that has assigned functions to a defendant.[8]

The concept that the aggravator can apply when a victim trusts an organization was explained in *State v. Harding*, 62 Wn. App. 245, 248-49, 813 P.2d 1259 (1991). In that case, the victim was raped by the defendant, who entered her apartment while she slept. The defendant was the son of one of the apartment managers and occasionally worked cleaning apartments. *Id.* at 246. In connection with his duties, he was given a master key that opened all of the apartment doors. *Id.* Common law violation of a position of trust was alleged in support of an exceptional sentence. *Id.* at 247. In response to the argument on appeal that there was no direct, personal relationship of trust between the victim and the defendant, the court explained, "In our modern world, people routinely put their trust in organizations (such as the management of an apartment

[8] The court also observed that the relationship of trust began when Mr. Chavez indicated a willingness to consider Heather as a babysitter for his children, citing comments to the pattern jury instruction on the aggravator that talk about babysitters. But the comments discuss the relationship of trust between babysitters and the children entrusted to their care. *See* Comment, 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 300.23, at 803-05 (4th ed. 2016).

complex) without knowing the individuals who will carry out the tasks entrusted to the organization." *Id.* at 249.

It was reasonable for the State to contend that Heather placed her trust in her church. But what the State did not prove is Heather's reliance on the church for a function that it then delegated (along with the associated obligation of trust) to Mr. Chavez. Moreover, unlike the *common law* violation of trust that could support an exceptional sentence, the *statutory* aggravator, adopted in 2005, required that Mr. Chavez use the delegated function to facilitate commission of his offense. *Compare* RCW 9.94A.535(3)(n) *with State v. Chadderton*, 119 Wn.2d 390, 398, 832 P.2d 481 (1992). The State points only to evidence that Heather was attending the church when she met Mr. Chavez, he spoke to her at church, she knew he was an usher, and she left a church function to meet him on the night that he first raped her. As Heather testified at trial, though, even in his usher capacity, Mr. Chavez never escorted her to her seat and he never "use[d] his position as an usher" in their encounters. RP at 140.

Many would view any rape of a child as involving an abuse of trust, because adults should be protectors of children, not predators. But to justify an exceptional sentence, the conduct must be more culpable than that inherent in the crime. *Chadderton*, 119 Wn.2d at 398. The evidence was insufficient to support the jury's special verdicts finding that Mr. Chavez used his position of trust to facilitate the crimes charged in counts I through III.

IV. CONVICTIONS ON COUNTS II AND III DO NOT VIOLATE CONSTITUTIONAL PROTECTIONS AGAINST DOUBLE JEOPARDY

Mr. Chavez contends that convictions on counts II and III constitute double jeopardy because both accused him of the third degree rape of Heather during the same time frame, and the jury was not instructed that it must find a separate act for each count.

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 double jeopardy claim, we engage in a two-step, de novo review. We first consider whether the jury instructions permitted the jury to convict a defendant of multiple counts based on a single act. *Id.* at 661-63. If the instructions are flawed in this respect, we proceed to the second step and examine the entire trial record 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.*

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

Here, instructions 10 and 11, the elements instructions for counts II and III, were identical apart from their reference to the two different counts. The State points to instruction 3, a "separate charges" instruction, as ensuring against redundant convictions.[9] But the identical instruction was found inadequate in *Mutch* because it does not explain to jurors that each "crime" requires proof of a different act. 171 Wn.2d at 662-63. Mr. Chavez demonstrates that looking only at the instructions, double jeopardy was possible.

At the next stage of the analysis, however, the evidence and argument of counsel made it manifestly apparent to the jury that the State was not seeking to impose multiple punishments for the same offense. The prosecutor consistently tied specific incidents to specific counts. In closing argument, he had names for most of the incidents, which he used consistently.[10] He walked through the counts consecutively, identifying which conduct went with which charge. Even the defense tracked the State's correlation of different incidents with different counts, stating at one point, "There are four accusations

[9] The instruction stated, "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 count." CP at 197.

[10] "New Year's count," "[Heather's] house charge," "incident at Slab Camp," "friend's house event," and "incident at his house." RP at 713, 714, 720, 723, 727.

that [Heather] has made against my client. My client has four charges against him as a result of that." RP at 736. The defense also discussed the "New Year's Eve incident," "[Heather's] house incident," the "allegation . . . where Mr. Chavez allegedly drove [Heather] to his home," and the "[f]ourth incident . . . at Isaac's house." RP at 736-38, 740. Finally, in his closing rebuttal argument, the prosecutor presented a chart to help clarify "which counts are what and who's involved." *See* RP at 771-77.

Viewing the entire trial record, the jurors could not have mistakenly believed that they could convict Mr. Chavez of multiple counts based on a single act.

V. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE FREE CRIMES AGGRAVATOR, BUT IT IS NOT CLEAR THAT THE COURT WOULD HAVE IMPOSED THE SAME EXCEPTIONAL SENTENCE ON THAT BASIS ALONE

Mr. Chavez argues the statutory "free crimes" aggravator did not justify an exceptional sentence because his offender score already included triple points for his sex offenses.

At the time of sentencing, Mr. Chavez had no scorable prior offenses, so he began with an offender score of zero. He was convicted of five sex offenses, which—being separate offenses—were each scored as "other current offenses" at three points each, in addition to the one point scored for his witness tampering conviction. *See* RCW 9.94A.525(17).

As the State pointed out in requesting an exceptional sentence, had Mr. Chavez been convicted of only three sex offenses and no other crimes, he would have had an

offender score of nine and a standard range of 60 months—the statutory maximum for his sex offenses, which were all class C felonies. Without exceptional consecutive sentencing, he would have served no additional time for the other two sex offenses and witness tampering.

RCW 9.94A.535(2)(c) provides that the trial court may impose an aggravated exceptional sentence where "[t]he defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished." Whether the trial court had authority to impose an exceptional sentence is reviewed de novo.

Mr. Chavez argues that "[u]sing the multiplier means [he] was punished for his offenses, which were factored in when determining his offender score." Opening Br. of Appellant at 41. Use of the multiplier accomplished the legislative objective of punishing repeated sex offenses more harshly until an offender score of nine was reached. But once that score was exceeded, use of the multiplier did not accomplish the legislative objective.

In arguing that application of the multiplier alone accomplishes the legislative objective, the only authority Mr. Chavez cites is *State v. Phelps*, No. 76209-5-I, (Wash. Ct. App. Mar. 5, 2018), an unpublished opinion.[11] *Phelps* is distinguishable. In that case,

[11] https://www.courts.wa.gov/opinions/pdf/762095.PDF.

the defendant pleaded guilty to two crimes: taking a motor vehicle without permission in the second degree, and hit and run injury accident. His offender score for the motor vehicle taking charge was elevated to 19 by the multiplier effect of his prior stolen car convictions. Even so, his standard range for the hit and run count, for which his offender score was only 6, was longer, because hit and run was the more serious offense. Looking at his presumptive sentence—the 33 to 43 month range for the hit and run—his motor vehicle taking would *not* go unpunished, because that crime increased his offender score for the hit and run.

Here, absent an exceptional sentence, Mr. Chavez's presumptive sentence would be one of the sex offenses, and because his offender score reached nine by counting only two of his other offenses, his remaining three crimes would go unpunished. The free crimes aggravator was properly applied.

The question remains whether we can affirm the exceptional sentence despite having found insufficient evidence to support the abuse of trust aggravator. If we were persuaded that a trial court would have imposed the same sentence on the basis of the free crimes doctrine alone, we could uphold the exceptional sentence regardless of the validity of the abuse of trust aggravator. *State v. Hughes*, 154 Wn.2d 118, 134, 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).

Looking closely at the trial court's statements at sentencing, it explained it was running three sentences consecutively "because of the aggravators under the situation and basically because of the free crimes doctrine." RP at 846. It is clear the court would have imposed a consecutive sentence for the witness tampering count, because the court used that count as an example of a free crime, stating that concurrent sentencing "would leave the possibility of oh, gee, you can go out and tamper with witnesses but you'll never get a greater sentence because that's a different crime." RP at 847. It is less clear that the court would have run the three sentences consecutively based on the free crimes aggravator alone, although it was authorized to do so.

Often, sentencing courts will state that any one of multiple aggravating circumstances, standing alone, would support the exceptional sentence imposed. Because we do not have that clarity here, we will remand for resentencing, at which the court may impose the same or a different sentence.[12]

[12] By remanding for resentencing, we need not address the second of Mr. Chavez's two assignments of error complaining that the trial court's findings of fact in support of the exceptional sentence include findings not made by the jury. *See* Opening Br. of Appellant at 2 (Assignment of Error 8). At resentencing, the only finding on which the trial court may rely for an exceptional sentence beyond the prescribed statutory maximum is the fact that his high offender score results in some of his current offenses going unpunished. *See Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004).

VI. MR. CHAVEZ CAN RAISE HIS CHALLENGE TO THE COMMUNITY CUSTODY CONDITION LIMITING ACCESS TO MINORS AT RESENTENCING

Mr. Chavez finally contends that the community custody condition limiting his communication or contact with minors under the age of 16 years old violates his constitutional right to have a relationship with his children.

There was testimony at trial that Mr. Chavez has four children, whose ages at the time of trial were between 2 and 8. The two oldest children are girls, and the younger two are boys.

The State requested a community custody condition that prohibits contact or communication with minors under the age of 16 years old "unless previously authorized by your [community custody officer] and [sex offender treatment provider] therapist and accompanied/supervised by an approved adult chaperone." CP at 50. Mr. Chavez asked in his sentencing memorandum that he be able to "have communication with his biological children while in a State Facility, be able to write to them while he is incarcerated, and to be able to see them when he gets out." CP at 95. At sentencing, the court said, "I . . . will allow you to have, certainly contact with your own children while you are incarcerated." RP at 848. It modified the State's proposed community custody condition by adding the language, "While incarcerated, the Defendant may

communicate and visit with his biological children." CP at 50. Mr. Chavez complains that the modification fails to address his desire for contact with his children following his release from confinement.

"An offender's usual constitutional rights during community placement are subject to [Sentencing Reform Act]-authorized infringements." *State v. Hearn*, 131 Wn. App. 601, 607, 128 P.3d 139 (2006). But "[c]onditions interfering with fundamental rights, such as the right to a parent-child relationship, must be 'sensitively imposed' so they are 'reasonably necessary to accomplish the essential needs of the State and public order.'" *State v. Torres*, 198 Wn. App. 685, 689, 393 P.3d 894 (2017) (quoting *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010)). The sentencing court has a "duty to balance the competing interests impacted by" a condition infringing on a fundamental right. *Id.* at 690.

Mr. Chavez asks us to order the condition struck, but striking the condition would allow Mr. Chavez to have contact with all children. And since the trial court was aware of Mr. Chavez's request and granted it only in part, it is possible the court wanted some postrelease limitations in place, particularly if Mr. Chavez might be released at a time when his daughters are in their early or mid-teens. Since we are remanding for resentencing, Mr. Chavez will have an opportunity to ask the court to revisit the condition.

We affirm the convictions and remand for resentencing in accordance with this opinion.

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:

Lee, C.J.

Maxa, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 52358-2-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

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☒ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Legal Assistant Date: August 20, 2020
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