

68006-4

68006-4

NO. 68006-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JEFFREY HARPER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE JIM ROGERS

BRIEF OF RESPONDENT

NOV 9 2012 11:31 AM
COURT OF APPEALS
STATE OF WASHINGTON

DANIEL T. SATTERBERG
King County Prosecuting Attorney

AMY MECKLING
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	3
1. THE INITIAL DISCLOSURE	3
2. THE ABUSE	6
3. THE TRIAL	9
C. <u>ARGUMENT</u>	13
1. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, A REASONABLE JURY COULD HAVE FOUND THAT HARPER COMMITTED FOUR SEPARATE ACTS OF FIRST DEGREE CHILD RAPE	13
a. Standard Of Review	13
b. K.R. Described With Specificity Four Distinct Acts Of Sexual Intercourse Occurring Between The Ages Of Four And Seven	14
c. This Court Defers To The Fact-Finder To Resolve Inconsistencies In The Testimony, Credibility Of Witnesses, And Persuasiveness Of The Evidence	19
d. There Was Sufficient Evidence Of Anal Penetration	22
e. The Evidence Supported Two Distinct Acts Of Sexual Intercourse Through Digital Penetration	26

2.	HARPER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS WITHOUT MERIT	27
a,	Standard Of Review	28
b.	Trial Counsel's Decision To Not Cross-Examine K.R. And Other State's Witnesses Was A Legitimate Trial Strategy ..	29
c.	Harper Has Failed To Establish That His Trial Counsel Was Ineffective For Not Calling A Defense Investigator As A Witness	34
d.	Harper Has Failed To Establish That His Trial Counsel Was "Inexperienced" Or That Any Alleged Inexperience Rendered Counsel Ineffective	36
e.	Harper Has Failed To Establish Prejudice	37
3.	THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY IMPOSING THE SENTENCING PROVISION THAT HARPER HAVE NO UNSUPERVISED CONTACT WITH MINORS	39
D.	<u>CONCLUSION</u>	44

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Harrington v. Richter, 562 U.S. ___,
131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)..... 37

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 28, 37

Washington State:

In re Rainey, 168 Wn.2d 367,
229 P.3d 686 (2010)..... 40, 41

State v. A.M., 163 Wn. App. 414,
260 P.3d 229 (2011)..... 22, 23

State v. Alexander, 64 Wn. App. 147,
822 P.2d 1250 (1992)..... 21

State v. Ancira, 107 Wn. App. 650,
27 P.3d 1246 (2001)..... 41

State v. Berg, 147 Wn. App. 923,
198 P.3d 529 (2008)..... 41, 42, 43

State v. Camarillo, 115 Wn.2d 60,
794 P.2d 850 (1990)..... 20

State v. Corbett, 158 Wn. App. 576,
242 P.3d 52 (2010)..... 19, 20, 41, 42, 43

State v. Curtiss, 161 Wn. App. 673,
250 P.3d 496 (2011)..... 29, 32

State v. Delmarter, 94 Wn.2d 634,
618 P.2d 99 (1980)..... 14

<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	29
<u>State v. Hickman</u> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	15
<u>State v. Jensen</u> , 125 Wn. App. 319, 104 P.3d 717 (2005).....	15
<u>State v. Johnson</u> , 119 Wn.2d 167, 829 P.2d 1082 (1992).....	34
<u>State v. Joy</u> , 121 Wn.2d 333, 851 P.2d 654 (1993).....	14
<u>State v. Longuskie</u> , 59 Wn. App. 838, 801 P.2d 1004 (1990).....	20
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	28, 29, 35
<u>State v. Olson</u> , 126 Wn.2d 315, 893 P.2d 629 (1995).....	34
<u>State v. Parramore</u> , 53 Wn. App. 527, 768 P.2d 530 (1989).....	40
<u>State v. Piche</u> , 71 Wn.2d 583, 430 P.2d 522 (1967).....	29
<u>State v. Price</u> , 158 Wn.2d 630, 146 P.3d 1183 (2006).....	10, 20
<u>State v. Riley</u> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	41
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992).....	14
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	28, 37

<u>State v. Thomas</u> , 150 Wn.2d 821, 83 P.3d 970 (2004).....	14, 20, 21, 25, 34
<u>State v. Tili</u> , 139 Wn.2d 107, 985 P.2d 365 (1999).....	26
<u>State v. Walton</u> , 64 Wn. App. 410, 824 P.2d 533 (1992).....	20
<u>State v. Warren</u> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	41
<u>State v. Weber</u> , 137 Wn. App. 852, 155 P.3d 947 (2007).....	35

Statutes

Washington State:

RCW 9.94A.030	40
RCW 9.94A.505	40
RCW 9.94A.703	40
RCW 9A.44.073	15

Other Authorities

David Boerner, <u>Sentencing in Washington</u> , § 4.5 (1985)	40
---	----

A. ISSUES PRESENTED

1. Evidence is sufficient to support guilty findings if, viewed in the light most favorable to the State, any rational trier of fact could find the elements of the crime beyond a reasonable doubt. During trial, the jury heard evidence that K.R. was sexually abused on numerous occasions by Harper from the time she was four or five years old until she was six or seven. A child interview specialist testified about four specific instances related to her by K.R. where Harper sexually assaulted her during that timeframe. K.R. was able to repeat one of those instances in court. Was the evidence sufficient for a reasonable juror to find Harper guilty of four counts of first degree rape of a child occurring during the time that K.R. was four to seven years old?

2. Legitimate trial strategy cannot support an ineffective assistance of counsel claim.

a. During direct examination, K.R. often stated that she did not remember or did not know the answers to the State's questions. She was unsure of the timeframe for and the specifics of the abuse. Harper's counsel chose not to cross-examine her. Instead, he argued to the jury that K.R.'s memory was so vague and so poor that they could not find guilt beyond a reasonable

doubt. Was the decision by Harper's trial counsel not to cross-examine K.R. a legitimate trial strategy?

b. The State had significant, damaging evidence that Harper had engaged in the physical and sexual abuse of K.R., as well as the physical and sexual abuse and neglect of his other children over a long period of time. The State agreed to limit the evidence to Harper's sexual abuse of K.R., and to not go into any detail concerning the other allegations, so long as Harper did not open the door to this testimony. Was trial counsel effective when he chose not to cross-examine witnesses who had limited substantive evidence to present, but who could testify to damaging evidence should Harper open the door?

3. Although parents have a fundamental constitutional right to raise their children without the State's interference, the trial court may impose conditions that are reasonably necessary to further the State's compelling interest in preventing harm and protecting children. While acting as her parent, Harper repeatedly sexually assaulted his stepdaughter, K.R., over a period of several years. He abused her in the family home, while at least one of his biological children was present. He abused her in a manner that was not gender-specific. The record contained evidence that he

had sexually abused another stepdaughter and had, at the least, exposed his biological daughter to the abuse. Did the sentencing court properly exercise its authority when it entered a sentencing provision that prohibits Harper from unsupervised contact with all minors?

B. STATEMENT OF THE CASE

1. THE INITIAL DISCLOSURE.

Appellant Jeffrey Harper is married to victim K.R.'s mother, Stacy Harper.¹ 2RP 27-29.² Stacy has a total of six children, ranging in age from 3 years to 21 years. 2RP 27-28. Harper is not K.R.'s biological father.³ 2RP 28. Between March of 2008 and the trial in October of 2011, Division of Children and Family Services (DCFS) social worker Sara Luft met with K.R. over 30 times. 2RP 25. The number of contacts she had with Stacy's family were "too numerous to count." Id. In 2008, K.R. was removed from

¹ To avoid confusion, Stacy Harper will be referred to as Stacy.

² The Verbatim Report of Proceedings consists of 6 volumes and will be referred to as follows: 10/6/11 (1RP), 10/10/11 (2RP), 10/11/11 (3RP), 10/12/11 (4RP), 10/13/11 (5RP), and 11/18/11 (6RP).

³ Although not a fact elicited at trial, Harper is the biological father of Stacy's two youngest children, I.H. and J.H. CP 24.

Stacy and Harper's care.⁴ 2RP 26. She was returned to the home in July of 2009, only to be removed again in October of 2010 due to further allegations of physical abuse. Id. At that time, K.R. and I.H. went to live with foster parents Shane and Jennifer Wilson. 2RP 26-27; 3RP 40-41.

In January of 2011, after spending several months in the Wilsons' care, K.R. was seen by Kate Conover, a research coordinator from the University of Washington. 2RP 30-31. Conover assessed K.R.'s appropriateness for a study involving children who have been exposed to traumatic events. 2RP 30, 32-33. The interview occurred at the Wilsons' residence, and Conover asked K.R. a list of standardized questions. 2RP 32-33. The questions were prefaced with an introductory statement that included telling K.R., "Below is a list of very scary, dangerous, or violent things that sometimes happen to people . . . Some people

⁴ During pretrial motions, the State agreed that it would not elicit details of the physical abuse and neglect suffered over the years by Stacy's children, so long as Harper did not open the door to it. 1RP 4-5; 4RP 5-6. This included details regarding physical abuse of K.R. by Harper, and evidence that Harper physically abused his biological son, I.H. CP 25. This also included evidence that K.R.'s older sister, S.R., was sexually abused by Harper, and that Harper's biological daughter, three-year-old J.H., was sexually inappropriate and aggressive after being removed from Harper's care. CP 30. The jury was instructed, "The evidence in this case of when Child Protective Services contacted Mr. and Mrs. Harper and removed [K.R.] from the home is admitted solely for the purpose of establishing a timeline in this case of when things occurred. You are to deliberate with the evidence based on that limitation." 4RP 7-8.

have had these experiences. Some people have not had these experiences. Please be honest in answering if the violent thing happened to you or if it did not happen to you.” 2RP 34-35.

One of the standardized questions that Conover asked K.R. was regarding “having an adult or someone much older touch your private sexual body parts when you did not want them to.” 2RP 35. K.R. answered in the affirmative, revealing that her step-dad had done so “a few times” in the house she lived in with her biological mother and step-father. 2RP 36. Conover did not ask K.R. any further questions, instead asking only the standard questions for the survey. Id.

After the questions were done, K.R. went off to play, and Conover began to interview Shane Wilson for the study. 2RP 37. At one point, K.R. came back in the room and asked when Conover was going to ask “the scary, hard things?” Id. Conover told K.R. that she had already asked all of the questions, at which time K.R. volunteered that she had to tell Conover something else. Id.

K.R. asked Conover if they could go into her room to talk, and so they did. 2RP 37. K.R. proceeded to tell Conover that what her step-dad had done was “S-E-X.” 2RP 38. Conover told K.R. that Conover would need to tell other grown-ups, including social

worker Sara Luft, what K.R. had disclosed. 2RP 40-41. K.R. seemed relieved, saying, "Oh good, Sarah [sic] will help." 2RP 41.

Redmond Police Detective Patty Neorr was assigned to investigate K.R.'s disclosure on January 4, 2011. 3RP 9. She arranged for K.R. to be interviewed by Carolyn Webster, a child interview specialist, on January 5, 2011. 3RP 8-10.

2. THE ABUSE.

During her videotaped child interview on January 5, 2011, K.R. reported to Carolyn Webster that Harper was "doing S-E-X" to her and that he "was keeping it a secret." Ex. 22 at 11.

K.R. did not remember the last time that it had happened, but she remembered with specificity an incident where she was taking a bath and a glass door shattered. Ex. 22 at 12-13. K.R. told Webster how Harper removed glass from her foot and then laid her down on the bed on her tummy. Ex. 22 at 14-17. After laying her down, Harper pulled down his underwear and put his "wiener" into her "B-U-T-T." Ex. 22 at 17-18. K.R. told Webster that it "hurt." Ex. 22 at 18.

K.R. told Webster that Harper used lotion during the incident, and that "he was moving up and down . . . again and over and over

and over again,” and that “he was going up and down, up and down with his wiener in my B-U-T-T.” Ex. 22 at 19, 20-21. Webster asked K.R. how old she was when this happened:

K.R.: Um...two, maybe one.

WEBSTER: Two, maybe one?

K.R.: No, I don't think, no. Um, probably four or five.

WEBSTER: Four or five, okay.

K.R.: Uh-huh.

Ex. 22 at 15.

During the child interview, K.R. also told Webster about an incident where Harper put the lotion on his “wiener” and then put it in her mouth. Ex. 22 at 24-25. K.R. said that he “would keep goin’ up and down and up and down.” Ex. 22 at 25. She said that “he acted like um he had to go like a little bit of his pee, um well he had to like go potty and stuff. He went a little tiny bit, and went in my mouth.” Id. K.R. later clarified that she was not sure if it was “pee” or if it was the lotion, but she “almost choked.” Ex. 22 at 26. She said that it felt “all gushy and all yucky.” Ex. 22 at 27.

K.R. said that he “kept doing it and kept doing it,” and that he finally “let me [run] into the bathroom and then I spit, and rinsed my

mouth out.” Id. She said that when she spit, “white goeey like slimy stuff” came out of her mouth. Ex. 22 at 27. K.R. said that she was “four or five” when this happened. Ex. 22 at 25.

K.R. also disclosed that one time, when she was lying down resting, Harper came into the room, pulled down her pants and underwear, and “put his finger in her back.” Ex. 22 at 32. She clarified that by “back,” she meant “B-U-T-T.” Ex. 22 at 33. K.R. said that Harper moved his finger front and back, and that “it felt like there was like um, uh something like on me. Like a, like a rock or maybe something like that.” Id.

K.R. told Webster that after Harper put his finger into her bottom, he put his finger in her “front,” or “pee-pee,” and did the same thing. Ex. 22 at 33-34. K.R. said that she was “about maybe six” when this happened. Ex. 22 at 30.

On January 12, 2011, K.R. was seen by Dr. Rebecca Wiester at the Harborview Center for Sexual Assault and Traumatic Stress. 4RP 41, 43, 48. During the examination, K.R. disclosed to Dr. Wiester that Harper’s “private part” had touched her “back private part” and that it hurt. 4RP 55. She also told Dr. Wiester something had come out of his body and into her mouth, and that

she did not like it. Id. Dr. Wiester's physical examination of K.R. was normal. 4RP 57.

3. THE TRIAL.

At the start of the trial, the State moved to amend the information to reflect four counts of first degree rape of a child, domestic violence. CP 20-22; 1RP 9. The charging period for each count spanned October 10, 2006 through October 9, 2010, the timeframe during which K.R. was between four and seven years old. CP 20-22; 3RP 25, 27.

Following his interviews of all of the witnesses and his review of the relevant caselaw, Harper's attorney conceded that K.R. was competent to testify. 1RP 5-6. The trial court agreed with that assessment after a review of K.R.'s interview with the child interview specialist. 1RP 26.

However, Harper disputed the admissibility of the testimony from Kate Conover, Carolyn Webster and Dr. Rebecca Wiester regarding K.R.'s disclosures to them of sexual abuse at the hands of his client. 1RP 12-13, 22-23. Harper's counsel told the court that when he had interviewed K.R., her answer to many of his questions was that she did not know, or did not remember.

1RP 12. Harper argued that as a result, he was not able to “confront” K.R. on the stand about the hearsay statements. 1RP 12-13. Harper also argued that the statements were not reliable because it was unclear whether anyone had talked to K.R. about the abuse before the hearsay statements were made, and because the statements were eight or nine months old. 1RP 22-23.

The prosecutor pointed out that she had been present at K.R.’s pre-trial interview with Harper’s counsel, and that K.R.’s responses were largely a function of inartful questioning as well as K.R.’s discomfort with being interviewed about the abuse by two strange men. 1RP 24. The prosecutor expressed concern that K.R. might be similarly uncomfortable during her courtroom testimony. Id.

The trial court found that, although K.R.’s statements to the three different witnesses varied in some of the details, they were all consistent, detailed and spontaneous. 1RP 28-29. The court found that the statements were reliable, and that there was no evidence suggesting K.R. had a motive to lie. 1RP 29. The court determined that, pursuant to State v. Price, 158 Wn.2d 630, 146 P.3d 1183 (2006), a lack of memory on K.R.’s part during testimony would not

render the statements inadmissible or violate Harper's right to confrontation. 1RP 30.

K.R. testified at trial. 3RP 26-39. At the time, she was nine years old. 3RP 27. In response to some of the State's questions, she stated that she did not remember, or that she did not know. 3RP 28-29, 31-32. However, when prompted about whether she remembered a glass door breaking, she testified that Harper had put his penis into her vagina and her anus and that it hurt. 3RP 34. She started crying shortly thereafter, and the court took a brief recess. Id.

After the break, K.R. testified in further detail about the incident with the broken glass. 3RP 37-39. She remembered Harper laying her on the bed in his bedroom and her being on her tummy. 3RP 38. These details were consistent with what she had previously disclosed to Carolyn Webster during her child interview. Ex. 22 at 15-17.

Harper did not cross-examine K.R., Sara Luft, Kate Conover or Jennifer and Shane Wilson. He cross-examined Detective Neorr about the fact that no DNA analysis was performed. 3RP 25-26. He cross-examined Carolyn Webster regarding her child interview with K.R., and how K.R. would sometimes answer, "I don't know, or

I don't remember." 4RP 35. He cross-examined Dr. Wiester about the lack of injury to K.R. 4RP 64-65.

Following the conclusion of the State's case, Harper made a motion to dismiss all four charges for insufficient proof. 4RP 67-68, 70. He argued that K.R. could provide no clear timeframe for when the abuse occurred, and that she was too vague about the abuse for the State to have met its burden of proof. Id. Finding that Harper's arguments were ones that he could make to the jury, but that the evidence, viewed in the light most favorable to the State, supported a finding of guilt, the court denied Harper's motion. 4RP 70-71.

At the conclusion of the trial, the jury found Harper guilty as charged of four counts of rape of a child in the first degree, domestic violence. CP 117. The court sentenced him to indeterminate sentences of 276 months to life on each count. CP 121. The court also imposed as a condition of sentence that Harper have no contact with minors without the supervision of an adult with knowledge of the convictions. CP 121; 6RP 18. The court further specified that the permission of a sexual deviancy treatment provider would be required for Harper to have contact

with minor children, and that Stacy Harper could not supervise any such contact. CP 121; 6RP 18. Harper appeals. CP 115-16.

C. ARGUMENT

1. VIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, A REASONABLE JURY COULD HAVE FOUND THAT HARPER COMMITTED FOUR SEPARATE ACTS OF FIRST DEGREE CHILD RAPE.

Harper argues that the evidence was insufficient for his conviction on four counts of rape of a child in the first degree. He essentially makes four claims in support of this argument: (1) the evidence did not establish that the acts occurred within the charging period, (2) K.R.'s testimony was too confused and inconsistent to support conviction, (3) there was insufficient evidence of penetration with respect to the two counts involving anal intercourse, and (4) the two counts involving digital penetration were not "separate incidents." All four of these claims must be rejected.

a. Standard Of Review.

Evidence is sufficient to support a conviction if, after viewing all of the evidence in the light most favorable to the State, any

rational jury could have found the elements of the crime proved beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). A defendant who challenges the sufficiency of the evidence admits the truth of the evidence and all rational inferences that may be drawn from it. State v. Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). All reasonable inferences must be drawn in favor of the State and against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Furthermore, the reviewing court defers to the jury's determination as to the weight and credibility of the evidence and its resolution of any conflicts in the testimony. Thomas, 150 Wn.2d at 874-75. Circumstantial evidence is just as reliable and probative as direct evidence in reviewing the sufficiency of the evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

- b. K.R. Described With Specificity Four Distinct Acts Of Sexual Intercourse Occurring Between The Ages Of Four And Seven.

To prove each of the four counts of rape of a child in the first degree, the State had to prove that, on an occasion separate and distinct from the other counts, Harper had sexual intercourse with K.R., that K.R. was less than twelve years old and not married to

Harper, and that Harper was at least twenty-four months older than K.R. RCW 9A.44.073. See also CP 101, 105-07 (court's instructions to the jury).

Harper concedes that the State alleged four specific and distinct acts, and concedes that the jury was properly instructed. However, citing to State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998), and State v. Jensen, 125 Wn. App. 319, 104 P.3d 717 (2005), Harper claims that the State assumed the added burden of proving that the four acts of child rape occurred between October 10, 2006 and October 9, 2010, when it included that language in the jury instructions. He claims that K.R.'s testimony was insufficiently detailed for the jury to find that the four separate acts occurred within that timeframe.

Harper's claim should be rejected. Even assuming that under Hickman the charging period became the law of the case, the State provided sufficient evidence for a rational jury to find that Harper committed the offenses during that timeframe. Harper cannot show that given the evidence, no rational jury could have found the acts were committed within the charging period. This Court should affirm.

Harper was charged with four counts of first-degree child rape, alleged to have occurred during a period of time intervening between October 10, 2006 through October 9, 2010. CP 20-22. K.R. was between the ages of four and seven during that time period. 3RP 25, 27. The State's theory of the four counts of child rape were premised on (1) penile-anal penetration, (2) digital-vaginal penetration, (3) digital-anal penetration and (4) penile-oral penetration. 4RP 69, 98-100.

The jury heard specific evidence as to each of the four distinct sexual acts. With respect to the count involving penile-anal penetration, the jury watched a video of K.R.'s interview with Child Interview Specialist Carolyn Webster. 4RP 30-31. During the interview, the jury heard eight-year-old K.R. describe a time when a glass door shattered and she cut her foot. Ex. 22 at 4, 13, 15. She said that after Harper assisted her with her cut, he laid her down on the bed on her tummy, pulled down his underwear, and put his "wiener" into her "B-U-T-T." Ex. 22 at 13-18. K.R. described how that action "hurt." Ex. 22 at 18. The jury heard K.R. describe how Harper moved "up and down, up and down with his wiener in my B-U-T-T." Ex. 22 at 19. They heard K.R. describe how there was "creamy, slimy stuff" on her bottom afterwards. Ex. 22 at 20.

K.R. also testified in court about this act by the defendant. 3RP 34, 37-38.

When she was interviewed by Carolyn Webster, K.R. was eight years old. Ex. 22 at 2. At first, K.R. volunteered that the incident with the glass door occurred “when she was little.” Ex. 22 at 13. Later, she gave more detail:

WEBSTER: You said this time it happened when you were little.

K.R. Yeah.

WEBSTER: About how old do you think you were?

K.R. Um . . . two, maybe one.

Ex. 22 at 15. However, K.R. quickly corrected herself and clarified that she was four or five when the incident occurred:

WEBSTER: Two, maybe one?

K.R. No, I don't think, no. Um probably four or five.⁵

Id.

A second count involved oral penetration. The jury heard K.R. describe to Carolyn Webster how Harper put his penis into her

⁵ Harper mischaracterizes this exchange between K.R. and Webster as, “K.R. stated on the video that she was one or two or maybe four or five.” Appellant's Opening Brief, at 16. The transcript, to which Harper did not object (see 4RP 31), speaks for itself.

mouth. Ex. 22 at 24-25. She talked about how he put lotion, or “creamy stuff,” on his “wiener.” Ex. 22 at 24. She said that he “would keep goin’ up and down and up and down,” and then he “acted like he had to go potty,” and “went a little tiny bit, and went in my mouth.” Ex. 22 at 25. The jury heard K.R. describe how she did not know whether it was “pee” or “the creamy stuff” that went into her mouth, but that she “almost choked.” Ex. 22 at 26. She “spit” and rinsed her mouth out afterwards. Ex. 22 at 25. The jury heard K.R. describe how, when she spit, “white gooey like slimy stuff” came out of her mouth. Ex. 22 at 27. K.R. told Webster that this act occurred when she was “four or five.” Ex. 22 at 25.

The third and fourth acts involved digital-anal penetration and digital-vaginal penetration. The jury heard K.R. describe to Carolyn Webster a time when she was lying down resting and Harper pulled down her pants and underwear and put his finger into her “B-U-T-T,” and slowly moved “front back, front back.” Ex. 22 at 30-33. He then put his finger into her “pee-pee” or “private.” Ex. 22 at 34. K.R. testified in court that her “private” meant “vagina.” 3RP 30. K.R. told Webster that this incident occurred when she was “pretty much the same” age as the others [four or five], but “maybe six.” Ex. 22 at 30.

In sum, K.R. told Carolyn Webster that each of these four separate acts occurred during a time when she was between the ages of four and six years old. Based on this evidence, a rational fact-finder could easily conclude that Harper committed four separate and distinct acts of child rape during the timeframe alleged by the State. Sufficient evidence supports his convictions.

- c. This Court Defers To The Fact-Finder To Resolve Inconsistencies In The Testimony, Credibility Of Witnesses, And Persuasiveness Of The Evidence.

Harper claims that the State's evidence was "confused" and "inconsistent."⁶ He argues that no rational jury could convict him because K.R. testified in court that she did not remember how old she was when the abuse started, because she was unable to answer some of the State's questions on direct examination, and because some of her answers were inconsistent with her prior statements.

However, this Court must defer to the jury "on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." State v. Corbett, 158 Wn. App.

⁶ Most of the inconsistencies cited by Harper relate to K.R.'s inability to remember things during her testimony that she had previously recalled during her interview with Webster. These are not true "inconsistencies" at all.

576, 589, 242 P.3d 52 (2010) (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), and State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992)); Thomas, 150 Wn.2d at 874-75. See also State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990) (“Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and persuasiveness of material evidence”) (citations omitted).

K.R. clearly had a difficult time testifying about the abuse in open court. She answered “I don’t know,” or “I don’t remember” to many of the State’s questions. 3RP 26-39. She started crying and needed to take a break during her description of the glass door incident and her explanation of why she did not tell her mother about the abuse. 3RP 34. However, she did testify that after the glass door broke, Harper took her into his room, dried her off, took out the glass, put her on the bed on her tummy, and put his penis into her vagina and anus. 3RP 34, 38.

K.R.’s responses of “I don’t remember,” or “I don’t know,” was a factor that the jury could consider when evaluating her testimony and the credibility of her out-of-court statements. CP 92 (instruction to the jury that it could consider the quality of a witness’s memory while testifying); see also Price, 158 Wn.2d at

649 (child hearsay statements do not violate confrontation clause when victim testifies to a lack of memory because defendant is given opportunity to expose memory lapse and the jury is provided an opportunity to evaluate whether it believes that the witness forgot or is evading for some other reason) (citations omitted).

In fact, Harper's closing argument focused on K.R.'s lack of memory during her testimony, and he argued to the jury that her lack of memory or her evasiveness equaled a reasonable doubt. 4RP 90-92. Despite Harper's argument, the jury found the State's evidence convincing beyond a reasonable doubt. This Court must defer to the fact-finder on the credibility of the witnesses, the resolution of conflicting testimony, and the persuasiveness of the evidence. Thomas, 150 Wn.2d at 874-75.

Harper's reliance on State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) is misplaced. There, the child victim did not demonstrate an inability to recall (or an unwillingness to testify in court); rather, her testimony was inconsistent *in the extreme* on the issue of whether the abuse even happened at all. 64 Wn. App. at 158. Additionally, the child's testimony in Alexander as to the timing of the abuse was contradicted by other witnesses. Id. at 149-50.

To the contrary, here, K.R.'s statements were not contradicted by other witnesses and the inconsistencies⁷ in her testimony were not extreme and do not rise to the level that "no rational jury could have found beyond a reasonable doubt" that Harper committed the acts in question. The evidence was sufficient for the jury to convict Harper.

d. There Was Sufficient Evidence Of Anal Penetration.

Citing to State v. A.M., 163 Wn. App. 414, 260 P.3d 229 (2011), Harper further claims that the evidence was insufficient to establish that he penetrated K.R.'s anus, with either his penis or his finger. A.M. is inapposite.

A.M. involved a bench trial of a juvenile charged with first degree child rape. During direct examination of the victim, the

⁷ During K.R.'s testimony, the State asked her if Harper ever touched her bottom with anything. 3RP 31. She responded, "His penis." Id. Harper argues that this answer is contradictory to her prior statement to Webster about Harper putting his *finger* into her "B-U-T-T" while she was napping. But K.R. did not testify that Harper's penis was the *only* thing he had touched her bottom with. 3RP 31. It is hard to see how that testimony is contradictory at all, much less to the point that no rational jury could find that Harper committed the acts charged. Harper also claims that K.R. testified that "she *only* knew" what Harper's penis looked like because he "would walk around naked with no clothes on." Appellant's Opening Brief, at 13. Harper misstates the record. K.R. described Harper's penis as having a "hole in the middle." 3RP 39. The prosecutor asked how K.R. knew it had a hole in the middle, to which K.R. responded, "Because at our house sometimes he would walk around naked with no clothes on." Id. She did not testify that was the *only* basis for her knowledge.

prosecutor asked for specifics on the extent of the sexual activity. The victim testified that the defendant's penis went inside his buttocks, but was unwilling to say that it went inside his anus. 163 Wn. App. at 417-18.

The trial court specifically found that there "was penetration of the buttocks, but not the anus." Id. at 418. Despite that finding, the court found the juvenile respondent guilty of first degree child rape. Id. The State argued on appeal that the "buttocks" are part of the anus, and that the evidence was therefore sufficient for a finding of penetration. Id. at 420. The appellate court disagreed, finding that "sexual intercourse" requires penetration of the anus, not just the buttocks. Id. at 421. The facts of A.M. are nothing like the facts here.

Harper claims that the only evidence that he penetrated K.R.'s anus with his penis was (1) K.R.'s statement to social worker Sara Luft that Harper had touched her and done "S-E-X," (2) K.R.'s testimony that Harper "touched her bottom" with his penis, and (3) K.R.'s statement to Carolyn Webster that Harper had touched her "B-U-T-T" with his "wiener." Harper minimizes the evidence of penetration.

First, K.R. testified in court that Harper “stuck his penis in . . . my anus,” and that when he did so, it hurt. 3RP 34. K.R. told Carolyn Webster that after he removed glass from her foot, Harper pulled down his underwear and put his “wiener” *into* her “B-U-T-T.” Ex. 22 at 17-18. K.R. told Webster that it “hurt.” Ex. 22 at 18. K.R. told Webster that Harper used lotion during the incident, and that “he was moving up and down . . . again and over and over and over again,” and that “he was going up and down, up and down with his wiener in my B-U-T-T.” Ex. 22 at 19, 20-21.

Additionally, K.R. told Webster that when Harper put his finger in her “B-U-T-T” it “really, really, really hurt.” Ex. 22 at 29, 33.

This evidence was more than sufficient for a rational fact-finder to determine that Harper penetrated K.R.’s anus with his penis and with his finger.

Harper also argues that Dr. Wiester’s testimony renders the evidence of penetration insufficient. Harper cites to Dr. Wiester’s finding that K.R.’s anal examination was normal. He also claims that K.R.’s answer, “I couldn’t really,” in response to Dr. Wiester’s asking K.R. if she could tell if any part of Harper’s body went inside

her body was an inconsistency that renders the evidence insufficient.

However, Harper ignores Dr. Wiester's assessment that K.R.'s history was "consistent" with sexual abuse. 4RP 62. He further ignores Dr. Wiester's testimony that based on her years of experience it is common to see no anal injuries during an exam, because the injuries heal quickly. 4RP 60-61. Moreover, Dr. Wiester testified that K.R. told her that Harper's actions involving her bottom "hurt." 4RP 55. Additionally, although at one point K.R. said that she "couldn't really" tell if any part of Harper's body went inside of her body, she also pointed to her open mouth when Dr. Wiester asked where Harper's body part went. 4RP 55-56. Finally, as noted above, this Court defers to the fact-finder on the resolution of conflicting testimony and persuasiveness of the evidence. Thomas, 150 Wn.2d at 874-75. The testimony from Dr. Wiester did not render the evidence insufficient. To the contrary, it bolstered proof of Harper's guilt.

e. The Evidence Supported Two Distinct Acts Of Sexual Intercourse Through Digital Penetration.

The unit of prosecution for rape is “sexual intercourse,” which is complete upon any penetration of the vagina or anus, however slight. State v. Tili, 139 Wn.2d 107, 117, 985 P.2d 365 (1999). In Tili, the court determined that double jeopardy was not offended by the defendant’s prosecution for three counts of rape when he committed three independent acts of penetration during the same incident. Id. at 119. The acts in Tili are virtually indistinguishable from Harper’s actions against K.R. Tili penetrated the victim’s anus with his finger; he then penetrated the victim’s vagina with his finger. He did so sequentially, not simultaneously. Tili, 139 Wn.2d at 117. Each act of penetration “was an independent violation of the victim’s personal integrity” and an appropriate basis for an independent rape charge. Id.

Harper argues that the “napping” incident, during which he digitally penetrated both K.R.’s anus and vagina, were not two separate and distinct acts of sexual intercourse. See Appellant’s Opening Brief, at 21. He cites no persuasive authority for that proposition, which is contradictory to the law. Harper’s first act of sexual intercourse was complete when he penetrated K.R.’s anus

with his finger. Ex. 22 at 33. The second act of sexual intercourse was complete when Harper penetrated K.R.'s vagina with his finger. Ex. 22 at 34. The evidence was sufficient to support two separate counts of child rape for Harper's digital penetration of K.R.

2. HARPER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM IS WITHOUT MERIT.

The defendant claims that his trial counsel was constitutionally ineffective for (1) failing to cross-examine "most of the state's witnesses," (2) failing to call a defense investigator to testify, and (3) being "inexperienced."

Harper's claims that his trial attorney provided deficient representation are without merit. First, trial counsel's decision to conduct limited cross-examination of the victim and other State's witnesses was a legitimate tactical decision. Secondly, Harper's claim that his trial attorney should have called an investigator to testify is meritless, as he does not establish that the investigator had anything relevant to say. Finally, Harper's claim that his trial counsel was "inexperienced" and thereby ineffective is not supported by the record or any legal authority or persuasive reasoning.

Moreover, even if Harper could demonstrate that no reasonably competent attorney would have failed to cross-examine the witnesses or failed to take testimony from the investigator, Harper cannot show prejudice. This Court must reject Harper's claim of ineffective assistance of counsel.

a, Standard Of Review.

An ineffective assistance of counsel analysis begins with the strong presumption that counsel's representation was effective and competent. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). For Harper to overcome this presumption, he must prove by a preponderance (1) that his trial counsel's performance was so deficient that it fell outside the wide range of objectively reasonable behavior based on consideration of all the circumstances of the case; and (2) that this deficient performance prejudiced him, i.e., that there is a reasonable probability that but for counsel's objectively unreasonable representation, the results of trial would have been different. Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). If the defendant fails to prove either prong of this test, the inquiry must

end. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To establish deficient performance, Harper “must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.” McFarland, 127 Wn.2d at 336; Hendrickson, 129 Wn.2d at 77-78. It is simply insufficient to argue that because a trial tactic failed to sway the jury, the decision was not legitimate. State v. Curtiss, 161 Wn. App. 673, 703, 250 P.3d 496 (2011) (citing State v. Grier, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011)).

b. Trial Counsel’s Decision To Not Cross-Examine K.R. And Other State’s Witnesses Was A Legitimate Trial Strategy.

The decision of whether to cross-examine a witness is tactical. State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). In the context of this case, Harper’s trial attorney made a perfectly reasonable tactical decision not to cross-examine K.R. and several of the State’s other witnesses.

With regard to K.R., Harper argues that given her repeated answers of “I don’t know” and “I don’t remember” during direct examination, his attorney should have questioned her in order to

“highlight” the inconsistencies in her testimony as well as the insufficiency of the evidence.

However, it was precisely due to K.R.’s non-detailed testimony that Harper’s trial counsel made the reasonable tactical decision not to question her. During direct examination, K.R. demonstrated either a limited ability to recall details of the sexual abuse, or a desire to avoid answering questions about it. Either way, her minimal testimony cut against the State’s burden of proof. If Harper’s attorney had stood up and questioned her about alleged inconsistencies or her inability to recall, she may easily have provided additional detail, further damaging Harper’s case.

That Harper’s trial counsel made this tactical decision is clear from the record. After K.R. testified, trial counsel told the court that he was intentionally not questioning some of the State’s witnesses, stating that if “I don’t think I need to go somewhere, I’m not going there.” 3RP 57. Indeed, Harper’s trial counsel focused his closing argument on K.R.’s inability to remember the timing and details of the abuse during her testimony:

I don’t remember. I don’t remember. I just don’t remember. Over and over and over we heard that from [K.R.] on the stand. . . . It’s unclear as to instances and it’s unclear as to timelines. At one point the state asked [K.R.] on the stand, standing

right here, do you remember any specific instances? [K.R.]'s response was, I don't remember. Then the quick follow-up by the state, well, you remember the broken glass incident. Oh, now she does. Okay, we got her going now. Okay. She said, I don't remember. . . . When she was on that stand, [K.R.] didn't remember much of anything. You got to give some value to that. That has to have some price tag on that. She was on the stand, nine years old now. To say that these were all consistent statements that [K.R.] was giving is completely incorrect. When she took that stand all of a sudden she didn't remember. It has to be given some weight.

4RP 90-91. And later, Harper's counsel argued:

Let me make something very clear here too. [K.R.] said I don't remember, I don't remember, I don't remember. Boy, she remembered her brothers and sisters birthdays pretty well, and their ages, and where they all lived. She's not a stupid kid. She's a smart kid. You were not provided information here.

4RP 92. Counsel's entire closing argument focused on the presence of reasonable doubt, and he stressed that it was not his job to disprove anything by cross-examining witnesses:

I didn't have a lot of questions for most of the witnesses in this case. The burden is not on me. The burden is on the state beyond a reasonable doubt to all four charges. I'm going to ask questions if I'm trying to disprove the state's case or maybe add an argument to my side. Outside of that, okay.

4RP 95.

Harper complains that the decision by his trial attorney not to cross-examine K.R. and other witnesses "proved detrimental to the

case.” Appellant’s Opening Brief, at 24. However, counsel’s decision not to cross-examine a child sexual abuse victim who provided very limited information on direct examination, and then to argue that the State had not proven its case, was a legitimate strategy. The fact that it was not ultimately successful is of no consequence to Harper’s claim of ineffective assistance of counsel. Curtiss, 161 Wn. App. at 703.

Other than K.R., the witnesses whom Harper did not cross-examine had little to add to Harper’s defense, but they had much that could harm it. K.R. was initially removed from Harper’s care for physical abuse. 2RP 26. The State agreed not to elicit any details of that physical abuse unless Harper opened the door to it. 1RP 4-5. Additionally, despite significant evidence of Harper’s physical and sexual abuse of K.R.’s siblings,⁸ the State did not elicit that information during trial. 1RP 4-5. Sara Luft, the social worker assigned to the Harper family, testified in general terms about the Harper family and how K.R. was placed in foster care. 2RP 23-29. Had Harper’s trial counsel cross-examined Luft, he might well have opened the door to damaging information about the significant neglect and abuse in the Harper home.

⁸ CP 24, 27, 30; 6RP 5-8.

Kate Conover, the research assistant to whom K.R. initially disclosed, had limited interaction with K.R. and could testify only about what K.R. told her. It is unclear what function cross-examining Conover would have served, other than for her to repeat K.R.'s disclosure of sexual abuse by Harper. The same holds true for K.R.'s foster parents; Harper had no incentive to highlight their testimony about the abuse or the positive changes in K.R.'s behavior after she was removed from Harper's care. See 3RP 41-49, 50-55.

In contrast, Harper's trial counsel cross-examined the police detective about her retrieval of bedding from Harper, even though she failed to submit it for DNA analysis. 3RP 25-26. He then argued to the jury that there was an incomplete investigation. 4RP 95. Harper's trial counsel also cross-examined Carolyn Webster regarding the times K.R. answered "I don't remember" during the child interview. 4RP 34-35. Finally, he cross-examined Dr. Wiester about K.R.'s normal physical examination and the lack of any observable injury. 4RP 65-66.

In sum, Harper has failed to establish deficient performance on the part of his trial counsel for failing to cross-examine some of the State's witnesses. Based on the record as a whole, it is clear

that his decision to forgo questioning of some witnesses was a reasonable tactical decision.

c. Harper Has Failed To Establish That His Trial Counsel Was Ineffective For Not Calling A Defense Investigator As A Witness.

Harper claims that trial counsel's failure to present the testimony of a defense investigator, Mike Powers, constituted deficient performance. Appellate courts "will not review issues for which inadequate argument has been briefed or only passing treatment has been made." Thomas, 150 Wn.2d at 868-69 (citing State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992) and State v. Olson, 126 Wn.2d 315, 321, 893 P.2d 629 (1995)). Because Harper has not specified with any particularity what Powers would have testified to, or why the decision not to call him was deficient, this Court should decline to consider this claim.

Even if this Court addresses the claim, Harper has fallen woefully short of establishing deficient performance for not calling Powers to testify. Harper insinuates that Powers could have impeached K.R. with prior inconsistent statements.⁹ However, a

⁹ Harper argues, "Powers spoke with K.R. for 'an extensive period,' yet counsel did not call Powers to testify." Appellant's Opening Brief, at 24.

reviewing court considers an ineffective assistance claim only in light of those matters included in the trial record. McFarland, 127 Wn.2d at 335. Harper does not point to any inconsistent statements in the record. Rather, during K.R.'s interview with Powers, K.R. initially gave "I don't know" or "I don't remember" answers. 1RP 12, 22-23. It was only after the "defense and his investigator kind of narrowed down the questions," that she gave more detailed responses during the interview, which were "consistent with what she previously reported." 1RP 24. Harper has not established that Powers had any relevant impeachment evidence. See State v. Weber, 137 Wn. App. 852, 858, 155 P.3d 947 (2007) (the failure to call a witness cannot be considered prejudicial unless the record supports that the witness would have been helpful to the defense).

In fact, Harper's trial counsel clearly understood Powers's potential role as a rebuttal witness. See 1RP 10 ("I would anticipate Mr. Powers would take the stand if it is more for rebuttal towards anything the state might have said that . . . we believe would not be correct or inconsistent with a previous statement."). The fact that Powers did not testify is strong evidence that trial counsel felt that there were no significant inconsistencies.

Moreover, it was a legitimate trial strategy not to call Powers as a witness. K.R. provided limited detail of the sexual abuse during her testimony in court. Harper's trial counsel capitalized on her lack of memory during direct examination when he argued to the jury that there was reasonable doubt. 4RP 90-97. It would have been a particularly poor strategy for Powers to take the stand and tell the jury that K.R. was ultimately able to recall the abuse during their prior interview. Harper has not established deficient performance for not calling Powers as a witness.

- d. Harper Has Failed To Establish That His Trial Counsel Was "Inexperienced" Or That Any Alleged Inexperience Rendered Counsel Ineffective.

Harper makes a passing claim that his trial counsel "by his own admission," was "inexperienced" in sexual assault cases. His support for this claim lies in trial counsel's submission of a jury questionnaire (for which the court ultimately substituted a shorter one) along with counsel's statement regarding the questionnaire: "I didn't know the policies usually with this kind of case."

Harper's conclusory allegation that trial counsel was inexperienced (and therefore ineffective) is without merit. The

questionnaire that the court ultimately submitted was similar to counsel's proposed one, but narrowed down to a single page, making it easier to photocopy. 1RP 3. Moreover, counsel's statement regarding his unfamiliarity with the protocols of the trial court relating to jury questionnaires does not mean that he was "inexperienced" in sexual assault cases generally. Harper has not established that he received ineffective assistance of counsel.

e. Harper Has Failed To Establish Prejudice.

Even if this Court were to find deficient performance, Harper must still establish prejudice. He cannot.

To prevail on his claim that his counsel was constitutionally ineffective, Harper must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. Thomas, 109 Wn.2d at 226; Strickland, 466 U.S. at 694. "The likelihood of a different result must be *substantial*, not just conceivable." Harrington v. Richter, 562 U.S. ___, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (citing Strickland, at 693) (italics added).

Harper cannot show that there is a reasonable probability that the outcome of the trial would have been different if trial counsel had cross-examined K.R. During closing argument, trial counsel was able to point to inconsistencies between her testimony and her prior child hearsay statements without the risk that cross-examining her posed (i.e., eliciting more detailed testimony about the abuse). See 4RP 94.

Similarly, Harper has not shown how cross-examining the other witnesses would have changed the outcome of the trial. Luft and the Wilsons had little substantive evidence to add to the case. Conover only repeated what K.R., a little girl whom she did not know, said to her during a standardized assessment. Harper does not point to any questions that trial counsel should have asked these witnesses, and cross-examination would likely have served no purpose other than to highlight the testimony that they gave on direct.¹⁰ Harper has failed to show any prejudice from his counsel's tactical choice not to cross-examine these witnesses.

Finally, as outlined above, Harper has not shown that his investigator, Mike Powers, had anything to add to the case, and he

¹⁰ Additionally, as pointed out above, had trial counsel questioned them further, he ran the risk of opening the door to testimony that would be significantly damaging to Harper.

has not shown a reasonable probability that the outcome of the trial would have been different if he had called Powers as a witness. In sum, Harper cannot establish the prejudice necessary to sustain an ineffective assistance of counsel claim.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY IMPOSING THE SENTENCING PROVISION THAT HARPER HAVE NO UNSUPERVISED CONTACT WITH MINORS.

Harper challenges the imposition of a no-contact order with minors, arguing that it infringes on his fundamental right to parent his biological children.

However, because the condition is reasonably necessary to protect Harper's biological children from the same type of harm that he inflicted on his stepdaughter, K.R., and because the condition was narrowly tailored to serve important State interests, it should be affirmed.

As part of Harper's sentence, the court ordered that:

For the maximum term of life, defendant shall have no contact, direct or indirect, in person, in writing, by telephone, or through third parties with: Any minors without the supervision of a responsible adult who has knowledge of this conviction. A sexual deviancy treatment provider's permission to have contact with children is required. Stacy Harper is not allowed to supervise.

CP 121. Additionally, as a condition of community custody, the court ordered, "Have no direct and/or indirect contact with minors."

CP 126.

The sentencing court had the authority to impose conditions of community custody pursuant to RCW 9.94A.703. The court had discretion to prohibit the defendant from direct or indirect contact with a specified class of individuals. RCW 9.94A.703(3)(b).

Moreover, a sentencing court is authorized to impose "crime-related prohibitions" as part of a felony sentence. RCW 9.94A.505(8).

A crime-related prohibition is an order of the court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted. RCW 9.94A.030(10).

The determination of whether a relationship exists between the crime and the sentencing condition "will always be subjective, and such issues have traditionally been left to the discretion of the sentencing judge." State v. Parramore, 53 Wn. App. 527, 530, 768 P.2d 530 (1989) (quoting David Boerner, Sentencing in Washington, § 4.5 (1985)). As such, this Court reviews imposition of a crime-related prohibition for an abuse of discretion. In re Rainey, 168 Wn.2d 367, 375, 229 P.3d 686 (2010). A decision that

is manifestly unreasonable or based on untenable grounds or exercised for untenable reasons is an abuse of discretion. State v. Riley, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993); State v. Ancira, 107 Wn. App. 650, 653, 27 P.3d 1246 (2001).

Although parents have a fundamental constitutional right to raise their children without the State's interference, the court may impose conditions that are reasonably necessary to accomplish the essential needs of the State and public order, so long as they are sensitively imposed. State v. Warren, 165 Wn.2d 17, 32, 195 P.3d 940 (2008); Rainey, 168 Wn.2d at 377. "Sentencing courts can restrict fundamental parenting rights by conditioning a criminal sentence if the condition is reasonably necessary to further the State's compelling interest in preventing harm and protecting children." Corbett, 158 Wn. App. at 598 (citations omitted).

In both Corbett and State v. Berg, 147 Wn. App. 923, 198 P.3d 529 (2008), the defendants were convicted of sexual crimes against children whom they lived with and parented, though not their biological children. Corbett, 158 Wn. App. at 599; Berg, 147 Wn. App. at 942-43. Both defendants challenged conditions of sentence that prohibited them from having contact with all minors,

including their biological children. Corbett, 158 Wn. App. at 597; Berg, 147 Wn. App. at 941-43.

Noting that the defendants had lived with and acted as parents to the victims, both courts concluded that the defendants had abused their parenting roles by sexually assaulting minors entrusted to their care. Corbett, 158 Wn. App. at 599; Berg, 147 Wn. App. at 942-43. The appellate courts upheld both no-contact provisions, finding that the sentencing conditions were reasonably necessary to protect the defendants' biological children, a compelling State interest. See Corbett, 158 Wn. App. at 599 ("The no-contact order is reasonably necessary to protect Corbett's children because of his history of using the trust established in a parental role to satisfy his own prurient desire to sexually abuse minor children."); Berg, 147 Wn. App. at 943-44 (the no-contact order "addresses the potential for the same kind of abuse at issue here, which Berg was able to achieve by exploiting a child's trust in him as a parental figure.").

Here, Harper lived with K.R., acted as her parent, and sexually abused her in the family home. 2RP 27-29; 3RP 33, 35, 37, 39. He did so while his biological son was in the house. Ex. 22 at 16; 3RP 35. The record before the trial court included

convicted of involved a method of sexual intercourse that is not gender specific (oral and anal intercourse). Because the record supports that the sentencing condition is reasonably necessary to meet the compelling State interest to protect all of Harper's children, it should be affirmed.

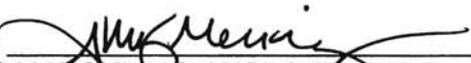
D. CONCLUSION

As outlined above, this Court should find that the evidence was sufficient for a rational jury to find Harper guilty of four counts of first degree child rape. Additionally, Harper has failed to establish that he received ineffective assistance of counsel. Finally, the sentencing court's imposition of a no-contact order was necessary to meet the compelling State interest of protecting Harper's children from harm. Harper's convictions and sentence should be affirmed.

DATED this 9 day of November, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
AMY MECKLING, WSBA #28274
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Steven J. Krupa, the attorney for the appellant, at Law Offices of Krupa & Clark, 705 S. 9th Street, Suite 202, Tacoma, WA 98405, containing a copy of the Brief of Respondent in STATE V. JEFFREY MATTHEW HARPER, Cause No. 68006-4-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington

11-09-12
Date