

NO. 49332-2-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOSEPH LEROY FUGLE, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 14-1-04016-6

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether, in the light most favorable to the State, defendant's convictions for first degree child molestation, first degree rape of a child, and second degree rape of a child are supported by sufficient evidence that proved defendant repeatedly fondled, penetrated, and engaged in oral sex with his minor stepson M.G. (Appellant's Assignment of Error No. 3)
2. Did the trial court properly exercise its discretion by limiting cross-examination on a collateral issue that was speculative and hearsay? (Appellant's Assignment of Error No. 2)
3. Did the trial court properly exercise its discretion by admitting expert testimony on delayed disclosure where the evidence was helpful to the jury in assessing M.G.'s credibility? (Appellant's Assignment of Error No. 1)
4. Did the trial court properly exercise its discretion in finding counts II and III did not constitute the same criminal conduct where the evidence established multiple acts of rape over a period of years? (Appellant's Assignment of Error No. 4)

B. STATEMENT OF THE CASE.

1. Procedure

On October 8, 2014, the Pierce County Prosecutor's Office charged JOSEPH LEROY FUGLE (hereinafter "defendant") with one count of child molestation in the first degree, two counts of rape of a child in the first degree, and one count of rape of a child in the second degree. CP 1-3¹. All four counts were charged as domestic violence incidents and included abuse of trust and ongoing pattern of sexual abuse aggravating circumstances.² CP 1-3.

On May 31, 2016, the case proceeded to trial before the Honorable Kathryn Nelson. RP³ 1-3. The jury found defendant guilty on all counts and answered "yes" to every special verdict form. RP 983-86; CP 183-195. The court sentenced defendant to an indeterminate sentence of 240 months to life confinement with lifetime community custody. RP 1020-21; CP 259-274. The court declined to impose an exceptional sentence based on the aggravating factors found by the jury. RP 1020; CP 259-274. The court found that Counts II and III (first degree rape of a child) did not

¹ An amended information and second amended information were later filed which added defendant's date of birth and amended some of the incident dates. CP 6-8; CP 56-58.

² See RCW 9.94A.535(3)(g) and (n).

³ The verbatim report of proceedings ("RP") is contained in multiple consecutively paginated volumes.

constitute the same criminal conduct. RP 1020; CP 259-274. Defendant filed a timely notice of appeal. CP 275-293.

2. Facts

M.G. was born on July 14, 1995. RP 85, 216. Defendant was born on June 25, 1958. RP 218. M.G.'s mother, Jana, married defendant in June of 2002. RP 89, 218. Defendant became M.G.'s stepfather. RP 89. Immediately after she and defendant were married, Jana moved into defendant's residence in Tacoma, Washington with her three children: A.G., M.G., and C.F. RP 87-89, 215-19. After moving into the residence, A.G. and M.G. initially shared a bedroom for approximately 6-8 months. RP 90-91, 221. Defendant starting coming into M.G.'s bedroom when A.G. was away. RP 92-93. M.G. was seven years old. RP 93.

The first time defendant molested M.G., he came into M.G.'s room when it was dark outside and M.G. had been asleep in bed. RP 93-94. Defendant entered the room, came up to M.G. and whispered that they were going to have some "fun." RP 94. Defendant told M.G. that it needed to be kept between the two of them, and he threatened to harm M.G. and his mother if M.G. told. RP 94. Defendant proceeded to touch M.G.'s genitals over his underwear, and then he pulled down M.G.'s underwear and fondled his genitals. RP 94-95. Defendant touched himself over his clothing. RP 95. Defendant threatened M.G. again and

then left. RP 95. M.G. did not disclose what happened, because he was afraid that defendant would carry out his threats. RP 96, 98. Defendant came into this bedroom a second time while A.G. was away and fondled M.G.'s genitals after pulling down his underwear. RP 98-99.

M.G. thereafter moved into the master bedroom by himself (the "second" bedroom). RP 99, 224-25. M.G. stayed in the second bedroom approximately six months to a year. RP 103, 224-25. He was eight years old during this time. RP 103. Defendant continued to come into M.G.'s room and fondle M.G.'s genitals. RP 100-05. Defendant began to insert his finger into M.G.'s rectum. RP 102. This happened approximately 10-20 times in the second bedroom. RP 103. Defendant also started taking off his own pants and masturbating. RP 101-03. M.G. estimated that defendant came into the second bedroom and touched M.G. "[m]aybe somewhere between 30 and 50, 60 [times], something like that. Maybe more." RP 100.

M.G. never called out for help, because he was frightened. RP 104. Defendant threatened to hurt M.G., A.G. and C.F., threatened to kill M.G.'s mother, and threatened to mutilate M.G.'s genitals. RP 104-05. Defendant threatened M.G. every time he came into M.G.'s room. RP 105. Also during this time, defendant would physically restrain M.G. if

M.G. started to resist. RP 114. M.G. eventually became so scared that he stopped resisting. RP 114.

M.G. next moved into the “third” bedroom by himself. RP 105-06, 225. Something happened with defendant in this bedroom a few hundred times. RP 107. Defendant came into M.G.’s room about once a week. RP 107. Defendant’s behavior was “very ritualistic, so pretty much every time it happened, everything that had been done was always repeated and then it was added on to.” RP 108. Defendant would lick M.G.’s genitals, and then he would force M.G. to lick his genitals and give defendant oral sex. RP 108, 110-11. M.G. was about nine years old when this first happened, and it happened on multiple occasions. RP 110. Defendant had M.G. perform oral sex on him until defendant ejaculated. RP 112-13. Defendant also continued to insert his finger into M.G.’s rectum. RP 112.

Once M.G. turned twelve years old, defendant began anally penetrating M.G. with his penis. RP 115-17. M.G. estimated that defendant had penile/anal sex with him approximately 50 times. RP 115. The first time it happened, defendant hit M.G. when M.G. tried to cry out, and he threatened M.G. RP 116. Defendant ejaculated inside of M.G. and forced some of the residual sperm into M.G.’s mouth. RP 116. After that, defendant “would do always the oral sex first and the anal penetration was

always last.” RP 117. Defendant stopped coming into M.G.’s room when M.G. was “just barely 14” years old. RP 117.

There were several instances where defendant molested M.G. outside of their home. RP 118. Defendant molested M.G. in the bathroom of a coffee stand near their house and in the car at a Christmas tree farm. RP 118-21. There was also an incident where defendant performed oral sex on M.G. when M.G.’s four-year-old cousin J⁴ was present in the car. RP 118-26. M.G. and defendant have never been married or in a state registered domestic partnership. RP 162, 277.

During the approximately seven years of sexual abuse, M.G. never told anyone what happened, because he “was terrified, and...kind of locked it away.”⁵ RP 128. M.G. eventually disclosed the abuse in early 2014. RP 128-32. When M.G. was 18 or 19 years old, he “started getting the memories [of the sexual abuse] in the middle of the day, flashbacks,” where he “would just get overwhelmed with these memories.” RP 128-29. He started getting the memories at night and had trouble sleeping. RP 129-30. At this point, defendant was no longer living in the home. RP

⁴ M.G.’s minor cousin, whose last name does not appear in the record, will be referred to by the first letter of his first name - J.

⁵ M.G. later testified that the memories of the sexual abuse were repressed, because “I was threatened and I was frightened, and to continue living day in and day out, I had to be able to do something to help me cope with all of that.” RP 182-83.

131. M.G. decided to tell his grandmother⁶ and then his mother about the abuse. RP 130-34, 234, 266-67, 317. M.G. eventually reported the abuse to police. RP 159-61, 342, 346-47, 602-05.

Before M.G. had his flashbacks of the sexual abuse, he suffered from a number of physical issues and ailments, including chronic pain, fatigue and anxiety, and saw multiple specialists. RP 135-36, 230, 495-503, 629-34. M.G. was sick for over a year before he started getting back his memories of the abuse. RP 136. In March or April of 2014, after getting his memories and disclosing the abuse to his grandmother and mother, M.G. was hospitalized after having a flashback of the abuse and then seizing uncontrollably. RP 139-41. M.G. was diagnosed with anxiety disorder and likely PTSD.⁷ He also complained of memory loss. RP 456.

After his hospitalization, M.G. suffered from dissociative amnesia,⁸ where he could only remember defendant and the sexual abuse. RP 139-44, 150, 240, 244, 452. M.G. would get pseudo-seizures anytime

⁶ M.G. testified that he had regained most if not all of his memories of the abuse by this time. RP 133.

⁷ PTSD stands for post-traumatic stress disorder. RP 435, 541. Trauma can lead to PTSD, and sexual abuse is trauma. RP 433-34, 463, 704.

⁸ Dr. Joy Jones and Dr. Susan Poole testified that amnesia/dissociation can be a symptom of PTSD. RP 436, 456, 544-45. *See also* RP 677-78. Dissociative amnesia is the inability to recollect parts of one's memory and can be general or specific (e.g., a person can forget certain autobiographical memories). RP 546-47. For a further description of dissociative amnesia, *see* RP 544-48.

he became overwhelmed with the trauma memories. RP 156-58, 242. M.G. started seeing a counselor, Dr. Susan Poole, to help him cope with the sexual abuse memories. RP 151, 153-54. Dr. Poole diagnosed M.G. with PTSD and dissociative amnesia⁹ after he provided his history, described his physical symptoms, and also provided information regarding the sexual abuse.¹⁰ RP 551-54. In addition to Dr. Poole, M.G. saw other counselors and physicians for his chronic pain and fatigue, anxiety and trauma therapy. *See* RP 136-37, 151-52, 154-56, 505-10, 637-40, 661-62, 706-26. M.G. disclosed the sexual abuse to his providers. RP 138, 551-53, 559, 637-39, 663-66, 717-18. Dr. David Tauben, who specializes in pain medicine, diagnosed M.G. with “[p]ost traumatic stress disorder from prolonged interval sexual abuse” and connected M.G.’s widespread muscle pain and fatigue to his sexual abuse exposure.¹¹ RP 697, 699, 725. M.G.’s reported symptoms were consistent with childhood trauma. RP 566, 587, 722-27. M.G. testified that none of his doctors tried to help him

⁹ Dr. Poole testified that M.G. suffered dissociative amnesia twice: (1) as a child where he suppressed the memories of the abuse to go about his daily life, and (2) after his hospitalization. RP 563. The memories were not “completely gone” or forgotten, but there was a problem with retrieval. RP 562.

¹⁰ Contrary to defendant’s assertion, M.G. “remembered having the trauma memories” when he saw Dr. Poole; he did not remember if he had told others about the memories. RP 571. *See* Brief of Appellant at 6.

¹¹ Dr. Tauben testified that individuals with PTSD can manifest actual physical symptoms such as chronic pain. RP 704-05.

remember the abuse or recover more memories of the abuse;¹² rather, everything came from M.G. himself. RP 139, 152, 154-56, 181, 189, 207.

Defendant called Dr. Daniel Reisberg as a witness. CP 299; RP 768. Dr. Reisberg testified that many features of M.G.'s case were "puzzling" to him in light of how memory works. RP 819. Dr. Reisberg does not treat patients, and he testified that he never met M.G. and could not offer an opinion as to whether M.G.'s memories were true or false. RP 823-24. Defendant elected not to testify at trial. CP 299; RP 869-70. M.G. identified defendant in open court. RP 88-89.

C. ARGUMENT.

1. DEFENDANT'S CONVICTIONS FOR FIRST DEGREE CHILD MOLESTATION, FIRST DEGREE RAPE OF A CHILD, AND SECOND DEGREE RAPE OF A CHILD ARE SUPPORTED BY SUFFICIENT EVIDENCE THAT PROVED DEFENDANT REPEATEDLY FONDLED, PENETRATED, AND ENGAGED IN ORAL SEX WITH HIS MINOR STEPSON M.G.

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51

¹² M.G.'s mother, grandmother, and providers testified that they did not try to help M.G. develop his memories or remember more. RP 267, 322-24, 560, 642-43, 671-72, 729-30.

Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Thus, sufficient evidence supports a conviction when, viewing the evidence in the light most favorable to the State, a rational fact finder could find the essential elements of the crime beyond a reasonable doubt. *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. *State v. Barrington*, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), *review denied*, 111 Wn.2d 1033 (1988) (*citing State v. Holbrook*, 66 Wn.2d 278, 401 P.2d 971 (1965)); *State v. Turner*, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are considered equally reliable. *Id.*; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*,

115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing *State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, review denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said, “[G]reat deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.” *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Here, defendant challenges the sufficiency of the evidence, claiming the elements that the State was required to prove were based on “rank speculation and guess work.” See Brief of Appellant at 12, 14. Defendant does not specify which elements and/or counts suffer from insufficient evidence. Thus, the State will address each count and element. As discussed below, after viewing the evidence in the light most favorable to the State, defendant’s convictions for first degree child molestation, first degree rape of a child, and second degree rape of a child

are supported by sufficient evidence that proved defendant repeatedly fondled, penetrated, and engaged in oral sex with his minor stepson M.G.

- a. The evidence was sufficient for a rational trier of fact to find defendant guilty of first degree child molestation.

To convict defendant of child molestation in the first degree, as charged in Count I, the State proved:

- (1) That on or about the period between July 14, 2002 and July 13, 2003,¹³ the defendant had sexual contact with M.G.;
- (2) That M.G. was less than twelve years old at the time of the sexual contact and was not married to the defendant;
- (3) That M.G. was at least thirty-six months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

CP 143-182 (Instruction No. 8). *See also* RCW 9A.44.083 and Washington Pattern Jury Instruction – Criminal (WPIC 44.21). “Sexual contact” means “any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desires of either party.”

CP 143-182 (Instruction No. 9). *See* RCW 9A.44.010(2) and WPIC 45.07. Sexual gratification may be inferred from the nature and circumstances of the act itself. *State v. Harstad*, 153 Wn. App. 10, 20-23,

¹³ The relevant time period for each count corresponds with M.G.’s age. Count I covers the time period that M.G. was seven years old.

218 P.3d 624 (2009); *State v. T.E.H.*, 91 Wn. App. 908, 916-17, 960 P.2d 441 (1998).

Taken in the light most favorable to the State, sufficient evidence supports defendant's conviction for first degree child molestation. M.G. was born on July 14, 1995. RP 85, 216. Defendant was born on June 25, 1958.¹⁴ RP 218. On June 29, 2002, M.G.'s mother Jana married defendant. RP 89, 218. Jana and her children moved immediately into defendant's residence in Tacoma, Washington. RP 86-87, 89, 216-19. M.G. was seven years old. 86-87, 219. M.G. lived in that home for about 12 years. RP 86.

M.G. initially shared a bedroom with his older sister for approximately 6-8 months. RP 87, 90-93, 221. Approximately two times during that period, while M.G.'s older sister was away, defendant came into M.G.'s room and molested M.G. RP 93. M.G. was seven years old. RP 93.

The first time he molested M.G., defendant came into M.G.'s room when it was dark out and whispered to M.G. that they were going to have some "fun." RP 93-94. Defendant threatened to harm Jana and M.G. if M.G. told what happened. RP 94-95. Defendant lifted up M.G.'s

¹⁴ At the time of trial, M.G. was 20 years old, and defendant was 57 (almost 58) years old. RP 85, 89, 218.

nightshirt and touched M.G.'s genitals over his underwear. RP 94. Defendant then pulled down M.G.'s underwear and fondled M.G.'s genitals.¹⁵ RP 94-95. Defendant touched himself over his clothing. *Id.*

The second time¹⁶ he molested M.G. in that bedroom, defendant came into the room and said something about having “fun” and keeping it a secret. RP 98. Defendant again threatened M.G. RP 98. Defendant again pulled down M.G.'s underwear and fondled M.G. RP 98. Defendant was “kind of touching himself a little bit over his clothes.” RP 98-99. Defendant and M.G. have never been married or in a state-registered domestic partnership. RP 162, 277.

Thus, the evidence was sufficient for a rational trier of fact to find that, in the State of Washington, defendant had sexual contact with M.G. when M.G. was seven years old. Viewing the evidence in the light most favorable to the State, a rational fact finder could find the essential elements of first degree child molestation beyond a reasonable doubt. *Cannon*, 120 Wn. App. at 90.

¹⁵ M.G. later identified his genitalia as his penis and testicles. RP 111.

¹⁶ The court gave a *Petrich* instruction for all charges. CP 143-182 (Instruction 17). See also WPIC 4.25 and *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

- b. The evidence was sufficient for a rational trier of fact to find defendant guilty of first degree rape of a child.

To convict defendant of rape of a child in the first degree, as charged in Counts II and III, the State proved:

- (1) That on or about the period between July 14, 2003 and July 13, 2007, the defendant had sexual intercourse with M.G.[]¹⁷;
- (2) That M.G. was less than twelve years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That M.G. was at least twenty-four months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

CP 143-182 (Instruction Nos. 12 and 13). *See also* RCW 9A.44.073 and WPIC 44.11. “Sexual intercourse” includes “any penetration of the...anus, however slight, by an object, including a body part, when committed on one person by another” or “any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.” CP 143-182 (Instruction No. 16). *See* RCW 9A.44.010(1) and WPIC 45.01.

¹⁷ The “to-convict” jury instructions for Counts II and III specified that the sexual intercourse in Count II was “separate and distinct” from the acts alleged in Count III (and visa versa). CP 143-182 (Instruction Nos. 12 and 13).

Taken in the light most favorable to the State, sufficient evidence supports defendant's convictions for first degree rape of a child. M.G. testified that he moved out of the bedroom he shared with his older sister and into the master bedroom by himself. RP 99. He was in the master bedroom for about a year. RP 91. M.G. was about eight years old during this time. RP 103. Defendant came into this second bedroom to do "similar or different things" with M.G. "between 30 and 50, [or] 60 [times]...Maybe more." RP 100. Defendant started to put his finger in M.G.'s rectum when M.G. was in the second/master bedroom. RP 102-03. Defendant penetrated M.G.'s rectum with defendant's finger about 10-20 times. RP 103. Defendant would also take his own pants off and masturbate. RP 103.

M.G. then moved into the third bedroom (described as the red and blue room). RP 105. M.G. had the room to himself. RP 105. Defendant came into this room about once a week, and "something happened" with defendant in this bedroom a few hundred times. RP 107. M.G. described defendant as "ritualistic" – defendant would repeat everything he had done and then add onto it. RP 108. In this third bedroom, defendant started licking M.G.'s genitalia and then would force M.G. to lick defendant's genitalia and give defendant oral sex. RP 108-110. M.G. was nine or ten years old when this first happened. RP 110-11. Before M.G. turned

twelve, every time that defendant came into his room, defendant would lick M.G.'s genitalia. RP 110. Defendant continued to put his finger in M.G.'s rectum. RP 112. Defendant had M.G. perform oral sex on him until defendant ejaculated. RP 112. Defendant forced M.G. to give him oral sex more than once. RP 113. M.G. was under twelve years old (approximately ten) when defendant forced him to swallow defendant's ejaculate. RP 113. Again, defendant and M.G. have never been married or in a state-registered domestic partnership. RP 162, 277.

Thus, the evidence was sufficient for a rational trier of fact to find that, in the State of Washington, on at least two separate occasions, defendant had sexual intercourse with M.G. when M.G. was at least eight but less than twelve years old. Viewing the evidence in the light most favorable to the State, a rational fact finder could find the essential elements of first degree rape of a child beyond a reasonable doubt.

Cannon, 120 Wn. App. at 90.

- c. The evidence was sufficient for a rational trier of fact to find defendant guilty of second degree rape of a child.

To convict defendant of rape of a child in the second degree, as charged in Count IV, the State proved:

- (1) That on or about the period between the 14th day of July, 2007 and the 13th day of July, 2009, the defendant had sexual intercourse with M.G.;
- (2) That M.G. was at least twelve years old but was less than fourteen years old at the time of the sexual intercourse and was not married to the defendant;
- (3) That M.G. was at least thirty-six months younger than the defendant; and
- (4) That this act occurred in the State of Washington.

CP 143-182 (Instruction No. 15). *See also* RCW 9A.44.076 and WPIC 44.13.

Taken in the light most favorable to the State, sufficient evidence supports defendant's conviction for second degree rape of a child. Once M.G. turned twelve years old,¹⁸ defendant started anally penetrating M.G. with defendant's penis. RP 114-15. Before that, most of defendant's "visits" involved fondling, licking, and giving defendant oral sex. RP 115. M.G. testified that defendant penetrated him with his penis approximately 50 times. RP 115. M.G. was still in the third bedroom when defendant penetrated him with his penis. RP 114-15. The first time it happened, defendant came into M.G.'s room and said they were going to try something "new" and have some more "fun." RP 115. M.G. performed oral sex on defendant, but defendant did not ejaculate. RP 116.

¹⁸ M.G. turned twelve years old on July 14, 2007. RP 85.

Defendant licked M.G.'s anus area and then penetrated M.G.'s anus with defendant's penis. RP 116. Defendant ejaculated inside of M.G. and forced some of the residual sperm into M.G.'s mouth. RP 116. After that, defendant would "always [do] the oral sex first and the anal penetration was always last." RP 117. Defendant stopped coming to M.G.'s room when M.G. was "just barely" 14 years old. RP 117. Again, defendant and M.G. have never been married or in a state-registered domestic partnership. RP 162, 277.

Thus, the evidence was sufficient for a rational trier of fact to find that, in the State of Washington, defendant had sexual intercourse with M.G. when M.G. was at least twelve but less than fourteen years old. Viewing the evidence in the light most favorable to the State, a rational fact finder could find the essential elements of second degree rape of a child beyond a reasonable doubt. *Cannon*, 120 Wn. App. at 90.

- d. The evidence was sufficient for a rational trier of fact to find the special verdict and aggravating circumstances.

The jury found that (1) defendant used his position of trust, confidence or fiduciary responsibility to facilitate the commission of the crime; (2) the crime was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time; and (3) defendant and M.G. were

members of the same family or household. CP 184-85, 187-88, 190-91, 193-95; RP 983-86. *See* RCW 9.94A.535(3)(g) and (n) and RCW 10.99.020. Sufficient evidence supports these findings.

Defendant was M.G.'s stepfather and they lived in the same household for years. RP 86-89, 215-220, 231. The sexual abuse began when M.G. was seven and continued until he was about fourteen years old. RP 93-95, 117, 123-27, 128. The sexual abuse occurred in M.G.'s bedrooms as well as during outings with defendant. RP 92-126. M.G.'s mother was ill throughout her marriage to defendant and was often in bed. RP 224, 294. M.G. testified that defendant abused him in the second bedroom "between 30 and 50, [or] 60 [times]... [m]aybe more;" defendant came into the third bedroom about once a week and abused him "a few hundred" times; and defendant anally raped M.G. with his penis "about 50 times." RP 100, 107, 115. Thus, the evidence was sufficient for a rational trier of fact to find that: (1) defendant used his position of trust, confidence or fiduciary responsibility to facilitate the commission of the crime; (2) the crime was part of an ongoing pattern of sexual abuse of the same victim under the age of 18 years manifested by multiple incidents over a prolonged period of time; and (3) defendant and M.G. were members of the same family or household.

- e. Defendant fails to identify or provide meaningfully analysis of the alleged inconsistencies, guess work and speculation that render the State's evidence insufficient, and he asks this Court to find his expert witness credible when credibility determinations are not reviewable on appeal.

Defendant cites to *State v. Alexander*, 64 Wn. App. 147, 822 P.2d 1250 (1990) and *State v. Vasquez*, 178 Wn.2d 1, 309 P.3d 318 (2013), and argues that the State failed to present sufficient evidence, because defendant's conviction is based on "nothing more than rank speculation and guess work" and M.G.'s "so-called memories are so subject to inconsistencies much like in *Alexander*." Brief of Appellant at 14. Defendant's argument fails for the reasons set forth below.

First, defendant fails to identify or provide examples of the alleged "rank speculation" and inconsistencies in M.G.'s memories. See RAP 10.3(a)(6) (appellate brief should contain argument supporting issues presented for review, citations to legal authority, and references to relevant parts of the record). Arguments unsupported by applicable authority and meaningful analysis should not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); *In re Disciplinary Proceeding against Whitney*, 155 Wn.2d 451, 467, 120 P.3d 550 (2005)

(citing *Matter of Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (declining to scour the record to construct arguments for a litigant)); RAP 10.3(a). See also *State v. Stubbs*, 144 Wn. App. 644, 652, 184 P.3d 660 (2008), reversed by 170 Wn.2d 117 (2010) (“[p]assing treatment of an issue or lack of reasoned argument is insufficient to allow for our meaningful review”). This Court should therefore decline to review defendant’s assignment of error as his argument is unsupported by meaningful analysis and he fails to reference relevant parts of the record.

Second, *Alexander* and *Vasquez* are distinguishable from the present matter. In *Alexander*, the court overturned multiple child rape convictions, in part because of extreme inconsistencies in the child victim’s testimony at trial. *Alexander*, 64 Wn. App. at 157-58. However, the court also held that the victim’s testimony was impermissibly bolstered, the prosecutor’s questioning elicited impermissible evidence that the defendant was the abuser, and the prosecutor’s attempts to repeatedly instill inadmissible evidence in the juror’s minds amounted to misconduct. *Id.* at 153-56. The court therefore reasoned that “[w]e cannot conclude that a rational jury would have returned the same verdict had...[the] bolster[ed] testimony and the prosecutor’s improper remarks been properly excluded.” *Id.* at 158. *Alexander* does not stand for the proposition that inconsistencies or contradictions in a victim’s testimony

equates to insufficient evidence to convict. Rather, the court held that under the unique facts of that case, the “extreme” inconsistencies in the victim’s testimony coupled with the other trial errors identified above, the evidence was too “confused” to allow the jury to find the defendant guilty. *Id.* at 158. Here, M.G. was clear and consistent in his testimony about defendant’s repeated acts of sexual abuse. *See* RP 92-127 (M.G.’s description of the abuse), 564-65 (M.G.’s timeline consistent). Defendant has failed to identify any alleged inconsistencies, extreme or otherwise, in M.G.’s testimony.¹⁹ Moreover, defendant has failed to allege or demonstrate that any supposed inconsistencies were coupled with significant trial errors, as in *Alexander*, thereby rendering the evidence “too confused” to allow the jury to find defendant guilty.

In *Vasquez*, the State had to prove that the defendant possessed forged social security and permanent resident cards with intent to injure or defraud. *Vasquez*, 178 Wn.2d at 7. The court noted that while possession plus slight corroborating evidence can be sufficient to infer such intent, intent cannot be inferred from evidence that is patently equivocal. *Id.* at 8. There was no evidence before the court that the defendant “had sought

¹⁹ Defendant’s challenge to the sufficiency of the evidence admits the truth of the State’s evidence and any reasonable inferences from it. *Barrington*, 52 Wn. App. at 484; *Turner*, 29 Wn. App. at 290. *See* RP 169-70, 181-83 (M.G. testifying regarding his ability to distinguish between memories that are true versus nightmares that are not true and testifying that he has firsthand knowledge of the abuse).

work, was working, or planned to work in the area” or that the defendant had used the forged documents to obtain employment. *Id.* at 17. The court held that Vasquez’s possession of forged identification cards, together with his statement to a security guard that the cards were his and evidence that Vasquez held a job, was insufficient to support the necessary inference of intent to injure or defraud. *Vasquez*, 178 Wn.2d at 14-18. Thus, “[t]he evidence that the State presented to demonstrate intent to injure or defraud was not sufficient because it either was patently equivocal or based on rank speculation.” *Id.* at 17-18. *Vasquez* is distinguishable factually from this case. Moreover, M.G. was unequivocal in his testimony that defendant molested and raped him and gave details of the abuse.²⁰ *See* RP 92-127.

Defendant argues that his conviction is based on “rank speculation and guess work,” and he also argues “[t]he expert testimony presented by the defense conclusively established that the alleged memories presented in this case...did not conform to known processes.” Brief of Appellant at

²⁰ For example, the following exchange occurred during the State’s direct examination of M.G.:

[State]: Can you remember each and every instance separately and distinctly?

[M.G.]: Yes. Everything was very ritualistic, so it does get a little hard to sit and fully go, but I can remember them as individual events, yes.

RP 103-04. *See also* RP 94-95 (defendant pulled down M.G.’s underwear and fondled M.G.’s genitals), 102-03 (defendant put his finger in M.G.’s rectum), 108 (defendant forced M.G. to lick defendant’s genitalia and give oral sex), 115-16 (defendant licked M.G. anus area and penetrated M.G.’s anus with defendant’s penis).

14. However, these arguments are about credibility and the weight of the evidence. Appellate courts defer to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

The jury was instructed, “You are the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness.” CP 143-182 (Instruction No. 1).

See WPIC 1.02. The jury was also instructed,

A witness who has special training, education, or experience may be allowed to express an opinion in addition to giving testimony as to facts.

You are not, however, required to accept his or her opinion. To determine the credibility and weight to be given to this type of evidence, you may consider, among other things, the education, training, experience, knowledge, and ability of the witness. You may also consider the reasons given for the opinion and the sources of his or her information, as well as considering the factors already given to you for evaluating the testimony of any other witness.

CP 143-182 (Instruction No. 5). See WPIC 6.51.

The jury had the opportunity to hear the testimony and evaluate the demeanor of M.G. as well as the State’s medical, mental health and other expert witnesses (e.g., Keri Arnold, Dr. Joy Jones, Dr. John Daniel, Dr. Susan Poole, Dr. Justin Steffener, Wendy Rawlings, and Dr. David Tauben). CP 299. The jury had the opportunity to weigh their testimony against defense witness Dr. Daniel Reisberg’s testimony and determine the

credibility and weight to be given to the evidence.²¹ It was the jury's role to weigh the credibility of those who diagnosed and treated M.G.²² against Dr. Reisberg, who never met M.G., does not treat patients, and could not offer an opinion as to whether M.G.'s recollections or memories were true or not. RP 823-24. Again, "[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal." *Camarillo*, 115 Wn.2d at 71. This Court should affirm defendant's convictions as there was sufficient evidence to support each charge.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY LIMITING CROSS-EXAMINATION ON A COLLATERAL ISSUE THAT WAS SPECULATIVE AND HEARSAY.

The right to confront and cross-examine witnesses is guaranteed by both the federal and state constitutions. U.S. Const. amend 6; Const. art I, sect. 22. However, that right is not absolute. *State v. Darden*, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002) (citing *Chambers v. Mississippi*, 410 U.S.

²¹ E.g., Dr. Reisberg testified that repression, suppression, and dissociative amnesia are terms used "to explain a pattern that my clinical colleagues believes exist." RP 789. He further testified that his clinical colleagues (the mental health professionals) are "really good at what they do...in diagnosis and therapy, but they're not scientists" and psychologists disagree as to whether the theory of repression is real. RP 793-94, 798. Dr. Reisberg also testified that a person can lose a memory, there are documented cases of repressed memory, the diagnosis of dissociative amnesia exists, and there are still questions as to how the human brain works. RP 798-99, 824, 833-34.

²² See, e.g., testimony of Dr. Joy Jones (RP 435-38, 443, 456, 460-63, 474); Dr. John Daniel (RP 495, 497, 505-06, 509-10); Dr. Susan Poole (RP 536, 549-56, 563, 566, 587); Dr. Justin Steffener (RP 629-34, 636-40); Wendy Rawlings (RP 661-66, 677-78); and Dr. David Tauben (RP 704-08, 710-11, 716-19, 722-26).

284, 295, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973)). As articulated by
Division III of the Court of Appeals,

Is it well established that a trial court that limits cross-examination through evidentiary rulings as the examination unfolds does not violate a defendant's Sixth Amendment rights unless its restrictions on examination "effectively...emasculate the right of cross-examination itself." Generally speaking, the confrontation clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.

State v. Turnipseed, 162 Wn. App. 60, 69, 255 P.3d 843 (2011)
(emphasis in original)(internal citations omitted).

"The scope of such cross examination is within the discretion of the trial court." *State v. Russell*, 125 Wn.2d 24, 92, 882 P.2d 747 (1994).
See Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) (trial courts "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things...prejudice...or only marginal[] relevan[ce]."). "[A] court's limitation of the scope of cross-examination will not be disturbed unless it is the result of manifest abuse of discretion." *Darden*, 145 Wn.2d at 619.
A trial court abuses its discretion when its decision is manifestly unreasonable or is based upon untenable grounds or reasons. *State v. Garcia*, 179 Wn.2d 828, 844, 318 P.3d 266 (2014).

A trial court is within its sound discretion to deny cross-examination when the evidence sought is vague, argumentative, or speculative. *Darden*, 145 Wn.2d at 620-21. The right to cross-examine is also limited by general considerations of relevance under ER 401 and balancing under ER 403. *Id.* at 621. Facts are relevant if they have any tendency to make the existence of any consequential fact more or less probable. ER 401. Neither party may impeach a witness on collateral issues,²³ that is, facts that are not directly relevant to the trial issue. *State v. Aguirre*, 168 Wn.2d 350, 362, 229 P.2d 669 (2010). Moreover, relevant testimony may be excluded from trial if it is hearsay. ER 801(c), ER 802. The proponent of the evidence bears the burden of establishing relevance and materiality. *State v. Hilton*, 164 Wn. App. 81, 99, 261 P.3d 683 (2011).

Here, defendant claims that the trial court violated his constitutional right to confront witnesses when it limited the scope of cross-examination of M.G. during trial. Brief of Appellant at 11. He argues that “defense attempted to cross examine the accuser and the

²³ “Evidence offered to impeach is relevant only if (1) it tends to cast doubt on the credibility of the person being impeached, and (2) the credibility of the person being impeached is a fact of consequence to the action. *State v. Allen S.*, 98 Wn. App. 452, 459-60, 989 P.2d 1222 (1999). If the person is one who can be impeached, the offered evidence “must still be (1) relevant to impeach, and (2) either nonhearsay or within a hearsay exemption or exception.” *Id.* at 466.

officer regarding the other names that M.G. indicated were also victims. The trial court allowed questions to be asked regarding the list, but, it was restricted to that question.” Brief of Appellant at 12. Because the potential evidence that defendant sought was speculative, hearsay, and involved a collateral issue, the trial court properly exercised its discretion in limiting the scope of cross-examination.

a. Cross-Examination of M.G.

During cross-examination of M.G., defense counsel asked if he provided the interviewing detective with a list of names that he (M.G.) thought were also abused. RP 193. The State objected, and the trial court heard argument outside of the presence of the jury. RP 193-99. Defense counsel offered to the court:

[Defense Counsel]: Here’s my concern and the reason I ask it. On direct, he was asked why [he] came forward, and he said he wanted to prevent other people from getting abused, and I believe, based on that stated argument or comment, he gave a list of names and numbers to the police detective... **I’m not sure the names on that list**, but that was in order to do that, and nothing could be verified. **So – and I certainly wanted to ask him, you know, what – you gave him a list of names. And of course, he’s not going to know if it was verified or not, or if he does know it, he wouldn’t know it by direct first hand. And then I want to ask, is that based on the memories that you had since, you know, March or February of 2014.**

...

And one of them is the cousin...consistent with how he testified this morning, he testified that the cousin...[J]...was there in this vehicle...[and] was like four

or so, very young at the time...**I don't know if [the detective] talked to [J] but talked to the mother of [J], which I guess would be the aunt, and she was unable to verify that particular incident.**

...

He identified people... I don't know why these people came up, and I quite frankly forgot to ask him that question when we did the interview. So I'm just going straight from the transcript that he gave to the police... The detective has in his notes that he received a list with names and numbers from [M.G.] and his mother, I think is how it's characterized.

RP 195-96 (emphasis added). The trial court indicated that the information would not be relevant unless it potentially impeached M.G. regarding his lost memories. RP 197. Defense counsel then offered:

[Defense Counsel]: If he's given a list of people, assuming that list evolved out of these memories that still exists and those are the names he knows because he can visualize them, I'm not saying that they told him this. But I think I – if they're part of this visualization and they're not true or have been – they cannot verify them, then that creates an issue for all of his memories that are the basis of this charge.

RP 197-98.

The State agreed that “it could be potential impeachment as to memory, how he's saying everything else is gone.” RP 198. However, the State argued that whether he could verify anyone else was abused would open the door to potential bad character evidence of defendant. RP 198. The trial court ruled that defense counsel could not ask M.G. about “what happened to these other people, were they verified or were they not

verified.” RP 199. Defense counsel had already conceded that M.G. would not have firsthand knowledge if the information was verified. RP 195. The trial court did rule, however, that defense counsel could ask M.G. questions “about the other people he thought might get hurt and bring out how this...list, if he remembers giving one to anyone, developed and who was responsible for it, and that will put into context some of the other things he said about his memory.” RP 199.

Defense counsel then asked M.G. the following during cross-examination:

[Defense Counsel]: Did you provide a list of people you thought *might* have been abused by Joe to the detective?

[M.G.]: Yes.

[Defense Counsel]: Did you draw up that list?

[M.G.]: Yes. I gave them some names.

[Defense Counsel]: Was that a list that developed through your memories that came back?

[M.G.]: The list that I gave them was one and then just a couple possibilities, and Jana gave them some.

...

[Defense Counsel]: Okay. Go ahead and finish.

[M.G.]: Yes, the ones that I listed to the detectives were of my own.

[**Defense Counsel**]: Okay. And did those names come up from your flashbacks or nightmares?

[**M.G.**]: Only the one: [J].²⁴

RP 200-01 (emphasis added).

Defense counsel thus asked the two questions that he wanted to ask: (1) whether M.G. gave the detective a list of names, and (2) whether that list was based on M.G.'s memories that came back. *See* RP 195.

M.G. testified that only one name was from his own memory, and that was his cousin J. Defense had already acknowledged that M.G. would not have firsthand knowledge if the information was verified. RP 195. Any potential answer that M.G. would have given regarding verification would have been inadmissible hearsay. ER 802.

Additionally, M.G. never testified that his cousin(s) were in fact sexually abused by defendant or that he witnessed defendant sexually abuse them. Rather, M.G. testified that his young cousin J was present during one instance where defendant abused M.G. in a vehicle. RP 118-26. M.G.'s cousin J was therefore someone defendant "might" have abused. *See* RP 200. J's brother was another *possibility* based on his

²⁴ On re-direct, M.G. testified that he had a memory of his cousin J, and he knew that J had a brother, "so I knew those two at least being connected. And I don't think I ever suggested anybody else to the detectives." RP 208. M.G. had previously testified that J was present during one incident where defendant performed oral sex on M.G. RP 118-26.

relation to J. RP 200, 208. M.G.'s list of names was speculative, and any evidence regarding verification of M.G.'s suggestions was collateral. Whether or not J and his brother were actually abused by defendant was not directly relevant to the trial issue.

The trial court properly exercised its discretion in limiting cross-examination of M.G. regarding the list of names he provided to law enforcement. The speculative evidence was hearsay and involved a collateral issue. There was no error. Moreover, defendant has failed to articulate what, specifically, he was unable to cross-examine M.G. regarding.

b. Cross-Examination of Detective Moss.

Defendant also argues that the trial court improperly limited cross-examination of "the officer" regarding the list of names provided by M.G. Brief of Appellant at 12. Again, defendant's argument fails. During cross-examination of Detective Jessica Johnson, defense counsel asked the following:

[Defense Counsel]: You were handed, were you not, by either [M.G.] or his mother, a list of names?

[State]: And Your Honor, I'm going to object as, one, outside the scope, and with this witness, not relevant for the purposes that it was talked about previously.

The Court: Well, I guess he can ask if she's the one that got a list.

[Defense Counsel]: Were you provided a list of names?

[Detective]: Yes.

[Defense Counsel]: And did you follow up as part of that, part of your – was it part of your responsibility to follow up and in contacting those individuals on that list?

[Detective]: No.

[Defense Counsel]: And you did not, I assume?

[Detective]: No.

RP 348-49.

Defense counsel later asked Detective Darren Moss during cross-examination if he received a list of names from another officer, and the State objected. RP 610. The State argued that asking the detective whether he followed up on the list of names (to determine whether they were abused by defendant) would improperly elicit “good character evidence” that no one else has accused the defendant of sexual abuse. RP 612. The State also argued that it involved collateral issues. RP 613. Defense counsel confirmed that he wanted to ask Detective Moss whether he followed up on the list of names and whether he was able to verify if sexual abuse occurred in order “to show that one of the things [M.G.] said is not supported by his memory.” RP 612-13. Defense had already told

the court, “I don’t know if [the detective] talked to [J] but talked to the mother of [J]...and she was unable to verify that particular incident.” RP 196. The trial court sustained the State’s objection with the exception that defense counsel could ask whether or not the detective received a list of names. RP 613, 615. Defense counsel elected not to ask the detective that question. RP 614.

The trial court properly exercised its discretion in limiting the cross-examination of Detective Moss regarding the names of two individuals who *might* have been abused by defendant. Defendant could not even tell the court if Detective Moss had interviewed J (and therefore could not identify the evidence he sought to admit). *See* RP 196. The information that defendant did provide to the court was that a *third party* – J’s mother – could not verify the incident where four-year-old J was present when defendant abused M.G. *Id.* As articulated above, the evidence defendant sought was collateral, speculative, and inadmissible hearsay. The trial court was within its sound discretion to exclude such evidence. There was no error.

However, even if this Court were to find that the trial court abused its discretion in limiting cross-examination regarding the list of possible victims, any error was harmless. Courts review confrontation clause violations under the constitutional harmless error test. *State v. Koslowski*,

166 Wn.2d 409, 431, 209 P.3d 479 (2009). A confrontation clause violation is harmless if “the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant’s guilt.” *Koslowski*, 166 Wn.2d at 431. Here, even if the trial court had admitted evidence that J’s mother was unable to verify the particular incident involving her young son, the overwhelming untainted evidence from M.G. and his doctors and therapists, which the jury found credible, necessarily leads to a finding of defendant’s guilt. Thus, even if the limitation on cross-examination of M.G.’s and Detective Moss’ testimony impaired defendant’s right of confrontation, any such impairment was harmless.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY ADMITTING EXPERT TESTIMONY ON DELAYED DISCLOSURE BECAUSE THE EVIDENCE WAS HELPFUL TO THE JURY IN ASSESSING M.G.’S CREDIBILITY.

ER 702 governs the admissibility of expert testimony and provides: “If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” Under this rule, expert testimony is admissible when (1) the witness qualifies as an expert, (2) the expert’s opinion is based on a theory

generally accepted in the scientific community, and (3) the testimony is helpful to the trier of fact. *State v. Graham*, 59 Wn. App. 418, 423, 798 P.2d 314 (1990) (citing *State v. Allery*, 101 Wn.2d 591, 596, 682 P.2d 312 (1984)). Testimony is helpful when it concerns issues outside common knowledge and is not otherwise misleading. See *State v. Groth*, 163 Wn. App. 548, 564, 261 P.3d 183 (2011); *State v. Rafay*, 168 Wn. App. 734, 784, 285 P.3d 83 (2012). Courts should interpret helpfulness broadly and in favor of admissibility. *Groth*, 163 Wn. App. at 564. The trial court enjoys broad discretion in determining whether to allow expert testimony, and appellate courts do not disturb this discretion absent manifest abuse. *Graham*, 59 Wn. App. at 425. The burden is on the appellant to prove abuse of discretion. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999).

Once the credibility of a witness is at issue, evidence tending to corroborate the testimony may be obtained from an expert witness. *State v. Petrich*, 101 Wn.2d 566, 575, 683 P.2d 173 (1984), *overruled in part on other grounds by State v. Kitchen*, 110 Wn.2d 403, 756 P.2d 105 (1988). “Cases involving crimes against children generally put in issue the credibility of the complaining witness, especially if defendant denies the acts charged and the child asserts their commission. An attack on the

credibility of these witnesses, however slight, may justify corroborating evidence.” *Petrich*, 101 Wn.2d at 575.

In cases involving sexual misconduct, expert testimony about the recognized characteristics of delayed reporting common to sexually abused children is admissible to help jurors assess the victim’s credibility. *Petrich*, 101 Wn.2d at 575-76; *Graham*, 59 Wn. App. 424-25; ER 702. Such evidence is helpful to the trier of fact because, “[t]o an average juror, it may appear...a delay in reporting [sexual abuse] by either an adult or a child...strongly indicates...the alleged event never happened....” *Graham*, 59 Wn. App. at 425 (quoting *State v. Madison*, 53 Wn. App. 754, 765, 770 P.2d 662 (1989)). For that reason, courts have recognized that expert testimony is “expressly permit[ted]” to rebut an attack on a victim’s credibility. *Graham*, 59 Wn. App. at 425.

It is thus generally permissible for a jury to hear expert testimony explaining why delayed disclosure does not necessarily mean the victim lacks credibility. *Petrich*, 101 Wn.2d at 575–76; *State v. Holland*, 77 Wn. App. 420, 427, 891 P.2d 49, *review denied*, 127 Wn.2d 1008 (1995). Moreover, it is well established that expert testimony about delayed disclosure is admissible if it is limited to an opinion that delayed reporting is not unusual. *Petrich*, 101 Wn.2d at 575-76. The admission of delayed reporting expert testimony under ER 702 should be affirmed absent a

manifest abuse of discretion. *Petrich*, 101 Wn.2d at 575; *State v. Stevens*, 58 Wn. App. 478, 497-98, 794 P.2d 38 (1990).

In this case, M.G. delayed reporting defendant's sexual abuse for years.²⁵ M.G. was sexually abused from the time he was seven to about fourteen years old, and he disclosed the abuse when he was eighteen or nineteen. RP 93-95, 117, 127-29, 131-35. M.G. testified that he did not tell anyone about the abuse when he was young, because he was too afraid. RP 98, 104-05, 114, 120-21, 128. During direct examination, M.G. explained:

[State]: You didn't tell your mother?

[M.G.]: I was too afraid.

[State]: Okay. What do you mean, you were too afraid?

[M.G.]: Well, I – he said if I had told anyone, that he would hurt me and he would hurt her, Jana. My mom.

...

[State]: Why didn't you – the times that it was happening in this room, ever, like, yell out for help for anyone?

[M.G.]: Well, I was frightened. You know, he had constantly, every time that he came in, would threaten to hurt me. You know,

²⁵ The State argued, and the evidence established, that the case involved both delayed disclosure and repressed or dissociated memory. RP 12, 355. See also RP 98, 104-05, 114, 120-21, 128-35, 139-44, 153-54, 159-60.

multiple times he had threatened to mutilate my genitalia. He had threatened to kill Jana, my mom. Once or twice, he had threatened to hurt [my sisters]. So I wasn't willing to risk that.

[State]: Did you believe his threats?

[M.G.]: Yes, I believed that he would.

RP 98, 104-05. Years later, in 2014, M.G. became overwhelmed with memories and flashbacks and finally disclosed the sexual abuse to his grandmother. RP 128-135.

Here, defendant argues that the trial court abused its discretion when it allowed expert testimony about delayed disclosure, because “the credibility of the witness was not in issue in this unique case.” *See* Brief of Appellant at 8, 10. Defendant claims that his “cross examination was not designed to address delayed disclosure, but only that he had no memory, and the memories that he did have were false memories based in fiction, not fact.” Brief of Appellant at 10. This claim, on its face, admits that M.G.’s credibility was at issue. *See also*, Appellant’s Assignment of Error No. 2 (regarding M.G.’s credibility). M.G. delayed reporting the sexual abuse for years, and defendant’s cross-examination was designed to show that M.G.’s later memories of the abuse, which prompted his disclosure, were false.

The record also demonstrates that one of defense counsel's primary strategies in this case was attempting to diminish M.G.'s credibility. During defense's cross-examination of M.G., counsel attempted to delegitimize M.G.'s story by asking about his various medications and suggesting that M.G.'s memories were actually hallucinations. RP 163-65, 172-73. Defense also suggested that M.G.'s flashbacks and memories were influenced by others. RP 175-77, 180-82, 187-88, 193. He suggested that M.G. did not have firsthand knowledge of the abuse. RP 182. He asked about the reasons why M.G. did not report the abuse to others. RP 183. Counsel also questioned M.G.'s ability to distinguish between what was real and not real. RP 184-88. Moreover, defense articulated to the court, "You know, our position is, obviously, this never happened" and "I'm arguing this didn't happen." RP 357, 381. Therefore, the credibility of M.G. was clearly at issue.

During trial, the State sought to admit expert testimony from child forensic interviewer Keri Arnold about delayed disclosure and argued that the testimony was warranted, because witness credibility was an issue. RP 11-14, 354-55, 379-80, 383. Defendant objected to the testimony, arguing that delayed disclosure was not relevant to the case. RP 11-12, 357-58, 381-82. After an offer of proof, the court allowed the testimony. RP 358-83. The court ruled,

Okay. I'm going to allow the testimony. I do find that it does provide expert information to jurors that they may not otherwise know and that I do believe it's relevant in part to some portions of what is alleged to have happened in this case. But by the same token, defense counsel has leeway to point out all of the ways that this testimony is not pertinent to other parts of the case and can also make clear what her scope of expertise is and what it isn't.²⁶

RP 383.

The State subsequently called Keri Arnold as a witness in its case-in-chief. RP 385. Arnold is a forensic child interviewer who has conducted approximately 2,200 forensic interviews of children. RP 385-86. Arnold explained the concept of delayed disclosure based on her professional familiarity derived from extensive training and other professional experience. RP 386-87, 390-95.

Arnold explained that delayed disclosure is the understanding that people do not always disclose immediately after an event of abuse. RP 392. She explained that children will often wait for a period of time after an abusive event before disclosing it, and many of the reasons are fear-based. RP 392-95. Arnold testified that delayed disclosure is very common, and the majority of her interviews involve delayed disclosure. RP 391, 394. Defense counsel then cross-examined Arnold and

²⁶ The court limited the testimony to "[j]ust generally, children delay their disclosures. They delay them for these reasons, they tell us this. We read about it in literature." RP 384. The court also permitted the State to pose a hypothetical regarding whether seven years of abuse without disclosure would constitute delayed disclosure. RP 365, 384.

questioned her regarding the lapse of time needed for disclosure to be considered “delayed.” RP 402-03.

Arnold’s testimony was helpful to the jury. To an average juror, a child’s delay in reporting sexual abuse may strongly indicate that the alleged event never happened. *Graham*, 59 Wn. App. at 425 (citing *Madison*, 53 Wn. App. at 765). The jury heard evidence that M.G. did not disclose defendant’s abuse until years after the abuse ended. Arnold testified about delayed disclosure generally, informing the jury about the reasons why a child might wait to disclose abuse. Her testimony also addressed whether delayed reporting was common. This information allowed the jury to better assess M.G.’s credibility.

Case law expressly permits expert testimony regarding delayed disclosure to rebut an attack on credibility of victims. *Graham*, 59 Wn. App. at 425. Thus, just as in *Petrich* and *Graham*, the trial court did not abuse its discretion in this case by finding that the expert testimony would assist the trier of fact in understanding the evidence. See *Petrich*, 101 Wn.2d at 575-76; *Graham*, 59 Wn. App. at 425.

Even if the court did abuse its discretion in admitting the limited testimony, any error was harmless. When the party challenging an evidentiary ruling meets its burden to show that the trial court abused its discretion, the appellate court will not reverse a conviction unless the

evidentiary ruling prejudiced the outcome. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004); *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (evidentiary error is grounds for reversal only if the error is prejudicial). “An error is prejudicial if, ‘within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.’” *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001), *as amended* (2002) (quoting *State v. Smith*, 106 Wn.2d 772, 780, 725 P.2d 951 (1986)). A trial court’s erroneous admission of evidence does not prejudice the outcome if that evidence is minor in comparison to the State’s otherwise overwhelming evidence. *Thomas*, 150 Wn.2d at 871. Here, any error was harmless and did not prejudice the outcome of the trial given the overwhelming evidence from M.G. and his various doctors and therapists regarding the sexual abuse and resulting trauma, which the jury found to be credible.

4. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN FINDING COUNTS II AND III DID NOT CONSTITUTE THE SAME CRIMINAL CONDUCT WHERE THE EVIDENCE ESTABLISHED MULTIPLE ACTS OF RAPE OVER A PERIOD OF YEARS.

Crimes constitute the same criminal conduct when they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). “Unless all elements

are present, the offenses must be counted separately.” *State v. Chenoweth*, 185 Wn.2d 218, 220, 370 P.3d 6 (2016). The Legislature intended the phrase “same criminal conduct” to be construed narrowly. *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). Appellate courts review determinations of same criminal conduct for abuse of discretion or misapplication of law. *State v. Graciano*, 176 Wn.2d 531, 535, 295 P.3d 219 (2013). Thus, “when the record supports *only one* conclusion on whether crimes constitute the ‘same criminal conduct,’ a sentencing court abuses its discretion in arriving at a contrary result.” *Id.* at 537-38 (emphasis added)(internal citation omitted). However, “where the record adequately supports either conclusion, the matter lies in the court’s discretion.” *Id.* at 538.

As articulated by the Washington Supreme Court:

Deciding whether crimes involve the same time, place, and victim often involves determinations of fact. In keeping with this fact-based inquiry, we have repeatedly observed that a court’s determination of same criminal conduct will not be disturbed unless the sentencing court abuses its discretion or misapplies the law.

Chenoweth, 185 Wn.2d at 220-21.

The defendant bears the burden of proving same criminal conduct.

Graciano, 176 Wn.2d at 538-40. “[A] ‘same criminal conduct’ finding favors the defendant by lowering the offender score below the *presumed*

score...Because this finding favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct.”

Graciano, 176 Wn.2d at 539. See also *State v. Lopez*, 142 Wn. App. 341, 351, 174 P.3d 1216 (2007) (“In determining a defendant’s offender score... two or more current offenses... are presumed to count separately unless the trial court finds that the current offenses encompass the same criminal conduct.”).

In this case, defendant argues that “the convictions for counts 2 and 3 can be interpreted to be the same criminal conduct” and “the proper offender score is 6.” Brief of Appellant at 16. He asks this Court to reverse his sentence. Brief of Appellant at 15. Defendant made the same argument below, which the trial court properly rejected. RP 1015, 1020; CP 248-255. The Washington Supreme Court has specifically held that in cases of sex offenses involving multiple incidents over a period of years, the counts do not constitute “same criminal conduct.” *State v. French*, 157 Wn.2d 593, 613-14, 141 P.3d 54 (2006).

In *French*, the defendant was convicted of six counts; counts II and III were both rape of a child in the first degree and counts IV-VI were all rape of a child in the second degree. *French*, 157 Wn.2d at 597-98, 611. The defendant claimed that counts II and III, and counts IV-VI, constituted the same criminal conduct. *Id.* at 612. The Washington

Supreme Court disagreed and held that the counts were not the same criminal conduct. *Id.* at 613-14. While the crimes involved the same victim, the crimes did not occur at the same time or involve the same criminal intent. *Id.* The rapes and molestation in that case, as in the present case, occurred on several occasions over a period of years. *Id.*

The Supreme Court also pointed out that, as in *State v. Grantham*, 84 Wn. App. 854, 932 P.2d 657 (1997), the criminal intent for each instance of abuse is distinct; the defendant had ample time during the course of the sexual abuse to “pause and reflect upon his actions.” *Id.* at 613. Further, “[t]he rapes at issue here were sequential, not continuous or simultaneous.” *Id.* at 613-14. The court also held that convictions for the several counts did not violate double jeopardy, where the victim testified to an ongoing pattern of sexual abuse that occurred for five years and testified to several acts of penetration. *Id.* at 612. Each act of penetration was sufficient to support a single count of rape. *Id.* See also *Graciano*, 176 Wn.2d at 540-41 (trial court appropriately exercised its discretion in finding defendant’s crimes did not constitute the same criminal conduct, where victim’s testimony discussed various incidents with no suggestion that incidents were continuous, simultaneous or happened sequentially within a short time frame).

In the instant case, the defendant was convicted of four counts. RP 983-86; CP 183-195. Counts II and III were the same crime, rape of a child in the first degree, occurring over the same time period of July 14, 2003 through July 13, 2007. CP 56-58, 143-182 (Instructions 12 and 13). The evidence presented at trial established that the acts of rape occurred multiple times during this time period and that each time was separate and distinct, as found by the jury. *See* RP 99-114 (multiple acts in different bedrooms and at different ages); CP 186, 189. *See also* CP 143-182 (Instructions 12 and 13). As in *French*, the instances were sequential, over a period of years, not simultaneous.²⁷ Over the course of the abuse, and between each act of rape, defendant had ample time to pause and reflect upon his actions. Thus, these acts did not occur at the same time, but rather sequentially, and defendant had to form the requisite intent each time. The offenses do not constitute the same criminal conduct. The convictions also do not violate double jeopardy, because, as in *French*, M.G. testified to several acts of penetration occurring over a period of years. Each act is sufficient to support a single count.

²⁷ This is not a case as in *State v. Calle*, 125 Wn.2d 769, 888 P.2d 155 (1995) or *State v. Tili*, 139 Wn.2d 107, 895 P.2d 365 (1999), cited by defense, where there was a “single act of intercourse” or multiple acts of rape within minutes of each other, respectively. *See* Brief of Appellant at 15-16.

As a result, the trial court properly found defendant's offender score to be "9." RP 1020; CP 256-258, 262. Pursuant to RCW 9.94A.589(1)(a), "[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score." Pursuant to RCW 9.94A.525(17), "If the present conviction is for a sex offense...count three points for each adult and juvenile prior sex offense conviction." Defendant was convicted of four Class A felony sex offenses. RCWs 9A.44.073, 9A.44.076, 9A.44.083; RCW 9.94A.030(47). *See* CP 183, 186, 189, 192; RP 983-86. Each count scored as three points against each other, resulting in an offender score of "9."

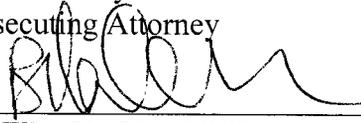
As argued above, the trial court appropriately exercised its discretion in finding defendant's crimes did not constitute the same criminal conduct and thereby properly sentenced defendant based on an offender score of "9." This Court should therefore affirm defendant's sentence.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's conviction and sentence.

DATED: May 31, 2017

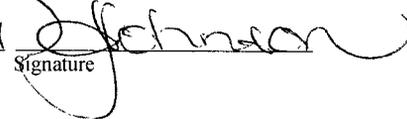
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5/31/17 
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