

NO. 49707-7-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JOHN K.L. AYLWARD,

Appellant.

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

The Honorable Michael J. Sullivan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it denied appellant's motion to suppress evidence obtained with an invalid search warrant.

2. The trial court erred in entering conclusions of law 4, 5, 6, and 7 regarding the search warrant.¹ Clerk's Papers (CP) 113.

3. The trial court erred in entering findings of fact 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 and 41 insofar as the findings and resulting charges were predicated by evidence obtained from two memory cards seized from Mr. Aylward's house during execution of the challenged search warrant.² CP 274-82.

4. The trial court erred in entering findings of fact 43, 44, 45, 46, 47, 48, and 49, pertaining to the aggravating factor of "particular vulnerability." CP 282-84.

5. The trial court erred in entering findings of fact 50 and 51 pertaining to the aggravating factor of "abuse of position of trust." CP 284.

6. The trial court erred in entering finding of fact 52 pertaining to the aggravating factor of "invasion of privacy." CP 285.

7. The trial court erred in entering findings of fact 54, 55, and 56

¹The trial court's CrR 3.6 findings and conclusions are attached as Appendix A.

²The trial court's findings and conclusions are attached as Appendix B.

pertaining to the aggravating factor of domestic violence pursuant to RCW 9.94A.535(3)(h). CP 286.

8. The trial court erred in entering finding of fact 57 pertaining to multiple current unpunished offenses. CP 286.

9. The trial court erred in entering findings of fact 1(a), (b), (c), (d), and (e) in support of an exceptional sentence contained in Appendix 2.4B of the Judgment and Sentence. CP 316.

10. The trial court erred in entering the unnumbered conclusions of law contained in Appendix 2.4B of the Judgment and sentence. CP 316.

11. The 1200-month sentence is clearly excessive.

12. The trial court exceeded its statutory authority in barring the appellant from having contact with his daughter H.A. for life because the order is not crime-related.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Law enforcement obtained a warrant permitting them to search through the entirety of the content of appellant's cell phones and a video memory card, including information unrelated to the suspected crimes and information protected by the First Amendment. Did the trial court err when it found the warrant did not violate the particularity requirements of the Fourth Amendment and article I, section 7 of the Washington Constitution?

Assignments of Error No. 1, 2 and 3.

2. The “plain view” doctrine provides an exception to the prohibition against warrantless searches. Where the search warrant itself was unconstitutionally overbroad, and where police found three firearms in the house during execution of the warrant, did the trial court err in permitting admission of the firearms? Assignments of Error No. 1, 2 and 3.

3. Is imposition of a 100-year sentence clearly excessive where the aggravating circumstances are inherent to the underlying offenses, and the sentence is slightly less than four times the top of Mr. Aylward’s standard range sentence of 318 months? Assignments of Error No. 4 -11.

4. The Sentencing Reform Act (SRA) authorizes a sentencing court to impose crime-related prohibitions. Furthermore, if a sentencing condition burdens a fundamental right, it must be narrowly tailored to meet a compelling State interest. Where Mr. Aylward was convicted of rape of his biological child D.D., did the court exceed its authority by prohibiting Mr. Aylward from having any contact with his daughter H.A.? Assignment of Error No. 12.

C. STATEMENT OF THE CASE

1. Procedural history:

John Aylward was charged by third amended information filed in

Pacific County Superior Court with six counts of rape of a child in the first degree (RCW 9A.44.073), six counts of incest in the first degree (RCW 9A.64.020(1)), three counts of sexual exploitation of a minor (RCW 9.68A.040(1)(b), (c)), first degree dealing in depictions of minors engaged in sexually explicit conduct (RCW 9.68A.050(1)), first degree possession of depictions of minors engaged in sexually explicit conduct (RCW 9.68A.070), and second degree unlawful possession of a firearm (RCW 9.41.040(2)(a)(i)). Clerk's Papers (CP) 141-60.

In counts 1 through 6, Mr. Aylward was charged with rape of a child in the first degree, with each count involving his daughter, D.D. CP 141-47. Mr. Aylward was charged with first degree incest involving D.D. in counts 7 through 12. CP 148-54. He was charged with sexual exploitation of a minor in counts 13 through 15. CP 154-57. In those counts, the State alleged that he engaged in sexually explicit involving D.D., based on three video clips obtained from a white cell phone depicting acts of sex involving Mr. Aylward and D.D. CP 157-58. Mr. Aylward was charged in counts 16 and 17 with dealing in depictions of minors engaged in sexually explicit conduct in the first degree and possession of depictions of minors, based on images obtained from the phone depicting child pornography. CP 157-58.

Finally, in count 18, Mr. Aylward was charged with unlawful

possession of a firearm in the second degree based on three firearms found in a workroom in Mr. Aylward's house during the execution of a search warrant on December 12, 2015. CP 159-60.

The State alleged that counts 1 through 15 were aggravated by the following circumstances: the defendant knew or should have known that D.D. was particularly vulnerable or incapable of resistance (RCW 9.94A.535 (3)(b)), that he used his position of trust to facilitate the commission of the current offenses (RCW 9.94A.535(3)(n)); the offenses involved an invasion of the victim's privacy (RCW 9.94A.535(3)(p)); the offenses involved domestic violence as defined in RCW 10.99.020 and the offense was part of an ongoing pattern of sexual abuse of D.D. manifested by multiple incidents over a prolonged period of time (RCW 9.94A.535(3)(h)), and the defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished under RCW 9.94A.535(2)(b). The State alleged that counts 16, 17, and 18 were also aggravated by multiple current offenses.

a. *CrR 3.5/3.6 suppression hearing*

Defense counsel moved to suppress the evidence found on a removable 32g mini-SD memory card obtained from a white Samsung Galaxy S3 cell phone during execution of the warrant on December 12, 2015 at Mr. Aylward's

house in Ocean Park, Washington. 6 RP Report of Proceedings (RP)³ at 148-164; 7 RP at 166-243; CP 36-50. Counsel move to suppress the contents of a white Samsung cell phone, a video memory card, and the three guns found during the search. The motion was based on several grounds, including that the warrant authorizing the search was not supported by probable cause and failed to satisfy the particularity requirement of the Fourth Amendment. CP 36-50.

Deputy Kendall Biggs of the Pacific County Sheriff's Office testified at a motion hearing on August 24, and 26, 2016, that Mr. Aylward was investigated for suspicion of child molestation of his daughter D.D., based on an allegation made by his daughter H.A. to a school counselor on December 9, 2015. H.A. told the counselor that she thought her father was sexually molesting D.D. 7 RP at 170-71. Deputy Biggs testified that after interviewing H.A. regarding her allegation he prepared an affidavit, and a search warrant was authorized by a District Court Judge. 7 RP at 171.

During the search, members of the Pacific County Sheriff's Office found a 2 gigabyte memory card located in a hutch in the living room that

³The Verbatim Report of Proceedings consists of the following sequentially paginated hearings. To assist in reference, appellate counsel has cited each volume separately as follows: 1RP (4/15/16); 2RP (4/29/16); 3RP (5/27/16); 4RP (6/10/16); 5RP (7/8/16); 6RP (8/24/16, child hearsay hearing); 7RP (8/26/16, suppression hearing); 8RP (9/7/16, pretrial motions); 9RP (9/9/16, pretrial hearing); 10RP (9/19/16, motion to seal record, waiver of jury); 11RP (9/19/16, non-jury trial, day 1); 12RP (9/20/16, non-jury trial, day 2); and 13RP (10/7/16, sentencing).

contained over 17,000 files, of which police viewed approximately 70 files, and which consisted of “hard core” adult pornographic material. CP 42-48. Approximately one-quarter of the 70 files viewed by law enforcement consisted of child pornography. The 2 gigabyte card was larger than that used in cell phones and is the type commonly used in video cameras. The card contained 39 files, of which 33 were wedding photos. Three however, were files of D.D. and John Alyward in sexual activity and one of the videos depicted sexual abuse by Mr. Alyward, and showed D.D. holding and watching a white cell phone which was displaying pornography while engaging in sexual activity with Mr. Alyward.

Deputy Biggs testified that deputies located two rifles propped against a wall and a handgun located on top of a dresser in a workroom in the house used for Mr. Alyward’s tattoo business. 7 RP at 172, 177.

Defense counsel argued that the search warrant issued December 10, 2015 was unconstitutionally overboard. 6 RP at 149-159. The warrant authorized seizure of

video or photographs stored on media devise to include but not limited to cell phones, cameras, thumb drives, desktop computers, laptop computers, tablets, video cameras, printed photos DVDs, CDs, VHS tapes, suspected or known to contain sexually explicit material of adults or minors

CP 42.

Defense counsel argued that in addition to overbreadth, the affidavit contained no information regarding cell phones except an allegation by D.D.'s sister H.A. that H.A. was able to see "porn videos" on a white cell phone and that this was seen "through the corner of her eye." CP 45-48. The warrant does not specifically list a white cell phone, and the warrant and makes no distinction between sexually explicit depictions involving adults or minors and therefore permits seizure of constitutionally protected material - adult pornography - and is therefore invalid under *State v. Besola*.⁴ 6 RP at 149-50. Defense counsel also argued that under *Besola*, the material was not severable and therefore all evidence found pursuant to the warrant, including the firearms found in the house during execution of the warrant and charged in count 18, must be suppressed. 6 RP at 153-55.

The State argued that the affidavit and warrant are constitutionally sufficient and that the affidavit itself contains allegations by H.A. that a white Samsung phone is one of two phones used in the house, and that the white phone contained videos that Mr. Aylward would show to D.D. during the molestations. Affidavit for Search Warrant at 5, CP 43-49. 6 RP at 157.

During execution of the warrant, Mr. Aylward was handcuffed and placed on a couch in the living room of the house. 6 RP at 169. Deputy Biggs

⁴184 Wn.2d 605, 359 P.3d 799 (2015). 8

stated that after being given his *Miranda* warnings, Mr. Aylward said the guns obtained in the workroom belonged to his father and had been brought into the house and placed in the workroom. 7 RP at 173, 177-78, 185.

Deputy Sean Eastham testified that Mr. Aylward was subsequently arrested on January 7, 2016, and transported to a police interview room in Long Beach, Washington. 7 RP at 187. Deputy Eastham stated that after being administered constitutional warnings, Mr. Aylward initially denied molesting D.D., but after being shown screen shots from video obtained using a SanDisk memory card reader, he subsequently became emotional, broke down and “admitted it was the meth.” 7 RP at 193. Mr. Aylward, he testified, said that he did not want to talk any longer and that he wanted to talk to an attorney. 7 RP at 205. Deputy Eastham said that he left the interview room, but that a short time later Mr. Aylward said that he wanted the deputy to come back into the room, and he resumed the interview. 7 RP at 193, 205. The deputy stated that during the resumed interview, Mr. Aylward initially blamed D.D., but that he admitted that it was not her fault and said he “didn’t do anything forcibly.” 7 RP at 195.

Mr. Aylward testified that he had been up for several days when he was questioned by police and that he told the deputy that he wanted to talk to an attorney and that the deputy then said “all right. This interview is over.” 7 RP

at 219. He said that approximately five minutes later he said that wanted to talk to police and the interview then was resumed. 7 RP at 219-222.

After hearing testimony and argument of counsel, the court found that Mr. Aylward's statement was knowingly, voluntarily and intelligently made and was therefore admissible. 7 RP at 245-246. The court entered an order on August 26, 2016 which stated in relevant part:

The search warrant is upheld based upon the State's argument that the defendant's use of the porn video located on the defendant's cell phone was illegal because said video was intended, and, in fact used, to show the minor just prior to the sexual assault(s) by the defendant upon the minor. The issue is not whether the State was seeking adult pornography which is constitutionally protected.

CP 85.

On September 9, 2016, the court entered findings of facts and conclusions of law regarding the State's motion to admit child hearsay statements pursuant to RCW 9A.44.120, and findings regarding the defense motion to suppress pursuant to CrR 3.5 and CrR 3.6. CP 105-114. Regarding the defense motion to suppress evidence obtained as a result of the warrant executed on December 12, 2015, the findings state in relevant part:

4. The affidavit in support of the search warrant, admitted into evidence as part of the State's reply and incorporated herein by reference, contains facts and circumstances sufficient to establish a reasonable inference that the defendant was involved in criminal activity and that evidence of the criminal activity could be found at the place to be searched.

5. The warrant was properly granted and the defendant has failed to meet his burden of demonstrating the facts were sufficient.
6. There was sufficient information contained with the affidavit to establish a nexus between Mr. Aylward's use of the cellphone to initiate sexual contact with D.D. and as a result the warrant was properly granted.
7. The firearms were in open view and properly seized.

CP 113.

2. Trial testimony:

The case came on for bench trial on September 19 and 20, 2016, the Honorable Michael Sullivan presiding. 10-11 RP at 310-480, 12 RP at 481-600. Mr. Aylward waived jury trial the morning of trial following inquiry by the court regarding voluntariness of the waiver. 10 RP at 322-350. The court also determined that Mr. Aylward agreed to waive a jury determination of the aggravating factors alleged by the State. 10 RP at 332-344.

Law enforcement executed a search warrant at Mr. Aylward's house in Ocean Park, Washington on December 12, 2015. H.A., who is twelve years old, testified that her father is John Aylward and that he was married to her mother Danielle Aylward. 11 RP at 454. Her younger sister, D.D., is the Danielles' daughter, and was born July 24, 2008. 11 RP at 454, 12 RP at 492. She stated she saw D.D. looking at what she believed to be pornography on a cellphone. 11 RP at 456.

Pacific County Deputy Sheriff Sean Eastham testified that H.A.,

reported to a school counselor that she thought her younger sister D.D. was being abused by her father, Mr. Aylward. 11 RP at 392. As a result of H.A.'s allegation, law enforcement obtained a warrant to search items in the house, including a white cellphone described by H.A. as containing pornography. 11 RP at 394.

Pacific County Deputy Sheriff Kendall Biggs testified that during a search of Mr. Aylward's house in Ocean Park, on December 12, 2015, law enforcement found a white Samsung Galaxy S3 cell phone in a workroom located in the house. 11 RP at 367-68, 405. Police also located a sexual device that was used in a video in which D.D. was sexually molested. 11 RP at 371. Officers found a 2 gigabyte memory card in the hutch located in the living room of the house. 11 RP at 399. Police later viewed a portion of the SD card. 11 RP at 401. The card contained wedding photos from Mr. Aylward's former wife, and also contained video files of Mr. Aylward sexually abusing D.D. 11 RP at 402-03. Deputy Eastham identified the man abusing D.D. in the videos as Mr. Aylward based on his visible face and tattoos. 11 RP at 417. He also identified the victim as D.D., stating that he had seen her multiple times, and that he could clearly see her in the videos, and that there was no question as to her identity. 11 RP at 418.

Three videos from the 2 gigabyte memory card were played to the court.

11 RP at 427-433. Prior to playing the videos the courtroom was closed following a motion to seal the record during that portion of the testimony. The court ruled, without defense objection, that the closure was in compliance with *State v. Bone-Club*, 128 Wn2d 254, 906 P.2d 325 (1995). 11 RP at 385-86. In particular, the court noted that the victim was a minor and that closure was necessary to prevent further harassment or injury to D.D. 11 RP at 386. The court noted that no person in the courtroom noted opposition to the closing and granted the motion. 11 RP at 388. The State noted in support of its motion that the incident took place in a small community and that D.D. had already suffered harassment at her school regarding the case, which the court made part of its findings. 11RP at 386. The State then played three videos from the 2 gigabyte memory card. 11 RP at 427. The video showed D.D. viewing a white Samsung phone and using a sexual device on her vagina. 11 RP at 427.

James Bergstrom, a lieutenant with the Pacific County Sheriff's Office, testified that the white phone visible in the videos appeared to be the same white Samsung phone seized by officers during execution of the search warrant. 11 RP at 428. He also stated that the person making the video recording appeared to be moving around while filming D.D., and identified Mr. Aylward as the male depicted in the video. 11 RP at 428. A second video depicting penetration of D.D.'s vagina by the mouth of the man in the video, was shown,

and Lt. Bergstrom again identified the male in the video as Mr. Aylward. 11 RP at 429. The video also depicts D.D. manipulating Mr. Aylward's penis manually and orally. 11 RP at 431.

A third video also shows D.D. using a sexual device. 11 RP at 432. In the video Mr. Aylward enters the field of view and is shown moving the video camera. 11 RP at 432-33. Lt. Bergstrom testified that the lighting varied in each of the three videos, indicating that they were made at different times. 11 RP at 431. He also testified that the videos appeared to have been made in the bedroom of the Aylward's house, and that he identified a white dresser that was shown in Exhibit 6 taken in the same bedroom. 11 RP at 432-33. He also stated that D.D. had recently turned eight and that she appeared to be a year younger in the videos. 11 RP at 434.

Lt. Bergstrom also testified regarding photos obtained from a 32 gigabyte micro SD card taken from the white Samsung Galaxy cellphone. 11 RP at 436. He stated that although it was password protected, he was to remove the card, and using a SanDisk reader, was able to view the contents of the card. 11 RP at 438. Videos of children engaged in sexual actively with adults obtained from the Samsung phone were played to the court. 11 RP at 441-444. Lt. Bergstrom testified that the phone also included photographs of Mr. Aylward engaged in tattooing, which was his occupation. 11 RP at 444.

After the search of the house, police removed and opened the 32 gigabyte memory card contained in the Samsung phone and discovered “[t]housands and thousands of files.” 11 RP at 406. Deputy Eastham viewed approximately 70 of the videos, a quarter of which he estimated contained child pornography “[r]anging anywhere from ages toddler, two three years old, up though eight, nine range.” 11 RP at 406. The deputy did not open every file contained in the card, stating that it would have “take probably months.” 11 RP at 406.

Samantha Mitchell, a child forensic interviewer, testified that during an interview with D.D., she stated that what she termed “humping” or “S-E-X” started by her father, Mr. Aylward, when she was four and took place in various locations, including the master bedroom, shower, couch in the family house, and at Mr. Aylward’s tattoo shop and in his van. 12 RP at 521-525.. Ms. Mitchell stated that D.D. described that Mr. Aylward had penile-vaginal intercourse with her on numerous occasions starting when she was four. 12 RP at 523-34. Ms. Mitchell stated that D.D. was afraid during the two interviews that her step father would get mad and she did not want him to get into trouble if she told anyone about the abuse. 12 RP at 521.

Danielle Aylward testified that she was married John Alyward in September, 2013 until their divorce in August, 2016. 12 RP at 491, 502. She

stated that in 2015, D.D. was diagnosed with herpes simplex 1. 12 RP at 501.

She stated that Mr. Alyward also has herpes simplex 1. 12 RP at 501.

D.D. testified regarding multiple acts of rape and molestation by her father, that started when she was three or four, and stated that these crimes had occurred twenty times. 12 RP at 551-56.

During the search on December 12, 2015, police located firearms in a workroom in the house. 11 RP at 376, 380. The room also contained prescription pill bottles prescribed to Mr. Aylward, his wallet containing identification, and his social security card. 11 RP at 376. Lt. Bergstrom testified that he fired two rounds through each of the weapons obtained from the workroom. 11 RP at 446.

The State introduced evidence that Mr. Aylward was born March 5, 1970. Exhibit 2.

The defense rested without calling witnesses. 12 RP at 567.

3. Verdict and sentencing:

The court found Mr. Aylward guilty of eighteen counts as charged in the third amended information and entered findings of fact and conclusions of law on October 7, 2016. 12 RP at 593-97; CP 105-114.

At sentencing the State argued that Mr. Aylward's offender score for

counts 1 through 17 is “50,” and “18” for count 18.⁵ 13 RP at 619-620. The court found the following aggravating factors in support of an exceptional sentence:

- (a) RCW 9.94A.535(3)(b): the defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance;
- (b) RCW 9.94A.535(3)(n): the defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense;
- (c) RCW 9.94A.535(3)(p): the offense involved an invasion of the victims privacy;
- (d) RCW 9.94A.535(3)(h): the current offense involved domestic violence, as defined in RCW 10.99.020, or stalking as defined in RCW 9A.46.110, and one or more of the following was present: (i) the offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim or multiple victims manifested by multiple incidents over a prolonged period of time;
- (e) RCW 9.94A.535(2)(b): the defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offenses going unpunished.

CP 316.

⁵The offender score was elevated significantly by the recent decision in *State v. Chenoweth*, 185 Wn.2d 218, 370 P.3d 6 (2016), in which the court held that first degree incest and third degree child rape were not the same criminal conduct because “[t]he intent to have sex with someone related to you differs from the intent to have sex with a child.” *Chenoweth*, 370 P.3d at 9. Therefore, first degree rape of a child as charged in counts 1 through 6, and first degree incest in counts 7 through 12 are not the same criminal conduct because the objective intent varied between the offenses.

The trial court accepted the State's calculation of Mr. Aylward's offender score, and imposed the following exceptional sentence:

Count	Charge	Standard range	Sentence imposed
I	1 st degree rape/child	240-318 months	1200 months
2	1 st degree rape/child	240-318 months	1200 months
3	1st degree rape/child	240-318 months	1200 months
4	1st degree rape/child	240-318 months	1200 months
5	1st degree rape/child	240-318 months	1200 months
6	1st degree rape/child	240-318 months	1200 months
7	1 st degree incest	77-102 months	120 months
8	1st degree incest	77-102 months	120 months
9	1st degree incest	77-102 months	120 months
10	1st degree incest	77-102 months	120 months
11	1st degree incest	77-102 months	120 months
12	1st degree incest	77-102 months	120 months
13	Sexual exploitation of a minor	120 months	120 months
14	Sexual exploitation of a minor	120 months	120 months

15	Sexual exploitation of a minor	120 months	120 months
16	1 st degree dealing in depictions of minors engaged in sexually explicit conduct	87-116 months	120 months
17	1st degree dealing in depictions of minors engaged in sexually explicit conduct	77-102 months	120 months
18	2 nd degree unlawful possession of firearm	51-60 months	60 months

CP 302-322.

The court noted that it would impose the same sentence if only one of the grounds listed was found to be valid on appeal. 13 RP at 630; CP 316. The court ordered legal financial obligations of \$500.00 crime victim assessment and a \$100.00 DNA fee. 13 RP at 631; CP 309-10.

Timely notice of appeal was filed October 11, 2016. CP 323-324. This appeal follows.

D. ARGUMENT

1. THE WARRANT PERMITTING A SEARCH OF THE VIDEO RECORDER MEMORY CARD AND WHITE SAMSUNG CELL PHONE WAS NOT SUFFICIENTLY PARTICULAR TO SATISFY THE FOURTH AMENDMENT.

a. A search warrant must be particularized in its scope to be constitutionally valid.

The Fourth Amendment to the United States Constitution provides, “no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” The particularity requirement has three purposes: “[1] prevention of general searches, [2] prevention of the seizure of objects on the mistaken assumption that they fall within the issuing magistrate’s authorization, and [3] prevention of the issuance of warrants on loose, vague, or doubtful bases of fact.” *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992).

In *Perrone*, there was probable cause to seize child pornography from the defendant’s home, but the search warrant allowed the police to search for items related to adult pornography, drawings, and sexual paraphernalia, which are lawful to possess and implicate First Amendment protected activities. 119 Wn.2d at 551. Although the warrant also referred to illegal “child pornography,” it authorized police to search materials that were not illegal. *Id.*

at 553. The court concluded that the warrant was overbroad by “vesting too much discretion in the executing officers” and authorizing a general search of materials protected by the First Amendment. *Id.* at 559.

“By describing the items to be seized with particularity, the warrant limits the discretion of the executing officer to determine what to seize.” *State v. Besola*, 184 Wn.2d 605, 610, 359 P.3d 799 (2015) (citing *Perrone*, 119 Wn.2d at 546). It also serves to inform the person subject to the search what items may be seized. *Id.* at 610-611 (citing *State v. Riley*, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993)). Use of a general description of items to be searched is not a *per se* constitutional violation – with one important caveat: “the use of a generic term or general description is constitutionally acceptable only when a more particular description of the items to be seized is not available at the time the warrant issues.” *Perrone*, 119 Wn.2d at 616 (citing cases). And while a detailed affidavit in support of a warrant may cure the warrant’s overbreadth, it only does so “where the affidavit and the search warrant are physically attached, and the warrant expressly refers to the affidavit and incorporates it with ‘suitable words of reference’.” *Riley*, 121 Wn.2d at 29 (quoting *Bloom v. State*, 283 So.2d 134, 136 (Fla. Dist. Ct. App. 1973)).

Moreover, when a search warrant implicates materials that may be protected by the First Amendment, “the degree of particularity demanded is

greater” and must “be accorded the most scrupulous exactitude.” *Perrone*, 119 Wn.2d at 547-48 (quoting *Stanford v. Texas*, 379 U.S. 476, 485, 85 S. Ct. 506, 13 L. Ed. 2d 431 (1965)). Similarly, “the search of computers or other electronic storage devices gives rise to heightened particularity concerns.” *State v. Keodara*, 191 Wn. App. 305, 314, 364 P.3d 777 (2015) (citing *Riley v. California*, 134 S.Ct. 2473, 189 L. Ed. 2d 430 (2014); *United States v. Galpin*, 720 F.3d 436 (2nd Cir. 2013)), review denied, 185 Wn.2d 1028, 377 P.3d 718 (2016).

One of the “driving forces” in creating the Fourth Amendment was the founder’s opposition to “general warrants” that allowed the government “to rummage through their homes in an unrestrained search for evidence of criminal activity.” *Riley v. California*, 134 S.Ct. 2473, 2494, 189 L.Ed 2d 430 (2014); U.S. Const. amend. 4. In *Riley*, the Supreme Court unanimously agreed that because modern cell phones are essentially “minicomputers” capable of storing an enormous amount of information about “the privacies of life,” they cannot be searched without a warrant. *Id.* at 2489, 2495. However, a warrant that gives police “unbridled discretion to rummage at will among a person’s private effects” is also contrary to the Fourth Amendment. See *Id.* at 2492.

Under the Fourth Amendment, “a warrant may not be issued unless

probable cause is properly established and the scope of the authorized search is set out with particularity.” *Kentucky v. King*, 131 S.Ct. 1849, 1856, 179 L.Ed.2d 865 (2011).

Whether a search warrant contains a sufficiently particularized description is an issue this Court reviews *de novo*. *Perrone*, 119 Wn.2d at 549; *Keodara*, 191 Wn. App. at 312.

b. The search warrant authorizing unlimited access to cellphones, computers, and video card’s private information violated the particularity requirement of the Fourth Amendment and the protections of article I, section 7 of the Washington Constitution.

In this case, the search warrant was not sufficiently particular, and under *Besola*, evidence obtained during the search of Mr. Aylward’s house on December 12, 2015 must be suppressed.

In *Besola*, a friend of a co-appellant was arrested, and after her arrest told police she had seen drugs and child pornography at Besola's house. *Besola*, 184 Wn.2d at 608. Based on the information provided to police by the arrested friend, a judge issued a search warrant for illegal drugs but declined to issue a search warrant related to child pornography at that time. At the scene, police saw CDs and DVDs with handwritten titles that implied that they contained child pornography. Police obtained an addendum to the search warrant. The warrant listed the name of the crime under investigation--- “Possession of Child

Pornography R.C.W. 9.68A.070.” The warrant also stated “the following evidence is material to the investigation or prosecution of the above described felony”:

1. Any and all video tapes, CDs, DVDs, or any other visual and or audio recordings;
2. Any and all printed pornographic materials;
3. Any photographs, but particularly of minors;
4. Any and all computer hard drives or laptop computers and any memory storage devices;
5. Any and all documents demonstrating purchase, sale or transfer of pornographic material.

Besola, 184 Wn2d at 608. (boldface omitted). Police seized a number of computers, memory storage devices, CDs, and DVDs, and found child pornography on one computer and on DVDs. *Besola* and his co-appellant were convicted of possession of depictions of minors engaged in sexually explicit conduct and dealing in such depictions. *Id.* at 609.

On appeal the Court of Appeals affirmed their convictions. Review was granted regarding the warrant and ‘to convict’ instructions.” The Court found that the warrant failed to meet the Fourth Amendment’s particularity requirement and therefore was unconstitutionally overbroad. *Besola*, 184 Wn2d at 610-611. The court noted that the “descriptions of the items to be seized expressly included materials that were legal to possess, such as adult pornography and photographs that did not depict children engaged in sexually

explicit conduct.” *Besola*, 184 Wn2d at 610-612.

Here, the warrant issued by the Pacific County District Court authorized a search of the house which was similarly vague and specifically permitted the seizure of material that was legal to possess. The district court warrant authorized the search for:

video or photographs stored on media devices to include but not limited to cell phones, cameras, thumb drives, desktop computers, laptop computers, tablets, video cameras, printed photos DVDs, CDs, VHS tapes, suspected or known to contain sexually **explicit material of adults** or minors . . .

CP 42 (emphasis added).

The warrant provided an unconstitutional level of discretion to searching officers and thus failed to satisfy the particularity requirement.

As an initial matter, although the affidavit in support of the warrant contains detailed information concerning the suspected crimes and evidence that law enforcement hoped to obtain during a search of a cell phone, there is no indication this affidavit was attached to the warrant, and the warrant contains no language incorporating the affidavit by reference. Therefore, the warrant stands on its own when assessing particularity. *Riley*, 121 Wn.2d at 29.

As such the warrant contains no guidance for law enforcement as to the scope of the search because it does not contain any specific information from

the affidavit regarding Mr. Aylward or any specific alleged offense.

The warrant is even less particular than the warrant overturned in *Besola*. Unlike the *Besola* warrant, which listed the crime being investigated, the warrant in this case failed to list any crimes whatsoever— and therefore, failed to define the bounds of officers’ authority to search, which made the warrant less particular. See *State v. Higgins*, 136 Wn. App.87, 93, 147 P.3d 649 (2006) (warrant’s overly broad description of suspected crime improperly expanded scope of evidence officers could seek); *State v. Griffith*, 129 Wn. App. 482, 488-489, 120 P.3d 610 (2005) (in case involving nude photos of 16-year-old girl on defendant’s computer, warrant authorizing search for defendant’s internet use overly broad where affidavit failed to make connection between suspected criminal activity and internet), review denied, 156 Wn.2d 1037, 134 P.3d 1170 (2006).

Without additional circumstances from the warrant affidavit, what remains is an extremely broad list of items to be searched. This is insufficient to support a valid warrant. See *Keodara*, 191 Wn. App. at 309-310, 316-317 (despite listing suspected crimes, warrant authorizing collection of broad range of items from cell phone violated particularity requirement where list essentially imposed no limit on information to be searched and permitted “phone to be searched for items that had no association with any criminal

activity and for which there was no probable cause whatsoever.”); *State v. Higgins*, 136 Wn. App. 87, 90-94, 147 P.3d 649 (2006).

Therefore, the warrant fails to provide necessary guidance in the absence of specific circumstances of this case or reciting a specific crime or crimes.

More importantly, because the warrant potentially subjected to seizure items protected by the First Amendment, such as depiction of adult pornography, the degree of particularity had to satisfy the heightened standard of scrupulous exactitude. *Stanford*, 379 U.S. at 485; *Besola*, 184 Wn.2d at 611; *Perrone*, 119 Wn.2d at 547-48. That police sought to search an electronic storage device also triggered a heightened standard. *Keodara*, 191 Wn. App. at 314. Rather than using precise language, however, the warrant in Mr. Aylward’s case merely contains a wide laundry list of cameras, cell phones, computers DVDs, CDs, and a variety of other electronic storage devices for “sexually explicit material of adults or minors.” CP 42.

Because the warrant ultimately authorizes collection of the entirety of cell phone and computer contents for examination of content, it contains virtually no limitations whatsoever on what officers could seize and examine. The police were free to find and seize items entitled to First Amendment protection as well as any other materials legally possessed and electronically

stored on the phone. This broadest grant of authority in the warrant was not tied to any particular listed crime or crimes and or made more precise by limiting language. See *Besola*, 184 Wn.2d at 614-615 (where identification of suspected crime on warrant “does not modify or limit the list of items that can be seized via the warrant,” identified crime does not render warrant sufficiently particular); *Riley*, 121 Wn.2d at 28 (warrant overbroad and invalid where it authorized “the seizure of broad categories of material and was not limited by reference to any specific criminal activity.”).

Here, law enforcement elected to capitalize on the warrant’s broad authority for a complete search of the video card found in the drawer in the hutch in the living room and seizure of the white cell phone for examination. See, the Return of Inventory and Receipt for Property, which shows that on December 12, 2015, an officer seized a variety of phones, including a white cell phone. CP 43. The phone and a video camera memory card were subsequently searched using a SanDisk device to read the cards. Declaration of Probable cause, CP 1-7. This confirms that officers obtained and executed an unconstitutional general warrant rather than using the required specific particularity in its search.

Besola is controlling authority. As was the case in *Besola*, the search warrant was unnecessarily broad and left too much discretion to law

enforcement in deciding what to search, in violation of Mr. Aylward's Fourth Amendment rights. "When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." *State v. Kinzy*, 141 Wn.2d 373, 393, 5 P.3d 668 (2000) (quoting *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999)), cert. denied, 531 U.S. 1104, 121 S. Ct. 843, 148 L. Ed. 2d 723 (2001).

c. The open view doctrine did not authorize seizure of the firearms.

Even if the initial search warrant to search is upheld, the court erred in holding the firearms were properly seized under the "open view" doctrine. See CP 113 (Conclusion of Law 7).

The Fourth Amendment of the United States Constitution and Article I, § 7 of the Washington Constitution prohibit unreasonable searches. A search without a warrant is presumed unreasonable, "subject to a few specifically established exceptions." *State v. Hastings*, 119 Wn.2d 229, 233-34, 830 P.2d 658 (1992) (quoting *Schneekloth v. Bustamonte*, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973)).

"'[P]lain view'... involves an officer viewing an item after a lawful intrusion into a constitutionally protected area." *State v. Kennedy*, 107 Wn.2d 1, 10, 726 P.2d 445 (1986). "'[P]lain view' applies to a situation where an

officer inadvertently sees an item immediately recognizable as contraband, after *legitimately* entering an area. . . .” *Kennedy*, 107 Wn.2d at 9 (emphasis added) (quoting *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981)). Officers may seize an object in “plain view” “only where it is *immediately* apparent to the police that they have evidence before them.” *Coolidge v. New Hampshire*, 403 U.S. 443, 466, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (emphasis added). The doctrine of plain view “may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges.” *Id.*

Here, the Pacific County deputies had a warrant authorizing a search for depictions of adults and minors engaged in sexual conduct. CP 42. As discussed above, the warrant is overbroad under the holding of *Besola* and *Perrone* and therefore may not be relied upon to validate the officers’ intrusion into the house and to search items located in the house. Accordingly, any evidence seen while in the house - an area in which the officers could not legitimately be given the invalidity of the warrant, and therefore the weapons could not be seized.

The fruits from the search of the video camera memory card and cell phone card which formed the basis for all charges contained in the information— as well as the three firearms found during the search—should have

been suppressed pursuant to the defense motion filed June 20, 2016, and the convictions in counts 1 through 18 must be reversed and dismissed.

2. THE EXCEPTIONAL 1200-MONTH SENTENCE SHOULD BE REVERSED BECAUSE IT IS CLEARLY AN EXCESSIVE SENTENCE AND UNSUPPORTED BY THE RECORD

If this Court affirms Mr. Aylward's convictions, it should vacate the exceptional sentence. The SRA provides structure for the sentencing of felony offenders through standard sentence ranges based upon the seriousness of the offense and the defendant's criminal history. *State v. Tili*, 148 Wn.2d 350, 368, 60 P.3d 1192 (2003). The SRA permits the sentencing court to impose a sentence outside of the standard sentence range only if it finds, considering the purposes of the SRA, "there are substantial and compelling reasons justifying an exceptional sentence." RCW 9.94A.535; *Id.* The purposes of the SRA are to (1) ensure punishment is commensurate with the seriousness of the offense and the defendant's criminal history, (2) promote respect for the law by providing just punishment, (3) provide punishment that is commensurate with that imposed upon others committing similar offenses, and (4) protect the public. RCW 9.94A.010.

a. The sentencing court's reasons are not legally adequate to support the exceptional sentence or are not supported by the record

The SRA includes non-exclusive lists of aggravating and mitigating factors which may justify an exceptional sentence. RCW 9.94A.535 (1), (2). An aggravating factor “must truly distinguish the crime from others of the same category.” *State v. Tili*, 148 Wn.2d at 369, citing *State v. Chadderton*, 119 Wn.2d 390, 396, 832 P.2d 481 (1992) and Boerner, Sentencing in Washington § 9.6. Thus, factors that are inherent in a particular crime may not justify an exceptional sentence. *Id.* When reviewing the imposition of an exceptional sentence, a reviewing court must engage in an evaluation of whether an aggravating factor legally supports a departure from the standard sentence range, *State v. O’Dell*, 183 Wn.2d 680, 358 P.3d. 359 (2015). To reverse an exceptional sentence, a reviewing court must find: (1) under a clearly erroneous standard, there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence; (2) under a de novo standard, the reasons supplied by the sentencing court do not justify a departure from the standard range; or (3) under an abuse of discretion standard, the sentence is clearly excessive or clearly too lenient. *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013) (citing RCW 9.94A.585(4)); *State v. Borg*, 145 Wn.2d 329, 336, 36 P.3d 546 (2001). Whether a particular factor can justify an exceptional sentence is a question of law the Court reviews de novo. *O’Dell* at 685.

The reasons for an exceptional sentence “must take into account factors

other than those which are necessarily considered in computing the presumptive range for the offense.” *State v. Chadderton*, 119 Wn.2d 390, 395, 832 P.2d 481 (1992) (quoting *State v. Nordby*, 106 Wn.2d 514, 518, 723 P.2d 1117 (1986)). The factfinder “may not base an exceptional sentence on factors necessarily considered by the Legislature in establishing the standard sentence range.” *Id.* (quoting *State v. Grewe*, 117 Wn.2d 211, 215-16, 813 P.2d 1238 (1991)). “[F]actors inherent in the crime—inherent in the sense that they were necessarily considered by the Legislature [in establishing the standard sentence range for the offense] and [that] do not distinguish the defendant’s behavior from that inherent in all crimes of that type—may not be relied upon to justify an exceptional sentence.” *State v. Ferguson*, 142 Wn.2d 631, 647-48, 15 P.3d 1271 (2001).

Here the court gave Mr. Aylward an exceptional sentence of 1200 months, almost four times the high end of the standard range. Five of the aggravating factors found by the court do not support an exceptional sentence in this case as a matter of law because they do not truly distinguish Mr. Aylward’s crime from other cases of first degree rape and incest.

i. An exceptional sentence based on “particular vulnerability” was clearly erroneous

The court found that counts 1 through 15 were aggravated because the

defendant knew or should have known that D.D. was particularly vulnerable or incapable of resistance. RCW 9.94A.535(3)(b). A person is particularly vulnerable to a crime only if he or she is more vulnerable to the offense than other victims and the defendant knew of such vulnerability. *State v. Bedker*, 74 Wn. App. 87, 94, 871 P.2d 673, review denied, 125 Wn.2d 1004 (1994). The particular vulnerability must be "a substantial factor in the accomplishment of the crime." *State v. Jackmon*, 55 Wn. App. 562, 566, 778 P.2d 1079 (1989). *State v. Suleiman*, 158 Wn.2d 280, 291-92, 143 P.3d 795 (2006).

It is not enough that the victim was vulnerable; the Legislature did not simply set an aggravator for a "vulnerable" victim, but specifically for a "*particularly* vulnerable" victim. A sentencing court may not base an exceptional sentence upon factors that are typical for the crime in question or considered by the Legislature in setting the seriousness level of the offense. *State v. Tili*, 148 Wn.2d at 369; *State v. Alexander*, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995)

An exceptional sentence is justified only when the conduct is proportionately more culpable than that inherent in the crime. *State v. Chadderton*, 119 Wn.2d 390, 398, 832 P.2d 481 (1992). Here, the vulnerability of D.D. was her young age. Rape of a child and incest, however,

already factor the youthful age of the victim into the standard range of the offense. And the court must still find that the defendant knew of and used the victim's youth to perpetrate the offense and the victim was more vulnerable than other victims of this crime due to extreme youth. *State v. Jackmon*, 55 Wn.App. 562, 566-67, 778 P.2d 1079 (1989).

The age range for the offenses in this case does not support the finding that D.D. was more vulnerable to the commission of the crime than the typical victim of rape. D.D.'s age is already taken into account in the sentencing scheme: her age dictates the degree of the offense, and her age at the time of the offense resulted in being charged first degree rape, rather than an inferior degree of second or third degree rape. Accordingly, her vulnerability inures in the crime as charged. No evidence shows that her age, mental or physical capacity or other factor made her particularly vulnerable in contrast to other victims of first degree rape.

Thus, whether a victim was particularly vulnerable due to the youthful age of the victim was necessarily factored into the determination of the standard range by the Legislature. In addition, cases upholding the aggravating factor that the victim was particularly vulnerable based upon age alone involve children younger than D.D. *State v. Fisher*, 108 Wn.2d at 425 (indecent liberties, victim 5 ½ years old); *State v. Rotko*, 116 Wn.App. 230, 243, 67 P3d

1098 (2003) (first degree criminal mistreatment of child, victim 11 months old); *State v. Quigg*, 72 Wn.App. 828, 841-42, 866 P.2d 655 (1994) (first degree rape of child, first degree child molestation, victim 3 to 4 years old).

This Court should strike the particularly vulnerable aggravating factor because D.D. was not a particularly vulnerable victim, and in the absence of a finding that her alleged particular vulnerability was a substantial factor in the commission of the offenses, the trial court's finding and conclusion to the contrary were clearly erroneous and cannot support the exceptional sentence imposed.

ii. *An exceptional sentence based on use of a position of trust was clearly erroneous*

The court found that Mr. Aylward used his or her position of trust, to facilitate the commission of the offenses in counts 1 through 15. Abuse of a position of trust is a statutory aggravating factor that cannot be used to support a sentence outside the standard range unless the defendant actually was in a position of trust, and the position of trust was used to facilitate the commission of the offense. *State v. Vermillion*, 66 Wn. App. 332, 832 P.2d 85 (1992), review denied, 120 Wn.2d 1030 (1993). "Whether the defendant is in a position of trust depends on the length of the relationship with the victim, the trust relationship between the primary caregiver and the perpetrator of a sexual

offense against a child, the vulnerability of the victim to trust because of age, and the degree of the defendant's culpability." *Vermillion*, at 348.

iii. An exceptional sentence based on invasion of privacy was clearly erroneous

The court found that Mr. Aylward invaded D.D.'s privacy when he committed the offenses. Case law suggests that entry into an area that belongs to another may be already factored into the crime. For instance, invasion of a victim's "zone of privacy" inheres in the crime of burglary. *State v. Lough*, 70 Wn. App. 302, 336, 853 P.2d 920 (1993), affirmed, 125 Wn.2d 847, 889 P.2d 487 (1995). Because unlawful entry into the victim's home is an element of that crime, "invasion of the victim's zone of privacy cannot be used as a basis for imposition of an exceptional sentence" for a burglary offense. *State v. Post*, 59 Wn. App. 389, 401-402, 797 P.2d 1160 (1990), affirmed, 118 Wn.2d 596, 826 P.2d 172, 837 Wn.2d 599 (1992). The State's argument in support of the factor, however, is applicable to virtually any non-property offense, since there is a "privacy" or "personal" component to almost any crime whether it occurs within a house or not. In addition, the State's interpretation of "privacy" is nebulous. The State initially argues in its Sentencing Memorandum that the Mr. Aylward took away D.D.'s security "In the most sacred of places for a child;

her bed and that of her mothers.” CP 256. The State then argues in its Memorandum that the invasion pertained to invasion of “her privates”, referring to the physical molestation of her body CP 256. Because the undefined phrase “invasion of privacy” appears to be inherent in the offenses charged, this Court should strike the finding of invasion of D.D.’s privacy as an aggravating factor.

iv. The finding of an ongoing pattern of sexual abuse occurring over prolonged period of time was erroneous

The court found that the offenses constituted domestic violence, and that one or more of the offense was part of an ongoing pattern of sexual abuse of a victim or manifested by multiple incidents over a prolonged period of time under RCW 9.94A.535(3)(h). Finding of Fact 54. Although this aggravating factor is included in the illustrative list provided by statute, the court may not base an exceptional sentence upon this factor if it is already considered by the Legislature in setting the standard sentence range; the aggravating factor must actually distinguish the offense from others in the same category. *State v. Alexander*, 125 Wn.2d at 725. In assault cases, for example, a series of injuries justifies an exceptional sentence only where the conduct was atypically severe for the type of crime committed. See *State v. Ritchie*, 126 Wn.2d 388, 894 P.2d 1308 (1995) (repeated severe blows causing over 20 broken bones in

commission of first degree murder); *State v. Armstrong* 106 Wn.2d 547, 723 P.2d 1111 (1986) (repeated burning of 10-month-old baby with scalding coffee); *State v. Rotko*, 116 Wn.App. 230, 67 P3d 1098 (2003) (abuse of infant over 11-month period, ending in child's death, supported exceptional sentence for criminal mistreatment); *State v. McClure*, 64 Wn.App. 528, 531-32, 827 P.2d 290 (1992) (multiple severe blows to the head of second degree assault victim). In cases involving the sexual assault of children, abuse may occur on a regular basis over a long period of time, especially in those cases where the defendant has access to the victim. *State v. Overvold*, 64 Wn.App. at 445-46, citing *State v. Brown*, 55 Wn.App. 738, 746-47, 780 P.2d 880 (1989), rev. denied, 114 Wn.2d 1014 (1990). See, e.g., *State v. Onefrey*, 119 Wn.2d 572, 573, 835 P.2d 213 (1992) (defendant molested neighbor child 50 to 100 times over 34-month period); *State v. Duvall*, 86 Wn.App. 871, 877, 940 P.2d 671 (1997), rev. denied, 134 Wn.2d 1012 (1998) (father abused daughters over 3-year period). As a result, it is difficult or impossible for the child to distinguish separate incidents. *Id.* Thus, in *Overvold*, the sentencing court relied upon a 10-year pattern of abuse, beginning when the victim was only 4 years old. 64 Wn.App. at 442-43. Accord, *State v. Quigg*, 72 Wn.App. at 841 ("chronic, repeated" penetrations of victim beginning in early infancy and continuing to age 4 to 5). Tragically, many children are abused by family members and do

suffer from a pattern of abused. *Overvold*, 64 Wn.App. 440, 445-46, 825 P.2d 729 (1992) six incidents over a two year period between January 1, 2014 and December 31, 2015 alleged by the State in this case does not establish a “pattern” of abuse that distinguishes Mr. Aylward’s case from other first degree rape and incest convictions. This aggravating factor does not support an exceptional sentence in Mr. Aylward’s case as a matter of law.

v. The multiple unpunished offense aggravating factor is insufficient to support an exceptional sentence

"[R]emand for resentencing is required where the reviewing court cannot conclude from the record that the trial court would have imposed the same sentence if it had considered only the valid aggravating factors." *State v. Smith*, 67 Wn. App. 81, 92, 834 P.2d 26 (1992). Remand for resentencing is appropriate when there is a possibility the lower court would grant a different disposition. *State v. K.E.*, 97 Wn. App. 273, 284-85, 982 P.2d 1212 (1999). Such is the case here. In the written findings, the court found it would “impose the same sentence if only one of the grounds listed in the preceding paragraph is valid [.]” CP 316. Boilerplate written findings are not dispositive. See *State v. Smith*, 123 Wn.2d 51, 58 n.8, 864 P.2d 1371(1993) (remanding for resentencing after two of four aggravators invalidated on appeal even though trial court found “[e]ach of the above findings of fact is a substantial and

compelling reason justifying an exceptional sentence of 100 months on each count to run consecutively.").

Regardless, whether an individual aggravator supports the exceptional sentence is not the same thing as saying the court would have imposed the same sentence if only one factor were present. The trial court did not find there were substantial and compelling reasons to impose an exceptional sentence based on the free crimes aggravator alone. In its oral ruling, the trial court found five aggravators were applicable did not single out the free crimes aggravator for special emphasis. 13 RP at 627-29.

To avoid remand for resentencing, this Court must be able to determine with certainty from the record that the trial court would have imposed the same sentence in the absence of invalid aggravators. *K.E.*, 97 Wn. App. at 284-85. The record does not show the court would have exercised its discretion in the same manner in the absence of the invalid aggravators, challenged *supra*, upon which it relied. Cf. *State v. Cardenas*, 129 Wn.2d 1, 12,914 P.2d 57 (1996) (appellate court satisfied trial court would have imposed same sentence where it stated any of the factors standing alone would be a substantial and compelling factor justifying the exceptional sentence and indicated in its oral opinion that the primary reason for imposing the exceptional sentence was based on the remaining valid aggravator). Mr. Aylward submits that because the five

aggravators found by the trial court are inapplicable, the exceptional sentence must be vacated and this case remanded to the trial court for resentencing.

b. The exceptional sentence should be reversed because a prison term almost four times the standard range is clearly excessive in this case.

This Court will reverse an exceptional sentence under an abuse of discretion standard if the sentence is clearly excessive. *State v. Alvarado*, 164 Wn.2d 556, 560-61, 192 P.3d 345 (2008); *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013) review denied 179 Wn.2d 1015 (2014). A “clearly excessive” sentence is one that is clearly unreasonable, for example if it is “exercised on untenable grounds or for untenable reasons, or [represents] an action that no reasonable person would have taken.” *State v. Knutz*, 161 Wn. App. 395, 410, 253 P.3d 437 (2011) (internal quotations omitted). An exceptional sentence is clearly excessive if its length, in light of the record, “shocks the conscience.” *State v. Kolesnik*, 146 Wn. App. 790, 805, 192 P.3d 937 (2008) (internal quotations omitted) (holding sentence of twice the standard range, 240 months, appropriate for first degree assault that inflicted life-threatening injuries on a police officer).

The sentence imposed here, 1200 months, is far beyond the 240 to 318 month standard range sentence for a class XII offense where the offender has an offender score of nine or more points. In fact, it is almost four times as long as

the high end of the standard range. See, e.g., *State v. Hyder*, 159 Wn. App. 234, 244 P.3d 454 (2011) (affirming exceptional sentence as not clearly excessive where sentenced imposed was half statutory maximum).

Mr. Aylward had a limited criminal history; his offender score was a “1.” The standard range sentence for first degree rape for Mr. Aylward is 240 to 318 months. Twenty-six and a half years in prison is a substantial sentence—even for crimes as disturbing as those presented here. The court’s intention at sentencing to impose a significant sentence is understandable, particularly in light of the video evidence of rape and molestation—which the appellant argues was unconstitutionally obtained and erroneously admitted, as argued in section 1, *supra*. However, the trial court nevertheless imposed almost four times the high end of the prison term by sentencing Mr. Aylward to 100 years in prison.

Twenty six and one half years in prison would result in Mr. Aylward’s incarceration until he is 72 years old, given his age of 45 at the time of sentencing. 13 RP at 622. His offenses, although horrific and beyond all boundaries of an acceptable society, are not so aggravated as to merit a life term. Imposition of a sentence within the standard range is sufficient to accomplish the goals of punishing Mr. Aylward and protecting D.D. and society in general. The length of a century-long sentence imposed therefore “shocks the conscience” and should be reversed for resentencing within the

standard range.

3. THE TRIAL COURT ABUSED ITS DISCRETION BY IMPOSING AN ORDER REQUIRING MR. AYLWARD NOT TO HAVE CONTACT WITH H.A. FOR LIFE

The Sentencing Reform Act of 1981, RCW 9.94A.505(8), authorizes the trial court to impose “crime-related prohibitions” as a condition of sentence. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008). On appeal, the imposition of crime-related prohibitions is reviewed for an abuse of discretion. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 229 P.3d 686 (2010).

A no-contact order with the victim is a crime-related prohibition. *State v. Armendariz*, 160 Wn.2d 106, 113, 156 P.3d 201 (2007) (defining “crime-related” to include no contact with the victim of a no-contact order violation who merely witnessed an assault). However, even a crime-related prohibition must comport with constitutional protections. Thus a crime-related prohibition that affects a fundamental right, such as the right of association, must be narrowly drawn, requiring there be no other way to achieve the State’s interests. *Warren*, 165 Wn.2d at 33-34.

The scope and duration of the prohibition is relevant. *Rainey*, 168 Wn.2d at 381. In *Warren*, the Court held a no-contact order reasonably

crime-related as to the mother of the two child victims of sexual abuse for which the defendant was convicted because the defendant attempted to induce the mother not to cooperate in the prosecution of the crime, she testified against the defendant, the defendant's criminal history included convictions for murder and for physically abusing her, and nothing in the record suggested she objected to the no-contact order. 165 Wn.2d at 33-34.

Here, on the other hand, the trial court imposed a blanket order prohibiting Mr. Aylward from having contact with H.A. for life. CP 311; 13 RP at 629. H.A., who testified at trial, told a school counselor about suspected sexual abuse of D.D. but otherwise was not a crime victim in the strictest sense of the word. The order by the court prohibiting contact fails to comport with the SRA because it is not crime-related. In addition, the duration of the no contact order constitutes an abuse of the trial court's discretion. "[A] no-contact order imposed for a month or a year is far less draconian than one imposed for several years or life." *Rainey*, 168 Wn.2d at 381. The court did not address the need for a lifetime prohibition against contact with H.A.

Division One of this Court limited a similarly broad no-contact order in *State v. Ancira*, 107 Wn. App. 650, 654-55, 27 P.3d 1246 (2001). There, upon conviction for violating a prior no-contact order as to appellant's wife, the court entered an order prohibiting contact with the appellant's children, who bore

witness to the domestic violence. *Id.* at 652-53. Division One held that the State failed to show that a complete ban on contact with the defendant's non-victim children was necessary to protect their safety or that accommodations such as supervised visits and indirect contact, such as through the mail, were not appropriate. *Id.*

In *State v. Corbett*, this Court upheld a no-contact provision barring contact with the defendant's sons where his step-daughter was the victim of the underlying crime. 158 Wn. App. 576, 598-601, 242 P.3d 52 (2010). However, in that case the prohibition was limited to a prohibition against unapproved contact with the defendant's sons. *Id.* at 601 n.14. Upon approval from supervisors, the defendant could have contact with them. *Id.*

In this case, the order prohibits all contact with H.A. for life. This Court should order it stricken based on the authorities cited above.

4. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.

If Mr. Aylward does not substantially prevail on appeal; he asks that no appellate costs be authorized under title 14 RAP. See RAP 14.2. The record does not show that he had any assets. The court imposed legal financial obligations including \$500.00 victim assessment and \$100.00 felony DNA collection fee. 13 RP at 631; CP 309-310.

The trial court found him indigent for purposes of this appeal. CP 329-330. There has been no order finding Mr. Aylward's financial condition has improved or is likely to improve since that finding.

Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." This Court has discretion to deny the State's request for appellate costs in the event this appeal is unsuccessful. Under RCW 10.73.160(1), appellate courts "may require an adult offender convicted of an offense to pay appellate costs." "[T]he word 'may' has a permissive or discretionary meaning." *State v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). The commissioner or clerk "will" award costs to the State if the State is the substantially prevailing party on review, "unless the appellate court directs otherwise in its decision terminating review." RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the State. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the concept that discretion should be exercised only in "compelling circumstances." *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In *Sinclair*, Division One concluded, "it is appropriate for this court to

consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant's brief." *Sinclair*, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. *Id.* at 392-94. Based on Mr. Aylward's continuing indigence, this Court should exercise its discretion and deny any requests for costs in the event the State is the substantially prevailing party.

E. CONCLUSION

For the reasons discussed above, this Court should reverse Mr. Aylward's convictions based on the unconstitutionally overbroad search warrant.

In the alternative, Mr. Aylward respectfully requests this Court to remand for resentencing within the standard range. This Court also should exercise its discretion and deny any request for appellate costs, should Mr. Aylward not prevail in his appeal.

DATED: March 23, 2017.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
ptiller@tillerlaw.com
Of Attorneys for John Aylward

CERTIFICATE

I certify that I sent by JIS a copy of the Brief of Appellant to Clerk of the Court, Court of Appeals, Division II and to Mark D. McClain, Deputy Prosecuting Attorney, and mailed copies, postage prepaid on March 23, 2017, to John Aylward at the following address:

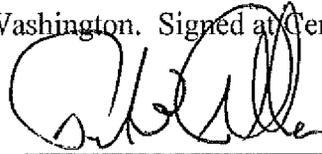
Mark D McClain
Pacific County Prosecuting Attorney
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Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. John Aylward DOC# 954145
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on March 23, 2017.



PETER B. TILLER

Appendix A

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FINDINGS OF FACT

Based on the evidence provided the Court hereby finds the following facts:

1. D.D. (DOB 7/24/08) testified that her step-father, John Aylward (DOB 3/5/70), sexually assaulted her on several occasions when she was seven years old. According to D.D., the sexual assaults began when she was three or four years old and continued until she was removed from Aylward's home. D.D. testified that Aylward told her that the assaults began when she was three or four, but her earliest recollection of the assaults was within the past two years or so.
2. D.D. testified in the child hearsay hearing, which was outside the presence of the jury, that Aylward taught her S.E.X. and "humping." The time, content, and circumstances of the statement provide sufficient indicia of reliability and the child testified, and is anticipated to testify at trial. The Defendant was provided adequate notice of this hearing and the particular statements alleged by D.D. and had sufficient time to prepare to meet the statements presented at the hearing, which are substantially contained herein and are otherwise noted herein by reference.
3. D.D. described these acts as occurring when she and Aylward were without clothing and that he would put his "privates" into her "privates." D.D. described privates as her "crotch" which is where she "pees." D.D. indicated Aylward's privates were also called his penis. D.D. further described instances where Aylward placed his penis into D.D.'s mouth. Further details were provided in the audio record which is incorporated herein by reference.

- 1 4. D.D. made clear disclosures that these sexual assaults occurred in her bedroom,
2 Aylward's bedroom, the bathroom, the shower, on the couch, in the van, and in
3 Aylward's tattoo shop.
- 5 5. D.D. was credible, clear, consistent in her disclosures, and could easily follow
6 questioning from both the Prosecutor and Defense Attorneys.
- 8 6. D.D. provided no body language or statements which would suggest that she was
9 being deceptive.
- 11 7. D.D. presented no bias towards either party and her testimony exhibited that she
12 had no motive to lie, there was no evidence that she was coached in any way, and
13 that she did not hesitate to give clear and consistent testimony regarding the sexual
14 assault allegations. D.D. is competent to testify and did testify competently.
- 16 8. This Court finds D.D. was extremely truthful and exhibited both in her testimony and
17 through the testimony of others that she has a character of truthfulness.
- 19 9. D.D. demonstrated she is capable of understanding the requirements to tell the truth
20 and that there are consequences for not telling the truth. D.D. also demonstrated
21 she is capable of understanding complex issues which may be beyond that of others
22 her same age.
- 24 10. D.D. made several disclosures regarding the sexual acts committed by Aylward in
25 both a forensic setting and to her foster mother shortly after being taken from her
26 family home.
- 28 11. Samantha Mitchell, with the Youth Advocacy Center of Lewis County, who is a
29

1 certified forensic interviewer, conducted two forensic interviews of D.D.. Mitchell
2 described the protocols used and further described the non-leading, non-suggestive
3 questioning utilized in this case. The interview style did not suggest Aylward
4 committed the acts. D.D.'s disclosures to the questions were consistent with her
5 testimony in court as she described the several sexual acts committed against her
6 by Aylward.
7

8
9 12. Lisa Wahl, A.R.N.P., with St. Peter's Hospital Sexual Assault and Maltreatment
10 Clinic, testified that she conducted a physical examination of D.D. and described
11 D.D. as a normally developed seven year old child (her age at the time of the
12 examination). Ms. Wahl testified that D.D. responded appropriately and intelligently
13 to her questioning and examination. D.D. disclosed Aylward taught her S.E.X. and
14 made further disclosures which are contained on the record and incorporated herein.
15

16
17 13. Pacific County Deputy Sean Eastham testify in support of the State's CrR 3.5 motion
18 to admit and in opposition to Defendant's motion to suppress the firearms pursuant
19 to his CrR 3.6 motion.
20

21 14. Deputy Eastham testified that on December 12, 2015 he, and Deputies Kendall
22 Biggs, Sam Schouten, and Mike Ray of the Pacific County Sheriff's Office executed
23 a search warrant (admitted into evidence through the parties motion and response to
24 the motion to suppress, and incorporated herein by reference) for media devices
25 (see warrant for specific details). When Deputies entered Aylward's residence, he
26 was placed in custody, but informed that he was not under arrest. Aylward was
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1 provided his *Miranda* warning by Deputy Eastham from his Department issued
2 *Miranda* card (a copy of which was admitted into evidence and is incorporated
3 herein by reference). Aylward was read his warnings slowly, clearly, and
4 completely. Aylward was not under the influence of any drugs or alcohol and
5 demonstrated that he understood his *Miranda*¹ warnings (a copy of which was
6 admitted as Exhibit C).

9 15. Aylward, his wife, Danielle, and the children were placed on a couch while the
10 Deputies executed the search warrant. A .22 caliber bullet was found on Aylward,
11 but was not retained by the Deputy.

13 16. While searching Deputies located in open view three firearms in Aylward's
14 office/work space. Deputy Biggs testified that in advance of execution of the search
15 warrant (two or three days before), he confirmed that Aylward was a convicted felon
16 and had served approximately 12 or 14 months in prison. While still executing the
17 warrant Deputy Biggs again confirmed Aylward was previously convicted of a felony
18 offense and communicated this to the other Deputies who were still in the process of
19 executing the warrant. Aylward also admitted, post-*Miranda*, that he had a prior
20 felony conviction. Without moving or otherwise manipulating the firearms, they were
21 determined to be illegal contraband and seized. First a photograph was taken of the
22 firearms in place, they were then seized and entered into evidence by Deputy
23 Eastham.

28
29 ¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966)

- 1 17. Deputies secured the evidence located at Aylward's residence and left without
2 arresting Aylward.
3
- 4 18. Deputy Eastham was able to open the media devices seized pursuant to the warrant
5 and determined that there were videos which depicted Aylward having sexual
6 intercourse with his then seven year old step-daughter, D.D., along with other
7 images of adult and child pornography. With this evidence, on January 7, 2016
8 Deputy Eastham contacted Aylward at his residence and placed him in custody.
9
- 10 19. Deputy Eastham read Aylward his *Miranda* warnings (see admitted exhibit), which
11 Aylward acknowledged and waived. Aylward was transported to the Pacific County
12 Sheriff's Office. Once there, Aylward was provided (exhibit B) Incorporated herein
13 by reference) entitled "Voluntary Statement."
14
- 15 20. Deputy Eastham testified that he read the entire statement to Aylward. Aylward
16 understood the warnings contained on the statement form and signed that he
17 understood and acknowledged his *Miranda* rights. Aylward testified (with the CrR
18 3.5(b) warnings provided in court) that he did not recall having the *Miranda* rights
19 read to him, that he had been awake for three to four days and only recently went to
20 sleep before being arrested by Deputy Eastham. Aylward agreed that he had signed
21 the statement under his *Miranda* rights.
22
- 23 21. During the recorded interview, Aylward admitted that D.D. was his daughter and that
24 his wife was Danielle Aylward. Aylward also admitted giving Deputy Eastham the
25 passwords for the phone, but could not recall where he got the phone. Aylward also
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1 denied knowing there was child pornography on the phone, but did confirm the blue
2 memory card located in the drawer of the hutch and that it was located and seized
3 during the execution of the search warrant. Aylward acknowledged seeing the item
4 taken by the Deputy, but asserted he had no idea what was on the card.
5

6
7 22. Aylward denied molesting or inappropriate touching of D.D..

8 23. Aylward was shown images from these devices, specifically 12 images which
9 showed Aylward engage in oral sex with D.D. and D.D. masturbating Aylward. The
10 white cell phone, with D.D. observing pornography, is visible in the video and was
11 shown to Aylward.
12

13 24. Aylward said that "he didn't remember" and "that it was the meth."
14

15 25. Aylward was emotional and said he wanted to talk with an attorney. Consequently,
16 Deputy Eastham concluded the interview. However, within a few minutes Aylward
17 re-initiated contact with Deputy Eastham by calling the Deputy over to where
18 Aylward was sitting.
19

20 26. According to Deputy Eastham, Aylward was reminded of his Miranda warnings with
21 words to the effect of, "you remember your rights?" And "do you want to talk with an
22 attorney or do you want to talk about what happened." Aylward denied this is how
23 the interaction occurred. Aylward made additional statements during this portion of
24 the interview.
25

26
27 27. This Court finds that Deputy Eastham's testimony was credible and Aylward's
28 testimony was not credible based on the manner in which they testified, the difficulty
29

1 he had recalling what occurred, and his testimony that he was under the influence of
2 methamphetamine for days prior to the interview. Further, Aylward's testimony and
3 recollection of the events was sketchy, at best, and certainly suspect in the Court's
4 view. Aylward asserts he was delirious. It is the Court's finding that the Officer's
5 memory was superior, more credible, and more logical than Aylward's, and the officer
6 did not in any way intimidate, trick, or otherwise attempt to induce Aylward into
7 further discussion about this incident. The State's analysis is adopted as a finding of
8 fact by this Court and is incorporated herein by reference.²

9
10
11
12 28. The State admitted, without objection, exhibit A, which contained three recordings
13 Aylward made while in custody at the Pacific County Jail. The recording clearly
14 announces on each that the call is subject to recording. These recordings are
15 admissible and Aylward stipulated, subject to foundation, that they are admissible.
16
17

18
19 CONCLUSIONS OF LAW

- 20 1. This Court has jurisdiction over this matter.
21
22 2. Pursuant to RCW 9A.44.120 the statements of D.D. shall be properly admitted by
23 the State in its case-in-chief as the State has satisfied the *Ryan* factors as noted
24 in the Findings above.
25
26 3. In addition to the Court's "Order on CrR 3.6 RE: SEARCH WARRANT and CrR
27 3.5 RE; THREE JAIL CALLS" entered on August 25, 2016 this Court also

28
29 ² The State has agreed not to utilize the "second portion" or portion after Aylward requested an attorney at trial.

1 concludes as follows:

- 2
- 3 4. The affidavit in support of the search warrant, admitted into evidence as part of
- 4 the State's reply and incorporated herein by reference, contains facts and
- 5 circumstances sufficient to establish a reasonable inference that the defendant
- 6 was involved in criminal activity and that evidence of the criminal activity could be
- 7 found at the place to be searched.
- 8
- 9 ~~5.~~ 5. The warrant was properly granted and the Defendant has failed to meet his
- 10 burden of demonstrating the facts were insufficient.
- 11
- 12 ~~6.~~ 6. There was sufficient information contained within the affidavit to establish a
- 13 nexus between Aylward's use of the cell phone to initiate sexual contact with
- 14 D.D. and as a result the warrant was properly granted.
- 15
- 16 ~~7.~~ 7. The firearms were in open view and properly seized.
- 17
- 18 ~~8.~~ 8. The recordings from Aylward which are contained on Exhibit A are admissible.
- 19
- 20 ~~9.~~ 9. Any conclusions of law which are findings of fact should be treated as such, as
- 21 should any conclusion of law which is more appropriately a finding of fact should
- 22 be treated as such.

23 ORDER

24 It is hereby the Order of the Court that Mr. Aylward's motion to suppress is

25 denied.

26

27 It is further ordered that the State's motion to admit child hearsay statements is

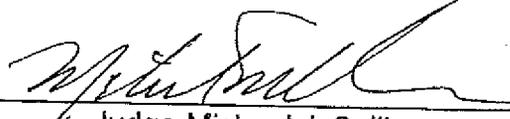
28 granted.

29

30 COURT'S FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND ORDER
REGARDING STATE'S MOTION TO ADMIT
CHILD HEARSAY STATEMENTS; CrR 3.5; AND
CrR 3.6 MOTION TO SUPPRESS-- Page 9 of 10

PACIFIC COUNTY
PROSECUTING ATTORNEY
300 Memorial Avenue/PO Box 45
South Bend, WA 98586
360-875-9361 (Voice) 360-875-9362 (Fax)

1 Decided: This 26th day of August, 2016 and signed this 9th day of September,
2 2016.

3
4 
5 _____
6 Judge Michael J. Sullivan

7 Presented by:

8 
9 _____
10 Mark McClain, WSBA#30909
11 Prosecuting Attorney

12 And by:

13 
14 _____
15 Harold Karlsvik, WSBA#23026
16 Attorney for Defendant

17 *As to form*
18 _____

Appendix B

FILED

2016 OCT -7 PM 4:55

CLERK OF SUPERIOR COURT
PACIFIC COUNTY, WA

BY all DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PACIFIC

STATE OF WASHINGTON,

Plaintiff,

vs.

JOHN K.L. AYLWARD,

Defendant,

Cause No. 16-1-00013-2

**COURT'S FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND VERDICT**

A Bench Trial was conducted on September 19, 2016 and September 20, 2016. The Court, after fully considering the briefing and argument of counsel, considering evidence and testimony submitted, and being fully advised on the matter, hereby makes the following Findings of Fact, Conclusions of Law, and after considering the same, renders the following Verdict:

FINDINGS OF FACT

Based on the evidence provided the Court hereby finds the following facts:

1. John K.L. Aylward was born on March 5, 1971.
2. D.D. was born on July 24, 2008.
3. John K.L. Aylward, at all times between January 1, 2014 and December 31, 2015,

COURT'S FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND VERDICT

PACIFIC COUNTY
PROSECUTING ATTORNEY
300 Memorial Avenue/PO Box 45
South Bend, WA 98586
360-875-9361 (Voice) 360-875-9362 (Fax)

1 was married to D.M.A. (DOB: January 8, 1977).¹

2
3 4. D.D. and John K.L. Aylward were not married to each other.

4 5. Between January 1, 2014 and December 31, 2015, D.D. was the step-daughter of
5 John K.L. Aylward.

6
7 6. D.D. is at least 24 months younger than John K.L. Aylward and was so during all times
8 relevant to the charges in the Third Amended Information.

9
10 7. D.D.'s bedroom, as it relates to counts 1 and 7 of the Third Amended Information, is
11 in John K.L. Aylward and D.M.A.'s residence on "N Street" in Ocean Park, State of
12 Washington.

13
14 8. John K.L. Aylward and D.M.A.'s bedroom, as it relates to counts 2 and 8 of the Third
15 Amended Information, is in John K.L. Aylward and D.M.A.'s residence on "N Street"
16 in Ocean Park, State of Washington.

17
18 9. The couch, which relates to counts 3 and 9 of the Third Amended Information, is in
19 John K.L. Aylward and D.M.A.'s residence on "N Street" in Ocean Park, State of
20 Washington.

21
22 10. John K.L. Aylward's "tattoo shop," as it relates to counts 4 and 10 of the Third
23 Amended Information, is either in Long Beach or Ocean Park, both of which are in the
24 State of Washington.

25
26 11. John K.L. Aylward, between January 1, 2014 and December 31, 2015, owned a white
27 GMC van. This van contained a bench seat which resembled a couch to the victim,
28

29 ¹ Initials used in place of victim's mother to protect the identity of the minor.

1 and a bench seat to the victim's mother. As it relates to counts 5 and 11 of the Third
2 Amended Information, at the time of the commission of the Rape of a Child in the First
3 Degree and First Degree Incest committed in the van, the van was located in the State
4 of Washington.
5

6
7 12. The residence on "Birch," which was referenced as D.M.A.'s friend's home, as it
8 relates to counts 6 and 12 of the Third Amended Information, where John K.L. Aylward
9 and D.D. went to feed the dog, is in Ocean Park, State of Washington.

10
11 13. As it relates to counts 1 and 7 of the Third Amended Information, between January 1,
12 2014 and December 31, 2015, John K.L. Aylward, had sexual intercourse with D.D. in
13 D.D.'s bedroom. At the time of the intercourse D.D. was under twelve years of age,
14 not married to John K.L. Aylward, who was at least 24 months older than D.D. at the
15 time of the sexual intercourse.
16

17 14. As it relates to counts 2 and 8 of the Third Amended Information, between January 1,
18 2014 and December 31, 2015, John K.L. Aylward had sexual intercourse with D.D. in
19 John K.L. Aylward and D.A.M.'s bedroom. At the time of the intercourse D.D. was
20 under twelve years of age, not married to John K.L. Aylward, who was at least 24
21 months older than D.D. at the time of the sexual intercourse.
22

23
24 15. As it relates to counts 3 and 9 of the Third Amended Information, between January 1,
25 2014 and December 31, 2015, John K.L. Aylward had sexual intercourse with D.D.
26 on the couch which is in the living room in John K.L. Aylward and D.M.A.s residence.
27 At the time of the intercourse D.D. was under twelve years of age, not married to John
28

1 K.L. Aylward, who was at least 24 months older than D.D. at the time of the sexual
2 intercourse.
3

4 16. As it relates to counts 4 and 10 of the Third Amended Information, between January
5 1, 2014 and December 31, 2015, John K.L. Aylward had sexual intercourse with D.D.
6 in John K.L. Aylward's tattoo shop. At the time of the intercourse D.D. was under
7 twelve years of age, not married to John K.L. Aylward, who was at least 24 months
8 older than D.D. at the time of the sexual intercourse.
9

10 17. As it relates to counts 5 and 11 of the Third Amended Information, between January
11 1, 2014 and December 31, 2015, John K.L. Aylward had sexual intercourse with D.D.
12 in John K.L. Aylward's white GMC van. At the time of the intercourse D.D. was under
13 twelve years of age, not married to John K.L. Aylward, who was at least 24 months
14 older than D.D. at the time of the sexual intercourse.
15

16 18. As it relates to counts 6 and 12 of the Third Amended Information, between January
17 1, 2014 and December 31, 2015, John K.L. Aylward had sexual intercourse with D.D.
18 in the Birch Street home of D.M.A.'s friend. At the time of the intercourse D.D. was
19 under twelve years of age, not married to John K.L. Aylward, who was at least 24
20 months older than D.D. at the time of the sexual intercourse.
21

22 19. As it relates to count 13 of the Third Amended Information, between January 1, 2014
23 and December 31, 2015, John K.L. Aylward aided, invited, authorized, or caused D.D.
24 who was a minor at the time, to engage in sexually explicit conduct.
25

26 20. At that time, John K.L. Aylward was the parent, guardian, or person in control of D.D.
27
28
29
30

1 and he permitted D.D. who was a minor at the time, to engage in sexually explicit
2 conduct.
3

4 21. In findings 19 and 20, John K.L. Aylward knew the conduct would be photographed
5 because it is evident from the video that John K.L. Aylward was holding and/or
6 maneuvering the recording device so that it would capture D.D. while engaged in, and
7 performing, sexually explicit acts or conduct.
8

9 22. As to count 13, the acts were filmed in John K.L. Aylward's bedroom, which is in the
10 State of Washington. It is evident that this was filmed in Aylward's bedroom because
11 there are several objects in the room, including the built-in dresser, which were
12 identified as the Aylward bedroom by the victim, D.D., and by her mother, D.M.A. Also
13 in this video being used on D.D.'s vagina, was D.M.A.'s sexual device which had been
14 given to her by John K.L. Aylward. D.D. was also holding John K.L. Aylward's cell
15 phone which, at the time, was playing pornographic images for D.D. to watch as
16 Aylward performed sex acts on D.D. These acts includes sexual intercourse which
17 included oral-genital contact and penile-vaginal intercourse.
18
19

20
21 23. As it relates to count 14 of the Third Amended Information, between January 1, 2014
22 and December 31, 2015, John K.L. Aylward aided, invited, authorized, or caused D.D.,
23 who was a minor at the time, to engage in sexually explicit conduct.
24

25 24. As it relates to count 14, John K.L. Aylward was the parent, guardian, or person in
26 control of D.D. and he permitted D.D. who was a minor at the time, to engage in
27 sexually explicit conduct.
28
29

1 25. In findings 23 and 24, John K.L. Aylward knew the conduct would be photographed
2 because it is evident from the video that John K.L. Aylward was holding and/or
3 maneuvering the recording device so that it would capture D.D. while engaged in, and
4 performing, sexually explicit acts or conduct.
5

6 26. As it relates to count 14, the acts occurred in John K.L. Aylward's bedroom, which is
7 in the State of Washington. It is evident that this was filmed in Aylward's bedroom
8 because there are several objects in the room, including the built-in dresser, which
9 were identified as the Aylward bedroom by the victim, D.D. and by her mother, D.M.A..
10 Also in this video being used on D.D.'s vagina, was D.A.M.'s sexual device which had
11 been given to her by John K.L. Aylward. D.D. is also holding Aylward's cell phone
12 which is displaying pornographic images.
13

14 27. As it relates to count 15 of the Third Amended Information, between January 1, 2014
15 and December 31, 2015, John K.L. Aylward aided, invited, authorized, or caused D.D.
16 who was a minor at the time, to engage in sexually explicit conduct.
17

18 28. As it relates to count 15, John K.L. Aylward was the parent, guardian, or person in
19 control of D.D. and he permitted D.D. who was a minor at the time, to engage in
20 sexually explicit conduct.
21

22 29. As it relates to count 15, John K.L. Aylward knew the conduct would be photographed
23 because it is evident from the video that John K.L. Aylward was holding and/or
24 maneuvering the recording device so that it would capture D.D. while engaged in, and
25 performing, sexually explicit acts or conduct.
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1 30. As it relates to count 15, these acts occurred in John K.L. Aylward's bedroom, which
2 is in the State of Washington. It is evident that this was filmed in Aylward's bedroom
3 because there are several objects in the room, including the built-in dresser, which
4 were identified as the Aylward bedroom by the victim, D.D, and by her mother, D.M.A..
5 Also in this video being used on D.D.'s vagina, was D.M.A.'s sexual device which had
6 been given to her by John K.L. Aylward.
7

8
9 31. The videos containing the acts related to counts 13, 14, and 15, were stored on a blue
10 2 gigabyte SD card. Also on this SD card were images of John K.L. Aylward's first
11 wife's recent wedding. This SD card was located by Pacific County Sheriff Deputy
12 Sean Eastham in a hutch in the living room of the Defendant's home. The hutch
13 contained an upper open section then a bank of drawers. Deputy Eastham pulled the
14 drawer entirely out of the hutch and located the SD card hidden in the vacant space
15 between the drawers. The SD card was not tampered with and was introduced into
16 evidence in the same condition as it was when located by the Deputy.
17
18
19

20 32. After being booked into custody Aylward made a telephone call to a friend, asking
21 that his friend search the hutch for items to sell. Aylward stated on the recording that
22 he hid the items in the hutch in the living room. Aylward hides items in this hutch
23 where the blue 2 gigabyte SD card was located.
24

25 33. As it relates to count 16 if the Third Amended Information, on or between January 1,
26 2014 and December 31, 2015, John K.L. Aylward did knowingly duplicate a matter
27 depicting a minor engaged in sexually explicit conduct. John K.L. Aylward knew the
28
29
30

1 person depicted was a minor. John K.L. Aylward owned and possessed a white
2 cellphone which was admitted into evidence. This cellphone was Aylward's cell phone
3 and it was password protected. A phone which is password protected prohibits
4 another from accessing the contents of the phone. Only Aylward knew the password
5 on this cell phone. This cellphone was used to access the internet. Inside this
6 cellphone was a 32 gigabyte mini-SD card which was completely full. A "mini-SD card"
7 is a storage device. On this mini SD card were 1700 stored images. The only way for
8 an image to be stored on this SD card is for the image to be physically duplicated and
9 thereby stored on this storage device. On this SD card were images of the Defendant,
10 his family, including his wife and the victim of this offense, his tattoo work, and dozens
11 or more images of minors in actual acts of sexual intercourse, including oral-genital,
12 genital-genital sexual acts. The minors depicted in these images were under 7 or 8
13 years old. It was obvious to the Court based on the size and development of the
14 children that they were minors. This Court finds the four images shown from the mini-
15 SD card were videos of minor children engaged in oral-genital and genital-genital
16 sexual intercourse. Aylward knew the persons depicted in these images were minors.
17 Aylward knowingly duplicated these images by storing them on an SD card. This
18 occurred in the State of Washington.

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25 34. As it relates to count 17 if the Third Amended Information, on or between January 1,
26 2014 and December 31, 2015, John K.L. Aylward did knowingly possess visual
27 material depicting a minor engaged in sexually explicit conduct. John K.L. Aylward
28
29

1 knew the person depicted was a minor. John K.L. Aylward owned and possessed a
2 white cellphone which was admitted into evidence. This cellphone was Aylward's cell
3 phone and it was password protected. A phone which is password protected prohibits
4 another form accessing the contents of the phone. Only Aylward knew the password
5 on this cell phone. This cellphone was used to access the internet. Inside this
6 cellphone was a 32 gigabyte mini-SD card which was completely full. A "mini-SD card"
7 is a storage device. On this mini SD card where 1700 stored images. The only way
8 for an image to be stored on this SD card is for the image to be physically duplicated
9 and thereby stored on this storage device. On this SD card were images of the
10 Defendant, his family, including his wife and the victim of this offense, his tattoo work,
11 and dozens or more images of minors in actual acts of sexual intercourse, including
12 oral-genital, genital-genital sexual acts. The minors depicted in these images were
13 under 7 or 8 years old. It was obvious to the Court based on the size and development
14 of the children that they were minors. This Court finds the four images shown from the
15 mini-SD card were videos of minor children engaged in oral-genital and genital-genital
16 sexual intercourse. Aylward knew the persons depicted in these images were minors.
17 Aylward knowingly possessed these images by storing them on an mini SD card. This
18 occurred in the State of Washington.

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25 35. As it relates to count 18 of the Third Amended Information, on December 12, 2015
26 John K.L. Aylward did knowingly own or have in his possession three firearms, a
27 Mossberg .22 magnum rifle, a Remington model 760 .270 rifle, and a Hi-Point model
28
29
30

1 CF 380 .380 pistol. The substitution of a photograph in place of the firearms was
2 stipulated.
3

4 36. The ownership and the possession of these firearms occurred in the State of
5 Washington. At the time of the ownership and possession, John K.L. Aylward was
6 prohibited from owning, possessing, or controlling a firearm as a result of his January
7 20, 2009 conviction for felony violation of a domestic violence protection order in
8 Pacific County Cause Number 08-1-00164-2. John K.L. Aylward stipulated to this
9 previous felony conviction. A certified copy of John K.L. Aylward's felony Judgement
10 and Sentence was admitted as exhibit 1 and demonstrates that he was properly
11 advised that he was prohibited from owning, possessing, or controlling a firearm.
12
13

14 37. Each of these firearms are working firearms capable of firing a projectile by an
15 explosion. Pacific County Deputy James Bergstrom "test-fired" each firearm by
16 shooting two projectiles (bullets) from each of the three firearms.
17
18

19 38. On December 12, 2015 these three firearms were located in John K.L. Aylward's "work
20 room," which is in his residence in Ocean Park, State of Washington.

21 39. John K.L. Aylward's "work room" is off limits to other members of his family and is
22 cluttered with his personal items, as noted in the photographs admitted into evidence,
23 including his wallet which contained his driver's licensē. His wallet was located within
24 feet of the three firearms.
25

26 40. John K.L. Aylward was also observed shooting the .22 caliber rifle at squirrels at his
27 residence by his wife, D.M.A.. D.M.A. was certain it was the .22 caliber rifle admitted
28
29

1 (by stipulation as a photograph in place of the actual firearms) because of its unique
2 configuration, having a flashlight on the front and a scope.
3

4 41. On December 12, 2015, when the Deputies seized the firearm, John K.L. Aylward had
5 two unfired .22 caliber bullets in his pocket.
6

7 42. Counts 1 through 15 were charged with the following aggravating circumstances
8 pursuant to RCW 9.94A.535(3)(b): The defendant knew or should have known that
9 the victim of the current offense was particularly vulnerable or incapable of resistance;
10 (n) The defendant used his or her position of trust, confidence, or fiduciary
11 responsibility to facilitate the commission of the current offense; (p) The offense
12 involved an invasion of the victim's privacy; (h) the current offense involved domestic
13 violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110,
14 and one or more of the following was present: (i) The offense was part of an ongoing
15 pattern of psychological, physical, or sexual abuse of a victim or multiple victims
16 manifested by multiple incidents over a prolonged period of time. Relative to these
17 aggravating circumstances the court finds as follows:
18
19
20

21 43. D.D. is a particularly vulnerable victim and Aylward was aware of this fact. Her
22 vulnerability was a substantial and compelling reason for Aylward's crimes and her
23 vulnerability allowed Aylward to commit these offenses.
24

25 44. Aylward cultivated a physical, sexual relationship with D.D. when she was 3 or 4 years
26 old. This normalized these acts for this child. These sexual acts continued throughout
27 her life until she was taken from her home.
28
29
30

1 45. This early indoctrination into physical intimacy made her particularly vulnerable to
2 future offenses of child rape committed by her step-father.
3

4 46. It is evident in the videos which depict D.D. and Aylward in that she expresses no
5 resistance or discomfort to the acts which Aylward caused her to perform. Even when
6 she is moved to face the video recorder or pulled from one place to another, she
7 merely lets it happen without any hesitation. It was as if she had done these acts on
8 a daily basis her entire life. Because of this, D.D. was particularly vulnerable.
9

10 47. Because of D.D.'s extreme youth, small size (being under five feet tall and of slight
11 build), especially in comparison to Aylward's 200+ pound frame and six feet of height,
12 D.D. was particularly vulnerable to Aylward, and these were among the reasons he
13 committed this act against D.D..
14
15

16 48. Aylward was perceived by D.D. to be her father, rendering them on unequal footing
17 and making her particularly more vulnerable to his requests for sexual acts. Aylward
18 utilized this fact to sexually assault her. This was bolstered by Aylward's use of
19 rewards of special treatment, in using the phone, taking her alone into his bedroom,
20 gave her special attention which cultivated her affinity for Aylward and this began as
21 early as four years old. Because it is clear D.D. was abused for years by Aylward,
22 she was more vulnerable to his sexual assaults than another would be under the same
23 circumstances. Aylward was aware of this and it appears from this Court that he
24 cultivated this position in D.D.'s life. This was evident to this Court in the way D.D.
25 testified. Her manner in testifying did not demonstrate any animosity towards Aylward.
26
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1 In fact, it appears that she still cares for Aylward. Further, her apprehension in "telling
2 her secret" (which is obviously about the sexual abuse) was because she did not want
3 Aylward to get into trouble. D.D. further indicated that Aylward told her not to tell. This
4 also made her more vulnerable as she could not seek help from those closest to her.
5

6
7 49. D.D. was very young during the time of the abuse and her age was a factor much
8 made her more vulnerable to Aylward's sexual assaults which appears from this Court
9 to be a substantial factors enabling him to commit each of these offenses against her.
10 This Court finds beyond a reasonable doubt that the State has proven D.D. was a
11 particularly vulnerable victim and that Aylward was aware of this fact and it was this
12 fact that was a substantial and compelling reason for John K.L. Aylward's commission
13 of these offenses in counts 1 through 15 as alleged in the third Amended Information.
14

15
16 50. Aylward utilized his position of trust as D.D.'s step-father to commit counts 1 through
17 15. The position of trust is not an inherent in these offenses.
18

19 51. D.D. did not know her father, but instead, because Aylward and her mother were
20 together from the time D.D. was under one year old, she considered Aylward her
21 father. As such, he was able to use this position of trust to secure private time with
22 D.D. without her mother's involvement or presence. Aylward clearly cultivated a close
23 relationship with D.D. in order to accomplish these offenses. His ability to have D.D.
24 "keep their secret" demonstrates the trust that developed between D.D. and Aylward
25 and as a result he was able to have her do things that an ordinary 7 year old girl would
26 not do or be comfortable doing. This court finds that the State has proven beyond a
27
28
29

1 reasonable doubt as to this aggravator for each offense in counts 1 through 15 that
2 John K.L. Aylward utilized his position of trust to commit these offenses against D.D.,
3

4 52. Aylward, in committing the offenses in counts 1 through 15, invaded D.D.'s privacy.

5 Aylward invaded her body while she was in the most vulnerable and private places
6 possible for a child: her bedroom at her family home, and that of her mother's
7 bedroom. D.D. was forced to contend with having the privacy of her body invaded,
8 for example, at the tattoo shop. Aylward recorded D.D. performing oral sex on him
9 and when he finished Aylward had D.D. watch what he had done to her. This appears
10 to be common for Aylward from the several videos saved and D.D. watching them,
11 including watching sexual videos of Aylward and her mother. As to each of these
12 counts, Aylward invaded D.D.'s privacy. This court finds that the State has proven
13 beyond a reasonable doubt as to this aggravating factor for each count in 1 through
14 15 that John K.L. Aylward invaded the privacy of D.D..
15
16
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18

19 53. In counts 1 through 15, D.D. and John K.L. Aylward are family or household members.

20 54. Counts 1 through 15 involved domestic violence and each offense, separately,
21 evidenced and was part of an ongoing pattern of sexual abuse of the victim manifested
22 by multiple instances over a prolonged period of time.
23

24 55. It is evident that John K.L. Aylward began sexually assaulting D.D. when she was 3
25 or 4 years old and the sexual abuse continued until she was 7 years old. The
26 victimization was so frequent that it is evident the sexual interaction between father
27 and step-daughter was commonplace for this victim.
28
29
30

1 56. The State has proven beyond a reasonable doubt as to each aggravated allegation in
2 counts 1 through 15 involved domestic violence as defined by RCW 10.99.020, and
3 that the offense in counts 1 through 15, separately, was part of an ongoing pattern of
4 sexual abuse of the victim manifested by multiple incidents over a prolonged period
5 of time pursuant to RCW 9.94A.535(3)(i).
6

7
8 57. John K.L. Aylward committed multiple current offenses and the defendant's high
9 offender score results in some of the current offenses going unpunished. This Court
10 makes this finding as to each offense in the Third Amended Information, counts 1
11 through 18.
12

13 58. Since this Court is in the best possible vantage point to consider and view the
14 testimony of witnesses, this Court wants to elaborate upon this Court's finding that
15 D.D. was a credible witness.
16

17 59. D.D. demonstrated absolutely no evidence that she was in any way coached in her
18 testimony or disclosures.
19

20 60. D.D. demonstrated an understanding of what the truth is and her obligation to tell the
21 truth and this Court finds she is a competent witness.
22

23 61. D.D. did not hesitate to ask questions when she was uncertain of what was being
24 asked of her, nor did she have any difficulty seeking clarification of the questions
25 asked of her when necessary. She demonstrated a clear understanding the concepts
26 being discussed, including the concepts of sexual acts, including male and female
27 anatomy in general and genitalia specifically.
28

1 62. D.D. was credible.

2
3 63. Count 13, 14, and 15 occurred on a separate days and are separate and distinct acts
4 and conduct as is evident from the film content and lightening.

5 64. Any finding of fact which is a conclusion of law should be consider as such; and each
6 conclusion of law which would be more appropriately considered a finding fact should
7 be considered as such.
8

9
10 CONCLUSIONS OF LAW

11 1. This Court has jurisdiction over this matter.

12 2. Each offense is a separate offense.

13
14 3. Each aggravating factor is a separate finding as to each separate offense, and
15 each separate aggravating factor.

16
17 4. The evidence in each of these counts, 1 through 18, as well as each aggravating
18 factor in each count, was overwhelming and proven beyond a reasonable doubt.

19 5. It is clear to this Court that the defendant committed Rape of a Child in the First
20 Degree, Incest in the First Degree, Sexual Exploitation of a Minor, Dealing in
21 Depictions of a Minor Engaged in Sexually Explicit Conduct, and Possession of
22 Depictions of a Minor Engaged in Sexually Explicit Conduct much more frequently
23 than reflected in the number of crimes charged. That said, this Court finds and
24 concludes that the State has proven beyond a reasonable doubt that at least one,
25 unique event of Rape of a Child in the First Degree occurred in each of the counts
26 1 through 6. This Court also finds and concludes that the State has proven beyond
27
28
29

30 COURT'S FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND VERDICT

1 a reasonable doubt that at least one, unique event of Incest in the First Degree
2 occurred in each of the counts 7 through 12. This Court also finds and concludes
3 that the State has proven beyond a reasonable doubt that at least one, unique
4 event of Sexual Exploitation of a Minor occurred in each of the counts 13 through
5 15. This Court also finds and concludes that the State has proven beyond a
6 reasonable doubt that at least one, unique event of Dealing in Depictions of a Minor
7 Engaged in Sexually Explicit Conduct occurred in count 16. This Court also finds
8 and concludes that the State has proven beyond a reasonable doubt that at least
9 one, unique event of Possession of Depictions of a Minor Engaged in Sexually
10 Explicit Conduct occurred in count 17.

11 6. As for Counts 16 and 17, while the state need not prove that the defendant knew
12 that the images depicted minors (RCW 9.68A.110(2)), the state did so prove.

13 7. The image files on the mini-SD card are "visual or printed matter" for purposes of
14 counts 16 and 17. *State v. Rosul*, 95 Wn.App. 175, 185-86, 974 P.2d 916 (1999)
15 *review denied* 135 Wn.2d 1006.

16 8. This Court affirms its intention to impose an exceptional sentence. This Court is
17 expressly stating that the same exceptional sentence would be imposed based on
18 any one of the above aggravating factors standing alone.²

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26 VERDICT

27
28 ² This Court is making this finding to ensure that any reviewing Court understands this Court's rational in
29 affixing the punishment which follows. See *State v. Weller*, 185 Wn.App. 913, 930, 344 P.3d 695, *review*
30 *denied*, 183 Wn.2d 1010, 352 P.3d 188 (2015).

1
2 As to each of the verdicts below, this Court finds beyond a reasonable doubt as to
3 each element of the offense. This Court further finds beyond a reasonable doubt as to
4 each element of each the aggravating factors. The Court's verdict is as follows:
5

6
7 1. This Court finds John K.L. Aylward guilty of rape of a child in the first degree,
8 occurring between January 1, 2014 and December 31, 2015 occurring in D.D.'s
9 bedroom, as alleged in count 1 of the Third Amended Information.

10 a. D.D. and John K.L. Aylward were members of the same family or
11 household.

12 b. John K.L. Aylward knew or should have known that the victim was
13 particularly vulnerable or incapable of resistance.

14 c. John K.L. Aylward used his position of trust or confidence to facilitate the
15 commission of the crime.

16 d. This crime involved an invasion of D.D.'s privacy.

17 e. This crime is an aggravated domestic violence offense.

18 f. The defendant's high offender score results in some of the current offenses
19 going unpunished.
20

21
22 2. This Court finds John K.L. Aylward guilty of rape of a child in the first degree,
23 occurring between January 1, 2014 and December 31, 2015 in John K.L. Aylward's
24 bedroom, as alleged in count 2 of the Third Amended Information.

25 a. D.D. and John K.L. Aylward were members of the same family or
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1 household.

2
3 b. John K.L. Aylward knew or should have known that the victim was
4 particularly vulnerable or incapable of resistance.

5 c. John K.L. Aylward used his position of trust or confidence to facilitate the
6 commission of the crime.

7
8 d. This crime involved an invasion of D.D.'s privacy.

9 e. This crime is an aggravated domestic violence offense.

10 f. The defendant's high offender score results in some of the current offenses
11 going unpunished.
12

13
14 3. This Court finds John K.L. Aylward guilty of rape of a child in the first degree,
15 occurring between January 1, 2014 and December 31, 2015 on the couch in the
16 Aylward home, as alleged in count 3 of the Third Amended Information.
17

18 a. D.D. and John K.L. Aylward were members of the same family or
19 household.

20 b. John K.L. Aylward knew or should have known that the victim was
21 particularly vulnerable or incapable of resistance.

22 c. John K.L. Aylward used his position of trust or confidence to facilitate the
23 commission of the crime.

24
25 d. This crime involved an invasion of D.D.'s privacy.

26 e. This crime is an aggravated domestic violence offense.

27 f. The defendant's high offender score results in some of the current offenses
28
29

1 going unpunished.
2

3 4. This Court finds John K.L. Aylward guilty of rape of a child in the first degree,
4 occurring between January 1, 2014 and December 31, 2015 in the tattoo shop, as
5 alleged in count 4 of the Third Amended Information.
6

7 a. D.D. and John K.L. Aylward were members of the same family or
8 household.
9

10 b. John K.L. Aylward knew or should have known that the victim was
11 particularly vulnerable or incapable of resistance.
12

13 c. John K.L. Aylward used his position of trust or confidence to facilitate the
14 commission of the crime.
15

16 d. This crime involved an invasion of D.D.'s privacy.
17

18 e. This crime is an aggravated domestic violence offense.
19

20 f. The defendant's high offender score results in some of the current offenses
21 going unpunished.
22

23 5. This Court finds John K.L. Aylward guilty of rape of a child in the first degree,
24 occurring between January 1, 2014 and December 31, 2015 in John K.L. Aylward's
25 van, as alleged in count 5 of the Third Amended Information.
26

27 a. D.D. and John K.L. Aylward were members of the same family or
28 household.
29

30 b. John K.L. Aylward knew or should have known that the victim was

1 particularly vulnerable or incapable of resistance.

2
3 c. John K.L. Aylward used his position of trust or confidence to facilitate the
4 commission of the crime.

5 d. This crime involved an invasion of D.D.'s privacy.

6
7 e. This crime is an aggravated domestic violence offense.

8 f. The defendant's high offender score results in some of the current offenses
9 going unpunished.

10
11 6. This Court finds John K.L. Aylward guilty of rape of a child in the first degree,
12 occurring between January 1, 2014 and December 31, 2015 in the Birch Street
13 residence, as alleged in count 6 of the Third Amended Information.

14
15 a. D.D. and John K.L. Aylward were members of the same family or
16 household.

17
18 b. John K.L. Aylward knew or should have known that the victim was
19 particularly vulnerable or incapable of resistance.

20
21 c. John K.L. Aylward used his position of trust or confidence to facilitate the
22 commission of the crime.

23 d. This crime involved an invasion of D.D.'s privacy.

24
25 e. This crime is an aggravated domestic violence offense.

26 f. The defendant's high offender score results in some of the current offenses
27 going unpunished.

1 7. This Court finds John K.L. Aylward guilty of incest in the first degree, occurring
2 between January 1, 2014 and December 31, 2015 in D.D.'s bedroom, as alleged
3 in count 7 of the Third Amended Information.
4

5 a. D.D. and John K.L. Aylward were members of the same family or
6 household.
7

8 b. John K.L. Aylward knew or should have known that the victim was
9 particularly vulnerable or incapable of resistance.
10

11 c. John K.L. Aylward used his position of trust or confidence to facilitate the
12 commission of the crime.
13

14 d. This crime involved an invasion of D.D.'s privacy.
15

16 e. This crime is an aggravated domestic violence offense.
17

18 f. The defendant's high offender score results in some of the current offenses
19 going unpunished.
20

21 8. This Court finds John K.L. Aylward guilty of incest in the first degree, occurring
22 between January 1, 2014 and December 31, 2015 in John K.L. Aylward's
23 bedroom, as alleged in count 8 of the Third Amended Information.
24

25 a. D.D. and John K.L. Aylward were members of the same family or
26 household.
27

28 b. John K.L. Aylward knew or should have known that the victim was
29 particularly vulnerable or incapable of resistance.
30

c. John K.L. Aylward used his position of trust or confidence to facilitate the

1 commission of the crime.

2 d. This crime involved an invasion of D.D.'s privacy.

3 e. This crime is an aggravated domestic violence offense.

4 f. The defendant's high offender score results in some of the current offenses
5 going unpunished.
6
7

8
9 9. This Court finds John K.L. Aylward guilty of incest in the first degree, occurring
10 between January 1, 2014 and December 31, 2015 on the couch in the Aylward
11 home, as alleged in count 9 of the Third Amended Information.
12

13 a. D.D. and John K.L. Aylward were members of the same family or
14 household.
15

16 b. John K.L. Aylward knew or should have known that the victim was
17 particularly vulnerable or incapable of resistance.
18

19 c. John K.L. Aylward used his position of trust or confidence to facilitate the
20 commission of the crime.

21 d. This crime involved an invasion of D.D.'s privacy.

22 e. This crime is an aggravated domestic violence offense.

23 f. The defendant's high offender score results in some of the current offenses
24 going unpunished.
25
26

27 10. This Court finds John K.L. Aylward guilty of incest in the first degree, occurring
28 between January 1, 2014 and December 31, 2015 in the tattoo shop, as alleged in
29

1 count 10 of the Third Amended Information.

- 2
- 3 a. D.D. and John K.L. Aylward were members of the same family or
- 4 household.
- 5 b. John K.L. Aylward knew or should have known that the victim was
- 6 particularly vulnerable or incapable of resistance.
- 7
- 8 c. John K.L. Aylward used his position of trust or confidence to facilitate the
- 9 commission of the crime.
- 10
- 11 d. This crime involved an invasion of D.D.'s privacy.
- 12
- 13 e. This crime is an aggravated domestic violence offense.
- 14
- 15 f. The defendant's high offender score results in some of the current offenses
- 16 going unpunished.

17 11. This Court finds John K.L. Aylward guilty of incest in the first degree, occurring

18 between January 1, 2014 and December 31, 2015 in John K.L. Aylward's van, as

19 alleged in count 11 of the Third Amended Information.

- 20
- 21 a. D.D. and John K.L. Aylward were members of the same family or
- 22 household.
- 23 b. John K.L. Aylward knew or should have known that the victim was
- 24 particularly vulnerable or incapable of resistance.
- 25
- 26 c. John K.L. Aylward used his position of trust or confidence to facilitate the
- 27 commission of the crime.
- 28
- 29 d. This crime involved an invasion of D.D.'s privacy.

1 e. This crime is an aggravated domestic violence offense.

2
3 f. The defendant's high offender score results in some of the current offenses
4 going unpunished.

5
6 12. This Court finds John K.L. Aylward guilty of incest in the first degree, occurring
7 between January 1, 2014 and December 31, 2015 in the Birch Street residence,
8 as alleged in count 12 of the Third Amended Information.

9
10 a. D.D. and John K.L. Aylward were members of the same family or
11 household.

12 b. John K.L. Aylward knew or should have known that the victim was
13 particularly vulnerable or incapable of resistance.

14 c. John K.L. Aylward used his position of trust or confidence to facilitate the
15 commission of the crime.

16 d. This crime involved an invasion of D.D.'s privacy.

17 e. This crime is an aggravated domestic violence offense.

18
19 f. The defendant's high offender score results in some of the current offenses
20 going unpunished.

21
22
23
24 13. This Court finds John K.L. Aylward guilty of sexual exploitation of a minor,
25 occurring between January 1, 2014 and December 31, 2015 as alleged in count
26 13 of the Third Amended Information.

27
28 a. D.D. and John K.L. Aylward were members of the same family or
29

1 household.

2
3 b. John K.L. Aylward knew or should have known that the victim was
4 particularly vulnerable or incapable of resistance.

5 c. John K.L. Aylward used his position of trust or confidence to facilitate the
6 commission of the crime.

7
8 d. This crime involved an invasion of D.D.'s privacy.

9 e. This crime is an aggravated domestic violence offense.

10
11 f. The defendant's high offender score results in some of the current offenses
12 going unpunished.

13
14 14. This Court finds John K.L. Aylward guilty of sexual exploitation of a minor,
15 occurring between January 1, 2014 and December 31, 2015 as alleged in count
16 14 of the Third Amended Information.

17
18 a. D.D. and John K.L. Aylward were members of the same family or
19 household.

20
21 b. John K.L. Aylward knew or should have known that the victim was
22 particularly vulnerable or incapable of resistance.

23 c. John K.L. Aylward used his position of trust or confidence to facilitate the
24 commission of the crime.

25
26 d. This crime involved an invasion of D.D.'s privacy.

27 e. This crime is an aggravated domestic violence offense.

28
29 f. The defendant's high offender score results in some of the current offenses

1 going unpunished.

2
3 15. This Court finds John K.L. Aylward guilty of sexual exploitation of a minor,
4 occurring between January 1, 2014 and December 31, 2015 as alleged in count
5 15 of the Third Amended Information.
6

7 a. D.D. and John K.L. Aylward were members of the same family or
8 household.
9

10 b. John K.L. Aylward knew or should have known that the victim was
11 particularly vulnerable or incapable of resistance.
12

13 c. John K.L. Aylward used his position of trust or confidence to facilitate the
14 commission of the crime.
15

16 d. This crime involved an invasion of D.D.'s privacy.
17

18 e. This crime is an aggravated domestic violence offense.
19

20 f. The defendant's high offender score results in some of the current offenses
21 going unpunished.
22

23 16. This Court finds John K.L. Aylward guilty of dealing in depictions of minors
24 engaged in sexually explicit conduct, as alleged in count 16 of the Third Amended
25 Information.
26

27 a. The defendant's high offender score results in some of the current offenses
28 going unpunished.
29

30 17. This Court finds John K.L. Aylward guilty of possession of depictions of minors

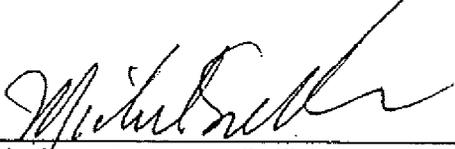
1 engaged in sexually explicit conduct, as alleged in count 17 of the Third Amended
2 Information.
3

4 a. The defendant's high offender score results in some of the current offenses
5 going unpunished.
6

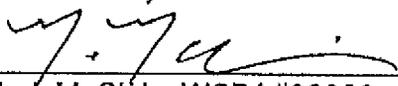
7 18. This Court finds John K.L. Aylward guilty of unlawful possession of a firearm in the
8 second degree, as alleged in count 18 of the Third Amended Information.
9

10 a. The defendant's high offender score results in some of the current offenses
11 going unpunished.
12

13 Decided: This ^{7th} day of September, 2016 and signed this ^{Oct} 7th day of October,
14 2016.

15
16 
17 Judge Michael J. Sullivan

18 Presented by:

19 
20 Mark McClain, WSBA#30909
21 Prosecuting Attorney

22 And by:

23 
24 Harold Karlsvik, WSBA#23026
25 Attorney for Defendant

26
27
28
29
30 COURT'S FINDINGS OF FACT AND
CONCLUSIONS OF LAW AND VERDICT

TILLER LAW OFFICE
March 23, 2017 - 5:00 PM
Transmittal Letter

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Case Name: State of Washington v. John K.L. Aylward

Court of Appeals Case Number: 49707-7

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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