

No. 49707-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOHN K. L. AYLWARD,

Appellant.

Appeal from the Superior Court of Washington for Pacific County

Corrected Respondent's Brief

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I. ISSUES

- A. Did the trial court err when it denied Aylward's motion to suppress all the evidence obtained from the execution of the search warrant of his residence after determining the search warrant was sufficiently particular, thereby meeting the requirements of the state and federal constitutions?
- B. Did the trial court err when it found all the aggravating factors alleged by the State and imposed an exceptional sentence of 1200 months?
- C. Did the trial court error when it imposed a lifetime no contact order with Aylward's biological daughter, who is not the victim in this case?
- D. Should this Court deny any request for costs if the State prevails on this appeal?

II. STATEMENT OF THE CASE

SUBSTANTIVE FACTS

John Aylward was born on March 5, 1971. RP 365; Ex. 2.¹ Aylward and Danielle² had a relationship spanning approximately seven and a half years. RP 514.³ Danielle and Aylward were married several years into their relationship on September 14, 2013. RP 491, 502-03.

Danielle has a daughter, D.D., who was born on July 24, 2008. RP 493. Aylward entered D.D.'s life when she was six months old. RP 514.

¹ The State will be filing a supplemental designation of Clerk's papers. All exhibits from the bench trial, dated 9/20/16 will be referred to as Ex. and its proper number.

² Danielle will be referred to her first name to protect the identity of the victim, no disrespect intended.

³ There are multiple volumes of the verbatim report of proceedings that are continually paginated, pursuant to RAP 9.2(2).

D.D. had therefore known Aylward basically her entire life and called him, “Daddy.” RP 514.

Danielle and Aylward also have a daughter together who was three-years-old. RP 503. Danielle and Aylward’s daughter resided with them. RP 503. Aylward had a daughter from a previous relationship, H.A., who is 12 years old. RP 452, 454. H.A. went to live with Aylward on August 28, 2015 when her mother went to prison. RP 453. With H.A. in the home, there were three girls, Danielle, and Aylward. RP 455.

Danielle and Aylward lived in multiple residences in Pacific County, Washington during their relationship. RP 493. D.D. lived with Danielle and Aylward. RP 493. Eventually the family moved to a home on N Street in Ocean Park. RP 493.

The house on N Street included a master bedroom that Aylward and Danielle shared, a bedroom for the girls, a living room area, and a workroom that Aylward claimed. RP 367-75, 494, 499; Ex. 3, 5, 6, 10.

Danielle was predominantly the breadwinner for the family, working as a dental assistant, and later a housekeeper. RP 502-03. In the last couple of years Aylward and Danielle were together Aylward opened up a tattoo shop. RP 502-03. Aylward would generally work nights and take care of the children during the day. RP 506.

H.A. noticed D.D. was touching her private parts, which did not seem right to H.A.. RP 455. H.A. also saw D.D. holding what H.A. believed was Aylward's cell phone, and watching pornography. RP 456-57. At one point H.A. saw D.D. naked and sprawled out "like a starfish" on Aylward's bed. RP 459. Aylward was with D.D., and was half naked, only wearing his boxers. RP 459.

Danielle took D.D. to the doctor in May 2015 because D.D. had sores around her vagina and Danielle was concerned it might be a staph infection. RP 500-01. D.D. was diagnosed with having herpes simplex 1. RP 501. Aylward and Danielle both have herpes simplex 1. RP 501.

Around December 9, 2015 Pacific County Deputy Sheriff Sean Eastham was assigned to investigate a complaint regarding Aylward. RP 390-91. H.A. was concerned Aylward was exposing D.D. to pornographic material and molesting her. RP 394. H.A. had reported seeing D.D. and Aylward together in bed while D.D. was naked. RP 394.

Officers obtained a search warrant for the N Street residence. RP 366, 394. Officers executed the search warrant on December 12, 2015.⁴ *Id.* Officers found a blue, 2 gigabyte SD card hidden just inside the bottom of a hutch in Aylward's living room. RP 398-99; Ex. 3, 4. Officers also located a white Samsung Galaxy S3 cell phone. RP 404; Ex. 8. The phone was

⁴ The State will discuss the search warrant more fully in sections below.

found in Aylward's workroom. RP 373-74; Ex. 8. The cell phone was locked with a code that could not be broken, but it had a removable 32 gigabyte memory card. RP 405. Officers also found three firearms in Aylward's workroom. RP 374-75; Ex. 9.

Aylward was previously convicted of a felony. Ex. 1. The officers seized the firearms. RP 409-10. There was a Remington model 760, a .27 rifle. RP 408-09. A .22 Mossberg rifle, which Danielle had seen Aylward possess and shoot. RP 409, 510-11. There was also a .380, Hi-Point pistol. RP 409. All the firearms were test fired and all were operable. RP 445-46.

Aylward was taken into custody by Deputy Eastham and searched. RP 397. Deputy Eastham located a cell phone, a broken SD card, and two .22 magnum bullets. RP 397. Deputy Eastham confronted Aylward about the allegation Aylward was having sexual intercourse with D.D. RP 403. Aylward responded that he could not remember, that it was the meth. RP 413.

The blue SD card contained wedding photographs of Aylward and his ex-wife. RP 401. It also contained video files of Aylward having sexual intercourse with D.D. RP 401-02; 421-23, 425-34. D.D. appears to be approximately seven-years old in these videos. RP 434.

In one video, D.D. is viewing a video on the Samsung phone and using a sexual device on her vagina. RP 427. The sexual device appears to

be the dildo found in her mother's bedroom. RP 427, 496; Ex. 7.⁵ As the video continues Aylward can be seen piercing D.D.'s vagina with his tongue. RP 428.

In a second video D.D. is again viewing the Samsung phone, unclothed. RP 429. Aylward penetrates D.D.'s vagina with his tongue. RP 429. Aylward then has D.D. manipulate his penis with her hands and then stick it in her mouth. RP 430. In a third video D.D. is shown again using the sexual device on her vagina. RP 434.

The 32 gigabyte memory card located in Aylward's cell phone contained a wide array and collection of pornography, both adult and child. RP 407. Officers found, Image 14459862893 GPP, a video of child pornography. RP 440-41. The child in the video is approximately four or five-years-old. RP 441. In the video, the child manipulates a man's penis and the child's genitals are exposed. RP 442. Image 1445986367 GPP, is a video of a child who is approximately four or five, naked, with her legs spread apart. RP 442. There is a female in the video who inserts her finger into the child's vagina. RP 443. Image 1446017880, is a video of a six or seven-year-old child performing sex acts on an adult woman. RP 443-44.

⁵ Danielle identified the sexual device in Exhibit 7 as a dildo belonging to her and Aylward. RP 496.

Image 1446367015, is a video of a five to seven-year-old girl performing oral sex on an adult male. RP 444.

D.D. disclosed to Samantha Mitchell, a child forensic interviewer, that Aylward had been sexually abusing her for years. RP 521-26. These disclosures occurred during a second interview Ms. Mitchell conducted with D.D. on April 11, 2016. RP 519-20.

D.D. told Ms. Mitchell Aylward was “teaching her things that only parents should do.” RP 521. D.D. could not remember when it all started because it had been going on for such a long time. RP 521. D.D. told Ms. Mitchell that Aylward had told D.D. that the abuse began when D.D. was four-years old. RP 521. D.D. called it humping or spelled out “S-E-X.” RP 521.

D.D. said the abuse would occur in D.D.’s bedroom, Aylward’s bedroom, the shower, and the couch. RP 522. D.D. explained that in her bedroom, she would be on the bottom bunk, laying on a pillow, and Aylward would be hunched over, holding onto the bars of the bed. RP 522. According to D.D., Aylward would have no pants on and a black shirt on, and would be “humping” her. RP 522. D.D. told Ms. Mitchell “it would hurt because his weiner is - - was big and round and hurt her, and her hole was small.” RP 522. D.D. also “said something along the lines of her mom telling her that it was bad for her because it would hit her organs.” RP 522.

D.D. described being in Aylward's bedroom and he would hump her. RP 523. D.D. said she would watch a phone with other people having sex. RP 523. D.D. also told Ms. Mitchell this happened more than one time. RP 523.

D.D. described being in the shower with Aylward and having to touch his penis and place it in her mouth. RP 523. D.D. said it felt icky and weird to have Aylward's penis in her mouth. RP 523.

D.D. described Aylward "humping" her on a skin-colored couch, that it made a slapping noise. RP 524. D.D. said Aylward put his weiner in her mouth and videotaped it at the tattoo shop. RP 524. D.D. said it only happened one time at the tattoo shop. RP 525.

D.D. said the abuse happened multiple times in a white van. RP 525. D.D. said there was a couch in the van you could turn into a bed, they moved the van around, and Aylward would hump her in the van. RP 525.

D.D. told Ms. Mitchell about going to their friend's house to take care of her dog. RP 525. D.D. explained at the friend's house Aylward had D.D. lay down on the bed and he put his weiner in her mouth. RP 525. Aylward told D.D. they were going to try to make the white stuff come out this time. RP 525. D.D. did make the white stuff come out, and it was gross, she ran to the bathroom, spit it out, and called it slimy. RP 525.

D.D. told Ms. Mitchell she was scared to tell and, her dad, Aylward, had told her not to tell. RP 526. D.D. was afraid Aylward would get into trouble. RP 526.

D.D. also made disclosures to her foster mother, Lana Malone, who D.D. went to live with on January 8, 2016. RP 539. D.D. told Ms. Malone she had a secret to keep. RP 540. Ms. Malone told D.D. she could tell Ms. Malone the secret if she wanted to, but did not have to. RP 540. D.D. told Ms. Malone that her dad did “S-E-X” to her. RP 540.

D.D. told Ms. Malone it happened in the tattoo shop, D.D.’s bedroom, and the van. RP 542. D.D. also “said that she told her mom. Her and her mom had a secret that she wasn’t supposed to tell anybody in the whole, wide world. And it was the S-E-X.” RP 542.

PROCEDURAL HISTORY

The State charged Aylward by information on January 8, 2016 with Count 1: Rape of a Child in the First Degree, Count 2: Sexual Exploitation of a Minor, and Count 3: Incest in the First Degree. CP 9-12. The State also alleged aggravating factors for Count I and II, that Aylward abused his position of trust and that D.D. was a particularly vulnerable victim. CP 9-10. The State also gave notice of its intent to seek an exceptional sentence. CP 9.

On April 15, 2016 the State filed an amended information adding several charges. CP 14-34. The State charged Aylward with Counts 1-6: Rape of a Child in the First Degree, Counts 7-12: Incest in the First Degree, Counts 13-15: Sexual Exploitation of a Minor, Count 16: Dealing in Depictions of a Minor Engaged in Explicit Conduct, Count 17: Possession of Depictions of Minor(s) Engaged in Sexually Explicit Conduct in the First Degree, Counts 18: Unlawful Possession of a Firearm in the Second Degree. *Id.*

Further, in Counts I-XV, the state alleged the following aggravating factors, 1) the defendant used his position of trust, 2) invasion of victim's privacy, 3) current offense involved domestic violence, and was part of an ongoing pattern of psychologic, physical, or sexual abuse of the victim manifested by multiple incidences over a prolonged period of time. *Id.* On all counts the State alleged the defendant's high offender score and multiple current offenses would leave some offenses to go unpunished. *Id.*

Aylward's trial counsel filed a motion to suppress evidence on June 16, 2016.⁶ CP 45-50. Aylward claimed the search warrant issued for his residence was overbroad and all evidence obtained as a result should be suppressed. *Id.* Aylward relied upon *State v. Besola*, 184 Wn.2d 605, 359

⁶ In this section the State is just providing an overview of the procedural history. In the Argument section below the State will supplement the factual record regarding the search warrant and the suppression hearing, along with providing legal arguments in support of the State's position to the Court.

P.3d 799 (2015) to support his position. The State filed a response on June 28, 2016. Supp. CP Response State. The trial court heard the motion, along with the Child Hearsay and the CrR 3.5 hearing on August 24th and August 26th, 2016. RP 30-249. Ultimately the trial court ruled the affidavit in support of the search warrant sufficiently established that evidence of the criminal activity alleged, which there is a reasonable inference that Aylward was involved in, could be located at the residence. CP 113. The trial court also concluded there was a sufficient nexus established in the search warrant of Aylward's use of the cell phone to initiate sexual contact with D.D. *Id.* Therefore, the trial court ruled the search warrant was lawfully obtained, and Aylward's motion to suppress was denied. CP 113.

Aylward elected to try his case to the bench on September 19, 2016. RP 320, 324, 328-46; CP 164. The State filed a Third Amended Information, which corrected the date of Count 18 and added RCW statutory language in Count 17. RP 314-17; CP 88-160.

The State presented several witnesses, including H.A., Danielle, Ms. Mitchell, law enforcement, and D.D. See RP 363-563. The State played the video clips described above for the court. RP 426-44. D.D. explained that Aylward, her dad, had sex with her last year, and the year before that. RP 556. According to D.D., Aylward had sex with her in his bedroom about 20 times. RP 556. D.D. described performing oral sex on Aylward at a friend's

house while they were watching her dog. RP 559. D.D. talked about having “S-E-X” in Aylward’s van, but could not recall which type of sex they had in his van. RP 560. D.D. could recall performing oral sex on Aylward at his tattoo shop. RP 561. D.D. also spoke of Aylward using his cellphone to record himself having sex with D.D. RP 561. Aylward would also use his cellphone to show D.D. photos of people having sex. RP 562.

The trial court found Aylward guilty of all 18 counts. CP 289-99. The trial court also found all the aggravating factors as charged. *Id.* The Department of Corrections did a pre-sentence investigation and recommended Aylward be sentenced to an exceptional sentence of 100 years. CP 259-68. The Prosecuting Attorney prepared a sentencing memorandum, recommending a 100 year minimum sentence on Counts I-VI, and high end of the standard range for all remaining counts. CP 252-58. The trial court sentenced Aylward to an exceptional sentence of 1200 months on Counts 1-6, 120 months on Counts 7-12 and 16-18, a standard range sentence of 120 months for Counts 13-15, and a 60 month standard range sentence for Count 13. CP 305-07. The trial court entered findings of fact and conclusions of law in support of the exceptional sentence. CP 316-17. Aylward timely appeals. CP 323-24.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. THE SEARCH WARRANT FOR AYLWARD'S RESIDENCE WAS SUFFICIENTLY PARTICULAR, THEREFORE THE SEARCH WARRANT WAS VALID AND ALL EVIDENCE SEIZED PURSUANT TO THE WARRANT AND IN PLAIN VIEW WAS LAWFULLY OBTAINED.

Aylward contends the warrant obtained by officers for his residence was overbroad, therefore all items seized pursuant to the warrant and found in plain view should have been suppressed. Brief of Appellant 20-31. Aylward asserts the inclusion of adult sexually explicit material and the failure to state the crime for which the officers were searching for evidence thereof made the search warrant fail the particularity requirement of the Fourth Amendment. *Id.* The warrant, given the facts and circumstances of Aylward's case was sufficiently particular to be constitutionally valid. The trial court did not error when it denied Aylward's motion to suppress. This Court should affirm the trial court and Aylward's convictions.

1. Standard Of Review.

The validity of a search warrant is assessed on a case by case basis. *State v. Askham*, 120 Wn. App. 872, 878, 86 P.3d 1224 (2004), *citing State v. Perrone*, 119 Wn.2d 538, 546-47, 834 P.2d 611 (1992). The legal sufficiency of a warrant is reviewed de novo. *Ashkam*, 120 Wn. App. at 878.

When an appellant challenges a trial court's denial of a motion to suppress, the reviewing court determines whether there is substantial

evidence to support the challenged findings of fact and whether those findings support the trial court's conclusions of law. *State v. Campbell*, 166 Wn. App. 464, 469, 272 P.3d 859 (2011). Findings of fact entered by a trial court after a suppression hearing will be reviewed by the appellate court only if the appellant has assigned error to the fact. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Findings of fact not assigned error are considered verities on appeal. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Aylward does not assign error to any of the findings of facts from the suppression motion.

Sufficiency of evidence following a bench trial is reviewed for “whether substantial evidence supports the challenged findings of fact and whether the findings support the trial court's conclusions of law.” *State v. Smith*, 185 Wn. App. 945, 956, 344 P.3d 1244 (2015) (citation omitted).⁷

A trial court's conclusions of law are reviewed de novo, with deference to the trial court on issues of weight and credibility. *State v. Sadler*, 147 Wn. App. 97, 123, 193 P.3d 1108 (2008).⁸

⁷ Aylward challenges a number of the trial court's findings of fact from the bench trial. Aylward qualifies his challenge of all the findings with the exception of the ones pertaining to the aggravating factors and exceptional sentence. The qualified challenged findings state they were predicated on an invalid search warrant. The State's position is the search warrant is valid, therefore the qualified challenge for these findings is baseless and the findings are supported by substantial evidence.

⁸ Aylward attached as appendixes, pursuant to RAP 10.4(c) the Findings of Fact and Conclusions of Law for both the Bench Trial and the Suppression Hearing. The two documents combined are 36 pages long. To avoid repetition and another large appendix, the State is not attaching the documents.

2. The Fourth Amendment And Article One, Section Seven, Protect Citizens From Warrantless Searches And Seizures By Police.

Citizens have the right to not be disturbed in their private affairs except under authority of the law. U.S. Const. amend IV; Const. art. I, § 7. The right to privacy in Washington State is broader than the right under the Fourth Amendment of the United States Constitution. Const. art. I, § 7; *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). Washington State places a greater emphasis on privacy and recognizes individuals have a right to privacy with no express limitations. Const. art. I, § 7; *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999). Generally, a search is not reasonable unless it is based on a warrant issued upon probable cause. *Skinner v. Ry Labor Executives' Ass'n*, 489 U.S. 602, 619, 109 S. Ct. 1402, 103 L. Ed.2d 639 (1989).

The Fourth Amendment requires that “no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularity describing the place to be searched, and the persons or things to be seized.” The warrant requirement places a layer of protection for a citizen against unlawful searches and seizures by government officials. *Steagald v. United States*, 451 U.S. 204, 212, 101 S. Ct. 1642, 68 L. Ed. 2d 38 (1981).

In order for a search warrant to issue, a detached and neutral magistrate or judge must make a determination of probable cause to support

issuance of a search warrant. *State v. Maddox*, 152 Wn.2d 499, 505, 98 P.3d 1199 (2004). “Probable cause to issue a search warrant exists where there are facts and circumstances sufficient to establish a reasonable inference that the defendant is involved in criminal activity and that evidence of the criminal activity can be found at the place to be searched.” *Maddox*, 152 Wn.2d at 505. In determining the existence of probable cause to issue a search warrant, the magistrate is entitled to make reasonable inferences from the facts and circumstances set out in the affidavit. *Id.* “It is only the probability of criminal activity, not a prima facie showing of it that governs probable cause to issue a search warrant.” *Id.*

Search warrants are to be tested in a commonsense and realistic fashion as technical requirements of elaborate specificity have no proper place in this arena. *State v. Patterson*, 83 Wn.2d 49, 56, 515 P.2d 496 (1974), citing *U.S. v. Ventresca*, 380 U.S. 102, 108, 85 S. Ct. 741, 13 L. Ed. 2d 684 (1965) (internal quotations omitted). On appellate review, all doubts are resolved in favor of a search warrant’s validity. *State v. Kalakosky*, 121 Wn.2d 525, 531, 852 P.2d 1064 (1993). A magistrate’s determination that probable cause exists to issue a search warrant is entitled to considerable deference by appellate courts. *State v. Jackson*, 102 Wn.2d 432, 436, 688 P.2d 136 (1984).

a. A search warrant is required to be particularized in its scope.

The Fourth Amendment of the United States Constitution requires warrants to describe with particularity the place, persons, or things that are to be seized. U.S. Const. amend IV. There are three main purposes behind the particularity requirement, 1) to prevent general searches, 2) to prevent officers from seizing items under the mistaken assumption that those objects fall within the authorization of issuing magistrate, and 3) to prevent the issuance of warrants on vague, loose, or doubtful bases of fact. *Perrone*, 119 Wn.2d at 545 (citations omitted).

The prohibition against general searches was to prevent a general, exploratory search of a person's belongings. *Id.* The particularity requirement is to protect the occupant and to limit the intrusion upon their expectation of privacy to "no further than is necessary to find particular objects." *Id.* at 545-46.

The "second purpose underlying the particularity requirement, conformance with this requirement eliminates the danger of unlimited discretion in the executing officer's determination of what to seize. *Id.* at 546 (citation omitted). A warrant must enable the person conducting the search "to reasonably ascertain and identify the things which are authorized to be seized." *Id.* (citations omitted). The circumstances and the type of

items that are involved determine the degree of particularity required in a warrant. *Id.* at 546-47.

A general or generic description of what is to be seized is not a per se violation of the particularity requirement. *Id.* at 547. General or “generic descriptions may be sufficient [i]f probable cause is shown and a more specific description is impossible” because the precise identity of the items cannot be determined at the time the warrant is issued. *Id.* But, if a more precise description is available at the time of the warrant’s issuance the general description will not be considered constitutionally acceptable. *Id.*

Materials covered under the First Amendment enjoy heightened protections under the particularity requirement. *Id.*, citing *Stanford v. Texas*, 379 U.S. 476, 13 L. Ed. 2d 431, 85 S. Ct. 506 (1965). Courts and legal scholars have reiterated that the First Amendment’s protections of thoughts, ideas, and expression are fundamental, and therefore, the Fourth Amendment’s protection requiring particularity in the description of the items to be seized is of greater significance when the items sought are protected by the First Amendment. *Id.*, citing *Stanford*, 379 U.S. at 483 and 485; 2 W. LaFare, *Search and Seizure* § 4.6(e) at 255 (2d ed. 1987); *State*

v. J-R Distribs., Inc., 111 Wn.2d 764, 774, 765 P.2d 281 (1998); *Walthall, v. State*, 594 S.W.2d 74, 78, 32 A.L.4th 364 (Tex. Crim. App. 1980).⁹

The third requirement is to ensure the magistrate issues the warrant only upon receiving adequate probable cause that a particular item is connected to criminal activity and can be found in the location to be searched. *Peronne*, 119 Wn.2d at 548 (internal quotations and citations omitted).

b. The search warrant issued for Aylward's home was constitutionally valid.

Aylward argues the search warrant that issued for his home was not sufficiently particular, and therefore, all evidence obtained during the December 12, 2015 search must be suppressed. Brief of Appellant 23-31. Aylward argues for reversal of all 18 counts and states this Court should not only reverse but dismiss all counts. Brief of Appellant 31.

The search warrant issued for Aylward's residence was sufficiently particular given the facts and circumstances of this case. This is not simply a case of alleged possession or dealing in child pornography, as was the scenario in the primary cases Aylward cites in support of his argument. *See State v. Besola*, 184 Wn.2d 605, 359 P.3d 799 (2015); *Peronne*, 119 Wn.2d

⁹ The Court also compared *United States v. Truglio*, 731 F.2d 1123, 1127 (4th Cir.), *cert denied*, 469 U.S. 862 (1984); *Unites States v. Espinoza*, 641 F.2d 153 (4th Cir.), *cert. denied*, 454 U.S. 841 (1981).

538. This is a case where Aylward was accused of systematically raping his seven-year-old stepdaughter over a period of years and showing her adult, homemade pornography, which she viewed on his cellphone. CP 45-50. Therefore, even with the heightened protections given the content the officers sought to seize, the warrant was valid, the items were lawfully obtained, and the firearms located as part of the search were found in plain view.

In *Besola*, Dr. Besola, who was a veterinarian, lived with Jeffrey Swenson and allegedly gave drugs from his veterinary practice to Mr. Swenson. *Besola*, 184 Wn.2d at 608. The police received this information from another individual, Kellie Westfall, a friend of Mr. Swenson's, after Ms. Westfall was arrested. *Id.* Ms. Westfall also told police she had seen child pornography in Dr. Besola's home. *Id.* The police sought a search warrant based on Ms. Westfall's information. *Id.* A judge issued a search warrant for illegal drugs but declined the officers request for a search warrant related to images of child pornography. *Id.* When officers executed the search warrant at Dr. Besola's residence they saw DVDs and CDs with handwritten titles that implied they contained child pornography. *Id.* Officers requested, and received, an addendum to the search warrant. *Id.*

The issue in *Besola* was the addendum to the search warrant, and whether it was overbroad. The search warrant included the statute of the

crime under investigation, RCW 9.68A.070. *Id.* The warrant listed the crime under investigation as “Possession of Child Pornography.” *Id.* The warrant allowed for the seizure of the following evidence:

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.

Id. at 608-09.

Pursuant to the addendum to the warrant, officers seized CDs, DVDs, computers, and memory storage devices from Dr. Besola’s residence. *Besola*, 184 Wn.2d at 609. Child pornography was found on 41 disks and one computer. *Id.* There were also disks that were duplicated copies. *Id.* Dr. Besola was charged with Possession of Depictions of Minors Engaged in Sexually Explicit Conduct and Dealing in Depictions of Minors Engaged in Sexually Explicit Conduct. *Id.*¹⁰

The Supreme Court noted the search warrant that issued for Dr. Besola’s residence used broad descriptions of the items which could be seized. *Id.* at 609-10. In particular, it cited to “any photographs, but particularly of minors” and the provisions that allowed for “any and all

¹⁰ Mr. Swenson was also charged and their cases ran together, as did their appeal.

printed pornographic materials.” *Id.* at 610. The Court held, “[u]nder our holding from *Peronne*, these descriptions were overbroad because they allowed officers to seize lawfully possessed materials, such as adult pornography, when the descriptions could easily have been made more particular.” *Id.*

While warrants which have a statutory citation of the crime under investigation are generally seen as more complete, there is not a per se requirement for a statutory citation or the name of the crime to be included on the face of a warrant. *State v. Riley*, 121 Wn.2d 22, 27, 846 P.2d 1365 (1993). In *Besola* the statutory citations did not save the warrant from being overbroad because it did not limit or modify the items that officers could seize. *Besola*, 184 Wn.2d at 610.

The search warrant issued for Aylward’s residence read:

WHEREAS, upon the sworn affidavit made and filed in the above entitled court, the undersigned judge finds that there is probable cause to believe that evidence of a crime, contraband, the fruits of crime, things otherwise criminally possessed, weapons and/or other things which have facilitated a crime or which are likely to facilitate a crime in the near future, located in, on, or about certain premises, vehicles(s) or person(s) within Pacific County, Washington, hereinafter designated and described;

NOW, THEREFORE, IN THE NAME OF THE STATE OF WASHINGTON, you are hereby commanded with the necessary and proper assistance to search for and seize the following property: (SPECIFY ITEMS BEING SOUGHT)

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, DVD's, CD's, VHS TAPES SUSPECTED OR KNOWN TO CONTAIN SEXUALLY EXPLICIT MATERIAL OF ADULTS OR MINORS, GLASS SMOKING PIPES SUSPECTED TO BE USED TO SMOKE METHAMPHETAMINE, METHAMPHETAMINE OR OTHER WHITE POWDERY SUBSTANCE SUSPECTED OF BEING ILLEGAL DRUGS.

CP 42 (underlined portion handwritten and all in caps in the original).

The criminal activity Aylward was being investigated for was the sexual abuse of D.D., his seven-year old stepdaughter, and his methamphetamine use. CP 45-50. The information in the affidavit of probable cause for the search warrant details H.A. and D.D. viewing sexually explicit images of Aylward and Danielle. CP 45, 47-48. It was alleged D.D. was allowed to watch sexually explicit videos of Aylward and Danielle on Aylward's cellphone. *Id.* It was also alleged Aylward would take D.D. into his bedroom two to three times a week, when Danielle was not home, for approximately an hour and no one was to interrupt during these sessions. *Id.* H.A. also said Aylward had built a peephole into the bathroom. CP 48.

Unlike *Besola* or *Peronne*, which was also a case that dealt with Possession and Dealing in Minors Engaged in Sexually Explicit Conduct (child pornography), Aylward's case was not, at its inception, a child

pornography case. See *Peronne*, 119 Wn.2d at 542-45. Aylward's case was a Rape of a Child in the First Degree, Incest in the First Degree, and possibly a Child Molestation in the First Degree at its inception. See RCW 9A.44.073; RCW 9A.44.083; RCW 9A.64.020(1)(a). The allegation that Aylward was showing D.D., a seven-year old material, videos and photos, of adults doing sexually explicit activities, was one piece of the evidence of Aylward's inappropriate and illegal behavior towards D.D. The repeated viewing of sexually explicit adult material would make D.D., for lack of a better way to put it, a better victim, as she would be more sexualized and desensitized to the abuse Aylward would inflict upon her.

Aylward argues the search warrant contains no guidance for law enforcement as to the scope of the search because it does not contain specific information regarding Aylward's alleged offense. Brief of Appellant 25-26. While the State will concede that the warrant does not contain the alleged offense or offenses, naming the offenses, in and of itself, does not necessarily make a warrant more particular. *Besola*, 184 Wn.2d at 610. Only if naming the crime somehow signals limitations or makes more particular the items that may be searched will naming the crime or citation to the statute assist. *Id.*; *Peronne*, 119 Wn.2d at 555. Including Rape of Child or Child Molestation would not have added anything more to the warrant than was already contained within it.

Aylward also argues the warrant has no restricting language. Brief of Appellant 26-28. Aylward cites to *Keodara* to support his premise that the inclusion of electronic storage devices, such as cellphones and computers, raises heightened particularity concerns. Brief of Appellant 22, 26, citing *State v. Keodara*, 191 Wn.2d 305, 309-10 and 314, 364 P.3d 777 (2015).¹¹

In *Keodara*, the cellphone was found after the execution of a search warrant for a vehicle and the phone, illegal drugs, and packaging materials were found. *Keodara*, 191 Wn.2d at 309. The police obtained a search warrant for the phone including on the warrant the listed crimes of Assault in the Fourth Degree, Unlawful Possession of a Firearm, and Possession of Illegal Drugs with the Intent to Deliver. *Id.* at 310. There was no nexus between cellphone and the criminal activity except for statements contained in the search warrant generalities of what kind of evidence is found on cellphones. *Id.* at 310-11. The warrant did not meet the particularity requirement. *Id.* at 316-17. In part because it allowed for a broad search of the cellphone contents that was not sufficiently limited. *Id.*

Aylward appears to believe all he needs to do is state that adult sexually explicit material is included and this per se makes the warrant overbroad. Brief of Appellant 27-28. Aylward's warrant was not overbroad,

¹¹ Other internal citations are omitted.

as stated above. The warrant, unlike the one found in *Besola, Peronne, and Keodara*, is sufficiently particularized to limit the intrusion into the protected items the police sought to seize. Contrary to Aylward's assertion, there is limiting language in the warrant. The warrant only allows officers to search for and seize those listed items **suspected or known to contain sexually explicit material of adults or minors**. CP 44. When tested under a realistic and commonsense fashion, the appropriate standard for review of a search warrant as hypertechnical requirements are not proper, this language is sufficiently limiting within the facts of Aylward's case. *See Patterson*, 83 Wn.2d at 56.

Further, because there was a direct allegation that adult sexually explicit materials were involved in the criminal activity, the inclusion of that item, which is protected by the First Amendment, is permissible. While there is no doubt the adult sexually explicit material was appropriate given the facts and circumstances related to Aylward's case, any doubt should be resolved by this Court in favor of finding the warrant valid. *Kalakosky*, 121 Wn.2d at 531. The trial court properly denied Aylward's motion to suppress the evidence obtained as a result from the execution of the search warrant. This Court should affirm the trial court's denial of the motion to suppress and Aylward's convictions.

c. The firearms were found in plain view, and therefore seized pursuant to a lawful exception to the warrant requirement.

Aylward is correct, that the firearms were not properly seized pursuant to the open view doctrine. Brief of Appellant 29, citing CP 113 (Conclusion of Law 7). The State contends this is merely a scrivener's error. The State, in its briefing below, sets out how the firearms were obtained under the plain view exception to the warrant requirement. Supp. CP State's Response. It is clear, if the warrant is found to be valid, the firearms were seized pursuant to the plain view exception.

The plain view exception to the warrant requirement allows for an officer to seize an item if, (1) the officer has a prior, lawful, justification for being in the constitutionally protected area, (2) the discovery of the item was inadvertent, and (3) the item must be immediately recognizable to the officer as contraband. *State v. Myers*, 117 Wn.2d 332, 346, 815 P.2d 761 (1991). In the present case all three requirements are met.

The officers had a valid search warrant for Aylward's residence. The officers were executing the search warrant, looking for the items, including cellphones, when they entered Aylward's workroom. RP 366, 373-75; Ex 8, 9. Officers knew Aylward was a convicted felon at the time they served the search warrant on the premises. RP 170, 185. Therefore, the firearms

located in the workroom were lawfully obtained under the plain view exception to the warrant requirement.

3. If The Warrant Was Overbroad, It Is Harmless As To Counts I Through XII.

Aylward argues the overbroad warrant demands reversal and dismissal of all 18 counts. Brief of Appellant 31. First, even if Aylward is correct and the warrant is overbroad, dismissal is not his remedy. The remedy for an overbroad warrant would be reversal and suppression of the evidence collected from the warrant. It would then be for the State to determine if it could proceed on any of the remaining charged counts. Further, if the warrant is overbroad, *arguendo* the error is harmless as to Aylward's convictions for Counts 1 through 12 (Rape of a Child in the First Degree and Incest in the First Degree), and this Court should affirm those convictions.

An invalid warrant is still subject to the harmless error test. *Keodara*, 191 Wn. App. at 317. The trial court's admission of evidence that the State obtained in violation of the constitution, state or federal, is an error of constitutional magnitude. *Id.*

The proper harmless error analysis in Washington is the "overwhelming untainted evidence" test which requires appellate courts to only look at untainted evidence presented at trial and determine if the evidence is so overwhelming it "necessarily leads to a finding of guilt."

State v. Frost, 160 Wn.2d 765, 782, 161 P.3d 361, 370 (2007). “A finding of harmless error requires proof beyond a reasonable doubt that ‘any reasonable jury would have reached the same result in the absence of the error.’” *Id.*, quoting *Fulminante*, 499 U.S. 279, 425, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991).

If the search warrant was found to be invalid, the State would lose all evidence in connection with Counts 13 through 18. The State would be unable to prove Aylward committed Sexual Exploitation of a Minor, Dealing in Depictions of Minors Engaged in Sexually Explicit Conduct, Possession of Depictions of Minors Engaged in Sexually Explicit Conduct, and Unlawful Possession of a Firearm. CP 154-60. The State presented the trial court overwhelming untainted evidence of the six counts of Rape of a Child in the First Degree and the six counts of Incest in the First Degree. This overwhelming, untainted evidence was presented through the testimony of Ms. Mitchell, Ms. Malone, Ms. Wahl, and in particular D.D.

The question is, would any reasonable judge have reached the same result in absence of the error? The answer is simply, yes. While the State does not deny the shocking and graphic nature of the videos made by Aylward which were presented to the court, those videos do not make up the totality of the State’s evidence of the systematic rapes D.D. suffered at

the hands of Aylward. Each count of Rape and Incest had a particular location attached to that count, which the trial court found.

When delivering the verdict the trial judge stated,

So the child victim in this case, D. D., the Court wants to make it clear on the record that I am the only judicial officer for all practical purposes, unless there's a retrial on this case, and that's not up to this Court. It's up to the Court of Appeals if there is an appeal, because you are guilty of -- I'll mention what crimes you're guilty of in a moment, sir. But I observed very carefully this child witness, D. D. And she's very clear about her testimony. Her "yes" and -- all her statements were very clear. I didn't find that she was somehow mimicking or reciting things that somebody would coach her to say. I found her credible. She was -- at times she would even had no hesitancy about telling the prosecutor, "What do you mean?", or something like this. So she was tracking very well. In fact, she was tracking so well that it's -- these kinds of events and, you know, sexual things that happened to her, that it is -- the prosecutor hit it on the head when he said that it's just not -- she almost was too comfortable, because of what the Court will find shortly are multiple acts of sexual crimes upon this child. But I'm --again, I'm the only judicial officer that will ever be able to, assuming there's no retrial, that will ever be able to observe this witness. And I observed her carefully, listened to her carefully, and found her statements to be truthful.

Regarding the van, the Court finds that that one statement about I think she said "no" or something like that about the van -- that's one statement in a myriad of other statements and conditions and surrounding facts. So anyway, I just wanted to make the point about the child witness, D. D., the Court found her testimony credible. The Court finds that she clearly understood the difference between truth and falsity by her statements. The Court also finds that I cannot pick up any kind of overt, anyway, animosity or motive to fabricate her story against her father -- stepfather. Called him her father or Daddy, I think it was. The Court didn't sense any of that in her body language or tone of voice.

RP 586-87.

D.D.'s credibility was clear and her testimony similarly clear. D.D. told the court that Aylward had sex with her in his bedroom about 20 times. RP 556. D.D. described Aylward touching her private areas with his penis and his hands in her bedroom. RP 552-53. D.D. told the court that at their friend's house, when they were taking care of her dog, Aylward had D.D. perform oral sex on him until he ejaculated in her mouth. RP 559. D.D. described having sex with Aylward in his van. RP 560. D.D. described performing oral sex on Aylward at his tattoo shop. RP 561. D.D. also described Aylward having sex with D.D. on the couch. RP 561. These descriptions of events go to each count as found by the trial court for Counts 1-6: Rape of a Child in the First Degree, and Counts 7-12: Incest in the First Degree. Counts 1 and 7 are for D.D.'s bedroom, Counts 2 and 8 are for Aylward's bedroom, Counts 3 and 9 are for the couch incident, Counts 4 and 10 are for the tattoo shop, Counts 5 and 11 are for Aylward's van, and Counts 6 and 12 are for the Birch Street residence (the friend's house). RP 549-95; CP 289-296.

D.D.'s testimony is corroborated by the disclosures she made to Ms. Mitchell and Ms. Malone, which they testified about. RP 521-26, 540-42. In particular, each incident was detailed by Ms. Mitchell in her April 11, 2016 interview with D.D. RP 519-26. Lisa Wahl, the advanced registered

nurse practitioner at Providence St. Peter Hospital Sexual Assault and Child Maltreatment Center, also testified that D.D. told her Aylward had sex with her. RP 531, 535. Therefore, the overwhelming untainted evidence would have left any reasonable trier of fact, in this case a judge sitting without a jury, to find Aylward had committed six separate counts of Rape of a Child in the First Degree and six separate counts of Incest in the First Degree. This Court should affirm Counts 1-12 if it finds the warrant overbroad because the error is harmless as to these counts, and reverse and remand solely in regards to counts 13 through 18.

B. AYLWARD'S 1200 MONTH SENTENCE WAS APPROPRIATE, NOT EXCESSIVE, AND SUPPORTED BY THE RECORD.

Aylward asserts his exceptional sentence must be vacated due to it not being supported by the record and being clearly excessive. Brief of Appellant 31-43. The aggravating factors were supported by the record.¹² The trial court had substantial and compelling reasons to hand down a sentence of 1200 months given the severity and shocking nature of Aylward's actions in connection with the crimes he committed. The trial court's sentence should be affirmed.

¹² With the exception that the State is conceding that the invasion of privacy aggravating factor found for Counts 4-6 and Counts 10-12 are clearly erroneous.

1. Standard Of Review.

An exceptional sentence is reviewed by the court by addressing the following three questions under the indicated standards of review: (1) Are the reasons supported by the evidence in the record? *State v. Borg*, 145 Wn.2d 329, 336, 36 P.3d 546 (2001). This is reviewed under a clearly erroneous standard. *Borg*, 145 Wn.2d at 336. (2) Do the reasons justify a departure from the standard range? *Id.* This is reviewed de novo. *Id.* (3) Finally, this court reviews under an abuse of discretion standard if the sentence is clearly excessive. *Id.* It is an abuse of discretion when the trial court bases its decision on untenable reasons or grounds or the decision is manifestly unreasonable. *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003).

2. Findings Of Fact And Conclusions Of Law.

Aylward challenges Findings of Fact 43-52 and 54-57 from the bench trial, all pertaining to the aggravating factors. See CP 282-86. Aylward also challenges the Findings of Fact entered into on Appendix 2.4B of the Judgement and Sentence in support of the exceptional sentence. See CP 316.

Sufficiency of evidence following a bench trial is reviewed for “whether substantial evidence supports the challenged findings of fact and whether the findings support the trial court’s conclusions of law.” *State v.*

Smith, 185 Wn. App. 945, 956, 344 P.3d 1244 (2015) (citation omitted). Absent a concession below, the Findings of Fact entered by the trial court are all supported by substantial evidence. Aylward's contention to the contrary is inaccurate and this Court should affirm the trial court's findings.

3. The Trial Court Did Not Abuse Its Discretion When It Sentenced Aylward To An Exceptional Sentence Because There Were Adequate Legal Basis For the Sentence, And The Aggravating Factors Were Supported By The Record.

When a trial court imposes a sentence outside the standard sentence range it must find compelling and substantial reasons justifying the exceptional sentence. RCW 9.94A.535. Once a trial court has made the required determination, "the sentence court may exercise its discretion to determine the length of an appropriate exceptional sentence." *State v. Knutz*, 161 Wn. App. 395, 410, 253 P.3d 437 (2011). A trial court's exceptional sentence is reviewed for a determination if the sentence was clearly excessive. *Knutz*, 161 Wn. App. at 410. A sentence is clearly excessive when it is clearly unreasonable. *Id.* A sentence is clearly unreasonable when the sentence is "exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken." *Id.* (citations omitted).

If the trial court bases its exceptional sentence on proper reasons the reviewing court will only find the sentence to be excessive, "if its length, in

light of the record, shocks the conscience.” *Id.* at 410-11. A sentence is considered to shock the conscience only if it is a sentence that no reasonable person would adopt. *Id.* at 411.

The SRA includes a non-exclusive list of aggravating and mitigating factors. RCW 9.94A.535. The aggravating factors may be used to justify an exceptional sentence, either above or below the standard range. *Id.* An aggravating factor cannot be a factor inherent in the crime, as part of the elements necessary to prove the offense. *State v. Jennings*, 106 Wn. App. 532, 555, 24 P.3d 430 (2001) (citation omitted). An aggravating factor is something that distinguishes the behavior of the defendant from the behavior inherent in the commission of that crime. *Jennings*, 106 Wn. App. at 555.

- a. There was sufficient evidence presented to the trial court to sustain the finding that Aylward knew, or should have known, that D.D. was particularly vulnerable or incapable of resistance.**

Aylward argues the aggravating factor of particularly vulnerable found for Counts 1-15 was erroneous because D.D. was no more vulnerable than the typical child rape victim. Brief of Appellant 33-36. Aylward asserts there is no showing that D.D.’s mental state, physical condition, or age makes her more vulnerable than the average victim of these crimes, therefore, the aggravating factor was clearly erroneous. *Id.* Aylward

assertions are wrong. D.D.'s young age can be considered as making her more vulnerable. Further, Aylward fails to acknowledge other factors which made D.D. more vulnerable.

A victim's particular vulnerability must be known to the defendant at the time of the commission of the crime. *State v. Ross*, 71 Wn. App. 556, 565, 861 P.2d 473 (1993) (citations omitted). A defendant must use that vulnerability as a substantial factor to accomplish the crime. *Ross*, 71 Wn. App. at 565. When focusing on vulnerability the courts often look to age, whether advanced age or extreme youth, a person's health, or a disability that would make the person more vulnerable than other victims. *Id.*

Extreme youth may be a factor considered, even if the crime requires the victims to be under a certain age. *State v. Fisher*, 108 Wn.2d 419, 423-424, 739 P.2d 683 (1987). Where the crime requires a person to be under a certain age but there is a wide age range given, such as under 14 years of age, a seven-year-old, school age child, would not be considered a particularly vulnerable victim due to age alone. *State v. Woody*, 48 Wn. App. 772, 742 P.2d 133 (1987). Yet, "[v]ulnerability can be the result of characteristics other than the victim's physical condition or stature." *Ross*, 71 Wn. App. at 565.

The courts have found a five-and-a-half-year-old victim of indecent liberties to be a particularly vulnerable victim due to extreme youth. *Fisher*,

108 Wn.2d at 424-25. The court in *Fisher* reasoned that while the Legislature contemplated a stiffer penalty for those who commit indecent liberties against a person under 14 years of age, the Legislature could not have considered the particular vulnerabilities of a specific victim due to their extreme youth. *Id.* at 424. In contrast, the court in *Woody* held that under the same indecent liberties prong (under 14 years of age) that a seven-year-old victim was not a particularly vulnerable victim due to his or her youth. *Woody*, 48 Wn. App. at 777. The court explained that a child of school age has achieved a level of reason that a younger child has not, thereby setting a grade-school aged child apart from a younger child. *Id.*

Aylward focuses on D.D. being seven-years-old at the time of the crimes, in particular the Rape of a Child in the First Degree. Brief of Appellant 35. While the court in *Woody* did state a school aged child was not particularly vulnerable, as compared to the five-and-a-half-year-old in *Fisher*, D.D. was not seven for the entirety of the charged time period. See CP 141-160. The charging period begins on January 1, 2014. *Id.* D.D. was born on July 24, 2008. RP 492. This would make D.D. not even five-and-a-half years old at the beginning of the charging period for the crimes. The testimony from D.D., which occurred on September 20, 2016, was that the repeated rapes had occurred last year, and the year before, meaning 2015

and 2014. RP 556.¹³ Therefore, just based on her age alone, this is enough to justify the particularly vulnerable victim aggravator.

There was also uncontroverted testimony that the abuse started when D.D. was as young as four years old. RP 421. According to D.D., she could not remember exactly when the abuse began because it had been going on for a long time.¹⁴ *Id.* It has been previously held when the abuse started at a young age the trial court may consider “young age in terms of the consequent psychological vulnerability of the child.” *State v. Overvold*, 64 Wn. App. 440, 447, 825 P.2d 729 (1992) (citation omitted).

Further, Aylward also knew D.D. was particularly vulnerable because she could not escape him and had no other adult to turn to for assistance because these crimes occurred in the home when D.D.’s mother was at work. The particularly vulnerable victim aggravator was not clearly erroneous and does support the exceptional sentence imposed by the trial court.

b. There was sufficient evidence presented to the trial court to sustain the finding that Aylward used his position of trust or confidence to facilitate the commission of the crime.

Aylward simply states the legal standard for which this Court reviews abuse of trust aggravating factors, but fails to state he was not in a

¹³ Supports FFCL 43, 47, and 49.

¹⁴ Supports FFCL 43, 44, 45, 46 and 48. CP 282-83.

position of trust or put forward any argument that this aggravating factor was erroneously found. Brief of Appellant 36-37.

This Court analyzes abuse of trust with an inquiry focused on the defendant. *State v. Bedker*, 74 Wn. App. 87, 95, 871 P.2d 673 (1994). The question is whether the defendant was in a position of trust, and if so, was it used to facilitate the commission of the crime. *Bedker*, 74 Wn. App. at 95.

Whether the defendant is in a position of trust depends on the length of the relationship with the victim, the trust of the relationship between the primary care giver and the perpetrator of the sexual offense against the trial, the vulnerability of the victim, and the degree of the defendant's culpability.

Id.

In multiple cases an adult who is a member of the victim's family is considered sufficient to meet the position of trust aggravating factor. In *Garnica* the defendant was the brother-in-law of the 15-year-old victim. *State v. Garnica*, 105 Wn. App. 762, 772, 20 P.3d 1069 (2001). Garnica, after being requested to by another family member, was giving the victim a ride when he suddenly attacked her. *Garnica*, 105 Wn. App. at 772. This relationship was found sufficient to support an abuse of trust aggravating factor. *Id.* Similarly, fathers, mothers, and half-brothers have all been considered sufficient for abuse of trust. *Bedker*, 74 Wn. App. at 95-96; *State v. Hamby*, 69 Wn. App. 131, 848 P.2d 198 (1993); *Overvold*, 64 Wn. App. at 447.

The relationship need not be that of a familial relationship. The Supreme Court held that a relationship between an eight-year-old girl and her next door neighbor satisfied the abuse of trust aggravating factor. *State v. Grewe*, 117 Wn.2d 211, 219, 813 P.2d 1238 (1991). Grewe developed a relationship with his victim over four months, and she was a frequent visitor to his home where she would play on his piano and computer. *Grewe*, 117 Wn.2d at 219.

Therefore, Aylward's position as D.D.'s stepfather is sufficient to support the finding of abuse of trust in Counts 1-6 and 13-15.¹⁵ The fact that Aylward had been a trusted person in D.D.'s life since she was six months old, the person her mother entrusted to take care of her while she was working during the days, is sufficient to support the finding of abuse of trust for Counts 7-12, Incest in the First Degree.¹⁶ The trial court's finding was not erroneous and supports the exceptional sentence.

c. There was sufficient evidence presented to the trial court to sustain its finding that Aylward committed the aggravating factor of invasion of D.D.'s privacy for Counts 1, 2, 3, 7, 8, 9, 13, 14, and 15.

Aylward appears to argue that the aggravating factor for invasion of privacy was clearly erroneous because it is inherent in the offense, because

¹⁵ Supports FFCL 50 and 51.

¹⁶ Supports FFCL 50 and 51.

all sexual assaults invade one's privacy. Brief of Appellant 37-38. The invasion of privacy comes not from the act of the rape, incest, or sexual exploitation in and of itself. The invasion of privacy comes from Aylward additionally doing these acts in a place D.D. would normally have a clearly understood zone of privacy. Therefore, for Counts 4 and 10 (the tattoo shop), Counts 5 and 11 (the van), and Counts 6 and 12 (the Birch Street residence) the State concedes it was clearly erroneous for the trial court to find Aylward committed the aggravating factor of invasion of D.D.'s privacy. CP 291-96. For the remaining counts, the invasion of privacy factor are justified and should be affirmed.

The aggravating factor, invasion of a zone of privacy cannot be justified where violating one's zone of privacy is inherent in the crime. RCW 9.94A.535(3)(p); *State v. Lough*, 70 Wn. App. 302, 336, 853 P.2d 920 (1993). Therefore, offenses such as burglary, which necessarily requires the defendant to enter into the victim's home and invade their zone of privacy cannot have an invasion of privacy aggravating factor. *Lough*, 70 Wn. App. at 336. A sexual assault occurring in one's home can have an aggravating factor invasion of privacy, whether it be in their bedroom, or other room in that home. *Id.*

The Rape of a Child in the First Degree and the correlating Incest in the First Degree that occurred in D.D.'s home all sufficiently qualify for

invasion of privacy aggravating factors. CP 272-94. The Sexual Exploitation of a Minor, which were filmed by Aylward in the family home also sufficiently qualify for the invasion of privacy aggravating factor. CP 272-98. The trial court's finding on Counts 1-3, 7-9, 13-15 are supported by the record, not erroneous, and this court should affirm Aylward's sentence.¹⁷

d. There was sufficient evidence presented to the trial court to sustain the finding that Aylward's crimes were an aggravated domestic violence offense.

Aylward argues there were only six incidents over a two-year period and it is commonplace for cases of childhood sexual abuse to occur multiple times over a period of time. Therefore, according to Aylward, his six incidents is not sufficient to distinguish his case from other cases of Rape of a Child in the First Degree and Incest in the First Degree. Brief of Appellant 38-40. Aylward's argument is offensive and incorrect.

An ongoing pattern of sexual abuse of a victim, that is manifested by multiple instances occurring over a prolonged period of time is an aggravating factor the State may allege. RCW 9.94A.535(h)(i). Aylward appears to be confused, believing that only the charged counts for which he has been convicted of are available for the trial court to consider as evidence

¹⁷ The above paragraph supports FFCL 52 for Counts 1-3, 7-9, and 13-15. The State concedes there is not substantial evidence to support the FFCL for Counts 4-6 and 10-12.

for the aggravating factor ongoing pattern of sexual abuse. Brief of Appellant 39-40. Even the cases Aylward cites, clearly show that when the evidence, beyond the mere convicted counts, support that the abuse has been ongoing and occurring for years, that is sufficient to uphold a finding under RCW 9.94A.535(h)(i). *State v. Duvall*, 86 Wn. App. 871, 877, 940 P.2d 671 (1997); *Overvold*, 64 Wn. App. at 444-46.

In *Duvall* the defendant only pleaded guilty to two counts, but the probable cause statement established that Duvall had sexually abused his daughters on many occasions over a period of a couple years. *Duvall*, 64 Wn. App. at 877. The abuse included incidents that occurred in Oregon. *Id.* The Court found it did not matter where the pattern of abuse occurred, that the Washington State crimes were part of the pattern, and that was sufficient. *Id.*

In *Overvold*, the defendant pleaded guilty to two counts of indecent liberties. *Overvold*, 64 Wn. App. at 442. The Court of Appeals held the trial court did not err when it relied on incidents of abuse which were not charged in the information when it found the abuse occurred over a 10-year period of time. *Id.* at 444. The Court stated:

Further, while facts that establish the elements of uncharged crimes generally may not be relied on to justify an exceptional sentence under RCW 9.94A.370(2), a number of judicially created exceptions to the real facts doctrine have been established. Here, the sentencing judge relied on a pattern of abuse, not additional, discrete incidents which

could have been charged and from which it is therefore unfair to exempt the State from proving. As we explained in *State v. Daniels*, 56 Wn. App. 646, 654, 784 P.2d 579, review denied, 114 Wn.2d 1015 (1990):

Particularly when the accused resides with the victim or has virtually unchecked access to the child, and the abuse has occurred on a regular basis and in a consistent manner over a prolonged period of time, the child may have no meaningful reference point of time or detail by which to distinguish one specific act from another. . . .

State v. Brown, 55 Wn. App. 738, 746-47, 780 P.2d 880 (1989). . . .

. . . [T]he experience is often an indistinguishable blur [the victim] has tried to forget. Consequently, these cases present problems of proof that make multiple charges impractical. However, these problems should not benefit the defendant at sentencing. [*Brown*, 55 Wn. App. at 755.]

Id., 445-46.

The uncontroverted evidence was that Aylward had been sexually abusing D.D. since she was at least four-years-old. RP 521. The abuse had been occurring for so long that D.D. could not remember when it started. RP 521. D.D. testified about repeated rapes occurring in her parent's bedroom that occurred over two years, totaling at least 20 times. RP 556.¹⁸ This testimony is more than sufficient to support the trial court's finding

¹⁸ This paragraph supports FFCL 54, 55, and 56.

that D.D. had been the victim of a pattern of ongoing sexual abuse inflicted by Aylward. The finding was not erroneous and the exceptional sentence based upon the aggravating factor should be affirmed.

- e. The record sufficiently shows that the trial court would have imposed the same sentence, even if the multiple unpunished offense aggravating factor was the only aggravating factor found.**

If a trial court finds there are substantial and compelling reasons to impose an exceptional sentence it may impose an exceptional outside of the standard range. RCW 9.94A.537. The trial court must enter written findings of fact and conclusions of law setting forth its reason for imposing the exceptional sentence. RCW 9.94A.537. If a trial court relies upon reasons that are not substantial and compelling for the imposition of an exceptional sentence, it exceeds its authority and the matter is required to be remanded for resentencing within the standard range. *State v. Ferguson*, 142 Wn.2d 631, 649, 15 P.3d 1271 (2001). If the trial court indicates it would have given the same sentence for any of the aggravating factors, a finding that one of the factors is invalid would not require the court to remand for resentencing. *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003).

Aylward argues the trial court would not have given the same exceptional sentence based solely on the aggravating factor that his high offender score and current multiple convictions would leave some counts going unpunished. RP 41-42. The trial court stated that any of the

aggravating factors found, including Aylward's high offender score, which on the Counts that he received the 1200-month sentence was 50 points, was sufficient in and of itself to justify the exceptional sentence. RP 627, 630; CP 305-07. The trial court stated,

I don't want there to be any ambiguity on how the Court applied aggravating factors or not. But the Court's intent is that based upon even one of these crimes that you have been found guilty of of 1 through 6, or for that matter, 7 through - - what? 12, 1 through 6 for sure, that one of those aggravators -- excuse me -- that if somehow the Court of Appeals finds that this Court erred in some way, either at trial or what I said in sentencing, your crimes were so horrendous that this Court would give the same sentence even if there was only one aggravator on each of those counts. And, Mr. McClain, if you wish to have further clarification, I'm going to leave it up to you to, you know, frankly say what you think you need to say so that the Court's intention on this sentence is clear, and just clear, and no confusion as to under how this sentence should be applied under the law.

RP 630.¹⁹ This statement makes it clear the trial court would have imposed the exceptional sentence based only on the high offender score. The exceptional sentence was not erroneous and should be affirmed.

4. The Trial Court's Imposition Of A 1200-Month Sentence Was Not Clearly Excessive In Aylward's Case.

Aylward argues even if the aggravating factors were properly found, the length of his sentence, 1200-months on Counts 1-6, shocks the conscience and should be reversed. Brief of Appellant 42-44. Aylward

¹⁹ Supports FFCL 57.

argues a standard range sentence is sufficient to punish him and protect the victim and society, as he would be incarcerated until he is 72-years-old. *Id.* at 43. Aylward's sentence is not clearly excessive and should not be reversed.

A challenge to the length of an exceptional sentence is reviewed under an abuse of discretion standard. *Borg*, 145 Wn.2d at 336. A "sentence is excessive only if its length, in light of the record, 'shocks the conscience.'" *State v. Vaughn*, 83 Wn. App. 669, 681, 924 P.2d 27 (1996), citing *State v. Ritchie*, 126 Wn.2d 388, 392, 894 P.2d 1308 (1995).

In *Vaughn* the defendant was sentenced to an exceptional sentence of two and a half times the top end of the standard range for a single episode of sexual assault and kidnapping of a seven-year-old victim. *Vaughn*, 83 Wn. App. at 681. Vaughn raped the victim five times in the single incident, had an offender score of zero, and the Court of Appeals found sentencing him to an exceptional sentence of 21 years was not excessive. *Id.*

Clearly excessive is not determined under a proportionality test. *Ritchie*, 126 Wn.2d at 392. Therefore, the Court looks at the facts of Aylward's case, and determines if under the facts and circumstances in his particular case, does the 1200-month sentence shock the conscience? The sentence is 3.77 times high end of the standard range for Counts 1-6. CP 305-307. The State does not deny it is a long sentence. Yet, when one

evaluates the prolonged, systematic abuse suffered by D.D. the sentence is not excessive.

What shocks the conscience in Aylward's case is that the person D.D. called "Daddy" would film himself having sexual intercourse with his seven-year-old daughter. What shocks the conscience is that "Daddy" would teach a young child, four, five, six, seven-years-of-age to masturbate with her mother's dildo and then film it, for his sexual gratification. What shocks the conscience is that "Daddy" would so normalize this repeated sexual abuse that D.D. would treat being raped as a normal day-to-day occurrence. See RP 586. The 1200-month sentence for Counts 1-6 is not shocking, nor excessive, and this Court should affirm.

C. THE TRIAL COURT'S LIFETIME NO CONTACT ORDER PROHIBITING AYLWARD FROM CONTACTING HIS BIOLOGICAL CHILD, H.A., WHO WAS NOT THE VICTIM IN THIS CASE WAS PERMISSIBLE.

The State is allowed to impose sentencing conditions that are crime-related prohibitions. RCW 9.94A.030(10); RCW 9.94A.505(9).

"Crime-related prohibition" means an order of a court prohibiting conduct that directly relates to the circumstances of the crime for which the offender has been convicted, and shall not be construed to mean orders directing an offender affirmatively to participate in rehabilitative programs or to otherwise perform affirmative conduct. However, affirmative acts necessary to monitor compliance with the order of a court may be required by the department.

RCW 9.94A.030(10). There is no requirement that a crime related prohibition be causally related to the crime, it must be directly related. *State v. Letourneau*, 100 Wn. App. 424, 432, 997 P.2d 436 (2000) (internal citation omitted). Crime related prohibitions are reviewed for an abuse of discretion. *Letourneau*, 100 Wn. App. At 431.

A parent has a fundamental right to raise his or her child without interference from the State. *State v. Corbett*, 158 Wn. App. 576, 598, 242 P.3d 52 (2010). Parental rights may be subject to reasonable regulation, as they are not absolute. *Corbett*, 158 Wn. App. at 598. “Sentencing courts can restrict fundamental parenting rights by conditioning a criminal sentence if the condition is reasonably necessary to further the State’s compelling interest in preventing harm and protecting children.” *Id.* (internal citations omitted).

In *Letourneau* the Court stated the provision that prohibited Letourneau from having unsupervised visitation with her biological children was not reasonably necessary to protect her children because there was no evidence she was a threat to her own children. *Letourneau*, 100 Wn. App at 441. Conversely, in *Corbett*, this Court found that while Corbett’s victim, whom he sexually molested, was not his biological child, Corbett lived with and parented the victim and therefore there was evidence in the

record he did pose a threat to his own biological child. *Corbett*, 158 Wn. App. at 598-99.

Aylward was the only father D.D. had in her life. Aylward raised D.D. since she was six-months old. Aylward was convicted of sexually abusing D.D. while she resided in his home, as his stepdaughter. CP 272-99. Aylward's case is similar to *Corbett*, in which Corbett was sexually abusing a child whom he was raising in his home. This Court distinguished the actions in *Corbett* from the actions in *Letrouneau*, stating,

Letourneau did not have sex with a family member or with a child living in her home and evaluators did not find her to be a pedophile. *Berg*, 147 Wn. App. at 943 (citing *Letourneau*, 100 Wn. App. at 441-42). In contrast, Corbett's crimes were perpetrated against a minor he parented. The fact that Corbett sexually abused a child family member distinguishes *Letourneau* and provides the necessary support to impose a prohibition on contact with his own children.

Corbett, 158 Wn. App. at 599-600.

Therefore, while Aylward was not convicted of sexually abusing H.A., the testimony of his systematic abuse of D.D. was sufficient for the trial court to impose the no-contact order in this case. The trial court found the no-contact order was necessary to protect H.A. from Aylward. RP 629. If this Court finds a lifetime no contact order is prohibited, the State respectfully requests this Court remand the case back to the trial court so it may impose a no-contact order of a shorter term.

D. THE STATE IS UNABLE TO RECOVER APPELLATE COSTS FROM AYLWARD DUE TO THE COURT'S AMENDMENT OF RAP 14.2.

Aylward argues this Court should not impose appellate costs if the State prevails. This issue has been mooted by the amendment of RAP 14.2, as Aylward was found indigent for purposes of this appeal, and the State has no evidence that his circumstances have changed. *See* RAP 14.2; CP 232-34. Given that Aylward is currently incarcerated in the Department of Corrections the State sees no change likely in his financial status. Nor does the State know how it will ever meet RAP 14.2's burden to show by a "preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency." RAP 14.2 guarantees there will be no appellate costs imposed upon Aylward in this case if the State is the prevailing party.

IV. CONCLUSION

The trial court properly held the search warrant was sufficiently particular and therefore valid. The evidence obtained from the search warrant, including the firearms found in plain view were all lawfully obtained. The aggravating factors found by the trial court all had a sufficient basis, with exception of invasion of privacy for Counts 4-6 and 9-11. Therefore, the trial court's exceptional sentence was supported by the record, appropriate, and not excessive. The trial court had a lawful basis to impose a no-contact order between Aylward and his biological child, H.A. Finally, the State will not be seeking appellate costs, as RAP 14.2 makes recovering costs from indigent defendants an impossible task for the State.

RESPECTFULLY submitted this 13th day of August, 2017.

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