

No. 50003-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

Alexander Brown (a minor child),

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY
JUVENILE COURT

BRIEF OF APPELLANT

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A. SUMMARY OF ARGUMENT

The trial court created a Catch-22 in which it denied the defense request to continue in order to pursue a motion to compel discovery because there was not enough time to comply with the discovery statute. The exercise of constitutional right to counsel was a substantial and compelling reason to continue the matter. The juvenile court abused its discretion in denying the motions and violated appellant's constitutional rights in the process.

Furthermore, the complaining witness's testimony was so inconsistent and internally contradictory as to preclude finding substantial evidence to support the allegations. For that reason the court rejected two of four counts. The remaining two charges were also not supported by evidence sufficient to a guilty verdict beyond a reasonable doubt.

B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in denying the defense request for a continuance of the trial in order to permit reasonable and necessary investigation through the discovery process in preparation for trial.

2. The trial court abused its discretion by denying a defense motion to compel production of counseling records where they were material to the defense because she discuss the underlying allegations and counsel

was not provided sufficient time to comply with the statutory notice requirement.

3. To the extent the defense motions were denied because of a failure to file a supporting affidavit or seek an order within the time or an order shortening time in the case of the 14 day notice requirement, appellant was denied the constitutional right to effective assistance of counsel.

4. The trial court abused its discretion in entering Finding of Fact XVI to the extent it finds “The genital examination revealed that J.K. had a *deep* hymeneal scallop at 5 o’clock...” in the absence of substantial evidence in the record. CP 63 (FF XVI) (emphasis added).

5. The trial court abused its discretion by entering Finding of Fact VI and VII in the absence of substantial evidence in the record and in light of the number of critical inconsistencies in the testimony J.K. provided and her descriptions of the events themselves.

6. The trial court erred in concluding sufficient evidence to sustain a guilty finding beyond a reasonable doubt where the testimony and ensuing findings were inconsistent and the findings failed to support the legal conclusions drawn therefrom.

7. Cumulative error denied appellant a fair trial.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Children accused of crimes are entitled to the effective assistance of counsel which includes reasonable investigation and trial preparation. Defense counsel establish a substantial and compelling need to conduct further discovery, necessitating additional time to prepare before trial. In the face of these constitutionally based needs, did the trial court abuse its discretion in denying a defense request for a continuance of the trial in order to permit reasonable and necessary investigation, notwithstanding the potential anxiety the delay might cause the alleged child victims?

2. Children accused of crimes are entitled to discovery of any evidence which might be exculpatory or appropriate impeachment. The complaining witnesses various recounting of her recollections regarding the alleged conduct were highly relevant and in light of the witness's inconsistent and incomplete recollections, important to impeach the prosecution witness's testimony. Did the trial court therefore abuse its discretion by denying the defense motion to compel production of counseling records where he established a significant likelihood that relevant evidence would be found given the developing nature of the testimony and the questionable circumstances described by the alleged victim?

3 The effective assistance of defense counsel includes the presentation of proper pleadings in proper form in order to obtain appropriate relief provided by statutes and laws of the state. The motion to compel production of the counseling records was denied in part because of defense counsel's failure to file a supporting affidavit, provide 14-days' notice and due diligence. If so, did counsel's performance fall below standards of reasonable professional practice and was appellant prejudiced by that deficiency?

4. In juvenile court bench trials the court is required to enter findings of fact and conclusions of law establishing the basis for the court's decision. JuCR 7.11. Findings of fact must be supported by substantial evidence in the record or the judge abuses his or her discretion by basing it on untenable grounds or reasons. Did the trial court abuse its discretion in entering Finding of Fact XVI to the extent it finds "The genital examination revealed that J.K. had a *deep* hymeneal scallop at 5 o'clock..." in the absence of substantial evidence in the record? CP 63 (FF XVI) (emphasis added).

5. Where the complaining witness's testimony reflects internal inconsistencies and a meaningful lack of reliability it cannot support a finding that a particular event occurred. The complaining witness here presented testimony which contradicted her own ability to observe, was

internally inconsistent and failed to establish the underlying propositions. Did the trial court abuse its discretion by entering Finding of Fact VI and VII in the absence of substantial evidence in the record and in light of the inconsistencies in the testimony J.K. provided?

6. In a bench trial in juvenile court, the judge's findings of fact must be sufficient to establish the elements of the offense beyond a reasonable doubt. Where the testimony and ensuing findings were inconsistent and the findings failed to support the legal conclusions drawn, did the trial court err in concluding there was sufficient evidence to sustain a guilty finding beyond a reasonable doubt therefrom?

7. Cumulative error may warrant reversal when each error standing alone might not otherwise require it, but the collective effect is to produce a trial that is fundamentally unfair. Did the errors below when considered in the aggregate combine to deny appellant a fair trial?

D. STATEMENT OF THE CASE

1. Procedural History

By information filed in the juvenile court for Pierce County Superior Court on September 8, 2016, 13-year-old Alexander "Alex" Brown was charged with four separate offenses. CP 1-2. Counts 1, 2 and 3 charged three separate violations of RCW 9A.44.073 (rape of child), between April 21, 2015 and July 14, 2016, involving the alleged victim,

11-year-old J.K. CP 1-2. Count 4 charged a violation of RCW 9A.44.083 (child molestation), between April 1, 2016, and July 14, 2016, involving J.K.'s younger brother, 7-year-old R.K. CP 2.

Alex was arraigned on September 26, 2016. See Trial Court Docket 16-8-00728-4. On October 19, 2016, at an initial pretrial conference, the defense received additional discovery and a DVD. Alex waived his right to speedy trial and the matter was continued to a status conference on January 10, 2017. Id.

On January 10, 2017, the defense requested a continuance to complete witness interviews and impending trial schedule. 1/10/17RP 3-6.¹ The State objected because the allegations involved sex offenses with minor victims. 1/10/17RP 7. The judge deferred ruling on the motion, however, until the scheduled witness interviews were completed. 1/10/17RP 10.

On January 13, 2017, after completing the witness interviews, the defense returned to court and renewed the motion to continue. Defense counsel explained that because the witnesses disclosed the alleged victim had been in counseling focused on these events and it was necessary to move to compel production of those records. 1/13/17RP 13. The judge

¹ The transcripts for the pretrial proceedings were bound in a single volume and consecutively paginated. They are referenced by the date of the proceedings. The trial transcript is contained in several volumes, is separately paginated and will be cited as RP.

again denied the motion to continue, but agreed to reconsider if the motion to compel was granted. 1/13/17RP 20.

On January 18, 2017, the defense moved to compel production of the counseling records or in the alternative, an *in-camera* review of the complaining witnesses psychiatric and medical records. CP 17-27. The State opposed the request and argued a particularized showing that the records were likely to contain material relevant to the defense was necessary. CP 28-38. The State also asserted RCW 70.125.065 required a specific supporting affidavit which was not filed. 1/20/17RP 44.

The motion was heard on January 20, 2017. 1/20/17RP 35-42. The court denied the motion to compel, and the associated motion for continuance. CP 39-40; 1/20/17RP 51-53. The judge noted the absence of a sworn declaration as required by RCW 70.125.065, the failure to provide 14 days' notice required by RCW 70.02.060. 1/20/17RP 51. The judge also found a continuance to meet the time requirement would not be appropriate, asserting that:

for whatever reason this case has gone on for a period of months and it's only shortly before the trial date that the alleged victim, or victims, were interviewed, leading then to this particular motion. I don't know why the delay, but it has now created this particular problem of the time of this motion not being in compliance with the statute.

1/20/17RP 52. Finally the judge found there was an insufficient showing based on the prior inconsistent statements that evidence would be found in the records that might be admissible to impeach the credibility of the complaining witness.” 1/20/17RP 52. Relying instead on the complaining witness’s mother report that one counselor told her there was no retraction or change in the story, the judge denied the motions. 1/20/17RP 53

On January 24, 2017, 120 days after Alex’s first appearance, the case proceeded to trial before the Honorable Frank Cuthbertson.² Judge Cuthbertson found Alex was not guilty of the charges in Count 3 and Count 4. CP 66-68 (FF XXIII, CL IV, V); RP 553, 556. The judge did, however, find Alex guilty of the allegations in Count 1 and 2 based on some of complaining witness J.K.’s allegations. CP 66-67; RP 554-57.

At the disposition hearing, Judge Cuthbertson bemoaned the lack of discretion he was afforded under the statutory scheme. 2/13/17RP 15. Despite his objections, Judge Cuthbertson sentenced Alex to 15 to 36 weeks’ confinement on Counts 1 and 2, to be served consecutively. CP 41-50; 2/13/17RP 17.

This appeal timely followed. CP 51-54.

² The defense renewed its motion to compel at the start of trial. 1/24/17RP 5-7.

2. Trial testimony.

J.K. testified that during 2015 and 2016, it was hard to be around her house because her mother Jessica and father Derek were fighting a lot and she was scared her father was going to leave. RP 87, 213.³ Jessica testified there was considerable tension between she and her husband and the children were aware. RP 247. J.K. herself was exhibiting an unusual degree of anxiety, J.K. did not want her father to move out and pleaded with her mother not to make father move out. RP 87, 182, 253-54. J.K. acknowledged this was important to her and she wrote letters to her mother to that effect. RP 87, 182. J.K. also acknowledged that if she were threatened her father would help. RP 88.

In April 2016, J.K. with her mother, father and three brothers, C.J. (age 14), B.K. (age 13), and R.K. (age 7) moved into her current or “new” home.⁴ RP 33, 161. Appellant, Alex Brown, was C.J.’s best friend and along with B.K., they played on a variety of sports teams.⁵ RP 41-42. Jessica testified that the two families were close, and up until these allegations, she and Alex’s mother Khristena were best friends. RP 187-

³ Jessica testified that she and Derek were married in 2007, but had problems off and on during the marriage. RP 176.

⁴ Derek was not supposed to move into the new house, but for financial reasons it became necessary. RP 246. He moved into an apartment a short time later.

⁵ The boys played at various times football, soccer and basketball, and in middle school there was wrestling and lacrosse. RP 449-50.

88, 446. J.K. was also particularly close to Alex's parents, whom she described as "really nice." RP 46. She would do beading with Khristena and recalled watching television and playing games with Jay, Alex's stepfather. RP 47-48.

At trial J.K. described animosity she developed toward Alex because, as 13-year-old boys are too often inclined to do, he would call her names or hurt her feelings. RP 49-50. As a result, J.K. testified she did not like it when Alex came to her house and she did not play with him. RP 49-50.⁶

J.K.'s initial allegations.

In July 2016, J.K. and her brothers were at home watching a favorite television program, American Ninja Warrior (ANW), in which competitors attempt to complete a series of increasingly difficult obstacle courses. RP 63-66, 199-201. The boys were particularly fond of one participant, Flip Rodriguez, who competed wearing a mask, but on this day dramatically removed the mask and explained that he did this because he had overcome being abused as a child. RP 63, 66, 199, 272.

When Jessica returned home from work that evening, the boys "really wanted to show her, so they rewinded it." RP 63, 199. After

⁶ Although she was nervous and did not want to come to court, J.K. was buoyed by a Bible verse her mother shared and the prospect of seeing her grandmother after court. RP 38-39.

watching again, J.K. told her mother she “had to talk to her and then I finally told her.” RP 63, 200-02, 268-69. J.K. told her mother she had been touched inappropriately and went on to allege that when the boys would sleepover with Alex he would sneak around at night and touch her “private parts.” RP 51-52.

Allegations of sexual contact.

J.K. testified she could only remember two incidents. RP 55-56. She described them as “[t]he last time and just one other time in my new house.” RP 56, 75.⁷ In apparent contradiction, however, to only remembering these two incidents, J.K. also testified “it” occurred once

⁷ J.K. described the other potential incident at the new house as occurring when her father was sleeping in his room and mother was on the couch for movie night. RP 56. J.K. described her mother and brothers C.J. and B.K. as sleeping on couches, while she and R.K. were on the floor. RP 57. J.K. testified she was reaching for the remote control when she “saw Alex just look over, and then he just went back to bed up in my brother’s room.” RP 58.

J.K. then described the insertion of three fingers in her anus. RP 59. When asked if Alex did the same thing every time, J.K. answered “I don’t remember.” RP 59. On redirect, J.K. was then asked, “did he ever put his fingers inside your number two?” and she answered “Um, I don’t know.” RP 107. In a follow-up the prosecutor asked, “Do you remember any time that he touched your butt?” and she answered, “No.” RP 107. Finally, “Did he try to put his fingers in your number two?” to which J.K. answered, “Um, I don’t think so.” RP 107.

Judge Cuthbertson rejected the charge in Count 3 and found Alex not guilty of a second offense at the new house or elsewhere because “the court has a reasonable doubt as to the date, location, and occurrence that the respondent had sexual intercourse with J.K. on that count.” CP 66-67 (FF XXI; CL V); RP 556.

when she stayed at Alex's house. RP 52. J.K. testified categorically that "it" did not happen at the "old house," i.e. before April 2016.⁸ RP 60.

J.K. described the "last" incident as occurring at the new house when she was asleep in her own bedroom. She testified the assailant entered her room while she was asleep, "he" pulled a blanket over her head, "[a]ny blanket that would be on my bed or on my floor. He would mostly put about three blankets over my head." RP 68.⁹ J.K. testified he then pulled her pants and underwear down to her ankles, and then "use three fingers" to "touch me in number one..."¹⁰ RP 52-53. J.K. testified, however, that "any time like I would move to go to a different position he would, um, he would like run out of the room." RP 53. When asked "how long would he do this for before you would move?" J.K. answered "Until I wake up." RP 54.

When asked how she knew it was Alex, J.K. answered, "Every time that I would wake up I always see him in my room." RP 61. J.K. claimed that during this "last" incident, "I caught him in front of my bed."

⁸ J.K. was testifying in January 2017 and she moved to the new house in April 2016. RP 25, 234. They lived at the "old" house on 70th Street in Graham from April 2014 to April 2016. RP 234, 238.

⁹ When asked how she could breathe, J.K. testified, "He would leave like this little teeny tiny hole." RP 69.

¹⁰ J.K. described this last incident as occurring during on a Saturday or Sunday during the school year. RP 55. Khristena Sand's review of calendars and correspondence established Alex stayed over at the new house only once, on June 10, 2016. RP 459, 465, 498.

RP 53. “[T]hen he like ran out – he like gently went out of the room.” RP 53.¹¹ J.K. testified the assailant never said anything. “He would always be quiet.” RP 61. “The last time that I caught him his face was like – his face was like worried that I was going to tell, and he just ... gently walked out.” RP 61.

On the other hand, she testified that “when he puts my pants down to my ankles[,] I would never let him know – I said stop once; he didn’t listen.” RP 54, 71. Finally, she asserted this would occur about 7:00 o’clock in the morning and last for about five minutes. RP 54.

Notwithstanding J.K.’s testimony that she could only remember two incidents, both at the new house, she testified regarding an alleged incident at Alex’s house where the contact allegedly occurred while all six children were sleeping in the living room. RP 72. J.K. testified Jay and Khristena were in their bedroom while C.J. was on the small couch and B.K. was on the big couch. RP 72. She and R.K. were on the floor. RP 72-73, 77. J.K. testified Alex slept either on a chair in the living room or in his bedroom. RP 80.

While at Alex’s house, J.K. had a large patchwork quilt made by Jay’s grandmother. RP 78. Khristena described the heavy jean quilt Jay’s

¹¹ J.K. said she told her brothers that morning but they did not believe her. RP 53.

mother had stitched together. RP 457. J.K. testified the blanket was covering her face and eyes during the incident. RP 78. J.K. described herself as sound sleeper. RP 102. J.K. testified she was asleep whenever the blankets were put over her face and she did not wake up. RP 78-79.¹² J.K. testified that the one time at Alex’s house, she could identify him as the perpetrator by his shoes, but acknowledged it was not usual to wear shoes inside. RP 75. J.K. then testified she knew who it was, “Because I would – I would move around and then the hole would get bigger and then I – I would see him just exiting out of my room.” RP 69.

Still, J.K. testified Alex pulled her pants and underwear down and touched “my number one.” RP 73. When asked if his fingers went inside, J.K. testified “I think so,” because “it would hurt.” RP 73.

Alex’s mother Khristena reviewed her calendars, emails, etc. and determined that in the preceding 14 months, J.K. spent the night at their house only this once, on July 24, 2015. RP 455. She explained that all the children slept in the living room no matter how many people were staying over. RP 455. Alex slept in the chair, CJ on the longer couch, B.K. on the

¹² J.K. testified:

Q. Okay. But when he put the blankets on you that didn’t wake you up, did it?

A: No.

Q: And so you were asleep whenever the blankets were put over your face?

A: Yes.

RP 78-79.

smaller couch. J.K. and R.K. would sleep on the floor with the dogs. RP 456. The following day they all went to the movies with everyone getting up around 8 or 9 and having pancakes. Khristena noted the living room was visible from the kitchen, everybody was under their own blanket. Nothing appeared inappropriate or out of place. RP 458-59.

Khristena's work with the calendars also helped her establish that Alex only spent the night at J.K.'s new house once after they moved in April, on June 10, 2016. RP 459, 465, 498.

R.K.'s allegations.

While Jessica was preparing to take J.K. to the doctor she asked R.K. if Alex had touched him. RP 213-14. R.K. reportedly said yes. RP 214. Judge Cuthbertson, however, found R.K.'s testimony so inconsistent that it was insufficient to sustain conviction. CP 66. Alex was then found not guilty on Count 4. CP 67; RP 553.

Medical and forensic evaluations.

Heather Hokanson, a nurse practitioner at Sound Family Medicine, testified she has been seeing J.K. since she was born and that she was brought in immediately following disclosure. RP 472-78. Nurse Hokanson testified, over objection, that J.K. told her about watching the American Ninja Warrior, the character unmasking and disclosure of abuse, and her own report to her mother. RP 485-86.

Michelle Breland, a pediatric nurse practitioner with the Mary Bridge Children's Hospital Child Abuse Intervention Department, performs medical evaluations on children with child abuse concerns. RP 356-58. Nurse Breland examined J.K. and identified her as Tanner III with lots of tissue and the edges were kind of scalloped..., but at five o'clock she had an area where ... that looked a little different." RP 377. She noted that it was not abnormal that something would look a little different. RP 386. Nurse Breland could not say whether what she observed was a healed injury that could have come from penetrating trauma or how old it might have been, however, she noted that there can be penetration that causes damage and penetration that does not. RP 380. Furthermore, growth could have caused the scalloping. RP 385.

Keri Arnold, a forensic interviewer with the Pierce County Prosecutor's Office met with J.K. and R.K. on July 25, 2016, at the Child Advocacy Center in Tacoma. RP 280-99. Ms. Arnold testified they focus on episodic memory in order to get more complete and accurate detail. RP 302. Ms. Arnold found J.K. often "used scripted language." RP 306. Even when asked about "the last time or the first time" "you would see her language again be in script format." RP 307. Ms. Arnold noted that scripted language is not proof of multiple incidents. RP 327.

Ms. Arnold also noted that celebrity support can have both positive and negative results. Once the hero acknowledges you, you can not back away from the allegations. RP 342. B.A.C.A. contact congratulating, encouraging, reinforcing, bring them presents and hosting parties may similarly bolster witnesses. RP 345-46.

BACA & ANW

Eleven-year-old J.K. testified at trial surrounded by toys and stuffed animals after being escorted to the witness box by a cadre of motorcyclists calling themselves “Bikers Against Child Abuse” (B.A.C.A.) RP 25-26, 86.¹³ J.K. testified wearing her own “biker” vest with the name “Service Dog” which she described as her “little biker’s name.” RP 40. J.K. acknowledge she was getting a lot of attention for this and that she liked that attention. RP 86.

That attention included working with B.A.C.A. for several months before trial. It included visits to the house where, along with the vest she was told “you’re a member of our family here too.” RP 265-66. J.K.’s mother described how B.A.C.A. “helped huge in the bravery part.” RP 266. One woman has gone to a couple of J.K.’s school events and worked

¹³ The collection was so substantial that when J.K. finished testifying, she needed the assistance of a victim advocate, who was also present, to take out all the stuffed animals and other supports. RP 110-11.

to bolster J.K.'s confidence. RP 266. B.A.C.A. also held a Christmas party and hosted bowling with the whole group including other kids. RP 267.

J.K. testified she thought Flip was brave and she told her mother because she wanted to be like Flip. RP 66. Jessica reached out to Flip Rodriguez through Facebook. RP 272. "Face Timed him twice," including the night before she testified. RP 64, 82-84. The day before testifying, Flip told J.K. via Face Time:

I'm proud of you guys and you guys did the right thing coming out and being courageous enough and I'm glad you did it sooner than later. Then when he talked to them right before this he just said, you know, you guys are going to rock. You're going to kill it. You guys got this. There's no reason to be scared. Be brave. Go up there and be strong. You got this.

RP 272.

The judge specifically noted that the case was made more complicated because of the presence an involvement of B.A.C.A and the ongoing interactions with Flip Rodriguez. RP 552. The professionals were very proscriptive about avoiding anything influencing the disclosures of potential victims. They are very careful about how they ask questions and they have detailed protocols to avoid inappropriate influences. RP 552-53; CP 65.

E. ARGUMENT

1. The trial court abused its discretion in denying the defense request for a continuance of the trial in order to permit reasonable and necessary investigation.

a. Defense counsel timely requested a continuance for additional investigation and trial preparation.

On January 10, 2017, the defense requested a continuance based on the need to complete witness interviews and a series of impending scheduling conflicts. 1/10/17RP 3-6. The State objected to a continuance because the allegations in the case involved sex offenses with minor victims. 1/10/17RP 7. The judge deferred ruling on the motion, however, until the scheduled witness interviews were completed. 1/10/17RP 10.

After completing the witness interviews, the defense returned to court and renewed the motion to continue because the witnesses disclosed the alleged victim had been in counseling focused on these events and the additional time was necessary to move for production of those records. 1/13/17RP 13. The judge again denied the motion to continue, but agreed to reconsider if the motion to compel was granted. 1/13/17RP 20.

On January 18th, the defense filed its motion for the production of the counseling records. CP 17-27. On January 20th Judge Costello heard the defense motion for production of records or in the alternative, an *in-camera* review of the records. 1/20/17RP 35-41. The State argued there

was no particularized showing that the records were likely to contain material relevant to the defense. CP 28-38; 1/20/17RP 42. The State also asserted RCW 70.125.065 required an affidavit to support the motion. 1/20/17RP 44.

Judge Costello denied the motion for production and the associated motion for continuance.¹⁴ CP 39-40; 1/20/17RP 50-53. The court found the motion was not supported by a sworn declaration as required by RCW 71.125.065 and that sufficient notice had not been provided pursuant to RCW 70.02.060. 1/20/17RP 51-53.

Defense counsel noted, however, that the problems with timing were created by the courts which denied the continuance he initially requested. 1/20/17RP 53.

b. The trial court had the broad discretion to grant the continuance in the interests of justice.

In both criminal and civil cases, the trial courts have the broad discretion to continue trials and hearings. State v. Hurd, 127 Wn.2d 592, 594, 902 P.2d 651 (1995); State v. Miles, 77 Wn.2d 593, 597, 464 P.2d 723 (1970); Skagit Ry. & Lumber Co. v. Cole, 2 Wash. 57, 62, 65, 25 P. 1077 (1891). A trial court may continue a criminal trial when required in the administration of justice and the defendant will not be substantially

¹⁴ The defense renewed its motion to compel at the start of trial. 1/24/17RP 5-7.

prejudiced in the presentation of the defense. State v. Woods, 143 Wn.2d 561, 23 P.3d 1046 (2001); State v. Silva, 107 Wn.App. 605, 614, 27 P.3d 663 (2001).

In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, materiality, due process, and maintenance of orderly procedure. State v. Downing, 151 Wn.2d 265, 273, 87 P.3d 1169 (2004); State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974); RCW 10.46.080;¹⁵ CrR 3.3(f).¹⁶ In

¹⁵ RCW 10.46.080 provides that:

A continuance may be granted in any case on the ground of the absence of evidence on the motion of the defendant supported by affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it; and also the name and place of residence of the witness or witnesses; and the substance of the evidence expected to be obtained, and if the prosecuting attorney admit that such evidence would be given, and that it be considered as actually given on the trial or offered and overruled as improper the continuance shall not be granted.

¹⁶ CrR 3.3(f), regarding continuances, provides:

Continuances or other delays may be granted as follows:

(1) Written Agreement. Upon written agreement of the parties, which must be signed by the defendant or all defendants, the court may continue the trial date to a specified date.

(2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for trial has expired. The court must state on the record or in writing the reasons for the continuance. The

certain cases involving allegations with child victims trial courts must also compare any detriment to the child that might be caused by a continuance with the reasons for continuing the trial. *See* RCW 10.46.085;¹⁷ State v. Downing, 151 Wn.2d 265, 87 P.3d 1169 (2004).

In the case of a juvenile who is not in detention, the adjudicatory hearing would be within 60 days after the commencement dates specified in the rule. JuCR 7.8(b).¹⁸ A juvenile defendant is free to waive his right to

bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

¹⁷ RCW 10.46.085 provides:

When a defendant is charged with a crime which constitutes a violation of RCW 9A.64.020 or chapter 9.68, 9.68A, or 9A.44 RCW, and the alleged victim of the crime is a person under the age of eighteen years, neither the defendant nor the prosecuting attorney may agree to extend the originally scheduled trial date unless the court within its discretion finds that there are substantial and compelling reasons for a continuance of the trial date and that the benefit of the postponement outweighs the detriment to the victim. The court may consider the testimony of lay witnesses and of expert witnesses, if available, regarding the impact of the continuance on the victim.

(emphasis added).

¹⁸ JuCR 7.8(b) provides pertinent part:

(b) Time for Adjudicatory Hearing.

(1) Juvenile Held in Detention. A juvenile who is held in detention shall be brought to hearing within the longer of

- (i) 30 days after the commencement date specified in this rule, or
- (ii) the time specified in subsection (b)(5).

(2) Juvenile Not Held in Detention. A juvenile who is not held in detention shall be brought to hearing within the longer of

- (i) 60 days after the commencement date specified in this rule, or
- (ii) the time specified in subsection (b)(5)

....

a speedy adjudication hearing. JuCR 7.8(c)(2)(i).¹⁹ Furthermore, JuCR 7.8(f)²⁰ expressly allows for continuances on the motion of a party and excludes that time from the speedy trial calculations. See State v. Silva,

(5) Allowable Time after Excluded Period. If any period of time is excluded pursuant to section (e), the allowable time for the adjudicatory hearing shall not expire earlier than 15 days after the end of that excluded period.

¹⁹ JuCR 7.8(c) provides in part:

(c) Commencement date.

(1) Initial Commencement Date. The initial commencement date shall be the date of arraignment as determined under JuCR 7.6 and CrR 4.1

(2) Resetting of Commencement Date. On occurrence of one of the following events, a new commencement date shall be established, and the elapsed time shall be reset to zero. If more than one of these events occurs, the commencement date shall be the latest of the dates specified in this subsection.

(i) Waiver. The filing of a written waiver of the juvenile's rights under this rule signed by the juvenile. The new commencement date shall be the date specified in the waiver, which shall not be earlier than the date on which the waiver was filed. If no date is specified, the commencement date shall be the date of the hearing contemporaneously or subsequently set by the court.

²⁰ JuCR 7.8 (f) provides:

(f) Continuances. Continuances or other delays may be granted as follows:

(1) Written Agreement. Upon written agreement of the parties, which must be signed by the alleged juvenile offender or all the alleged offenders, the court may continue the hearing date to a specified date.

(2) Motion by the Court or a Party. On motion of the court or a party, the court may continue the hearing to a specified date when such continuance is required in the administration of justice and the juvenile will not be prejudiced in the presentation of his or her defense. The motion must be made before the time for the adjudicatory hearing has expired. The court must state on the record or in writing the reasons for the continuance. The bringing of such motion by or on behalf of any party waives that party's objection to the requested delay.

107 Wn.App. 605, 27 P.3d 663 (2001) (defendants may waive the right to a speedy trial by requesting a continuance).

A continuance granted by the trial court is an abuse of discretion only if it can be said that the decision was “manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” In re Schuoler, 106 Wn.2d 500, 512, 723 P.2d 1103 (1986). The well recognized grounds for exercising discretion to grant a continuance included surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure. State v. Downing, 151 Wn.2d 265, 273, 87 P.3d 1169 (2004); State v. Eller, 84 Wn.2d 90, 95, 524 P.2d 242 (1974); RCW 10.46.080. However, trial courts must also compare any detriment to a child victim that might be caused by a continuance with the compelling reasons for continuing the trial. *See* RCW 10.46.085.

c. Trial court abused its discretion when it failed to find Alex’s right to counsel and due process of law was a substantial and compelling reasons to continue which outweighed impact on J.K.

A reviewing court will not disturb the trial court's decision unless there is “a clear showing ... [that the trial court's] discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (citing MacKay v. MacKay, 55 Wn.2d 344, 347 P.2d 1062 (1959)).

In this case, the decision to deny the continuance was based on both untenable grounds and untenable reasons.

i. The motion to compel was well founded because the evidence sought was material to the defense.

Pursuant to CrR 4.7, and in accordance with the Sixth and Fourteenth Amendments, and Article I, section 22 of the Washington Constitution, Alex sought an order directing the production of the complainant's counseling records. CP 17-27. This became necessary because during the defense interview on January 12, 2017, J.K. made several inconsistent statements and included new details regarding the alleged abuse. CP 19. J.K. also indicated she was seeing a counselor following a referral from the Child Advocacy Center. CP 19. Defense counsel learned in the interview that the counselor conducted play therapy with J.K. and apparently elicited additional information about the alleged misconduct. CP 19. Defense counsel also learned that J.K. was seeing a counselor at school and reported she had discussed the allegations with that counselor as well. CP 19. The record established there were additional statements by J.K. that had not been provided to the defense pursuant to the discovery request. CP 19.

These records were discoverable pursuant to CrR 4.7(d) which provides:

Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant. If the prosecuting attorney's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant.

It is CrR 4.7 which provides the mechanisms to fulfill the constitutional obligation to provide criminal defendants with access to any evidence which is either mitigating or exculpatory. Kyles v. Whitely 514 U.S. 419, 433, 446-47, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974) (complaining witness's juvenile record was discoverable pursuant to the Sixth Amendment Confrontation Clause, even though state law made such records privileged). The defense is entitled to discover the complaining witnesses statements to others regarding these allegations if it is any way "favorable to the accused." Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed2d 215 (1963).²¹

²¹ Relevant evidence is that which has any tendency to make the existence of any fact of consequence to the case more or less probable than without the evidence. ER 401. This threshold for relevancy is low, and "[e]ven minimally relevant evidence is admissible." State v. Darden, 145 Wn.2d 612, 621, 41 P.3d 1189 (2002).

The records at issue here were held by the school district and therapist. The court had authority to issue a subpoena in order to make such material available to the defense. CrR 4.7(d). The materials requested were critical in this case because they illustrate the evolution of J.K.'s recollections. This evidence is crucial, especially considering there was little or no corroboration of the complainant's developing claims.

Notwithstanding the statutory privileges often governing such records, the United States Supreme Court has concluded they are subject to disclosure if they are in any way "favorable to the accused and material to guilt or punishment." Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S.Ct. 989, 94 L.Ed.2d 40 (1987). The Court held that, at a minimum, Due Process requires the trial court review counseling records in chambers and provide the defense with any information that is material or exculpatory. Washington courts have adopted a similar approach. State v. Knutson, 121 Wn.2d 766, 771-73, 854 P.2d 617 (1996); State v. Diemel, 81 Wn.App. 464, 467-68, 914 P.2d 779 (1996). The Washington Supreme Court has further counseled that courts must be "sensitive to the importance impeachment evidence can have in sexual assault cases where the complaining witness and the accused are the only witnesses." Knutson, 121 Wn.2d at 775; see also State v. Kalakosky, 121 Wn.2d 525, 852 P.3d 1064 (1993).

The records sought contained information pertaining to J.K.'s discussion of the allegations of molestation and rape that are the basis for this case. CP 17-26. It was highly likely that J.K. made statements that are inconsistent with prior and subsequent statements that she has made. J.K. had not been consistent in her previous statements nor in her subsequent testimony. Cf. reporting to Jessica and Nurse Hokanson with trial testimony. The records were therefore highly likely to provide relevant and material evidence for the defense as important impeachment evidence. CP 23-24.

Finally the judge found there was an insufficient showing based on the prior inconsistent statements that evidence would be found in the records that might be admissible to impeach the credibility of the complaining witness. 1/20/17RP 52. Relying instead on the complaining witness's mother report that one counselor told her there was no retraction or change in the story, the judge denied the motions. 1/20/17RP 53. This conclusion ignores, however, the fact that the mother did not attend all of the counseling sessions. 1/13/17RP 27. Moreover, J.K.'s subsequent trial testimony illustrates the speciousness of this conclusion because she testifies to only two incidents and no abuse at the old house which is significantly different than what was earlier reported.

Cases upholding the denial of access to such records have been based on the premise that there was no possibility that they contained exculpatory evidence. See supra. The contrary is plainly true here and the judge's conclusion on materiality is, therefore, untenable in light of the record presented.

ii. Continuance was necessary and appropriate to ensure the right to fair trial where the evidence sought was material

Both the federal and state constitution's guarantee a criminal defendant the right to present a defense, including calling witnesses on his or her behalf. U.S. Const. amend. V, VI, XIV; Const. art. I, sec. 22; *see also* Washington v. Texas, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); State v. Maupin, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); State v. Wittenbarger, 124 Wn.2d 467, 474, 880 P.2d 517 (1994). The opportunity to complete discovery through the production of these records was also required under the Sixth Amendment right to confrontation. See Davis v. Alaska, 415 U.S. at 316 (requiring disclosure of protected juvenile court records); State v. Foster, 135 Wn.2d 441, 473-74, 957 P.2d 712 (1998) (finding a more protective right to confrontation under Washington Constitution Art I, sec. 22). Confidentiality requirements do not restrict a superior court's inherent power to compel the production of

evidence and the appearance of witnesses. State v. Mark, 23 Wn.App. 392, 395, 597 P.2d 406 (1979).

The constitutional right to assistance of counsel includes a reasonable time for consultation and preparation. State v. Hartzog, 96 Wn.2d 383, 402, 635 P.2d 694 (1981). Compare Barnes where the denial of a motion to continue to complete discovery and properly prepare for trial, this conclusion was not untenable in light of at least three prior continuances which has already been granted. State v. Barnes, 58 Wn.App. 465, 471, 794 P.2d 52 (1990).²²

A trial court's discretion to grant or deny continuances is abused when the trial court's decision "is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). Decisions which violate an accused person's rights to counsel or due process of law are manifestly unreasonable. State v. Williams, 84 Wn.2d 53, 855, 529 P.2d 1088 (1975); State v. Cadena, 74 Wn.2d 185, 443 P.2d 826 (1968). In this case, it was wholly unreasonable to find the Alex did not have substantial and compelling reasons to continue the hearing date to complete discovery and present necessary witnesses and evidence on his own behalf. State v. Eller,

²² The Court reviews claims of a denial of Sixth Amendment rights, including the right to counsel, de novo. State v. Jones, 168 Wn.2d 713, 719, 230 P.3d 576 (2010); State v. Iniguez, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009).

84 Wn.2d at 95; Cadena, 74 Wn.2d 85; State v. Edwards, 68 Wn.2d 246, 258, 412 P.2d 747 (1966) (denial of continuance where defense counsel exercised due diligence by issues subpoenas violated right to compulsory process).

iii. Denial of the motion based on lack of diligence or procedural hurdles were untenable grounds.

In denying the motion for production and the associated motion for continuance the Judge Costello noted the absence of a sworn declaration as required by RCW 70.125.065 and the failure to provide 14 days' notice required by RCW 70.02.060. CP 39-40; 1/20/17RP 51-53. The judge also found a continuance inappropriate:

for whatever reason this case has gone on for a period of months and it's only shortly before the trial date that the alleged victim, or victims, were interviewed, leading then to this particular motion. I don't know why the delay, but it has now created this particular problem of the time of this motion not being in compliance with the statute.

1/20/17RP 52.

aa. The juvenile court's holding regarding the affidavit requirement was untenable.

RCW 70.125.065, governing records of community sexual assault programs bars access through discovery in sexual assault cases except upon motion "accompanied by an affidavit or affidavits setting forth specifically the reasons why the defendant is requesting discovery of the

community sexual assault program or underserved populations provider records.” RCW 70.125.065. Defendants must make a showing of need before the privacy interests of individuals will be infringed. State v. Kalakosky, 121 Wn.2d 525, 852 P.2d 1064 (1993).

A “community sexual assault program” is defined in the statute as “a community-based social service agency that is qualified to provide and provides core services to victims of sexual assault.” RCW 70.125.030. The statute has no application, therefore, to the request for records from the school district. Furthermore, although the referral for counseling came from CAC, the record fails to support the conclusion that counselor or therapist J.K. consulted was part of a covered social service agency.²³ Denial of the motion based on a statute that does not apply to the records in question was untenable and therefore an abuse of discretion.

bb. The juvenile court’s holding regarding the 14 day notice was untenable.

Denial of the motion based on the failure to satisfy the 14 day notice requirement was untenable under these facts and therefore an abuse of discretion. The Washington Uniform Healthcare Information Act requires at least 14 days’ notice to be given to a healthcare provider and

²³ ““Serices for underserved populations’ means culturally relevant victim-centered community-based advocacy responses to alleviate the impact of sexual assault, as delinated in the Washington state sexual assault services plan of 1995 and its subsequent revisions.” RCW 70.125.030(6)

the patient, who then will have an opportunity to seek a protective order. See RCW 70.020070. In this case, where the patient was a minor and was provided a victim advocate, defense counsel below argued that the Pierce County Prosecuting Attorney could adequately represent this patient's interest.

Furthermore, since J.K.'s mother testified at the Status Conference on January 13, 2017, (isn't it the 1/10 hearing she testified at, before the interview etc.?) regarding J.K.'s interest in the privacy of the records, she had the necessary notice.

As to the 14 day notice requirement, it was never possible to meet that time limitation. The healthcare providers were provided copies of the defense motion. In order to meet the 14-day requirement the requested continuance was necessary and the denial of that request was unreasonable.

cc. The juvenile court's finding of a lack of diligence was untenable.

The juvenile court judge ruled that too much time had passed and the failure or inability to conduct the witness interviews until approximately 10 days before the scheduled trial demonstrated a lack of diligence which precluded the continuance. 1/20/17RP 51-52. Certainly the parties must be active in reviewing evidence, interviewing witnesses,

issuing subpoenas, and testing forensic evidence. Defendants must be conscientious in obtaining counsel and in alerting the court to any problems with current counsel. Exercising diligence means that the party has done everything reasonable, not everything possible. Like most issues relating to continuances, the definition of diligence depends upon the facts and circumstances of the particular case. See State v. Williams, 84 Wn.2d 853, 855, 529 P.2d 1088 (1975), overruled on other grounds, State v. Gosby, 85 Wn.2d 758, 539 P.2d 680 (1975) (holding it is an abuse of discretion to deny a continuance based on a lack of due diligence when the defense has shown it exercised due diligence). Because the failure to grant a continuance may then deprive a defendant of a fair trial and due process of law the question of diligence on the part of counsel is a difficult proposition. Williams, 84 Wn.2d at 855 (citing State v. Cadena, 74 Wn.2d 185, 443 P.2d 826 (1968)). Ultimately, the law will not require someone to do the impossible and due process does not require that the absurd be done before vindicating a compelling interest. Detention of Henrickson, 140 Wn.2d 686, 2 P.3d 473 (2000).

Defense counsel outlined at the January 10th hearing the considerable work that had been accomplished and the other matters on counsel's calendar which had delayed the witness interviews. See 1/10/17RP 4-5 (interviews previously set in December had to be moved

because defense counsel was in trial).²⁴ Those interviews occurred on January 12th and the parties returned to court on January 13th in order to renew the motion to continue in light of the new information developed and need to seek discovery of the counseling records identified in the interviews. 1/13/17RP 13-14. The motion to compel production was filed shortly thereafter, on January 18th and then argued on January 20th. CP 17-27; 1/20/17RP 35-55.

As the Cadena court explained, “a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality.” State v. Cadena, 74 Wn.2d 185, 189, 443 P.2d 826 (1968), citing Ungar v. Sarafite, 376 U.S. 575, 589, 84 S.Ct. 841, 11 L.Ed.2d 921 (1964). Where counsel demonstrated reasonable diligence in investigating and preparing the case for trial, the juvenile court’s conclusion to the contrary was unsupported by the record and based on untenable grounds and reasons.

²⁴ The prosecutor also notes that defense counsel “had some vacation in December and then he got sent out to trial....” RP 7

d. Failure to satisfy the procedural bars would be ineffective assistance of counsel when prejudicial to the accused.

Every person accused of a crime has a constitutional right to effective assistance of counsel. U.S. Const. amend. VI;²⁵ Const. art. I, § 22;²⁶ United States v. Cronin, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

An accused’s right to be represented by counsel is a fundamental component of our criminal justice system. Lawyers in criminal cases are necessities, not luxuries. Their presence is essential because they are the means through which the other rights of the person on trial are secured. Without counsel, the right to trial itself would be of little avail, as this Court has recognized repeatedly. Of all the rights an

²⁵ The Sixth Amendment provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.”

²⁶ Article I, § 22 of the Washington Constitution provides, in relevant part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...”

accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.

Cronic, 466 U.S. at 653-54 (internal quotations omitted). So crucial to the reliability of the outcome is the attorney's work, that where counsel's performance was deficient and the deficient performance prejudiced the defendant, a new trial is required. Strickland, 466 U.S. at 687.

An attorney renders constitutionally inadequate representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. State v. McFarland, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); see also Wiggins v. Smith, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) (“[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms”), quoting Strickland, 466 U.S. at 688. While an attorney's decisions are treated with deference, his actions must be reasonable under all the circumstances. Wiggins, 539 U.S. at 533-34.

In the present case, there is no conceivable tactical reason not to provide an affidavit in support of the motion to compel production. The motion outlined the facts in support of the request, so there was no concern regarding disclosure of defenses or alternate theories. CP 17-27.

To the extent that Alex was prejudiced by the juvenile court's rejection of the motion to compel because of this failure, he has been substantially prejudiced by the error.

Furthermore, to the extent that the 14-day notice provision was a bar to relief, counsel had a duty to seek an order shortening time. A deviation from the normal time limits is permitted as long as there is ample notice and time to prepare. Loveless v. Yantis, 82 Wn.2d 754, 759, 513 P.2d 1023 (1973). To establish prejudice from an order shortening time, the State would have to show a lack of actual notice, a lack of time to prepare for the motion and no opportunity to submit case authority or provide countervailing oral argument. State ex rel Citizens Against Tolls (CAT) v. Murphy, 151 Wn.2d 226, 236-37, 88 P.3d 375 (2004). In fact the State had notice on January 13th, filed an 8-page memorandum on January 18th and had the opportunity to present oral argument on January 20th. CP 28-35; 1/20/17RP 42-47.

If there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. Strickland, 466 U.S. at 694; Hendrickson, 129 Wn.2d at 78. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "A claim of

ineffective assistance of counsel presents a mixed question of fact and law [and is] reviewed *de novo*.” State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To the extent that the juvenile court denied the motion to compel based on counsel’s failure to satisfy certain procedural requirements, his performance was deficient and prejudiced Alex’s ability to a fair trial. Allowing counsel time to prepare for trial is a valid basis for continuance and must prevail over other procedural rights because of its central part in the application of due process of law. State v. Campbell, 103 Wn.2d 1, 14-15, 691 P.2d 929 (1984); State v. Williams, 104 Wn.App. 516, 523, 17 P.3d 648 (2001). Scheduling conflicts are central considerations in the granting continuances. See e.g. State v. Heredia–Juarez, 119 Wn.App. 150, 153–55, 79 P.3d 987 (2003) (valid continuance granted to accommodate prosecutor's reasonably scheduled vacation). In the alternative, the defendant will be denied effective assistance of counsel by his trial counsel's failure to conduct an adequate investigation of the events leading to arrest or to properly support his motion for continuance and for a new trial with any affidavits. State v. Jury, 19 Wn.App. 256, 262-64, 576 P.2d 1302 (1978).

Both the prosecution and the defense are entitled to a reasonable time to prepare for trial. While exactly what constitutes a reasonable time

is always open to interpretation, it depends on the circumstances and complexity of a particular case. In this case, facing four Class A felonies, defense counsel was preparing for the most serious and complex of trials. That requires sufficient time to review the evidence, investigate the facts, consult with witnesses, and confer. Where new events or information previously unknown to the defense arise, a continuance is warranted to complete the discovery process and the denial here was error.

2. The trial court abused its discretion by entering findings of fact that were not supported by substantial evidence in the record and must be stricken

a. Judge's findings were entered pursuant to JuCR 7.11 and are reviewed for substantial evidence

JuCR 7.11(d) provides in pertinent part:

The court shall enter written findings and conclusion in a case that is appealed. The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision.

Following a bench trial, review begins with determining whether substantial evidence supports the findings of fact, and if so, whether the findings support the conclusions of law. State v. Homan, 181 Wn.2d 102, 105-06, 330 P.3d 182 (2014); Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999); In re Welfare of Aschauer, 93 Wn.2d 689, 695, 611 P.2d 1245 (1980). “Substantial evidence” is

evidence sufficient to persuade a rational, fair-minded person of the truth of the premise. Homan, 181 Wn.2d at 106; State v. Vickers, 148 Wn.2d 91, 116, 59 P.3d 58 (2002); Holland v. Boeing Co., 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978).

**b. The evidence fails to support the finding of a
“deep” scallop in Finding of Fact XVI.**

Finding of Fact XVI, which seeks to summarize the findings of a physical examination of J.K. by nurse Michelle Breland at Mary Bridge Childrens Hospital. CP 63. The finding is in erroneous, however, to the extend that it asserts, “The genital examination revealed that J.K. had a deep hymenal scallop at 5 o’clock....” CP 63.

In fact, Ms. Breland testified simply that:

And what happens with kind of the puberty is the hymen becomes what we call estrogenated, and so it – the tissue grows and it proliferates. And she had lots of tissue and the edges were kind of scalloped on – on itself, but at five o’clock she had an area where I was concerned that it looked a little different and it might – rather than being that normal scallop it might represent a healed injury.

RP 377. Ms. Breland continued,

so for me to call that an abnormal finding and have that be supported, there’d have to be a complete absence of tissue right at that spot, and she did have just a little bit at that spot, and she did have just a little bit at the the base.

RP 378.

There is no testimony from this witness, or any other, describing the hymenal scallop at 5 o'clock as "deep" and in fact the witness describes scalloping throughout. RP 377. The finding must be stricken to the extent it is not supported by substantial evidence in the record.

c. The trial court erred in entering Finding of Fact VI, VII and XXI regarding the underlying incidents in the absence of substantial evidence.

Finding of Fact VI states in part:

On at least one occasion while the respondent was spending the night at J.K.'s "new" house, the respondent entered J.K.'s bedroom while she was asleep...The respondent put a blanket over J.K.'s head, pulled her pants down, and inserted his fingers into her vagina. J.K. woke up and moved, at which time the respondent took his hands out of her vagina, quickly tried to hide by her dresser, and then ran out of her bedroom. J.K. was able to witness the respondent leaving her room and positively identify him as the person who put his fingers in her vagina. J.K. felt pain during the time the respondent had his fingers in her vagina and described it [as] feeling like she was "stung by a bee."

CP 60.

Finding of Fact VII states in part:

On at least one occasion while J.K. was spending the night at the respondent's house, J.K. was sleeping on the floor. While she was sleeping, the respondent quietly approached J.K., pulled down her pants, and inserted his fingers into her vagina. When J.K. moved, the respondent walked away. J.K. felt pain during the time the respondent had his fingers in her vagina.

CP 60.

Finding of Fact XXI states in part:

The court finds beyond a reasonable doubt that the respondent inserted his fingers into J.K.'s bare vagina on two different occasions at two different locations.

CP 65.

Because J.K.'s testimony was so inconsistent and contradictory, this Court should find that the record lacks substantial evidence necessary to support the findings.

First, with regard to number of incidents J.K. asserted the improper contact had been going on for almost two years, but categorically indicated nothing occurred at the old house and she could only remember two incidents at the new house. RP 52, 56, 60, 75. When asked which incidents she did remember, J.K. just provided "The last time and just one other time in my new house." RP 56, 75. The judge rejected the "one other time in my new house," and should have similarly rejected the incident alleged to have occurred at Alex's house Finding VII as well based on the conflicting testimony.

Second, with regard to her identification of respondent, J.K. testified that she was asleep and that her head was covered by blankets. RP 52, 68. J.K. described herself as a "pretty sound sleeper, generally." RP 102. She testified that putting blankets over her head did not wake her. RP

78. She believed it to be the respondent “cause I would feel my pants go down to my ankles.” RP 59. From this experience, J.K. testifies it was only because “then the last time I saw him in my bedroom, that’s how I remember him.” RP 56. The clear implication being that J.K. had not seen respondent in any prior encounter and casting doubt on the other portions of her testimony.

Furthermore, with regard to the “last” incident, contrary to the language in Finding VI that respondent “then ran out of her bedroom,” J.K. testified “he just gently walked out.” RP 61. The erroneous portion of the finding should be stricken.

With regard to the essential element of penetration, J.K. testified variously that respondent would insert three fingers “inside the number one area,” but on further examination was asked if she could feel the fingers go inside and she answered “no.” Cf RP 53, 62.

J.K. testified she knew it went inside “because I would always – it would always hurt.” RP 62. Michelle Breland testified that such penetrating trauma would make it painful to urinate, but J.K. testified she never had any such difficulties. RP 54, 379. Neither J.K.’s conflicting testimony, nor the medical witnesses observations provide substantial evidence from which to make a finding regarding penetration.

The problems with the testimony were so substantial that the court did not find a third incident occurred during the charging period. CP 65. The court also inconsistencies in R.K.'s testimony precluded a guilty finding. CP 66. The same shortcomings plague the Findings VI, VII and XXI. They should be stricken to the extent they are not supported by substantial evidence.

3. Due Process required the State to prove every element of the crime charged beyond a reasonable doubt.

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime charged. In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); State v. Cantu, 156 Wn.2d 819, 825, 132 P.3d 725 (2006). A juvenile's fundamental right to due process is violated when a conviction is based upon insufficient evidence. Winship, 397 U.S. at 358; U.S. Const. amend. 14; Wash. Const. art. I, sec. 3; City of Seattle v. Slack, 113 Wn.2d 850, 859, 784 P.2d 494 (1989).

The beyond a reasonable doubt standard is designed to impress "upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused." Jackson v. Virginia, 443 U.S. 307, 315-16, 99 S.Ct. 628, 61 L.Ed.2d 560 (1970). It "symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself." Id.

Where a determination of sufficiency of the evidence requires statutory construction, review is de novo. State v. Engel, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009).

In the absence of critical findings regarding the allegations, the court can not find the allegations proven beyond a reasonable doubt.

Where the evidence is not sufficient because of the inconsistencies, dismissal would be called for.

4. Cumulative error denied Alex a fair trial.

The cumulative error doctrine provides that the accused is entitled to a new trial when the cumulative effect of the errors produces a trial that was fundamentally unfair. See State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (court finds that cumulative error requires a new trial). In Alex's case, the error in denying the continuance compounds the error in denying the motion to compel production of counseling records. Given the lack of corroborating evidence, the court's error in the findings regarding the gynecological examination then aggravate the challenges in sifting through the evidence and identifying the inconsistencies which were critical to the judge's reasoning in concluding sufficient evidence had been presented.

This represents a classic circumstance in which the individual error standing alone may not require relief, but the cumulative effect was to

clearly deny a fair trial on the critical issues presented by the evidence. Cf. State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963) (three instructional errors and the prosecutor's remarks during voir dire required reversal); State v. Alexander, 64 Wn.App. 147, 158, 822 P.2d 1250 (1992); (reversal required because a witness impermissibly suggested the victim's story was consistent and truthful, the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and the prosecutor repeatedly attempted to introduce inadmissible testimony in trial and closing); State v. Whalon, 1 Wn.App. 785, 804, 464 P.2d 730 (1970) (reversing because of court's severe rebuke of defense counsel before the jury, refusal to admit testimony of defendant's wife, and jury listening to tape of lineup in the absence of court and counsel).

In Alex's case, the cumulative error similarly served to violate his right to a fair trial and reversal is warranted. See State v. Venegas, 155 Wn.App. 507, 526-27, 228 P.3d 813 (2010) (reversed for cumulative errors including discovery rule violation, prosecutorial misconduct and ER 404(b) error).²⁷ Alex is entitled to relief in the reversal of the adjudications of guilt on Counts 1 and 2.

²⁷ State v. Greiff, 141 Wn.2d 910, 929, 10 P.3d 390 (2000); State v. Emery, 174 Wn.2d 741, 766, 278 P.3d 653 (2012); State v. Weber, 159 Wn.2d 252, 279 149, P.3d 646 (2006).

F. CONCLUSION

Alex Brown requests this Court reverse his adjudication of guilt and remand for a new hearing.

DATED this 3rd day of July, 2017.

Respectfully submitted,

s/ David L. Donnan

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