FILED
Court of Appeals
Division II
State of Washington
11/30/2017 2:49 PM

NO. 50005-1-II

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

STATE OF WASHINGTON

Respondent,

vs.

RICHARD E. HALEY,

Appellant.

BRIEF OF RESPONDENT

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I. COUNTERSTATEMENT OF THE ISSUES

A. Whether the Trial Court having since issued Findings of Fact and Conclusions of Law related to the bench trial in this matter has rendered compliance with CrR 6.1(d) moot?

B. Whether the Trial Court properly admitted statements made by Defendant into evidence in accord with CrR 3.5?

C. Whether the Trial Court properly tried this matter to the bench following Defendants knowing, intelligent and voluntary waiver of his right to a jury trial?

D. Whether the Trial Court erred in imposing consecutive sentences for two matters sentenced on the same day without finding grounds for an exceptional sentence?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Defendant, Richard E. Haley, by Third Amended Information with three counts of Rape of a Child First Degree, one count of Child Molestation First Degree, three counts of Incest in the First Degree, and one count of Incest Second Degree. CP 60-64. The offenses were alleged to have occurred from 2006 to 2010, inclusive. *Id.* With respect to the Rape of a Child Charge, those three offenses allegedly occurred on three separate dates. *Id.* The same is true for the Incest in the First Degree charges. *Id.*

1. Findings of Fact and Conclusions of Law following Bench Trial.

The State acknowledges that Findings of Fact and Conclusions of Law, as required by CrR 6.1(d) were not entered by the time defense counsel filed their brief in this appeal. That error has since been corrected as is reflected in Respondent's Supplemental Designation of Clerk's Papers, filed concomitantly with Respondent's brief.

If those Findings of Fact and Conclusions of Law raise any additional issues for Defense Counsel, the State does not oppose the filing of any supplemental brief Defense Counsel believes is necessary.

2. CrR 3.5 Hearing

On January 30, 2017, the Court heard a CrR 3.5 hearing. VRP 163. Prior to the hearing defense counsel stipulated to the admissibility of Defendant's statement "denying anything happening" *Id.* at 161, 183. The State stipulated that the interrogation of Defendant was custodial. *Id.* at 158.

The State called Det. Shane Stevenson. *Id.* at 162. Det. Stevenson testified Defendant appeared at the Jefferson County Sheriff's Office on May 11, 2016, to register as a sex offender. *Id.* at 164. Following completion of the registration process Det. Stevenson told Defendant he had a separate matter to discuss with Defendant. *Id.*

Det. Stevenson then told Defendant he was going to close the door of the room they were in for privacy. *Id.* Det. Stevenson asked Defendant

if he would agree to their conversation be recorded. *Id.* Defendant declined this request. *Id.*

Det. Stevenson testified on direct examination: "I read him his constitutional rights. I asked him if he understood his rights and if he was willing to speak with me and he said that he did understand his rights and we was willing to speak with me." *Id.*

The following colloquy then took place between the Deputy Prosecutor and Det. Stevenson:

> **Q:** Thank you. Did. you then question Mr. Haley?
>
> **A:** I did. I advised him of a investigation regarding his daughter who was 17-year-old -- 17 years old at the time, BLH. And allegations of sexual assault she had made against him. I gave him details of the assault. That she had said. that he had pinned her down and forcefully pulled down her pants and her underwear and inserted his penis into her anus. And when she screamed he had pushed her head into the pillow.
>
> That when he was done she rolled into a fetal position. He came in and made her go pick blackberries. And when the blackberries got thin he told her to go into the center of the bush to get the hard to reach berries. And when she complained she was getting cut by the thorns he said., "You can either do this, or the other thing." And by the other thing she believed, go back in and get sexually assaulted again.
>
> And the Defendant interrupted and said. that he had never picked blackberries with BLH. Never. And then he kinda calmed down and he said., "Well, maybe once. Yeah, one time I did." And I pointed out to him that after just telling him his daughter had made these

> horrendous allegations of sexual assault I thought it strange that he would contest the blackberries.
>
> **Q:** Did. he make any statements in response to that comment of yours?
>
> **A:** He interrupted again and said, "There are no blackberries on the property. Nowhere." And then he calmed down and he said., "Well, down the hill, yeah, there are some." And I brought up to him, I said, you know, "You did. it again. You're contesting the blackberries."
>
> I'm telling this man that his daughter is saying that he's anally raping her and he's holding onto this blackberry thing. Well, at that point then he denied ever sexually assaulting BLH.

Id. at 164 – 166.

During the course of the hearing and on direct examination, Det. Stevenson acknowledged that after he advised Defendant of his Constitutional Rights, Defendant was no longer free to leave. *Id.* at 167.

Defense counsel and Det. Stevenson then had an exchange that basically parroted the Deputy Prosecutor's inquiries and responses thereto – closing the door for privacy, asking if it was okay to record the interview. *Id.* at 169 – 171. Defense Counsel also asked:

> **A:** … I told him that he had completed his registration process,
>
> **Q:** You then advised him of his right to remain silent?
>
> **A:** Yes.

> **Q:** And that's after he had said he didn't want to have it recorded?
>
> **A:** Yes.
>
> **Q:** Okay. And when you asked him if he understood his rights he said. yes. Okay. Did. you -- and then you asked him whether he was willing to talk with you?
>
> **A:** Correct.
>
> **Q:** Okay. You didn't have him sign a waiver, or anything like that?
>
> **A:** No.
>
> **Q:** Okay. And you began your interview with him by telling him in detail what BLH had reported against him?
>
> **A:** Yes.

Id.., 170 – 171.

Despite being advised by the Court he had a right to testify at the CrR 3.5 hearing, Defendant chose not to. *Id.* at 182 - 183. Thus Det. Stevenson was the only person to testify at the CrR 3.5 hearing. *Id.* 162 – 183.

> **THE COURT:** Okay. Let me -- just to cover the issue of Defendant testifying or not testifying. Mr. Haley, in connection with this hearing I just need to advise you that you may, but need not testify at this hearing on the circumstances surrounding any statements that you may have made.
>
> If you do testify at this hearing you would be subject to cross-examination with respect to the

> circumstances surrounding the statements and with respect to your credibility. If you do testify at this hearing you do not waive your right to remain silent during the actual trial. If you do testify at this hearing neither the fact that you testified at this hearing would be mentioned to a jury in the event of a jury trial, unless you testified concerning the statement at the trial.
>
> Okay. So Mr. Charlton -- well, just to be clear for the record, any testimony or evidence?
>
> **MR. CHARLTON:** No, Your Honor. He won't be -- won't be testifying.

3. Jury Trial

Defendant waived jury trial. CP 67, VRP 93 -99. Defense Counsel advised the Court that he and Defendant "have had lengthy, extensive discussions... And I've expressed by strong preference for a trial by jury. He's adamant that he'd prefer trial to the Bench. I'm handing up to the Court his Waiver of Jury Trial executed yesterday." *Id.* at 93. Counsel continued:

> I can tell the Court we've been discussing this for – or arguing about this actually, for a few weeks. I met with Mr. Haley out at the jail the evening before last and again had a lengthy discussion/argument with Mr. Haley about the pros and cons of a Bench Trial, my preference for a trial by jury. He's -- steadfast in his decision and would like to try this to the Bench on the 30th, Your Honor.

Id.

The Court confirmed Defendant's counsel's statements were accurate. *Id.* at 94 – 95. The Court confirmed Defendant understood he had a right to a jury trial and that most people consider the right to a jury trial a valuable constitutional right. *Id.* at 95. The Court advised Defendant that most people would want a jury trial, particularly in serious criminal cases. *Id.* The Court advised Defendant he, the Judge, was just one person with a legal background and that some people would be more nervous having a judge hear the case rather than a jury of 12. *Id.* at 96. The Court then asked Defendant if anybody was making threats or promises to Defendant to convince him to waive his right to a jury trial. *Id.* Defendant responded, "[n]o, Your Honor." *Id.* The Court asked Defendant if anyone was forcing or coercing him to waive his right to a jury trial. *Id.* Defendant responded in the negative. *Id.* The Court asked Defendant if he had had enough time to discuss the pros and cons of waiving his right to a jury trial with defense counsel. *Id.* at 96 – 97. Defendant indicated he had had enough time and added: "[W]e went back and forth on it and I – I'm pretty much standing along [alone?] on this decision and I feel it's the right thing to do." *Id.* at 97. The Court asked Defendant if he needed more time to consult with his defense counsel with respect to whether Defendant wanted to waive his right to a jury trial. *Id.* Defendant responded: "I honestly don't believe there's anything else to

talk about Your Honor. I feel that we've – we've discussed it thoroughly." *Id.*

The Court then found that Defendant's waiver of his right to a jury trial was "knowingly, and intelligently, and voluntarily waived." *Id.*

A few moments later near the end of the hearing the Court gave Defendant one last chance to change his mind:

> If we were going to have a jury trial on January 30th, today would be the day that notices would go out to the jury for them to be in court on the 30th. So with your waiver and your decision not to have a jury trial, a jury at this point will not be called in for January 30th. So – you understand that.

Id. at 99. Defendant responded: "Yes, Your Honor." *Id.*

4. Sentencing

The State acknowledges the Trial Court sentenced Defendant incorrectly and that this matter must be remanded to the Trial Court for sentencing consistent with the SRA.

The Trial Court found Defendant guilty of three Counts of Child Rape First Degree and Three Counts of Incest First Degree, all of which were acts of Domestic Violence. CP 195 - 209. The Court imposed a standard range sentence of 318 months based on an offender score of 9+ points for the Child Rape First Degree charges. CP 198. Although Defendant had 9+ points for sentencing purposes, by this author's estimate, Defendant had no less than 41 points if all points were counted.

CP 195 - 197. Sentencing occurred March 30, 2017. CP 195 - 209. The Trial Court ordered the sentence in that matter to run consecutive with time imposed in Jefferson County Superior Court No. 17-1-00010-3. CP 199.

On the same date, the Trial Court also sentenced Defendant in Jefferson County Superior Court No. 17-1-00010-3 for one count of Incest in the Second Degree, also an act of Domestic Violence, following Defendant's plea to this charge on February 10, 2017. CP 240 – 254. The Court ordered this sentence of 60 months to run consecutive to the primary case, Jefferson County Superior Court No. 16-1-00063-6. CP 244.

Although the sentence imposed in each cause number was within the standard range, the consecutive portion of the sentence in each matter converts the sentences into exceptional sentences. The State is not able to locate any Findings of Fact and Conclusions of Law supporting the imposition of an exceptional sentence thus both matters will need to be remanded for resentencing. Consistent with the plea bargain it reached, the State will continue to advocate for concurrent sentences as it did. at sentencing. CP 637.

B. FACTS AT BENCH TRIAL

A bench trial commenced following the CrR 3.5 hearing. VRP 198.

The State called BLH who was born in August of 1998. VRP 209. Defendant, Richard Haley, is BLH's father. *Id.* at 213. BLH and Defendant lived on Marrowstone Island in Jefferson County when BLH was six, seven, and eight. *Id.* at 215. They also lived there with BLH's mother, sister, and a half-sister who came to visit occasionally. *Id.* BLH lived in a 5th wheel with her mother and sisters and Defendant lived in a silver trailer on the same property. *Id.* at 216.

There were times BLH lived with Defendant but she but not like to be alone with him as he would "abuse me in certain ways." *Id.* at 217. By that, she meant that Defendant, her father, would sexually assault her anally, and also orally. *Id.* at 218. Defendant would also feel her around her breasts & vaginal areas. *Id.* at 218

One time on Marrowstone Island when her sister went to Rainbow Club (BLH was too young to attend) BLH was left alone with Defendant. *Id.* at 219. BLH tried to hide in the trunk of her mother's car as her mother headed out to clean a house. *Id.* at 220. BLH did not tell her mother about the about the abuse because "it would break her heart, and I didn't know where we would end up." *Id.* Additionally, Defendant had told BLH that if she told anybody, she would be homeless and no one would want to help her. *Id.* at 221.

After her mother left to clean house Defendant wanted BLH to enter his home with him. *Id.* at 222. When asked if she complied, BLH stated: "I had no choice."…"He is my father." "I had to do what he said." *Id.* In the trailer Defendant began to sexually assault BLH. *Id.*

BLH said, "I was scared." *Id.* at 223. Defendant pushed her onto the bed. *Id.* He told her to lie on her stomach. *Id.* BLH did as she was told. *Id.* at 224. "He took his penis out and put it in my anus." *Id.* "It hurt. Stung. Burned a lot." *Id.* She cried. *Id.* He told her to be quiet. *Id.* When she started screaming he put his hand over her mouth. *Id.* at 225. The pain "was unbearable …" *Id.* When it was over she felt sick to her stomach and worthless. *Id.* She was nauseous and threw up. *Id.* She couldn't sit. *Id.* Afterwards Defendant said he wanted her to pick blackberries and if she wasn't willing to get the blackberries in the back of the bushes they would "do the other thing instead." i.e. rape her again, *Id.* at 226.

BLH recalls another incident from Marrowstone Island quite well. *Id.* at 227. BLH's mother was frustrated living in a small space and wanted to clean it out with BLH's older sister. *Id.* Her mother wanted BLH to go stay with Defendant while they cleaned. *Id.* BLH tried to talk her way out of it but it did not work. *Id.* BLH testified that she did not tell

her mother of the abuse this time because Defendant periodically told her that if she said anything people wouldn't love her anymore. *Id.* at 227.

BLH went to Defendant's trailer and he was staring at a computer. *Id.* at 228. Eventually Defendant indicated he wanted BLH to perform sex on him. *Id.* To convey this, Defendant would give BLH a certain look that was very suggestive and made her sick to her stomach. *Id.* at 229. Defendant unbuckled his pants and looked down at his genitals. *Id.* His penis was erect. *Id.* Defendant forced BLH to her knees and put his penis in front of her face. *Id.* BLH tried to perform oral sex on Defendant but was so sick she threw up in her mouth. *Id.*

Defendant got mad, rolled his eyes then wanted BLH to try again. *Id.* at 230. Defendant wanted to ejaculate in his daughter's mouth. *Id.* She said it tasted gross and got out of having to perform oral sex on her Dad. *Id.* Not satisfied with his daughter's act of performing oral sex on him Defendant pushed his daughter to her stomach, beat her with a belt, and proceeded to anally rape her *Id.* at 2030 – 231. Once again she experienced burning, stinging, and nausea. *Id.* at 231

BLH testified these weren't the only times Defendant raped her; there were multiple times but these two were the most vivid. *Id.* Although BLH blocked most of Defendant's sexual assaults out, she estimated she was raped by Defendant about four times per week while living on

Marrowstone Island. *Id.* She thinks Defendant began raping her when she was five or six and the rapes continued until Defendant's arrest [on other matters]. *Id.* at 232.

BLH also feared physical violence from Defendant if she told anyone what he was doing. *Id.* at 235. He had a number of weapons such as throwing stars and knives. *Id.* Additionally, he would use a belt and a cane to discipline her. *Id.* at 258

Fallout from the sexual assaults included acquiring PTSD, cutting behavior, pouring hot wax on herself, and over 20 suicide attempts – after she heard her father/Defendant would be getting out of prison soon, and being institutionalized. *Id.* at 237, 248, 250 – 252. The self-harm helped her relieve pressure; it was a coping mechanism. *Id.* at 323. BLH testified she felt conflicted about her feelings for her father – he was her victimizer but he was also her father. *Id.* at 306 – 309. She had ongoing nightmares where she would relive the sexual assaults. *Id.* at 326 – 327.

When asked about going to law enforcement BLH said. "I was scared. I still am. But the truth is better than being scared all the time." *Id.* at 236.

III. ARGUMENT

A. The Trial Court having issued Findings of Fact and Conclusions of Law related to the bench trial in this matter rendered compliance with CrR 6.1(d) moot.

Defense Counsel correctly points out that following a bench trial, a trial court is required to enter findings of fact and conclusions of law pursuant to CrR 6.1(d). That did. not occur in this case initially. However, following the filing of Defendant's Brief and a directive from this Court, the Trial Court did file Findings of Fact and Conclusions of Law on October 6, 2017. Those Findings of Fact and Conclusions of Law are attached hereto as Attachment A and are incorporated by reference. They will become part of the appellate record additionally as reflected in Respondent's Supplemental Designation of Clerk's Papers filed concomitantly with this brief.

As stated previously, should the Findings of Fact and Conclusions of Law raise new issues, the State does not oppose any supplemental briefing Defense Counsel believes is necessary.

B. The Trial Court properly admitted statements made by Defendant into evidence in accord with CrR 3.5.

As is reflected in the Statement of the Case, Defendant was advised of his Miranda[1] rights and waived them by agreeing to speak with

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[1] *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Det. Stevenson. As such, any statement made to Det. Stevenson by Defendant were properly admissible.

However, even if this Court should determine the statements made by Defendant were obtained in violation of *Miranda*, any error in admitting those statements was harmless.

> [A]dmission of an involuntary confession obtained in violation of *Miranda* is subject to treatment as harmless error. To find an error affecting a constitutional right harmless, the reviewing court must find it harmless beyond a reasonable doubt. The Washington Supreme Court has adopted the "overwhelming untainted evidence" standard in harmless error analysis; therefore, we look only at the untainted evidence to determine if it is so overwhelming it necessarily leads to a finding of guilty.

State v. Reuben, 62 Wn. App. 620, 626 – 627, 814 P.2d 1177 (1991).

Defendant takes pains to cite to the portion of the record prior to the announcement of the verdict. Appellant's Brief, pp. 20 – 22. In this section the Court discussed Defendant's interview with Det. Shane Stevenson, to include the section where Det. Stevenson found it odd Defendant was worried about blackberry bushes rather than the allegation he anally raped his daughter.

However, read in context, it is clear the Court was simply summing up the evidence as he saw it. See TMHVRP, pp. 2 – 22[2].

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[2] The document Defendant cites to and quotes from extensively is entitled: Transcript of Motion Hearing before the Honorable Keith C. Harper Jefferson County Superior Court Judge. The hearing date referenced is February 3, 2017. This was not actually a motion hearing rather it was the lead up to and delivery of the verdict by the Bench. The State

Defendant's concern with the blackberry bushes was interesting but of little value to the Court in determining Defendant committed the crimes he was accused of. This is reflected in the following statement by the Court:

> Ultimately -- ultimately, with all the testimony, I found BLH to be credible concerning the sexual assault allegations. Yes, she's had a number of issues. I suspect - - there wasn't any expert testimony -- but, based on what I heard and what I recited, and the things I did not recite here today, I believe that a number of her issues probably arose from this conduct.
>
> And -- but they did not affect -- in my mind, it did not affect her credibility in connection with these incidents. I think she was credible in connection with these.
>
> Her mother's testimony is not necessary to corroborate that. The fact that her mother may have been inaccurate, or may have embellished, or may have left things out doesn't affect the credibility of BLH.
>
> And the -- and like I say, I'm not relying on any confession over the phone because it's just not reliable as to what happened.

TMHVRP, pp. 24 – 25.

Additionally, in its Findings of Fact and Conclusions of Law (FOFCOL), the Court made a brief reference to the blackberry bushes in its "Testimony Presented at Trial." FOFCOL, pp. 9 – 10. However, the Court completely omits any mention of Defendant's statements to Det.

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will cite to this transcript as "TMHVRP" and mentions this so that the Court and parties do not confuse the pagination of this transcript with the pagination in the remainder of the Report of Proceedings which include the CrR 3.5 Hearing, the bulk of the bench trial, and sentencing, and are sequentially numbered from pp. 1 – 650.

Stevenson in the actual "Findings of Fact" section of that document. FOFCOL, pp. 10 – 11.

Finally, substantial experience with the criminal justice system will support the conclusion that the Defendant appreciates the gravity of *Miranda* warnings. See, e.g. *State v. Hutchinson*, 85 Wn. App. 726, 938 P.2d 336 (1997) (in 12 preceding years, Defendant had been Mirandized on at least five separate occasions, and on each occasion had acknowledged those rights, waived them, and answered questions).

Here the record does not provide enough information to speak to how many times Defendant has been Mirandized but the record does reflect that Defendant has a significant number of prior convictions from multiple dates and multiple counties to include:

	Crime	Date of Crime	Sentencing Court
1	Unlawful Possession of Firearm in the First Degree 10-1-00306-0	03/25/10	Okanogan County Superior Court, Washington
2	Unlawful Possession of Firearm in the First Degree 10-1-00306-0	03/25/10	Okanogan County Superior Court, Washington
3	Possess Depict Minor – Sex Conduct 10-1-00306-0	03/25/10	Okanogan County Superior Court, Washington
4	Rape in the Third Degree 10-1-00306-0	06/26/09	Okanogan County Superior Court, Washington
5	Rape in the Third Degree – No Consent 10-1-00306-0	07/10/09	Okanogan County Superior Court, Washington
6	Incest in the First Degree 10-1-00306-0	06/26/09	Okanogan County Superior Court, Washington

7	Incest in the First Degree 10-1-00306-0	07/10/09	Okanogan County Superior Court, Washington
8	Fail to Register as Sex Offender 99-1-00126-1	08/12/99	Jefferson County Superior Court, Washington
9	Child Molestation in the Second Degree 89-1-00768-0	07/25/90	Kitsap County Superior Court, Washington
10	Bail Jumping 89-1-00768-0	05/22/90	Kitsap County Superior Court, Washington
11	Attempt to Elude Pursuing Police Vehicle 89-1-00589-0	09/25/89	Kitsap County Superior Court, Washington

Thus the likelihood that Defendant did not understand his rights or understand the gravity of speaking with Det. Stevenson after he had been advised of his Constitutional rights is near non-existent.

C. The Trial Court properly tried this matter to the bench following Defendants knowing, intelligent and voluntary waiver of his right to a jury trial.

There is no question that Defendant had a right to a jury trial under both the Sixth Amendment and Article I, § 21 of the Washington State Constitution. See also *State v. Stegall*, 124 Wn.2d 719, 723, 881 P.2d. 979 (1994). However that right may be waived. CrR 6.1.

> In general, constitutional rights may only be waived by knowing, intelligent, and voluntary acts. *See, e.g.,* This court has held, with respect to a 12-person jury, that the right can be waived as long as the Defendant "acts intelligently, voluntarily, [and] free from improper influences ...".
>
> The validity of any waiver of a constitutional right, as well as the inquiry required by the court to establish waiver, will depend on

> the circumstances of each case, including the Defendant's experience and capabilities. Moreover, the inquiry by the court will differ depending on the nature of the constitutional right at issue. For example, when a Defendant wishes to waive the right to counsel, and proceed pro se, the trial court must usually undertake a full colloquy with the Defendant, on the record, to establish the Defendant knew the relative advantages and disadvantages of proceeding pro se. ("only rarely" will the record contain sufficient information to support a waiver of the right to counsel in the absence of a colloquy with the Defendant). A guilty plea, which involves waiving numerous trial rights, is valid. only if the record shows not only a voluntary and intelligent waiver, but also an understanding of the waiver's direct consequences.
>
> *By contrast, no such colloquy or on-the-record advice as to the consequences of a waiver is required for waiver of a jury trial; all that is required is a personal expression of waiver from the Defendant.*

Stegall, at 724 – 726 [internal citations omitted, italics added for emphasis].

Defendant chose to waive his right to a jury trial in writing, and following an oral colloquy with the Trial Court, the Trial Court consented to a bench trial in the instant matter. CP 67, VRP 93 -99. It's also quite apparent from the record that the waiver of the right to jury trial was made contrary to the advice of counsel. VRP 93.

CrR 6.1(a) provides as follows: "(a) Trial by Jury. Cases required to be tried by jury shall be so tried unless the Defendant files a written waiver of a jury trial, and has consent of the court." Here Defendant filed a written waiver and the Court consented to the matter being heard by the bench after the Court:

- Asked Defendant if he understood he had a right to a jury trial and that most people consId.er the right to a jury trial a valuable constitutional right;

- Advised Defendant that most people would want a jury trial, particularly in serious criminal cases;

- Advised Defendant he, the Judge, was just one person with a legal background and that some people would be more nervous having a judge hear the case rather than a jury of 12;

- Asked Defendant if anybody was making threats or promises to Defendant to convince him to waive his right to a jury trial - Defendant responded, "[n]o, Your Honor;"

- Asked Defendant if anyone was forcing or coercing him to waive his right to a jury trial - Defendant responded in the negative;

- Asked Defendant if he had had enough time to discuss the pros and cons of waiving his right to a jury trial with defense counsel - Defendant indicated he had had enough time and added: "[W]e went back and forth on it and I – I'm pretty much standing along [alone?] on this decision and I feel it's the right thing to do;"

- Asked Defendant if he needed more time to consult with his defense counsel with respect to whether Defendant wanted to waive his right to a jury trial - Defendant responded: "I honestly don't believe there's anything else

> to talk about Your Honor. I feel that we've – we've discussed it thoroughly."

Short of forcing Defendant to have a bench trial it appears there is little else the Trial Court could have done to make sure Defendant understood the significance of the right he was waiving. The Trial Court properly determined Defendant made a knowing, intelligent, voluntary, and free from improper influences, waiver of his right to a jury trial.

D. The Trial Court erred in imposing consecutive sentences for two matters sentenced on the same day without finding grounds for an exceptional sentence.

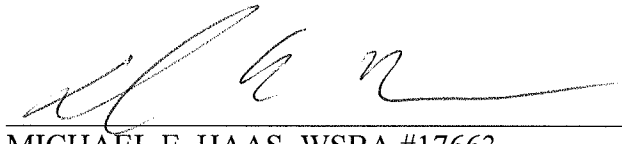
The State acknowledges the Trial Court improperly sentenced Defendant to consecutive sentences in Jefferson County Superior Court No.s 16-1-00063-6 and 17-1-00010-3 in light of the fact that the respective sentences were not supported by Findings of Fact and Conclusions of Law as is needed when a court imposes an exceptional sentence. See RCW 9.94A.535 and RCW 9.94A.589(1)(a).

That said., this acknowledgement should be little cause for celebration by Defendant as there is certainly a legitimate statutory basis for imposition of an exceptional sentence based on Defendant's tremendous number of "unpunished" offenses. See RCW 9.94A.535(2)(c).

IV. CONCLUSION

For the foregoing reasons, the Defendant's convictions should be affirmed however, the matter must be remanded to the Trial Court for sentencing in accord with the SRA.

Respectfully submitted this 30th day of November, 2017.



MICHAEL E. HAAS, WSBA #17663
Jefferson County Prosecuting Attorney
Attorney for Respondent

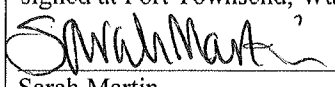
PROOF OF SERVICE

I, Sarah Martin, declare that on this date:

I filed the State's BRIEF OF RESPONDENT electronically with the Court of Appeals, Division II, through the Court's online filing system. I delivered an electronic version of the brief, using the Court's filing portal, to:

John A. Hays, WSBA #16654
jahayslaw@comcast.net

I declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct. Dated this 30th day of November, 2017, and signed at Port Townsend, Washington.



Sarah Martin
Senior Legal Assistant

ATTACHMENT A

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2017 OCT -6 AM 10: 16

IN SUPERIOR COURT
JEFFERSON COUNTY, WA

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

STATE OF WASHINGTON, **Plaintiff,** **vs.** **RICHARD EVERETT HALEY,** **Defendant.**	**NO. 16-1-00063-6** **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

I. SUMMARY OF PROCEEDINGS

On January 11, 2017 the State filed a Third Amended Information alleging the following counts against the defendant, Richard E. Haley:

Count I: Rape of a Child in the First Degree-Ongoing Pattern of Sexual Abuse;

Count II: Rape of a Child in the First Degree-Ongoing Pattern of Sexual Abuse;

Count III: Rape of a Child in the First Degree-Ongoing Pattern of Sexual Abuse;

Count IV: Child Molestation in the First Degree-Ongoing Pattern of Sexual Abuse;

Count V: Incest in the First Degree-Ongoing Pattern of Sexual Abuse;

Count VI: Incest in the First Degree-Ongoing Pattern of Sexual Abuse;

Count VII: Incest in the First Degree-Ongoing Pattern of Sexual Abuse;

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On January 20, 2017 the defendant waived jury trial, electing to have the case tried before the bench. The court queried defendant regarding his waiver of jury trial. The court found that defendant's waiver was knowing, voluntary, and intelligent.

Bench trial took place on January 30, 2017. Chief Deputy Prosecuting Attorney Julian E. St. Marie represented the State. Attorney Scott Charlton represented the defendant.

The State presented testimony by the alleged victim, BLH. In addition, the State presented testimony by investigating officer Detective Shane Stevenson and the alleged victim's mother, Dana Richardson.

The defendant presented testimony by the defendant's mother, Betty June Haley. In addition, the defendant presented testimony by retired officer David Miller. The court admitted defense exhibits marked #1,2,4,8,11,12, and 13, consisting of greeting cards and letters from BLH to the defendant.

II. TESTIMONY PRESENTED AT TRIAL

The following testimony was presented at trial:

BLH:

BLH was a minor child between the ages of six and eight at the time these events occurred. Her date of birth is August 14, 1998. At the time of her testimony she was eighteen years old. Her mother is Dana Richardson. Her father is the defendant, Richard Haley. At all pertinent times she lived with her mother and sister on Marrowstone Island, in Jefferson County. BLH lived in a fifth wheel with her mom and sister. Defendant lived in a separate, silver trailer on the same property.

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Defendant stayed in his trailer most of the time. He played various games with BLH. There were certain times BLH enjoyed the time she spent with her Dad. BLH didn't like to be alone with the defendant because he would abuse her in certain ways. The abuse specifically included sexual assault, both anally and orally. Defendant also touched her breast and vaginal areas during this time period.

With respect to the first rape allegation, BLH and her family were living on Marrowstone Island. The defendant at various times made threats that if BLH didn't do what she was told they would become homeless and the Haley family would no longer support them. At times the defendant imposed physical punishment using belts or spanking her if she refused to do what he said. Punishment included sexual contact.

BLH's sister had gone to a "Rainbow Girl's Club" function. BLH was too young to be a participant in that function. BLH's mother went to clean for an unknown woman. BLH was alone with her father.

BLH had begged her mom to go with her so she didn't have to stay with her father alone. BLH cried, and hid in her mother's mini-van in the trunk but her mother saw her before leaving and told BLH she had to stay. BLH did not tell her mother why she was upset or why she didn't want to stay with her dad because it would break her mom's heart and BLH didn't know what would happen to the family.

BLH's mother left. Just BLH and the defendant were there. The defendant wanted BLH in the fifth wheel bedroom with him. The defendant went into the fifth wheel and she had to do what her father said.

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Defendant sexually assaulted her in the fifth wheel. BLH couldn't remember exactly how he approached her. BLH was scared. Defendant pushed her onto the bed. Defendant told her to lay on her stomach on the bed and defendant sexually assaulted her by putting his penis into her anus. It hurt and burned a lot in her gut. She cried. Defendant told her to be quiet and put his hand over her mouth to quiet her. On a scale of 1-10 with "10" being most painful she described the pain as"10". The pain was unbearable. BLH was sick to her stomach. She felt worthless. She was nauseous. She couldn't sit for a period of time. She couldn't recall how long the incident lasted. She couldn't remember anything else that was said. After that defendant wanted to pick blackberries to make jam. Defendant wanted her to go into the sticker bushes to get the berries that couldn't be easily reached. Defendant told her that if she didn't get them, "we'll do the other thing", which she took to mean going back into the trailer and being sexually assaulted. She went into the sticker bushes because the pain from the sticker bushes was less than the sexual assault.

There was a second and a third rape alleged. There was another time on Marrowstone Island when the family lived there. BLH's mother was agitated because she was cleaning the fifth wheel trailer. BLH's mother told BLH to go see her dad. BLH tried to stay with her mother. Again, BLH did not tell her mother why she didn't want to go to her dad's trailer; the defendant periodically told her that if she told anyone they wouldn't understand and wouldn't like her anymore. So BLH went inside her father's silver trailer and sat down.

The defendant was inside the trailer on a computer. The defendant wanted BLH to perform sexually. The defendant had a certain look in his eye that was very suggestive. The defendant unbuckled his pants and looked at his genitals. The defendant grabbed BLH by her shoulders and pushed her down. The defendant put his penis in her face and mouth. BLH threw

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up in her mouth. Defendant wanted BLH to do it again. Defendant wanted to ejaculate. BLH didn't like the taste so defendant pushed her to the bed. BLH tried to oppose him. Defendant then beat her with a belt. Defendant then put his penis in her anus. BLH described it as burning, stinging, and causing her nausea.

BLH testified defendant anally raped her multiple other times but couldn't describe specifics, stating the incidents became a blur over the years. BLH can't remember the other times. The sexual abuse occurred about four (4) times a week, starting in the pink house when the family lived in Chimacum. The abuse continued to a time when they lived in the mountains, over near Okanagen, in Washington State. The abuse continued until defendant was arrested on another matter.

BLH also described groping, stating that defendant touched her breasts and looked at her vagina and touched the outside of her vagina over a period of years. The last time it occurred would have been when the family lived in the mountain area. She doesn't remember why these incidents ended. BLH testified she and her mother were very close, like sisters. Her mother would be very sad if BLH told her about these events, because it hurt BLH. BLH was afraid of her father's threats that she would be homeless, and that no one would like her. She feared physical harm. She feared he would hurt her. He would hint at hurting her if she didn't obey. She didn't go to law enforcement about this because she was scared and still is.

BLH has been in therapy and spent time in a mental health facility in the last year because she tried to kill herself. She attempted suicide because she'd heard that her father was getting out of jail soon. BLH talked to a friend at school about her concerns. The friend told the school, which then confronted BLH. BLH then disclosed some of these events. At some point

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she talked to a sexual assault investigator in Kitsap County. When she talked to the sexual assault investigator, BLH was truthful. Nobody told her what to say.

BLH partially recalled an investigation a number of years ago. BLH didn't disclose her father's sexual abuse at that time because she was scared. During her testimony BLH identified the defendant in the courtroom. She has never seen the video/audio of that interview.

The first time BLH went to counseling was this last year. She tried to kill herself a number of times. She has engaged in self-harm behaviors such as cutting herself, starting when she was quite young. The self-cutting is emotionally triggered. She has anxiety attacks. The defendant used a belt and sometimes a cane to discipline her when she was young. Her mother knew of the defendant using a belt but was afraid to say anything. All of her family members were afraid of the defendant.

There were times when she wrote to the defendant while he was incarcerated for a different matter. BLH would say "Happy Birthday" and "Happy Father's Day" to her father just to be nice. What he did was unforgiveable. She sent the cards when he was in jail. She stopped sending cards to him in jail a couple of years ago because he could not threaten her any longer. When he was in jail they were homeless for a while but then they discovered that they could survive without the defendant as a provider. Her attitude about cards and letters changed.

She never told her mother that defendant molested her multiple times. She reiterated that defendant told her she would be homeless and the family would be destroyed. The defendant never verbally threatened to hurt her physically, he was too smart for that. She didn't tell law enforcement because she felt intimidated by police and was afraid of police. She was afraid of

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the police because of things that happened in the past. She didn't think they were good guys until much later when she was older.

During the earlier investigation she might have said the defendant did not do anything to her. Even though she feared her father there was an underlying love because he was her father. Even though he was an abuser they had some fun with games and things like that. He is the only father she has ever known.

She felt threatened by defendant's phone calls from jail and his suggestions that they could be a family again. While he was in jail she grew older and could make her own decisions and she was afraid he could be back in her life.

Only defendant could drive, not her mother, which was why she didn't seek medical treatment. She didn't tell her mother about the suicide attempts. Her mother didn't know about these attempts until last year when BLH ended up in a mental health facility.

She didn't tell her mother about the sexual abuse until the Kitsap interview. When her mother learned of it she cried; that was the response BLH expected if she learned about it.

BLH never asked for prosecution. She didn't tell anybody about her suicide attempts because she didn't want to be sent to an institution. She engaged in self-harming because it helped relieve pressure in connection with things that happened. She's been diagnosed with PTSD related to defendant's sexual abuse. She has repeated flashbacks of the sexual abuse. Nothing has been more troubling to her than the sexual abuse. She has nightmares and relives it. Her mother had to go through a lot of stuff, things were complicated, and she had much on her plate. BLH didn't want to trouble her with these allegations.

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In connection with visiting her father she had multiple emotions. She would sleep in the car on the way and would feel depressed. She didn't tell her mother because her mother had enough to do. She wasn't mixing up what's happened to her with things she's seen on television or confusing reality with anything else.

DANA HALEY:

Ms. Haley was married to defendant in 1999. They divorced in April 2016, after these allegations surfaced. They have two daughters, SLH and BLH. Defendant has another child from another relationship, SH. Ms. Haley and the defendant separated between 2006 and 2010, meaning they lived at same location but had separate living quarters.

During the time of these allegations, she was in a fifth wheel and defendant was in a trailer. She was on SSI. She didn't drive. Defendant did drive. They each had their own money. The defendant kind of helped support the kids-he would lend her money and she would have to repay it.

At the time these allegations took place she didn't know about it. When she learned of it she cried her eyes out. They divorced so she could be free of him because of what happened to the girls. There was never any question of custody.

She had a close relationship with BLH. They were like sisters, or buddies. She learned later of BLH's self-harm and suicide attempt. There was a time in 2013 that BLH was on suicide watch; family kept an eye on her, tried to help her. BLH didn't actually attempt suicide. A counselor indicated to Ms. Haley there was no need for counseling. Financially, they have medical through DSHS. Going to the hospital wasn't a financial issue.

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Sometime in 2015 Ms. Haley learned of allegations of anal sex. In a telephone call the defendant acknowledge hurting the girls.

DETECTIVE SHANE STEVENSON:

Detective Stevenson has training in Child Forensic Interviews and has been certified to conduct that type of interview. In this case he didn't conduct a Child Forensic Interview. BLH disclosed to an officer in Kitsap County, which was recorded in audio and video. In his training and experience, it is not uncommon for reporting of sexual abuse to be delayed. Some of the reasons include shame, embarrassment, fear, intimidation, and a lot of other reasons. He received copy of forensic interview and further investigated the case. He interviewed a number of people.

He interviewed the defendant at the Jefferson County jail, when the defendant came to the Sheriff's office to register as a sex offender. Detective Stevenson indicated he wanted to speak with the defendant about another matter and shut the door for privacy. Detective read the defendant his Miranda rights and explained in detail one of the rape allegations.

Detective Stevenson described that it was alleged by the victim that defendant had anally raped her and afterwards laid in a fetal position on the bed. As Detective Stevenson described BLH's allegations, he mentioned that BLH indicated she and her father picked blackberries after an instance of anal rape. The defendant interjected that he didn't pick blackberries with BLH. Defendant then acknowledged that he had picked blackberries with BLH, one time. The Detective described defendant's reaction as odd.

The defendant at first denied there were blackberries on the property, then acknowledged there were. The detective found that response to be very odd as well, and indicated the defendant did not seem to express any concern for the victim. Defendant indicated to Detective Stevenson

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that there might be child custody issues in connection with a divorce, even though one of the children was eighteen and the other would be turning eighteen that year.

Detective Stevenson investigated BLH's allegations. He found the family did live on Marrowstone Island during the time described. In addition, Detective Stevenson learned that blackberries existed on the property and would have borne fruit while school was in session as described by the victim. At some point during the interview the defendant eventually denied the allegations in connection with BLH. The conversation was not confrontational or argumentative. It appeared to Detective Stevenson that the defendant was trying to grasp for some item of truth. It was some time before defendant denied the allegation. Detective didn't believe defendant was being truthful and ultimately arrested defendant for Rape of a Child in the First Degree.

BETTY JUNE HALEY:

Betty June Haley is defendant's mother. She doesn't want him to go back to prison. When BLH went with the family to visit the defendant in prison, she seemed happy.

RETIRED DEPUTY DAVID MILLER:

Then Deputy David Miller investigated allegation of abuse by the defendant against BLH in 2007. Back then defendant denied assaulting BLH. The retired Deputy testified he didn't ask specifically whether BLH's father had touched her inappropriately. He couldn't say whether BLH was fearful or not, but that she didn't appear to be fearful.

III. FINDINGS OF FACT

The court finds that BLH's testimony regarding the sexual assault allegations was credible. Although BLH has a number of issues, those issues probably arose from defendant's conduct. While BLH's testimony may not have been accurate about how many suicide attempts

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she made and she may have exaggerated in that respect, it did not affect her credibility with respect to the sexual assault allegations. The victim was less than twelve years old at the time of the sexual assaults. The defendant was at least twenty-four months older than the victim. The defendant knew the victim to be his descendant.

Regarding Dana Haley's testimony that defendant confessed to hurting the girls in a phone call with Ms. Haley while defendant was incarcerated, the court finds it's likely that at some time a phone call occurred. However, the court finds the testimony about the confession to be vague and unreliable. The court does not based its decision on the alleged confession by defendant. At various points, Ms. Haley's testimony was not credible. Apparently Ms. Haley is still intimidated by the defendant and didn't want to put herself in a worse light than she had to. It appeared to be hard for Ms. Haley to explain how daughter had a number of issues over a period of time and did not recognize any of them.

With respect to Betty June Haley's testimony, the court found her testimony not credible.

Regarding retired Deputy David Miller's testimony, the court listened to the tape of that interview. The court interprets the question to BLH as whether "anyone" had molested her, rather than specifically about her father. BLH appeared to be subdued and didn't say a much about the father nor what they did together.

BLH's testimony concerning the allegation of Child Molestation was vague, with no real time frame. BLH's testimony was vague with respect to the alleged ongoing pattern of sexual abuse.

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IV. CONCLUSIONS OF LAW

Based on the facts as outlined above, the court finds the defendant Guilty of the following counts:

Count I: Rape of a Child in the First Degree (First allegation of anal rape);

Count II: Rape of a Child in First Degree (Oral sex);

Count III: Rape of a Child in First Degree (Second allegation of anal rape);

Count V: Incest in the First Degree;

Count VI: Incest in the First Degree;

Count VII: Incest in First Degree.

Based on the facts as outlined above, the court finds the defendant Not Guilty with respect to the following counts:

Count IV: Child Molestation;

Count VIII: Incest in Second Degree (correlating with the count of Child Molestation).

In addition, the court concludes that the evidence was insufficient to find a pattern of ongoing abuse with respect to any of the counts.

DATED: August 16, 2017

MICHAEL E. HAAS, Jefferson County Prosecuting Attorney

By: Julian E. St. Marie, WSBA #27268
Chief Deputy Prosecuting Attorney

Approved: 10/06/2017.

JUDGE KEITH C HARPER

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November 30, 2017 - 2:49 PM

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Appellate Court Case Title:	State of Washington, Respondent v. Richard Haley, Appellant
Superior Court Case Number:	16-1-00063-6

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