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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RICHARD NEIGHBARGER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Judge James Orlando

No. 15-1-03789-9

Brief of Respondent

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

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B. STATEMENT OF THE CASE.

1. PROCEDURE

On September 23, 2015, defendant was charged by amended information with eight counts of Rape of a Child in the First Degree (Counts I-IV, VI-VIII, XI), three counts of Child Molestation in the First Degree (Counts V, IX, X), and two counts of Incest in the First Degree (Counts XII and XIII). CP 11-18.

Prior to the trial defendant moved to exclude evidence relating to defendant's lustful disposition towards J.N. RP 15-17. The court denied the motion but stated it may require a limiting instruction. RP 17.

During the trial, defendant was prevented from admitting reputation evidence and J.N.'s character by way of Ms. Neighbarger. RP 514. The court excluded the testimony because a family is not a broad enough group to be a community and the testimony cannot come from a family member. RP 515.

The State orally amended the dates for counts XI, XII, and XII to expand the dates based on testimony given at trial. RP456. Defendant objected to the amendments. *Id.*

The jury returned guilty verdicts on all 13 counts and found aggravating factors on several. CP 253-78. Defendant was sentenced to confinement for a minimum of 480 months, based on an offender score of 36. CP 314-31, 381-85.

2. FACTS

a. Facts Prior to Trial

On September 14th, 2015, Z.N. submitted a writing assignment to his teacher at Emerald Ridge High School in Puyallup, Washington. RP 105. The class was Creative English and the assignment was for the writer to tell his life story. RP 106. Z.N., who was 15 years old at the time,

thought about the assignment and his life story. RP 147. He did not write about something fun and exciting, "That would have been a lie." RP 107. Z.N.'s assignment was about sexual and physical abuse. RP 273.

Z.N. did not want to be "weak" and put his problems on others, that is why at the top of the assignment he wrote a message asking his teacher to be discreet. RP 109. However, his teacher's obligation as a mandatory reporter compelled him to bring the content of Z.N.'s assignment to the attention of the authorities. RP 55. The assistant principal then notified Deputy Papen, the school resource officer, about the situation. *Id.* Based on the contents of the Z.N.'s assignment, Deputy Papen decided to speak with Z.N. RP 74.

Deputy Papen met with Z.N. on September 15, 2015, for approximately one hour at Emerald Ridge High School. RP 73, 75, 113. Despite being nervous and embarrassed, and at points shaking and crying, Z.N. spoke with Deputy Papen about the content of his assignment. RP 78, 113. Information was revealed during the meeting which led Deputy Papen to collect evidence from Z.N. RP 76. Deputy Papen had Z.N. email him text messages from his phone and write a statement. RP 77, 78. The text messages were between Z.N. and his brother J.N. about their father's actions and a "safety plan" if he were to "try anything." RP 141-143. Deputy Papen determined the incidents Z.N. were reporting likely

occurred in the city limits of Puyallup. RP 80. He contacted the Puyallup Police Department and advised them of what he learned, then turned the investigation over to them. *Id.*

Detective Wilcox of the Puyallup Police Department took over the investigation and she and Sergeant Pihl interviewed Z.N. on September 15, 2015, the same day he was interviewed by Deputy Papen. RP 271. The investigation was conducted at Emerald Ridge High School and lasted approximately an hour. RP 274. During the course of that interview, Z.N. disclosed and told the detectives his father was in Texas on a business trip. RP 116, 276. Detective Wilcox described Z.N. as “calm, matter of fact, a very intelligent boy,” understood the questions he was being asked and readily corrected the officers if they misstated anything he said. RP 275.

Sergeant Pihl then contacted Z.N.’s mother, Sarah Neighbarger, to inform her there was a situation “sexual in nature” involving Z.N. RP 276-77, 343. Sergeant Pihl asked for her consent to search Z.N.’s phone. RP 343. Ms. Neighbarger did not give consent because, “she didn’t want to do something – or consent to something that may incriminate her husband.” *Id.* Sergeant Pihl subsequently sought a warrant to search the phone. RP 345.

Detective Wilcox contacted J.N. and communicated to him that she was investigating a matter involving his brother and needed to speak to

him. RP 277. Initially, J.N. was reluctant to speak with Detective Wilcox. RP 278. However, he agreed to come to the police station and speak with her when she told him, “things have been going on in the house for the last decade between [Z.N.], his dad, and [J.N.]” *Id.*

When Ms. Neighbarger arrived at the police station, Detective Wilcox and Sergeant Pihl notified her Z.N. had disclosed sexual abuse. RP 279. Z.N. did not want to tell his mother about the allegations, but he wanted to be there for her. RP 279, 346. When the officers notified Ms. Neighbarger about Z.N.’s disclosure “she did not make any contact with him” and appeared to be “cold” to him; “there was no comforting or did not appear to be reaching out to [Z.N.] in a way...” RP 280, 347. Sergeant Pihl asked Ms. Neighbarger about pornography being shown in the home. RP 349. Ms. Neighbarger she said there was pornography “running” in the living room and that she did not see a problem with it, but she was aware of her kids possibly being uncomfortable with it. *Id.*

J.N. arrived to the police station 20 minutes after Ms. Neighbarger. RP 280. Detective Wilcox interviewed J.N. at the police station for approximately one hour. *Id.* During the interview J.N. was “sullen, but upfront and willing to talk.” RP 281. Following the interview, Detective Wilcox and Sergeant Pihl contacted CPS and discussed making a physical arrest of defendant. RP 280-81.

Ms. Lopez-Silvers, a CPS investigator, contacted Ms. Neighbarger and asked her about pornography being played in the living room of the family home. RP 325. Ms. Neighbarger told Ms. Lopez-Silvers that pornographic photos and videos were frequently on display in the living room. *Id.* Ms. Neighbarger also stated that the videos stopped being played about two weeks prior “because [Z.N.] didn’t like having it out there.” *Id.* Ms. Neighbarger did not have any difficulty understanding what was meant by the word “pornography.” RP 285. Ms. Neighbarger also informed the officers that physical discipline was used on Z.N. and J.N. RP 286-87. Z.N. and J.N. were hit with objects, defendant would pin them down by their necks, but they were still able to breathe, and that she was aware defendant struck Z.N. with his fist. RP 286-87, 327.

After Detective Wilcox’s, Sergeant Pihl’s and Ms. Lopez-Silvers’s conversation with Ms. Neighbarger concluded, Z.N. came outside to help his mother with her luggage. RP 287. “[S]he was again very cold and didn’t want his help.” *Id.* “She was very worried about Mr. Neighbarger and what was going to be happening with him.” RP 328.

b. Facts at Trial

When the case proceeded to trial, Z.N. and J.N. both testified about the sexual and physical abuse they endured at the hands of defendant.

i. **Sexual Assault of J.N.**

The first home J.N. remembered living in was his paternal grandmother's home in either Spanaway or Tacoma. RP 371. J.N. believes this is the location where the earliest sexual contact between him and his father, defendant, occurred. RP 402. He was approximately four or five years old and "[t]he very early incidents were very blended together." RP 371, 403. The sexual encounter included oral sex and a "hand job." RP 403. Both were reciprocated by defendant "sucking on" J.N.'s penis or J.N. "sucking on" defendant's penis; and defendant stroking J.N.'s penis or J.N. stroking defendant's penis. RP 404-05.

The second residence J.N. remembers from his childhood was a small rental home the family moved into a few blocks away from his grandmother's. RP 371-72. J.N. was between six and seven years old when the first instance he can recall of sexual assault occurred there. RP 405. J.N. and the defendant engaged in anal sex. *Id.* Defendant used sexual lubricant to assist in the penetration. RP 406. J.N. described the experience of his father anally penetrating him as: "Physically it was very

painful. It was going very slow. He was very gentle, but I remember being very sore for the next couple of days.” *Id.* J.N. did not understand what was going on, he just knew it was something his father wanted to do. RP 407.

The family moved into their current family home in 2004. RP 408. J.N. was approximately eight years old. *Id.* Most of his years living there prior to middle school “blended together.” RP 409. The incidents prior to middle school included “[t]he same oral or hand sex as described prior, anal sex.” *Id.* The assaults often began in the same manner. Defendant would invite J.N. to join him on the couch to watch TV. RP 418. “Then the pornography would come on and he would begin to masturbate and then start to rub [J.N.’s] penis with his hands, eventually performing oral sex and then expect that the favor was returned, at which point it was, and then it would either end there or escalate to anal sex.” *Id.*

Defendant continued his sexual assault on J.N. in the Puyallup home with “[c]ontinual anal sex, ranging from [J.N.’s] bedroom, [defendant’s] bedroom, the living room, kitchen, the front room; anal, oral, hand sex.” RP 412. Anal sex occurred throughout the residence. RP 412-13. Hand/penile contact was usually performed in the living room. RP 413. The sexual assaults were committed “[e]very few weeks, at least

once a month.” RP 414. J.N. “took it to be normal.” RP 415. “It was just something that happened.” *Id.*

Although defendant was “gentle sexually,” “[t]he advances were not wanted and they were accepted in fear of what would happen if [J.N.] did reject them.” RP 416. Defendant told J.N. not to tell anyone about the sexual assaults throughout the years he committed them against J.N. *Id.* J.N. informed his mother once about physical abuse and tried to tell her about the sexual assault. RP 417. J.N. believed her to have understood the sexual assault was happening after he told her. *Id.* The sexual assaults did not end. *Id.*

Around 5:55 am on June 16, 2015, defendant attempted to perform oral sex on J.N. in the kitchen of the Puyallup home. RP 455-56. J.N. was 19 years old at the time. RP 365, 455-456. J.N. was concerned about a medical issue involving his penis and asked his father for advice. RP 394. When J.N. showed defendant his penis, defendant put J.N.’s penis in his mouth. RP 395. J.N. pulled his penis out of defendant’s mouth and told him “no.” *Id.* Defendant responded to refusal by saying, “why not? You seriously haven’t been laid in over a year. Come on.” RP 396. J.N. informed his brother, Z.N. about this in a text message. *Id.*

ii. Sexual Assault of Z.N.

The first instances of sexual assault Z.N. remembers occurred when he was approximately five years old. RP 117. It occurred at the family's Puyallup home. RP 116, 120. Defendant called Z.N. into his room where he was watching child pornography. RP 117-16. Z.N. knew it was child pornography because in the video was a boy about his age in the "same situation." RP 117. Defendant directed Z.N. to sit in his lap. *Id.* He then masturbated Z.N. as they watched child pornography. *Id.* When defendant finished, he instructed Z.N. not to tell his mother. RP 119. Z.N. promised not to tell his mother. *Id.* He kept his promise. *Id.*

The next instance of sexual assault Z.N. could recall happened when he was approximately seven years old. RP 122. It occurred around 6:00 pm on a winter night. RP 121. Z.N. knew what time it must have occurred because his mother would have been at work and J.N. would have been attending a Boy Scouts meeting. *Id.* He knew the season because after the assault was over, he could see it was already dark through a window above the kitchen sink where defendant was washing his hands and penis. RP 131. It began when defendant told Z.N. to take a shower. RP 123. After his shower, defendant had him sit on the couch. *Id.* Z.N. thought they were going to watch a movie together. *Id.* Defendant played pornography. *Id.* He made Z.N. move closer to him. *Id.*

He began masturbating Z.N. *Id.* Defendant then instructed Z.N. to masturbate him. RP 124.

Next, defendant sucked Z.N.'s penis. *Id.* Z.N.'s penis became erect. *Id.* After sucking Z.N.'s penis, he made Z.N. reciprocate. RP 125. After the oral sex, defendant and Z.N. engaged in anal sex. RP 126. Defendant used the lubricant to assist penetrating Z.N.'s anus. RP 129. Despite using lubricant, "[i]t was painful." RP 128. Z.N. did not attempt to leave because he did not want defendant to get mad. RP 126. Z.N. stated, "when he gets mad, he typically breaks things or hits me." RP 126-27.

In that Puyallup home a sexual assault occurred that involved J.N., Z.N., and defendant. *Id.* J.N. was still attending Sunrise Elementary. RP 410. Defendant directed J.N. and Z.N. to take showers. RP 127. The defendant and J.N. engaged in anal sex and defendant directed Z.N. to perform oral sex on J.N. RP 133. Thereafter, the defendant directed that J.N. engage in anal sex with him. *Id.*

Once J.N. understood his father wanted sex from both his sons, J.N. would "willingly partake" in the sexual assaults to protect Z.N. RP 420. "[He] would rather go through them rather than [Z.N.]." *Id.* J.N. and Z.N. established an "evacuation plan" if "something got too bad," and decided to keep the abuse to themselves until they were in a "better situation" to lessen the "damage on the family dynamic." RP 419.

C. ARGUMENT.

1. THE COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT EXCLUDED REPUTATION EVIDENCE ATTACKING J.N.'S CHARACTER WHEN THE OFFERED EVIDENCE WAS A REPUTATION AMONG FAMILY ONLY AND THE TESTIMONY WAS FROM A FAMILY MEMBER.¹

Trial court rulings admitting or excluding evidence are reviewed for an abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). A trial court abuses its discretion when its decision is based on untenable grounds or reasons. *State v. Dye*, 178 Wn.2d 541, 548, 309 P.3d 1192 (2013). Trial courts have wide discretion to determine the admissibility of evidence. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.2d 1278 (2001) (citing *State v. Rivers*, 129 Wn.2d 697, 709-710, 921 P.2d (1996)).

To offer reputation testimony, a witness must lay a foundation establishing that the subject's reputation is based on perceptions in the community. ER 608(a). A witness's personal opinion is not sufficient to

¹ In his opening brief, the defense asserts that the issue of J.N.'s reputation for honesty per his mother is somehow interconnected with his mother's own credibility. BOA, page 11 (. . . the defense was only allowed to resurrect Ms. Neighbarger's credibility after the state had questioned her veracity). The issue of J.N.'s veracity and Ms. Neighbarger's veracity are completely separate matters. To the extent the defendant is now trying to transpose the two, this court should decline to do so as that was not raised in a separate assignment of error.

lay a foundation. *State v. Land*, 121 Wn.2d 494, 500, 851 P.2d 678 (1993).

In *State v. Gregory*, 158 Wn.2d 759, 805, 147 P.3d. 1201 (2002), *overruled on other grounds by State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014), stated:

[T]he inherent nature of familial relationships often precludes family members from providing an unbiased and reliable evaluation of one another. In addition, the “community” with which Larson had discussed R.S.’s reputation included only two people, Larson and R.S.’s sister. Any community comprised of two individuals is too small to constitute a community for purposes of ER 608.

In this case, the defense at trial attempted to attack J.N.’s credibility by introducing reputation evidence through Ms. Neighbarger’s (his mother’s) testimony. RP 513-14. The State objected. RP 514-15. The court responded with the following:

You can inquire under the evidence rules regarding a witness’s reputation for truth and veracity, but it needs to be by a broader community. It’s not a person. It’s not a mother. It’s not a family member. The general question is, do you have knowledge of the witness’s reputation in the community for being truthful or untruthful, and if they have that broad knowledge you can render that very limited opinion. You can’t have them come in and testify as to specifics, so I would exclude her testimony as to her opinion of his truthfulness, because it doesn’t comport with the evidence rule regarding community.

RP 515. The court properly applied the evidence rules and case law when it excluded Ms. Neighbarger's testimony regarding J.N.'s character for truthfulness. *State v. Lord*, 117 Wn.2d 829, 874, 822 P.2d 177 (1991) (The Washington Supreme Court held that a valid community must be "neutral enough [and] generalized enough to be classed as a community."); *State v. Thach*, 126 Wn. App. 297, 315, 106 P.3d 782, 792 (2005).

Defendant failed to lay a proper foundation to admit character evidence to attack J.N.'s credibility as the offered evidence was not from a neutral or generalized community. The court properly exercised its discretion by adhering to the evidentiary rules and case law. *State v. Cayetano-Jaimes*, 190 Wn. App. 286, 296, 359 P.3d 919, 924 (2015)(a defendant's right must yield to "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence."). Because the only offered evidence presented by the defense at trial was alleged reputation testimony from J.N.'s mother, the trial court properly exercised its discretion in declining to admit such evidence under ER 608.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT ADMITTED EVIDENCE THAT THE DEFENDANT CONTINUED TO SEXUALLY ABUSE Z.N. AS AN ADULT TO SHOW THE DEFENDANT'S LUSTFUL DISPOSITION TOWARD Z.N.

ER 404(b) is not designed to deprive the State of the opportunity to present relevant evidence necessary to establish an essential element of its case, but only to prevent a defendant from being cast as a criminal likely to commit the crime. *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); *State v. Lough*, 125 Wn.2d 847, 859, 889 P.2d 487 (1995). Generally, evidence of a defendant's prior crimes, wrongs, or acts is not admissible to show that he has a propensity to commit crimes. ER 404(b); *State v. Gunderson*, 181 Wn.2d 916, 921, 337 P.3d 1090 (2014). But such evidence may be admitted for other purposes, such as proof of the defendant's lustful disposition towards the victim or to prove a common scheme or plan. *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012); *State v. Ray*, 116 Wn.2d 531, 547, 806 P.2d 1220 (1991). Appellate courts will not disturb a trial court's ER 404(b) ruling absent manifest abuse of discretion. *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). The Court of Appeals may affirm a lower court's ruling on any grounds adequately supported in the record. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795, 802 (2004).

Evidence of prior sexual misconduct may be admitted to show the defendant's lustful disposition toward the victim. *Ray*, 116 Wn.2d at 547. In fact, a criminal defendant's prior sexual offenses against the same victim as the charged case have been repeatedly held to be admissible. *See, State v. Guzman*, 119 Wn. App. 176, 182, 79 P.3d 990 (2003); *State v. Ferguson*, 100 Wn.2d 131, 134, 667 P.2d 68 (1983); *State v. Thorne*, 43 Wn.2d 47, 60-61, 260 P.2d 331 (1953). Such evidence is admissible "for the purpose of showing the lustful inclination of the defendant toward the [victim], which in turn makes it more probable that the defendant committed the offense charged." *Id.* (internal quotation marks omitted). It is within the discretion of the trial court to determine what time limits apply and when such evidence is too remote. *Id.* Such evidence is admissible even if it is not corroborated by other evidence. *Id.*

Moreover, the fact that the offered evidence in this case occurred after the charged offenses makes no difference in terms of the application of ER 404(b). The defendant's assertion that the evidence is not relevant because it occurred after the charged crimes is not founded in any legal authority. BOA, page 12-13. In fact, this argument was long ago rejected in *State v. Crowder*, 119 Wn. 450, 451-52, 205 P. 850 (1922). Evidence of acts prior to and after the charged acts are admissible to explain lust disposition. *Crowder*, 119 Wn. at 451. For example, in *State v. Russell*,

171 Wn.2d 118, 249 P.3d 604 (2011), the Washington Supreme Court reviewed a Court of Appeals decision reversing Russell's conviction for rape of a child in the first degree. *Id.* at 122-123. The Court of Appeals held that the trial court did not abuse its discretion in admitting evidence of both prior and *subsequent* abuse in order to prove Russell's lustful disposition toward his victim. *Id.* The Court of Appeals found that a limiting instruction should have been given, and reversed the conviction. *Id.* The Washington Supreme Court disagreed and affirmed the conviction. *Id.* at 123.

The offered evidence in this case was evidence of a sexual encounter between the defendant and J.N. that happened when J.N. was 19 years old. Pretrial, the State argued that a text message between Z.N. and J.N. was relevant to show the defendant's lustful disposition toward J.N., specifically arguing:

[T]he state does intend on introducing those text messages. They were discussed at the time of the disclosure. They were three months prior to this disclosure, an exchange between the two brothers, and Josh was 19 at the time of that exchange. It is consistent with the behavior that's been described in the charges. It goes to the lustful disposition of the defendant toward the victim, even though it's not within the charging period. That is not required under the lustful disposition.

Further, it's also relevant to their delay. It's relevant to how this became the normalcy of their life, and as the Court will note, the last text message after he talks about his father

sexually propositioning him, it goes right into cleaning up the kitchen and chores and getting the chores done. It is supportive of that position of the boys, that this just became a part of their life, and although it was something that was not normal amongst most family members, this is something that they were experiencing consistently over ten years of time.

RP 16.

The court heard both sides' arguments and under the guidance of the rules of evidence made its decision. The court reasoned:

[I]n terms of the, I guess the state's proffer regarding the text messages, I think it would be admissible regarding the lustful disposition and the norm within the family that allegedly had been created. It may require a limiting instruction limiting it to just that purpose only.

RP 17. The court adopted the State's argument and, as such, found the probative value of the evidence, regarding defendant's lustful disposition toward Z.N. and how a family norm of sexual abuse led to delayed disclosure, was not outweighed by the prejudicial effect on defendant.

While the State concedes that the trial court did not articulate the four factors² required, the trial court did adopt the State's analysis and argument regarding the factors. More importantly, the defendant's implication that the trial court's failure to do a balancing test on the record

² A trial judge must "(1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002).

constitutes automatic reversal is inaccurate. While a balancing is required, the lack of such balancing on the record can still be harmless. In *State v. Hepton*, 113 Wn. App. 673, 54 P.3d 233 (2002), citing *State v. Jackson*, 102 Wn.2d 689, 689 P.2d 76 (1984), the court held:

What the trial court failed to do was to balance on the record probative value versus prejudicial effect. Mr. Hepton contends this is a fatal error. While Washington courts generally observe that this balancing test should be done on the record, its absence is not fatal if the trial court has established a careful record of the reasons for admission. *Jackson*, 102 Wash.2d at 694, 689 P.2d 76. When the trial court identifies the purpose for which the evidence is believed to be relevant, the reviewing court can determine whether the probative value of the evidence outweighs its prejudicial effect. *Id.*

In this case, the record is sufficient for this court to conclude that the probative value outweighs the prejudicial effect. The record supports that this is sexual contact the defendant had with his son—a named victim in the case. This evidence was highly probative to show the defendant’s lustful disposition toward the victim, even when the victim became an adult. The offered evidence was also highly probative to show that the defendant’s behavior toward the victim—from childhood through adulthood—never changed. This evidence is evidence of lustful disposition in its most basic application. Because the record clearly supports its admission, any shortcoming in the trial court’s analysis can be

supported by the record, and this court should determine that the probative value of such evidence outweighs any prejudice.

The defendant reframes this evidence, not as evidence of the defendant's lustful disposition toward J.N., but as a sexual encounter between two "consenting adults." BOA, page 13. Such argument ignores the fact that the offered evidence was a sexual act committed against the same charged victim, making such evidence highly relevant. The court should affirm the trial court's decision to admit this evidence under ER 404(b).

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING THE STATE TO AMEND THE CHARGED TIME PERIOD FOR COUNT XIII WHEN THE DEFENSE WAS GENERAL DENIAL AND THE AMENDMENT OCCURRED BEFORE THE STATE HAD RESTED ITS CASE.

A trial court may permit any information to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced. CrR 2.1(d). The defendant bears the burden to show prejudice. *State v. Brown*, 74 Wn.2d 799, 801, 447 P.2d 82 (1968). Prejudice may occur when the amendment "leav[es the defendant] without adequate time to prepare a defense to a new charge." *State v. Purdom*, 106 Wn.2d 745, 749, 725 P.2d 622 (1986)(quoting *State v. Jones*, 26 Wn. App. 1, 6, 612 P.2d 404 (1980)). Reversal is only required upon a showing of an abuse

of discretion. *State v. Schaffer*, 120 Wn.2d 616, 621-622, 845 P.2d 281 (1993), citing *State v. James*, 108 Wn.2d 483, 490, 739 P.2d 699 (1987); *State v. Wilson*, 56 Wn. App. 63, 65, 782 P.2d 224 (1989), review denied, 114 Wn.2d 1010, 790 P.2d 167 (1990); *State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982).

In this case, prior to resting its case in chief and well before a verdict, the State orally moved to amend the dates to counts XI, XII, and XIII based on J.N.'s testimony on when events occurred. RP 465, 508. Defendant object to the amendment. RP 509. The court allowed the charging dates for count XIII to be amended from the original charge period of August 10, 2011 to August 9, 2013 to the time period of March 7, 2010 to August 9, 2013. RP 509, 513. The State asserted, and the record supports, that the amendment would not be contrary to the defense presented at trial, which was that of general denial. While the defendant now asserts that the amendment was to his "detriment," he does not articulate how. BOA, page 14. The defendant never asserted that sexual contact between himself and his sons had occurred at a time outside the charged time period, but rather that no sexual contact had ever occurred. The amendment allowed by the trial court did not undermine the defense presented at trial.

Defendant relies heavily on *State v. Pelkey*, 109 Wn.2d 484, 745 P.2d 854 (1987) for the proposition that “ ‘[a] criminal charge may not be amended after the State has rested its case-in-chief unless the amendment is to a lesser degree of the same charge or a lesser included offense.’ ” BOA, page 13. Reliance on this by the defendant is misplaced. In this case, the amendment occurred before the State rested its case, and as argued above, did not prejudice the defendant or undermine his defense at trial. Moreover, the *Pelkey* rule “is not applicable to all amendments to informations.” *State v. DeBolt*, 61 Wn. App. 58, 61, 808 P.2d 794 (1991). An amendment during trial is permissible when the “amendment merely specific[s] a different manner of committing the crime originally charged.” *Pelkey*, 109 Wn.2d at 490. These permissible amendments include a change to the charging date because the charging period is not a material part of the charged crime. *DeBolt*, 61 Wn. App. at 62.

In the case at bar, the precise date of the charge was not material, and as such it falls outside of the ambit of *Pelkey*. *State v. DeBolt*, 61 Wn. App. 58, 62, 808 P.2d 794, 796 (1991). Especially in the context of child sex abuse, “Children often cannot remember the exact date of an event, and in cases of sexual abuse, they may repress memory of that date.” *Id.* The permitted amendment in this case, before the State rested its case, did not change the nature of the charge nor did it impact defense

theory. As such, the trial court properly exercised its discretion in allowing the amendment as to count XIII.

4. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE WAS SUFFICIENT EVIDENCE PRESENTED TO SUPPORT THE JURY'S VERDICTS.³

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. *State v. McCullum*, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983); *see also Seattle v. Gellein*, 112 Wn.2d 58, 61, 768 P.2d 470 (1989); *State v. Mabry*, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the State met the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wn.2d 333, 338, 851 P.2d 654 (1993). Thus, sufficient evidence supports a conviction when, viewing the evidence in the light most favorable to the State, a rational fact finder could find the essential

³ While the State addresses the sufficiency of the evidence for each count individually, it is difficult to respond directly to the defendant's arguments on appeal because this section of the opening brief contains no citations to the record below to support his claim. BOA, page 14-15. The defendant only raises his insufficiency of the evidence claims as to counts I-IV and XI-XIII only, so the State is confining its response to those counts. This section of the opening brief also makes a passing argument to an alleged error that occurred in the State's closing argument. BOA, page 15. Any alleged error during closing argument should not be considered, as such allegation is not part of any assignment of error and is not properly before this court. *See State v. Sims*, 171 Wn.2d 436, 256 P.3d 285 (2011).

elements of the crime beyond a reasonable doubt. *State v. Cannon*, 120 Wn. App. 86, 90, 84 P.3d 283 (2004).

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

In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (*citing State v. Casbeer*, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the

Supreme Court of Washington said, “[G]reat deference . . . is to be given the trial court’s factual findings. It, alone, has had the opportunity to view the witness’ demeanor and to judge his veracity.” *State v. Cord*, 103 Wn.2d 361, 367, 693 P.2d 81 (1985) (citations omitted). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

As discussed below, after viewing the evidence in the light most favorable to the State, defendant’s convictions are supported by sufficient evidence that proved defendant repeatedly engaged in sexual intercourse with his two sons, Z.N. and J.N. Defendant argues that the jury was “allowed” to convict “based on mere speculation.” BOA, page 14. Defendant supports his by labeling the victims’ testimonies as “inconsistent” in regards to dates and descriptions of the sexual assaults but does not articulate how or provide any specific details or citations to the record below. *Id.* This is a matter of credibility and is the province of the jury. *State v. Holbrook*, 66 Wn. 2d 278, 279, 401 P.2d 971, 972 (1965) (“It is the function and province of the jury to weigh the evidence, to determine the credibility of the witnesses and to decide the disputed questions of fact.”).

a. Counts I, II, III, IV: Rape of a Child in the First Degree (J.N.) from March 7, 2000 to March 6, 2008⁴

To convict the defendant of each count of rape of a child in the first degree as charged in counts I-IV, the State was required to prove that between the charged time period of March 7, 2000 and March 6, 2008, the defendant had four separate and distinct acts of sexual intercourse with J.N. CP 215-252, instructions #12-#15. The State also had to prove that J.N. was less than 12 years old and at least 24 months younger than the defendant, that the two were not married and that the acts occurred in Washington. The State presented evidence to support each of these elements, which the jury clearly found to be credible.

J.N. was born on March 7, 1996. RP 365. Defendant was born April 14, 1979. RP 535. J.N. and defendant have never been married or in a state-registered partnership. RP 591. The first time defendant raped J.N. was in J.N.'s paternal grandmother's home. RP 371, 402. J.N. was approximately four or five years old. RP 371, 403. The rape involved reciprocal oral sex between the defendant and J.N. RP 404-405.

⁴ Because counts I-IV involve the same victim, the same charge and the same charging period, the State will address the sufficiency of the evidence under one section. It is important to note, however, that the jury was instructed to consider each crime separately and were specifically instructed in counts I-IV that each count was separate and distinct from the other. CP 215-252, instructions #12-15.

The second time defendant raped J.N. he was approximately six or seven years old. RP 371-72. It occurred in a home the family rented a few blocks from J.N's. grandmother. *Id.* The second time described by J.N. as anal sex being performed by both himself and the defendant. RP 406. The third time defendant raped J.N., it was in the family's current home in Puyallup. RP 407. J.N. was approximately eight years old. RP 409. Defendant anally penetrated J.N. in the living room RP 412. The fourth time defendant raped J.N., it was in the family kitchen sometime before he was twelve years old. *Id.* Defendant made J.N. perform oral sex on him and reciprocated oral sex on J.N. RP 413-414.

b. Count XI: Rape of a Child in the First Degree (Z.N.) from August 10, 2009 to August 9, 2012

To convict the defendant of rape of a child in the first degree as charged in count XI, the State was required to prove that between the charged time period of August 10, 2009 and August 9, 2012, the defendant or someone acting at the defendant's direction, had sexual intercourse with Z.N. CP 215-252, instruction #26. The jury was told that this alleged incident involved "J.N. penile/oral Z.N.). The State also had to prove that Z.N. was less than 12 years old and at least 24 months younger than the defendant, that the two were not married and that the acts occurred in

Washington. The State presented evidence to support each of these elements, which the jury clearly found to be credible.

Z.N. was born on August 10, 2000. RP 97. Defendant was born April 14, 1979. RP 535. Z.N. and defendant have never been married or in a state-registered partnership. RP 591. When Z.N. was around 10 years old, defendant raped Z.N. and J.N. in the living of the family home in Puyallup. RP 131-32. During that incident, the defendant engaged in anal sex with Z.N. RP 133.

c. Count XII: Incest in the First Degree (J.N.)
from August 10, 2009 to August 9, 2012

To convict the defendant of incest in the first degree as charged in count XII, the State was required to prove that between the charged time period of August 10, 2009 and August 9, 2012, the defendant had sexual intercourse with J.N. CP 215-252, instruction #28. The State also had to prove that J.N. was related to the defendant as a child and that the defendant was aware that they were related. The State also had to prove that the acts occurred in Washington. The State presented evidence to support each of these elements, which the jury clearly found to be credible.

Defendant had sexual intercourse with J.N., his son, in the living room of the family home between August 10, 2009 and August 9, 2012.

RP 410. Defendant engaged in anal sex with J.N. while instructing Z.N. to perform oral sex on J.N. RP 133.

d. Count XIII: Incest in the First Degree (J.N.)
from March 7, 2010 to August 9, 2013

To convict the defendant of incest in the first degree as charged in count XIII, the State was required to prove that between the charged time period of March 7, 2010 to August 9, 2013, the defendant had sexual intercourse with J.N. CP 215-252, instruction #28. The State also had to prove that J.N. was related to the defendant as a child and that the defendant was aware that they were related. The State also had to prove that the acts occurred in Washington. The State presented evidence to support each of these elements, which the jury clearly found to be credible. Defendant had oral sex with J.N., his son, between March 7, 2010 and August 9, 2013. RP 134-35.

5. DEFENDANT IS NOT ENTITLED TO RELIEF
UNDER THE CUMULATIVE ERROR
DOCTRINE AS DEFENDANT CANNOT SHOW
THE ALLEGED ERRORS RESULTED IN
PREJUDICE.

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). The doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *Id.*

The test for whether cumulative errors require reversal of a defendant's conviction is whether the totality of the circumstances substantially prejudiced the defendant, depriving her of a fair trial. *In re Cross*, 180 Wn.2d 664, 690, 327 P.3d 660 (2014). Defendant bears the burden of showing multiple trial errors and that the accumulated prejudice affected the outcome of the trial. *Id.* The cumulative error doctrine does not apply where the errors are few and have little or no effect on the outcome of the trial. *State v. Venegas*, 155 Wn. App. 507, 520, 228 P.3d 813 (2010).

Reversals for cumulative error are reserved for egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, (*see, e.g., State v. Badda*, 63 Wn.2d 176, 385 P.2d 859 (1963) (holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts as to cumulative error)), because the errors centered around a key issue, (*see, e.g., State v. Coe*, 101 Wn.2d 772, 684 P.2d 668 (1984) (holding that four errors relating to defendant's credibility, combined with two errors relating to

credibility of State witnesses, amounted to cumulative error because credibility was central to the State's and defendant's case)), or because the same conduct was repeated, some so many times that a curative instruction lost all effect (*see, e.g., State v. Torres*, 16 Wn. App. 254, 554 P.2d 1069 (1976) (holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions)). The defendant bears the burden of proving an accumulation of errors of such magnitude that retrial is necessary. *State v. Yarbrough*, 151 Wn. App. 66, 98, 210 P.3d 1029 (2009). When the evidence against the defendant is overwhelming, there is no prejudicial error under the cumulative error doctrine. *In re Cross*, 180 Wn.2d at 691.

In this case, the defendant cannot establish prejudice. As argued above, evidence of lustful disposition was properly admitted under ER 404(b), and that is the only error articulated by the defendant in this section of his brief. He cannot establish cumulative error because no error occurred in the admission of such evidence. The principles established in relevant case law falls well short of the egregious circumstances that would require reversal.

6. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN CALCULATING EACH OF THE DEFENDANT'S CONVICTIONS INDIVIDUALLY WHEN THE DEFENDANT AGREED WITH HIS OFFENDER SCORE OF 36, AND EVEN IF THE DEFENDANT WERE CORRECT, THIS COURT WOULD BE UNABLE TO GRANT HIM ANY MEANINGFUL RELIEF BECAUSE OF HIS HIGH OFFENDER SCORE.

Crimes constitute the same criminal conduct when they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” RCW 9.94A.589(1)(a). “Unless all elements are present, the offenses must be counted separately.” *State v. Chenoweth*, 185 Wn.2d 218, 220, 370 P.3d 6 (2016). The Legislature intended the phrase “same criminal conduct” to be construed narrowly. *State v. Flake*, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). Appellate courts review determinations of same criminal conduct for abuse of discretion or misapplication of law. *State v. Graciano*, 176 Wn.2d 531, 535, 295 P.3d 219 (2013). Thus, “when the record supports *only one* conclusion on whether crimes constitute the ‘same criminal conduct,’ a sentencing court abuses its discretion in arriving at a contrary result.” *Id.* at 537-38 (emphasis added)(internal citation omitted). However, “where the record adequately supports either conclusion, the matter lies in the court’s discretion.” *Id.* at 538.

As articulated by the Washington Supreme Court:

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

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

The defendant bears the burden of proving same criminal conduct.

Graciano, 176 Wn.2d at 538-40. “[A] ‘same criminal conduct’ finding favors the defendant by lowering the offender score below the *presumed* score...Because this finding favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct.”

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

- a. The defendant waived any challenge regarding same criminal conduct by stipulating to his offender score below.

Generally, issues not raised before the trial court may not be raised for the first time on appeal unless the defendant can establish that the error is a manifest error affecting a constitutional right. RAP 2.5(a)(3).

[I]n general a defendant cannot waive a challenge to a miscalculated offender score.... While waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, waiver can be found where the alleged error involves an agreement to facts, later disputed, or where the alleged error involves a matter of trial court discretion.

In re PRP of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002).

The failure to assert that crimes constitute the same criminal conduct is a “failure to identify a factual dispute for the court’s resolution and a failure to request an exercise of the court’s discretion”. *State v. Nitsch*, 100 Wn. App. 512, 520, 997 P.2d 1000 (2000). The court has held that a defendant waives his right to argue that his crimes constitute the same criminal conduct on appeal after the defense agreed with the defendant’s criminal history below. *State v. Bergstrom*, 162 Wn.2d 87, 94 P.3d 816 (2007), *superseded by RCW 9.94A.530(2) on other grounds*.

In this case, the defendant did not raise a same criminal conduct argument during his sentencing below. He signed the “Statement of Prior Record and Offender Score,” which indicated his offender score was a 9+. CP 391-393. As part of that form, it stated “The defendant stipulates that the above criminal history and scoring are correct, producing an offender score as follows, including current offenses, and stipulates that the offender score is correct.” In its findings of fact and conclusions of law, the sentencing court found the defendant’s offender score to be 36. CP

381-385. At no point during sentencing did the defendant object to his offender score calculation or assert that any of the convictions constitute the same criminal conduct. Because this alleged error was not preserved, this court should decline to address the merits of this claim.

- b. If the court were to reach the merits of the defendant's claim, counts VI, VII, VIII, IX and X do not constitute the same criminal conduct.

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

In this case, defendant alleges that counts VI-X constitute the same criminal conduct because all acts constituting those crimes were “continuous, uninterrupted, and occurred in a short time frame.” BOA, page 18. The counts were demarcated in the jury instructions as follows:

- Count VI: Rape of a Child in the First Degree
Victim: Z.N.
Act: Defendant oral/penile Z.N.
- Count VII: Rape of a Child in the First Degree
Victim: Z.N.
Act: Defendant penile/oral Z.N.
- Count VIII: Rape of a Child in the First Degree
Victim: Z.N.
Act: Defendant penile/anal Z.N.
- Count IX: Child Molestation in the First Degree
Victim: Z.N.
- Count X: Child Molestation in the First Degree
Victim: Z.N.

CP 215-252, instructions #19-25.

While the defendant is correct that all of the acts for these counts occurred on a couch, each act was not continuous, uninterrupted, or simultaneous. This is not a case as in *State v. Tili*, 139 Wn.2d 107, 895 P.2d 365 (1999), cited by defense, where there was a “single act of intercourse” or multiple acts of rape within minutes of each other, respectively. See BOA, page 18. In *Tili*, the defendant committed a rape

of the victim by using his finger to penetrate the victim's anus and vagina. *Id.* at 111. The defendant then used his penis to penetrate the victim's vagina. *Id.* The court held that Tili's actions were one continuous rape, not three separate rapes. *Id.* at 123. In contrast, the court acknowledged that in *State v. Grantham, supra*, that the defendant had time to pause, reflect, and either cease his criminal activity or continue. *Grantham*, 84 Wn. App. at 856-859.

In this case, the State argued that the evidence applicable for counts VI-X involved an incident between Z.N. and the defendant. RP 679. The evidence showed that the defendant did have time to pause and reflect when transitioning from one type of act to the next. Moreover, unlike the facts of *Tili*, the defendant in this case engaged in mutual stimulation with his victim, presumably with separate intents. During his testimony, Z.N. indicated that it started on the couch in the home when the defendant displayed pornography on the television. RP 123. At that point, the defendant began to masturbate Z.N. and himself. RP 123-124. The defendant provided verbal instructions to Z.N., telling Z.N. to masturbate him. RP 124. The mutual masturbation lasted "a few minutes." RP 126. The State correctly categorized these actions as two separate counts of child molestation—the basis for counts IX and X. RP

680. These acts involved two separate organs (defendant's hand on Z.N.'s penis and Z.N.'s hand on the defendant's penis) and two separate people.

Following the masturbation, the defendant performed oral sex on Z.N. *Id.* The defendant then told Z.N. to perform oral sex on him. RP

127. Again, those two events involve two separate sexual contacts.

After the oral sex, the defendant instructed Z.N. to stand up. RP 128. This act in itself constitutes a break from the sexual contact. At that point the defendant directed Z.N. to sit down on the defendant's lap facing away from him, and the defendant penetrated Z.N.'s anus with his penis, constituting the basis for count VIII. RP 128, 683.

All of the acts described by Z.N. were separate acts, and arguable for differing goals. These acts were not "simply a progression" as the defendant now suggests. The trial court properly counted each of the convictions in the defendant's offender score.

- c. If the court were to reach the merits of the defendant's claim, counts I, II, III, IV, V, VI and XIII do not constitute the same criminal conduct.

In this case, defendant alleges that counts I-VI and count XIII constitute the same criminal conduct without any citations to the record or any authority. The counts were demarcated in the jury instructions as follows:

- Count I: Rape of a Child in the First Degree
Victim: J.N.
Date: 3/7/00-3/6/08
- Count II: Rape of a Child in the First Degree
Victim: J.N.
Date: 3/7/00-3/6/08
- Count III: Rape of a Child in the First Degree
Victim: J.N.
Date: 3/7/00-3/6/08
- Count IV: Rape of a Child in the First Degree
Victim: J.N.
Date: 3/7/00-3/6/08
- Count V: Child Molestation in the First Degree
Victim: Z.N.
Date: 8/10/05-8/9/07
- Count VI: Rape of a Child in the First Degree
Victim: Z.N.
Act: Defendant oral/penile Z.N.
Date: 8/10/06-8/9/09
- Count XIII: Incest in the First Degree
Victim: J.N.
Date: 3/7/10-8/9/13

CP 215-252, instructions #12-15, 18, 29.

Moreover, with regard to counts I-IV, the jury was specifically instructed that each count was to be considered a separate and distinct act from those other counts. *Id.* As stated above, the defendant provides no argument as to how these counts constitute the same criminal conduct. When each count is examined, however, it is clear that none of them

constitute the same criminal conduct. All of the counts the defendant alleges to be the same criminal conduct do not occur during the same charging period, include the same elements, or even involve the same victim.

The Washington Supreme Court has specifically held that in cases of sex offenses involving multiple incidents over a period of years, the counts do not constitute "same criminal conduct." *State v. French*, 157 Wn.2d 593, 613-14, 141 P.3d 54 (2006).

In *French*, the defendant was convicted of six counts; counts II and III were both rape of a child in the first degree and counts IV-VI were all rape of a child in the second degree. *French*, 157 Wn.2d at 597-98, 611. The defendant claimed that counts II and III, and counts IV-VI, constituted the same criminal conduct. *Id.* at 612. The Washington Supreme Court disagreed and held that the counts were not the same criminal conduct. *Id.* at 613-14. While the crimes involved the same victim, the crimes did not occur at the same time or involve the same criminal intent. *Id.* The rapes and molestation in that case, as in the present case, occurred on several occasions over a period of years. *Id.*

The Supreme Court also pointed out that, as in *State v. Grantham*, 84 Wn. App. 854, 932 P.2d 657 (1997), the criminal intent for each instance of abuse is distinct; the defendant had ample time during the

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

In this case, the defendant is asserting the same criminal conduct for counts that occurred over a period of many years, involved different dates, and involved different victims. These counts cannot and should not be considered the same criminal conduct. The defendant’s argument is without merit.

As argued above, the trial court properly found, and the defendant himself agreed, to defendant’s offender score being 36. CP 391-393. Pursuant to RCW 9.94A.589(1)(a), “[W]henver a person is to be sentenced for two or more current offenses, the sentence range for each

current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score.” Pursuant to RCW 9.94A.525(17), “If the present conviction is for a sex offense...count three points for each adult and juvenile prior sex offense conviction.” Defendant was convicted of 13 Class A felony sex offenses. RCWs 9A.44.073, 9A.44.076, 9A.44.083; RCW 9.94A.030(47). See CP 183, 186, 189, 192; RP 983-86. Each count scored as three points against each other, resulting in an offender score of “36⁵.”

Even if this court were to grant the defendant relief as to these meritless claims regarding the same criminal conduct, this court would be unable to grant him any effective relief. If the defendant is correct, as he concedes, his offender score would still be over nine points. The defendant was convicted of the aggravating factor of utilizing his position of trust to facilitate his crimes as to each count. CP 391-393⁶. The sentencing court specifically held that it would impose an exceptional sentence on the basis of the aggravating factor alone. *Id.* The defendant

⁵ The defendant incorrectly states that he was sentenced with an offender score of 38 in his assignments of error. BOA, page 1. The defendant was sentenced with an offender score of 36.

⁶ The defendant does not assign error to any of the sentencing court’s findings of fact or conclusions of law, making them verities on appeal. *State v. O’Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003).

concedes that his offender score would remain higher than nine even if this court were to accept his argument. BOA, page 18. Therefore, even if this court were to adjust the defendant's offender score to a lower number still exceeding nine, it would not grant him any relief and his sentence would remain the same.

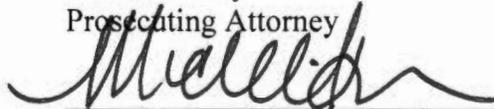
As argued above, the trial court appropriately exercised its discretion in finding defendant's crimes did not constitute the same criminal conduct, and thereby properly sentenced defendant based on an offender score of "36." This court should therefore affirm defendant's sentence.

D. CONCLUSION.

For the above stated reasons, the State respectfully requests that this court affirm the defendant's convictions below.

DATED: January 16, 2018.

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

1.16.18 Therese Van
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

January 16, 2018 - 4:19 PM

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