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NO. 50497-9-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

RICHARD J. HARDY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Gretchen Leanderson

No. 15-1-04940-4

BRIEF OF RESPONDENT

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

1. Whether defendant waived the right to challenge venue by failing to timely object below?

2. Whether, viewing the evidence in the light most favorable to the prosecution, the State presented sufficient evidence to support multiple counts of first degree child rape, where E.E.'s testimony describing the type and number of acts committed and the general time period was specific enough to sustain Counts I through III?

3. Whether the trial court properly exercised its discretion in admitting evidence of defendant's prior acts of domestic violence under ER 404(b) to explain E.E.'s delayed reporting?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On December 10, 2015, the Pierce County Prosecutor's Office charged RICHARD HARDY (hereinafter "defendant") with four counts of Rape of a Child in the First Degree pursuant to RCW 9A.44.073.[1] CP 3-5.

[1] An amended information was later filed which removed the domestic violence designation. CP 185-187; RP 877.

According to the Declaration for Determination of Probable Cause:

> On September 3, 2015, E.E. came to Tacoma Police Headquarters and reported she had been sexually abused by her mother's boyfriend, hereinafter referred to as the defendant, when she was between the ages of 6-12 at multiple residences in Pierce and King County…E.E. said the defendant would enter her room in the middle of the night and lay on the bed next to her. E.E. said he would then insert one of his hands down her underwear and would digitally penetrate her for 5 to 10 minutes. She also described an incident when her mother was at work when she and the defendant were playing a game in the living room where the defendant would place a blindfold on her, put something in her mouth, and E.E. would guess what it was. E.E. said…she could clearly feel his penis was placed into her mouth and he thrust his penis in and out of her mouth for approximately 15 seconds…During a subsequent interview with E.E. she clarified the addresses she lived at with the defendant and her mother. She lived with them in Gig Harbor, University Place, Lakewood, and Federal Way. The oral sex incident happened in Federal Way.

CP 1-2.

On February 16, 2017, the case proceeded to trial before the Honorable Gretchen Leanderson. RP[2] 1. Defendant raised a venue issue regarding the Federal Way incident for the first time during trial, after the jury was sworn, by simply asserting that the Federal Way incident could not form the basis of a conviction. *See* RP 424, 474. Defendant did not move to change venue. The State argued that any challenge to venue was untimely. RP 487-88. After the State rested, defendant affirmed that he

[2] The verbatim report of proceedings is contained in six consecutively paginated volumes and will be referred to as "RP" followed by the page number.

was not bringing a venue motion or asking that a count be dismissed, but he indicated that he had a "problem" with the King County incident. RP 863-66. The State again argued that any challenge to venue was untimely and waived. RP 864-65. The State relied on the Federal Way incident for Count IV. *See* RP 864-65, 887; CP 146-176 (Instruction No. 24). The jury found defendant guilty of all four counts of first degree rape of a child and also found defendant used his position of trust or confidence to facilitate the commission of the crime(s). CP 177-184; RP 955-56. At sentencing, the court imposed an indeterminate sentence of 380 months to life confinement with lifetime community custody. CP 201-216; RP 975. Defendant filed a timely notice of appeal. CP 188.

2. FACTS

E.E. was born on December 12, 1996, to Melissa and James Eriksen. RP 581, 584, 723-24. E.E.'s parents divorced in 2001, after which E.E. lived primarily with her mother and visited her father on weekends. RP 584-85, 676-79, 725. James subsequently married E.E.'s stepmother, Jessica Eriksen, in 2002.[3] RP 676, 698.

In November of 2001, Melissa met defendant in the bar of the Pacific Lanes bowling alley, and she allowed defendant to move into her

[3] Because there are multiple witnesses with the last name of Eriksen, the State will refer to the witnesses by their first name. The State means no disrespect.

one-bedroom apartment in University Place a month later. RP 726-29. Defendant, Melissa and E.E. lived together in that apartment for approximately six months. RP 730-32.

Defendant, Melissa and E.E. thereafter moved into a two-bedroom apartment in Lakewood when E.E. was six years old. RP 589-90, 736-38. After living approximately eight months in Lakewood, they moved into a two-bedroom apartment in Federal Way. RP 591, 739. It was around this time that defendant started physically abusing Melissa. RP 632-33, 739-41. Defendant would hit Melissa, threaten her, and on one occasion he held a knife to her neck. RP 632-33, 739-40. E.E. witnessed the abuse, which occurred every few weeks. RP 632-33, 740.

After living approximately a year and a half at the Federal Way apartment, Melissa and E.E. "ran away from [defendant]" and lived with Melissa's mother in Gig Harbor. RP 591, 741-42. Just a few months later, Melissa and defendant reconciled and they again moved in together. RP 743-44. E.E. remained with her grandmother until she moved in with her father and Jessica. RP 592, 743-48. E.E. lived primarily with her father from the age of eight onwards and would occasionally visit her mother on weekends. RP 581, 592-95, 678-79, 746-48, 751-53. As E.E. grew older, she visited her mother less frequently. RP 394-95. Melissa and defendant

maintained a romantic relationship and lived together on and off until November 2015. RP 593-97, 743-55, 770.

Defendant began sexually abusing E.E. at the Lakewood apartment when E.E. was six years old. RP 598-99. Defendant came into E.E.'s room while Melissa was asleep. RP 598-99. E.E. could hear defendant pacing as he moved about her room, checking to see if she was asleep. RP 598-601. Defendant removed the covers from E.E. and ripped a small hole in E.E.'s underwear. RP 600-01. Defendant then used his fingers to touch E.E.'s clitoris and vagina area. *Id.*

Defendant continued to sexually abuse E.E. until she was about 12 years old. RP 604. Between the ages of six and eight, when E.E. lived primarily with her mother and defendant, defendant would come into her room and touch her vagina in the above manner about three or four times a month. RP 602. He would always rip E.E.'s underwear unless it was already ripped. RP 602. E.E.'s father recalled seeing holes in the crotch of her underwear when doing laundry. RP 689, 694-95. After age eight, when E.E. lived primarily with her father, defendant touched her anytime she spent the weekend. RP 604.

"[M]ost of the time" defendant's hands stayed on the outside of E.E.'s body, but there were times when defendant used his finger to penetrate E.E.'s vagina. RP 601-05. E.E. estimated that between the ages

of six and eight, defendant digitally penetrated her seven or eight times, and between the ages of eight and 12, he digitally penetrated her at least four times. RP 603-05.

E.E. also recounted an incident when she was seven years old and living in Federal Way when defendant asked if she wanted to play a game. RP 605-06. E.E.'s mother was at work, and it was just E.E. and defendant in the apartment. RP 606. Defendant blindfolded E.E. and had her guess what she was tasting. *Id.* Defendant first gave E.E. cough syrup, and for the second "taste test," defendant inserted his penis into E.E.'s mouth. *Id.* E.E. recalled that defendant "jiggled" his penis in her mouth and then took it out. RP 606-07.

E.E. did not say or do anything about the "taste test" incident or the other instances of sexual abuse because she was scared. RP 607. E.E. was scared of defendant because of the physical and verbal abuse he inflicted upon Melissa, as well as the physical abuse he inflicted upon E.E. RP 632-34. Whenever E.E. got into trouble, defendant would hit her with a belt, leaving welts on her back. RP 633. E.E.'s father recalled noticing behavioral changes in his daughter when Melissa had primary custody and E.E. had to return to her mother's house. RP 679. E.E. "would get very upset. She would cry. She would state that she didn't want to go back

home." RP 680. *See also* RP 671, 688. E.E. told her father that defendant was mean to her and spanked her. RP 680, 688.

E.E. did not report defendant's sexual abuse to police until 2015, when E.E. was 18 years old. RP 634, 643, 650-51. E.E. had tried to tell her mother about the abuse multiple times, but Melissa did not believe her. RP 634-42, 771-777. E.E. first tried to report the abuse when she was seven years old by telling her mother that defendant touched her.[4] RP 635-36. Melissa responded by telling E.E. that she was "fucking lying." RP 635. E.E. did not attempt to disclose the sexual abuse again until years later when she was 14 years old.[5] RP 637-42. E.E. told her brother that defendant molested her, and she again attempted to tell her mother about the abuse on multiple occasions. *Id.* Nothing came of these attempts. *Id.* Melissa never reported E.E.'s disclosures to police, because she did not believe E.E. and she did not want to hurt defendant. RP 777, 779-82.

When E.E. was 18 years old, she disclosed the abuse to her brother's girlfriend, Debra Thompson, and then she disclosed to her father and stepmother. RP 641-50, 691-93, 705-07, 820-21. The day after

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[4] Melissa, however, testified that E.E. first disclosed the sexual abuse when E.E. was 13 or 14 years old. RP 771. E.E. reportedly told her mother that defendant touched her inappropriately when living in Federal Way. RP 771. Melissa did not believe E.E. and reportedly brought it up to E.E. months later because she was annoyed with her daughter's disclosure. RP 772-74.

[5] E.E. testified that she did not tell her father about the abuse when she was younger, because "if my mother wasn't going to believe me, who was?" RP 671.

disclosing the sexual abuse to her father, E.E. reported the matter to police. RP 650-53, 692-93. *See also*, RP 536-45 (police investigation and contact with E.E.). After E.E. reported the sexual abuse to authorities, defendant attempted to contact her through Melissa. RP 658. E.E. testified,

> [Defendant] said that he would pay me off. He said that he would leave, never contact me or my mother again…He would exchange money for me to drop the charges…[and] if I didn't drop the charges, he would kill himself.

RP 658-59. E.E. testified that she did not give in to defendant because she was no longer afraid. RP 659.

E.E. identified defendant in open court. RP 586. Defendant elected not to testify at trial and did not call any witnesses. RP 862, 868.

C. ARGUMENT.

1. DEFENDANT WAIVED THE RIGHT TO CHALLENGE VENUE BY FAILING TO TIMELY OBJECT.

Generally, criminal actions must be commenced in the county where the offense, or an element of the offense, was committed. CrR 5.1(a). Under article I, section 22 of the Washington Constitution, a criminal defendant has the right "to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed[.]" If there is "reasonable doubt whether an offense has been

committed in one of two or more counties, the action may be commenced in any such county." CrR 5.1(b).

Proper venue, however, is neither an element of a crime nor a matter of jurisdiction. ***State v. Rockl***, 130 Wn. App. 293, 297, 122 P.3d 759 (2005); ***State v. McCorkell***, 63 Wn. App. 798, 800, 822 P.2d 795 (1992). "Rather, proper venue is a constitutional right which is waived if a challenge is not timely made." ***McCorkell***, 63 Wn. App. at 800 (citing ***State v. Harris***, 48 Wn. App. 279, 282, 738 P.2d 1059 (1987)). *See also,* ***State v. Dent***, 123 Wn.2d 467, 479-80, 869 P.2d 392 (1994) (a defendant may waive the constitutional right to challenge venue). A trial court's decision denying a change of venue will only be disturbed for an abuse of discretion. ***Rockl***, 130 Wn. App. at 297. Questions of law, such as statutory interpretation, are reviewed de novo. *Id.*

Here, defendant argues his constitutional right to venue was violated, because no evidence supported venue in Pierce County for the "taste test" incident that formed the basis of count IV. Brief of Appellant at 16. However, defendant failed to promptly and properly object to venue below and therefore waived any venue challenge.

In ***Dent***, the Washington Supreme Court held that under CrR 5.1(b), "where there is reasonable doubt whether the offense has been committed in one of two or more counties[,] [t]he right of a defendant to

change to the other county is strictly limited." 123 Wn.2d at 480. Pursuant to CrR 5.1(c), "Any objection to venue must be made as soon after the initial pleading is filed as the defendant has knowledge upon which to make it." The objection to venue is waived if not promptly made pursuant to Washington's "expeditious objection requirement." ***State v. Price***, 94 Wn.2d 810, 816, 620 P.2d 994 (1980).

Where CrR 5.1(c) does not apply, a defendant must raise a venue issue at the omnibus hearing. ***Dent***, 123 Wn.2d at 480. The ***Dent*** court stated,

> Absent facts which require application of CrR 5.1, the defendant is required to raise the venue question at the omnibus hearing. CrR 4.5 is specific: "Failure to raise or give notice at the hearing of any error or issue of which the party concerned has knowledge may constitute waiver of such error or issue." CrR 4.5(d). There is no reason why this principle should not apply to a challenge to venue. **Unless the defendant makes a showing of good cause for not raising the issue at the omnibus hearing, failure to do so constitutes a waiver**.

123 Wn.2d at 480 (emphasis added). Where evidence introduced during the trial raises a question of venue for the first time, the defendant must raise the issue at the end of the State's case. *Id.* In that situation, if the defendant demonstrates a lack of any proof of venue, the State should be allowed to reopen its case in chief absent a showing of actual prejudice to defendant. *Id.* When there is a genuine issue of fact as to where a crime

occurred, venue becomes an issue for the jury to resolve by a preponderance of the evidence, unless, of course, the issue of venue has been waived. *Id.* at 480-81.

In ***State v. Himple***, No. 75298-7-I, 2018 WL 417982, at *1 (Wash. Ct. App. January 16, 2018) (unpublished), the defendant was charged in King County with three counts of first degree rape of a child.[6] The certification for determination of probable cause alleged that the criminal acts occurred in both King and Snohomish counties, and it specifically stated that the victim "disclosed that she was molested by … Himple … from 2004-2006 … within King County" and that "Himple had done the same thing to her at his home in Snohomish." *Id.* at *3 (internal quotation marks omitted). The defendant did not object to venue after his formal arraignment. *Id.* Prior to trial, the State amended the charges and extended the charging period, and again defendant did not object to venue. *Id.* at *1. Rather, "Himple informed the trial court that he had no intention of objecting, as long as the conduct the State was alleging during the extended time period occurred at Himple's mother's house in Snohomish." *Id.*

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[6] GR 14.1 allows citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013. The unpublished decision cited above has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate.

The case proceeded to a bench trial, and after the State rested, the defendant moved to dismiss all three counts, arguing that the State was required to prove that the acts occurred in King County. *Id.* The defendant specifically stated that he was not raising a venue issue and acknowledged that any venue challenge was untimely. *Id.* The court denied the defendant's motion to dismiss and found the defendant guilty of one count of first degree rape of a child based on the incident that occurred in Snohomish County. *Id.* The defendant subsequently moved for a new trial based on improper venue and argued that "when the State amended the charges it included an allegation that occurred in Snohomish County, but it did not indicate that the alleged act occurred in Snohomish County rather than King County." *Id.* at *2. The court denied Himple's motion for a new trial. *Id.*

On appeal, Himple argued that his conviction violated article I, section 22 of the Washington Constitution, because the crime allegedly occurred in Snohomish rather than King County. *Id.* The defendant also claimed the trial court erred in denying his motion to dismiss, because the State presented no evidence to establish that the crime occurred in King County. *Id.* Division I rejected Himple's claims, finding that the defendant waived any objection to venue. *Id.* at *3-4.

The ***Himple*** court stated,

> Here, the State repeatedly presented Himple with information that the State was alleging acts that occurred in both King and Snohomish counties...Himple failed to object to venue, even though he was aware pretrial that the State was alleging acts that occurred in both King and Snohomish counties. This constitutes a waiver of a venue objection.
>
> Under Dent, if evidence at trial raises a question of venue for the first time, the defendant must raise the issue at the end of the State's case. Not only was the close of the State's case not the first time Himple was made aware of a potential venue issue, counsel expressly chose not to object to venue[.]
>
> ...
>
> Himple argues that he did not waive his venue objection at the outset of trial because it was possible, based on the allegations in the amended information, for the court to have found that all three charged crimes occurred in King County. However, the issue is not of what the court might convict the defendant, but whether the defendant knows of a venue issue. Because Himple was aware the information alleged acts in Snohomish County, the general venue rule applies. He did not object and, therefore, he waived his objection.

Id. at *3-4 (internal citations omitted).[7]

This case is analogous to ***Himple***. Here, the State charged defendant with multiple counts of first degree rape of a child for acts occurring between December 12, 2002, and December 11, 2008. CP 3-5. *See also*, CP 185-187. The declaration for determination of probable

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[7] The court in ***Himple*** also rejected the defendant's claim of ineffective assistance of counsel based on his counsel's alleged failure to properly raise and argue venue. *Id.* at *2, 5. Here, defendant is not alleging ineffective assistance of counsel.

cause, regarding defendant's sexual acts, stated that the alleged acts occurred in both Pierce and King County. CP 1-2. The declaration also specifically stated that the alleged incident of oral sex occurred in Federal Way. *Id.* There is no indication from the available record that defendant objected to venue after his formal arraignment. The omnibus order, entered April 22, 2016, does not mention venue. CP 222-224.

Defendant did not raise a question of venue in his pretrial motions in limine, filed February 10, 2017, or in his reply to the State's trial brief, filed February 21, 2017. *See* CP 6-26, 60-65. The State's trial brief again alleged that defendant raped E.E. at their home in Federal Way by thrusting his penis into her mouth. CP 32. *See generally*, CP 27-50. The case was called for trial on February 16, 2017, and the jury was sworn on February 23, 2017.[8] RP 1, 424. Again, defendant did not raise the issue of venue. At this point, because defendant failed to object to venue even though he was aware at pretrial that the State was alleging that criminal acts occurred in both Pierce and King counties, he waived any objection to venue. *See* ***Dent***, 123 Wn.2d at 480; ***Himple***, 2018 WL 417982, *3.

The first time defendant addressed a venue issue was on February 27, 2017, after the jury was empaneled, while responding to the State's ER

[8] On February 16, 2017, the court addressed motions in limine. *See* RP 25-36. The State again referenced the "taste test game" (i.e., the oral sex incident in Federal Way), and again defendant did not object to venue. RP 27.

404(b) motion in limine. RP 474. *See generally*, RP 453-474. Defense counsel stated,

> [I]t's alleged she was asleep in her room, and she repeated this over and over. This is how it happened every single time other than one incident in Federal Way.
>
> We don't have to deal with that. Because of venue issues, that can't be the subject of conviction in this case. We're going to have to get some kind of an instruction to limit that, but it can be admitted for -- with the Court's call…lustful disposition.
>
> So, I mean, the acts can come in in this case, but it can't be the basis of a conviction because it's a -- venue. We don't have venue here. And we're not stipulating to venue. It's a King County act. If King County wants to bring it up, that's their business. It can't be the basis of a conviction here. It's venue.

CP 474. Defendant clearly knew about the oral sex incident in Federal Way and did not object to venue. His apparent assumption or hope that the State would not rely on the Federal Way incident for one of the charged counts of child rape does not relieve him of his duty to raise a timely objection and does not undo his waiver. As the State pointed out to the court in response to defendant's venue argument, defendant's claim of improper venue was untimely, and the State properly asked the court not to entertain a venue objection at that juncture. RP 487-88

Moreover, although defendant stated that the Federal Way incident could not be the basis of a conviction, his statement did not constitute a

formal objection to venue. He did not move to change venue to King County. Rather, defense counsel made a passing comment about the need for a limiting jury instruction. Regardless, as argued above, any objection was untimely, and defendant had already waived the right to challenge venue by failing to object earlier.

At the close of the State's case, defendant again addressed the issue of venue.[9] RP 863-66. Defense counsel acknowledged that he knew about the King County incident when the case started, and he purposefully chose not to bring a venue motion:

> I've got that dilemma with the King County incident… I got to figure out an instruction to deal with it. You know, I couldn't bring a venue motion because there's so many alleged acts here that occurred in Pierce County, and under the *Petrich* instruction, they only need one act per case. So I couldn't say, "Well, Judge, you know, I'm going to bring a motion" – I knew this when this case started. I want count one moved or dismissed because of venue because I can't. Yet we have an act in King County that isn't proper venue that the jury might rely on to convict on one of these counts. I got to deal with it.
>
> …
>
> **I am not bringing a venue motion. I'm not asking that it be dismissed for venue. I never thought it could be… I had never intended to bring a venue motion**, but I have this problem with this King County thing floating around out there not knowing if the jury is going to rely on it or not. So I wanted to propose at least an instruction to deal with it.

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[9] E.E. testified at trial that defendant put his penis in her mouth when she was approximately seven years old in the Federal Way house. RP 605-07.

RP 863-64, 866 (emphasis added). Defendant apparently chose not to propose an instruction (perhaps after realizing the issue was waived) and took no exceptions to the court's instructions to the jury. *See* CP 66-101, 102-141; RP 870-73. The State relied on the Federal Way incident for count IV, and the jury subsequently found defendant guilty. *See* RP 864-65, 887, 955-56; CP 177-184.

Here, as in ***Himple***, defendant failed to object to venue even though he was aware pretrial that the State was alleging that he raped E.E. in King County, and when he addressed the King County incident at the close of the State's case, defendant specifically stated that he was not bringing a venue motion. *See* ***Himple***, 2018 WL 417982, *1, 3. "Not only was the close of the State's case not the first time [defendant] was made aware of a potential venue issue, counsel expressly chose not to object to venue." *Id.* at *4. Thus, defendant waived any objection to venue, and he is not entitled to relief.

Defendant, however, relies on ***State v. Stearman***, 187 Wn. App. 257, 348 P.3d 394 (2015), and argues "[t]here was an obvious venue problem" and "the trial court abused its discretion by failing to act when necessary to protect Hardy's constitutional right to venue." *See* Brf. of App. at 13-16. However, as defendant himself acknowledges, ***Stearman*** is factually and procedurally distinguishable from the present matter. In

Stearman, the defendant moved to change venue from Pierce County to King County prior to trial, arguing that none of the alleged crimes occurred in whole or in part in Pierce County. 187 Wn. App. at 261. The State gave an offer of proof that at least some elements of the defendant's offenses occurred in Pierce County, and the trial court denied the motion to change venue. *Id.* at 262, 266-67. At trial, however, the State failed to produce evidence that any of Stearman's acts occurred in Pierce County. *Id.* at 269. At the close of the State's case, the defendant renewed his motion to change venue, but the trial court refused to entertain the motion. *Id.* at 263-64.

On appeal, the ***Stearman*** court held that the trial court abused its discretion by failing to entertain the defendant's renewed motion to change venue. *Id.* at 269-70. The court noted that "the trial court must allow the defendant to raise a venue issue at the close of the State's case when evidence at trial raises a question of venue." *Id.* at 269 (citing ***Dent***, 123 Wn.2d at 480). The court further held that the defendant did not waive his challenge to venue, and the error was not harmless because no reasonable jury could have found that Stearman committed his offenses in Pierce County by a preponderance standard. *Id.* at 271-73.

Notably, the court in ***Himple*** rejected the defendant's same reliance on ***Stearman*** and distinguished that case as follows:

> In Stearman, venue emerged as an issue because of the evidence the State offered during trial. Therefore, there was a later trigger point for Stearman to object to venue. Stearman's objection was timely. Here, Himple was aware that the State was alleging that criminal conduct had occurred in Snohomish County before the trial began and he did not timely object.

Himple, 2018 WL 417982, *4 (internal citations omitted). The same analysis applies to the case at hand. Here, defendant was aware that the State was alleging that criminal conduct had occurred in King County before the trial began and he did not timely object. ***Stearman*** therefore does not apply.

Defendant waived any challenge to venue by failing to raise the issue in a timely manner. Defendant failed to object to venue even though he was aware at pretrial that the State was alleging acts that occurred in Pierce and King counties. This constitutes a waiver of a venue objection. ***Dent***, 123 Wn.2d at 480. Once the issue was waived, "there was nothing for the trial court to address *sua sponte* or otherwise." ***Himple***, 2018 WL 417982, *5 (citing ***McCorkell***, 63 Wn. App. at 800; ***Dent***, 123 Wn.2d at 480). Accordingly, this Court should affirm defendant's convictions.

2. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT MULTIPLE COUNTS OF FIRST DEGREE CHILD RAPE, WHERE E.E.'S TESTIMONY DESCRIBING THE TYPE OF ACT(S) COMMITTED, THE NUMBER OF ACTS COMMITTED, AND THE GENERAL TIME PERIOD IN WHICH THE ACTS OCCURRED WAS SPECIFIC ENOUGH TO SUSTAIN COUNTS I THROUGH III.

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. Smith***, 155 Wn.2d 496, 502, 120 P.3d 559 (2005). Evidence is sufficient to support a conviction when, viewing the evidence in the light most favorable to the State, any rational fact finder could find the essential elements of the crime beyond a reasonable doubt. ***State v. Salinas***, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); ***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. ***Salinas***, 119 Wn.2d at 201. Circumstantial and direct evidence are

considered equally reliable. *Id.* at 201; ***State v. Delmarter***, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

In considering the 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)). Deference must be given to the trier of fact who resolves conflicting testimony and evaluates the credibility of witnesses and the persuasiveness of the evidence presented. ***State v. Homan***, 181 Wn.2d 102, 106, 330 P.3d 182 (2014); ***State v. Martinez***, 123 Wn. App. 841, 845, 99 P.3d 418 (2004). Therefore, when the State has produced sufficient evidence of all the elements of a crime, the decision of the trier of fact should be upheld. Sufficiency of the evidence is reviewed de novo. ***State v. Berg***, 181 Wn.2d 857, 867, 337 P.3d 310 (2014).

To convict a defendant of first degree rape of a child, the State must prove beyond a reasonable doubt that the defendant had "sexual intercourse with another who is less than twelve years old and not married to the [defendant] and the [defendant] is at least twenty-four months older than the victim." RCW 9A.44.073. Sexual intercourse includes "any penetration of the vagina or anus however slight, by an object, when committed on one person by another" and also includes "sexual contact

between persons involving the sex organs of one person and the mouth or anus of another." RCW 9A.44.010(1).

Defendant here claims that as to counts I through III, "the State failed to present any evidence from which a jury could have found three separate and distinct acts of sexual intercourse." Brf. of App. at 17. He argues that all three counts must therefore be dismissed. Brf. of App. at 21. Defendant's claim fails, because E.E.'s testimony was specific enough to sustain separately each of the counts charged.[10]

The constitutional right to a jury trial requires that the jury be unanimous as to the specific act the defendant committed for each crime. ***State v. Petrich***, 101 Wn.2d 566, 572, 683 P.2d 173 (1984), *overruled in part by* ***State v. Kitchen***, 110 Wn.2d 403, 756 P.2d 105 (1988). To protect this right, the State may elect an act to rely on for conviction, otherwise the court must instruct the jury "that all 12 jurors must agree that the same underlying criminal act has been proved beyond a reasonable doubt." ***Petrich***, 101 Wn.2d at 572.

"In sexual abuse cases where multiple counts are alleged to have occurred within the same charging period, the State need not elect particular acts associated with each count so long as the evidence 'clearly

[10] Defendant does not challenge the sufficiency of the evidence as to count IV, the oral sex incident in Federal Way, and the State will therefore not address that count in this section.

delineate[s] specific and distinct incidents of sexual abuse' during the charging periods." ***State v. Hayes***, 81 Wn. App. 425, 431, 914 P.2d 788 (1996) (quoting ***State v. Newman***, 63 Wn. App. 841, 851, 822 P.2d 308 (1992)). When, as here, the State charges identical counts, the trial court must also instruct the jury "that they are to find 'separate and distinct acts' for each count." ***Hayes***, 81 Wn. App. at 431 (quoting ***State v. Noltie***, 116 Wn.2d 831, 842-43, 809 P.2d 190 (1991)).[11]

For generic testimony to support multiple counts of sexual abuse, the victim must be able to describe:

> (1) the kind of act or acts with sufficient specificity for the jury to determine which offense, if any, has been committed; (2) the number of acts committed with sufficient certainty to support each count alleged by the prosecution; and (3) the general time period in which the acts occurred.

State v. Jensen, 125 Wn. App. 319, 327, 104 P.3d 717 (2005) (citing ***Hayes***, 81 Wn. App. at 438). These requirements balance the rights of accused resident child molesters against the risk of immunizing them from prosecution due to the nature of their crimes (and the "inability of the young accuser[s] to give extensive details regarding multiple alleged assaults"). ***Hayes***, 81 Wn. App. at 438.

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[11] Defendant here is not alleging that the trial court failed to properly instruct the jury. *See* CP 146-176.

The first prong requires a sufficient description of the acts at issue. In ***Hayes***, the court found that the victim's testimony that Hayes "'put his private part in mine'" sufficiently described the acts to allow the trier of fact to determine what offense had been committed. 81 Wn. App. at 438. The victim also described the defendant's usual course of conduct, testifying that it happened in his bed, with him on top of her, and that he used paper towels to clean up afterwards. *Id.*

Here, E.E. testified that defendant "put his finger inside of me" and detailed that defendant inserted his finger into her vagina. RP 601-05. She also described defendant's usual course of conduct, testifying that defendant would come into her room, check to see if she was asleep, remove the covers, rip a small hole in her panties, and then use his fingers to touch her. RP 598-605. E.E. testified to penetration of her vagina by an object (i.e., defendant's finger). *See* RCW 9A.44.010(1) (definition of sexual intercourse). As in ***Hayes***, E.E.'s testimony described the acts with sufficient specificity to satisfy the first prong.

The second prong requires the victim to describe the number of acts with sufficient certainty to support each count. In ***Hayes***, the victim testified that the defendant had intercourse with her at least "four times" and up to "two or three times a week." 81 Wn. App. at 439. This testimony was sufficient to support convictions of four counts of rape of a

child. *Id.* Thus, a victim's testimony may provide varying estimates as to the number of sexual assaults and still satisfy the second prong provided the estimates support the counts charged.

Here, defendant was charged with four counts of first degree rape of a child. CP 3-5, 185-187. Counts I through III pertained to defendant's acts of digitally penetrating E.E.'s vagina. *See* RP 886-88; CP 146-176 (Instruction Nos. 14-16, 23). E.E. testified that between the ages of six and eight, defendant digitally penetrated her "seven, maybe eight times," and she answered in the affirmative when asked if it happened more than four times. RP 603. She also testified that defendant inserted his finger into her vagina more than four times when she was between the ages of eight and 12. RP 605. Pursuant to ***Hayes***, E.E.'s testimony was sufficiently certain to support each count and satisfies the second prong.

Finally, the third prong requires the victim to testify to the general time period in which the acts occurred. In ***Hayes***, the victim testified that the acts occurred between 1990 and 1992, and she tied the abuse to events in her life (e.g., where she was living). 81 Wn. App. at 427-29, 439. The court held that the evidence about the timeframe satisfied the third prong. *Id.* at 439.

Here, E.E. testified that defendant penetrated her vagina with his finger between December 2002 and December 2008. RP 597-605. She tied

the abuse to where she was living and her approximate age: when living exclusively with her mother and defendant between the ages of six and eight, defendant penetrated her vagina seven or eight times; and after age eight, when splitting her time between her parents, defendant penetrated her vagina more than four times. RP 602-05. *See also*, RP 588-95 (E.E.'s testimony regarding where she lived and at what approximate age). The charging period encompasses the period that E.E. described. *See* CP 3-5, 185-187. Thus, E.E.'s testimony satisfies the third prong.

Defendant compares this case to ***State v. Edwards***, 171 Wn. App. 379, 401-03, 294 P.3d 708 (2012), where the court found insufficient evidence for the jury to convict the defendant of two separate and distinct counts of first degree child molestation. *See* Brf. of App. at 19-21. In ***Edwards***, however, the victim only described the first time the defendant molested her. 171 Wn. App. at 384. She testified that when she was about six years old, Edwards sat her on his lap, removed her pajama bottoms and underwear, and touched her vagina with his fingers. *Id.* The defendant moved his hand and it felt "bad" and "hurt." *Id.* (internal quotation marks omitted). The victim then gave undifferentiated accounts of 10-15 incidents where Edwards touched her "'front private'" and testified that Edwards always touched her the same way. *Id.*

After the jury convicted the defendant on two identical counts of child molestation, the trial court found insufficient evidence existed for juror unanimity on count II and vacated that conviction. *Id.* at 401-03. On appeal, this Court affirmed the trial court's vacation of the defendant's conviction. *Id.* Based on the victim's undifferentiated accounts of 10-15 circumstances where Edwards touched her "front private," this Court found the jury could not have differentiated between the alleged acts, because only the victim's testimony about the first time Edwards abused her was specific enough to allow the jury to find the defendant committed the crime, and apart from the victim's testimony that the first incident occurred when she was five or six, "[t]here was no evidence defining the time period in which any other act occurred." *Id.*

Unlike the victim in ***Edwards***, who only described the defendant's acts on one occasion, E.E. described defendant penetrating her vagina with his finger on multiple occasions. RP 600-05. Also unlike in ***Edwards***, where the State offered testimony about one specific incident where the victim was about five of six but "no evidence defining the time period in which any other act occurred," 171 Wn. App. at 403, E.E. described the general time period of the acts of penetration. *See* RP 603-05. ***Edwards*** is therefore distinguishable from the present matter.

E.E.'s testimony in this case was sufficiently specific under the three prong test announced in ***Hayes***. Viewed in the light most favorable to the State, the evidence established the occurrence of multiple separate and distinct acts of sexual intercourse that took place between December 12, 2002, and December 11, 2008,[12] to support defendant's convictions of first degree rape of a child as charged in counts I, II and III. E.E.'s inability to recall specific dates and times or provide additional details about the offenses are factors affecting credibility, and credibility determinations are not reviewable on appeal. ***Hayes***, 81 Wn. App. at 437-38; ***Homan***, 181 Wn.2d at 106; ***Camarillo***, 115 Wn.2d at 71. Accordingly, defendant's convictions should be affirmed.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE OF DEFENDANT'S PRIOR ACTS OF DOMESTIC VIOLENCE UNDER ER 404(B) TO EXPLAIN E.E.'S DELAYED REPORTING.

ER 404(b) generally prohibits admitting evidence of "other crimes, wrongs, or acts" to "prove the character of a person in order to show action in conformity therewith." Evidence of prior misconduct is presumptively inadmissible. ***State v. Gresham***, 173 Wn.2d 405, 421, 269

[12] The charging period relates to the period between E.E.'s sixth birthday and the day before her 12th birthday. *See* RP 581 (E.E.'s date of birth).

P.3d 207 (2012). However, the rule does allow admission of such evidence for other purposes, including "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). "This list of other purposes for which such evidence of other crimes, wrongs, or acts may be introduced is not exclusive." ***State v. Baker***, 162 Wn. App. 468, 473, 259 P.3d 270 (2011).

A trial court must state its reasoning on the record when admitting ER 404(b) evidence. ***State v. Jackson***, 102 Wn.2d 689, 693-94, 689 P.2d 76 (1984). Before the trial court admits evidence under ER 404(b), it 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. ***Gresham***, 173 Wn.2d at 421 (quoting ***State v. Vy Thang***, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002)). The third and fourth elements of this rule ensure that admission of the evidence does not violate ER 403.[13] ***Gresham***, 173 Wn.2d at 421. The proponent of the evidence has the burden demonstrating that the evidence has a proper purpose. ***Gresham***,

[13] ER 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice."

173 Wn.2d at 420. If the trial court admits the evidence, it must give upon request an appropriate limiting instruction to the jury. *Id.* at 420.

The trial court's interpretation of ER 404(b) is reviewed de novo as a matter of law. ***State v. Fisher***, 165 Wn.2d 727, 745, 202 P.3d 937 (2009). If the trial court interprets ER 404(b) correctly, then the appellate court reviews the ruling to admit or exclude evidence of misconduct for an abuse of discretion. *Id.* "A trial court abuses its discretion where it fails to abide by the rule's requirements." *Id.*

Here, the State moved to admit evidence of defendant's prior physical abuse of E.E. and her mother for the purpose of explaining E.E.'s delayed reporting under ER 404(b). *See* RP 496-504, 510-11, 539, 550-51, 615-16, 619-20; CP 27-28, 32-35, 51-56. Defendant opposed the admission of the ER 404(b) evidence. RP 505-09, 616-18, 620-22; CP 65. After hearing the offered evidence outside the presence of the jury, wherein E.E. testified that she was scared of defendant because he spanked her with a belt and physically abused and verbally threatened her mother,[14] the trial court granted the State's motion and explained:

> At the close of the testimony, I heard some argument from both sides as to whether or not that line of inquiry and getting into issues concerning the prior bad acts under 404(b) would be admissible in this trial.
> ...

[14] E.E. described an incident when she was seven years old where defendant pushed her mother against the wall, held a knife to her neck, and threatened to kill her. RP 610.

> And so the Court took a little time. I wanted to reread the *Fisher* case and also reread or go back and look at some of the transcript -- first going back to some of the opening statements and then couple other areas.
> And so the Court has determined that why [E.E.] waited so long to report is an issue in this case, and it had been raised as an issue actually in opening statement by the defense. So there will be -- or the defense has indicated that there will be testimony by the mother as to why [E.E.] is -- has made the allegations that she has and why they arose at the time that they did. All right. So that has been raised as an issue.
>
> So the Court is going to allow the evidence of physical abuse that [E.E.] witnessed of the defendant physically abusing [her mother] and also the physical abuse that she specifically experienced from the defendant. And what this is going to go to is [E.E.'s] state of mind as to why she delayed in her reporting.
>
> So the Court had balanced -- because the Court needs to balance the prejudice to defendant versus the probative value of this testimony. And, yes, this type of evidence is prejudicial, hitting someone, holding a knife to mother's throat, hitting the victim with a belt leaving welt marks is all very prejudicial. However, the probative value outweighs the prejudicial effect as it goes to the victim's state of mind as to why she delayed.

RP 627-29. *See also,* RP 607 (E.E. testifies she did not try to stop the sexual abuse because she was scared), 609-14 (E.E. testifies outside the presence of the jury regarding the physical abuse). The court invited defendant to propose a limiting instruction if he wanted one. RP 629. E.E. thereafter testified before the jury regarding why she was afraid of defendant and described the physical abuse and verbal threats, and she also described her later disclosures of defendant's sexual abuse. RP 632-

50. E.E.'s mother also testified that defendant physically abused her and specifically recounted that defendant gave her a black eye and threatened to choke her. RP 739-41. *See also*, RP 769 (Melissa testifies that defendant had permission to spank E.E.). The court later gave a limiting instruction to the jury. CP 146-176 (Instruction No. 13).

Defendant now argues that the trial abused its discretion in admitting the prior misconduct evidence, because (1) E.E. did not actually delay reporting the sexual abuse and (2) even if E.E.'s conduct did qualify as delayed disclosure, defendant neither raised the issue nor used it to attack E.E.'s credibility. Brf. of App. at 22-23. Defendant's arguments fail for the reasons set forth below.

Defendant's first argument that E.E. did not delay reporting the sexual abuse is not supported by the record. The record instead establishes that defendant first began sexually abusing E.E. when she was six years old, and the abuse continued until she was about 12 years old. RP 598-605. E.E. did not try to stop the abuse because she was scared. RP 607. E.E. tried to tell her mother about the abuse when she was seven years old – a *year* after the abuse began – but her mother called her a liar and E.E. did not provide details of the abuse. RP 634-35. *See also*, RP 588-594 (E.E.'s ages and respective living arrangements, which provide context for her disclosure(s)), 771-72 (Melissa Eriksen testifies that E.E. first

disclosed the sexual abuse when E.E. was 13 or 14). E.E. did not disclose the abuse again until years later when she was approximately 14 years old. RP 637-40. She did not tell her father about the sexual abuse or report it to the police until 2015, when she was 18 years old. RP 643-50. The record establishes that E.E. did not immediately disclose the sexual abuse as it was occurring but rather delayed reporting the abuse for years.

Moreover, defendant did not argue below that E.E.'s behavior did not qualify as delayed disclosure. *See* RP 616-22 (defendant's arguments to the court). Instead, defendant acknowledged that E.E. did in fact delay reporting the abuse. *See* RP 617 ("we haven't cross-examined her on delayed disclosure yet"), 621 (defendant tells the court "[o]bviously, it's there" and "I can't make that go away" regarding E.E. waiting years to report the abuse). *See also*, RP 668-69 (defendant cross examines E.E. regarding the first time she disclosed to her father and step-mother), 929 (defendant argues during closing that "[E.E.] had opportunity after opportunity for many years to tell her stepmother and her father. Didn't."). A party may only assign error on appeal based on the specific ground of the evidentiary objection at trial. ***State v. Guloy***, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985). Defendant's first argument accordingly fails.

Second, in sexual abuse cases, Washington courts allow admission of evidence of misconduct "to prove the alleged victim's state of mind,"

and to explain the victim's delay in reporting the sexual abuse. ***Fisher***, 165 Wn.2d at 744-45. Additionally, evidence of prior abuse that bears on a victim's credibility may include abuse of others that causes fear for the current victim. ***State v. Nelson***, 131 Wn. App. 108, 114-16, 125 P.3d 1008 (2006). Here, the trial court properly admitted the prior misconduct evidence to explain E.E.'s state of mind and help the jury evaluate her delay in reporting the sexual abuse.

Defendant relies primarily on ***State v. Fisher***, 165 Wn.2d 727, 745, 202 P.3d 937 (2009), to argue that the trial court improperly admitted the prior misconduct evidence, because "the defense did not make an issue of [delayed disclosure] and did not use the delay to challenge E.E.'s credibility." Brf. of App. at 23. In ***Fisher***, the defendant was charged with molesting his stepdaughter. ***Fisher***, 165 Wn.2d at 733. The State sought to admit evidence of the defendant's prior physical abuse of his other children under ER 404(b) to explain the victim's delayed reporting. *Id.* at 734. The trial court ruled that the prior misconduct was inadmissible *unless* the defense raised the delayed reporting. *Id.* (emphasis added).

On appeal, the defendant argued that the ER 404(b) evidence's prejudicial effect outweighed its probative value. *Id.* at 744-46. The Washington Supreme Court held that given the circumstances, the trial court did not abuse its discretion by making the prior misconduct's

admissibility contingent upon the defense first making an issue of the victim's delayed reporting. *Id.* at 746. The court explained, "Only if defense counsel made an issue of [the victim's] delayed reporting did the physical abuse become relevant to the determination of whether sexual abuse occurred." *Id.*

Fisher did not hold that such a contingent ruling was required as a matter of law and did not hold that delayed reporting must be made an issue by defense before ER 404(b) evidence is admitted to explain a delay. If that were the case, then defendant could lie in wait and make an issue of the delay only in closing argument when it is too late for the State to present evidence of the prior abuse to explain the delay. The prosecutor in this case argued as such below. *See* RP 619-20. Moreover, the ***Fisher*** court noted that prior misconduct evidence is relevant to prove the alleged victim's state of mind and cited to ***Nelson***, *supra*, with approval. 165 Wn.2d at 744-45 (citing ***Nelson***, 131 Wn. App. at 116). And, the court affirmed that "a proper purpose for admitting the evidence [is] to explain why [the victim] chose not to disclose the sexual abuse." *Id.* at 746.

The issue in ***Fisher*** was that the trial court "*expressly* conditioned the admission of evidence of physical abuse on defense counsel's making an issue of [the victim's] delayed reporting." 165 Wn.2d at 747 (emphasis added). The prosecutor, however, mentioned the physical abuse during

opening argument, introduced evidence of the physical abuse through its first witness, and "generate[d] a theme throughout the trial that Fisher's sexual abuse of [the victim] was consistent with his physical abuse of all his stepchildren and biological children, an impermissible use of the evidence." *Id.* at 747-48. Defense counsel was not provided an opportunity to decide whether to raise the issue of the delayed reporting and ultimately never raised the issue. *Id.* at 747.

The ***Fisher*** court explained that the prosecutor impermissibly used the evidence in violation of the pretrial ruling to "demonstrate Fisher's propensity to commit the crimes." *Id.* at 748-49. Additionally, the ***Fisher*** court held that there was a substantial likelihood that the prosecutor's misconduct affected the jury's verdict, because the emphasis on the physical abuse left the jury "with the wrong impression that it must convict Fisher to obtain justice for the harm caused" to Fisher's other children.[15] *Id.* at 749.

Here, unlike in ***Fisher***, the trial court did not condition the admission of defendant's prior acts of domestic violence upon defense counsel's making an issue of E.E.'s delayed reporting. Therefore, the

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[15] The trial court in ***Fisher*** also failed to instruct the jury that it could not consider the physical abuse evidence to assess the defendant's propensity to sexually abuse the victim. *Id.* at 749. Here, again, the trial court gave a limiting instruction. CP 146-176 (Instruction No. 13).

prosecutor(s) here did not violate the court's ruling like the prosecutor in ***Fisher***. The prosecutor(s) also did not impermissibly use the evidence to demonstrate defendant's propensity to commit the crimes. Moreover, the trial court here actually found that defendant raised the issue of E.E.'s delayed reporting in opening statement. RP 628-29 ("defense has indicated that there will be testimony by the mother as to why [E.E.]...has made the allegations that she has and why they arose at the time they did"). *See also* RP 530-31 (defendant's opening statement). However, as argued above, even if defendant did not raise the issue in opening statement, the trial court still properly admitted the prior misconduct evidence to explain E.E.'s state of mind and help the jury evaluate her delay in reporting the sexual abuse.

Additionally, courts have recognized that cases involving sex crimes against children generally put the child victim's credibility in issue, especially where the defendant denies that the crimes occurred and the child asserts their commission. ***State v. Kirkman***, 159 Wn.2d 918, 933, 155 P.3d 125 (2007) (citing ***State v. Petrich***, 101 Wn.2d 566, 575, 683 P.2d 173 (1984)). "Where the child's credibility is thus put in issue, a court has broad discretion to admit evidence corroborating the child's testimony." *Id.* This is true regardless of whether the defense makes delayed reporting an issue. However, despite defendant's claims to the

contrary, the record here establishes that defendant attacked E.E.'s credibility based on her delayed reporting. *See* RP 530-31 (defendant's opening statement), 668-69 (cross examination of E.E.), 924-30 (defendant's closing argument).

The record demonstrates that the trial court properly admitted evidence of defendant's prior acts of domestic violence, because defendant's physical assaults and verbal threats and E.E.'s testimony that she was afraid of defendant explained why she did not report the sexual abuse for so many years and showed that the sexual abuse actually occurred. *See* ***Fisher***, 165 Wn.3d at 745-46; ***State v. Wilson***, 60 Wn. App. 887, 890, 808 P.2d 754 (1991) (in sexual abuse of a minor case, evidence of physical assaults was properly admitted under ER 404(b) to explain delay in reporting the abuse and to rebut inference that the sexual abuse did not occur); ***State v. Baker***, 162 Wn. App. 468, 474-75, 259 P.3d 270 (2011) (prior acts of domestic violence between defendant and victim are admissible to assist jury in assessing credibility of victim who delays reporting, changes her story, or minimizes the degree of violence due to fear of defendant).

After hearing testimony from E.E. regarding (1) her reluctance to report the sexual abuse due to fear and (2) her fear of defendant stemming from his physical abuse, the court stated on the record its reasoning for

admitting the prior misconduct evidence. RP 628-29. The court found the evidence relevant and identified a proper purpose for admission: to explain "[E.E.'s] state of mind as to why she delayed in her reporting." RP 628. The court also took care to weigh the probative value of the evidence against the prejudicial effect and found such balancing favored admission. RP 628-29. Further, the trial court limited the State's use of this evidence and gave the jurors the following limiting instruction:

> Evidence of past alleged acts of domestic violence have been admitted for the sole limited purpose of considering why E.E. may have delayed reporting the allegations made against the defendant in this case. You may consider that evidence only for that limited purpose and for no other purpose.

CP 146-176 (Instruction No. 13). Juries are presumed to follow the court's instructions. ***State v. Stein***, 144 Wn.2d 236, 247, 27 P.3d 184 (2001). Thus, the trial court did not abuse its discretion when it admitted evidence of defendant's prior acts of domestic violence.

However, even if the trial court improperly admitted the prior misconduct evidence, any error was harmless. An erroneous evidentiary ruling that is not of constitutional magnitude is not prejudicial unless, within reasonable probabilities, the trial's outcome would have been different had the error not occurred. ***State v. Brockob***, 159 Wn.2d 311, 351, 150 P.3d 59 (2006); ***State v. Neal***, 144 Wn.2d 600, 611, 30 P.3d 1255

(2001). "Improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the evidence as a whole." ***Neal***, 144 Wn.2d at 611.

Here, E.E. testified that over a period of years, defendant would enter her room at night, rip a hole in her panties, and use his fingers to touch and penetrate her vagina. RP 598-605. E.E.'s father testified that he observed holes in E.E.'s underwear when doing laundry. RP 689, 694-95. He also testified as to E.E.'s demeanor when she had to return to her mother and defendant's home. RP 679-80, 688. E.E. testified as to the various locations she lived with her mother and defendant and tied the sexual abuse to those locations (including the oral sex incident in Federal Way). RP 588-607. E.E.'s mother's testimony corroborated those locations. RP 728-755. And, multiple witnesses testified as to E.E.'s disclosures of the sexual abuse. *See* RP 691-93, 705-07, 771-777, 820-21. There is no reasonable probability that the outcome of the trial would have been different had the trial court not admitted this evidence. Accordingly, any error was harmless, and defendant's convictions should be affirmed.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court affirm defendant's convictions.

DATED: January 26, 2018

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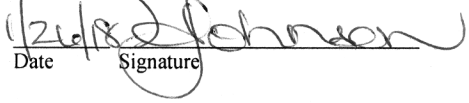
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ efile or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct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

1/26/18 
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PIERCE COUNTY PROSECUTING ATTORNEY

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