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NO. 51519-9-II

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

STATE OF WASHINGTON,
Respondent,

v.

JEFFREY L. BUTTERFIELD SR.,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY , JUDGE

BRIEF OF RESPONDENT

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T A B L E S

TABLE OF CONTENTS

I. RESPONDENT’S COUNTER STATEMENT OF THE CASE	1
II. RESPONSE TO ASSIGNMENTS OF ERROR	65
1. Ineffective Assistance of Counsel for Failure to Employ a Medical Expert Argument	65
2. Ineffective Assistance of Counsel for Failure to Object to ER 404(b) Testimony Argument	69
3. Aggravating Circumstance Error in Jury Instruction Argument	3
4. Exceptional Sentence Error Argument.....	7
5. Filing Fee and DNA Fee Argument.....	11
CONCLUSION	2

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)..... 8

Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d.403 (2004)..... 7

Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) 4

Gersten v. Senkowski, 426 F.3d 588, 607 (2d Cir.2005) 67

In re Pers. Restraint of Rice, 118 Wn.2d 876, 828 P.2d 1086 (1992)..... 66

Lindsey v. State, 135 Ga. App. 122, 218 S.E.2d 30, 31 (1975) 77

Neder v. United States, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) 4

Pavel v. Hollins, 261 F.3d 210 (2d Cir. 2001)..... 67

People v. Zack, 184 Cal. App. 3d 409, 229 Cal. Rptr. 317, 320 (1986) ... 76

State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010) 66

State v. Barragan, 102 Wn. App. 754, 9 P.3d 942 (2000)..... 77

State v. Brown, 132 Wn.2d 529, 940 P.2d 546 (1997) 71, 72, 4, 11

State v. Camarillo, 115 Wash.2d 60, 794 P.2d 850 (1990) 70

State v. Chanthabouly, 164 Wn. App. 104, 262 P.3d 144 (2011)..... 8, 9

State v. Cook, 131 Wn. App.845, 129 P.3d 834 (Div II, March 7, 2006). 74

State v. Creekmore, 55 Wash.App. 852, 783 P.2d 1068 (1989) 9

State v. Elvin, 481 N.W.2d 571, 575 (Minn. App. 1992) 76

State v. Ferguson, 100 Wash.2d 131, 667 P.2d 68 (1983) 70

State v. Fisher, 108 Wash.2d 419, 739 P.2d 683 (1987) 9, 10

State v. Gore, 143 Wash.2d 288, 21 P.3d 262, 277 (2001) 7

State v. Grant, 83 Wn. App. 98, 920 P.2d 609 (1996)..... 74, 75, 76

State v. Grewe, 117 Wash.2nd 211, 813 P.2d 1238 (1991)..... 9, 10, 11

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011) 66

State v. Harp, 43 Wash.App. 340, 717 P.2d 282 (1986) 9

State v. Johnson, 73 Ohio Misc. 1, 657 N.E.2d 383, 384 (1994) 76

State v. Kelly, 89 Ohio App. 3d 320, 624 N.E.2d 733, 734-35 (1993)..... 76

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) 66

State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995)..... 71, 72, 73

State v. Lord, 117 Wash.2d 829, 884, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992)..... 65, 66

<i>State v. Maurice</i> , 79 Wn.App. 544, 903 P.2d 514 (1995).....	66
<i>State v. McBride</i> , 74 Wn.App. 460, 873 P.2d 589 (1994).....	71
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	65
<i>State v. Medcalf</i> , 58 Wash.App. 817, 795 P.2d 158 (1990).....	70
<i>State v. Oxborrow</i> , 106 Wash.2d at 529, 723 P.2d 1123	9
<i>State v. Pryor</i> , 115 Wash.2d 445, 799 P.2d 244 (1990)	9
<i>State v. Ramirez</i> , __ Wn.2d __, __ P.3d __, 2018 WL 4499761 (Sept. 20, 2018)	11, 2
<i>State v. Ray</i> , 116 Wash.2d 531, 806 P.2d 1220 (1991).....	70, 71
<i>State v. Shephard</i> , 53 Wash.App. 194, 766 P.2d 467 (1988).....	11
<i>State v. Strauss</i> , 54 Wash.App. 408, 773 P.2d 898 (1989)	9
<i>State v. Stubbs</i> , 170 Wash.2d 117, 240 P.3d 143 (2010)	8
<i>State v. Swan</i> , 114 Wn.2d 613, 790 P.2d 610 (1990)	66, 67, 69
<i>State v. Tharp</i> , 96 Wn.2d 591, 637 P.2d 961 (1981)	70, 71, 73, 74
<i>State v. Wilson</i> , 97 Wash.App. 1094, 1999 WL 1048646 (Court of Appeals, Div. 2, 1999)	68, 77, 2
<i>State v. Yates</i> , 161 Wash.2d 714, 168 P.3d 359 (2007)	9
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	65, 66
<i>State v. Gibbons</i> , 256 Kan. 951, 889 P.2d 772, 780 (1995).....	76

Statutes

RCW 10.99.020	5
RCW 9.94A.120.....	7
RCW 9.94A.390.....	7
RCW 9.94A.533.....	7, 8
RCW 9.94A.535.....	5, 7
RCW 9.94A.585.....	7, 8
RCW 9A.46.110.....	5

I. RESPONDENT'S COUNTER STATEMENT OF THE CASE

On March 28, 2017, the State filed an Information, charging the Defendant with two counts of Rape of a Child in the First Degree, two counts of Rape of a Child in the Second Degree, two counts of Rape of a Child in the Third Degree, and two counts of Incest in the First Degree for abuse alleged against both of his twin daughters. CP 1-6. The Information further contained the allegations that the offenses were part of an ongoing psychological, physical, or sexual abuse of the same victim manifested by multiple incidents over a prolonged period of time. CP 1-6. The Information notified the Defendant that the State would be seeking an exceptional sentence if convicted on those aggravating circumstances. CP 1-6. The State later filed an Amended Information that changed a scrivener's error in date range alleged under Counts 3 and 4, but otherwise no other changes were made to the original charges. CP 61-62, 64-68. The Defendant was assigned David Mistachkin of Ingram, Zelasko, & Goodwin as his defense counsel. Mr. Mistachkin is a highly experienced and highly regarded attorney, now sitting as a Superior Court Judge for

Grays Harbor County, who specialized in sex abuse cases in his defense practice.

The case was initially continued by defense due to the high volume of material and seriousness of the charges with trial ultimately being confirmed for December 19, 2017. CP 21-22. The State filed its omnibus response on November 28, 2017, which included the Appellant's criminal history as well as criminal history for the State's potential witnesses. Supplemental CP 185-196. Prior to the trial court confirming the December 19th trial, the State had filed a motion to continue this trial due to having two sex offense cases scheduled for that same trial week. *See* CP 21-22 and 18-20. At an earlier hearing on December 7, 2017, the State had argued that due to the nature of sex offense cases and the bond developed between the prosecutor and the victim(s) in sex offense cases, neither case could be reassigned to another prosecutor for trial, particularly with the short time between the confirmation and the trial, which was essentially a week. Grays Harbor County has one dedicated prosecutor for all sex offense cases and is a relatively "young" office with felony deputies that have between 2 and 10 years experiences as attorneys.

The assigned prosecutor requested that a different case, which had a young child victim, go on December 19th with this case being continued

into February because this case had victims who were now adults and a witness, the SANE nurse, who was additionally unavailable for that trial week. The Court denied that request and ordered that both cases be set for December 19th, leaving one of the cases to be reassigned as a result. CP 21-22. The assigned prosecutor kept this case due to the complexity of the case and the other case with the young child was reassigned to the elected prosecutor for trial. The State thereafter submitted a supplemental omnibus response, which was not included with the originally requested Clerk's Papers, identifying a different SANE to replace the unavailable SANE. Supplemental CP 197-198. The substituted SANE was going to testify to the same substantive material as the unavailable SANE who had previously been disclosed to defense. *Id.* This is referenced in the Defense's Response to State's Supplemental Omnibus Response, which was included in the originally requested Clerk's Papers. CP 29-30. During the trial and after hearing argument from both counsels, the trial court ruled that the testimony of the SANE would be excluded. RP Vol. 2 Dec. 20, 2017 at 166.

Also not included with the originally requested Clerk's Papers in this case was the State's Trial Memorandum, which contained a number of Motions in Limine. Supplemental CP 152-181. The originally requested

Clerk's Papers indicate there is a Trial Memorandum, however, the Clerk's Papers only included the Defense's Trial Memorandum. CP 26-28. Motions in Limine were heard prior to trial and included the State's request to be allowed to admit prior bad acts of the Appellant where the evidence was offered for a purpose other than proving a propensity to commit the crime. *See* State's Trial Memorandum, Section 5 Motions in Limine, Motion Number 5, Pages 17-26; Supplemental CP 168-177. The State provided case law, rules of evidence, such as ER 404(b), and other legal authority to support the use of prior misconduct to prove "motive, opportunity, intent, preparation, plan, knowledge, identify, or absence of mistake or accident," which, according to case law, is not an exhaustive list of possible ways prior misconduct may be admissible. *Id.* at 168. The State specifically noted that the prior acts would be admissible to show the Appellant's lustful disposition toward the victims, as part of the *res gestae* of the crime(s) charged, and to help the jury understand the victims' behavior. *Id.* at 168-177. This motion was granted by the trial court, therefore, the State was allowed to discuss prior acts, such as the Appellant's physical abuse and torture techniques utilized to gain compliance over the victims and other family members in order to commit the sexual abuse offenses against the victims.

The State's Trial Memorandum also included a Motion in Limine regarding the State's request that there be no reference to or description of the victims' past or present mental health diagnosis. *See* State's Trial Memorandum, Section 5 Motions in Limine, Motion Number 5, Pages 16; Supplemental CP 167. Defense's Trial Memorandum, which was included under CP 26-28, acknowledges information obtained in discovery and during defense interviews about the victims' alleged mental health issues. The information contained in discovery regarding alleged mental health issues was provided at the beginning of the case and the defense interviews were done before the trial on December 19, 2017. A portion of the discussion about the use of the victims' alleged mental health issues was captured in the Report of Proceedings. RP Vol. 1 Dec. 19, 2017 at 11-18. Specifically, defense asked the court for a ruling to allow him to speak about the victims' alleged mental health history in opening. *Id.* The trial court asked for copies with the areas highlighted that defense specifically wanted to address. *Id.* at 17. The trial court reserved on the decision regarding any discussion of alleged mental health history until after the victims' testimony. *Id.* at 19.

A.B. [Sister 2] testified first at trial. RP Vol. 1 Dec. 19, 2017 at 24. Sister 2 initially described herself, her family make-up, both past and

present, and where the family lived as a child. *Id.* at 24-28. Sister 2 described her mother as working and not being around very often and that she just remembered being around her Grandma Lorraine, who was her father's mother, her dad, and her three brothers Chris, David, and Jeffrey. *Id.* at 26, 28. Sister 2 described that her father was on SSI and so was at home. *Id.* at 41. Sister 2 talked about her relationship with her father, the Appellant, stating that she didn't really look at him as a father. *Id.* at 29. Sister 2 described having to be a look out to watch for her brothers coming in while he raped her twin sister and that he would yell and scream, and hit. *Id.* at 30. Sister 2 described that they would have good times doing stuff like going fishing, but that mostly there were bad days. *Id.* Sister 2 described a time when she had tried to report what was going on in the home and her being beat up while attending AJ West Elementary School, which focused on bruising that she had on her legs. *Id.* Sister 2 described her father whipping her all the way from school and CPS coming to the home and taking a statement from her while her father was in the room. *Id.* at 30-31. Sister 2 testified that her father whipped her at home and told her to tell CPS that her mother had hit her. *Id.* at 38. Sister 2 described her father's retaliation for reporting, which consisted of him grabbing her hair, pulling her to a window in the front room, and smashing her face into

the glass repeatedly. *Id.* at 31, 38. Sister 2 testified that she went to school the next day, still having blood on her nose from being banged into the window glass, and told her teacher that she would never report again. *Id.* at 31-32, 38-39. Sister 2 testified that she never tried to report what was going on in her home again because she was too afraid. *Id.* at 32.

Sister 2 next described in more detail about what she meant by acting as a look-out, describing that she acted as a look-out while her brothers were outside playing when her father and sister would be in his room together so that she could knock on his door if the boys came in. RP Vol. 1 Dec. 19, 2017 at 32-33. Sister 2 described looking underneath the door crack and seeing her sister's legs up and the chair moving while her father and sister would be in the room. *Id.* at 33. Sister 2 clarified that nothing sexual had occurred between her and her father yet so at that time, she just thought her father and sister were playing a game. *Id.* Sister 2 testified that the sexual abuse between her and her father did not begin until she was 9 and they were living up at North River so before that in the AJ West house, she had to be the look-out for her brothers or if Grandma Lorraine came upstairs. *Id.* at 34.

Sister 2 described a specific time when she was supposed to knock three times on the door if Grandma Lorraine came up and she had fallen

asleep while sitting watch on the stairs. RP Vol. 1 Dec. 19, 2017 at 34. Sister 2 testified that when she opened her eyes and woke-up, Grandma Lorraine was already halfway up the stairs before she was able to run to the door and knock three times. *Id.* at 34-35. Sister 2 described her father pushing her sister out of the room and described her sister looking weak. *Id.* at 35. Sister 2 testified that she had not seen that time what her father was doing with her sister and that she just remembered her sister being pushed out of the room and telling her sister that it was going to be okay. *Id.* at 35. Sister 2 also testified in more detail about the abuses that were going on with her at that time, specifically talking about a time when her father became angry at her for watching him eat spaghetti. *Id.* at 36. Sister 2 described her father yelling at her, stating “you’re going to eat it all, b-i-t-c-h,” as he starting cramming the fork of spaghetti down her throat, forcing her to eat it. *Id.*

Sister 2 testified that she recalled a DARE officer coming to school and watching a video that made her realize that what her father was doing to them was wrong and talking to him and her sister about what he was doing being wrong, but that nothing changed. RP Vol. 1 Dec. 19, 2017 at 36-37. Sister 2 testified that she only talked to her sister about what was going on and how it was wrong and that she couldn’t talk to her grandma

or her mom or anyone else because they were too scared. *Id.* at 37. Sister 2 testified that after Grandma Lorraine died when they were 8, almost 9, the family moved up to North River in Artic. *Id.* at 41-42. Sister 2 testified about similar abuses and acts occurring at the North River house and that this was when her father first began showing himself to her. *Id.* at 42. Sister 2 clarified that he started showing her his privates, meaning his penis, and that this began happening when she was 9 years old. *Id.* at 42-43. Sister 2 testified about her father telling her that he would give her money and change and whatever he had so that she would not to say anything. *Id.* at 43. Sister 2 also testified about her father telling her that she was his girl and that he needed to get her ready for the world by doing these things. *Id.* While living at that house, Sister 2 also testified about seeing her father on top of her sister having sex with her sister while her sister held her legs up. *Id.* Sister 2 described this happening in his room while their mother was at work and the boys were outside or hanging out with friends. *Id.* at 43-44.

Sister 2 described the boys spending a lot of time outside and they weren't allowed to as much, having to stay in their room a lot, because their father would accuse them of looking at their brothers and wanting to screw them. RP Vol. 1 Dec. 19, 2017 at 44. Sister 2 testified about

thinking that she had started her period at 9, but that she hadn't and that it had been because she was just bleeding from her father working his penis inside of her. *Id.* at 45. Sister 2 then went into detail about the first time she had a memory of her father touching her sexually. *Id.* at 46. Sister 2 testified about how she had to have one pant leg out and one in so that she could easily put her pants back on really fast if her brothers or anyone came in. *Id.* Sister 2 testified about not really understanding everything and that at first it was his fingers, then he was able to work his way. *Id.* Sister 2 testified that it was disgusting her talking about it. *Id.* Sister 2 described remembering holding her legs up and looking over at the clock, just trying to block out what was happening. *Id.* Sister 2 described her father's sweat dripping down, that it was gross, and that she didn't want to be there. *Id.* Sister 2 testified that he was rapping her, using his penis once he was finally able to get his area in, but before that his fingers and/or other things that he used. *Id.* at 46-47. Sister 2 testified that she thought her mom might have had [sex] toys that he used just to open everything up in order to get his penis in. *Id.* at 47.

Sister 2 described that her sister was there, sometimes in the room and sometimes as the look-out because it would trade off. RP Vol. 1 Dec. 19, 2017 at 47. Sister 2 testified that her father had sex with her a lot, a

few times a day and at night, describing it happening any chance he could get pretty much. *Id.* at 48. Sister 2 described wanting to tell someone, wanting to say or do something to make it stop, but that after the window incident, she was too afraid to say anything. *Id.* Sister 2 testified that she would say that it hurt and that she would be crying, but her father would tell her it's okay. *Id.* Sister 2 testified about other memories from that house and specifically described the day her mom left because her father had planned on killing her. *Id.* Sister 2 testified about her and her sister running out to their mother when she returned home, crying and scared to death, to tell their mother that she had to leave. *Id.* at 49. Sister 2 testified that they showed their mother the hole that was dug for her body and that her mother left. *Id.* Sister 2 testified about being forced by their father to tell CPS that it was their mother who abused them and that they were not allowed to see her from that point on. *Id.*, 50. Sister 2 testified about her and her sister staying in their father's room every night once their mother left permanently. *Id.* at 49-50, 52. Sister 2 testified that she would sleep on the floor in her father's room while her sister would sleep up in the bed with him. *Id.* at 52. Sister 2 testified about the abuse continuing the same, including vaginal rape, while they were living at the North River house until they moved when they were 10. *Id.* at 52-53.

Sister 2 testified that after they moved, the living arrangements remained the same with she and her sister sharing a room with their father. RP Vol. 1 Dec. 19, 2017 at 54. Sister 2 testified about their father forcing them to act dumb and fake being retarded so that he could get them on social security to collect money for drugs. *Id.* at 54-55. Sister 2 described not really being allowed to wear clothes that they wanted and their father requiring them to wear his clothes and oversized clothes in order to make themselves unattractive to men. *Id.* at 55. Sister 2 testified that they were still allowed to go to school then, but described being inside a lot and not being allowed to look up or around when they were out. *Id.* Sister 2 demonstrating having to sit in the car with their heads down in their laps and testified that if they looked up, they would be elbowed in the face or yelled at, accused of looking at men and wanting to screw them. *Id.* at 55-56. Sister 2 testified that they didn't have many friends and they stayed away from their brothers because of their father's accusations that they wanted to screw them and because their brothers were also taught to spit on them, pull their hair, and be mean to them as well. *Id.* at 59. Sister 2 testified that they primarily just communicated with each other. *Id.* at 58.

Sister 2 testified about their father not using any protection with them and described him using a rubber band on his penis to stay erect.

RP Vol. 1 Dec. 19, 2017 at 60. Sister 2 testified their father would ejaculate inside of them and that he would have a towel next to his bed or a shirt to wipe himself on. *Id.* Sister 2 also testified that the family never stayed very long in just one place, describing that there were times when they were homeless. *Id.* Sister 2 specifically testified about a time when they were living in a camper in Capitol Forrest, describing how the physical and sexual abuse continued, including a time when their father had struck her sister in the face with a .22. *Id.* at 60-61. Sister 2 described how her father blamed her for making him do that to her sister and chased after her, shooting at her with the .22. *Id.* at 61. Sister 2 testified that she was very scared and thought that her sister was dead. *Id.* Sister 2 described hiding between two logs and later underneath the camper, staying out in the rain for the longest time. *Id.* Sister 2 testified that she later went to the door of the camper, which the Defendant opened, hitting her with it, and telling her, “Get in her, you stupid, b-i-t-c-h.” *Id.*

Sister 2 testified about how the Defendant would indicate to her that he wanted to have sex with her and that the sexual abuse was more aggressive as time went on, meaning that it happened a lot more. RP Vol. 1 Dec. 19, 2017 at 67. Sister 2 testified about another move to Ocean City and described how they continued to stay in their father’s room despite

there being 5 bedrooms in that particular house. *Id.* at 68, 73. Sister 2 testified that there was a room set up for them in that house, but that it was only used for show to CPS or anyone that might show up. *Id.* at 69, 73. Sister 2 described that CPS came out because there had been concerns at the school about them keeping food and wanting extra food. *Id.* at 69-70. Sister 2 testified that they did that at their father's request because he wanted them to bring food home for him to eat. *Id.* Sister 2 testified that they were made to put empty boxes in the cupboard and things that made it look like they had food when they really didn't when CPS came to check the house. *Id.* at 70. Sister 2 testified that they were told by their father to tell CPS or anyone else that came over that he was a good dad and she felt in her mind that she couldn't tell anyone what was really going on. *Id.* at 72.

Sister 2 testified about having a miscarriage while living in that house from a pregnancy by her father when she had just turned 13. RP Vol. 1 Dec. 19, 2017 at 74-77. Sister 2 testified from beginning to end how a sexual encounter occurred with her father and that these types of encounters occurred up until she was 16 years old. *Id.* at 78, 79. Sister 2 described that she thought her father loved her sister more because he would tell her sister that he was going to marry her someday. *Id.* at 81.

Sister 2 testified that as she got older, she and her sister started to fight back a little because they knew it was wrong and couldn't take what was happening anymore and she also described what would happen if when they did fight back. *Id.* at 79, 82. Sister 2 testified that her father would lock them outside or drop them off in the dark in the mountains, making them chase after the car. *Id.* at 82. Sister 2 described that sometimes her brothers would be there, too, and their father would have their brothers roll down the window and spit on them and call them names when they caught up to the car. *Id.* Sister 2 testified that she remembered being faster than her sister and described hearing her sister crying and telling her to wait for her. *Id.* Sister 2 testified that she was just scared and wanted to be the first one to the car to make her father proud. *Id.*

Sister 2 testified about how it was that the abuse finally stopped, describing that it occurred after she called the food bank and asked for food again, which prompted the food bank to call CPS. RP Vol. 1 Dec. 19, 2017 at 84. Sister 2 testified that she was at a point then when she wanted to kill herself because she could not take the abuse anymore. *Id.* Sister 2 described being 70 to 76 pounds and 5'3" or 4" at that time. *Id.* at 85. She described being that size due to being on methamphetamine and being starved. *Id.* At that time, the girls were 16 years old. Sister 2

testified about her father introducing her and her sister to methamphetamine when they were 12 in order to keep them awake longer to abuse them longer. *Id.* at 85-86. Sister 2 testified about what happened after CPS came and finally took them into protective custody, placing them first with their cousin Michelle and later being adopted by the school librarian. *Id.* at 86-87. Sister 2 testified that her sister was the first to disclose the abuse to their cousin and she later talked about the abuse after they had been removed from their father's home. *Id.* at 87-88.

Sister 2 testified that after their disclosure, an investigation into their father's abuse ensued, which occurred in 2006. RP Vol. 1 Dec. 19, 2017 at 92-93. Sister 2 testified about the Appellant reaching out to them while they were in care and before the case against him in 2006 was filed/went to trial. *Id.* at 93. Sister 2 testified that he told them to say it was all a lie and if they didn't, he was going to find them and kill them. *Id.* Sister 2 testified that they recanted because they were scared. *Id.* at 93-94. Sister testified that eventually the adoption went through and life went on from there without the case being pursued or really having any contact with their father from that point on other than occasionally waving at him or getting letters from him. *Id.* at 94. Sister 2 talked about still feeling really scared, sick, and guilty with regard to her father after 2006

and that she did a lot of writing about what happened to them as children. *Id.* Sister 2 testified about how it came about that she and her sister reported the abuse again more recently, describing that her sister told her that she was ready. *Id.* at 95.

Sister 2 testified that they were still scared and described all of the possibilities they were worried about if they came forward again. RP Vol. 1 Dec. 19, 2017 at 95. Sister 2 testified that they decided that they couldn't just let it go and that there needed to be justice so they would need to be brave. *Id.* Sister 2 testified that her sister initiated talking to the police and that she felt safe to talk about what happened after he was in custody. *Id.* Defense then cross examined Sister 2 with a break taken to address the mental health issue outside the jury's presence. *Id.* at 96-113. Defense counsel identified a report from Children's Hospital and BHR from 2006 in which Sister 2 was evaluated following their removal from the Appellant's home and diagnosed with what described as psychotic features, psychosis, hallucinations, etc. *Id.* at 114. The State argued that defense intended use was merely a back-door attack on the victim's character and that defense had no evidence to present that any diagnosis in 2006 had any effect on Sister 2's memory. *Id.* at 115. The trial court ultimately allowed questioning of the victim about her having

some mental health issues at that time, but defense was not to use the medical report themselves. *Id.* at 118.

Sister 2 testified on cross-examination that in 2006 she was suffering from mental health issues such as hearing voices, psychosis, and schizophrenia. RP Vol. 1 Dec. 19, 2017 at 121. Sister 2 described that the voice she heard was her dad's voice and not that they were voices telling her to do things or not do things. *Id.* at 121. Sister 2 also testified that she no longer has that diagnosis and currently suffers from post-traumatic stress disorder and generalized anxiety disorder. *Id.* at 122. Sister 2 testified that she did not remember having hallucinations in 2006 and described those experiences as being mostly flashbacks. *Id.* at 123-124. Sister 2 further testified on re-direct that she was hospitalized after being taken out of her father's home because of all the abuse that happened at the home, describing that she could still hear the gun and a bunch of things happening. *Id.* at 129. Sister 2 described still being scared of loud bangs and how things like screaming and hearing a child crying still triggered things for her. *Id.* at 130. Sister testified that that was in her past and that was her, but that she's better now, that she is okay and safe, and that she doesn't have to be scared anymore. *Id.* at 130. Sister 2 further testified

that nothing she had gone through has affected her memory and that she remembered everything that her father did. *Id.*

Sister 1 was the next witness to testify. RP Vol. 1 Dec. 19, 2017 at 136. Sister 1 similarly testified about being close to her sister, but that their father isolated her and her sister from their brothers. *Id.* at 138-139. Sister 1 testified about her first memory of abuse between her and her father, which was when the family lived in Rochester and she was very young, around the age of three or four. *Id.* at 139-140. Sister 1 described her brothers making a fort outside and her father called her inside, pulled down his pants, and showed her his penis. *Id.* at 139. Sister 1 testified about the physical and sexual abuse starting when she was approximately 6 years old while living in the house on Pacific Avenue and they were going to A.J. West. *Id.* at 142. Sister 1 testified about her first incident of sexual touching that she recalled, describing that it happened around Christmas time. *Id.* at 145. Sister 1 described that her sister and brothers were in the front room and her father had told them that he was taking her into his room for a while. *Id.* Sister 1 described that her father had toys up in the closet and testified that he told her that if she was a good girl, he would give her a present early out of the closet. *Id.* Sister 1 testified that the Appellant told her to pull down her pants and lay back on the bed, then

he started touching her, clarifying that he touched her vagina with his fingers. *Id.* at 145, 146.

Sister 1 testified about remembering seeing her brother Chris's face at one point looking down at them through the vent while her father was touching her. RP Vol. 1 Dec. 19, 2017 at 147. Sister 1 testified that her father told her to hurry up and put her pants back on and to tell her brother that he was just putting medicine on her, which she did. *Id.* at 147. Sister 1 testified about other memories in which the family would be down at the river and that she and her sister had to stay in the truck with the Appellant. *Id.* at 149. Sister 1 described that her sister was made to look out the back window while her father had her pants down and was trying to put his fingers inside of her. *Id.* Sister 1 described that later her father made a hole in her underwear so that he could have easy access to her and if anybody came up to the truck, she wouldn't have to pull her underwear up. *Id.* at 149-150. Sister 1 testified that she recalled at least 3 incidents of touching like that at the river and that she was around 6 or 7 years old at that time. *Id.* at 151. Sister 1 testified about another time around this same age when her father had her go into the bathroom and try to put her own fingers inside of herself. *Id.* Sister 1 described the

Appellant as being very encouraging and praising her for trying to do this. *Id.* at 152.

Sister 1 testified about thinking at the time that what was happening was more like a game and it wasn't until later when they were seeing the way other kids were at school that she began to think what was happening wasn't normal. RP Vol. 1 Dec. 19, 2017 at 152. Sister 1 testified that it wasn't until after her grandmother died when the abuse started to get really bad and their father started doing more sexual things to them at that point. *Id.* at 153. Sister 1 testified about her father telling her to sneak up to his room after everyone fell asleep so that he could attempt to put his penis in her vagina. RP Vol. 2 Dec. 20, 2017 at 177. Sister 1 testified similarly to her sister about the Appellant having her take just one leg out of her pants and trying different positions with her in order to try to put his penis inside of her. *Id.* at 177-178. Sister 1 testified that she was 8 years old when that was happening. *Id.* at 178. Sister 1 also testified similarly to her sister about a time when her father had been abusing her and he heard their grandmother/his mother coming up the stairs. *Id.* at 179. Sister 1 testified that he pushed her out of the room and he made an excuse to her Gram about her being scared so she was sleeping in the room next to his. *Id.*

Sister 1 testified that she recalled her grandmother asking her the next day if her father had touched her or done anything to her, but that she didn't tell because she was too scared of her father being mad at her if she had. RP Vol. 2 Dec. 20, 2017 at 179-180. Sister 1 testified about the type of punishment that occurred in the house and her father accusing her of wanting to be with other people, describing that he would call her a little slut and a little whore. *Id.* at 180-181. Sister 1 testified about her brothers and sister treating her the same way as her father when he would start yelling at her and punishing her. *Id.* at 181. Sister 1 testified about her father telling her what to do and say if ever her vaginal area was checked by a doctor or if anyone talked to her about the abuse, describing that she was to tell them that her mother was the one who was abusing her, sticking objects up inside of her. *Id.* at 181-182. Sister 1 testified about the time when CPS came to the house after her sister had reported abuse, describing that her father was in the room when her sister was interviewed by CPS. *Id.* at 183-184. Sister 1 described the Appellant grabbing her sister by the hair and pushing her face against the window. *Id.* at 186. Sister 1 testified that she recalled her sister crying and that she had blood on her face. *Id.*

Sister 1 testified about when the family moved to the Artic house after her grandmother died, describing the house as being way out in the country with only two neighbors. RP Vol. 2 Dec. 20, 2017 at 187. Sister 1 testified about things being really, really bad there, describing a fight between her mother and father there and their mother wanting asking them to go with her, but they were too afraid to go with her. RP Vol. 2 Dec. 20, 2017 at 185-186. Sister 1 testified similarly to her sister about the incident where her father and brothers dug a hole at that house and her father saying that they were digging the hole so they could bury their mother out back. *Id.* at 193. Sister 1 also testified similarly to her sister about never sleeping in their own room in the Artic house because they had to sleep with their father. *Id.* at 187. Sister 1 testified about her and her sister having a room, which was used if anyone came over so that he could say that was where his daughters slept, but that they actually slept with their father every night. RP Vol. 2 Dec. 20, 2017 at 191. Sister 1 described her father using the room against them when he got mad at them, making them feel like they had to be in the same room as him. *Id.* at 192.

Sister 1 testified about her father putting his penis inside of her vagina once he was able to, while they were living at the Artic house after her mom had left, starting when she was 9 year old. RP Vol. 2 Dec. 20,

2017 at 191. Sister 1 testified about it hurting and that her father would tell her that it was okay, honey. Sister 1 testified about being thrown outside as punishment and being accused by their father of wanting to be with their brothers. *Id.* at 188-189. Sister 1 described a time when they were in the woods when her father tried to have sex with her while on a three-wheeler while her sister kept watch for anyone that might come by. *Id.* at 195-196. Sister 1 testified about their father giving them alcohol and marijuana, which she described wanting to do because everyone else was drinking and that it help her forget, especially later on, about the abuse. *Id.* at 197. Sister 1 testified about how it was while they were in their father's room with her sister sleeping at the foot of the bed while she was in the bed with her father. *Id.* Sister 1 testified that her sister would be at the foot of the bed while he had sex with her and that sometimes their father would have them switch, taking turns between her and her sister. *Id.* at 197-198.

Sister 1 testified that she didn't talk to her teachers or tell anyone about what was going on because she was afraid, describing that she thought that's what she was supposed to do and that she was afraid of getting in trouble. RP Vol. 2 Dec. 20, 2017 at 192. Sister 1 described a time when her father had told her to fake sick so that she could stay home

from school to be with him while her sister and brothers were at school. *Id.* at 200. Sister 1 testified that her father was touching her in the front room and she saw one of the two neighbors they had, a woman, looking through the window. *Id.* at 201. Sister 1 testified that the woman had seen her on the floor with her father and that her father was freaking out, thinking the woman was going to come back. *Id.* Sister 1 described her father telling her to hurry up and put her pants on and that he was asking her if the woman had seen her. *Id.* Sister 1 testified that the woman never came back. *Id.*

Sister 1 testified that her father did not use condoms and that he would tell them to go pee afterwards. RP Vol. 2 Dec. 20, 2017 at 198. Sister 1 testified similarly to her sister that after he was finished, he would grab a sock and would use that to wipe off their vaginas. *Id.* at 199. Sister 1 also similarly testified as her sister had about her father using a rubber band to make his penis bigger, describing that he started using the rubber band later on. *Id.* Sister 1 described how sometimes she would pretend that she was too tired and would tell him to go to her sister for sex. *Id.* Sister 1 also testified about her father making them feel like they didn't want him anymore if they didn't want to have sex with him. *Id.* Sister 1 described later on telling him no. *Id.* at 200.

Sister 1 testified that no one was working when they lived in the Artic house and they were living off of her father's social security, going to food banks for food, and her brother having to hunt when they were out of food. RP Vol. 2 Dec. 20, 2017 at 194. Sister 1 described wearing her father's clothes and being dressed in big, giant clothes to hide their bodies. *Id.* at 195. Sister 1 specifically testified about her father wanting them to wear these clothes in order to hide their breasts and being afraid to show off their breasts. *Id.* Sister 1 described living in the Artic house when they were 9 and 10 and that they were evicted by the landlords from that house due to the condition the house was in. *Id.* at 198, 200.

Sister 1 testified about the next house they lived in near Thumpers Tavern in Hoquiam when they were 11, describing the same living conditions with there being a room that was supposedly for her and her sister, but that they actually slept in their father's room. RP Vol. 2 Dec. 20, 2017 at 203. Sister 1 described her father having sex with her every single night and that he would also have her watch while he was having sex with her sister and visa versa. *Id.* at 206. Sister 1 described that the father didn't have them act as look-outs anymore, but would just make sure that their brothers were either gone or asleep. *Id.* Sister 1 testified that it was still bad with regard to having food in the house and described

that her father would say that at least they got to eat at school, making them feel bad for eating, even at school, so they starting saving their lunches and bringing food home to their father. *Id.* at 207. Sister 1 testified similarly to her sister about putting their heads in between their legs when they were in the car and not being allowed to look up because they would be accused of looking at guys and would get hit. *Id.* at 208.

Sister 1 testified about other houses they moved to, describing the same living arrangements and similar abuses. RP Vol. 2 Dec. 20, 2017 at 210-211. Sister 1 testified that they lived way out in the country in Humptulips when they were around 13 years old. *Id.* at 210. Sister 1 testified about her father sometimes throwing them out of his room and that they would beat on the door, begging him to them back in, because they were so used to being right next to him by then. *Id.* at 211. Sister 1 testified about the same sexual abuse occurring with their father putting his penis inside of them and having sex with them almost every night. *Id.* Sister 1 described that it was at this time that drugs, specifically methamphetamines, came into their lives. *Id.* Sister 1 testified that their father introduced them to drugs, first stating with their brothers. *Id.* at 212. Sister 1 described wanting to try meth because that was what their life was about then, waiting outside in the car while their father was inside

the drug dealer's house, and they wanted to be a part of it. *Id.* Sister 1 testified that the money they had was spent on drugs and that they would get drugs instead of food. *Id.* at 212-213.

Sister 1 described other instances of abuse such as her father putting a knife right through a door next to her sister's head, almost stabbing her in the head, when he was angry, lifting her up by the ears and biting her face, and dropping them off in the woods, making them run to catch the car. RP Vol. 2 Dec. 20, 2017 at 213-214. Sister 1 testified similarly to her sister about her father having their brothers spit in their faces and throwing water at them when they caught up to the car. *Id.* at 215. Sister 1 testified that these instances of abuse made her feel very scared and that her father did these things to scare them and make them feel like a piece of shit. *Id.* at 214, 216. Sister 1 testified about their relationship with their brothers as they got older, describing that they started throwing things at their brother, calling them rapists, and telling them to get away. *Id.* at 217. Sister 1 testified that they felt if they were hateful toward their brothers, if he thought that they hated their brothers, he would treat them better. *Id.*

Sister 1 described the sexual assaults continuing as they got older, testifying that her father also used sex toys in their vaginas. RP Vol. 2

Dec. 20, 2017 at 219. Sister 1 testified about moving to the house in Ocean City and described the home similarly to her sister as a beautiful beach house with a wrap-around deck and a hot tub. *Id.* at 220. Sister 1 described the room that they thought they were going to get to use because it was perfect, close to his room with two twin beds and two twin dressers, but that they still slept in their father's room. *Id.* Sister 1 described that the sexual abuse was the same in that house with their father having sex with them every night. *Id.* at 221. Sister 1 testified that their brothers lived there with them and would come to their father's door more often, knocking on the door, which made their father angry. *Id.* Sister 1 testified that at some point their father went to jail while they were living in Ocean City and they stayed with Earl Matthews during that time. *Id.* at 222, 224. Sister 1 testified about the time when she believed her sister had a miscarriage. *Id.* at 224. Sister 1 described her sister waking up and that there was blood everywhere in the bed. Sister 1 described her sister going to the bathroom and something came out into the toilet. *Id.* Sister 1 testified that her sister was scared because it was in the toilet. *Id.* Sister 1 testified that at the time she thought it was blood clot, describing it as red and white, because she didn't know about babies or anything at the time, but now she believes that it was a miscarriage. *Id.* at 224, 225.

Sister 1 testified about the time the family lived in Capitol Forest when they were homeless and were staying in two campers parked way up in the woods. RP Vol. 2 Dec. 20, 2017 at 226. Sister 1 testified that she and her sister stayed in the one of the campers while her brothers stayed in the other. *Id.* at 227. Sister 1 testified about the living conditions being very bad and that they went days without food or water up there, describing that her brothers had to walk out to get water. *Id.* at 226. Sister 1 did not recall any incidents of sexual abuse while they were living in the woods, but did testify about the incident involving her father hitting her in the face with the back end of a sawed-off .22. *Id.* at 227. Sister 1 testified that her father was addicted to meth then and didn't have any drugs and he was angry, having a fit because he didn't have his drugs. *Id.* at 227-228, 230. Sister 1 testified that the Appellant hit her in the face, causing her face to be bloody, then turned to her sister and said, "Look what you made me do." *Id.* Sister 1 testified that she told her sister to run because her father was the angriest she'd ever seen him before and she was scared. *Id.* at 228. Sister 1 testified that her sister ran as fast as she could through the wood and their father shot at her sister with the .22. *Id.* Sister 1 described that she felt really scared and did not know if her sister was alive or not because he was shooting at her sister. *Id.* Sister 1 testified that she didn't

know if her father was going to kill her then, too, and she felt like her sister was gone for a couple of hours before she heard her come up to the end of the trailer. *Id.* and at 229.

Sister 1 testified that her sister tapped on the trailer and she told her to shut up because she knew her father was still up and awake, rolling his cigarettes. RP Vol. 2 Dec. 20, 2017 at 229. Sister 1 testified that she heard her sister climb underneath the trailer and stayed there for what felt like a couple more hours. *Id.* at 231. Sister 1 testified that she heard her father say, “Get in here, you stupid bitch. You’re bleeding,” and she saw that her sister’s shirt was torn and she had blood on her back from a scrap. *Id.* Sister 1 testified about CPS making contact during this time period and her father telling her to tell CPS that bruises that she had on her were caused by her brother. *Id.* at 233. Sister 1 testified about how she lied to CPS because she was scared, specifically she testified that she was scared of going to a foster home because her father would tell them that she would be split up from her sister and would never see her brothers again. *Id.* at 234. Sister 1 testified that she thought she was her father’s favorite because the Appellant would do the sexual abuse to her more. *Id.* at 235.

Sister 1 testified that she was sexually abuse through vaginal penial penetration from the time she was 9 years old until she was 16 years old.

RP Vol. 2 Dec. 20, 2017 at 236-237. Sister 1 testified about when the abuse stopped and how that come about, describing similarly to her sister about CPS and police coming over after her sister had repeatedly called the food bank. *Id.* at 237. Sister 1 described the visit as a surprise visit and that they took them because of the living conditions they were in. *Id.* at 238. Sister 1 testified about going first to her cousins and then to the school librarian, Linda Pavletich, who eventually adopted the sisters. *Id.* Sister 1 testified that it was the best day of their lives when they were taken out of the home because they were finally going. *Id.* at 239. Sister 1 testified that at the time they were taken out of the home, she was 5'6" and about 97 pounds. *Id.* at 248. Sister 1 testified that once she moved into her cousin Michelle's house, she came open with everything, including that their father had sexually abused them. *Id.* at 240. Sister 1 testified about CPS and law enforcement becoming involved and doing a forensic interview. *Id.* Sister 1 testified about going through withdrawals from the drugs they had been on while in her father's home and having issues from that such as anger, sweating, and delusions. *Id.* at 241-242.

Sister 1 also testified about having contact with her father during that time and that she the backed out of reporting the abuse. RP Vol. 2 Dec. 20, 2017 at 242. Sister testified that her father begged her not to tell

and to say that it was all a lie. *Id.* Sister 1 testified that she said it was all a lie, describing that she did it because she was scared and that she didn't know why, didn't know what to think, and that this was the life they lived, all that she knew. *Id.* at 243. Sister 1 testified that the case didn't go forward as a result at that time. *Id.* at 244. Sister 1 testified about contact that she had with her father when she was adult at the age of 23. *Id.* at 249, 256. Sister 1 testified about still being on drugs at that point in life and was at her lowest of lows. *Id.* at 255. Sister 1 testified that she didn't have anybody to turn to except her sister and she was contacted by her brother at first, then her father, to come home and live with them. *Id.* Sister 1 testified that her father told her that he was a good dad, that he knew how to be a good dad, and that nothing would ever happen again. *Id.*

Sister 1 testified that her father also told her that her brother, his girlfriend, their child, and his girlfriend's mom was also living there. RP Vol. 2 Dec. 20, 2017 at 255. Sister 1 testified that she went back and after a while of living there, everyone else moved out, leaving her there alone. *Id.* at 256. Sister 1 described it being a dark time and that her father was begging her, begging her, begging her, "Please, can we just do it one more time," and telling her that he wouldn't hurt her. *Id.* Sister 1 testified that

she kept telling him no, that he was her dad, and that he wasn't supposed to be doing this. *Id.* Sister 1 described that she finally just gave in, taking her pants down when he came toward her. *Id.* Sister 1 described cringing and that her legs wouldn't open. *Id.* at 256-257. Sister 1 testified that he finally got in between her legs and that he had his penis against her vagina. *Id.* at 257. Sister 1 described freezing and that all she could think was how could this be happening again and why was this happening again. *Id.* Sister 1 testified that she left after that without any further sexual contact with her father as an adult that she could remember. *Id.*

Sister 1 then testified about how the case was re-opened. RP Vol. 2 Dec. 20, 2017 at 257. Sister 1 described receiving a call from her brother and she heard her father's voice in the background, which triggered her. *Id.* at 257-258. Sister 1 testified that she had gone into a three-year recovery program after leaving her father's house and that at this time she was clean and sober. *Id.* at 258. Sister 1 testified that she felt it was over at that point and she felt she could re-open the case because she was stronger. *Id.* at 259. Sister 1 testified that she wanted to protect her daughter and didn't want any chance of her father coming into contact with her daughter. *Id.* Sister 1 also testified that she knew her brothers were still living with her father and she wanted to get them help.

Id. Sister 1 testified that she contacted the advocates at the connection center to find out if there was anything they could do to re-open the case. *Id.* at 258, 259. Sister 1 testified that law enforcement become involved then and she went through another forensic interview. *Id.* at 259-260. Sister 1 testified that everything she wrote down in her statements and what she said in her forensic interviews once the case was re-opened was from her memory. *Id.* at 261. Sister 1 further testified that nothing in her life had affect her memory as to what happened to her as a child. *Id.*

Sister 1 testified that once the police investigation was underway, she did a phone confrontation call with her dad. RP Vol. 2 Dec. 20, 2017 at 260. Sister 1 testified about the process of the confrontation call and she identified the recording, marked as State's Exhibit 10, of that call, which she had previously reviewed. *Id.* at 261-262, 263-264. Sister 1 testified that it was important for her to come forward for herself, her daughter, for her brothers, for the community, and for 16 years of going through abuse. *Id.* at 266. On cross-examination, defense asked Sister 1 about being hospitalized after being taken out of her father's home at 16. *Id.* at 287. Sister 1 verified that she was hospitalized for about ten days then, but did not recall what exactly what she was diagnosed with. *Id.* at 288. Sister 1 verified that she thought she was hearing voices and having

auditory hallucinations at that time, but denied that the voices were telling her to do things or not do things or that there was more than one voice. *Id.* at 288, 290. On re-direct, Sister 1 testified that she was in the condition she was at that time due to the abuse she suffered. *Id.* at 308.

Sister 1 also testified that no one had promised her anything to testify as defense had attempted to insinuate on cross. RP Vol. 2 Dec. 20, 2017 at 277-283, 309. Sister 1 testified that her motivation for being in court was because she wanted this over with and that what happened needed to be told. *Id.* at 310. Sister 1 testified that what she was getting out of this was closure and finally being able to come out and say what happened to them. *Id.* The sisters' brother Christopher testified next at the trial. *Id.* at 321. Christopher testified about moving multiple times as a child, starting with Oakville and then all over Grays Harbor County, including Aberdeen, North River (Artic), Pacific Beach, and Ocean City. *Id.* at 323. Christopher testified that he didn't know why they moved so much except they couldn't afford rent and at one point they moved because his grandmother had passed away. *Id.* Christopher testified about his grandmother moving in after his grandfather died and that his grandmother was like the mom figure then because his mother was having a bad time with his father. *Id.* at 323-324. Christopher testified that he

was 13 years old when his grandmother passed away and that after that, things went haywire. *Id.* at 324.

Christopher described what it was like in the family growing up and described that they weren't really allowed to talk to his sisters. RP Vol. 2 Dec. 20, 2017 at 325. Christopher testified that they were split apart by their father and that if they tried to talk to each other, they would get punished, describing that they would be beaten. *Id.* at 325, 326. Christopher testified that he stopped trying after the first few times because there wasn't any sense in it otherwise. *Id.* Christopher testified that he loved his father no matter what, but he wished he could have been different, describing that he treated them inhumane and that even a dog shouldn't be treated the way he treated them. *Id.* at 326. Christopher testified that he felt it wasn't fair that they couldn't have contact with his sisters and that he knew something was going on. *Id.* at 327. Christopher testified that he told them to get ahold of their teachers and get out of there. *Id.* Christopher testified about a time when he had wanted to go into their father's bedroom instead of his sister because he was the oldest and thought he had more privileges than them. *Id.* at 328. Christopher testified that he thought his sister might have been playing on the computer or something, but when he looked through a little square peak

hole above the door, he saw his father on top of his sister. *Id.* Christopher testified that it was not right and that he told their grandmother about it, describing that this had occurred at the house on Pacific Avenue. *Id.* Christopher testified that his grandmother had talked to his father, but he didn't know what was said or anything because he was separated from his sister. *Id.*

Christopher clarified that it was Sister 1 that he had seen with their father through the door and he described her father doing things with his sister that he was supposed to do with their mom. RP Vol. 2 Dec. 20, 2017 at 328-329. Christopher further testified that they were undressed and he told his grandmother who then came and pounded on the door until his father finally opened the door. *Id.* at 329. Christopher testified that he didn't know what happened after that and that he blocked things out of his head so he wouldn't remember it. *Id.* Christopher testified that everything has been coming back to him slowly and that he didn't really like it because it was messing him up in the head. *Id.* Christopher testified about not telling anyone else about what he had seen between his father and his sister and that he thought he just needed to talk to his grandmother because she was like a savior to him. *Id.* at 330. Christopher testified about the aftermath of his grandmother dying and that things got worse

with both him and his father using drugs then. *Id.* Christopher testified that the family moved to the house in Artic, North River after his grandmother died and described that his sisters slept with their father in the back bedroom even though there were plenty of rooms for them to sleep in at that house. *Id.* at 331.

Christopher described interactions that he observed between his father and sister at that house. RP Vol. 2 Dec. 20, 2017 at 332. Christopher testified that his sisters weren't allowed to go outside and he and his brothers were outside playing at the tree swing. *Id.* Christopher testified that he saw his sister standing in front of his father and that he could tell by the movement that something was going on. *Id.* Christopher testified that he didn't know if his father thought he was blind or what, but that he wasn't blind. *Id.* Christopher testified that the movements he saw were like something sexual was going on. *Id.* at 333. Christopher testified that in the bedroom where his father and sisters slept there was just one big bed in there and that when they laid in bed, it was his father, Sister 1, and then Sister 2 as far as what the sleeping arrangements were in that room. *Id.* at 334. Christopher also testified about digging the hole for his mother in the back of the house there that they were going to put her in and that it was his father who directed them to dig the hole. *Id.* at 334-

335. Christopher testified about types of punishment in the house, describing that they would have to run out of the woods when it was dark, that they couldn't go outside, and that they couldn't eat among other things. *Id.* at 335.

Christopher described that there was food in the house from going to the food bank and that no one was working, testifying that they were all on SSI. RP Vol. 2 Dec. 20, 2017 at 336. Christopher testified about his father first introducing him to marijuana and that his father and his father's friends brought drugs into the home to begin with. *Id.* at 337. Christopher testified that he was about 14 or 15 when drugs came into the house and that later he brought drugs into the house himself. *Id.* at 336, 337.

Christopher testified about CPS coming around, describing that Cliff would come out every once in awhile and check on them. *Id.* at 338.

Christopher described that every time Cliff came out, everything would change and everything would be okay like everything was fine and nothing was going on when he'd come around. *Id.* Christopher clarified that they would all just act like everything was fine and they were afraid something bad would happen if they said something wrong. *Id.*

Christopher described that he felt that he was treated better than the rest of the kids because he was the oldest and the first boy, but he didn't think it

was right that he got treated better. *Id.* at 339-340. Christopher testified that it made him feel bad about being who he was. *Id.* at 340.

Christopher described his sisters getting smacked around and name calling, all of the name calling, which he testified hurting worse than getting physically hit. RP Vol. 2 Dec. 20, 2017 at 340. Christopher described that this type of abuse went on throughout their childhood and he also described being dropped off in the woods as a type of punishment. *Id.* at 341. Christopher testified that this would happen to him as well and described that just before it was dark, they would all get in the vehicle except for the person whose turn it was to run in the dark out of the mountains. *Id.* Christopher described that it was scary being out there because you could not even see in front of your face. *Id.* Christopher described that once whoever it was caught up to the vehicle, they would get pushed or spit on, which was directed by their father. *Id.* Christopher also testified about their sisters being locked outside as a form of punishment and that this happened to his sisters at least three times a month. *Id.* at 342. Christopher testified that there were lots of things that he blocked out of his mind and that he didn't want to even be testifying at the trial. *Id.* at 343. Christopher then testified about when the girls were

finally taken out of the home while they were living in Humptulips. *Id.* at 344.

Christopher testified that he was happy when the girls were finally taken out so they didn't have to go through what they were going through. RP Vol. 2 Dec. 20, 2017 at 345. Christopher testified about law enforcement contacting him at that time and that he told them that he didn't know anything because he didn't have time to think about anything and about what was right. *Id.* Christopher testified that he loved his sisters dearly and wished that he was off of the drugs and that things could change, but that he knew things couldn't change when asked what his relationship was with his sisters currently. *Id.* at 346. When asked what his relationship was with his father currently, Christopher testified that he loved him still with all his hard and that he wished he could get the help he needs. *Id.* On cross examination, defense attempted to portray to the jury that Christopher was only testifying to get out of jail where he was being held on an unrelated misdemeanor warrant. *Id.* at 347-348, 350. Christopher testified that he wanted to get out of jail, but that he wouldn't turn on his father or anybody else for wrong being in order to get out of jail. *Id.* at 350.

On re-direct, Christopher testified that before he was in custody, he had been contacted by a detective about his sisters coming forward and he had given a statement to the detective at that time about what he knew of the abuse by his father against his sisters. RP Vol. 2 Dec. 20, 2017 at 355. Christopher clarified that his statement included the information that he testified about before the court in the trial and that no promises were made by the detective to him in order to get that statement. *Id.* Christopher testified that the reason he was there in court was because he just wanted to tell the truth and that it was only fair. *Id.* at 355-356. Christopher testified that he was not lying about it and that there was no reason for him to lie about it. *Id.* at 356. The cousin to the girls and Christopher, Michelle Pierog, testified next. *Id.* at 359. Ms. Pierog testified that the Appellant was her mother's brother and she testified about not having a strong relationship with the girls growing up because her father protected her from that side of the family. *Id.* at 360, 361. Ms. Pierog testified that they did visit the family once a year and she described observing that the family was very dysfunctional. *Id.* at 361.

Specifically, she testified that when they visited, most of the time the children weren't there, but she believed that they were there. RP Vol. 2 Dec. 20, 2017 at 361. Ms. Pierog testified that she would here noises

and would ask the Appellant about what the noises were and he would tell her that it was rats. *Id.* at 362. Ms. Pierog testified that when she did see them, they were always too thin, not always clean, very clingy, and that a lot of times they hung onto each other. *Id.* at 362-363. Ms. Pierog testified that the Appellant would be over the top happy while they were there and would keep them in one area of the house, that they would always stay in the living room, that she never saw a bedroom, and that she did not recall ever using a restroom at any of his houses. *Id.* at 363. Ms. Pierog testified that the area they could see was clean, but that the outside of the houses were usually a mess. *Id.* at 363-364.

Ms. Pierog testified that they saw the family less as the girls got older because it was difficult to find them, describing that they moved all the time, sometimes twice a month. RP Vol. 2 Dec. 20, 2017 at 365. Ms. Pierog testified about when the children were removed from the home and how she and her husband had taken the girls in soon after that for a period of time. *Id.* at 368. Ms. Pierog testified about contacting the police after receiving some information from the girls and that the case was investigated at that point, including the girls being interviewed and checked out at an advocacy clinic in Olympia. *Id.* at 370-371. Ms. Pierog testified that the girls' demeanor was pretty chaotic at that time, explaining

that it was fresh and the first time they had starting talking about what had happened to them. *Id.* at 371. Ms. Pierog testified that CPS had allowed the Appellant to have phone contact with the girls and that she had been present and listening most of the time during those calls. *Id.* at 371-372. Ms. Pierog testified that the Appellant would start out by making statements of conspiracy, telling them that she and her husband were talking the girls away from him and the boys and that they just wanted the girls to hate him, and that he would try to make the girls feel guilty for wanting to be with them. *Id.* at 372. Ms. Pierog further testified that the Appellant had told the girls that Ms. Pierog's husband only wanted them there in order do them. *Id.* at 373.

Ms. Pierog testified that she cut off the calls because they were outside of what CPS had allowed in authorizing the conversations by phone. RP Vol. 2 Dec. 20, 2017 at 373. Ms. Pierog testified that the girls went into a tailspin after that. *Id.* Ms. Pierog testified that after that she would get probably 20 calls a day from the Appellant while the girls were still living with her, but she would just hang up the phone. *Id.* at 374-375. Ms. Pierog testified to having had contact with the Appellant prior to the girls moving in with her and her husband following a CPS meeting regarding placement of the girls and prior to knowing anything that had

happened with the girls. *Id.* at 375, 376. Ms. Pierog testified that she was giving the Appellant a ride after the meeting and described the Appellant as being pretty shook up. *Id.* Ms. Pierog testified that the Appellant put his hands down into his face and said, “I have done some really bad things.” *Id.* Ms. Pierog testified that she was talking to him and told him that the first step would be to get clean. *Id.* Ms. Pierog testified that the Appellant responded by stating, “No. I’ve done some horrible things to my family, to my children, to my girls” and that he was going to burn in hell. Ms. Pierog testified that the Appellant told her to just let him out of the car and that he would walk the rest of the way. *Id.* Ms. Pierog testified that she let him out and she didn’t have any further personal contact with him after that. *Id.* at 375, 376.

Next to testify was Retired Detective Ed McGowan, who was the original investigating officer on the case when the girls were first removed from the Appellant’s home and had disclosed abuse. RP Vol. 2 Dec. 20, 2017 at 381, 385. Mr. McGowan testified that the girls were very shy and reserved, describing them as co-dependent on each other and very guarded as to how they talked about things. *Id.* at 386. Mr. McGowan testified that he also interviewed the Appellant who told him that it was somebody else who abused them and that it was the woman [Ms. Pierog] the girls

were living with putting things in the girls' heads. *Id.* at 388. The Appellant's written statement, which contained this information, was entered into evidence. *Id.* at 390. The State attempted to enter a letter allegedly written by the Appellant to the girls that had been intercepted by DSHS, but defense objected and the Court did not allow the letter to be entered into evidence. *Id.* at 393-395.

Mr. McGowan testified about the girls recanting their statements of abuse during the initial investigation and that the case was forwarded to the prosecutor's office, but was not brought to trial or otherwise pursued at that time. RP Vol. 2 Dec. 20, 2017 at 396-397. On re-direct, Mr. McGowan clarified that the case was not closed because the victims were continuing in counseling and the case still had potential to move forward as the victims were ready to pursue the case and ready to testify. *Id.* at 401. Detective Sergeant Darrin Wallace, who was the investigator on the case when it was re-opened, was next to testify at trial. RP Vol. 3 Dec. 20, 2017 at 408, 411. Detective Sergeant Wallace testified about assisting on the girls' interviews and talking to Sister 1 about doing a confrontation call. *Id.* at 411-412. Detective Sergeant Wallace testified about the confrontation call process generally, how they are authorized, what they are, and how they are set up. *Id.* at 413-415. Detective Sergeant Wallace

also testified about the specific confrontation call in this case, where it was done, how Sister 1 was prepped, and how the call was recorded. *Id.* at 415-416. Detective Sergeant Wallace testified that he had reviewed a copy of the confrontation call and identified the recording he had reviewed. *Id.* at 417. The recording Detective Sergeant Wallace had reviewed was entered into evidence and was played for the jury. *Id.* at 417, 419. In the recording, the first call attempt went to voicemail and Sister 1 was able to speak with the Appellant during both the second and third call attempts.

In the recording of Sister 1's first contact with the Appellant, Sister 1 talked to the Appellant about having some things that she wanted to talk to him about related to family issues that were hard for her to talk about. *See* Exhibit 10, 2nd Confrontation Call Attempt. The Appellant stated, "Yes. I know, honey. I know. I already know." *Id.* The Appellant went on to say that he was sorry and he loved her, specifically stating, "Yeah, I'm sorry for everything I've done wrong and I love you, honey. I love you with all my heart." *Id.* The Appellant stated he didn't know why he treated her so poorly, stating that he thought it was the drinking or something. *Id.* The Appellant stated, "I just wish you could forgive me and we could work things out and live happily ever after." *Id.* When

Sister 1 told the Appellant that she was worried that she might try those things with her own daughter because that was how she was raised, the Appellant stated, “Oh no. You would never do that, honey. You’ll be okay. Everything’s fine. You’re a good mama.” *Id.* When Sister 1 stated that it still messes with her head, that she still had bad dreams, not knowing why a dad would do that, the Appellant responded, “Well, I don’t either, honey. I don’t know either. I don’t either. It was like a bad nightmare.” *Id.*

It should be noted that up to this point, Sister 1 had not used any words to indicate that she was talking about sexual abuse or any other type of abuse specifically and that she merely used terms like “those things” and being treated so poorly. Sister 1 then asked, “Dad, if you could change like what you did to me like sexually touch me and stuff like would you want to take it back?” *See Exhibit 10, 2nd Confrontation Call Attempt.* The Appellant stated, “Yes, man. Yes.” and again stated, “I love you, honey.” *Id.* The Appellant promised that he would not do the things he did to her if she let him back in her life, stating, “I promise I’m a dad now. I’m dad now...that person’s gone.” *Id.* Sister 1 then directly asked, “Why did you have sex with me when I was a child?” *Id.* The Appellant responded, “I don’t know. I don’t know. I don’t know, honey,” then

stated he had company and wanted to call her back later. *Id.* Sister 1 attempted to keep him talking to her, but the Appellant claimed that he had friends over. *Id.* Before ending the call, the Appellant stated, “I love you and I’m a changed person. I’m a good person now. I don’t drink. I haven’t drank in years.” *Id.* Sister 1 asked the Appellant what time she should call back and the Appellant responded, “Oh God. In an hour.” *Id.*

In the recording of Sister 1’s second contact with the Appellant, Sister 1 asked the Appellant if he remembered the first time he had sex with her and the Appellant responded, “I don’t remember. That’s the one thing I can’t remember. I don’t remember. But you say I did, I did, hon. I just don’t remember. It was like a curse. Like I was cursed or something.” *See Exhibit 10, 3rd Confrontation Call Attempt.* Sister 1 stated, “Well, it was at the age of 7. Remember?” and the Appellant responded, “I can’t remember, honey. That’s the one thing I can’t do. I can’t remember. But if you say I did. I did.” *Id.* Sister 1 continued to ask him about specific instances and the Appellant stated he can’t remember, eventually stating, “All I remember is I was bad. ___ that bad. ___ bad person. Like I’ve changed is all. I’m not that person no more. I asked God to forgive me and he forgave me. And I know I needed to ask you guys to forgive me, too, and I did. I tried to ask [Sister 2], but [Sister 2’s] like oh, no. I’ve been

suffering for 10 years. 10 years I've been suffering. You know ___ saying I'm sorry and fighting, paying. Saying it that way and stuff. I asked God to forgive me and he did. I love God. I love Jesus." *Id.*

Sister 1 told the Appellant that she loved Jesus and that he forgives, too, if you ask for forgiveness to which the Appellant stated, "Yes. He did, honey. That's what I asked him for. Is please forgive me for what I did. Please let [Sister 1] and [Sister 2] forgive me I said 'cause it'll never happen again. I'm changed. I'm dad. I'm back to dad." *See Exhibit 10, 3rd Confrontation Call Attempt.* Sister 1 told the Appellant that if he actually admitted to what he did, then she could forgive him and the Appellant responded, "Yes. I admit it. Yes. I admit it, honey." *Id.* The Appellant then continued to claim he didn't remember, but if she said he did, then he did. *Id.* Specifically, the Appellant stated, "I don't know, it's like a trance. It was like I was possessed or something." *Id.* When Sister 1 stated, "Dad, you had sex with me every other day. How could you forget?," the Appellant stated, "Oh my God. I can't remember, honey. That's what I mean. I think I was possessed. It wasn't me. It was someone else." *Id.* The Appellant continued to say that he couldn't remember, but if she said he did, he did and that he was sorry. *Id.* When asked what he did remember, the Appellant stated, "I just want you to

forgive me is all. Forgive me and know that I'd never do nothing like that again. It makes me sick to think it. You know what I mean. It makes me sick to my stomach that I did it. 'Cause I'm not that way. Honey, I'm really not that way. You know I'm gonna be dying. I'm not going to live forever." *Id.*

The Appellant continued to say that he was a real dad now, that he had changed, that he didn't remember, that it was like he was in a trance, and that he thought he was possessed. *See* Exhibit 10, 3rd Confrontation Call Attempt. The Appellant stated that all he remembered was drinking and that he didn't know why when asked by Sister 1 why he tortured her and her sister for 16 years and did things to her. *Id.* The Appellant specifically responded, "I don't know why, honey. I was possessed is why. I was possessed is what I think. I think I was possessed because I don't remember, honey... You say I did, I did. If you say I did, I believe you, honey. There's some reason you don't come around here. I know that. But I'm just sorry. I mean I'm sorry. Please forgive me. Please forgive me. It would never happen again. It's over. It's gone out of me. That demon is gone. In Jesus' name." *Id.* The Appellant claimed that God had forgiven him and healed him, specifically, "That's why I say I'm healed because I don't remember." *Id.* The Appellant then went on to talk about how he

was dying and listing his alleged ailments. *Id.* When Sister 1 talked to the Appellant about when she had come back as an adult and he had wanted to do the same thing to her then, the Appellant stated, “Oh my God. See, I don’t remember. I wasn’t healed then.” *Id.*

The Appellant went on to say, “God’s helping me most of everything, [Sister 1]. As I asked God to forgive me and after I asked him to forgive me, he did forgive me and I woke up a different person. I’m dad. I’m just Jeff. I’m dad now. I’m Jeff. All I can do is just prove it to you. You’d have to give a me a chance is all. But I promise you I’ve changed. I would never be like that. It makes me sick like I could ever think that way. It makes me embarrassed and sick to myself. I meant it makes me event want to kill myself if I think that way.” *See* Exhibit 10, 3rd Confrontation Call Attempt. The Appellant continued to talk about being sorry and it making him feel sick, stating, “I want to forget it. I want to forget about it. ‘Cause it will never happen again. Never in my whole life. It makes me sick like ___ think that way. You’re my baby, honey. You’re my daughter.” *Id.* When Sister 1 asked, “Forget what though?” the Appellant stated, “Forget about things like that. For being that way. ‘Cause I’m not that way. I’m not that way anymore, honey. I’m different. I’m changed. Like I said, God took it from me. Got took it from me,

honey. And I've changed. It makes me sick when I think about that way. Like how could I be that way?" *Id.*

Sister 1 asked, "Are you telling me you prayed to God to forgive you for sleeping with your daughters?," and the Appellant responded, "Yeah. Forgive me, please. Please forgive me. That's what I asked God to forgive me and he did, honey. He forgave me. 'Cause he knows I'm telling thr truth. If he knows you're telling the truth, he will forgive you. And I am telling the truth. It does make me sick when I think about that, man. I just want you to love me as a dad. I want to be a dad again. I was a dad before. I was a dad earlier, wasn't I?" *See* Exhibit 10, 3rd Confrontation Call Attempt. Sister 1 responded by stating, "No. You had sex with me and Amber every day." *Id.* The Appellant then stated, "Oh my God, honey. So Sorry. So sorry. God. Just forgive me, please. Please forgive me. 'Cause God forgave me, honey." *Id.* When Sister 1 began to describe how they had to bolt the door and here sister would have to watch, the Appellant stated, "Oh my God. See, it freaks me out. You're freaking me out, man. It's like scary when you're saying that kind of stuff. Like, what was I? What could I have done? What kind of person was I, man? My God. It's like scary. And it was a different person than me." *Id.* Sister 1 stated that it was evil and demonic to which the Appellant stated, "Yes, it

was. See, that's what I mean. I was possessed. I was possessed, honey. There was a demon in me. It's gone. It left. It left because I asked God to forgive me and then it left me." *Id.*

The Appellant went on in this manner, talking about God forgiving him, changing, feeling sick to think that he was that way, that he had stayed away so that he wouldn't bother them, and that he wouldn't hurt her or touch them again. *See Exhibit 10, 3rd Confrontation Call Attempt.* When Sister 1 again talked about worrying she would turn out like him, the Appellant stated, "You aint gonna turn out like me. You're a good mom." *Id.* When Sister 1 stated that she worried about touching her daughter like he had done to her, the Appellant told her to just pray because that was what he had done. *Id.* The Appellant continued to ask for forgiveness and promised that it would never happen again, stating, "Me being bad, mean to you. Like I said, it's a blackout. I don't remember, honey. I don't remember. It's like I was in a seizure or something. I don't know. It's weird. And I'm starting not to feel good right now again. Starting to get hard to breathe again. I'm gonna have to go, hon. I just don't feel good. I don't know the ___ or something. I don't know. I have to go though. Goodbye. I love you... God be with you,

honey. Bye.” *Id.* The contact then ended and the calls were concluded.

Id.

After some brief testimony from Detective Sergeant Wallace on cross and re-direct regarding the interview process with the girls, the State rested. RP Vol. 3 Dec. 20, 2017 at 422. The Appellant testified at the trial, identifying his five children as Chris, David, Jeffrey, and the two girls. RP Vol. 3 Dec. 21, 2017 at 438, 439. The Appellant testified that when the girls were little, around two, three, four years old, his wife was pulling their hair out and hitting them. *Id.* at 440. The Appellant claimed that he reported her and she went into a motherhood thing and passed it, but she started doing it again when she returned home so he told her leave because she couldn’t do that to their kids. *Id.* The Appellant claimed that their mother had mental health issues, stating that it had something to do with her period, postpartum or something, “where they go crazy when they bleed a lot or something.” *Id.* at 442. The Appellant claimed that CPS gave him custody of the all the kids and that he moved to protect the kids from their mother. *Id.* at 441, 442. The Appellant claimed that he put the children into school when they were two and that he made sure they went to school every day. *Id.* at 443. The Appellant stated that he feed his kids at all times and denied that he was physically abusive. *Id.* at 444.

The Appellant testified that he took the children to the doctor three times a month or every third month because CPS required that, that he took them to counseling to see a psychiatrist, and that he had to take them to IOP meetings or else they would take them away from him. RP Vol. 3 Dec. 21, 2017 at 445. When asked if inappropriately sexually touched either of his daughters, the Appellant testified that he had not. *Id.* at 446. With regard to the confrontation call, the Appellant claimed that he was concerned because Sister 1 had told him that she was going to hurt her kid because of the lifestyle she had with him, that she might molest her kid. *Id.* at 448. The Appellant claimed that he was concerned because of her personality, specifically stating that if you didn't say the right things to her, she could hurt someone or herself. *Id.* at 450. The Appellant claimed that he thought she had the baby in her hand and that she was going to hurt the baby so all he could think of was agreeing with her because if he didn't agree with her, she would hurt the baby. *Id.*

The Appellant testified about prior incidents of Sister 1 allegedly cutting herself and having to take her to the hospital too many times. RP Vol. 3 Dec. 21, 2017 at 451. The Appellant testified about the last time Sister 1 allegedly cut herself, claiming that she had written "I'm sorry, daddy. I love you." in her own blood on the wall in Ocean Shores and that

he had put butterfly stitches on the cut himself and had wrapped it with a rag and it healed. *Id.* The Appellant indicated three times that he was simply “humoring” her in the confrontation call, lastly stating that he did so because he thought she had the baby in her arms. *Id.* at 451, 452, 453. On cross, the Appellant admitted to trying to tell the girls how much he cared for them and loved them, tried to come see them, and would wave at them when he saw them after that had been taken away. *Id.* at 455. The Appellant testified that the girls would find a phone while staying with their cousin and would call him even though they knew they weren’t supposed to. *Id.* at 456. When asked if he also wrote to them, the Appellant stated that the girls would write him letters and would throw them out the car window. *Id.* When handed a letter that the State alleged the Appellant had written, he stated that he did not remember writing the letter and stating that the handwriting didn’t look like his despite the letter identifying the writer as “dad” and telling the girls how much he missed them and wanted to say good-bye to them. *Id.* at 457.

The Appellant testified that the girls would call him to tell him that their cousin and her husband treated their daughter better, that they had to live in the basement, and that they didn’t want to stay there. RP Vol. 3 Dec. 21, 2017 at 458. The Appellant claimed that he didn’t want them to

come home and that he had told them that it's best to be on their own, just to take care of themselves, that he loved them, and that when they were old enough, they could come and see him. *Id.* The State pointed out that the Appellant had testified that his boys had been living with him at that point, but that what he said wasn't true because Jeffrey was in prison and David was in a mental facility. *Id.* at 459. When asked how many children the Appellant had said he had since he had only named five on direct, the Appellant stated, "I have five, six, seven, eight." *Id.* The Appellant acknowledge that he did not know the age of other twins he had, Jeffrey, Jr. and Lucy, because he hadn't seen them since he gave them up. *Id.* at 460. The Appellant further acknowledge that, although in the confrontation call he had stated he was saying what he said because he was concerned for Sister 1's mental health, he never asked her about her mental health in the calls, never asked how she was doing, including in the beginning of the call. *Id.* The Appellant claimed he didn't do that because if he had, she would have got mad and did something wrong. *Id.*

When asked that about saying that he already knew what Sister 1 wanted to talk about right in the beginning of the call, the Appellant stated that he already knew, but claimed it was some of the things, indicating physical abuse, but not sexual abuse. RP Vol. 3 Dec. 21, 2017 at 461.

The State then pointed out that he had just testified that he had never beat them, never touched them. *Id.* The Appellant then talked about the girls coming out with clothes on that were skin tight and that he would tell them to get back in the bedroom and put on appropriate clothes. *Id.* at 462.

When the State pointed out that was because he didn't want anyone else to be attracted to them, the Appellant stated, no and that it was because he wanted them to save themselves for their husbands, for their favorite, their husbands. *Id.* When the State pointed out that Sister 1 doesn't sound mentally ill, but rather she sounds determined, strong in the confrontation calls, the Appellant did not agree, stating, no, not really. *Id.* at 463. When confronted about specific statement he made to her during the call, the Appellant stated that he agreed with her because that was what she said. *Id.* The Appellant stated he was just humoring his daughter when he had told her that it was someone else doing those things, a demon inside of him. *Id.* at 464. The Appellant continued to testify in the same manner, simply stating that he had just told her these things because he was thought she was going to hurt his grandchild. *Id.* at 464-467. In the end, the Appellant agreed that the reason he was concerned was because of the lifestyle Sister 1 had had with him. *Id.* at 467. Defense had no further

questions or witnesses and rested. *Id.* at 468. There was no rebuttal presented. *Id.*

The court went through jury instructions with the jury. RP Vol. 3 Dec. 21, 2017 at 474-496. There were a total of 8 counts presented to the jury – Count 1 – Rape of a Child in the First Degree for Sister 1, Count 2 – Rape of a Child in the First Degree for Sister 2, Count 3 – Rape of a Child in the Second Degree for Sister 1, Count 4 – Rape of a Child in the Second Degree for Sister 2, Count 5 – Rape of a Child in the Third Degree for Sister 1, Count 6 – Rape of a Child in the Third Degree for Sister 2, Count 7 – Incest in the First Degree for Sister 1, and Count 8 – Incest in the First Degree for Sister 2. *Id.* at 482, 483, 484, 485-486, 487, 488, 490, 491. Each of the counts also included an instruction that if the Appellant was found guilty, then the jury was to determine whether or not the following aggravating circumstance existed for each count: “Whether the crime was part of an ongoing pattern of psychological, physical, or sexual abuse of the same victim manifested by multiple incidents over a prolonged period of time.” *Id.* at 483, 484, 485, 486, 487-488, 488-498, 491, 492. The State presented its initial closing arguments, discussing the evidence presented, namely the testimony from the two victims, their brother, and the Appellant’s own statements. *Id.* at 496-506.

Defense made his closing arguments, namely discussing that regardless of how heinous the allegations are or how many times they are repeated, that doesn't make them more true. RP Vol. 3 Dec. 21, 2017 at 507-523. Defense cited to the lack of corroboration with any physical evidence, that the State had not charged any counts of physical abuse despite all the allegations of physical abuse presented at trial, and that none of the doctors, counselors, teachers, or CPS workers, who are all mandated reporters, had able to substantiate or corroborate any of the allegations of physical abuse. *Id.* at 508-511. Defense further cited to the lack of medical evidence of sexual abuse and that all the jury had to consider was the testimony of Sister 1 and 2. *Id.* at 514. Defense attacked their credibility based on the fact that they had recanted, claiming that they were not scared since they were then living in a safe environment and they had recanted because they felt guilty for fabricating the allegations. *Id.* at 516. Defense further argued that they had heard the Appellant's testimony where he had denied the allegations, that he had not done it, and that the abuse did not occur, claiming he did so convincingly. *Id.* at 517.

Defense argued that the State had spun the confrontation call into proof that something at happened. RP Vol. 3 Dec. 21, 2017 at 518.

Defense argued that the Appellant had only said what he said in the calls

because of Sister 1's major mental health issues, then went on to speculate about various motives the girls would have had to fabricate the abuse, including the possible impact their mental illnesses, drug use, and hospitalizations may have had on their beliefs about what had happened. *Id.* at 518, 518-522. In the end, defense essentially argued that despite the heinous nature of the allegations, that there was not sufficient proof to convict the Appellant beyond a reasonable doubt. *Id.* at 523. On rebuttal, the State addressed defense's theory of no matter how heinous the allegations were and how often they heard them, didn't make it true and pointed out that it was the totality of what the jury had heard that they would be considering, not pieces in isolation as defense had just argued. *Id.* at 524. The State pointed out that the jury was not being asked to convict the Appellant on the testimony of Sister 1 and 2 alone, but also on other testimony and evidence, including the Appellant's own statements. *Id.* The State addressed defense's arguments that no one noticed or reported the abuse, reminding the jury that the family moved constantly and about the neighbor having seen the abuse, but she turned and never came back. *Id.* at 525. The State pointed out that it is unfortunately human nature that people may know or suspect something is wrong, but

don't want to get involved, don't want to be wrong and accuse someone.

Id.

The State pointed out that the Appellant hide what was happening from the rest of the world because that is how these types of crimes happen. RP Vol. 3 Dec. 21, 2017 at 525. The State addressed the defense arguments about the lack of charges for physical abuse, explaining that the time for filing those charges had past and that the information was included because the physical abuse was part of the conditioning. *Id.* at 526. The State pointed out that the conditioning was why the girls complied, why the brothers didn't step in, why the family didn't get involved because they were afraid of him. *Id.* The State pointed out his testimony about the contact he had with them without anyone knowing and how he got to the girls because he knew he could given that they had spent their whole lives under his control. *Id.* at 528. The State argued that now that they had some distance, some help, they were a little stronger so could stand up and tell the jury what happened. *Id.* at 526. The State argued that it took 10 years and that their motivation for coming forward was simply because it was time, time for the Appellant to be held accountable, for the world to know what he did to them. *Id.* at 528-529. The State argued that the girls and their brother had nothing to gain in

testifying and that the only one who had something to gain was the Appellant. *Id.* at 529. The State ended with pointing out the Appellant's statements, both in testimony and in the confrontation call, which showed the Appellant's sole desire to not be held accountable for the sexual abuse against his daughters. *Id.* 529-531.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. Ineffective Assistance of Counsel for Failure to Employ a Medical Expert Argument

Ineffective assistance of counsel is a mixed question of law and fact that we review de novo. *Strickland v. Washington*, 466 U.S. 668, 698, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the performance prejudiced the defendant's case. *Strickland*, 466 U.S. at 687. Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 700. An attorney's performance is deficient if it falls "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If prejudice is not shown, evaluation of the counsel's performance is unnecessary. *State v. Lord*, 117 Wash.2d 829, 884, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).

Deficient performance prejudices a defendant if there is a “reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this presumption, a defendant bears the burden of establishing the absence of any legitimate trial tactic explaining counsel's performance. *Grier*, 171 Wn.2d at 33. If defense counsel's trial conduct is a legitimate trial strategy or tactic, it cannot serve as a basis for an ineffective assistance of counsel claim. *Lord*, 117 Wash.2d at 883. Reasonable tactical choices do not constitute deficient performance and reviewing courts make “every effort to eliminate the distorting effects of hindsight. *Strickland*, 466 U.S. at 689; *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992).

Generally, “the decision whether to call a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel. *State v. Maurice*, 79 Wn.App. 544, 552, 903 P.2d 514 (1995). But, “depending on the nature of the charge and the issues presented, effective assistance of counsel may require the assistance of expert witnesses to test and evaluate the evidence against a defendant.” *State v. A.N.J.*, 168 Wn.2d 91, 112, 225 P.3d 956 (2010). Medical evidence is considered one of the strongest types of corroborating evidence, especially in cases involving child rape as articulated in *State v. Swan*, where the Supreme Court considered whether there was sufficient corroborating evidence to

justify the trial court allowing into evidence hearsay statements of a child victim in a rape case. *State v. Swan*, 114 Wn.2d 613, 618, 790 P.2d 610 (1990). It stated, “The most effective types of corroboration in such cases, of course, are eyewitness testimony, ***a confession or admissions by the accused***, and medical or scientific testimony documenting abuse.” *Id.* at 622-623 (emphasis added).

The Appellant argues that defense was ineffective for failing to retain a consulting or testifying medical expert, citing *Pavel v. Hollins* and *Gersten v. Senkowski*, both which had medical evaluations/examination as part of the State’s case with expert testimony from a medical expert on behalf of the State regarding the results of the physical examination of the alleged victims. *Pavel v. Hollins*, 261 F.3d 210 (2d Cir. 2001); *Gersten v. Senkowski*, 426 F.3d 588, 607 (2d Cir.2005). The courts in those cases found deficiencies in a multitude of failures, including not interviewing the State’s medical experts, making no challenges to the physical evidence the prosecution introduced, and not calling experts of their own to rebut the prosecution’s experts. *Id.* The State’s case here did not have medical evaluations/examinations nor did a medical expert testify for the State. The State was seeking testimony from a SANE as an expert in sex offense victim behavior, not any medical testimony related to the victims in this case, which the trial court denied. The cases cited by the Appellant are distinguishable and not applicable to the circumstances of this case.

The State was unable to locate any reported cases that specifically addressed the issue of expert testimony for prior mental health diagnosis as it

relates to the victim's credibility as more specially argued by the Appellant in this case. The issue of failure to seek an expert to assess a victim's credibility related to the victim's prior psychological issues was, however, addressed in an unreported case out of this court in 1999. See *State v. Wilson*, 97 Wash.App. 1094, 1999 WL 1048646 (Court of Appeals, Div. 2, 1999). In that case, the Appellant argued that his trial counsel was deficient in not hiring and presenting an expert to assess the alleged victim's credibility in light of her prior psychological difficulties. *Id.* at 6. This court found because the Appellant had not shown that suicidal thoughts or attention deficit disorder impair credibility, he could not show prejudice. *Id.* Therefore, his ineffective assistance of counsel claim failed and his conviction was affirmed. *Id.* This was essentially what was argued prior to trial by the State in its motions in limine related to no reference or description of the victim's past or present mental health diagnosis and/or medications. See Supplemental CP 167.

The trial court allowed defense to question and explore the victim's mental health issues during the trial, despite the State's motion in limine and objection to such questioning. The victims both testified that their mental health issues had no effect on their memory or their perception of the abuses they suffered at the hands of the Appellant. The use on an expert under the circumstances of this case would have changed nothing in the outcome so the Appellant cannot show prejudice, which ends the analysis. Even if this wasn't the case, had defense used an expert to explore the issue of the victims' mental health

issues, the State would have certainly questioned that expert and/or hired its own expert to present evidence that the victims' mental health issues were the direct result of the torture and abuse they suffered throughout their childhood, which defense even conceded during his closing arguments. See RP Vol. 3 Dec. 21, 2017 at 519. Based on those facts, it is clear that defense's decision not to call an expert was a strategic one.

As addressed in *State v. Swan*, the case presented was not one just based on the testimony of the victims, but also had corroborating evidence through testimony of other witnesses and the Appellant's own, very damning statements. There was no need for medical testimony by a defense expert because there was no medical evidence to rebut and there has been no finding that the victims' mental health issues affected their credibility to warrant calling a defense expert for that purpose. Furthermore, if a defense expert had been called, the testimony could have resulted in additional evidence against the Appellant so it was a legitimate and reasonable tactical decision/trial strategy not to call an expert in this case. As such, the Appellant's claim of ineffective assistance of counsel fails.

2. Ineffective Assistance of Counsel for Failure to Object to ER 404(b) Testimony Argument

Evidence of other crimes, wrongs, or acts may be admissible if offered for a purpose other than to prove "the character of a person in order to show action in conformity therewith." ER 404(b). Prior misconduct may be admissible to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." ER 404(b). "Rule 404(b) itself lists some of the purposes

for which for which evidence of misconduct is admissible, but the list is not exhaustive.” See *Tegland’s Courtroom Handbook on Washington Evidence*, Washington Practice 2003; ER404(b); *State v. Tharp*, 96 Wn.2d 591, 637 P.2d 961 (1981).

A. Prior acts admissible to show defendant’s lustful disposition towards the victims

Rule of Evidence 404(b) provides in part that:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes.

The Washington Supreme Court “has consistently recognized that evidence of collateral sexual misconduct may be admitted under ER 404(b) when it shows the defendant’s lustful disposition directed toward the offended female.” *State v. Ray*, 116 Wash.2d 531, 547, 806 P.2d 1220 (1991); *State v. Camarillo*, 115 Wash.2d 60, 70, 794 P.2d 850 (1990); *State v. Ferguson*, 100 Wash.2d 131, 133-134, 667 P.2d 68 (1983); *see also State v. Medcalf*, 58 Wash.App. 817, 822-23, 795 P.2d 158 (1990) (misconduct directly connected to the offended female, which does not just reveal the defendant’s general sexual proclivities is admissible).

“In *Ferguson*, 100 Wash.2d at 134, 667 P.2d 68 (quoting *State v. Thorne*, 43 Wash.2d 47, 60-61, 260 P.2d 331 (1953)), the court emphasized that: Such evidence is admitted for the purpose of showing the lustful inclination of the defendant toward the offended female, which in turn makes it more probable that the defendant committed the offense charged.” *State v. Ray*, 116, Wash.2d at 547.

In *Ray*, the defendant was charged with incest in connection with a March 1987 incident. *Ray* at 546. The defendant objected when the court allowed in the victim's testimony that the defendant had initiated sexual contact with the victim, "D.", three times prior to the charged conduct. *Ray* at 546-47. The court, however, found that "[t]he evidence of prior sexual contact here is directly connected to the 'offended person,' D., and reveals Ray's lustful inclination toward D." *Ray* at 547. Further, the court did not find that the trial court abused its discretion by allowing D's testimony, even though the prior incidents happened approximately 10 years prior to the conduct charged and were not corroborated. *Ray* at 547.

B. Prior Acts admissible as part of crime charged- res gestae

Misconduct that is connected in time, place, circumstances, or means employed is admissible to provide a complete picture of the crime charged. *State v. Tharp*, 96 Wn.2d 591, 596; *State v. Brown*, 132 Wn.2d 529, 570, 940 P.2d 546 (1997); *State v. Lane*, 125 Wn.2d 825, 889 P.2d 929 (1995); *State v. McBride*, 74 Wn.App. 460, 873 P.2d 589 (1994).

In *Brown*, the defendant raped and killed Holly C. Washa, placing her body in the trunk of her car. The defendant used money he had stolen from Ms. Washa to finance a trip to see Susan Schnell in Palm Springs. Ms. Schnell was tied up, raped and gagged by the defendant but she later escaped. Ms. Schnell testified as to the series of events at the defendant's trial for the murder of Ms. Washa. Prior to trial, the defendant sought to exclude Ms. Schnell's testimony.

The court ruled the testimony was admissible because it placed in context the crime for which the defendant was charged by describing the "fabric of events" or "res gestae" surrounding Ms. Washa's murder. The Supreme Court agreed, finding as follows:

In addition to the non-exhaustive list of exceptions identified in Rule 404(b) itself, this court has recognized a res gestae or "same transaction" exception to the rule. Under this exception, evidence of other crimes or misconduct is admissible to complete the story of the crime by establishing the immediate time and place of its occurrence. Where another offense constitutes a "link in the chain" of an unbroken sequence of events surrounding the charged offense, evidence of that offense is admissible "in order that a complete picture be depicted for the jury." *Brown*, at 571.

In *Lane*, the defendant, while trying to evade police, broke into Eva Wolfe's home and held her against her will for 2 hours. Ms. Wolfe was the primary witness in the State's case. The defendant later pleads guilty to criminal trespass in the first degree. Upon release from jail, the defendant and two other accomplices abducted Ms. Wolfe for 2-3 days. During this period, the defendant robbed a man at gunpoint, displayed a weapon to a grocery store employee, and set off a smoke bomb at a bowling alley. During trial, evidence of these unrelated and uncharged events were admitted into evidence under a res gestae theory.

The Supreme Court found that "once the trial court has found res gestae evidence relevant for a purpose other than showing propensity and not unduly

prejudicial, that evidence is admissible under the res gestae exception to ER 404(b), so long as the State has shown by a preponderance of the evidence that the uncharged crimes occurred and were committed by the accused. There is no additional requirement, as imposed by the Court of Appeals here, that res gestae evidence be relevant for *an additional purpose*, such as plan, motive, or identity.” The Supreme Court specifically rejected the Court of Appeal’s ruling that res gestae alone was not a valid basis for admitting evidence under ER 404(b). *State v. Lane*, Cause 13439-0-II, slip op. at 16 (1993).

In *Tharp*, the defendant was charged with second-degree murder. Over the defendant's objection, the trial court admitted evidence of a series of uncharged crimes committed prior to and after the alleged murder. The Court of Appeals held the admission of the other crimes was proper under a "res gestae" or "same transaction" exception. The court explained:

The jury was entitled to know the whole story. The defendant may not insulate himself by committing a string of connected offenses and thereafter force the prosecution to present a truncated or fragmentary version of the transaction by arguing that evidence of other crimes is inadmissible because it only tends to show the defendant's bad character. "[A] party cannot, by multiplying his crimes, diminish the volume of competent testimony against him."

On appeal, the court affirmed, similarly finding, the uncharged crimes were an unbroken sequence of incidents tied to *Tharp*, all of which were necessary to be placed before the jury in order that it have the entire story of what transpired on that particular evening. Each crime was a link in the chain leading up to the murder and the flight therefrom. Each offense was a piece in the mosaic

necessarily admitted in order that a complete picture be depicted for the jury.

Tharp, at 594.

C. Prior Acts admissible to help jury understand victim behavior

Prior misconduct is admissible under ER 404(b) to explain seemingly inconsistent behavior by the victim of domestic violence. *State v. Cook*, 131 Wn. App.845, 129 P.3d 834 (Div II, March 7, 2006); *State v. Grant*, 83 Wn. App. 98, 920 P.2d 609 (1996).

In *Cook*, the defendant was charged and convicted of Assault in the third degree against his girlfriend. The victim initially informed the police and firefighters that the defendant had kicked her and broken her finger but at trial she testified that her finger was broken in an accident. Following the victim's recantation, the State questioned the victim about six prior incidents of domestic violence. Over defense objection, the trial court admitted evidence of the prior incidents. The Court of Appeals upheld the trial court's admission of evidence, finding that, "evidence of prior abuse is relevant and potentially admissible under ER 404(b) to illuminate the victim's state of mind at the time of the inconsistent act." The Court further held that expert testimony regarding battered partner syndrome is not a foundational requirement for admission of the 404(b) evidence. "The jury may draw from its own common knowledge and the evidence submitted at trial to determine if the victim's inconsistent behavior is a result of a fear of

retaliation, internalized shame or blame, or a continuing dependence on the defendant.”¹

In *Grant*, the defendant was charged and convicted of Assault in Violation of a Protective Order. At trial, the victim testified that she permitted the contact with the defendant. The victim also minimized the assault with the defendant. Over defense objection, the trial court admitted evidence of the defendant’s history of assault against the victim. On appeal, the court held that the prior assaults were relevant “to explain her statements and conduct which might otherwise appear inconsistent with her testimony of the assault at issue in the present charge.” *State v. Grant*, 83 Wn. App. at 107. The Court of Appeals noted that, “victims of domestic violence often attempt to placate their abusers in an effort to avoid repeated violence, and often minimize the degree of violence when discussing it with others. The Grants' history of domestic violence thus explained why Ms. Grant permitted Grant to see her despite the no contact order, and why she minimized the degree of violence when she contacted Grant's defense counsel after receiving a letter from Grant, sent from jail. Ms. Grant's credibility was a central issue at trial. The jury was entitled to evaluate her credibility with full knowledge of the dynamics of a relationship marked by domestic violence and the effect such a relationship has on the victim.” *State v. Grant*, 83 Wn. App. at 108.

¹ Although the Court of Appeals upheld the admission of the 404(b) evidence, the conviction was reversed due to the insufficiency of the jury instruction regarding prior bad acts. The Court held that the limiting instruction should have specifically advised the jury that the prior abuse may be considered to assess the victim’s state of mind at the time of the inconsistent act.

The Court of Appeals cited a variety of other jurisdictions which have upheld admission of prior acts of domestic violence for even broader purposes. *State v. Grant*, 83 Wn. App. 109, n7. *See State v. Gibbons*, 256 Kan. 951, 889 P.2d 772, 780 (1995) (holding that, notwithstanding the rule prohibiting admission of other crimes evidence, evidence of prior physical abuse of spouse may ordinarily be admitted to establish the relationship of the parties, to show the existence of a continuing course of conduct between the parties, to corroborate the testimony of witnesses, or to show motive or intent); *State v. Elvin*, 481 N.W.2d 571, 575 (Minn. App. 1992), (holding that evidence of prior domestic violence is admissible to illuminate the relationship between the defendant and the victim), *review denied* (1992). *See also State v. Johnson*, 73 Ohio Misc. 1, 657 N.E.2d 383, 384 (1994) (holding that defendant's prior convictions for crimes of violence against same victim are admissible in domestic violence threat cases as proof of element of crime charged, and as proof of defendant's intent, motive, or absence of mistake or accident); *State v. Kelly*, 89 Ohio App. 3d 320, 624 N.E.2d 733, 734-35 (1993) (holding that although history of domestic violence was not inextricably related to crimes charged and accordingly not admissible as "other acts" evidence under ER 404(b), history of domestic violence was admissible to show victim's state of mind and to explain why she did not try to escape from defendant or summon police); *People v. Zack*, 184 Cal. App. 3d 409, 229 Cal. Rptr. 317, 320 (1986) (holding that evidence of defendant's prior assaults on victim he was alleged to have murdered was admissible based solely on

consideration of identical perpetrator and victim), *review denied* (1986); *Lindsey v. State*, 135 Ga. App. 122, 218 S.E.2d 30, 31 (1975) (holding that prior attempts to commit same crime against same victim are generally admissible). The Court of Appeals affirmed the defendant's conviction, finding that the prior assaults were properly admitted into evidence.

Prior misconduct is admissible under ER 404(b) to demonstrate the victim's fear of the defendant even where the prior conduct was not against the victim. *State v. Barragan*, 102 Wn. App. 754, 9 P.3d 942 (2000). In *Barragan*, the trial court, in a harassment prosecution, admitted evidence of the defendant's prior uncharged assaults to show that the victim was placed in reasonable fear by the defendant's threats. Although the prior uncharged assaults did not involve the same victim, the evidence was relevant to show the basis for the victim's fear.

Prior misconduct is admissible under ER 404(b) to explain a victim's delay in reporting abuse. *State v. Wilson*, 60 Wn. App. 887, 808 P.2d 754 (1991). In *Wilson*, the defendant was charged and convicted of statutory rape and indecent liberties. The victim testified that the defendant began molesting her when she was 13 years old. As the sexual abuse continued, the defendant began hitting and kicking the victim. The physical abuse never occurred at the same time as the sexual abuse. The abuse continued until the victim turned 15 years old. The Court of Appeals upheld the admission of the physical assaults finding that "evidence of the assaults was offered to show something other than that [the defendant] had a violent character or to show that he acted in

conformity with that character.” *State v. Wilson*, 60 Wn. App. at 891. The evidence “was admissible to explain the delay in reporting the sexual abuse and to rebut the implication that the molestation did not occur.” *State v. Wilson*, 60 Wn. App. at 891.

In the case at hand, the State argued in its motions in limine to introduce 404(b) evidence, utilizing the same case law as presented above. See Supplemental CP 168-177. The State believes that the Appellant is arguing that defense was ineffective for not objecting to the evidence presented regarding his physical abuse of the victims because the State’s Trial Memorandum, which contained this motion in limine, because this information was not part of the original record. This issue was, however, addressed at length by the trial court, which found that the 404(b) evidence related to the physical abuse was admissible. There were no objections by defense counsel during the trial because the issue had already been addressed by the court prior to the commencement of the trial. Nonetheless, the State will again argue that the trial court’s decision was appropriate under the facts and circumstances presented in this case, including that the Appellant had numerous sexual contacts with both victims over the time period charged in the Information, which were detailed in discovery and the State’s trial memorandum.

These prior incidents proved the Appellant's lustful disposition towards the victims in this case, and under Washington case law, they should have been ruled admissible. Furthermore, the State sought to admit evidence of the Appellant's history of violence against the victims and his family in order to explain inconsistencies, demeanor, delay in reporting, and the victim's recantation. The State further sought to admit this evidence to allow the jury to evaluate credibility with full knowledge of a relationship marked by domestic violence and sexual abuse, and to provide a complete picture of the crime charged. Additionally, the Appellant's alleged crimes against his daughters spanned more than a decade and the sexual abuse was intertwined with acts of violence, which could not be parsed out. The physical, mental, emotional, and verbal abuse was part and parcel of the sex crimes charged against the Appellant and it was imperative that the jury hear the entirety of the events. As such, the trial court's ruling to allow such testimony was warranted and the absence of objections by defense to this evidence was not ineffective assistance given the trial court's ruling.

3. Aggravating Circumstance Error in Jury Instruction Argument

An omission or misstatement of the law in a jury instruction that relieves the State of its burden to prove every element of the crime

charged is erroneous. *State v. Brown*, 147 Wash.2d 330, 339, 58 P.3d 889 (2002). However, not every omission or misstatement relieves the State of its burden. *Id.* The Supreme Court adopted the rule that an erroneous jury instruction that omits an element of the charged offense or misstates the law is subject to harmless error analysis. *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999); *Brown*, 147 Wash.2d at 339, 58 P.3d 889. “[A]n instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.” *Neder*, 527 U.S. at 9, 119 S.Ct. 1827. The *Neder* test for determining the harmlessness of a constitutional error is: “whether it appears ‘beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’ ” *Id.* at 15, 119 S.Ct. 1827 (quoting *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967)). As applied to omissions or misstatements of elements in jury instructions, “the error is harmless if that element is supported by uncontroverted evidence.” *Brown*, 147 Wash.2d at 341, 58 P.3d 889 (citing *Neder*, 527 U.S. at 18, 119 S.Ct. 1827).

Here, the Appellant argues that the State’s citation in the charging document for the aggravating circumstance to be considered by a jury was

incorrectly cited, namely that the State's notice citation refers to RCW

9.94A.535(3)(h)(i), which states in relative part:

(3) Aggravating Circumstances – Considered by a Jury – Imposed by the Court... (h) The current offense involved domestic violence, as defined in RCW 10.99.020, or stalking, as defined in RCW 9A.46.110, and one or more of the following was present: (i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of a victim... manifested by multiple incidents over a prolonged period of time.

The State concedes that the Appellant is correct that the wrong citation was made, but argues that the error is harmless. It is clear that the State's intention was to use the aggravating circumstance under this same section 3 of RCW 9.94A.535, but under subsection (g), which states in relative part:

(3) Aggravating Circumstances – Considered by a Jury – Imposed by the Court... (g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

The language in both aggravating circumstances are substantially the same and do not relieve the State from proving the aggravating circumstance alleged, namely that the offenses were 1) part of an ongoing pattern of sexual abuse and 2) manifested by multiple incidents over a prolonged period of time. The only difference in using (h)(i) versus (g) was the alternative options of psychological or physical abuse to the sexual abuse

in (h)(i) and the criteria of the victim being under the age of eighteen in (g). Given that the evidence presented at trial and based on the charges associated with the aggravating circumstances, which all related to sex offenses that occurred while the victims were under the age of 16, the differences between (h)(i) and (g) would have had no effect on the jury's decision.

The error complained of did not contribute at all, let alone beyond a reasonable doubt, to the jury's finding of the aggravating circumstance and the aggravating circumstances were supported by uncontroverted evidence. Even if the Court were to find that the State was bound to the mis-cited subsection identified in the Information, there was uncontroverted evidence presented at trial that the victim's and the Appellant were, in fact, family or household members and that the offenses were part of an ongoing pattern of psychological, physical, or sexual abuse manifested by multiple incidents over a prolonged period of time. Either way, the error was harmless and did not contribute to the verdicts of guilty or findings by the jury of the aggravating circumstances, which supported the exceptional sentence in this case.

4. Exceptional Sentence Error Argument

A judge may impose a sentence above the standard range if he finds “substantial and compelling reasons justifying an exceptional sentence.” *Blakely v. Washington*, 542 U.S. 296, 299, 124 S.Ct. 2531, 159 L.Ed.2d.403 (2004); RCW 9.94A.120(2); RCW 9.94A.535. Washington’s Sentencing Reform Act lists aggravating factors that justify such a departure, which it recites to be illustrative rather than exhaustive. *Id.*; RCW 9.94A.390; RCW 9.94A.533. Nevertheless, “[a] reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense.” *Id.* (quoting *State v. Gore*, 143 Wash.2d 288, 315-316, 21 P.3d 262, 277 (2001)).

When a judge imposes an exceptional sentence, he must set forth findings of fact and conclusions of law supporting it. *Blakely v. Washington*, 542 U.S. at 299; RCW 9.94A.120(3); RCW 9.94A.533. A reviewing court will reverse the sentence if it finds that “under a clearly erroneous standard there is insufficient evidence in the record to support the reasons for imposing an exceptional sentence.” *Id.* at 299-300 (quoting *Gore*, 143 Wash.2d at 315; RCW 9.94A.210(4)). Under RCW 9.94A.585, a sentence outside the standard sentencing range for the

offense is subject to appeal by the defendant or the state. RCW 9.94A.585(3). To reverse a sentence which is outside the standard range, the reviewing court must find: (a) either that the reasons supplied by the sentencing court are not supported by the record which was before the judge or that those reasons do not justify a sentence outside the standard sentence range for that offense or (b) that the sentence imposed was clearly excessive or clearly too lenient. RCW 9.94A.585(4).

“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond a prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. *Id.* at 300 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). RCW 9.94A.533 contains a number of aggravating circumstances to be considered by the jury and imposed by the court, including that the defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense. RCW 9.94A.533(3)(n). Appellate courts “review a jury's special verdict finding the existence of an aggravating circumstance under the sufficiency of the evidence standard.” *State v. Chanthabouly*, 164 Wn. App. 104, 142-43, 262 P.3d 144, 163 (2011) (citing *State v. Stubbs*, 170 Wash.2d 117, 123, 240 P.3d 143 (2010) and RCW 9.94A.585(4)). “Under

this standard, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the presence of the aggravating circumstances beyond a reasonable doubt. *Id.* (quoting *State v. Yates*, 161 Wash.2d 714, 752, 168 P.3d 359 (2007)).

An abuse of a position of trust may be a proper aggravating factor in some situations. *State v. Grewe*, 117 Wash.2d 211, 216, 813 P.2d 1238 (1991) (quoting *State v. Oxborrow*, 106 Wash.2d at 529, 723 P.2d 1123 (theft by deception); *State v. Creekmore*, 55 Wash.App. 852, 862, 783 P.2d 1068 (1989) (felony murder); *State v. Strauss*, 54 Wash.App. 408, 420-21, 773 P.2d 898 (1989) (rape)). Abuse of a position of trust has been expressly extended to apply to sexual offense cases. *Id.* (quoting *State v. Pryor*, 115 Wash.2d 445, 451, 799 P.2d 244 (1990); *State v. Harp*, 43 Wash.App. 340, 343, 717 P.2d 282 (1986)). In *Grewe*, the Supreme Court of Washington specifically addressed an exceptional sentence under an abuse of trust aggravator on a statutory rape conviction. *Id.* at 218.

The Court in *Grewe* stated that the two factors to be considered in determining whether defendant abused a sufficient position of trust to merit an exceptional sentence are the duration and the degree of the relationship. *Grewe*, 117 Wash.2d 211 at 218 (quoting *State v. Fisher*, 108 Wash.2d 419, 427, 739 P.2d 683 (1987)). In *Fisher*, the defendant

sexually assaulted a 5 ½-year-old boy who asked the defendant to accompany him to the rest room. *Id.* The victim testified that either his father or mother usually accompanied him to the rest room. *Id.* However, the victim met the defendant only a few days prior to the incident while swimming in the pool at his grandparents' trailer court. *Id.* We concluded that whether the evidence was sufficient to find the defendant had abused a position of trust was “a close question.” *Id.* Although we never settled that question, we did suggest,

A relationship extending over a longer period of time, or one within the same household, would indicate a more significant trust relationship, such that the offender's abuse of that relationship would be a more substantial reason for imposing an exceptional sentence.

Id. at 219 (quoting *Fisher*, 108 Wash.2d at 427).

In *Grewe*, the Court found that the victim had known defendant for approximately 4 months prior to the crime. *Grewe*, 117 Wash.2d 211 at 219. Furthermore, during that time, the victim was a frequent visitor in defendant's home where she played with defendant's computer and piano. *Id.* Therefore, the Court found that the relationship in *Grewe* exceeded that in *Fisher*. *Id.* The Court further found that based on *Fisher*, this record presents substantial evidence to support the trial court's finding defendant abused a position of trust. *Id.*

The Court in *Grewe* went on to address that the trust between the primary caregiver and the perpetrator may also give rise to a trust relationship subject to abuse, that relationship is secondary to the trust between the perpetrator and the child victim. *Grewe*, 117 Wash.2d 211 at 220. The Court stated that it is the trust between the perpetrator and the victim which renders the victim particularly vulnerable to the crime. *Id.* (See also *State v. Shephard*, 53 Wash.App. 194, 199, 766 P.2d 467 (1988) (discussed in *State v. Brown*, 60 Wash.App. 60, 75, 802 P.2d 803 (1990)).

Here, as argued above, any error alleged by the Appellant was harmless and did not contribute to the verdicts of guilty or findings by the jury of the aggravating circumstances. The findings of aggravating circumstances by the jury must stand. Therefore, the trial court did not err in sentencing the Appellant to an exceptional sentence based on the jury's findings that aggravating circumstances existed on each count.

5. Filing Fee and DNA Fee Argument

The State concedes that the Court found the Appellant to be indigent. He was assigned counsel throughout the pendency of the case and was ordered to pay mandatory fines and fees only at sentencing.

At the time the fines and fees were assessed in this case, the *Ramirez* case was not being applied to indigent cases, which effectively

eliminated fees such as the criminal filing fee and the DNA collection fee for indigent defendants. *State v. Ramirez*, __ Wn.2d __, __ P.3d __, 2018 WL 4499761 (Sept. 20, 2018). The State concedes that the criminal filing fee and DNA collection fee should be waived in this case.

CONCLUSION

DATED this 6th day of February, 2019.

Respectfully Submitted,

BY: 
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ECR / lh

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