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No. 51555-5-II

IN THE STATE OF WASHINGTON  
COURT OF APPEALS DIVISION II

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STATE OF WASHINGTON, Respondent,

v.

SHAWN MORGAN, Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PIERCE COUNTY  
#16-1-01561-3

**BRIEF OF RESPONDENT**

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## INTRODUCTION

This appeal concerns a trial court's discretionary joinder of charges under CrR 4.3(a). Defendant Shawn Morgan with his girlfriend and accomplice, Kierra Hall, groomed and then raped or molested three children, A.D., S.D.-F., and R.C. The State originally charged Defendant in two separate Informations, one for A.D. and one for S.D.-F. and R.C. On May 24, 2017, the State moved to join the charges together for trial. (Motion to Join; CP 17).

After receiving thorough briefing and extended argument, Pierce County Superior Court Judge Garold Johnson found compelling reasons to join the charges and consolidate the cases.

[T]he offenses charged....involving victims A.[D]., S.D.-F., and R.C. constitute a common scheme or plan as all involve young children under age 12, all involve a trusting relationship between the victims' parents and Morgan and Hall, all incidents happened under the control of Morgan and Hall, all of the children knew Morgan, and Hall's involvement in the offenses was considerably unique as she assisted in the grooming process of the children, added an additional element of trust to the caretaking relationship between Hall and Morgan and the children's parents, and she demonstrated sexual acts in front of the children and instructed the children as to how to perform sexual acts.

(Findings and Conclusions at 9; CP 68) (Attached as Appendix A).

Ms. Hall pled guilty and testified against Defendant at his trial.

On December 7, 2017, a Pierce County Jury found Defendant guilty on all ten counts. (Verdict Forms I-X; CP 298-317). Morgan appeals, arguing the trial court abused its discretion by joining the charges for trial. Because joinder was proper and did not unduly prejudice Defendant, the State of Washington respectfully requests this Court to affirm Defendant's convictions and dismiss his appeal.

**I. RESTATEMENT OF ISSUES PRESENTED**

Defendant Morgan's appeal presents three issues:

A. This court reviews "a trial court's joinder decision for abuse of its considerable discretion." State v. Bluford, 188 Wn.2d 298, 310, 393 P.3d 1219 (2017). The trial court joined the charges in two Informations against Defendant, concluding that the offenses were of similar character and part of a common scheme or plan, and that joinder would not unduly prejudice Defendant. (Findings and Conclusions at 11-12; CP 70-71). Did the court abuse its discretion?

B. "[A] defendant who claims ineffective assistance of counsel must prove (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that any such deficiency was prejudicial to the defense." Garza v. Idaho, \_\_\_ U.S. \_\_\_, 139 S. Ct. 738, 744, \_\_\_ L.Ed.2d \_\_\_ (2019). Defendant stipulated to venue in Pierce County, waiving any challenge in writing. Was

counsel's performance constitutionally deficient for not objecting to venue?

C. Under RCW 10.10.160(3), "the court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3)." Although Defendant Morgan is indigent, his judgment and sentence imposes a \$100 DNA database collection fee and a \$200 criminal filing fee. (Judgment and Sentence ¶ 4.1; CP 343). Should the Court strike the two LFOs from Defendant's sentence?

## **II. STATEMENT OF FACTS**

The facts leading to Defendant Morgan's conviction are uncontested. He does not challenge the sufficiency of evidence, nor has he assigned error to any findings of fact or jury instructions. RAP 10.3(g). The Court therefore treats the unchallenged findings as verities on appeal. State v. Arndt, 5 Wn. App. 2d 341, 347, 426 P.3d 804 (2018) ("unchallenged findings of fact are verities on appeal").

The trial court's June 30, 2017 Findings of Fact and Defendant Morgan's Opening Brief both provide neutral summaries of the disturbing facts in this case. (Findings and Conclusions at 2-9; CP 48-55) (Opening Brief at 5-13). Rather than repeat these narratives, the State will briefly highlight four facts that connect the charged

crimes: (1) Defendant Morgan and Hall together groomed their underage victims; (2) they gained the trust of their victims' parents or guardians before perpetuating the abuse; (3) the abuse occurred under Defendant and Hall's control; and (4) Defendant Morgan used Hall to gain compliance from his victims and their guardians. As the testimony at trial established, Defendant Morgan created a sophisticated scheme to repeatedly abuse his underage victims.

A. Defendant Morgan Groomed His Victims.

The three abuse survivors, A.D., S.D.-F., and R.C., knew Defendant Morgan and Ms. Hall and were the objects of the couple's extended plans. As Ms. Hall testified regarding S.D.-F., the couple would befriend the children first, and then make sexual advances.

Q. And did you get along with S[D.-F.]?

A. Yes.

Q. What was your relationship like with S[D.-F.]?

A. It was good. She liked me. I got along well with her and kind of played like a role of like -- like a -- I don't know -- like a caretaker or like I'd watch her and stuff.

Q. What was the defendant's relationship like with S[D.-F.]?

A. I don't know. Just like normal, like he was nice to her too and --

Q. You mentioned being a caretaker for S[D.-F.]. What do you mean by that?

A. Like I'd watch her.

Q. What were -- Why would you watch her? What were the circumstances that you would watch her?

A. Well, like when I would be at their house I would watch her for a couple minutes or whatever while they had to do something. And then I baby-sat her like for most of the day at Shawn's parents' house.

(16RP 2423). Ms. Hall's brother was dating S.D.-F.'s mother, and he would have Ms. Hall babysit occasionally. (16RP 2420).

Defendant Morgan also groomed A.D. and R.C. -- with Ms. Hall's help. A.D. is Morgan's son, and under the guise of wanting to be a more involved father, Defendant persuaded A.D.'s mother to let the boy spend more time with him.

Q. Was there a point in time where the defendant started to see A. more often?

A. Yes.

Q. So how did that happen?

A. Mr. Morgan called, and he wanted to -- he said he wanted to grow more of a relationship with A. and he would like to see him more. And that's how that conversation started.

Q. And did you -- At the time did you have any issue with that?

A. No.

(11RP 1515) (Lindsey Dearfield). Defendant used the lure of a swimming pool at his house to get A.D. to visit. (11RP 1517) (“his parents had a pool, and so he wanted A.D. to come over and hang out at the pool”). Defendant and Ms. Hall began the sexual abuse after A.D. had spent several overnights with the couple. (16RP 2371).

Finally, Morgan groomed R.C., the daughter of a friend, by ingratiating himself with R.C.’s guardians, her grandparents. Vickie Carrington, R.C.’s grandmother, testified to Defendant’s skillful predatory behavior.

A. [Morgan] just was there to help us with all the grandkids. And, you know, my husband and I need help with putting the pool together. Just interacted, you know, with family. My son and him seemed to get along.

Q. So at the time did you have any problem personally with him spending time with R[C.]?

A. No, ma'am, I didn't.

Q. How come?

A. He just kind of made himself part of the family. My husband and son felt comfortable; I felt comfortable.

(13RP 1949). R.C. called Defendant “Uncle Shawn”. (13RP 2004).

Defendant did not abuse R.C. immediately. After waiting a few years, Morgan took R.C. on an overnight trip and sexually abused her. (13RP 2010). As with A.D. and S.D.-F., Defendant Morgan established a relationship with R.C. first, getting her to trust him and eventually, agree to be alone with him.

B. Defendant Gained The Trust of His Victims' Parents or Guardians.

To access his victims, Defendant Morgan also had to gain the trust of their parents or guardians. With S.D.-F., this required him to convince her mother to let Ms. Hall take her daughter to Morgan's trailer.

A. So I didn't ask for her and Shawn to watch my kid. I didn't really know Shawn. But I had met Kierra [Hall] enough, and I was comfortable with her, and she was really good with my kid. And so we had asked her to baby-sit.

Q. Okay. So you would ask Kierra to baby-sit. Would you have her baby-sit at her residence?

A. Yeah. I would -- I remember one time I like went to the grocery store when I was at my apartment and she watched her. And everything was fine. And I had asked her -- She had baby-sat when they were at Shawn's house. They had --

Q. Go ahead.

A. They did baby- -- She had baby-sat once. I don't know if they were -- if he was there or not. But everything seemed fine that first time.

(18RP 2842-43) (Sera Lujan).

After a few successful sessions babysitting, Ms. Lujan agreed to go out to the casino with Andrew Hill, Kierra's brother, and leave S.D.-F. with Kierra and Defendant Morgan.

A. Andrew wanted to go to the casino. So we were in the casino like all night long.

Q. How old was S. about that time?

A. She was five.

Q. Five?

A. Mm-hm.

Q. Had you planned on being gone all night long?

A. I don't remember planning to being gone all night. I don't think I would have planned that. I don't think I would have wanted to be in the casino all night.

Q. Do you recall who was at the residence when you -- Well, first, how did S. get to the residence?

A. We drove her.

Q. You dropped her off there?

A. Yes, yeah.

Q. And do you recall who you interacted with when you got to the residence?

A. Kierra.

(18RP 2843-2844). That night, Defendant Morgan molested S.D.-F. She ran to Ms. Hall, scared. (16RP 2434) ("she was crying and she came running out to me...I just remember her asking me where – where her underwear were").

Defendant Morgan used the same techniques with R.C.'s guardians. As quoted above, Vickie Carrington began to trust Defendant Morgan after he spent hours at the Carrington house, playing with the kids and helping. (13RP 1949). Morgan knew R.C. for four years before taking her out alone. (13RP 1950). Although R.C. was upset when she returned from the trip, she said nothing about the abuse. Ms. Carrington did not find out about Morgan's sexual assault until a few years later. (13RP 1954-55).

Finally, Morgan also gained A.D.'s mother's trust to let him stay at Morgan's trailer.

- A. I remember one time they said that they were going to go to Wild Waves, but they ended up not going. And then -- And then there was a time where he wanted A. to come over, because I guess his parents had a pool, and so he wanted A. to come over and hang out in the pool or something like that or -- That's pretty much it.
- Q. Okay. So you said you are living in the apartment when this change started to happen; is that right?

A. Yes, ma'am.

Q. So when the change started to happen, how frequently would A. go see the defendant?

A. Maybe once or twice throughout the summer. And then there was a couple -- I mean, it wasn't like a dramatic change like he was coming every week, but it was more than his normal.

Q. It was more than just the Father's Day and Christmas?

A. Yes, ma'am.

Q. So once the visits started becoming more frequent, how long did that last?

A. Maybe like a year, a year and a half at the most.

(11RP 1517-18). During this summer of frequent visits, Morgan began sexually abusing his son. (11RP 1571).

C. The Abuse Occurred As Part Of Morgan And Hall's Relationship.

Next, Morgan abused the children with Ms. Hall present and assisting at times. He did not hide the abuse from her, and it was an integral part of their relationship, like finding and watching pornography.

Q. Ms. Hall, defense counsel was just asking you about searching for -- searching on porn sites when Mr. Morgan was not present. Why did you do that?

A. To look up videos for when Shawn would be back.

Q. And why did you do that?

A. Because he would want me to.

Q. And you said you would look up videos for when Shawn would be back. What would happen when Shawn would be back?

A. We -- Like what would we do?

Q. Yes.

A. (Pause.)

THE COURT: You can answer the question.

A. Okay. We would end up watching it and being sexual together.

(17RP 2580-81).

The sexual abuse occurred under Morgan and Hall's control, in living areas they shared. As the trial court found,

watching child pornography, talking about child abuse, and carrying out child abuse was a significant part of Hall and Morgan's relationship. Hall told investigators how she and Morgan would watch child pornography together every time they would shoot up, which was several times a day.

(Findings at Conclusions at 8; CP 54). The abuse was not isolated, indiscriminate or haphazard. Instead, Defendant Morgan, with Ms. Hall's help, planned the crimes and controlled their execution.

D. Morgan Used Ms. Hall To Gain His Victims' Compliance.

Ms. Hall's participation was critical to Defendant Morgan's offenses. With A.D., she committed acts of abuse and "coached" the child on what to do. As Ms. Hall testified,

Q. What do you remember?

A. Just like Shawn giving me like directives on like what he wanted me to do, how he wanted me to help him do the sexual things that we were doing.

Q. Do you remember what he said?

A. One of the things that I remember is just him telling me to help him, like show him how he's supposed to like push himself inside and just -- just directives of just like how to show him how to do all of this stuff and to make him feel comfortable and... (Pause.)

Q. How were you supposed to make him feel comfortable?

A. By me not acting uncomfortable,...

(16RP 2381).

With S.D.-F., Defendant Morgan had private access to her because Ms. Hall was a trustworthy babysitter. (18RP 2843-2844). And Ms. Hall calmed the child down after the abuse, making it less likely she would disclose what happened.

Finally, with R.C., Ms. Hall made her feel comfortable and safe with Defendant Morgan. As R.C. testified at trial,

Q. (By Ms. Kooiman) R. how many times did you meet Kierra?

A. Once or twice.

Q. Did you interact with her –

A. Yes.

Q. -- when you met her? And how did you feel about Kierra at the time that you first met her?

A. I liked her.

Q. Did the two of you play any games or make any plans?

A. We made plans.

Q. What did those plans include?

A. I was supposed to hang out with her and Shawn on the weekend, and we were supposed to go shopping.

(13RP 2005-06).

The testimony at trial confirmed and reinforced what Judge Johnson found before trial: “the offenses with which Morgan has been charged...are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.” (Findings and Conclusions at 12; CP 58). They were not coincidental

or unrelated incidents. And for this reason, Judge Johnson joined the charges under CrR. 4.3(a) for trial.

Defendant Morgan now appeals, arguing this was error.

## **ARGUMENT**

### **III. STANDARD OF REVIEW**

This Court reviews the trial court's decision on permissive joinder for an abuse of discretion. State v. Bluford, 188 Wn.2d 298, 310, 393 P.3d 1219 (2017) ("review a trial court's joinder decision for abuse of its 'considerable discretion'").

The Court reviews Defendant's challenge to venue for an abuse of discretion. State v. Stearman, 187 Wn. App. 257, 264, 348 P.3d 394 (2015) ("we review a trial court's ruling on a motion to change venue for an abuse of discretion"). And the Court reviews Defendant's allegations of ineffective assistance of counsel *de novo* based only on the facts in the record. State v. Grier, 171 Wn.2d 17, 29, 246 P.3d 1260 (2011) ("reviewing court may consider only facts within the record").

Finally, this Court reviews Defendant's challenges to his legal financial obligations *de novo*. State v. Ramirez, 191 Wn.2d 732, 742, 426 P.3d 714, 719 (2018) ("de novo review applies to the alleged

error in this case: the failure to make an adequate inquiry under Blazina").

#### **IV. PERMISSIVE JOINDER WAS PROPER.**

The trial court did not abuse its discretion by joining the 10 charges against Defendant for trial. Under Washington law,

joinder pursuant to CrR 4.3(a) should be liberally allowed where the charged offenses (1) are of the same or similar character, even if not part of a single scheme or plan; or (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan. However, ...our precedent does not allow joinder if prosecution of all charges in a single trial would prejudice the defendant.

State v. Bluford, 188 Wn.2d 298, 310, 393 P.3d 1219 (2017) (citations and quotations omitted). The trial court appropriately found all these elements satisfied.

##### **A. The Offenses Are Of Similar Character**

First, the charged offenses were all for sexual abuse of prepubescent children – criminal acts of similar character. Their multiple similarities outweigh any individual differences among the victims. As the Supreme Court noted in a case of child sexual abuse,

Lisa (the alleged victim in counts 1 and 2), and Sonia (the alleged victim in count 3) were both children left in the care of their uncle, the defendant Markle. The nature of the acts committed against these children, and the method of contact and abuse was similar; and

in some instances the defendant acted while both girls were present. For example, the testimony was that Mr. Markle took both children “driving” and allowed them to hold the steering wheel while seated on his lap, and then placed his hands under their clothing.

State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992).

The trial court had ample grounds to conclude that the charges against Defendant “are of similar character pursuant to Criminal Rule 4.3 as they are all sex offenses involving minor children under 12.” (Findings and Conclusions at 11; CP 70).

B. The Offenses Are Part of A Single Scheme or Plan

Second, the offenses were connected and constituted a single scheme or plan to groom and abuse children. As described above, Defendant Morgan and Kierra Hall incorporated pornography, child pornography, and child sexual abuse into their long-term relationship. It was something they perpetrated together, after much planning and discussion. It is the archetype of a common scheme or plan with multiple victims.

When a defendant's previous conduct bears such similarity in significant respects to his conduct in connection with the crime charged as naturally to be explained as caused by a general plan, the similarity is not merely coincidental, but indicates that the conduct was directed by design.

State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995); State v. Robinson, 38 Wn. App. 871, 882, 691 P.2d 213 (1984) (“murder and assault counts both were arguably part of a series of acts related to the dissolution and were sufficiently similar to justify joinder”).

The trial court appropriately concluded that the charges against Defendant “are based...on a series of acts connected together or constituting parts of a single scheme or plan pursuant to Criminal Rule 4.3 as each count is part of a common scheme or plan involving Morgan and Hall.” (Findings and Conclusions at 12; CP 71).

C. A Single Trial Did Not Unduly Prejudice Defendant

Defendant focuses his appeal on prejudice, alleging “the trial court gave the benefit of ER 404(b) evidence to the State without any protection against jurors using the different crimes for an improper propensity purpose.” (Opening Brief at 19). But this overstates the likelihood of prejudice. As Defendant concedes, the evidence proving each count was strong, and the trial court instructed the jury to “decide each count separately”. (Instruction 6; CP 254) (Opening Brief at 16) (“strength of the evidence on each charge was similar”). Furthermore, the Court gave separate “to convict” instructions and

the Jury returned special verdicts on each count. (Instructions 12-25; CP 260-273) (Special Verdict Forms I-X; CP 298-317).

Before trial, the court concluded that “joinder of the offenses...does not cause undue prejudice given the similar nature of the offenses, the ability of jurors to compartmentalize the evidence, the strength of the evidence as to each count, the lack of conflicting defenses, and that the offenses would be cross-admissible at trial as evidence of a common scheme or plan.” (Findings and Conclusions at 11; CP 57). The progress of trial proved the court correct. The Jury had no trouble compartmentalizing the evidence and deciding each count separately.

Before granting joinder, the trial court examined four factors to decide whether combining the charges would prejudice Defendant.

In determining whether the potential for prejudice requires severance, a trial court must consider (1) the strength of the State's evidence on each count; (2) the clarity of defenses as to each count; (3) court instructions to the jury to consider each count separately; and (4) the admissibility of evidence of the other charges even if not joined for trial.

State v. Russell, 125 Wn.2d 24, 63, 882 P.2d 747 (1994). Each of these factors supported joinder.

1. The Evidence On Each Count Was Strong.

Defendant concedes that the evidence for each of the 10 counts was strong. (Opening Brief at 16). At least three witnesses – Kierra Hall, the survivor, and the survivor’s parent or guardian – testified to each charged crime. In addition, law enforcement investigators provided forensic evidence and circumstantial evidence from Defendant’s trailer and living areas. For good reason, Defendant does not challenge the sufficiency of the evidence supporting his convictions.

2. Defense Counsel Offered Only A General Defense.

Next, Defendant did not testify at trial, and defense counsel did not present evidence distinguishing the crimes or disputing a particular count. The Jury evaluated the evidence for each count separately, understanding that defense counsel argued the State did not meet its burden of proving guilt beyond a reasonable doubt. (22RP 3320). The defense was neither complicated nor complex.

3. The Court’s Instructions Required Separate Consideration.

The trial court gave multiple instructions that required the Jury to evaluate each count separately, based only on the evidence

relevant to the charge. First, the court gave WPIC 3.01 (4<sup>th</sup> Ed.) as

Instruction No. 6:

A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count.

(Instruction 6; CP 254). This is the correct statement of the law, and Defendant has not assigned error to the instruction.

Instead, Defendant faults the court for not giving a traditional ER 404(b) limiting instruction. (Opening Brief at 18). But Defendant did not request the instruction at trial and cannot now claim error. (Defendant's Proposed Instructions; CP 238-41). Defendant requested – and the trial court gave – WPIC 4.25 and 4.26, instructing the jury that “one particular act...must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved.” (Defendant's Proposed Instructions; CP 238-41). These instructions required the Jury to consider facts, not propensity, in deciding Defendant's culpability.

Furthermore, asking for an ER 404(b) limiting instruction would have highlighted the multiple counts and called attention to the various interpretations of the evidence. Defense counsel

appropriately kept the instructions, and the Jury's focus, on the evidence pertaining to each count.

Finally, the court instructed the Jury separately on each count that

[i]f you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any of these elements, then it will be your duty to return a verdict of not guilty.

(Instructions 12-25; CP 260-73). All of the Instructions required the Jury to evaluate each count separately and examine only the evidence relevant to the particular count. By determining guilt separately for each count, the Jury's special verdicts show that it followed the court's Instructions correctly.

#### 4. The Evidence Was Cross-Admissible

The fourth prong asks whether evidence of the other charges would be admissible even if not joined for trial. Although the evidence here is admissible under ER 404(b), the lack of admissibility does not prohibit joinder. "Even if separate counts would not be cross-admissible in separate proceedings, this does not as a matter of law state sufficient basis for the requisite showing by

the defense that undue prejudice would result from a joint trial.” State v. Markle, 118 Wn.2d 424, 439, 823 P.2d 1101 (1992).

The trial court correctly concluded that evidence of each charge was admissible for two reasons. First, the evidence “would be cross-admissible in each case given the existence of a common scheme or plan, meeting all the requirements of admissible common scheme or plan evidence under Evidence Rule 404(b).” (Findings and Conclusions at 10; CP 56). As described in the Statement of Facts above, Defendant Morgan and Kierra Hall worked together to gain access to their child victims and did so deliberately, over an extended time.

Second, the trial court concluded that evidence “involving the victims A.[D], S.D.-F., and R.C. constitutes evidence of Morgan’s sexual motivation and intent to sexually abuse children for the purposes of sexual gratification for the purpose of proving the offense of child molestation, as opposed to non-sexual conduct.” (Findings and Conclusions at 10; CP 56).

And third, the evidence “involving the victims A.[D.], S.D.-F. and R.C. would be cross-admissible in each case to show Morgan’s sexual motivation and intent to sexually abuse children for the purposes of sexual gratification, meeting all the requirements for

motive/intent evidence under Evidence Rule 404(b).” (Findings and Conclusions at 10; CP 56).

Defendant offers two arguments challenging these conclusions. Neither is persuasive.

First, he claims that his charged offenses “show a similarity in results, but not a substantial enough similarity in implementation to establish a common scheme or plan.” (Opening Brief at 21-22). He then lists facts that differentiate the three underage victims. But Washington law requires the offenses to be similar, not identical. As the Supreme Court held in State v. Lough,

to establish common design or plan, for the purposes of ER 404(b), the evidence of prior conduct must demonstrate not merely similarity in results, but such occurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the charged crime and the prior misconduct are the individual manifestations.

State v. Lough, 125 Wn.2d 847, 860, 889 P.2d 487 (1995) (citations and footnotes omitted).

Here, Defendant Morgan’s conduct with his three victims is strikingly similar – for obvious reasons. Ms. Hall and he sought out children to fulfill his sexual fantasies and used similar techniques to get the children alone in private places. The fact that each crime had

its own variations underscores the operation of Defendant's plan. He gained trust first and then found ways to abuse each victim.

Second, Defendant argues that the evidence is irrelevant because "a jury may infer sexual gratification from the circumstances of the touching itself, where those circumstances are unequivocal and not susceptible to innocent explanation." (Opening Brief at 23, citing State v. Ramirez, 46 Wn. App. 223, 730 P.2d 98 (1986)). Morgan did not admit to touching his victims. But according to Defendant, once the State proved touching, it also proved motive.

The State must prove all elements of the charged offenses beyond a reasonable doubt, including sexual contact. As Instruction No. 20 told the Jury, "sexual contact means any touching of the sexual or other intimate parts of a person *done for the purpose of gratifying sexual desires of either party.*" (Instruction 20; CP 268) (emphasis added). Evidence of Defendant's pattern of sexual abuse is compelling, relevant proof of his motive. Morgan committed these crimes to gratify his sexual desires.

Furthermore, the Court of Appeals has repeatedly criticized Ramirez, the case Defendant cites, for its summary reversal of defendant's convictions.

Without explanation or analysis, the court in Ramirez extended the rule of Harris and required a new trial in circumstances where there were no events actually prejudicing the defendant.

We see no reason in law or logic to establish a rule that misapplication of this particular prong of the prejudice-mitigating test should automatically lead to the conclusion that a new trial is required. There is no reason to preclude a harmless error analysis. Even in pure ER 404(b) cases, evidentiary errors under the rule do not necessarily lead to reversal.

State v. Watkins, 53 Wn. App. 264, 272–73, 766 P.2d 484 (1989);

State v. Standifer, 48 Wn. App. 121, 127, 737 P.2d 1308 (1987) (“we decline to follow the analysis implicit in State v. Ramirez”).

Under ER 404(b), Defendant’s grooming behavior and sexual abuse was cross-admissible in each of his three victims’ cases. It proved Defendant’s common scheme or plan and his motive for perpetuating the abuse. Consolidating the charges for trial did not cause him undue prejudice.

D. Judicial Economy Strongly Favored A Single Trial

The benefits of one trial were particularly compelling here. Three children had to testify about how Defendant Morgan and Ms. Hall abused them, raising difficult emotions and painful memories. Separating the cases would have required these three survivors to relive the trauma and repeat the anguish of describing the abuse. In

most cases, consolidated trials are preferable. Here, one trial was essential.

Weighing the benefits of joinder against the possibility of prejudice to Defendant, the trial court acted well within its discretion by consolidating the 10 charges for a single trial. Defendant provides no persuasive argument that the court abused its discretion. He received a fair trial.

**V. VENUE WAS APPROPRIATE IN PIERCE COUNTY.**

For the first time on appeal, Defendant argues that Thurston County, not Pierce County, had venue over the charges involving R.C. (Opening Brief at 26). On March 24, 2017, Defendant Morgan stipulated to venue in Pierce County, and “hereby knowingly, intelligently, and voluntarily waives his right to venue for the acts alleged in counts II and II in Thurston County.” (4/7/17 Waiver of Venue; CP\_\_\_)\*. He appropriately waived any right to have the charges brought in Thurston County. State v. Dent, 123 Wn.2d 467, 479, 869 P.2d 392 (1994) (“defendant may waive the right to challenge venue”).

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\* Respondent has filed a supplemental designation of clerk’s papers and CP cites do not yet exist for these documents. The brief cites to the date to identify the document.

Defendant argues that he received ineffective assistance of counsel for failure to contest venue. (Opening Brief at 29). But Defendant's written waiver undermines this claim. First, he made a tactical decision, which this Court does not review in hindsight.

A stipulation as to facts is a tactical decision. State v. Mierz, 127 Wn.2d 460, 476, 901 P.2d 286 (1995). In Mierz, the court declined to find that defense counsel's decision to agree to a trial on stipulated facts was ineffective assistance of counsel. Id. The court observed that "[a] stipulation as to facts may represent a tactical decision which may or may not bear fruit." Id. In addition, a waiver of the right to a jury trial is a tactical decision. Our Supreme Court has stated that whether the accused should waive his or her right to a trial by jury is within the area of judgment and trial strategy and as such rests exclusively in trial counsel.

State v. Ashue, 145 Wn. App. 492, 505–06, 188 P.3d 522 (2008).

"When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." State v. Carson, 184 Wn.2d 207, 218, 357 P.3d 1064 (2015).

Second, Defendant cannot allege prejudice from knowingly waiving a challenge to venue.

A defendant must affirmatively prove prejudice. To make a determination of prejudice, we consider the totality of the evidence before the jury. The law generally defines "prejudice," in the setting of ineffective assistance of counsel, as a "reasonable probability" that the result of the proceeding would have been different. The accused must show more than the errors having some conceivable effect on the

outcome of the proceeding and counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Classen, 4 Wn. App.2d 520, 542-43, 422 P.3d 489 (2018).

The evidence against Defendant was strong and it is highly likely that a Thurston County jury would reach the same verdict of guilt.

**VI. THE COURT SHOULD STRIKE THE FILING FEE AND DNA SAMPLE FEE FROM DEFENDANT'S JUDGMENT AND SENTENCE.**

The State acknowledges that Defendant is indigent and has already paid a \$100 DNA collection fee. Under the Supreme Court's decisions in State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018) and State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015), Defendant's Judgment and Sentence should not include the DNA collection fee or the \$200 Criminal Filing Fee. The State respectfully requests this Court to strike the two Fees from the Judgment and Sentence.

**CONCLUSION**

After carefully evaluating the evidence, a Pierce County Jury convicted Defendant Shawn Morgan on five counts of first degree rape of a child and five counts of first degree child molestation. The evidence of Defendant's guilt is compelling. He argues, however,

that the trial court abused its discretion by holding one trial rather than three.

The State of Washington respectfully requests this Court to affirm Defendant's convictions and dismiss his appeal. The trial court acted reasonably and humanely when it required Defendants' victims to testify only once.

DATED this 1 day of May, 2019.

MARY E. ROBNETT  
Pierce County Prosecuting Attorney

By

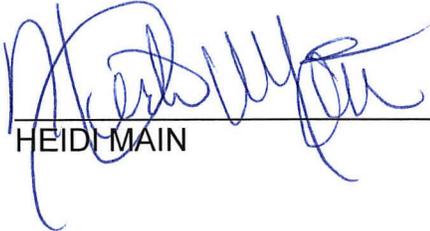
  
Philip J. Buri, WSBA #17637  
Special Deputy Prosecutor  
Buri Funston Mumford & Furlong  
1601 F. Street  
Bellingham, WA 98225  
360/752-1500

**DECLARATION OF SERVICE**

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of **Pierce County's Response Brief** to:

Stephanie Cunningham  
4616 25<sup>th</sup> Ave. NE., No. 552  
Seattle, WA 98105

DATED this 15<sup>th</sup> day of May, 2019.



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HEIDI MAIN

APPENDIX A



COPY



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

STATE OF WASHINGTON,  
Plaintiff,

CAUSE NOS. 16-1-01561-3  
16-1-01560-5  
16-1-04929-1

vs.

MORGAN, SHAWN  
(AKA SHAWN BUTLER) and  
HALL, KIERA

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW  
FOLLOWING MOTION TO  
JOIN OFFENSES

Defendant.

THIS MATTER having come on before the Honorable Gerald Johnson, Judge of the above entitled court, for hearing on June 12, 2017, upon the State's motion to join 16-1-01561-3, 16-1-01560-5, and 16-1-04929-1 for trial; the defendants having been present and represented by Bryan Hershman and Kent Underwood and the State being represented by Deputy Prosecuting Attorneys Erica Eggertsen and Robert Yu, and the court having reviewed the evidence presented by both parties, and having considered the arguments of counsel and being duly advised in all matters, the Court makes the following Findings of Fact and Conclusions of Law:

ORIGINAL

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1

Office of the Prosecuting Attorney  
930 Tacoma Avenue  
Tacoma, Washington 98402  
(253) 798-3400 / Fax: (253) 798-4019

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FINDINGS OF FACT

I.

That in November 2015, defendant Kierra Hall (hereinafter "Hall") told a counselor at her drug rehabilitation facility that she and her boyfriend, defendant Shawn Morgan (hereinafter "Morgan"), had together sexually abused the defendant's son, A.M., and she had witnessed Morgan sexually abuse another minor child, A.V.-H.

II.

That following her confession to her counselor, Hall agreed to speak with an FBI agent about what she confessed to while in treatment. Hall told law enforcement she met Morgan when she was working as a prostitute in 2009 when she was 19 or 20 years old. Since that time, she and Morgan had been in a relationship. She lived with Morgan in the trailer on his parents' property where they both used recreational drugs. Hall said that during their relationship, she and Morgan regularly watched child pornography together. She said that Morgan had sexually abused several children, most recently his 11 year-old son A.M. She described both taking part in this abuse, and her knowledge of his past sexual abuse of other children.

III.

That following Hall's interview, law enforcement located A.M. and he was forensically interviewed. He told the interviewer that when he was in the 5<sup>th</sup> grade, between December 2014 and the summer of 2015, he had been sexually abused by both Hall and Morgan on a number of occasions.

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IV.

1 That in his forensic interview A.M. said the sexual abuse perpetrated upon him by  
2 Morgan and Hall took place in Morgan's trailer. A.M. said that during the sexual abuse he,  
3 Morgan, and Hall would get completely undressed. A.M. said both Hall and Morgan  
4 masturbated him and performed oral sex on him. A.M. said that on more than one visit,  
5 Morgan directed A.M. to have vaginal sex with Hall. After A.M. had done so, Morgan would  
6 have vaginal sex with Hall. A.M. said that while he (A.M.) was having sexual intercourse  
7 with Hall, Morgan would be masturbating himself. A.M. said that on some visits, before the  
8 abuse Morgan would show him pornography depicting adults engaged in sexual activity.  
9

V.

10  
11 That Hall gave an additional post-arrest statement in which she further discussed  
12 the sexual abuse of A.M. as well as other children she and Morgan sexually abused. That two  
13 of those other children were S.D.-F. and R.C.  
14

VI.

15  
16 That in describing the sexual abuse of A.M. in her pre-arrest statement, Hall told law  
17 enforcement she witnessed Morgan and A.M. masturbating each other and performing oral  
18 sex on each other. Hall recalled an incident when she was under the influence of drugs and  
19 not fully conscious, where Morgan and A.M. involved her in sexual acts. She said Morgan  
20 had abused A.M. three times within the last six months. She described Morgan digitally  
21 penetrating A.M. in preparation for anal sex. She described one occasion during which she  
22 believed the sexual abuse of A.M. was possibly videotaped.  
23  
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VII.

1 That in Hall's post-arrest statement, she described Morgan involving her in sex acts  
2 involving A.M. Hall stated Morgan "wanted me to let his son have sex with me." That in  
3 Hall's earlier statement to the FBI Hall said, "the time that he like had me undressed and  
4 they were both there naked and like he's tellin' his son like to do this or whatever, you know  
5 what I mean, like fuck me this way, or, or you know or go like this or what not..." She  
6 explained further that, "he was trying to basically teach him how to fuck me pretty much."  
7 That Hall also said pornography was used in some of the sexual abuse of A.M.  
8

VIII.

9  
10 That law enforcement followed up on the information Hall provided pertaining to  
11 S.D.F. and R.C. That S.D.F. and R.C. had in 2012 previously disclosed sexual abuse by  
12 Morgan.  
13

IX.

14 That S.D.F. is Hall's niece.  
15

X.

16  
17 That in 2012, the Pierce County Sheriff's Department received a referral from the  
18 Kitsap County Sheriff's Department regarding the sexual abuse of 5 year-old S.D.-F., who  
19 had told her mother of an incident where she had woken up with no panties on and "the  
20 visitor" had his "boy parts" on her face.  
21

XI.

22 That S.D.-F. was forensically interviewed in June 2012. She told the interviewer that  
23 "Shawn" put his "boy part" in her face when she was spending the night at his house. She  
24 said it happened in a bedroom in Shawn's house in Tacoma after her mother dropped her  
25

1 (S.D.-F.) off to run errands. S.D.-F. said that Shawn took her underwear off and pulled out  
2 his "boy part." She said there was slime on his "boy part" and he rubbed it all over her face.  
3 After he was done, he got a towel from the kitchen and wiped her face.

4 XII.

5 That following the forensic interview, S.D.-F.'s mother told law enforcement that  
6 "Shawn" was Shawn Butler (AKA Shawn Morgan, the defendant).

7 XIII.

8 That Hall in her post-arrest statement described an incident with S.D.-F. where  
9 Morgan "...put a blanket over him and, it's like he would have me do everything for him or  
10 for the thing, I don't know how to explain it. Like he would have me put her in the middle,  
11 or he would have me take her shirt off and put her in the middle of us, and want me to like  
12 start jackin' him off. ...[e]ither he or I put her hand like on top of mine and then he moved  
13 my hand away. ... And then she looked under and realized what she was doing and didn't  
14 want to do it anymore." Hall stated they were in the trailer when this happened and "[a]ny  
15 time any of this happened we were always watching child porn, always."

16 XIV.

17 That Hall also described another time when she and the defendant babysat S.D.-F.  
18 and they all ended up together in a car somewhere. Hall said, "we were parked somewhere  
19 'cause he wanted to try to do somethin' with her or whatever. And so I was in the front  
20 seat and he just wanted to lay in the backseat with her. And I was in the front seat just  
21 getting' high, like I was always doing. And like I, he put on porn. ... So after I got high he  
22 wanted me to like move to the backseat." Hall further explained, "... what I believe what  
23 he was tryin' to have happen is like, you know what I mean, 'cause she was comfortable  
24  
25

1 with me, like I had babysat her just on my own lots of times for my brother ...and so she  
 2 was comfortable with me. But, so if I sat in the backseat of the car she wouldn't fight as  
 3 much bein' in the back, back with him."

XV.

4  
 5 That Hall also talked about the time Morgan hurt S.D.-F. in a bedroom at his  
 6 parents' house. Hall said Morgan "wanted me to again use like some of the heroin my  
 7 brother left me with to put in her drink." Hall stated she didn't do it. Morgan then took  
 8 S.D.-F. into the bedroom. Hall said, "I didn't physically watch him do it, but like he would  
 9 talk to me about what happened after that." She said, "I know that he hurt her, 'cause I  
 10 could her hear cryin for help." Hall said that S.D.-F. came out of the room without pants or  
 11 underwear on. Morgan told Hall he didn't penetrate S.D.-F. but only rubbed himself  
 12 against her.

XVI.

13  
 14 That R.C. is a child of adults known to Morgan and Hall.

XVII.

15  
 16  
 17 That in September 2012, Pierce County Sheriff's Department detectives were  
 18 investigating a separate reported sexual assault of a minor by Morgan that to date has not  
 19 been charged. That during that investigation, investigators learned Morgan had also  
 20 sexually assaulted R.C. when she was under the age of 12.

XVIII.

21  
 22 That R.C. was interviewed at the Child Advocacy Center by a child forensic  
 23 interviewer. R.C. stated that during the summer when she was ten years old, Morgan had  
 24 agreed to take R.C. for the weekend. Morgan picked R.C. up in his Chevy-truck and drove  
 25

1 her to his trailer by Black Lake in Thurston County. On the car ride to the trailer Morgan  
2 instructed R.C. to give him her hand and look away. R.C. then heard a zipper and the  
3 defendant pulled his "ding dong" out of his pants. Morgan then held R.C.'s wrist and moved  
4 her hand up and down on his "ding dong". R.C. confirmed that his "ding dong" was on the  
5 front of his body and used to urinate.

6 XIX.

7 That R.C. further described in her forensic interview that later that evening after  
8 she and Morgan arrived at Morgan's trailer, Morgan again asked for R.C.'s hand. R.C.  
9 refused. The following day Morgan took R.C.'s hand and again put it on his "ding dong".  
10 R.C. stated this incident took place on Morgan's bed in the trailer as the defendant stated  
11 someone might see them on the couch.

12 XX.

13 That Hall stated in her post-arrest interview that she was in custody when Morgan  
14 sexually abused R.C. and he told her about the abuse after it occurred. Hall stated the sexual  
15 abuse of R.C. followed previous babysitting of R.C. and Morgan's request to perform sex  
16 acts in front of R.C. Hall stated that Morgan "talked [R.C.] into to like giving him a hand job  
17 or like a blowjob for a cell phone, he was gonna buy her a cell phone. ... Like but before  
18 that, we babysat her one time and he wanted me to like leave the curtain open when we had  
19 sex, or like I gave him head, and I, I think I did that. I don't remember for sure, I just know  
20 that he wanted me to. And it was one of the times like I invited her over to go ride my horse  
21 at my mom's house."  
22  
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XXI.

1 That watching child pornography, talking about child abuse, and carrying out child  
 2 abuse was a significant part of Hall and Morgan's relationship. Hall told investigators how  
 3 she and Morgan would watch child pornography together every time they would shoot up,  
 4 which was several times a day. While they were watching the videos, they would talk about  
 5 the sexual abuse of children. Hall described how Morgan would ask her to tell him how she  
 6 was raped and molested by her own father and uncle and call him daddy. They'd talk about  
 7 how old the children looked on the videos they were watching and Hall described how the  
 8 defendant would masturbate to the videos in her presence or she would perform oral sex on  
 9 him while the videos were playing.

XXII.

11 That conversations Hall and Morgan had during their relationship about  
 12 perpetrating sexual abuse included discussions about abuse as well as specific plans and  
 13 instructions on how to sexually abuse children. Hall talked about how the defendant wanted  
 14 her to drug kids with either heroin or some other substance. She explained, "[t]hat's the only,  
 15 like a lot of times he would buy, buy heroin and I was supposed to like share it and drug  
 16 other kids that like we'd babysat." Hall said Morgan would "ask me sick things 'cause I'm a  
 17 girl. And he would ask me like, you know what I mean, if he could penetrate somebody this  
 18 age and, without physically hurting them, and. Like I would tell him my educated, you know  
 19 what I mean, guess on it." That Hall and Morgan talked about having a child together in  
 20 order to have constant access to a child to sexually abuse and also talked about snatching a  
 21 child from the street to sexually abuse.  
 22  
 23  
 24  
 25

XXIII.

1 That Hall said Morgan at times wanted to and did abuse children alone but also told  
 2 her, “[l]ike they’d be more willing to do it if I was there, sometimes he’d say that.” When  
 3 speaking further about the sexual abuse of A.V.-H. (un charged child), Hall stated, “...like  
 4 he’d talk about it a lot when we’d have sex. He’d, he’d go over it in his head and like replay  
 5 it like as a fantasy kinda thing.”  
 6

XXIV.

7  
 8 That the sexual abuse of A.M., S.D.-F., and R.C. took place between 2009 and 2015  
 9 in the State of Washington.  
 10

CONCLUSIONS OF LAW

I.

13 That the Court has jurisdiction over the parties and subject matter.

II.

15 That the offenses charged under 16-1-01561-3, 16-1-01560-5, and 16-1-04929-1  
 16 involving victims A.M., S.D.-F., and R.C. constitute a common scheme or plan as all involve  
 17 young children under age 12, all involve a trusting relationship between the victims’ parents  
 18 and Morgan and Hall, all incidents happened under the control of Morgan and Hall, all of the  
 19 children knew Morgan, and Hall’s involvement in the offenses was considerably unique as  
 20 she assisted in the grooming process of the children, added an additional element of trust to  
 21 the caretaking relationship between Hall and Morgan and the childrens’ parents, and she  
 22 demonstrated sexual acts in front of the children and instructed the children as to how to  
 23 perform sexual acts.  
 24  
 25

III.

That the offenses in each cause number, 16-1-01561-3, 16-1-01560-5, and 16-1-04929-1, would be cross-admissible in each case given the existence of a common scheme or plan, meeting all the requirements of admissible common scheme or plan evidence under Evidence Rule 404(b).

IV.

That each offense charged under 16-1-01561-3, 16-1-01560-5, and 16-1-04929-1 involving victims A.M., S.D.-F., and R.C. constitutes evidence of Morgan's sexual motivation and intent to sexually abuse children for the purposes of sexual gratification for the purpose of proving the offense of child molestation, as opposed to non-sexual conduct.

V.

That offenses charged under 16-1-01561-3, 16-1-01560-5, and 16-1-04929-1 involving victims A.M., S.D.-F., and R.C. would be cross-admissible in each case to show Morgan's sexual motivation and intent to sexually abuse children for the purposes of sexual gratification, meeting all the requirements for motive / intent evidence under Evidence Rule 404(b).

VI.

That the State's evidence as to each count under 16-1-01561-3, 16-1-01560-5, and 16-1-04929-1 involving different child victims is strong as it involves evidence from multiple sources.

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VII.

1 That the defense to all the counts under 16-1-01561-3, 16-1-01560-5, and 16-1-  
2 04929-1 is general denial and there is no conflict between the defenses under separate cause  
3 numbers and as to counts involving separate children.  
4

VII.

5 That the court will instruct the jurors to consider each count separately and the  
6 evidence is not so complex that the jury will not be able to separate evidence of one count  
7 from another.  
8

VII.

9 That considerations of judicial economy favor the joining of trials given the  
10 enormous burden of separate trials on the court system, witnesses, and victims.  
11

VIII.

12 That joinder of the offenses under 16-1-01561-3, 16-1-01560-5, and 16-1-04929-1  
13 does not cause undue prejudice given the similar nature of the offenses, the ability of jurors  
14 to compartmentalize the evidence, the strength of the evidence as to each count, the lack of  
15 conflicting defenses, and that the offenses would be cross-admissible at trial as evidence of a  
16 common scheme or plan.  
17  
18

VIX.

19 That the offenses with which Morgan and Hall have been charged under 16-1-01561-  
20 3, 16-1-01560-5, and 16-1-04929-1 are of similar character pursuant to Criminal Rule 4.3 as  
21 they are all sex offenses involving minor children under 12.  
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X.

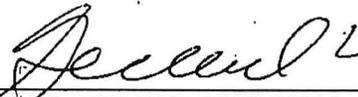
1 That the offenses with which Morgan has been charged under 16-1-01561-3, 16-1-  
 2 01560-5, and 16-1-04929-1 are based on the same conduct or on a series of acts connected  
 3 together or constituting parts of a single scheme or plan pursuant to Criminal Rule 4.3 as  
 4 each count is part of a common scheme or plan involving Morgan and Hall.  
 5

XI.

6  
 7 That the Court finds that the counts under 16-1-01561-3, 16-1-01560-5, and 16-1-  
 8 04929-1 shall be joined for trial as there is no compelling reason not to join these offenses  
 9 absent a motion upon change of circumstances at a later date.  
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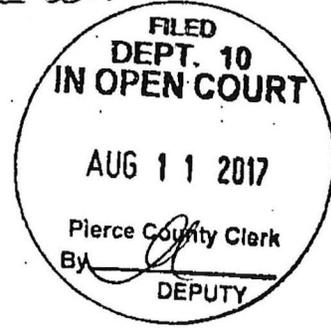
1 The Court's oral ruling on this issue was given in open court in the presence of the  
2 defendant on June 12, 2017.

3  
4 The findings and conclusions were signed in open court in the presence of the  
5 defendant June 30, 2017.

6  
7   
8 JUDGE GERALD JOHNSON  
CAROL E. JENKINS

9 Presented by:

10   
11 Erica Eggertsen  
12 Deputy Prosecuting Attorney  
13 WSBA# 40447

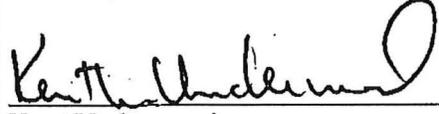


14 Presented by:

15   
16 Robert Yu Long Kocum  
17 Deputy Prosecuting Attorney  
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19 Approved as to Form:

20  14382  
21 Bryan Hershman  
22 Defense Counsel  
23 WSBA#

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25 Kent Underwood  
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28 ele

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**BURI FUNSTON MUMFORD, PLLC**

**May 01, 2019 - 1:52 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 51555-5  
**Appellate Court Case Title:** State of Washington, Respondent v. Shawn Morgan, Appellant  
**Superior Court Case Number:** 16-1-01561-3

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