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Division II
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NO. 51777-9-II

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

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STATE OF WASHINGTON, Appellant

v.

CORY TAYLOR PRATT, Respondent

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FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-02135-2

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# BRIEF OF APPELLANT

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## ASSIGNMENTS OF ERROR

I. Trial court erred in finding that Pratt had an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime.

II. The trial court erred in finding that Pratt had an established relationship with a child that he only "knew of."

III. The trial court erred in finding that Pratt had an established relationship with the victim based on the fact that the defendant was the victim's mother's step-sister's husband's nephew whom the victim and her parents had never met before.

IV. The trial court erred in finding that Pratt had been acquainted with the victim's family.

V. The trial court erred in finding that Pratt had contact with the victim at the party prior to molesting her.

VI. The trial court erred in finding Pratt qualified for SSOSA.

VII. The trial court erred in imposing a statutorily unauthorized SSOSA sentence.

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results showed that he had sexual interest in female children both above and under the age of five, and who had no established relationship with the victim, against the victim's wishes.

## ISSUES PRESENTED

I. Does a defendant who "knew of" the victim, but never met before the time of the molestation, have a sufficient connection or established relationship with the victim so as to qualify for SSOSA?

II. Does a defendant who is tangentially related to a child by way of his uncle's marriage to the step-sister of the victim's mother have an established relationship with the victim based on this familial connection?

III. Did the trial court err in granting SSOSA to a defendant who did not have an established relationship to the victim?

IV. Did the trial court abuse its discretion in granting SSOSA to a defendant who was not amenable to treatment, who denied the crime occurred, who denied any sexual deviancy despite testing showing he was sexually attracted to female children, and against whom the victim objected to a SSOSA disposition?

## STATEMENT OF THE CASE

After ten-year-old M. disclosed that Cory Pratt (hereafter 'Pratt'), a man she had never met before, touched her crotch, butt, leg and arm, while she was at her cousin's sleepover birthday party, the State charged Pratt with Child Molestation in the First Degree. CP 2-5.[1] Prior to trial the State amended the information to add a second count, Attempted Child

[1] There were multiple clerk's papers filed with this Court. The State refers to the Second Amended Clerk's Papers and the Corrected Clerk's Papers filed with this Court on March 28, 2018.

Molestation in the First Degree. CP 38-39. Pratt waived his right to have a jury trial, and requested a bench trial. CP 40. Pratt's trial was held on October 2 and 3, 2017 before Clark County Superior Court. CP 68. After hearing from ten witnesses and considering multiple admitted exhibits, the Court found Pratt guilty of Child Molestation in the First Degree as charged in count 1. CP 68-72; RP 313.[2] The court imposed the special sex offender sentencing alternative (SSOSA) over the State's objection and against the victim's wishes. CP 99-115; RP 348, 360. The State filed a notice of appeal of the sentence imposed. CP 185.

At trial the State called Sarah Jackson, M., M's parents, Troy Howington, and two police officers in its case in chief. Pratt called two witnesses and also testified in his defense. The trial testimony is summarized as follows:

In July 2016, Sarah Jackson lived in Vancouver, Washington with her husband, her three children, and her husband's mother. RP 47. Ms. Jackson's husband is Troy Howington. RP 47. Pratt is her husband's

[2] As both the State and Pratt filed notices of appeal in this matter, both parties had verbatim reports of proceedings prepared. The State refers to the verbatim report of proceedings arranged by the State, transcribed by Reed Jackson Watkins, LLC, and filed with this Court on April 16, 2018.

nephew. RP 48. Ms. Jackson has a step-sister named Jennifer.[3] Jennifer has three children, one of whom is M. RP 48.

Ms. Jackson's eldest child, H., turned 7 on July 22, 2016. RP 50-51. They had a birthday party at their house for H. on Saturday, July 23, 2016 that was a sleepover party, ending on July 24, 2016. RP 52. On Saturday at the party, the girls who attended H.'s party participated in swimming, playing in the backyard, birthday cake and presents. RP 56. In the evening they had s'mores and sat around the fire telling scary stories. RP 57. They set up a tent in the backyard for the girls to have a camp-out. RP 58. Some of the girls had their own sleeping bags, others used blankets, and they had set up air mattresses for the girls to sleep on. RP 60. The girls went to bed in the tent around 10pm, falling asleep by 10:30pm. RP 62-63. One of the guests was Pratt's daughter, who asked him to come lay next to her in the tent that night. RP 66. After the girls all went to sleep, Pratt and Mr. Howington left to play Pokemon Go. RP 67. Ms. Jackson stayed at the house, going to bed by midnight. RP 67. Pratt and Mr. Howington returned around 5:30am. RP 69-70. Pratt went into the tent to lay down. RP 70.

The next morning, Ms. Jackson saw M. using her phone; at one point she said she was calling her grandmother. RP 75. Later that morning

[3] To preserve the victim's privacy, the State refers to her parents by their first names only. The State intends no disrespect.

into afternoon Ms. Jackson noticed that M. was acting a little funny; Ms. Jackson asked her what was wrong and M. told her it was personal. RP 76. Ms. Jackson noted that M. was wanting to go home and eagerly waiting for someone to come pick her up. RP 80. She climbed a tree to watch for traffic over the fence. RP 80.

The following day Jennifer called Ms. Jackson, crying. RP 85. She told Ms. Jackson what M. had told her had happened; Ms. Jackson and Mr. Howington then talked to Pratt, telling him what M. had said. RP 85-86.

Ms. Jackson could not testify for sure as to whether M. or her parents knew Pratt, but assumed they had to have known of each other as Pratt has been a part of Ms. Jackson's own life for so long and would have been at family get-togethers. RP 53-54. Ms. Jackson concluded however that M. and her parents likely had never talked to each other or had a conversation. RP 54. Ms. Jackson never observed M. and Pratt interact at the party on Saturday, or the following day. RP 76-77.

Troy Howington's sister is Pratt's mother, making Pratt Mr. Howington's blood nephew. RP 88. However, Mr. Howington and Pratt are somewhat close in age and they have a close relationship. RP 88. Mr. Howington testified similarly to his wife about the events of the birthday party for his daughter H. in July 2016. RP 89-93. Mr. Howington also

noticed a change in M.'s demeanor from the Saturday of the party to the next day. RP 94. On Saturday M. was happy and appeared to be enjoying herself and the next day she seemed a little down. RP 94. Mr. Howington testified that he and Pratt had been smoking marijuana off and on since Saturday afternoon into the evening; they also drank multiple beers each that evening after the girls went to sleep. RP 95-96. Pratt and Mr. Howington went out after the girls went to bed on Saturday night to play Pokemon Go; they went to a nearby park and stayed there until 4:45am. RP 98-99. They arrived back at Mr. Howington's house around 5am and stayed up for another half hour. RP 99. Mr. Howington believes they again smoked marijuana once they returned to his house. RP 100.

Jennifer is M.'s mom. RP 113. Jennifer is married to M.'s father, Donald, and they all live in Corbett, Oregon, with M.'s two sisters. RP 113. M. was born on August 14, 2005 and has never been married. RP 114. Jennifer's step-sister is Ms. Jackson. RP 116. Near the end of July 2016, M. and her two sisters went to Ms. Jackson's house for a sleepover birthday party for H.'s birthday. RP 117. Jennifer's mother took the girls to the party and dropped them off. RP 118. The girls returned the following day. RP 118. When M. first came home from the birthday party she was acting a little different. RP 119. She was on the phone with her grandmother. RP 119. M. has a close relationship with her grandmother.

RP 116. M. came out of her room and told Jennifer that she needed to talk to her. RP 119. M. seemed scared; she started crying and said she was scared to tell her. RP 120. M. was also scared her parents would be mad at her. RP 120. As soon as M. told Jennifer a little bit about the incident she took M. to go include Donald in the conversation. RP 120. After learning about what happened, Donald called the police. RP 121. An officer came out that same day and talked to them. RP 121. Jennifer called Sarah and told her what M. had said. RP 121-22.

Prior to the incident, M. did not have problems sleeping, nor did she suffer from nightmares. RP 122. After the incident, for the next few months, M. had trouble sleeping and said she kept remembering what happened. RP 122, 170.

Jennifer testified that she did not know Pratt, had never interacted with him, and had never had a conversation with him, and to her knowledge has never been at any gathering that he has attended. RP 115.

Donald is M.'s father. RP 177. At the time of the birthday party at his wife's step-sister's house in July 2016, Donald had never met the defendant and had never spoken to him; to his knowledge M. had never met him either. RP 177. Donald was aware that M. went to a party at Ms. Jackson's house, but does not recall any details surrounding how his daughters went to the party or returned from the party. RP 177-79. Donald

does remember M. sharing some surprising information with him. RP 178. He recalls she had talked to his mother, who told her to tell her mom and dad. RP 179. Donald then called the police. RP 179.

Kathleen Davidson is Donald's mother, making her M.'s paternal grandmother. RP 125. Ms. Davidson had a close relationship with M. RP 116, 126, 179-80. The morning after the sleepover, Ms. Davidson received a phone call from M., but Ms. Davidson was either asleep or outside when M. tried calling. RP 126. M. left a voicemail and in it she sounded anxious and scared. RP 128. Over that morning M. left multiple voicemails and she sounded anxious and scared in the other messages as well. RP 128. Ms. Davidson and M. did connect on the phone later that morning. RP 128. M. told her grandmother that something had happened, but that she couldn't talk about it right then. RP 129. M. called her grandmother again when she was in the car on her way home. RP 130. M. then called Ms. Davidson again once she got home. RP 130. During their third conversation that day, Ms. Davidson urged M. to tell her parents what she had told her, but M. was worried and anxious about doing so. RP 131.

M. also testified at trial. RP 149. She testified she went to her cousin's 7th birthday party with her sisters. RP 157. At the party they made s'mores and camped out in a tent. RP 158. When M. went to bed, she was alone on her air mattress inside the tent. RP 159. But "something

happened." RP 151. She woke up, feeling something, and saw someone was touching her. RP 151. She eventually rolled off her bed and tried to stay quiet. RP 151. She could see it was a man's arm touching her on her front crotch. RP 152. The man was rubbing her on her front crotch with his hand. RP 153. M. then rolled over onto her left side, facing away from the man touching her. RP 153-54. He then touched her on her lower back, and M. again rolled away from him, this time off of the air mattress she had been on and onto the ground. RP 155-56. When she was touched, M. felt scared and had the chills. RP 156. After they woke up later that morning, M. tried to tell two girls at the party what had happened, but wasn't able to; she then called her grandmother. RP 164-65. Her grandmother told her she needed to tell her parents and if she hadn't done it in 10 minutes that she would call her dad. RP 166. So then M. told her mom. RP 165. Her mom got upset and they told her dad and her dad got mad and called the police. RP 166. M. had been worried about telling her parents what had happened; she was worried they would be upset at her. RP 167.

M. participated in a forensic interview about what happened. RP 15-18. A large portion of it was played during the trial as a recorded recollection. RP 195-222. M. told the interviewer that she woke up to the defendant touching her on her crotch, the area that she would go pee from.

RP 202. M. said that after she rolled away, he reached for her arm and she pulled her arm away. RP 208. He then tried to rub her leg, but she scooted over; he then started touching her bottom. RP 208. The defendant was rubbing her with his hand. RP 209. M. also told the forensic interviewer she had never met the defendant or his daughter before. RP 215.

During Pratt's testimony at trial he could not remember M.'s name. RP 236. In describing the children present at the party he referred to M. and her sisters, naming one of her sisters and then saying "I forget the other two names." RP 236. Pratt indicated he had never met M. before the sleepover, and had no interaction with her. RP 261-62.

In giving its verdict, the Court noted that M. and Pratt "had never met." RP 308. The Court further stated, "M. is a stranger who is at a party with him." RP 308. The trial court further found the aggravator of abuse of trust was not met because M. and Pratt "were, in essence, almost total strangers. There was no relationship. Short-term, just meeting at this party before." RP 311. The Court found Pratt guilty of Child Molestation in the First Degree. RP 313. In its written findings, the Court noted that M. had not met Pratt prior to the day of the party. CP 69.

At sentencing, the State asked the Court to impose a standard range sentence. RP 347-52. The pre-sentence investigative report recommended a standard range sentence. CP 51. Pratt continued to deny the crime

occurred, but was able to find a treatment provider who indicated he would be amenable to treatment with a provider who was willing to work with "deniers." CP 85-94. Pratt asked the Court to impose SSOSA. RP 353-58. The State objected to granting SSOSA, indicating the victim opposed SSOSA, the defendant took the matter to trial and denied the crime occurred, and argued that Pratt did not have a relationship or connection to M. which made him ineligible for SSOSA. RP 347-52. Over the State's objection, the Court granted SSOSA. RP 360; CP 99-100.

In deciding to order SSOSA the trial court agreed the defendant's relationship to the victim was "tenuous." State's RP 360. The trial court also indicated that it was not a situation in which the defendant "sought out the victim for the purposes of committing the act," as the defendant "knew of the [victim]" and he "knew of the parents [of the victim]." State's RP 360. In its written findings on this issue, the trial court found that Pratt and M. had an established relationship or connection because M.'s family is related through marriage to Pratt's family, Pratt knew of M. and had been acquainted with M.'s family, Pratt and M. were both invited to the same party, and M. and Pratt had contact at the party other than the molestation. CP 99. The trial court entered written findings, stating the reasons the court granted the defendant's request for SSOSA. CP 99-100.

Thereafter the State filed its notice of appeal. CP 185. Pratt also filed a notice of appeal. CP 116. The State is designated the appellant/cross-respondent in this matter.

## ARGUMENT

As an initial matter, the State may appeal the sentence imposed in this case as the State retains the availability of appellate review of a sentence that is based upon an erroneous legal conclusion or when the trial court abused its discretion in determining which sentence to apply. *State v. Willhoite*, 165 Wn.App. 911, 268 P.3d 994 (2012) (citing *State v. Kinneman*, 155 Wn.2d 272, 119 P.3d 350 (2005)). The State is also permitted to challenge the underlying facts and legal conclusions by which a court applies the chosen sentencing provisions, and RAP 2.2(b)(6) allows appeal of a sentence that "includes provisions that are unauthorized by law." *Id.* (citing *Kinneman*, 155 Wn.2d at 283 and *State v. Wood*, 117 Wn.App. 207, 70 P.3d 151 (2003)); RAP 2.2(b)(6).

In *Willhoite*, the Court found the State's challenge to the trial court's imposition of a SSOSA sentence was not a challenge to the length of the sentence within the standard range, but rather was a challenge to the trial court's legal determination that the SSOSA sentencing provisions applied at all. *Willhoite*, 165 Wn.App. at 914-15. The Court therefore held

the State's challenge was properly before the court on appeal. *Id.* at 915. Likewise in this case, the State challenges the legal applicability of the SSOSA sentencing provisions to Pratt's case, and challenges the trial court's decision that SSOSA was both an available and appropriate sentencing option. Therefore this appeal is properly before this Court.

### A. CERTAIN TRIAL COURT FACTUAL FINDINGS ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

Several of the trial court's findings of fact are not supported by substantial evidence and thus its decision to impose SSOSA was erroneously based on unsupported factual findings. Those factual findings should be found to be unsupported by the record.

This Court reviews a trial courts findings of fact for substantial evidence. *State v. Rooney*, 190 Wn.App. 653, 360 P.3d 913 (2015) (citing *State v. Russell*, 180 Wn.2d 860, 330 P.3d 151 (2014)). Substantial evidence is evidence that is sufficient to persuade a fair-minded person of the truth of the stated premise. *Russell*, 180 Wn.2d at 866-67. When no evidence in the record supports a stated premise, there is no "substantial evidence." *See State v. Pippin*, 200 Wn.App. 826, 403 P.3d 907 (2017) (unpublished portion).[4] There was no evidence presented to the trial court

[4] GR 14.1 allows citation to unpublished cases of the Court of Appeals issued after March 1, 2013. This portion of the opinion is not binding on this Court and may be accorded such persuasive value as this Court sees fit.

that Pratt had been acquainted with M.'s family and there was no evidence that Pratt and M. had contact at the party other than the molestation. These two factual findings by the trial court are not supported by any evidence, let alone substantial evidence.

No one testified at trial that Pratt had been acquainted with M.'s family. Jennifer, M.'s mother, testified that she had never met Pratt before, had never spoken to him, and had never been to a family gathering where he was present. RP 115. M.'s father, Donald, testified to the same. RP 177. M. also indicated in her forensic interview that she had never met Pratt before. RP 215. Pratt testified that he had never met M. before. RP 261-62. Mr. Howington's testimony never referred to his knowledge of whether Pratt knew M. or her family. Ms. Jackson testified that she had thought that Pratt knew M.'s parents, but could not testify to that for sure. RP 53-54. As she testified, Ms. Jackson appeared to remember more and indicated that M. and M.'s parents had likely never spoken to Pratt. RP 54. The trial court even made a finding from the trial that M. had not met Pratt before the party. RP 308; CP 69. In its oral rulings, the trial court referred to Pratt as a "stranger" to M. and that there was "no relationship" between them. RP 308. No other evidence was presented that Pratt had any kind of an acquaintanceship with M.'s family. The trial court had nothing to base its finding that Pratt had an acquaintanceship with M.'s family on. There

was no evidence actually presented that affirmatively showed they were acquainted. Furthermore, any fair-minded person would have been convinced that M.'s family was *not* acquainted with Pratt based on the testimony of all the witnesses. There is no substantial evidence to support the trial court's finding that M.'s family was acquainted with Pratt. No fair-minded person would be convinced of the truth of that statement. As such, this finding of fact should be found to be unsupported by the evidence.

The trial court also erred in making a factual finding that M. and Pratt had interacted at the party prior to the molestation. There was no evidence presented to support this premise. Ms. Jackson testified that she did not observe any interaction between M. and Pratt at the party. RP 76-77. Pratt also testified he had no interaction with M. RP 261-62. M. never made any mention of interacting with Pratt at the party. This finding has no basis in any established fact. It was created out of whole cloth. All the witnesses testified to the opposite. The trial court could not have possibly found substantial evidence that Pratt and M. had interacted prior to the molestation as not a single shred of evidence was introduced to support that premise. The trial court erred in entering that finding of fact.

With those two findings proven to be unsupported by substantial evidence, the trial court's conclusion that M. and Pratt had an established relationship or connection is unsupported by the court's findings.

### B. THE TRIAL COURT ERRED IN IMPOSING SSOSA AS PRATT IS NOT ELIGIBLE FOR SSOSA

Pratt did not meet all the eligibility requirements for SSOSA and the trial court erred in imposing the sentence. Pratt did not have an established relationship or connection to the victim such that the only purpose of the relationship was not the commission of the crime. The trial court's imposition of SSOSA should be reversed and the case should be remanded for a new sentencing hearing.

The requirements for an offender's eligibility for a SSOSA sentence are set forth in RCW 9.94A.670(2). One of the requirements is that "the offender had an established relationship with, or connection to, the victim such that the sole connection with the victim was not the commission of the crime...." RCW 9.94A.670(2)(e). Pratt failed to meet this eligibility requirement. Pratt had never met M. or her family before; he had no interaction with her except for his molestation of her while she was asleep at a sleepover to celebrate her cousin's seventh birthday; and "knowing of" someone's existence does not equate to an established relationship or connection to that person.

Whether a defendant is eligible for SSOSA is a question of statutory interpretation. *State v. Landsiedel*, 165 Wn.App. 886, 269 P.3d 347 (2012) (citing *Dot Foods, Inc. v. Dept. of Revenue*, 166 Wn.2d 912, 215 P.3d 185 (2009)). This Court reviews a defendant's eligibility for SSOSA de novo. *Id.* A court's main duty in interpreting a statute is to carry out the legislature's intent. *Lake v. Woodcreek Homeowners Ass'n*, 169 Wn.2d 516, 243 P.3d 1283 (2010). The Court first looks to the plain meaning of the statute. *Id.* If the plain language is unambiguous, then the legislative intent is apparent from the language used, and this Court will not construe the statute otherwise. *State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318 (2003); *State v. Armendariz*, 160 Wn.2d 106, 156 P.3d 201 (2007). If the language of a statute is susceptible to multiple meanings, then a Court may look to legislative history to determine the meaning of the statute. *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 43 P.3d 4 (2002). A statute's plain meaning may be determined by analyzing what the legislature has said in the statute and related statutes which may disclose the legislature's intent regarding the statute in question. *J.P.,* 149 Wn.2d at 450. Plain meaning is "discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Engel,* 166 Wn.2d 572, 210 P.3d 1007 (2009). In determining the plain

meaning, Courts are careful not to add words, and all the language of the statute must be given effect. *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 80 P.3d 598 (2003).

No statute further defines "established relationship" or "connection to" as used in the SSOSA statute. Among its many meanings, Merriam-Webster defines "establish" as "to institute (something, such as a law) permanently by enactment or agreement; to make firm or stable; to gain full recognition or acceptance of...." *Merriam-Webster.com* (retrieved May 29, 2018, from https://www.merriam-webster.com/dictionary/established). In Black's law dictionary, "establish" is defined as "to found, to create, to regulate, to make or form, to found, recognize, confirm...." Black's Law Dictionary (retrieved May 29, 2018, from https://www.thelawdictionary.org/establish). Established being the past tense of the verb "to establish," we can conclude that when used as an adjective it means something formed, created, stable, fully recognized or accepted, or previously instituted or enacted. Of the word "relationship's" many definitions, as applicable here it is defined as "a state of affairs existing between those having relations or dealings." *Merriam-Webster.com* (retrieved May 29, 2018, from https://www.merriam-webster.com/dictionary/relationship). Black's Law Dictionary defines "relationship" as "a particular type of connection existing between people

related to or having dealings with each other." Black's Law Dictionary (retrieved May 29, 2018, from https://www.thelawdictionary.org/relationship). Therefore an "established relationship" is a formed, created, stable, fully recognized or accepted, or previously instituted state of relations or connection between people. The word "connection" is defined in Merriam-Webster as "the act of connecting; the state of being connected; contextual relation or association; relationship in fact; a relation of personal intimacy; a person connected with another especially by marriage, kinship, or common interest; a political, social, professional, or commercial relationship." *Merriam-Webster.com* (retrieved May 29, 2018 at https://www.merriam-webster.com/dictionary/connection).

The meaning of "established relationship" and "connection" are not susceptible to multiple meanings. It is clear that the plain meaning of the words in RCW 9.94A.670(2)(e) that the legislature intended SSOSA to be for individuals with whom the victim knew, and had prior dealings with, someone the victim *had a relationship with*, a relationship that was based on more than simply the criminal act perpetrated against the victim. When all the language of the statute is given effect, it is evident that only offenders who knew their victims, who had dealings with their victims, and who was someone inside the victim's world, are eligible for SSOSA.

Anyone whose only connection to the victim is the crime itself is not eligible. Pratt had no standing, formed, stable, recognized or accepted relationship or connection to M. By all accounts he had never spoken to her before, and in fact, from all the testimony taken at trial *still* has never spoken to her as he did not utter a word as he molested her. Knowing *of* another person's existence does not create a connection or relationship with that person. Pratt had no established relationship with M. and the trial court erred in concluding he did.

If this Court finds that the terms "established relationship" and "connection to" are subject to multiple meanings, then it should consult the legislative history.

The Legislature added the requirement that the offender have an established relationship with, or connection to, the victim apart from the commission of the crime in 2004. LAWS OF 2004, ch 176, sec 4. The new provisions are clearly a greater limitation on eligibility of an offender for SSOSA. Of course, not every offender is eligible for SSOSA, but this was precisely the Legislature's intent. In 2004, the Legislature noted,

> SSOSA helps to encourage victims to come forward and can help prosecutors get convictions in tough cases.
>
> . . .

> SSOSA was originally designed for victims to try to get cases into court that would not be there, if not but for the sentencing alternative. SSOSA has been an important and narrowly used option for victims. The substitute puts great weight on victim input and narrows the pool of eligible persons.
>
> ...
>
> The majority of sex crimes against children are committed by people who have a relationship with the child. For those kids and their parents, you have to have the SSOSA option available. If the treatment option is eliminated, people will go underground.

Washington House Bill Report, 2004 Reg. Sess. H.B. 2400. It's clear the original intent in enacting a sentencing alternative for sex offenders was to encourage reporting of these offenses by victims, and to increase the likelihood of obtaining convictions in difficult cases. *See id.* The 2004 amendment was intended to promote that goal, but also to narrow the pool of eligible offenders as a major state interest is the protection of children. *Id.* (stating "There is no more essential duty for the Legislature than the protection of lives and the administration of justice. Persons guilty of victimizing our children must serve time. A message must be sent for the sake of children - if you do the crime, you do hard time. This bill will give families and victims justice. As for the costs of the bill, the safety of our children is priceless. Everything possible should be done to protect children. Use of SSOSA has led to sentences for these crimes dramatically

below the standard range. People get much more severe punishment for less serious crimes").

In essence, the inclusion of a requirement that the victim have a relationship with the perpetrator furthered the original intent of the SSOSA statute which was to promote reporting of sexual crimes against children perpetrated by family members, in the hope that the possibility of no prison sentence would make reporting more palatable and thus a more frequent occurrence. *See State v. Jackson*, 61 Wn.App. 86, 809 P.2d 221 (1991) (noting that one of the legislature's reasons for creating the sex offender sentencing alternative was because "providing alternatives to confinement had resulted in increased reporting of sex crimes, especially in the case of intrafamily abuse."). Allowing SSOSA for an individual who has never spoken to the victim, and who can't even remember her name when he is testifying at his trial for molesting her, was clearly not what the legislature intended in creating and amending the SSOSA statute. Pratt is not the person whom the legislature intended SSOSA to cover; he is ineligible because he did not know M., did not interact with her at all, did not know her family, and was not a part of her life in any way. If the victim's mother's step-sister's husband's nephew is considered to have a relationship or connection to the victim by virtue of his uncle's marriage to a woman whose father married the grandmother of the victim, then

practically anyone could be determined to have a "connection to" or "established relationship" with the victim of his or her sex crime. Especially in smaller cities and counties, where many people know people who attend the same schools, work for the same companies, have previously dated someone's cousin, or have mutual friends on Facebook, the words of RCW 9.94A.670(2)(e) would be rendered meaningless as nearly any defendant could claim a connection to a victim by virtue of his mother's cousin's brief dating history with the victim's second cousin once removed. This was not the intent of the legislature.

A trial court is statutorily prohibited from imposing a SSOSA sentence when the defendant does not meet the eligibility criteria under RCW 9.94A.670. *See State v. Adams*, 119 Wn.App. 373, 82 P.3d 1195 (2003). Pratt did not meet the eligibility criteria for SSOSA as he did not have an established relationship or connection to M. The trial court even recognized this very fact in delivering his verdict; the trial court's reasons for not finding that this was an abuse of trust was because Pratt and M. were virtually "strangers" and had not met prior to the birthday party. The trial court correctly did not find a trust relationship when it clearly considered whether M.'s parents had a trust relationship with the defendant. No trust relationship existed. No relationship existed. Pratt was a stranger to M., a stranger who violated her in a terrible way when she

was meant to be having a carefree sleepover for her little cousin's birthday. And to this day, Pratt has not spoken a word to M.

The trial court erred in finding there was an established relationship or connection between Pratt and M. As there was no relationship or connection, Pratt was not eligible for a SSOSA sentence and the trial court imposed an unlawful sentence. Pratt's sentence should be reversed and the matter should be remanded for a new sentencing hearing wherein the trial court imposes a statutorily authorized sentence.

### C. THE TRIAL COURT ABUSED ITS DISCRETION IN GRANTING SSOSA

Many reasons exist, and were presented to the court, that do not support a SSOSA sentence: the victim opposed the imposition of SSOSA; throughout trial and sentencing Pratt was adamant that he did not abuse M.; the evaluation for amenability to treatment discusses a central issue being Pratt's denial of his crime and that the main focus of most treatment programs was coming to terms with the behaviors and crimes the defendant perpetrated; the evaluation for amenability to treatment indicates Pratt will have to find a treatment provider who is willing to work with "deniers;" Pratt insists he is "sexually well-adjusted" and has no sexual deviancy, and the trial court failed to consider whether the

community would benefit from imposition of a SSOSA sentence. The trial court abused its discretion in sentencing Pratt to SSOSA.

A trial court's decision to grant or deny a defendant's request for SSOSA is reviewed for an abuse of discretion. *State v. Sims,* 171 Wn.2d 436, 256 P.3d 285 (2011). A trial court abuses its discretion if its decision is manifestly unreasonable or based upon untenable grounds or for untenable reasons. *State v. Cunningham*, 96 Wn.2d 31, 633 P.2d 886 (1981). In determining whether SSOSA is appropriate the trial court is not bound by expert opinion. *State v. Hays*, 55 Wn.App. 13, 776 P.2d 718 (1989); *State v. Toomey*, 38 Wn.App. 831, 690 P.2d 1175 (1984).

The SSOSA statute requires that prior to entering a SSOSA sentence, the trial court shall consider whether the community will benefit from use of this alternative sentence. RCW 9.94A.670(4). The trial court failed to make a finding that the community would be better off having Pratt out in the community under SSOSA as opposed to in custody. Without that consideration and finding, the trial court failed to follow the requirements of RCW 9.94A.670 and improperly imposed SSOSA without considering all the required factors. It's hard to imagine that it would benefit the community to have an offender who believes he has no problem, insists he did nothing wrong, and does not believe he needs treatment but is "willing" to do it, out in the community under a SSOSA

sentence. Instead, putting an offender who denies he has a problem, will only be participating in treatment to satisfy the court's order, likely without getting anything out of it as he'll believe it's all inapplicable to him, and who has impulse control problems and drug abuse issues, will only put the children in the community more in danger. The trial court should have considered whether this alternative would benefit the community and should have found that it would not. This failure was an abuse of the trial court's discretion.

The trial court further abused its discretion in finding Pratt was amenable to treatment. RCW 9.94A.670(4) requires the court to consider whether the offender is amenable to treatment prior to granting SSOSA. SSOSA is limited to those offenders who are amenable to treatment. *State v. Young*, 125 Wn.2d 688, 888 P.2d 142 (1995). While the trial court did consider Pratt's amenability, it abused its discretion in finding that Pratt was amenable to treatment. "Amenability to treatment" is a legal determination and not a medical one. *Doe G. v. Dept. of Corrections*, 190 Wn.2d 185, 410 P.3d 1156 (2018). The trial court is not bound by expert opinion in making this decision. *Hays*, 55 Wn.App. at 15.

The examination report submitted by Pratt discusses Pratt's continued denial of his molestation of M. CP 85-94. As the trial court itself noted at sentencing, that "in most treatments, [admission of the

offense] is one of the first things that are really accomplished, and the success rate of treatment is better where people admit." RP 360. The examination report also does not indicate Pratt is actually *amenable* to treatment, but rather indicates his denial does not necessarily mean he couldn't be amenable, and further indicates that Pratt, like *everyone* could benefit from some cognitive behavioral therapy. CP 93. The SSOSA statute states, "The fact that the offender admits to his or her offense does not, by itself, constitute amenability to treatment." RCW 9.94A.670(4). While there is not a requirement for offenders who are convicted after a trial to admit to their offense in order to be eligible for SSOSA, the statute clearly presumes those considered for this sentencing alternative, and those who would be amenable to treatment, would at a minimum admit to their offense. The report indicates that "Although targeting denial would typically be an initial treatment goal, even those in denial can benefit from cognitive behavioral treatment programs (CBT)." CP 93. The examiner goes on to indicate Pratt would need to ensure he finds a treatment provider who "is willing to work with 'deniers.'" CP 93.

The trial court gave no indication it was aware of the examination report's findings that Pratt was shown to have sexual interest in adolescent females, latency age females, and females age five and under. CP 90. This finding in an individual who "rejects any possibility of him having

sexually acted out with a child," who believes himself to be "sexually well-adjusted," and who denies any sexual interest in young children despite the test results, and who has problems with impulsivity and drug abuse, shows Pratt is a risk to the community and not amenable to treatment as he doesn't think he needs treatment and he does not think he did anything wrong. CP 88, 90-92. Yet the court found beyond a reasonable doubt that he had sexual contact with a ten-year-old child, touching her in intimate areas for his sexual gratification. By refusing to accept that he committed a sexual offense against a child, by refusing to admit he has a problem, Pratt cannot be amenable to treatment.

The Supreme Court's discussion in *State v. Sanchez*, 146 Wn.2d 339, 46 P.3d 774 (2002) is instructive here. In *Sanchez*, the defendant argued on appeal that the trial court abused its discretion in not imposing SSOSA. *Sanchez*, 146 Wn.2d at 355. There, the defendant urged that he was not sexually deviant and that he acted only "out of normal, healthy impulses." *Id.* The Supreme Court noted, "A perfectly healthy defendant would arguably not be 'amenable to treatment.'" *Id.* The Court also noted that the defendant's request for SSOSA appeared more to be a plea for leniency as opposed to a genuine request for treatment. *Id.* The Court affirmed the trial court's decision not to impose a SSOSA sentence. *Id.* Like in *Sanchez*, Pratt maintains he is not sexually deviant, despite testing

showing he is, and despite being convicted of child molestation. As Pratt insists he is "sexually well-adjusted," and denies ever offending, he could not be considered "amenable to treatment." As is clear from the transcript of the sentencing hearing, defense reminded the court multiple times that Pratt's alleged offense was not the worst child molestation ever seen, and was, as far as these crimes go, not that bad. RP 353-59. This is further supported by the fact that Pratt asked for an exceptional sentence downward if the court chose not to impose a SSOSA sentence. *Id.* Pratt was seeking a way not to serve a standard range sentence, and saw SSOSA as the way to guarantee he would serve the least time in custody. This is not a reason to impose SSOSA and further shows that Pratt is not amenable to treatment. The trial court abused its discretion in finding Pratt was amenable to treatment and thus abused its discretion in granting SSOSA.

## CONCLUSION

The trial court erred in finding that M. and Pratt had interacted at the party and that M.'s family was acquainted with him. These factual findings which were not supported by any evidence lead the court to enter a sentence prohibited by statute. Pratt was not eligible for a SSOSA sentence and the trial court erred in sentencing him to that alternative.

Even if Pratt was eligible for SSOSA, the trial court abused its discretion in imposing a SSOSA sentence as it failed to make a finding that SSOSA would benefit the community and erred in finding Pratt was amenable to treatment. The State respectfully asks this Court to reverse Pratt's sentence and remand the matter for a new sentencing hearing.

DATED this 30th day of May, 2018.

Respectfully submitted:

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## CLARK COUNTY PROSECUTING ATTORNEY

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