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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JAMES GARDNER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stanley J. Rumbaugh

No. 17-1-01516-6

Brief of Respondent

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INTRODUCTION

Defendant James Gardner was convicted of three counts of child molestation in the third degree for touching the vagina of his girlfriend's 14-year-old daughter A.R. on three distinct occasions over the course of one evening and the following morning during the summer of 2016. Defendant's trial counsel was not ineffective for refraining from raising the issue of same criminal conduct at sentencing where the law did not support it.

A finding of same criminal conduct could not properly apply to Defendant's convictions as Defendant had "the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act," between each molestation. Consequently, Defendant's crimes were distinct, sequential, and each preceded by an independent intent, precluding a finding of same criminal conduct. Defendant's claim his counsel was ineffective for not arguing same criminal conduct fails as counsel reasonably concluded the trial court would not have found the crimes to be the same criminal conduct in light of relevant legal authority.

This Court should reject Defendant's ineffective assistance of counsel claim and affirm Defendant's sentence. This Court should also remand the case for the trial court to strike the criminal filing fee and

interest accrual provision from Defendant's judgment and sentence based on the trial court's finding of indigency.

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

1. Has Defendant raised a meritless ineffective assistance of counsel claim based on trial counsel declining to raise a same criminal conduct argument at sentencing when Defendant's molestations were distinct, sequential, and each preceded by separate intent formed during gaps of time between offenses filled with activity unrelated to sexual assault?
2. Should this case be remanded so the sentencing court can strike the filing fee and interest accrual provision given recent case law and legislation?

B. STATEMENT OF THE CASE.

1. PROCEDURE

The State charged Defendant James Gardner with four counts of child molestation in the third degree for the repeated molestation of his girlfriend's 14-year-old daughter A.R. on or between June 1, 2016, through September 30, 2016. CP 3-4. The acts underlying these four

counts were separated by time and activity over the course of a summer day and the following morning. 6RP 50-139.¹

The State relied upon a single specific act constituting the crime for each count. CP 58, 9RP 20. The jury was properly instructed that the acts underlying each count had to be separate and distinct. CP 56, 9RP 19-20. The act underlying Count I was the touching of A.R.'s vagina taking place during the day at Five Mile Lake, a public location away from Defendant's apartment. 9RP 20. The act underlying Count II was the first touching of A.R.'s vagina in Defendant's apartment bedroom later that evening. 9RP 20. The act underlying Count III was the second touching of A.R.'s vagina in Defendant's bedroom taking place after A.R. ended the first assault, left the room, and returned. 6RP 64-72, 9RP 20. The act underlying Count IV was the touching of A.R.'s vagina in her bedroom hours later the following morning. 9RP 20.

The jury returned a verdict of not guilty as to Count I. CP 62. The jury returned verdicts of guilty as to Counts II, III, and IV. CP 63-65. Defendant's offender score for each count was 6 points, the result of 3 points for each concurrent molestation conviction, resulting in a

¹ The State refers to the verbatim reports of proceedings as follows: 1RP – Volume 1, 3-1-18; 2RP – Volume 2, 3-5-18; 3RP – Volume 3, 3-6-18; 4RP – Volume 4, 3-7-18; 5RP – Volume 5, 3-8-18; 6RP – Volume 6, 3-12-18; 7 RP – Volume 7, 3-13-18; 8RP – Volume 8, 3-14-18; 9RP – Volume 9, 3-15-18; 10RP – Volume 10, 3-19-18; 11RP – Sentencing, 5-11-18.

sentencing range of 41-54 months confinement. CP 70-86; RCW 9A.94A.510; RCW 9.94A.515; RCW 9.94A.525.

The court sentenced Defendant to 50 months incarceration in the Department of Corrections. CP 75. The court imposed the \$200 filing fee at sentencing. CP 75. The judgment provided for interest to accrue on the fines until paid in full. CP 75. Defendant was found to be indigent on appeal. CP 96-97. Defendant timely appealed. CP 92-95.

2. FACTS

A.R. turned 14 years old on May 11, 2016. 6RP 20, 54. Her mother Theresa Penny had recently started dating Defendant James Gardner, who she met at the Emerald Queen Casino where they both worked the night shift. 7RP 64-65, 73. By May 2016, Penny had moved into Defendant's apartment in Tacoma. 7RP 65-70. A.R. remained living with her grandmother until the school year ended, but spent time with her mother and Defendant at his apartment. 7RP 66-67, 8RP 99-100. A.R. and Defendant had a good relationship and got along well together. 6RP 36, 7RP 70, 104-105, 8RP 117.

A.R. began living primarily with her mother and Defendant at his apartment during the summer of 2016. 7RP 69-70, 8RP 101. Around the same time, Defendant's three daughters, S.G., J.G., and A.G., came from Wyoming to stay with Defendant for the summer. 7RP 70-71. S.G. was

the oldest of the three girls and 9 years old at the time. 8R 12-13. The four girls shared one of the two bedrooms in Defendant's apartment and Defendant and Penny shared the other. 7RP 67, 71.

Throughout the summer, Defendant, Penny, A.R., and Defendant's daughters went on outings together and had movie nights at the apartment. 7RP 75. On one of the group's trips to Five Mile Lake, Defendant gave A.R. a swimming lesson for the first time. 6RP 56. Defendant touched A.R.'s vagina with his hand over her swimsuit for a few minutes while holding her body up in the water.² 6RP 50, 53-57. A.R. tried to paddle away from Defendant and didn't tell anyone what had happened, uncertain at the time whether Defendant had touched her on purpose. 6RP 57.

Penny left for her night shift at the casino later that evening after the family returned home to Defendant's apartment. 6RP 57-58. The graveyard shift at the Emerald Queen was from 9:00 p.m. to 6:00 a.m., and Defendant's apartment was approximately 10 minutes from the casino. 7RP 73. Defendant did not work that night and remained home with the four girls. 6RP 58.

Defendant told A.R. she and S.G. would be watching a movie in his room that night, instead of in the living room where movies were

² Defendant was charged with molestation based on this conduct under Count I. 9RP 20. The jury acquitted Defendant of this count. CP 62.

usually watched, and the younger girls would get a chance to watch a movie with him another time. 6RP 59-60, 8RP 26. A.R. and S.G. began watching a horror movie in Defendant's room sometime after 9:00 p.m. 6RP 60-61. The television in Defendant's room was on the wall nearest the foot of the bed. 8RP 107.

When the movie began, A.R. was in the middle of the bed, S.G. was on one side, and Defendant was sitting on a chair at his computer, drinking beer. 6RP 60-62. The lights were off and the room was dark. 6RP 60-61. Defendant got in bed next to A.R. 6RP 62. He grabbed A.R.'s waist and pulled her close to him. 6RP 63-64. At the time, Defendant was 6'1" and approximately 320 pounds, while A.R. was about 5'4" and under 100 pounds. 6RP 64, 71, 8RP 93, 117-118. A.R.'s body was turned towards S.G., who appeared to be absorbed in the movie. 6RP 64-65. Defendant started to touch A.R.'s vagina with his hand. 6RP 63-64.

A.R. asked Defendant what he was doing and he said "sorry." 6RP 64-65. A.R. asked S.G. to get up so she could move off the bed and go out to the kitchen. 6RP 123, 126. A.R. left the room and tried and failed to reach her mother by phone. 6RP 65. She stayed in the kitchen for a few minutes, uncomfortable and unsure of what she should do. 6RP 65-66.

S.G. came into the kitchen, wanting to know where A.R. had gone and whether she was coming back to Defendant's room to watch the rest

of the movie. 6RP 65-66. A.R. returned to Defendant's room with S.G. but asked S.G. to switch places with her on the bed so S.G. would be between her and Defendant. 6RP 66, 68-69. A.R. tried to get on a different spot on the bed. 6RP 69. Defendant wouldn't let the girls switch spots. 6RP 69-70. He told S.G. she needed to learn how to be grown up and told her to stay on the outside of the bed. 6RP 69-70.

A.R. returned to the middle of the bed between Defendant and S.G. 6RP 70. She felt discomfort and scooted close to S.G. 6RP 70. Defendant again pulled A.R. towards him. 6RP 70. A.R.'s back was against Defendant's body. 6RP 70. Defendant reached under A.R.'s pants and touched A.R. on her vagina with his hand using a cupping motion. 6RP 71.

In shock and discomfort, A.R. asked Defendant why he was doing it, and he again said "sorry." 6RP 72. A.R. left the bed, again having S.G. move so she could get out of the bed on the side not blocked by Defendant. 6RP 126. A.R. "freaked out" and tried and failed to reach her mother once again. 6RP 72. This time, A.R. decided to go to the second bedroom where A.G. and J.G. were sleeping. 6RP 72. She kept her clothes on and wrapped herself in a comforter in case something happened again. 6RP 74. A.R. estimated this happened around 11:00 p.m. 6RP 74.

A.R. woke up the next morning around 5:00 or 6:00 a.m. to Defendant on top of her with his hand in her pants touching her vagina. 6RP 74-75. A.R. began crying and asked Defendant why he wouldn't stop touching her. 6RP 76. A.R. and Defendant both got up. 6RP 76. Defendant said he was "sorry" and told A.R. she needed to stop watching horror movies. 6RP 76. A.R. noticed Defendant's voice was "slurry" when he said this. 6RP 83 A.R. left the bedroom and tried to call her mother again. 6RP 84.

A.R.'s mother, Penny, confirmed A.R. called her quite a few times while she was working but she didn't answer due to being on duty. 7RP 77-78, 116. When her shift ended, she had both text and voicemail from A.R. 7RP 77-78, 109. On voicemail, A.R. was crying, "freaking out," telling her mother to hurry up and get home, and saying she was scared of Defendant. 7RP 77-78, 116-117. Penny called A.R. back around 6:00 a.m. 7RP 77-78. A.R. told Penny she was scared of Defendant, who she said had been drinking and had touched her. 7RP 77-78. A.R. was crying and appeared to be having a panic attack as she described what happened. 7RP 78.

Penny hurried home and spoke to A.R. when she arrived. 7RP 79. A.R. was upset and crying and told her what Defendant had done through words and motions. 7RP 79-80. Penny confronted Defendant, who said he

didn't know what she was talking about and didn't recall touching A.R. 7RP 80-81. Defendant testified at trial and denied molesting A.R. at any time. 8RP 114-114. He remembered the movie night, but said the movie began before Penny left at 11:00 p.m., all four girls had been in the bedroom for the movie, he was never next to A.R., and A.R. never got up during the movie. 8RP 104-111.

After speaking with her that morning, Penny took A.R. to her grandmother's home before returning to Defendant's apartment. 7RP 80-82. Penny did not contact police and a few weeks later sent A.R. to live with her biological father and his wife in North Carolina. 7RP 83-89. In the Fall of 2016, A.R. told her stepmother about Defendant molesting her. 6RP 151-152, 175. Her father immediately notified the police. 6RP 154-155, 176.

Defendant's daughter S.G. testified she remembered watching a scary movie in Defendant's room while Penny was at work, and said all four girls were present. 8RP 33-34. S.G. testified that A.R. had woken her up in the girls' bedroom and told her Defendant had touched her on her bottom part. 8RP 40-41. S.G. said this happened later at night when it was dark and described A.R. as sad and crying when she said this. 8RP 40-44.

C. ARGUMENT.

1. DEFENDANT CANNOT SHOW COUNSEL WAS INEFFECTIVE FOR REFRAINING FROM RAISING AN UNSUPPORTED SAME CRIMINAL CONDUCT ARGUMENT AT SENTENCING WHEN THE ACT UNDERLYING EACH MOLESTATION WAS PRECEDED BY AN INDEPENDENT AND DISTINCT CRIMINAL INTENT FORMED DURING A GAP IN TIME FILLED WITH ACTIVITY UNRELATED TO SEXUAL ABUSE.

a. Counsel properly refrained from raising a meritless same criminal conduct argument as Defendant's three molestations of A.R. were distinct sequential offenses each preceded by the formation of new criminal intent.

Defendant was convicted of three counts of molestation based on three distinct, sequential criminal acts preceded by the formation of independent intent during time filled with activity unrelated to sexual assault, precluding a finding of same criminal conduct. A defendant's sentencing range is based upon his or her offender score, which is determined by points assigned to both prior and current convictions. RCW 9.94A.589. Current offenses add points to an offender score unless they are the same criminal conduct. RCW 9.94A.589. Two or more current offenses are the same criminal conduct only if they "require the same criminal intent, are committed at the same time and place, and involve the

same victim.” RCW 9.94A.589(1)(a). Courts construe the phrase “same criminal conduct” narrowly and will not find same criminal conduct if any of the three elements is missing. *State v. Saunders*, 120 Wn. App. 800, 824, 86 P.3d 232 (2004). The defendant bears the burden of proving current offenses constitute the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 540, 295 P.3d 219 (2013).

Intent within the same criminal conduct analysis means the defendant’s “objective criminal purpose in committing the crime,” rather than an offense-specific mens rea. *State v. Davis*, 174 Wn. App. 623, 642, 300 P.3d 465 (quoting *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990)); RCW 9A.08.010(1). Mens rea refers to a crime’s required mental state, while intent for same criminal conduct requires examination of the defendant’s objective to carry out an act constituting a crime. *State v. Grantham*, 84 Wn. App. 854, 860, 932 P.2d 657 (1997). An offender can carry out the same crime repeatedly for the same criminal purpose, but these crimes are not the same criminal conduct if preceded by an independent intent. *Id.* In determining whether the intent for two or more crimes is different, courts consider how “intimately related” the crimes are, whether the offender’s objective changed from one crime to the next, and whether one crime furthered another. *State v. Phuong*, 174 Wn. App. 494, 546-547, 299 P.3d 37 (2013) (quoting *State v. Burns*, 114 Wn.2d 314,

318, 788 P.2d 531 (1990)). But if the criminal objective of each crime was realized independently of the others, the crimes do not constitute the same criminal conduct. *See Burns*, 114 Wn.2 at 319.

Sequential offenses involving the same victim at the same location do not constitute the same criminal conduct when the offender “has the time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act.” *State v. Mutch*, 171 Wn.2d 646, 654, 254 P.3d 803 (2011) (quoting *Grantham*, 84 Wn. App. at 859). A gap in time between offenses filled with activity unrelated to crime establishes an offender’s opportunity to cease criminal activity or proceed to commit a further criminal act based on new criminal intent. *See Mutch*, 171 Wn.2d at 654-56; *Grantham*, 84 Wn. App. at 859.

Defendant formed independent intent for each molestation of A.R. during the time and activity between each assault comparable to the facts in *Grantham* and *Mutch*. In *Grantham*, the court found that an anal rape and oral rape of the same victim at the same place taking place “relatively close in time” were sequential offenses preceded by distinct criminal intents when the time between the two was filled by the defendant threatening the victim, the victim begging the defendant to stop his assault, and the defendant using new physical force to gain the victim’s compliance for the second rape. *Grantham*, 84 Wn. App. at 856, 859-860. The activity taking

place during this short gap in time following the end of the first rape and before the second demonstrated the defendant's opportunity to cease his criminal activity or commit a sequential act. *Id.* at 859.

In *Mutch*, the defendant committed five episodes of sexual assault consisting of oral and vaginal rape against the same victim at her residence over "the course of a night and the entire next morning." *Mutch*, 171 Wn.2d at 809. Given the victim's testimony that the defendant stopped between each of the episodes and that "substantial breaks" separated the different counts during which no assault took place, the court found the defendant "had time to pause, reflect and either cease or continue." *Id.* In committing new acts the victim described as "the same thing" taking place repeatedly, the defendant "objectively formed new criminal intent" for each. *Id.*

Following each instance of molestation in this case, Defendant disregarded his opportunity to cease assaulting A.R., instead forming and acting upon new and distinct criminal intent to touch A.R. for sexual gratification on another occasion, similar to what occurred in both *Grantham* and *Mutch*. The first molestation of A.R. ended when A.R. asked Defendant what he was doing and physically separated herself from

him.³ In the time after this molestation and before the next: 1) Defendant acknowledged what he had done by saying “sorry;”⁴ 2) A.R. conveyed to S.G. she needed to move so A.R. could get off the bed and put physical distance between herself and Defendant;⁵ 3) A.R. got off the bed and went into the kitchen;⁶ 4) A.R. tried to call and text her mother;⁷ 5) A.R. stayed in the kitchen for several minutes thinking about what she should do;⁸ 6) A.R. spoke with S.G. in the kitchen about why she left and whether she was coming back;⁹ 7) A.R. returned to the room and tried to prevent a new sexual assault from occurring by negotiating with S.G. about changing positions with her;¹⁰ 8) A.R. got in the middle of the bed and then moved when Defendant told her to;¹¹ and 9) A.R. got back on the bed and scooted closer to S.G. to separate and protect herself from Defendant.¹²

Defendant was not sexually assaulting A.R. during this time and activity. 6RP 64-70. Not only did he have the “opportunity to pause, reflect, and cease his criminal activity,” but he did pause and cease his

³ The first touching of A.R.’s vagina in Defendant’s bed, the act underlying Count II. 9RP 20, 6RP 64-65.

⁴ 6RP 64-65.

⁵ 6RP 123, 126.

⁶ 6RP 65-66.

⁷ 6RP 65, 7RP 77-78, 116.

⁸ 6RP 65-66.

⁹ 6RP 65-66.

¹⁰ 6RP 66, 68-69.

¹¹ 6RP 69.

¹² 6RP 70.

criminal activity when A.R. separated herself from him, spent time in another room, and then tried to avoid being near him after returning to his bedroom. Defendant had even more opportunity than the defendant in *Grantham* to reflect on his actions and change course, as the defendant in *Grantham* was never physically separated from his victim and used the time between sexual assaults to threaten and assault her. Here, despite Defendant's opportunity to stop, he formed new intent to commit a new and distinct molestation against A.R. and carried out that intent by ensuring A.R. would be near him on the bed then pulling her body against his so he could touch her vagina a second time.¹³

Time filled with activity unrelated to sexual assault again filled the gap between the second and third molestation. A.R. stopped the second molestation by physically separating herself from Defendant and asking him what he was doing. 6RP 72. This time, A.R. took additional action to protect herself in the gap between this and the next molestation. After escaping the bed by having S.G. move to let her out, leaving the bedroom, and trying again to reach her mother, A.R. went into a different bedroom around 11:00 p.m. and wrapped herself in a comforter to prevent further assault. 6RP 74. Hours passed and A.R. slept. 6RP 74.

¹³ The act underlying Count III. 9RP 20, 6RP 71-72.

Like the defendant in *Mutch*, Defendant had a “substantial break” between his molestations of A.R. The second assault took place around 11:00 p.m. and the third around 5:00 or 6:00 a.m. when Defendant acted upon new criminal intent formed in the interim. The third and last molestation, taking place after hours had passed when A.R. woke to find Defendant on top of her and again touching her vagina, required Defendant to wait, go to a different location in the house, and maneuver his hand around blankets and clothing to again molest A.R.¹⁴

Only when sexual acts take place simultaneously, in a very narrow time frame, or are part of an unchanging course of conduct without opportunity for deliberation do they constitute the same criminal conduct. *See State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999), *see also State v. Palmer*, 95 Wn. App. 187, 975 P.2d 1038 (1999). Defendant’s crimes are distinguishable from the offenses in these cases. Unlike the defendant in *Tili*, who the court found was unlikely to form independent criminal intent during three separate but not simultaneous penetrations of the victim’s body in a two-minute time period, or the defendant in *Palmer*, who did not do anything unrelated to sexual assault between the first and second rape, Defendant had ample time, physical separation from A.R., and intervening

¹⁴ This is the act underlying Count IV. 9RP 20, 6RP 74-75.

activity to decide whether to commit new criminal acts. Furthermore, none of Defendant's crimes against A.R. were dependent upon or furthered by another. Defendant had three separate objectives to molest A.R. for his own sexual gratification on three separate occasions.

Punishment for each act preceded by a new criminal intent ensures an offender is not able to "commit further assaults on the same person with no risk of further punishment for each assault committed."

Grantham, 84 Wn. App. at 861 (quoting *Harrell v. State*, 277 N.W.2d 462, 469 (Wis. Ct. App. 1979)). "Each act is a further denigration of the victim's integrity and a further danger to the victim." *Id.* In *Grantham*, this Court noted that the *Harrell* court's concern about the lack of consequences for additional sexual assaults on the same victim is consistent with the proportionality policy of the Sentencing Reform Act. *Grantham*, 84 Wn. App. at 861.

Defendant's first molestation of A.R. did not give him license to repeatedly molest her throughout the night and morning without further consequence. A.R. suffered through sequential offenses. She ended each molestation by fleeing from Defendant, trying repeatedly to reach her mother in the interim between assaults, and fruitlessly attempting after each act to protect herself from further assault. Although closer together in time, the first and second molestations were distinct. Defendant's first

molestation of A.R. was *definitively* over when she left his bed. 6RP 64-71, 123, 126. He laid in wait in the interim and interfered with her naive efforts to separate herself from him when she returned. 6RP 64-71, 123, 126.

The law does not provide for Defendant receiving less punishment for distinct and sequential offenses because they both involved victimization of the same child in his bed. Defendant formed and acted upon new and independent criminal intent to molest A.R. during the time and activities separating each assault, precluding a finding of same criminal conduct for any of the counts. Defendant was properly sentenced for three distinct and sequential sexual assaults.

- b. Defendant cannot show counsel was ineffective as there was no reasonable probability the trial court would have found the offenses to be the same criminal conduct.

Defendant cannot show his counsel was ineffective as there was no reasonable probability the court would have found same criminal conduct when Defendant's offenses were preceded by independent criminal intent formed during gaps in time containing activity unrelated to sexual assault. To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109

Wn.2d 222, 225-226, 743 P.2d 816 (1987). First, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Id.* Second, a defendant must show prejudice from the deficient representation. *Id.* Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Counsel's performance is presumed effective. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 721, 101 P.3d 1 (2004); *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017). A defendant can rebut the strong presumption of effective representation by proving his attorney's representation was unreasonable under prevailing professional norms and the challenged action was not a legitimate trial strategy. *Davis*, 152 Wn.2d at 673. The failure to satisfy either prong of the *Strickland* test is fatal to an ineffective assistance of counsel claim. *Id.*

If a defendant fails to argue at sentencing that multiple offenses constituted the same criminal conduct, that argument is generally waived on appeal. *Phuong*, 174 Wn. App. at 547. But defense counsel's failure to argue same criminal conduct at sentencing can amount to ineffective assistance of counsel. *Id.* A claim of ineffective assistance is of

constitutional magnitude and may be raised on appeal. *Id.* (citing *State v. Greiff*, 141 Wn.2d 910, 924, 10 P.3d 390 (2000)).

Failure to raise the issue of same criminal conduct at sentencing constitutes ineffective assistance of counsel only if a defendant can demonstrate a reasonable probability the trial court would have found that the crimes were the same criminal conduct. *Phuong*, 174 Wn. App. at 547. A reasonable probability is one “sufficient to undermine confidence in the outcome.” *Estes*, 188 Wn.2d at 458 (citing *Strickland*, 466 U.S. at 694).

Defendant has not met either prong of the *Strickland* test. First, he cannot show counsel was deficient for refraining from raising a meritless and unsupported same criminal conduct argument. Given the combination of time and activity between each molestation of A.R., Defendant had the “time and opportunity to pause, reflect, and either cease his criminal activity or proceed to commit a further criminal act,” establishing that independent intent preceded each of his crimes. *Grantham*, 84 Wn. App. at 859. The first molestation was over when A.R. left Defendant’s bed. 6RP 53-65, 123, 126. During the following period of time prior to the second molestation, she left the room, tried to reach her mother, deliberated about how she was going to protect herself, had a conversation with S.G. about what was going on, and upon returning to Defendant’s room attempted to prevent further physical contact with him. 6RP 64-71,

123, 126. Between the second and third molestation, A.R. again left the bed and room, tried to reach her mother, and then slept for hours in a different part of the house away from Defendant. 6RP 72-76. Second, Defendant cannot show he was prejudiced by any deficiency in counsel's performance. Defendant cannot show any reasonable probability the trial court, interpreting same criminal conduct narrowly as required by law, would have found same criminal conduct for any or all of Defendant's offenses given the facts of this case. *See Grantham*, 84 Wn. App at 858.

Defendant's argument that counsel's ineffectiveness is shown by his agreement with the trial court's misstatement of his sentencing range, an unassigned error, is irrelevant to and attenuated from counsel's decision whether or not to make a same criminal conduct argument. 11RP 11. Defendant relies on *Estes* in support of this argument. In *Estes*, the Court found the trial record exposed counsel's failure to research the persistent offender act given his repeated lack of objection to evidence relevant to a third strike offense. *Estes*, Wn.2d. at 461-63. In this case, the record concerning counsel's exchange with the judge is insufficient to show failure to research same criminal conduct and the argument it reflects anything more than a momentary misstatement is contradicted by counsel's signature on the judgment and sentence reflecting Defendant's correct sentencing range. 11RP 11, CP 70-86. Counsel's decision to

proceed with sentencing without making a same criminal conduct argument was reasonable based on the clear evidence of separate molestations in this case. This Court should reject Defendant's unsupported ineffective assistance of counsel claim and affirm Defendant's sentence based on the correct offender score for three separate, distinct, and sequential acts of molestation against 14-year-old A.R.

2. THIS COURT SHOULD REMAND THE CASE FOR THE TRIAL COURT TO STRIKE THE FILING FEE AND INTEREST ACCRUAL PROVISION.

The State agrees that this Court should remand for the trial court to strike the filing fee and interest accrual provision in the judgment and sentence based on a recent change in the law. The trial court found Defendant to be indigent at sentencing. CP 96-97. House Bill 1783, effective June 7, 2018, prohibits the imposition of the \$200 filing fee on defendants who were indigent at the time of sentencing. As held in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), House Bill 1783 is applicable to cases that are on appeal and therefore not yet final. Based on the finding of indigency, the State agrees that the criminal filing fee of \$200 that was imposed in this case should be stricken. The State further agrees that House Bill 1783 eliminates any interest accrual on

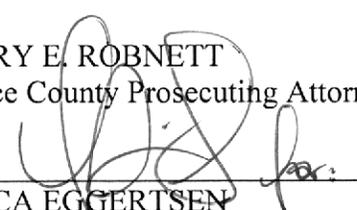
nonrestitution legal financial obligations. This Court should remand the case for the trial court to strike the filing fee and interest accrual provision.

D. CONCLUSION.

Defendant formed a criminal intent to sexually molest A.R. on three separate and sequential occasions and acted accordingly in repeatedly molesting A.R. Prior to each offense, Defendant had the time and opportunity to cease or proceed with his criminal activity, and chose to proceed with molesting the 14-year-old girl entrusted to his care. Lack of argument to treat his convictions as the same criminal conduct does not demonstrate deficient performance by Defendant's trial counsel, but rather an understanding of the law and the evidence in this case. This Court should affirm the Defendant's sentence, but remand for the trial court to strike the filing fee and interest accrual provision in the judgment and sentence.

DATED: June 17, 2019

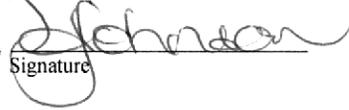
MARY E. ROBNETT
Pierce County Prosecuting Attorney



ERICA EGGERTSEN
Deputy Prosecuting Attorney
WSB # 40447

Certificate of Service:

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

6/17/19 
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

June 17, 2019 - 10:14 AM

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