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Division II  
State of Washington

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

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STATE OF WASHINGTON,

Respondent,

v.

NATHAN CHAVEZ,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
CLALLAM COUNTY, STATE OF WASHINGTON  
Superior Court No. 17-1-00046-8

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BRIEF OF RESPONDENT

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court properly admitted evidence of a common scheme or plan by allowing L.L. to testify that the defendant drove her to the woods where she was isolated and then raped.
2. Whether the State produced sufficient evidence to support the charge of tampering with a witness because a reasonable juror could infer that Chavez attempted to have Buckley, H.W. and M.C. withhold truthful testimony?
3. Whether the jury's special verdict finding an of abuse of trust was supported by testimony showing the defendant utilized trust gained from his position within the church community to facilitate access to H.W., continued to lure H.W. with talk about babysitting, groomed her, and then raped her after picking her up at the church?
4. Whether the convictions for Counts II and III did not violate double jeopardy because the evidence and arguments make it manifestly apparent that Counts II and III charge separate conduct?
5. Whether an exceptional sentence upwards was supported by the free crimes doctrine despite the statutory multiplier because the standard range for all sex crimes were identical and would have allowed the defendant to escape the punishment for a sex crime?

6. Whether the exceptional sentence should be upheld because the court relied upon the abuse of trust factor and the free crimes doctrine as justifying consecutive sentences and only relied on other factors for the purpose of structuring the sentence?
7. Whether the record supports the community custody condition limiting Chavez' access to his children?

## **II. STATEMENT OF THE CASE**

The State charged Mr. Chavez with Counts I, II, II, Rape of a Child in the Third Degree (ROC III), and Count IV, Child Molestation in the Third Degree (CM III) in which H.W. was the victim. CP 223–25. The State also charged an aggravating factor of abuse of trust for each of Counts I–IV. *Id.* The State also charged Chavez with Counts V and VI, ROC III, in which M.C. was the victim. CP 226. The last charge was Count VII, Witness Tampering. *Id.*

The matter was tried before a jury beginning with opening statements on May 30, 2018. RP 20 (VRP, pp 1–860); RP 1, 330 (voir dire and opening statements, pp 1–352).

The State argued that 28 year-old Chavez raped 14 year-old H.W. after using a position of trust perceived from his involvement in the Cornerstone Baptist Church community to gain access to H.W. by using her interest in babysitting for his family as a way to keep access to her by

stating he needed to get to know her better first. RP 331. Eventually Chavez shifted away from talking about babysitting and began to groom her through text communications to the point where he made plans with her to meet during the 2014 New Year's Eve church party by having her leave the party. RP 332. H.W. didn't know what was going to happen but she followed through with Chavez's plan and he met her down the street from the party and drove her to Port Angeles where he parked in an obscure cul-de-sac, talked with her, began kissing her, undressed her, and then raped her before bringing her back to the staging point at the church party. RP 332–333.

Sometime later in early 2015, Chavez continued his plan to have sex with H.W. by knocking on her window at her house when her mother was gone and H.W. had just gotten out of the shower. RP 333. H.W. let's Chavez in and he kisses her, takes her towel off, and has sexual intercourse with her again. RP 333. Chavez had sexual intercourse with H.W. a third time after getting H.W. agreed to meet him down the street from her house where he then drove her to his house and had sexual intercourse with her in his bedroom. RP 333–34.

Finally, in May 2016, approximately a year later, Chavez got into his brother Jesse's truck with H.W. and a Mr. Buckley and another high school friend. RP 335. H.W. had been drinking as well as Chavez, and

Chavez pulled H.W.'s pants down and touched her in a sexual manner. RP 335.

Then Chavez found a new victim, 15 year-old M.C. RP 336. Chavez was charged with raping M.C. after leaving a party at Slab Camp in his truck. RP 337. Chavez was following along with his brother Jesse's truck and then apparently lost sight of them. RP 337–38. Chavez was also charged with raping M.C. after a pool party after M.C. and Chavez had been drinking. RP 339. Chavez took M.C. to a secluded area and then had sexual intercourse with her. RP 339.

Finally, Chavez's brother Jesse brought Mr. Buckley a new i-phone and brought Buckley back to Chavez's home where Chavez spoke to him about the victims. RP 339–40. Buckley was present during the molestation charge of H.W. in the back of Jesse's truck and a Slab Camp party with M.C. present. RP 339. Chavez told Buckley to get his friends to stop lying and they could help each other out. RP 340.

The jury found Chavez guilty of Counts I–IV, VI, and VII. CP 179–190. The jury also found that Chavez abused a position of trust in relation to H.W. and Counts I–III. CP 185, 187, 189.

The trial court sentenced Chavez to an exceptional sentence of 137 months with counts I, VI, and VII running consecutive. CP 67, RP 845–46.

A statement of facts is presented before each issue throughout the remainder of the brief.

### **III. ARGUMENT**

#### **A. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF A COMMON PLAN WHEN IT ALLOWED L.L. TO TESTIFY THAT THE DEFENANT TOOK L.L. TO THE WOODS UNDER THE PRETEXT OF OFF ROADING.**

##### **1. Statement of Facts relevant to whether L.L.’s testimony was admissible under ER 404(b).**

As an offer of proof, to be considered by the trial court, the State produced a police report (CP 307–10, Attachment A) in which L.L. details in a recorded interview with a detective what happened to her when she was 16. CP 309. L.L. was 28 at the time of the interview and was crying during the conversation. CP 309.

#### **L.L.’s Statement**

L.L. stated she was waiting outside her friend’s home for a teenage gathering and the defendant showed up and invited her to take his truck for a drive somewhere in the woods. CP 309. The defendant then stopped the truck and conveyed that he wanted to have sex with her and if she did not comply he would not drive L.L. back. CP 309. L.L., not wanting to have sex and give up her virginity, said “Come on we don’t have that much time.” CP 309. L.L. said Chavez was persistent although she said no

and so she went along because she felt helpless and didn't know how to get out of the situation. CP 309.

Chavez raped her in the front seat and took her virginity. CP 309. Chavez had sexual intercourse with L.L. in the front seat of his truck and ejaculated in her. CP 310. L.L. stated that she remembered it hurting and was in pain and she had never been intimate with Chavez before and never had sex with anyone before Chavez. CP 310. Afterwards, Chavez drove L.L. back to her friend's house. CP 310.

The defense objected on the basis that the police report did not establish a common scheme or plan by a preponderance of the evidence. RP 8. The defense argued that L.L. was also not present to be cross-examined on the occurrence and thus the State just did not establish that L.L. was raped by a preponderance of the evidence. RP 9.

**Trial Court's Findings and Admission of State's ER 404(b) Evidence**

The trial court, granted the State's motion to admit the testimony of L.L. under ER 404(b). The trial court laid out its reasoning step-by-step after acknowledging that it had read the State's motion and offer of proof and the case law regarding the admission of ER 404(b) evidence in the context of sex crimes. RP 10–12, 13.

The trial court found that the sworn report supplied by the State as an offer of proof established the prior rape of L.L. by a preponderance of

the evidence. RP 11. The court pointed out that in determining whether the proof met the preponderance standard, the court does not just take two testimonies (i.e., L.L. versus Chavez) and divide them by two. RP 10. Rather, the court considered “the substance of what they say, the motive they have for saying it, words that actually are said.” RP 10.

The trial court identified the purpose for which the evidence would be introduced as evidence of a common plan or scheme. RP 11. The evidence was deemed to be relevant and highly probative under a common sense approach in the context of a sex case. RP 11–12. The court found that “the primary relevance of the evidence is that it establishes a plan or design, to rape.” RP 12. Finally the court pointed out that the probative value of the evidence outweighed any unfair prejudice and that a limiting instruction would be appropriate. RP 12. At trial, prior to L.L.’s testimony, the court instructed the jury L.L.’s testimony would be allowed for the limited purpose of showing a common scheme and that the jury could not consider the testimony for any other purpose. RP 365.

#### **L.L.’s testimony**

At trial, prior to L.L.’s testimony, the court instructed the jury L.L.’s testimony would be allowed for the limited purpose of showing a common scheme and that the jury could not consider the testimony for any

other purpose. RP 365. L.L. testified consistent with the State's offer of proof. RP 369–77.

### **H.W.'s testimony**

H.W. was 14 and in the eighth grade when she met Chavez. RP 87. She met Chavez at Cornerstone Baptist Church. RP 86. H.W. made her acquaintance with Chavez as a new member of the church and Chavez had a role something along the lines of a greeter or usher. RP 88. Chavez would speak to H.W. about the services and ask how she was. RP 88. Then H.W. reached out to Chavez through texting to inquire if he needed a babysitter. RP 89. H.W. was encouraged by her friend Joy to reach out in this manner as Joy was a friend of Chavez' family. RP 85, 89. Chavez responded that he would like to get to know H.W. more before allowing her to babysit his children. RP 90. The text communications stopped being about babysitting and became more flirtatious. RP 90. Chavez would comment to H.W. that she was pretty or beautiful. RP 91. Eventually, Chavez and H.W. agreed through text messages to meet one night. RP 92. Prior to this meeting, H.W. and Chavez communicated mostly by text message except for their first in person encounter. RP 92.

### **First event alleged in Count I (CP 203)**

The plan for their first encounter was for H.W. to leave church and then meet up with Chavez and go somewhere and talk. RP 92–93. This

was to occur during a church party on New Year's Eve of 2014 going into 2015. RP 96. H.W. was to leave the party and go down the road where Chavez was parked and would pick up H.W. RP 97. Later in the evening when it got dark, around ten or eleven, H.W. did as planned and went down the road to meet Chavez in his car. RP 97.

H.W. got into Chavez' white Toyota sports car and they drove for about 25 minutes to Port Angeles. RP 100. Chavez pulled into a cul-de-sac where there were no people out and no cars passing. RP 100. There were about one or two houses on the road. RP 100. Chavez talked a little then started kissing H.W. RP 101. Chavez then took off H.W.'s clothes and got over H.W. in the front seat and then had sexual intercourse with H.W. RP 104–05. Then they got dressed and drove back to the church. RP 106.

H.W. and Chavez had known of each other for about a month at that point and H.W. was 14 years old. RP 93, 106. Chavez was 28 years old. RP 507, 508, 525. Chavez came up with the plan which he and H.W. texted about. RP 95. H.W. had still never babysat for Chavez. RP 96.

Third Event Alleged in Count III (CP 205).

The third time Chavez had sexual intercourse with H.W. was at Chavez's home, when H.W. was still fourteen and in eighth grade. RP 114. The encounter started at H.W.'s house. RP 115. When it was starting to get dark out, Chavez contacted H.W. by text and said he was coming to

pick H.W. up. RP 115. H.W. told her mom she was going out for a jog and Chavez picked H.W. up down the corner from her house and drove her to his house. RP 116–17. They went to Chavez and his wife’s bedroom and Chavez started kissing H.W. and then undressing her. RP 118–121. Then Chavez had sex with H.W. RP 124. Afterwards, Chavez used the bathroom, then took H.W. home, dropping her off where he picked her up. RP 125–26.

**M.C.’s testimony**

M.C. was fourteen years old and in the 9<sup>th</sup> grade at Sequim High School when she first met Chavez. RP 210. M.C. was celebrating with some fellow students at a pep dance after an early season high school football game. RP 211. Chavez’s brother, Jesse, picked up M.C. and her friends at the high school to give them a ride to the party in his truck and he took the group to Slab Camp where people like to drink and have fires. RP 212. On the way to Slab Camp, the group stopped at Walmart where they met up with Chavez driving a different truck with two high school girls in it. RP 213. Once at Slab Camp, alcohol was supplied to the students from the bed of Chavez’s truck. RP 214.

**First Event Alleged in Count V (CP 208).**

This event was the first time M.C. had met Chavez although she did not talk with him at the party. RP 215. When it was time to leave,

M.C. had to get in Chavez's truck because Jesse's truck was full. RP 216. As they were driving, Chavez began to tell M.C. she was pretty and looked familiar. RP 217. Chavez told M.C. he was 20 years old. RP 217. Somehow, they lost sight of Jesse's truck at some point and then Chavez put his hand on M.C.'s leg and said he was going to pull over to text Jesse to find out where he was. RP 217–18. Chavez stopped in a field with lots of grass and no street lights. RP 218. M.C. testified that it was dark out and there were no visible house lights or houses in sight and that she would not have been able to find her way home from there. RP 218–19.

Rather than text Jesse, Chavez scooped M.C. out of her seat and put her on his lap and began to kiss M.C. and take her clothes off. RP 219. Chavez put M.C. back in the passenger seat, took off his pants and then had sexual intercourse with M.C. RP 219–20. Then Chavez called Jesse and then drove to a church in Sequim where they met up with Jesse. RP 220–21.

#### Second Event Alleged in Count VI (CP 209).

A week later M.C. received a text from Chavez that there would be another party and asked if she would go with him. RP 223. M.C. did not give Chavez her phone number and doesn't know who gave it to him. RP 223. Jesse picked up M.C. alone at the high school again and drove her to the party. RP 223–24. Jesse took M.C. to a party at someone's house

between Sequim and Port Angeles. RP 224. Chavez and a bunch of college people were present at the house. RP 224. Chavez and M.C. were drinking hard alcohol at the party. RP 225. After about an hour at the party that night, Chavez and M.C. left together as Jesse had apparently already left. RP 226. Rather than just take M.C. home, Chavez wanted to hang out longer and suggested they go to Port Williams. RP 227. Chavez took M.C. to Port Williams where, in Chavez's truck, they talked, listened to music, and M.C. drank vodka. RP 227.

A police officer appeared and Chavez told M.C. to put the bottle of vodka under the seat. RP 228. The officer spoke with Chavez and then left. RP 229. Chavez then suggested that they go four-by-fouring in the truck. RP 229. Chavez drove back towards Sequim and then stopped somewhere in the woods hidden by trees and turned the lights off and had sexual intercourse with M.C. in the truck. RP 229, 231. M.C. could not see any lights or houses from where they were and testified that she would not have been able to find her way home from there. RP 230. Afterwards, Chavez took M.C. home. RP 231.

**2. Standard of review and relevant authority to the issue of whether the L.L.'s testimony was properly admitted.**

“The trial court has wide discretion to determine the admissibility of evidence, and the trial court's decision whether to admit or exclude

evidence will not be reversed on appeal unless the appellant can establish that the trial court abused its discretion.” *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001) (citing *State v. Rivers*, 129 Wn.2d 697, 709–10, 921 P.2d 495 (1996)); *see also State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003) (citing *State v. Lough*, 125 Wn.2d 847, 856, 889 P.2d 487 (1995) (“[T]he trial court’s decision to admit or exclude evidence is reviewed for an abuse of discretion.”)).

“A trial court abuses its discretion only if no reasonable person would adopt the view espoused by the trial court.” *Demery*, at 758 (citing *State v. Sutherland*, 3 Wn. App. 20, 21, 472 P.2d 584 (1970)). “Where reasonable persons could take differing views regarding the propriety of the trial court’s actions, the trial court has not abused its discretion. *Id.* (citing *Sutherland*, 3 Wn. App. 22). “A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.” *State v. Slocum*, 183 Wn. App. 438, 449, 333 P.3d 541 (2014) (quoting *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009)).

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity

therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” ER 404(b) (Other Crimes, Wrongs, or Acts).

“[A] common plan or scheme may be established by evidence that the Defendant committed markedly similar acts of misconduct against similar victims under similar circumstances.” *State v. Lough*, 125 Wn.2d 847, 852, 889 P.2d 487 (1995).

“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.” *Lough*, 125 Wn.2d at 860.

“Proof of such a plan is admissible if the prior acts are (1) proved by a preponderance of the evidence, (2) admitted for the purpose of proving a common plan or scheme, (3) relevant to prove an element of the crime charged or to rebut a defense, and (4) more probative than prejudicial.” *Id.* at 852, 889 P.2d 487 (1995).

“When the existence of the criminal act is at issue, evidence of substantially similar features between a prior act and the disputed act is relevant.” *DeVincentis*, 150 Wn.2d at 20.

“In *Lough*, . . . we emphasized a “common sense” approach for the use of prior bad acts to show a plan, especially in cases of sexual crimes, because the doing of the act is often difficult to prove.” *Id.* at 24–25.

“[T]he trial court need only find that the prior bad acts show a pattern or plan with marked similarities to the facts in the case before it.” *Id.* at 18.

**3. The incident between L.L. and Chavez was sufficiently similar to incidents involving the current victims H.W. and M.C. to be admissible under ER 404(b).**

The incidents involving L.L., H.W., and M.C. all contain substantial similarities. Each victim was 14 to 16 years of age and impressionable to some degree such that they were vulnerable to manipulation by Chavez. Chavez was a relative stranger to each of his victims when Chavez first had sexual intercourse with them.

Chavez transported each of the victims in his truck or car to a secluded area where he could not be seen with the victim. Chavez then and rather quickly imposed his will on the victim and had sexual intercourse with each victim without asking for consent to have sex. Further, Chavez had sex with each of the minors without consent because L.L. said “no”

but felt coerced into having sex, and H.W. and M.C. were both underage and incapable of giving consent. The sexual relations were kept secret and planned in a way that would make it difficult to prove.

Chavez argues that the court erred by admitting L.L.'s testimony because the incident with L.L. was not similar to *any* of the occurrences of the current charges involving H.W. and M.C. Br. of Appellant at 17–18. Chavez refers to these incidents as crimes of opportunity at best.

Chavez argues that prior crimes of opportunity are not admissible under ER 404(b) as evidence of a common plan to rape and that the incident with L.L. was only a crime of opportunity. Br. of Appellant at 17. Chavez cites to *State v. Slocum* to support his argument. *Slocum*, 183 Wn. App. 438 (“Slocum simply seized opportunities when no one was watching.”).

Contrary to Chavez's argument, *Slocum* actually supports the admission of L.L.'s testimony in this case. There were multiple incidents in *Slocum* as in the instant case and the *Slocum* Court clearly distinguished the admissible prior conduct from inadmissible prior conduct.

In *Slocum*, the State charged the defendant with Child Molestation and Rape of a Child in the Third Degree for raping his granddaughter W.N. The state moved the trial court to admit evidence of a common scheme or plan under ER 404(b) that the defendant also “sexually abused

W.N.'s mother and paternal aunt many years earlier.” *Slocum*, 183 Wn. App. at 443–44.

W.N. testified that the defendant, her grandfather, called her to sit on his lap on his recliner where he molested W.N. by rubbing her vaginal area. *Id.* at 544–45.

W.N.’s mother testified that the defendant, her step-father, molested her on two occasions. On the first occasion, W.N.’s mother, 12 years old at the time, was lying on the floor under a blanket watching T.V. when the defendant ended up under the blanket with her and he took off her shirt and had his hands on her breasts. *Id.* at 445.

On the second occasion, also when W.N.’s mother was 12, the defendant was sitting on a recliner chair and asked W.N. to sit on the chair with him on his lap. W.N.’s mother sat on the defendant’s lap and the defendant rocked and then started rubbing her stomach and then her vagina. *Id.*

W.N.’s aunt testified that when she was 12, she went swimming with her brother at the defendant’s house. When she was getting ready to get in the pool, the defendant offered to put sunscreen lotion on her and explained “that she was most likely to burn near the edge of her swimsuit and then used that explanation to reach under the edges of her swimsuit

top, moving his hands around to her front, with his hands eventually placed on her breasts.” *Id.* at 446.

The *Slocum* Court held that of the three instances involving W.N.’s mother and aunt, “only the evidence of the recliner incident involving W.N.’s mother could be admitted consistent with a correct view of the law.” *Id.* at 454. The *Slocum* Court found only the other instances where W.N.’s mother was on the floor and where W.N.’s aunt was getting in the pool were purely opportunistic. On the other hand, it was not an abuse of discretion to admit testimony that defendant called W.N.’s mother to sit on his recliner where he then molested her. This was sufficient to constitute evidence of a common plan. *See id.* at 455.

“The facts of [*those two inadmissible incidents*] are therefore unlike cases where the defendant had a design for getting a victim physically isolated from possible witnesses. Mr. Slocum simply seized opportunities when no one was watching.” *Id.* at 445.

In the instant case, it is clear that Chavez had a design and took the initiative and further steps in order to get L.L., H.W., and C.M. physically isolated from friends and possible witnesses. This is more than opportunistic and required planning and further action.

Moreover, the facts of *Slocum* are also distinguished from the instant case where the victims were relative strangers rather than relatives.

Thus, mere opportunities were less likely to present themselves unlike the situation in *Slocum* where the defendant found opportunities to abuse his young female relatives. Therefore, *Slocum* does not support Chavez's argument and there was sufficient evidence of a plan establishing a substantial similarity between L.L.'s statement and the incidents involving H.W. and C.M.

Chavez further asserts that the "prosecution argued there was a common scheme by Mr. Chavez to isolate the complainants from their friends at parties, [and] most of the incidents described at his trial did not occur that way." Br. of Appellant at 17.

First, there were a number of instances that occurred in that manner. Regarding L.L.:

1. L.L. went to her friend's house on a summer afternoon to enjoy a gathering of friends and acquaintances. Chavez arrived, before the other friends showed up. L.L. did not know Chavez personally. Chavez convinced L.L. they could go off-roading in his truck to kill time. Chavez transported L.L. to a secluded place in the woods hidden from witnesses. Chavez conveyed to L.L. that they would have sex or she would be left behind where she was not likely to find her way home. Chavez then had sexual intercourse with L.L. taking her virginity.

Regarding H.W.:

1. Chavez transported H.W. in his car away from the New Year's Eve party and drove about 25 minutes towards Port Angeles and parked in a secluded cul-de-sac before raping H.W.
2. Chavez transported H.W. in his car to his house when no one was home and took her to his bedroom and raped her.
3. Chavez drove H.W. down a winding road and parked behind a big bush where he raped her.

Regarding M.C.:

1. After a high school party at Slab Camp, Chavez took M.C. in his vehicle to a secluded field where the victim would not be able to find her way home on her own, and then he raped her.
2. At another party, Chavez taking M.C. home decided he wanted to hang out more with M.C. and took her to Port Williams, then after a police officer approached to talk with Chavez, Chavez moved his vehicle again to a place where it could not be seen and M.C. did not know where she was, and then he raped M.C.

Thus, the testimony shows that Chavez did not just find himself in an opportunistic position. Rather, Chavez had to create opportunity by actively pursuing and then driving each victim, often away from a party or gathering of friends, to a secluded place under some pretext or other. This

is similar to *Slocum* where the defendant called to W.N.'s mother to have her sit on the recliner with him. *Slocum* took an extra step to create the opportunity to molest just as Chavez did to isolate his victims where he could then rape them.

Finally, Chavez argues that the incident with L.L. was too far in the past and the lapse of time erodes the commonality. Br. of Appellant at 18. The passage of time does not erode the commonality and relevance of L.L.'s testimony in this case. The passage of time alone does not render relevant evidence of a common plan inadmissible when there are other factors in play such as where "[t]here were marked similarities in the methodology of the crime and the age and circumstances of the victims." See *DeVincentis*, 112 Wn. App. at 161–62 (citing *State v. Baker*, 89 Wn. App. 726, 734, 950 P.2d 486 (1997) (prior misconduct 11 to 15 years earlier held admissible); *State v. Wermerskirchen*, 497 N.W.2d at 242, n. 3 (Minn.1993) (prior misconduct was at least seven years earlier); *State v. Griswold*, 98 Wn. App. 817, 826, 991 P.2d 657 (2000) (prior incidents 11 to 13 years earlier); *State v. Krause*, 82 Wn. App. 688, 691–92, 919 P.2d 123 (1996) (prior incidents 14 or more years earlier); *State v. Gresham*, 173 Wn.2d 405, 423, 269 P.3d 207 (2012) (The misconduct admitted under ER 404(b) occurred approximately 26 years prior to the charged incident).

Here, as to Chavez's conduct with each of the victims, "though there are some differences . . . , these differences are not so great as to dissuade a reasonable mind from finding that the instances are naturally to be explained as 'individual manifestations' of the same plan." *State v. Gresham*, 173 Wn.2d 405, 423, 269 P.3d 207 (2012) (quoting *Lough*, 125 Wn.2d at 860). It is reasonable to find that Chavez carried out individual manifestations of the same plan when he isolated each of the young victims, all of which were relative strangers, by driving them to a secluded place where Chavez's could control the victims and have sexual intercourse with them and then take them back so an undue absence would not be questioned.

Therefore, the trial court did not abuse its discretion by admitting L.L.'s testimony as evidence of a common scheme or plan under ER 404(b). This court should affirm.

**4. Admission of L.L.'s testimony under ER 404(b) was harmless beyond a reasonable doubt because there was overwhelming evidence of guilt.**

An erroneous admission of prior conduct evidence under ER 404(b) is subject to the nonconstitutional harmless error test. *Slocum*, 183 Wn. App. at 456. "[T]he question is whether within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Id.* (citing *Gresham*, 173 Wn.2d at 433).

“The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.” *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997) (*Nghiem v. State*, 73 Wn. App. 405, 413, 869 P.2d 1086 (1994)).

Here, the testimony of L.L. was not so significant that the outcome of the trial was materially affected considering the weight of the combined testimonies of H.W. and C.M. covering six separate charges involving sex crimes with child victims. Both victims testified in detail and were subject to cross examination. Buckley’s testimony corroborated Chavez’s behavior toward minor females and also corroborated the Slab Camp incident. Buckley’s testimony regarding the witness tampering charge (*see infra* section B) was relevant to show consciousness of guilt. Chavez himself testified and the jury made a credibility determination.

Finally, the jury was also instructed to only consider L.L.’s testimony for the limited purpose of showing a common scheme and that the jury could not consider the testimony for any other purpose. RP 365. Juries are presumed to follow the trial court’s limiting instructions. *Lough*, 125 Wn.2d at 864 (citing *State v. Johnson*, 124 Wn.2d 57, 77, 873 P.2d 514 (1994)).

**B. THE STATE PRESENTED SUFFICIENT EVIDENC TO SUPPORT A CONVICTION FOR TAMPERING WITH A WITNESS.**

“Sufficiency of the evidence is a question of law that we review de novo.” *State v. Rich*, 184 Wn.2d 897, 903, 365 P.3d 746 (2016).

“The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010) (citing *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)). “When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Kintz*, at 551 (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)).

“A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *Id.* “‘Circumstantial evidence and direct evidence are equally reliable’ in determining the sufficiency of the evidence.” *Id.* (quoting *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004)). “In determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case.” *State v. Dejarlais*,

88 Wn. App. 297, 305, 944 P.2d 1110 (1997), *aff'd*, 136 Wn.2d 939, 969 P.2d 90 (1998).

Additionally, this Court “defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” *State v. J.P.*, 130 Wn. App. 887, 891–92, 125 P.3d 215 (2005).

**1. Statement of facts relevant to issue of sufficiency of the evidence for the charge of Witness Tampering.**

David Buckley, testified that he is 16 years old and a student of Sequim High School. RP 321. Buckley testified that Chavez is the brother of his old friend Jesse Chavez. RP 321. Buckley was friends with H.W. and M.P. from school in 2016 when he first met the defendant. RP 324–25. On Carnival night in 2016, Jesse Chavez invited Buckley to join him and other friends for a fire and party at his brother’s (Chavez) house. RP 323. When Buckley arrived with Jesse at Chavez’s house, Chavez was seen getting wood for the fire and drinking beers. RP 324. Buckley and friends decided to pick up H.W. and M.P. to bring back to the party. RP 325. Jesse was driving. RP 326. When they got back, they went to the fire and Chavez was still there and gave Buckley a beer. RP 326. Chavez also gave H.W. and M.P. beers which they drank. RP 326. Buckley watched as Chavez drank more beer and become more intoxicated as the night

continued. RP 327. Buckley also saw H.W. become intoxicated. RP 328. Buckley saw Chavez and H.W. talking and laughing together and then saw Chavez give H.W. vodka. RP 329. When it was time for Jesse to drive Buckley, H.W. and M.P. home, Chavez got into the bed of the truck with H.W. and M.P. RP 330. On the way to taking H.W. home, Buckley watched Chavez begin to pull down H.W.'s pants and then massage H.W.'s butt. RP 331. Chavez climbed on H.W. and unzipped his pants and then said whiskey dick and laughed. RP 333. Buckley began pounding on the window of the truck cab to get Jesse's attention to stop the vehicle and get Chavez out of the vehicle. RP 333–34. M.P. tried to call through the window when Jesse finally opened it after about a minute of pounding. RP 334. Jesse finally pulled over into Red Dog and got out of the truck and Chavez got out as well. RP 334.

Buckley also testified that he went to Slap Camp with Jesse after a high school dance one night. RP 336. Buckley was with Jesse and they picked up M. and another girl B, both high school students. RP 337. Then they went to Walmart where Chavez was waiting for them with his truck. RP 337–38. Then they all went to Slab Camp where they had a fire and Chavez gave beers to the high school kids. RP 338–39. When they left, Jesse drove Buckley and Morgan and Chavez drove along in his own truck. RP 341. Jesse dropped Buckley off at his house on Woodcock

Street. RP 342. Buckley was then contacted by police and he told them everything he would eventually testify about. RP 343.

Later in 2017, Buckley testified that after Chavez's case had started and after he spoke with the police, he received a new phone from Jesse as a gift. RP 343. Jesse had gotten Buckley small gifts in the past such as paying for food at McDonald's. RP 344. Buckley was hanging out with his friends at Railroad Bridge Park when he received a call from Jesse that he had a gift for him. RP 344. Jesse told Buckley to wait there at the park for him. RP 344. Jesse gave Buckley a gift bag with a new i-phone in it. RP 345. Then Jesse took Buckley to Chavez's home. RP 347. They left Buckley's other friends behind at the park. RP 347–48.

Buckley did not know why Jesse took him to Chavez's home. RP 347. Chavez came up to Buckley and Jesse and Chavez's dad went into the house as Buckley set up the phone. RP 349–50. Chavez asked Buckley to talk to M.P. and H.W. and get them to quit lying, and he told Buckley something along the lines of, "you can help me, I can help you." RP 350.

**2. A reasonable juror could infer that Chavez Tampered with a Witness when attempted to influence Buckley's, M.P. and H.W. to withhold their truthful testimony.**

Here, in the light most favorable to the state, a rationale juror could reasonably infer that Chavez tried to directly influence David Buckley,

and through Buckley, M.P. and H.W., in order to get them to change their testimony in Chavez's favor.

Chavez did this by luring Buckley to his home where he could talk with him alone by having his brother Jesse Chavez give Buckley a brand new cell phone as a gift. Jesse then brought Buckley away from his friends at Railroad Bridge Park to Chavez's house to set up the phone. Chavez appeared with his father. Chavez's father and Jesse go inside the house leaving Buckley alone with Chavez. Chavez approached close to Buckley and raised the issue of the witness M.P. (RP 178) and victim H.W. in his pending trial by asking Buckley to get his friends to stop lying about him.

Then in this context, Chavez told Buckley that he could help Buckley out, they could help each other out. The cell phone was the initial offering and a suggestion of more to come. A reasonable juror could conclude that this was an attempt by Chavez to influence Buckley as a witness in his favor by suggesting that M.P. and H.W. were lying and that he should get M.P. and H.W. to stop "lying."

Chavez cites to *State v. Rempel*, 114 Wn.2d 77, 83-84, 785 P.2d 1134 (1990) where the request to the victim was simply to drop the charges. In *Rempel*, there were no threats, no promises, and no offerings. The defendant simply apologized and asked the victim to drop the charges.

The *Rempel* Court stated that “an attempt to induce a witness to withhold testimony does *not* depend only upon the literal meaning of the words used.” *Rempel*, 114 Wn.2d at 83 (emphasis added). “The State is entitled to rely on the inferential meaning of the words and the context in which they were used.” *Id.* at 83–84 (citing *State v. Scherck*, 9 Wn. App. 792, 514 P.2d 1393 (1973)).

However, in *Rempel*, the Court found that the entire context “which also includes the prior relationship between defendant and DuBois, and her reaction to the phone calls” negated any inference that the defendant induced the victim to withhold her testimony from a later trial.

The context in this case is not similar to *Rempel*. In *Rempel*, the witness at issue, DuBois, was Rempel’s victim. Buckley and M.P. are not victims of Chavez and don’t really know him well. Buckley and M.P. also did not have a prior romantic relationship with Chavez as DuBois and Rempel did. *Rempel* does not apply to the facts of this case.

Here, Chavez offered his future help to Buckley if he helped him. In return, Chavez made it clear what he wanted Buckley to do, to get M.P. and H.W. and Buckley himself to “stop lying” or in other words, to change their stories. Changing the stories would mean to withhold the truth and thus, to withhold testimony. Although, Chavez’s words are not as express as they could be, one could reasonably infer that Chavez was telling

Buckley in more opaque terms to “get your friends to change their stories at trial to help me, you can help me, and I will help you in the future, look here is a cell phone.” Charges have already been filed and statements to police were already made. Thus, all that was left to do was change the testimony at trial. Also counter to *Rempel*, Chavez did not ask Buckley to ask H.W. to drop the charges.

There was sufficient evidence to support the witness tampering charge. Therefore, the Court should affirm.

**C. THE STATE PRESENTED SUFFICIENT EVIDENCE OF THE AGGRAVATING FACTOR OF ABUSE OF TRUST.**

When an appellant challenges the jury’s verdict on aggravating circumstances, the appellate court reviews “whether the record supports the jury's special verdict on the aggravating circumstances.” *State v. Hale*, 146 Wn. App. 299, 307, 189 P.3d 829 (2008) (citing RCW 9.94A.585(4); *State v. Fowler*, 145 Wn.2d 400, 405, 38 P.3d 335 (2002)). “[The jury's] reasons will be upheld unless they are clearly erroneous.” *Id.* at 307 (quoting *Fowler*, 145 Wn.2d at 405).

The abuse of trust aggravating factor is set forth in RCW 9.94A.535(3)(n) as follows: “The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of

the current offense.” The court provided the jury with the following instruction defining an abuse of trust:

A defendant uses a position of trust to facilitate a crime when the defendant gains access to the victim of the offense because of the trust relationship.

In determining whether there was a position of trust, you should consider the length of the relationship between the defendant and the victim, the nature of the defendant's relationship to the victim, and the vulnerability of the victim because of age or other circumstance.

There need not be a personal relationship of trust between the defendant and the victim. It is sufficient if a relationship of trust existed between the defendant or an organization to which the defendant belonged and the victim or someone who entrusted the victim to the defendant's or organization's care.

CP 219.

“That there is no direct evidence that the position of trust was relied upon to perpetrate the crime is unimportant, as long as there is evidence which logically could lead to the conclusion that the crime was facilitated by the position of trust.” *State v. P.B.T.*, 67 Wn. App. 292, 304, 834 P.2d 1051 (1992).

**3. Statement of facts relevant to the aggravating factor of abuse of trust.**

Counts I, II, III, Rape of a Child in the Third Degree, and Count IV, Child Molestation in the Third Degree, relate solely to the victim H.W. CP 223–25. The court provided the jury with special verdict forms for

Counts I–IV alleging that Chavez used a position of trust to facilitate the crimes charged. CP 221. The jury returned a special verdict finding that Chavez used his position of trust to facilitate the crimes for Counts I, II, III. CP 185, 187, 189. The jury found that Chavez *did not* use his position of trust to facilitate the crimes for Counts IV. CP 183.

H.W. began attending the Church around November of 2014, the year she met Chavez. RP 96, 138. H.W. only attended the church for about three or four months. RP 87. H.W. enjoyed going to the services and the service dinners and eating together with the church members. RP 87–88. H.W. felt good when she started attending Cornerstone. RP 87.

H.W.’s contact with Chavez was limited as an acquaintance at first and Chavez spoke to her just about the services and inquired how H.W. was doing. RP 88. Eventually, H.W. reached out to Chavez by text to inquire about the possibility of babysitting for Chavez’s family to make some money. RP 89. H.W.’s friend Joy, a friend of Chavez’s family, most likely gave her the phone number. RP 90. Chavez eventually told H.W. through text messaging that he would like to get to know H.W. before she babysat his kids. RP 90. The texts eventually stopped being about babysitting and became more flirtatious on Chavez’s part and he would call H.W. pretty or beautiful. RP 90–91. The acquaintance between Chavez and H.W. became more than just texting after H.W. agreed to

meet Chavez in person after knowing him about a month. RP 92. The plan, initiated by Chavez, was for H.W. to leave the New Year's Eve church party at night and meet up with Chavez. RP 93, 95. H.W. was to leave the church around 10:00 p.m. and walk down the road where Chavez would pick her up in his car. RP 98. H.W. had never babysat for Chavez at that point. RP 96. Chavez picked H.W. up as planned and drove her towards Port Angeles where he parked in an obscure cul-de-sac, talked for a few minutes, started kissing H.W., undressed her and then had sex with H.W., and then brought her back to the church. RP 100–06.

H.W. was aware that Chavez was an usher because she was present at the service where new appointments took place in January and Chavez was appointed as an usher. RP 139–140. H.W. had known Chavez for about three months at that point. RP 141. H.W. stopped going to the church in February and Pastor Savage came to visit her at her home to talk with her about returning to church. RP 146–148. H.W. never told the Pastor Savage about Chavez having sex with her because she knew he would get into trouble. RP 155.

**4. Chavez used his affiliation with the church community to maintain access to H.W. and as a staging point for the first meeting and commission of the first rape on New Year's Eve.**

Here, the testimony cited above is evidence which logically could lead to the conclusion that the crime was facilitated by the position of

trust. Chavez presented himself as a trustworthy adult affiliated with the church by talking with H.W. about the services and showing interest in her welfare as a new member of the Cornerstone Baptist Church. This was sufficient to earn N.W.'s trust to reach out to him by texting his phone to see if he would be interested in having her in his home to babysit his children. The evidence shows that H.W. trusted Chavez enough to reach out to offer babysitting for him because of his affiliation with the church of which she was a new member and clearly enjoyed being part of.

Once this connection of trust was established, Chavez utilized this trust and kept the text communications going between H.W. and himself although he was not interested in having H.W. babysit and he never hired her. The evidence shows that he utilized the trust and began to groom her with his compliments. *See Matter of Phelps*, 190 Wn.2d 155, 170, 410 P.3d 1142 (2018) (holding that “the concept of grooming, as used in [*Phelps*], is within the common knowledge of jurors”).

Chavez used this trust to facilitate access to H.W. as he continued to string her along when he said he would like to get to know H.W. more before she babysat his kids. RP 90. Chavez then continued foster enough trust to get H.W. to agree to leave the church party on New Year's Eve under the pretext of going somewhere to talk (RP 93) so he could isolate her and take advantage of her. H.W. testified that Chavez was driving

towards another church by Port Angeles High School before pulling into an obscure cul-de-sac. RP 100. H.W. did not know what was happening or what was going to happen. RP 101.

Then Chavez used the trust associated with the organization, the Cornerstone Baptist Church as his cover for committing this crime. Chavez used the trust gained from his association within the church community to foster a relationship with H.W. and then groom her, isolate her, then rape her.

Chavez used the church as a staging point for picking up H.W. Chavez knew where H.W. would be that night and planned with H.W. to pick her up from the church party and return her to the party. H.W.'s family would be at ease since H.W. was at the church hosted New Year's Eve party (RP 97) where H.W. would be safe.

Chavez utilized that initial trust to gain influence over H.W. who was 14 and to manipulate her and develop influence over her by complimenting and grooming her. This influence allowed Chavez to rape H.W. two more times. This influence was also the primary driving factor that kept H.W. from telling the Pastor about Chavez, because she knew he would get in trouble.

The babysitting inquiry would never have evolved but for Chavez's connection to the church and H.W.'s trust in both. Chavez took advantage of that.

This evidence could logically lead a jury to conclude that Chavez's crime was facilitated by the trust he gained through his association with the church. Such a conclusion is not clearly erroneous. Therefore, the Court should find the record contains sufficient evidence to support aggravating factor and should affirm the exceptional sentence.

**D. DOUBLE JEOPARDY WAS NOT VIOLATED BECAUSE THE EVIDENCE PRESENTED MADE IT MANIFESTLY APPARENT TO THE JURY THAT COUNTS II AND III CHARGE SEPARATE ACTS.**

“The constitutional guaranty against double jeopardy protects a defendant ... against multiple punishments for the same offense.” *State v. Mutch*, 171 Wn.2d 646, 661, 254 P.3d 803 (2011) (quoting *State v. Noltie*, 116 Wn.2d 831, 848, 809 P.2d 190 (1991)) (citing U.S. Const. amend. V; Wash. Const. art. I, § 9). “A double jeopardy claim is of constitutional proportions and may be raised for the first time on appeal.” *Mutch*, 171 Wn.2d at 661 (citing *State v. Jackman*, 156 Wn.2d 736, 746, 132 P.3d 136 (2006)). “[R]eview is de novo.” *Id.* at 661–62 (citing *In re Pers. Restraint of Francis*, 170 Wn.2d 517, 523, 242 P.3d 866 (2010)).

“For it to be the “same offense” for double jeopardy purposes, the offenses must be the same in law and in fact.” *Noltie*, 116 Wn.2d at 848 (citing *In re Fletcher*, 113 Wn.2d 42, 47, 776 P.2d 114 (1989)).

“Considering the evidence, arguments, and instructions, if it is not clear that it was ‘manifestly apparent to the jury that the State [was] not seeking to impose multiple punishments for the same offense’ and that each count was based on a separate act, there is a double jeopardy violation.” *Mutch*, 171 Wn.2d at 664 (quoting *State v. Berg*, 147 Wn. App. 923, 931, 198 P.3d 529 (2008)).

““In reviewing allegations of double jeopardy, an appellate court may review the entire record to establish what was before the court.”” *Id.* at 664 (quoting *Noltie*, 116 Wn.2d at 848–49 (applying this scope of review to find no double jeopardy violation based on information that identically charged separate counts)).

In *Noltie*, the Court found that there was no double jeopardy violation although the State charged the defendant with First Degree Statutory Rape identically in Counts I and II of the information and the State did not elect which form of sexual intercourse, vaginal or oral, was alleged in each Count. *Noltie*, 116 Wn.2d at 835. However, the jury instruction in Count II was different from Count I in that the jury was instructed that the conduct in Count II was separate from any incident

proved in Count I. *Id.* at 849. The court also instructed the jury that in order to convict in Counts I or II, they must be “unanimously agree that at least one separate act of sexual intercourse pertaining to each count has been proved beyond a reasonable doubt.” *Id.* at 849.

Ultimately, the *Noltie* Court concluded “that defendant was tried for the commission of two separate crimes of statutory rape and was not charged twice for the same offense.” *Id.* In doing so, the *Noltie* Court pointed out that “the deputy prosecutor’s expressed position throughout the trial was to the effect that the State was charging two kinds of sexual intercourse during the period that defendant lived with M and her mother.” *Id.* The *Noltie* Court had also pointed out that “it was clear from the information, instructions, testimony and jury argument that the State was charging the defendant with two different instances of statutory rape and was not seeking to impose multiple punishments for the same offense.” *Id.* at 848. As to the testimony, the Court found “[t]he child's testimony provided substantial evidence to support a jury conclusion of either oral or vaginal intercourse, or both.” *Id.* at 846.

Here, the information identically charged Counts II and III. However, the record shows that it was manifestly apparent to the jury that each of the counts were based on separate acts.

The State clearly outlined three separate rapes involving H.W. as the victim during opening argument. (RP 330, June 5, 2018). The deputy prosecuting attorney highlighted only three instances where Chavez raped H.W. The first rape occurred in his car during the New Year's Eve church party (RP 332–33), the second occurred at H.W.'s house after she had gotten out of the shower and he appeared at her bedroom window (RP 333), and the third instance where Chavez took her to his home and raped her in his bedroom (RP 334).

During H.W.'s testimony, the defense attorney elicited succinct testimony from H.W. clarifying that Counts I, II, and III were separate and distinct acts. RP 156. During this cross-examination, H.W. testified that the first time she had sex with Chavez was on New Year's Eve of 2014. RP 156. H.W. testified that the second time they had sex was at H.W.'s house after she had gotten out of the shower. RP 156. The third time H.W. had sex with Chavez was at Chavez's house. RP 156.

Further, during closing argument, the State, consistent with opening statements, argued and highlighted the evidence of only three separate and distinct rapes. (RP 680–83). The deputy prosecutor argued the first rape occurred during the 2014 New Year's Eve church party (RP 681–82), then Chavez raped her a second time at her house where he appeared at her bedroom window (RP 682), and a third time after Chavez

took H.W. to his house and raped her in his bedroom (RP 682–83). The State did not argue any further rapes involving H.W. RP 684.

The only other incident with H.W. occurred at Carnival in May over *a year later* and it was not charged as rape and could not be confused with the rape charges. RP 157. The Carnival incident a year later was charged as Child Molestation with a time frame of Jan. 1, 2016 to Aug. 31, 2016. CP 207, 225. The State clearly designated this incident as Child Molestation in its closing argument. RP 718.

Count I had a separate date from Counts II and III: “between and including the 31st day of December, 2014 and the 1st day of January, 2015.” CP 203. This was clearly the 2014 New Year’s Eve incident which H.W. testified about and which the State argued on opening and closing. Thus the only options the jury had as to counts II and III were the second incident where Chavez appeared at H.W.’s bedroom window when her mother was not home and had sex with her in H.W.’s bedroom, and the third incident where Chavez drove H.W. to his home and had sex with her in his bedroom. These incidents are clear and distinct and beyond any possible confusion.

Finally, the trial court did instruct the jury “You must decide each count separately” and that the jury that it must be unanimous in their verdicts. CP 196, 197.

H.W.'s testimony and the State's arguments clearly eliminated any possible confusion that the second incident of rape at H.W.'s home and third incident of rape at Chavez's home constituted separate acts. Thus, the jury could not have convicted Chavez under counts II and III for the same conduct because it was manifestly apparent to the jury that Counts II and III were separate acts.

Therefore, the Court should affirm both convictions of Rape of a Child in the Third Degree.

**E. THE COURT RELIED UPON PROPER AGGRAVATING FACTORS FOR THE EXCEPTIONAL SENTENCE AND OTHER FACTORS ONLY TO STRUCTURE IT.**

A sentencing court may not rely upon additional facts not found by a jury to support an exceptional sentence. *See Hale*, 146 Wn. App. at 308 (“Here, the trial court carefully worded its findings to reiterate the jury's special verdict and avoided entering any additional findings that would have violated Hale's right to have a jury find beyond a reasonable doubt any factor used to increase his sentence.”).

Here, during the sentencing, the trial court stated as follows: “We have three different kinds of crimes, we have three victims and I'm gonna use that as the basis for giving you consecutive sentences.” RP 846. At

first glance it appears that the court used an invalid factor to *justify* the exceptional sentence.

A review of the rest of the relevant record shows it was far more likely that the sentencing court was using the three crimes and three victims discussion as a basis for the *structuring* of the consecutive sentences rather than the justification for the consecutive sentence. For example, the court ordered a sentence of 60 months for Counts I, II, III, and IV, involving one victim. RP 846; CP 67. Yet, the court only ordered Counts I, VI, and VII to be served consecutively as each of those three counts pertain to three different victims. CP 67.

Additionally, the sentencing judge stated that he was doing so “because of the aggravators under the situation and basically because of the free crimes doctrine where we have the outside range as 60 months.” RP 846–47. The sentencing judge continued on to explain, “I hope you understand that the basis of that and I think the State also proposed some findings in regard to why I would find an exceptional sentence and I think those still apply even though my analysis of the time is a little different than yours, . . . .” RP 847. Prior to talking about the structuring of the consecutive sentences, the court stated, “I have no

problem with the jury's decision that they found that you abused a position of trust in regard to counts one, two and three and I would add that it was not only the church, but the whole idea of her asking to babysit your children and then you're using that as a basis for contact with her and then committed the offenses. It's predatory behavior and it deserves an exceptional sentence." RP 848.

The record shows the sentencing court did not rely upon a finding that there were three different kinds of crimes and three victims as a basis to justify an exceptional sentence and impose consecutive sentences. Rather, the court used that as a basis only for structuring the consecutive sentences.

Therefore, the Court should affirm the exceptional sentence.

**5. The Court should uphold the exceptional sentence because the trial court would have imposed the same sentence based on upon the abuse of trust factor and free crimes doctrine.**

"[T]he United States Supreme Court [] concluded that *Blakely* errors can be subject to harmless error analysis." *State v. Suleiman*, 158 Wn.2d 280, 284, 143 P.3d 795 (2006) (citing *Washington v. Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006)).

"Where the reviewing court overturns one or more aggravating factors but is satisfied that the trial court would have imposed the same sentence based upon a factor or factors that are upheld, it may uphold the

exceptional sentence rather than remanding for resentencing.” *State v. Hughes*, 154 Wn.2d 118, 134, 110 P.3d 192 (2005) *abrogated on other grounds in Recuenco*, 548 U.S. 212, 126 S.Ct. 2546, 165 L.Ed.2d 466 (2006) (citing *State v. Jackson*, 150 Wn.2d 251, 276, 76 P.3d 217 (2003)).

The *Hughes* Court pointed out that “although some of the aggravating factors used in each sentence at issue [in *Hughes*] violated *Blakely*, [the Court] must still address whether the sentences . . . could be saved by independently valid aggravating factors based on prior convictions.” *Hughes*, 154 Wn.2d at 135.

Here, there are independently valid aggravating factors for abuse of trust, argued *supra* section E.2., and under the free crimes doctrine.

***a. The free crimes aggravator applies here because the offender score allows the defendant to avoid punishment for two crimes.***

The free crimes doctrine is codified in RCW 9.94A.535(2)(c):  
“The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.”

“In *Alvarado*, we explained that the determination that some offenses would go unpunished without an exceptional sentence ‘rests solely on criminal history and calculation of the offender score, without the need for additional fact finding by the jury’ and held that RCW

9.94A.535(2)(c) flows automatically from the existence of free crimes.”  
*Mutch*, 171 Wn.2d at 658 (quoting *State v. Alvarado*, 164 Wn.2d 556, 569,  
192 P.3d 345 (2008))(emphasis added).

“Under the “free crimes” doctrine, then, a trial court may impose an exceptional sentence where a defendant's current crimes would go unpunished through the imposition of a standard range sentence.” *State v. Brundage*, 126 Wn. App. 55, 66–67, 107 P.3d 742, 748, (2005) (citing *State v. Van Buren*, 123 Wn. App. 634, 653, 98 P.3d 1235 (2004)).

Here, Chavez was convicted on Counts I, II, III, and VI, Rape of a Child in the Third Degree (ROC III), and Count IV, Child Molestation in the Third Degree (CM III), and Count VII, Tampering with a Witness. ROC III and CM III are sex offenses per RCW 9.94A.030(47)(a)(i), RCW 9A.44.079, and RCW 9A.44.089. These sex offenses are sentenced under RCW 9.94A.525(17) wherein the sentencing court must “count three points for each adult and juvenile prior sex offense conviction.” Chavez’s offender score for each of the five sex offenses he was convicted of is 13.

The seriousness level for ROC III is VI and for CM III it is V. RCW 9.94A.515. The standard sentence range for ROC III with a maximum score of 9 is 77–102 months and for CM III it is 72–96 months. RCW 9.94A.510. However, since both ROC III and CM III are class C

felonies, the maximum sentence is 60 months and therefore so is the standard sentence range. RCW 9.94A.599.

The offender score for counts I, II, and III, and IV alone add up to 9. Thus, adding the additional points four points for counts VI, ROC III, and VII, Witness Tampering, increase the offender score to 13 but cannot increase the standard sentence range of 60 months. Therefore, in this case, ROP III and Witness Tampering are left unpunished. These are free crimes. No further analysis is required. *Brundage*, 126 Wn. App. at 66–67.

Chavez argues that the free crimes doctrine does not apply to this case because the offender score is only calculated beyond the maximum of nine because of the multiplier for sex crimes. This argument fails because all that matters is that a crime is left unpunished under the sentencing scheme as set forth in the SRA. Legislature has determined that some crimes will be punished differently from other, this includes sex offenses.

“The Washington Supreme Court has “held that where legislative intent is clearly indicated, that intent controls the offender score.” *State v. Chenoweth*, 185 Wn.2d 218, 224, 370 P.3d 6 (2016) (citing *State v. Calle*, 125 Wn.2d 769, 778, 888 P.2d 155 (1995)). The offender score multiplier for sex offenses set forth in RCW 9.94A.525(17) is a clear expression of legislative intent to require stronger penalties for sex offenses.

Chavez citation to *State v. Phelps* does not support his position.

*Phelps* cited to *State v. France* to explain the free crimes doctrine:

The court may impose an exceptional sentence ‘if the number of current offenses results in the legal conclusion that the defendant’s presumptive sentence is identical to that which would be imposed if the defendant had committed fewer current offenses.’

*State v. Phelps*, 2018 WL 1151975, at \*3 (Wn. App. 2018) (quoting *State v. France*, 176 Wn. App. 463, 469, 308 P.3d 812 (2013)) (*Phelps* is unpublished stated in Br. of Appellant’s Br. at 41).

The *Phelps* Court pointed out that *France* and the free crimes doctrine did not apply in *Phelps* because, “Contrary to the conclusion of the sentencing court, the standard sentence range of 33 to 43 months is not identical to what would have been imposed if Phelps had committed fewer crimes.” *State v. Phelps*, 2018 WL 1151975, at \*3 (Wn. App. 2018).

*Phelps* does not apply here because the fifth sex offense carries an identical 60 months standard range as the prior four sex offenses and would therefore be left unpunished. Therefore, the free crimes doctrine applies in this case.

Additionally, it’s clear the sentencing court would still have imposed an exceptional sentence absent the alleged erroneous aggravator considering that the court found that the two independent aggravating factors, abuse of trust and free crimes, justified the consecutive sentences.

The court made this clear by stating it had no problem with the jury's finding of the abuse of trust aggravator and commented, "It's predatory behavior and it deserves an exceptional sentence." RP 848. The court also explained that the exceptional sentence was warranted by the free crimes doctrine: "I'm gonna run all three of those different crimes consecutively because of the aggravators under the situation and basically because of the free crimes doctrine . . . ." RP 846. Therefore, the record shows the court would impose the same sentence absent consideration of the alleged erroneous aggravating factor.

#### Conclusion

The jury's finding that the State proved the aggravating factor of abuse of trust is not clearly erroneous because it is supported by the record. *Hale*, 146 Wn. App. at 307. Further, the aggravating factor under the free crimes doctrine clearly applies as Chavez's offender score was well beyond a nine, leaving two crimes unpunished. Finally, the court would have imposed the same exceptional sentence based upon the independently valid aggravating factors. *Hughes*, 154 Wn.2d at 134.

Therefore, the Court should uphold the exceptional sentence.

#### **F. THE STATE CONCEDES THE NO CONTACT CONDITION SHOULD BE MODIFIED.**

"Sentencing courts can restrict fundamental parenting rights by conditioning a criminal sentence if the condition is reasonably necessary

to further the State's compelling interest in preventing harm and protecting children.” *State v. Corbett*, 158 Wn. App. 576, 598, 242 P.3d 52 (2010) (citations omitted).

“There must be an affirmative showing that the offender is a pedophile or that the offender otherwise poses the danger of sexual molestation of his or her own biological children . . . .” *State v. Letourneau*, 100 Wn. App. 424, 442, 997 P.2d 436 (2000).

Here, the victims were adolescents and not prepubescent children. Additionally, there is no evidence in the record that Chavez otherwise poses a danger to his own biological children. Therefore, *Letourneau* is instructive and the State concedes that the provision should be modified to allow Chavez to have contact with his own biological children.

#### **IV. CONCLUSION**

The trial court properly admitted L.L.’s testimony under ER 404(b) because there were sufficient similarities where Chavez planned and transported the victims to isolated areas where he could rape his victims without being detected. Any error was harmless in light of the overwhelming evidence.

The State produced sufficient evidence of tampering with a witness because a reasonable juror could infer that Chavez attempted to have Buckley, H.W. and M.C. withhold truthful testimony.

The jury's special verdict finding an of abuse of trust was supported by testimony showing the defendant utilized trust gained from his position within the church community to facilitate access to H.W., continued to lure H.W. with talk about babysitting, groomed her, and then raped her after picking her up at the church.

The convictions for Counts II and III did not violate double jeopardy because the evidence and arguments make it manifestly apparent that Counts II and III charge separate conduct.

The exceptional sentence upwards was supported by the free crimes doctrine despite the statutory multiplier because the standard range for all sex crimes were identical and would have allowed the defendant to escape the punishment for a sex crime. Further, the exceptional sentence should be upheld because the court relied upon the abuse of trust factor and the free crimes doctrine as justifying consecutive sentences and only relied on other factors for the purpose of structuring the sentence.

Respectfully submitted this 14th day of June, 2019.

MARK B. NICHOLS  
Prosecuting Attorney

A handwritten signature in blue ink that reads "Jesse Espinoza". The signature is written in a cursive, flowing style.

JESSE ESPINOZA  
WSBA No. 40240  
Deputy Prosecuting Attorney

**CERTIFICATE OF DELIVERY**

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Travis Stearns on June 14, 2019.

MARK B. NICHOLS, Prosecutor

  
\_\_\_\_\_

Jesse Espinoza

**CLALLAM COUNTY DEPUTY PROSECUTING ATTORN**

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