

FILED
Court of Appeals
Division II
State of Washington
5/20/2019 4:51 PM
NO. 52452-5-11

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

STATE OF WASHINGTON,

Respondent,

v.

ZACKERY TORRENCE
Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR CLARK COUNTY

The Honorable John Fairgrieve, Judge

OPENING BRIEF OF APPELLANT

Peter B. Tiller, WSBA No. 20835
Of Attorneys for Appellant

The Tiller Law Firm
Corner of Rock and Pine
P. O. Box 58
Centralia, WA 98531
(360) 736-9301

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..	2
C. STATEMENT OF THE CASE	4
1. <u>Procedural facts</u>	4
a. <i>Trial</i>	5
b. <i>Motions in limine and CrR 3.5 hearing</i>	6
c. <i>Trial Testimony</i>	7
i. Testimony pertaining to Court II and III, as elected by the state:	12
ii. Testimony pertaining to Count I as elected by the State	12
iii. Testimony pertaining to Counts IV, V, VI and VII as elected by the State:.....	13
iv. Testimony pertaining to Counts VII and IX as elected by the State:	14
d. <i>Motion to dismiss</i>	23
e. <i>Jurors and jury inquiry.</i>	24
f. <i>Verdict, motion for arrest of judgment, and sentencing:</i>	25
D. ARGUMENT	31
1. THE COURT VIOLATED MR. TORRENCE'S RIGHT TO PRESENT A COMPLETE DEFENSE IN PROHIBITING THE STATE'S EXPERT WITNESS FROM TESTIFYING REGARDING "GROOMING BEHAVIOUR"	31

2.	THE MULTIPLE CONVICTIONS IN TWO OF THE INCIDENTS ELECTED BY THE STATE CONSTITUTED THE SAME CRIMINAL CONDUCT FOR SENTENCING PURPOSES BECAUSE EACH OFFENSE INVOLVED THE SAME VICTIM, SAME TIME, AND SAME INTENT	33
3.	COUNSEL’S UNPROFESSIONAL ERRORS AT TRIAL AND DURING SENTENCING CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL AND REQUIRE REVERSAL	38
	<i>a. Counsel was unaware of a critical email pertaining to blood spots described by Savannah Alexander despite evidence that the email has been provided to the defense by prosecution</i>	39
	<i>b. Counsel should have argued at sentencing that Mr. Torrence’s offenses encompass the same criminal conduct</i>	41
4.	INSUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT FINDING BEYOND A REASONABLE DOUBT THAT MR. TORRENCE COMMITTED THE OFFENSES	42
	<i>a. The State was required to produce sufficient evidence to prove beyond a reasonable doubt every essential element of the crime of child molestation in the first degree</i>	42
	<i>b. The State presented insufficient evidence to establish Mr. Torrence committed the offenses alleged</i>	44
	<i>c. The proper remedy is reversal of the convictions</i>	47
5.	THE CONDITION PROHIBTING IN-PERSON CONTACT WITH HIS MINOR CHILDREN VIOLATES MR. TORRENCE’S CONSTITUTIONAL RIGHT PARENT	47

6.	THE COURT ERRED IN IMPOSING THE \$200.00 FILING FEE, INTEREST ACCRUAL AND COMMUNITY SUPERVISION FEE	51
	<i>a. Recent statutory amendments prohibit discretionary costs for indigent defendants</i>	51
	<i>b. The Court did not inquire into Mr. Torrence’s financial situation</i>	53
	<i>c. Mr. Torrence was indigent</i>	54
	<i>d. The trial court erred by imposing dictionary community supervision and interest accrual LFOs.....</i>	54
E.	CONCLUSION.....	55

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2D 512 (1999)	39
<i>State v. Armendariz</i> , 160 Wn.2d 106, 156 P.3d 201 (2007).....	49
<i>State vs. Beaza</i> . 100 Wn.2d 487, 491, 670 P.2d 646 (1983).....	43
<i>State v. Berg</i> , 147 Wn. App. 923, 198 P.3d 529 (2008)	50, 51
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 (2015)	53, 54
<i>State v. Bobenhouse</i> , 166 Wn.2d 881, 214 P.3d 907 (2009).....	37
<i>State v. Bartholomew</i> , 104 Wn.2d 844, 710 P.2d 196 (1985)	54
<i>State v. Bunker</i> , 169 Wn.2d 571, 238 P.3d 487 (2010).....	43
<i>State v. Burns</i> , 114 Wn.2d 314, 788 P.2d 531 (1990).....	38
<i>State v. Catling</i> , No. 95794-1, April 18, 2019, ___ P.3d ___, 2019 WL 1745697	52
<i>State v. Cheatam</i> , 150 Wn.2d 626, 81 P.3d 830 (2003)	32
<i>State v. Chenoweth</i> , 185 Wn.2d 218, 370 P.3d 6 (2016).....	37,38
<i>State v. Cleman</i> , 18 Wn. App. 495, 568 P.2d 832 (1977)	43
<i>State v. Collins</i> , 2 Wn. App. 757, 470 P.2d 227, 228 (1970).....	44
<i>State v. Corbett</i> , 158 Wn. App. 576, 242 P.3d 52 (2010)	50, 51
<i>State v. DeVries</i> , 149 Wn.2d 842, 72 P.3d 748 (2003).....	43, 47
<i>State v. Dolen</i> , 83 Wn. App. 361, 921 P.2d 590 (1996)	35,36
<i>State v. Dunaway</i> , 109 Wn.2d 207, 743 P.2d 1237 (1987)	35,37
<i>State v. French</i> , 157 Wn.2d 593, 141 P.3d 54 (2006)	34
<i>State v. Garza-Villarreal</i> , 123 Wn.2d 42, 864 P.2d 1378 (1993).....	38
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	47
<i>State v. Haddock</i> , 141 Wn.2d 103, 3 P.3d 733 (2000)	38
<i>State v. Hayes</i> , 81 Wn. App. 425, 431-32, 434, 914 P.2d 788	45
<i>State v. Iniguez</i> , 167 Wn.2d 273, 217 P.3d 768 (2009).....	48
<i>State v. Jury</i> , 19 Wn.App. 256, 263, 576 P.2d 1302 (1978)	40
<i>State v. Kinneman</i> , 155 Wn.2d 272, 119 P.3d 350 (2005).....	48
<i>State v. Kylo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009)	39
<i>State v. Lessley</i> , 118 Wn.2d 773, 827 P.2d 160 (1987)	34,38
<i>State v. Letourneau</i> , 100 Wn. App. 424, 997 P.2d 436 (2000).....	50
<i>State v. Lewis</i> , 115 Wn.2d 294, 797 P.2d 1141 (1990).....	38
<i>State v. Lundstrom</i> , 6 Wn. App.2d 388, 429 P.3d 1116, 1121 n.3(2018 .	55
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	39
<i>State v. Moore</i> , 7 Wn. App. 1, 499 P.2d 16 (1972)	44
<i>State v. Mutch</i> , 171 Wn.2d 646, 254 P.3d 803 (2011)	50

<i>State v. Myers</i> , 133 Wn.2d 26, 941 P.2d 1102 (1997)	43
<i>In re Pers. Restraint of Rainey</i> , 168 Wn.2d 367, 229 P.3d 686 (2010)	48,49, 50
<i>State v. Ramirez</i> , 191 Wn.2d 732, 426 P.3d 714 (2018)	2,4, 52
<i>State v. Saunders</i> , 120 Wn. App. 800, 86 P.3d 232 (2004)	41, 42
<i>City of Seattle v. Slack</i> , 113 Wn.2d 850, 784 P.2d 494 (1989)	43
<i>State v. Smith</i> , 155 Wn.2d 496, 120 P.3d 559 (2005)	47
<i>State v. Taplin</i> , 9 Wn. App. 545, 513 P.2d 549 (1973)	44
<i>State v. Tili</i> , 139 Wn.2d 107, 985 P.2d 365 (1999)	38
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	39, 42
<i>State v. Torngren</i> , 147 Wn. App. 556, 196 P.3d 742 (2008)	35
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009)	47, 49
<i>State v. Wittenbarger</i> , 124 Wn.2d 467, 880 P.2d 517 (1994)	32

UNITED STATES CASES

Page

<i>Burks v. United States</i> , 437 U.S. 1, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1979)	47
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S. Ct. 628, 61 L.Ed.2d 560 (1970)	43
<i>Sanders v. Ratelle</i> , 21 F.3d 1446, 1456 (9th Cir.1994)	40
<i>Smalis v. Pennsylvania</i> , 476 U.S. 140, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986)	44
<i>Santosky v. Kramer</i> , 455 U.S. 745, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982)	48
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	39
<i>Washington v. Texas</i> , 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).	32
<i>In re Winship</i> , 397 U.S. 358, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970)	43

REVISED CODE OF WASHINGTON

Page

RCW 7.68.035(1)(a)	52
RCW 9A.44.050(1)(a)	36
RCW 9A.44.083	36
RCW 9A.44.100(1)(a)	36
RCW 9.94A.030(10)	48

RCW 9.94A.505(9)	47, 48
RCW 9.94A.507(3)(c)(ii)	5
RCW 9.94A.535(2)(c)	27,29
RCW 9.94A.535(3)(n)	5
RCW 9.94A.589(1)(a)	34,36,38,41
RCW 9.94A.703(3)(b)	47
RCW 9.94A.760(1)	51
RCW 9.94A.837	25
RCW 10.101.010(3)(a)	52, 54
RCW 10.01.160(1)	51, 52, 53
RCW 10.01.160(2)	51
RCW 10.82.090	31
RCW 36.18.020(2)(h)	53

OTHER AUTHORITIES

Page

Second Substitute House Bill (SSHB) 1783	2,4, 51, 52
LAWS OF 2018, ch. 269	52,55

CONSTITUTIONAL PROVISIONS

Page

U.S. Const. Amend VI	2,32,39
U.S. Const. Amend XIV	2, 3,32, 43, 48
Wash. Const. art. I, § 3	3,48
Wash. Const. art. I, § 22	2,39

A. ASSIGNMENTS OF ERROR

1. The trial court violated the appellant's constitutional right to present a complete defense in preventing the defense from eliciting testimony from a State's expert witness on "grooming behavior."

2. The trial court erred by refusing to count any of Mr. Torrence's offenses as the "same criminal conduct" for calculation of the offender score.

3. The trial court erred in adopting Conclusion of Law 2.7. (State's Findings of Fact and Conclusion of Law Regarding Double Jeopardy and Scoring, Clerk's Papers 395.

4. The appellant has a Sixth Amendment and article I, section 22 right to counsel and to the effective representation of counsel. Here, counsel (1) was not adequately prepared due to his unfamiliarity with an email by a State's witness describing blood drops found in A.K.A.'s underwear following the final visit to Mr. Torrence's house in the summer of 2011, and (2) failed to argue that convictions for rape and child molestation from one incident, and convictions for rape, indecent liberties, and child molestation from another incident, were the same criminal conduct. Was Mr. Torrence prejudiced by his attorney's deficient representation?

5. The evidence was insufficient to sustain the convictions as charged in Counts I through IX.

6. The sentencing court erred when it entered a community custody condition and corresponding order prohibiting in-person contact with the appellant's biological children until they reach age sixteen.

7. The sentencing court erred by imposing legal financial obligations [LFOs] including a \$200 criminal filing fee and an interest accrual provision in the judgment and sentence following the Supreme Court's decision in *State v. Ramirez*¹ and after enactment of *House Bill* 1783.

8. The sentencing court erred by imposing the discretionary cost of Department of Corrections (DOC) community supervision in the judgment and sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The state and federal constitutions guarantee a criminal defendant the rights to counsel, to compulsory process and to present a complete defense. Const. amends. VI, XIV; Const. art. I, § 22. Mr. Torrence had very limited contact with A.K.A., consisting of visitation with her mother for several weeks in the summer of 2011. Did the trial court violate Mr. Torrence's constitutional rights to present a complete defense when it prohibited him from eliciting testimony from an expert witness, called by the State to testify about delayed reporting of sex offenses, regarding the

¹191 Wn.2d 732, 426 P.3d 714 (2018).

prevalence and role of “grooming” behavior in sex offenses? Assignment of Error 1.

2. Whether the appellant’s multiple convictions in Counts II and III, and multiple convictions in Counts IV, V, VI, and VII, constituted the same criminal conduct for sentencing purposes because each offense involved the same victim, same time, and same criminal intent? Assignments of Error 2 and 3.

3. Under the Sixth Amendment to the U.S. Constitution and Art. 1 §22 of the Washington State Constitution, a criminal defendant has the right to effective assistance of counsel. If defense counsel is not adequately prepared due to failure to be aware of an important e-mail describing drops of blood found in A.K.A.’s underwear in a case devoid of physical evidence, has the defendant been deprived of effective assistance of counsel? Assignment of Error 4.

4. Did Mr. Torrence receive constitutionally ineffective assistance of counsel, prejudicing him, where his convictions for child molestation and rape of a child alleged in Counts II and III constitute the same criminal conduct, and where his convictions for first degree rape, second degree rape, indecent liberties, and child molestation constitute the same criminal conduct but defense counsel did not raise the issue below? Assignment of Error 4.

5. The appellant’s right to due process under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth

Amendment was violated where the State failed to prove all essential elements as charged in Counts I through IX? Assignment of Error 5.

6. Whether a community custody condition that prohibits in-person contact with the appellant's children until age sixteen must be stricken or modified because the condition violates his due process right to parent his child? Assignment of Error 6.

7. Under the Supreme Court's decision in *Ramirez*, and after enactment of *House Bill 1783*, should the \$200.00 filing fee, interest accrual provision, and community supervision fees be stricken? Assignments Error 7 and 8.

C. STATEMENT OF THE CASE

1. Procedural facts:

Zackery Torrence was charged by information filed on August 1, 2017 in Clark County Superior Court with one count of first degree rape of a child (Count 1), first degree child molestation (Count 2), first degree rape of a child (Count 3), and first degree child molestation (Count 4). Clerk's Papers (CP) 1-3. The State filed an amended information on March 27, 2018, charging Mr. Torrence with the following offenses:

Count 1	First Degree Child Molestation	RCW 9A.44.083
Count 2	First Degree Rape of a Child	RCW 9A.44.073
Count 3	First Degree Child Molestation	RCW 9A.44.083

Count 4	Second Degree Rape	RCW 9A.44.050(1)(a)
Count 5	Indecent Liberties with Forcible Compulsion	RCW 9A.44.100(1)(a)
Count 6	First Degree Rape of a Child	RCW 9A.44.073
Count 7	First Degree Child Molestation	RCW 9A.44.083
Count 8	First Degree Rape of a Child	RCW 9A.44.073
Count 9	First Degree Child Molestation	RCW 9A.44.083

1RP at 23-25; CP 70-74.

The State alleged that the victim in each offense involved A.K.A., who was less than twelve years old than the defendant and that the acts occurred in the intervening period between July 26, 2010 and July 25, 2012. CP 70-74. The State alleged that the defendant used a position of trust or confidence to facilitate commission of the crimes, and alleged that A.K.A. was under age twelve in Counts IV and V. RCW 9.94A.535(3)(n), 9.94A.507(3)(c)(ii). CP 70-74.

a. Trial

The case came on for trial on July 9, 10, 11, 12, 13, and 16, 2018, the Honorable John Fairgrieve presiding. 1Report of Proceedings² (RP)

²The record of proceedings consists of the following transcribed volumes: 1RP – August 2, 2017, August 8, 2017 (arraignment), August 16, 2017 (bail reduction hearing), August 23, 2017, October 31, 2017, January 4, 2018, March 27, 2018, April 19, 2018, July 5, 2018, July 9, 2018 (jury trial day 1, CrR 3.5 motion, voir dire); 2RP – July 9, 2018 (jury trial, day 1, July 10, 2018 (jury trial, day 2, voir dire, continued); 3RP – July 10, 2018 (jury trial, day 2), July 11, 2018 (jury trial, day 3); 4RP – July 11, 2018 (jury trial, day 3), July 12, 2018 (jury trial, day 4); 5RP – July 12, 2018 (jury trial, day 4); 6RP – July 12, 2018 (jury trial, day 4), July 13, 2018 (jury trial, day 5);

(7/9/18) at 35-190, 2RP (7/9/18, 7/10/18) at 191-381, 3RP (7/10/18, 7/11/18) at 385-577, 4RP (7/11/18, 7/12/18) at 578-768, 5RP (7/12/18) at 769-960, 6RP (7/12/18, 7/13/18) at 961-1149, 7RP (7/13/18, 7/16/18) at 1150-1306.

b. Motions in *limine* and CrR 3.5 hearing

Prior to trial the State moved to exclude testimony of three alleged acts of theft committed by A.K.A., including stealing a packet of icing from Walmart and, stealing money and cosmetics from relatives' purses. 1RP at 55. The court reserved ruling on the motion until A.K.A.'s testimony. 1RP at 58-59. Following opening statements, the court ruled that evidence of the alleged thefts prior to A.K.A.'s disclosure was not allowed. 1RP at 349-50.

Defense counsel argued that A.K.A. has a tremendous amount of anger, and that within days of her disclosure of molestation, she wrote an "angry" and "rather lengthy email to her mother" that "barely mentions Mr. Torrence as a side note" after having accused him of sexually molesting her. 1RP at 79. The email also states that A.K.A. told her sister J.A. about prior sexual abuse by a person other than Mr. Torrence, but that she had no memory of it. 1RP at 106.

After hearing the motions in limine the court heard a CrR 3.5 suppression hearing. 1RP at 136-48. Following testimony and brief

7RP – July 13, 2018 (jury trial, day 5), July 16, 2018 (jury trial, day 6), August 21, 2018, September 10, 2018 (motion for arrest of judgment); 8RP–

argument, the court found that Vancouver police Detective Dustin Goudschaal's questioning of Mr. Torrence was non-custodial and that his statements were made voluntarily and were admissible at trial. 1RP at 150-51.

c. Trial testimony

Laura Alexander is the mother of A.K.A. and J.A. 4RP at 621. A.K.A. was born July 26, 2000. 2RP at 353. The children's father is Brian Alexander, who lives with his wife Savannah³ in Rapid City, South Dakota. 2RP at 355, 4RP at 621, 5RP at 896. Laura Alexander and Brian Alexander were married in March 2000 and divorced in December 2004. 4RP at 621, 5RP at 897. After they divorced, they had a "shared custody agreement" and Laura saw the children "every week," but after Brian and Savannah moved to Texas with the children, her visits ceased. 5RP at 898-99. After moving to Texas in 2011, the family moved to Rapid City, South Dakota in 2013. 5RP at 904. Brian testified that Laura had more opportunities to visit but did not request visitation with A.K.A. 5RP at 902. Brian has two other children with his wife Savannah. 2RP at 357, 5RP at 900. He stated that last time that A.K.A. saw her mother in person was during the summer of 2011, and that she had infrequent telephone calls with

September 10, 2018 (sentencing).

³This brief refers to Laura Alexander, Savannah Alexander, and Brian Alexander by their first names for clarity and ease of reading. No disrespect is intended.

her mother since that time. 5RP at 912, 917. Brian Alexander stated that A.K.A. has had anger toward her mother starting when she was about twelve years old, and that the anger increased after she made the allegations against Mr. Torrence. 5RP at 917-18.

A.K.A.'s parents divorced when she was four and she first met Savannah Alexander when she was five years old. 2RP at 356. After her parents' divorce she primarily lived with her father and Savannah, but had periodic visitation with her mother. 2RP at 356, 4RP at 762.

A.K.A. was home schooled by Savannah Alexander. 2RP at 355.

The family lived in Everett then moved to Lynwood briefly and then moved to Texas and then to South Dakota. 4RP at 762. A.K.A. and J.A. visited with Laura when she was involved with Mr. Torrence three times. 4RP at 764. The first visit was in 2010, and during spring break in 2011, and then for a six to eight week visit during the summer of 2011. 4RP at 764. She stated that after the children returned from the third visit they moved to Texas within a month. 4RP at 765.

Until shortly before the trial A.K.A. lived in Utah with Diana Beardall, who is Savannah Alexander's mother. 2RP at 354, 3RP at 548

A.K.A. was home schooled from the second grade until she finished the equivalent of eleventh grade, and then attended her last year at high school in Utah when she started living with Ms. Beardall. 2RP at 354, 355, 5RP at 919. After moving to Utah, A.K.A. continued her home schooling

with Ms. Beardall and then attended public school and did “packets” so that she could graduate early. 3RP at 576.

A.K.A. has a deeply troubled relationship with her mother—whom she calls Laura; A.K.A. last saw her mother when she was eleven and last talked to her in November, 2016. 2RP at 356.

Laura Alexander met Zachery Torrence in 2008 in Vancouver, Washington. 4RP at 622-23. Mr. Torrence has two children; his son C.T. and his daughter V.T. 4RP at 633, 6RP at 1073. After initially living in an apartment complex, Laura and Mr. Torrence moved to a townhouse in Vancouver. 4RP at 623. After living in the townhouse for about six months they moved to a house on Whitman Avenue in Vancouver. 4RP at 625. They lived at the Whitman Avenue house for about two years. 4RP at 633.

Laura Alexander testified that A.K.A. and her sister J.A. visited them at the townhouse once in 2009 or 2010. 4RP at 623. She stated that the children visited them at the house on Whitman Avenue two times, once for Christmas and once during the summer of 2011. 4RP at 626. Laura Alexander stated that the children’s last visit in 2011 was for six weeks. 4RP at 628. Laura Alexander stated that she worked during part of that time and when she and Mr. Torrence were at work, their friend Anne Scheinle would watch the four children at the house. 4RP at 629. She stated that Ms. Scheinle would sleep on the couch when she stayed overnight at the

house, and would also sometimes spend time in the garage or carport. 4RP at 632.

Laura Alexander testified that Mr. Torrence pushed her on more than one occasion and that the children, including A.K.A., would have seen the assaults. 4RP at 645-46. She stated that Mr. Torrence threw things in the house, and there were occasions when A.K.A. would have seen Mr. Torrence throwing objects. 4RP at 646. She said that while the children were visiting, A.K.A. did not need help putting on or taking off her clothes. 4RP at 648. Laura acknowledged that she tried to commit suicide and that A.K.A. was exposed to those event, that A.K.A. had found her passed out drunk at their house, and that she also was in a mental institution during one of the children's visits. 4RP at 660-61. She also acknowledged that she and Mr. Torrence drank a lot during A.K.A.'s third visit in summer 2011, and that the children saw both of them while they were intoxicated and fighting. 4RP at 661.

A.K.A. first visited her mother in Vancouver when she was nine or ten, and her last visit was when she was eleven. 2RP at 358. A.K.A. testified that the third visit was for about seven weeks during July and August. 2RP at 362. While visiting her mother in Vancouver, Laura lived with Zackery Torrence, and sometimes his two children, C.T. and V.T., would also visit. 2RP at 359. During the times that she visited her mother, A.K.A.'s father and step mother lived in Everett or Lynwood, Washington.

2RP at 360. After the final visit A.K.A. and J.A. were driven to Everett in August, 2011, and in early September, 2011, the family moved to Big Springs, Texas, shortly after the visit with Laura. 2RP at 361.

A.K.A. stated that during the visits, Mr. Torrence was nice and they would do “normal things like eating dinner around the table as a family setting,” and playing outside, but that at other times when drinking, “he would get violent and throw things” like furniture and bottles. 2RP at 363. She stated that she saw him “hit” her mother by giving her a “smack” across her face. 2RP at 364-65.

A.K.A. said that Mr. Torrence “[s]ometimes he got us changed and undressed” during the third visit but did not recall if that had happened during the first two visits. 2RP at 365-66. She stated that he would help her take off her clothes and “it felt awkward when I was being undressed and changed into different clothes because I was already older—old enough to do it for myself.” 2RP at 366.

Following a disclosure of sexual abuse, Vancouver Police Department Detective Dustin Goudschaal arranged for A.K.A. be interviewed by police in Orem, Utah, and a videotaped interview took place on February 27, 2017. 5RP at 936. Detective Goudschaal interviewed several people by telephone including Savannah Alexander, Dianna Beardall, and Laura Alexander. 5RP at 937. Detective Goudschaal interviewed Zackary Torrance at the Family Court Annex in Vancouver on

June 14, 2017. 5RP at 938, 939. Detective Goudschaal stated that Mr. Torrance said that he and Laura Alexander started a dating relationship in 2009 and ended in 2011, and that the children had gone to Vancouver to visit Laura two times. 5RP at 940-41. Detective Goudschaal stated that during the interview, Mr. Torrance told him there was “not really any arguments” between he and A.K.A., and that they had a good relationship. 5RP at 942.

A.K.A. testified regarding four instances of sexual molestation or sexual assault:

i. Testimony pertaining to Counts II and III, as elected by the State:

A.K.A. said the first occurred when she was in V.T.’s bedroom getting undressed and Mr. Torrance was rubbing her legs and then put his hands under her underwear and “stuck his fingers” into her vagina. 2RP at 370, 371. She said that she tried to push him away and that she fought back and then gave up, and he left the room. 2RP at 370. She said that while this occurred he said “things like[‘]it was okay—nothing’s wrong—you don’t—you don’t need to be afraid.[‘]” 2RP at 372.

ii. Testimony pertaining to Count I as elected by the State:

A.K.A. testified that another incident took place in the living room of the house while she was watching television on the couch. 2RP at 376. She stated that he touched her and that it stopped when someone came into the

living room. 2RP at 376. She stated that she was wearing pajamas and Mr. Torrence sat down next to her and started to touch and rub her body with his hand over her clothes, touching her vagina and her chest. 2RP at 377. She said that this happened twice. 2RP at 377-78. She said that he said “reassuring things” like “[‘]it’s okay—it’s fine—don’t be afraid—it’s okay.[‘]” 2RP at 379.

iii. Testimony pertaining to Counts IV, V, VI, and VII as elected by the State:

A.K.A. testified that during another incident she was in V.T.’s room and Mr. Torrence came into the room and started to undress her, then touched her and she tried to push him away. 2RP at 380. She said that he “ended up pinning me to the bed and he stuck his penis” in her vagina. 2RP at 380. She stated when he first entered the bedroom, Mr. Torrence shut the door and started to undress her by taking off her jeans after A.K.A. tried to get up and run out the door, and she stated that he grabbed her arms and pinned her down and “once again he shut the door and locked it.” 2RP at 381, 3RP at 385. She said that he also blocked the bedroom door with a toy chest. 3RP at 385-86. She said that the door locked with a locking door knob. 3RP at 386. She said that he was not able to get her pants down because she kept trying to pull them back on, and that is when she tried to leave the room. 3RP at 385. After locking the door, he pulled her back and then started to undress her. 3RP at 387-88. She stated that she started to

yell and trying to escape and “I was then told to be quiet otherwise my sister could get hurt.” 3RP at 388. She said that he also threatened her mother and it was “[v]ery similar to what he said about my sister.” 3RP at 388.

She said that she would find blood in her underwear, and that “this was about the time that [Savannah] started talking to me about having my period[.]” 3RP at 397. She said that when she found blood in her underwear she would throw it in the trash outside. 3RP at 398. She stated that he told her “not to tell every time.” 3RP at 395.

iv. Testimony pertaining to Counts VIII and IX as elected by the State:

A.K.A. said that after the previous incident he raped her “about seven times” and that this occurred in the bedroom and that this happened “[a]round” the last week of the third visit. 3RP at 396, 3RP at 450. She said that in addition to seven rapes, there were two to three instances of touching her. She said that she knew “what happened several times with the rapes and that’s just the number I recall.” 3RP at 465.

A.K.A. testified that during the visit to Vancouver she was blocked from calling her father by her mother at one point during the visit. 3RP at 402. She said that she had a prearranged “safe word” to use to talk with her father if something was wrong during the visit, but that she did not use the word during calls, and that she did not do so “out of fear.” 3RP at 402, 403.

A.K.A. said that she started her period when she was thirteen. 3RP at 402.

Dianna Beardall said that after the family moved from Everett to Texas she visited the family for Christmas following their move to Texas the previous summer, and noticed “a lot of anger” in A.K.A. 3RP at 555-56. A.K.A.’s anger culminated in assaulting her father in 2016, at which point the family told her that she needed to go into counselling and that if she did not do so, her father would press charges against her for assault. 4RP at 769. After moving to Texas, Mr. Alexander stated that A.K.A. began to “act out more” and started to become oppositional, defiant, and angry. 5RP at 903. A.K.A. assaulted her father and she was told that her behavior would have to change and she would have to go into counselling or she would not be able to live with the family any longer. 5RP ta 905-07.

A.K.A. went to live with Ms. Beardall in Orem, Utah. 5RP at 911. After she went to live in Utah, her father saw her “a couple of times a year.” 5RP at 900. A.K.A. moved to Ms. Beardall’s house in April, 2016 and later engaged in counselling sessions. 3RP at 557. Ms. Beardall stated that in November, 2016, while driving her back from a session with her therapist, Savannah called to check on the status of the session. 3RP at 562. During the telephone call with Savannah, A.K.A. was crying and mentioned Mr. Torrence. 3RP at 570-71. A.K.A. testified that it was possible that she told her stepmother and grandmother first and then told her counsellor after that.

3RP at 532. After A.K.A.'s accusation that she was molested by Mr. Torrence, her father called Vancouver, Washington police and was told to notify the Orem, Utah police because that is where A.K.A. was living. 5RP at 909.

Ms. Beardall stated that A.K.A. did not report acts of sexual penetration until September 2017, almost year after he allegation of molestation. 3RP at 611-12.

A.K.A. testified that after moving to Texas she was angry for "years" and that her behaviors were bad when she was fifteen or sixteen. 3RP at 406. She said that her father and step mother told her that she would have to go to counselling or that they would put her in a mental institution. 3RP at 407. She started to live with her grandmother in Orem, Utah in April, 2016 and started counselling in July, 2016. 3RP at 408. She said that in counselling, her therapist said that they needed to figure out "where this anger stems from, what's causing it and he was having me talk about my childhood," and said that the abuse "came up during that talk." 3RP at 410. She sided that she told her stepmother about the abuse the same day while on speaker phone while being driven by her grandmother. 3RP at 410.

A.K.A. stated that she had little contact with her mother since 2011. 3RP at 423.

Dr. Christopher Johnson testified regarding the prevalence of delayed reporting of sex offenses. 4RP at 696-708. The court denied a motion by

the defense to elect testimony regarding “grooming” behavior by sex offenders from Dr. Johnson. 4RP at 719-21. The prosecutor argued that the evidence of grooming was “reverse propensity” evidence. 4RP at 713-14. Defense counsel argued that it was not propensity evidence and that grooming is part of the typical pattern of sexual abuse of children. 4RP at 714. Defense counsel noted it was not propensity, but the absence of the typical pattern seen in child abuse cases, and that he had hired Dr. Johnson on other cases to testify regarding grooming behavior and that “[i]t comes up in every single case.” 4RP at 716-17. The court stated that there is “an insufficient basis—factual basis or legal basis for me to allow that information in.” 4RP at 719. The court also stated that “this appears to be a type of character evidence or kind of reserve character evidence.” 4RP at 719.

The court revisited the issue the following day, stating that “Dr. Johnson’s testimony to what grooming activity is not going to be enough,” and that he “would have to testify that the lack of grooming activity decreased the probability that the defendant –you know—committed the crime in this case.” 4RP at 743.

Pediatrician Kimberly Copeland testified that it is possible for something to penetrate the labia minor lips and not go past the hymen because there is “a depth” between the two structures, with the labia majora being the most external of the structures. 5RP at 874. Dr. Copeland

explained that the hymen is not “a cover,” but a collar of tissues that goes around the vaginal opening. 5RP at 873. Dr. Copeland stated that there are “very few thing that are actual findings of sexual assault” and even after an assault that includes penetration of the vagina, only four to five percent of children will later have findings that give an indication that penetration occurred. 5RP at 876. Dr. Copeland did not examine A.K.A. and was not aware of any physical examination of her. 5RP at 882.

Savannah Alexander and A.K.A. acknowledged that A.K.A. did not have a physical genital examination. 3RP at 538, 4RP at 781.

During an offer of proof regarding emails prepared by Savannah about information from A.K.A. about the incidents, she testified that A.K.A. related an incident where he put his penis inside her, although that contention was not contained in the written materials she prepared. 5RP at 799. Savannah stated that she did not include it in her summary of A.K.A.’s statements because “I would just know that wasn’t something I would need to have notes to remember.” 5RP at 800. When questioned further by defense counsel, Savannah Alexander stated that “[s]he let him have penal penetration and it lasted five minutes and then it was over.” 5RP at 800. Counsel stated that he should have been informed about this testimony in advance and it was the first he had heard this allegation. 5RP at 801.

Savannah said that she saw blood spotting on A.K.A.’s underwear when they came home from their last visitation in 2011. 5RP at 816. She

said that he had not told counsel about the blood spotting during a defense interview in November because she did not recall it, and then emailed the victim's advocate with the information that she had seen blood. 5RP at 819. Counsel moved to strike that portion of the testimony on the basis that it was a discovery violation. 5RP at 819. The prosecutor told the court that she had sent an email to the victim advocate on November 9, 2017 and that it was provided to defense counsel. 5RP at 820. Defense counsel stated he did not receive it, and that his Bates stamps ends at 422 and resumes at 424, and that he did not get Bates document 433. 5RP at 820. The State presented a signed discovery receipt for document 423. Defense counsel responded that it was not signed by anyone in his office and that he had not previously seen the document. 5RP at 820. The state argued that the same signature on the receipt for document number 423 appears on receipts for other discovery receipts. 5RP at 821. Defense counsel moved for admission of the email from Savannah to the victim advocate, stating that the email "describes the—the explanation the explanation the child gave. The fact that was —you know—she was shaving and she cut herself and all that kind of stuff." 5RP at 823. Counsel moved for introduction of the email under ER 106 and as the effect on the listener. 5RP at 827. Counsel stated that he did not know about the email, and it was a "complete surprise to me." 5RP at 825. The court ruled that it was not admissible under ER 106 and that it was inadmissible hearsay, and that the State did not commit a

discovery violation. 5RP at 826, 827, 829.

Savannah testified that she was given an explanation for the two blood drops by A.K.A. and that she was satisfied with that answer. 5RP at 832. She stated that the blood drops were located in an area “beside” the vaginal area, but “not above it.” 5RP at 831.

Anne Schienle testified that she lived with Zachary for three periods of time in Vancouver, and that she did not see Mr. Torrence break things in the house. 6RP at 976. She stated that Zachery’s and Laura’s bedroom door had a lock on it. 6RP at 977. She stated that she got along with Laura’s children and that Mr. Torrence got along with A.K.A. and did not see any problems between them. 6RP at 977. Ms. Schienle testified that during the summer that the girls were with them in the house she was present in the house every day that the girls were there. 6RP at 991. Ms. Schienle testified that there was never a time when Mr. Torrence was in the house with the girls when Laura was not present. 6RP at 992.

Mr. Torrence testified at trial in his own defense. Mr. Torrence met Laura in 2009 and at the beginning of February, 2010 they moved into a townhouse, where they lived for nine months. 6RP at 1007-08. During the summer of 2010 time Laura’s daughter stayed with them at the townhouse for six weeks. 6RP at 1008. In October, 2010 they moved to a house on Whitman avenue. 6RP at 1011-12. Laura’s children visited the Whitman Avenue house twice. 6RP at 1012. Mr. Torrence testified that the first visit

at the Whitman street house was for a about two weeks during spring break in April 2011. 6RP at 1015. Mr. Torrance stated that there was a lock on the master bathroom that was broken that he replaced and that he installed a lock on the master bedroom door. 6RP at 1022. He stated that he got along well with A.K.A. during the visit. 6RP at 1033. The children visited the house a second time for two weeks during the summer of 2011, returning to in the middle of the visit to Laura's house for the weekend. 6RP at 1033.

During the third visit he worked part of the time as a car salesman. 6RP at 1055. Ms. Scheinle was also at the house every day during that time to help take care of the four children. 6RP at 1056. He stated that during the third visit, A.K.A. started to have an "attitude" regarding doing chores and they would give her "time outs." 6RP at 1058. He stated that when he returned home from work he would cook dinner for everyone. 6RP at 1060-61.

Mr. Torrance stated that during the last visit he did not help A.K.A. or J.A. change their clothes. 6RP at 1061. He stated that he did help change the cloths of his four year old daughter V.T. 6RP at 1061. He denied throwing bottles against the walls or throwing furniture around, and denied pushing Laura and denied hitting her across the face. 6RP at 1062. He did not recall a time when he was ever alone with A.K.A., although it may have been possible for them to have been alone in the kitchen and other people were in the other room or outside the house. 6RP at 1063. He stated that

A.K.A. spent a lot of time in her bedroom reading by herself and may have been in her room when bringing in laundry, but that he did not do that for very long because Laura liked the laundry done in a specific way and so he did not do the laundry for very long. 6RP at 1063. He testified that it was a pretty full house and that there were people “home pretty much all the time.” 6RP at 1064. He denied that there was a time when A.K.A. could have seen him without clothing. 6RP at 1064. He said that Ms. Scheinle usually slept on the couch or in Mr. Torrences’ son’s room when he was not there. 6RP at 1066. He denied ever touching A.K.A. on the chest, taking her clothes off, denied dragging a toy chest to the bedroom across the floor to block the door to keep it from opening, denied touching her sexually and denied that he put his penis in her vagina. 6RP at 1068-69. He stated that he did not have any troubles with A.K.A. during her last visit, but that A.K.A. had issues with her mother and that “there was yelling back and forth.” 6RP at 1069. He stated that he served as a mediator between A.K.A. and Laura, and that Laura would drink and A.K.A. did not like that. 6RP at 1069.

Mr. Torrence acknowledged that he pushed Laura when the girls were visiting. 6RP at 1084.

The third visit to the house ended in August, 2011. 6RP at 1073. Mr. Torrence rented a car to drive Laura, A.K.A. and J.A. from Vancouver back to Everett. 6RP at 1074. After returning, Brian Alexander, Laura,

A.K.A. and J.A. almost immediately began packing to move to Texas; Mr. Torrence did not see A.K.A. again after dropping them off in Everett. 6RP at 1083.

Mr. Torrence's contact with A.K.A. was only for a few weeks during a total of a three-month period during the spring and summer of 2011. 6RP at 1080.

d. Motion to dismiss

At the conclusion of the State's case-in-chief, defense counsel moved for dismissal of child molestation except Count I, dismissal of each rape of a child charge other than Count II and Count VI, and that Counts III, Count IV, Count V, Count VII, Count VIII, and Count IX should be dismissed due to insufficiency of the evidence presented, and that indecent liberties as alleged in Count V merges with the remaining counts. 5RP at 952. The court stated:

So the State had kind of hedged its bets in terms of alternative legal theories for each of the contacts that took place. Count I would pertain to a couch incident. Count II and III would pertain to the incident in the bedroom—that was digital vaginal penetration but nothing more.

Counts IV, V, VI and VII pertain to the first instance of penile/vaginal rape which was forcible. And VIII and IX would pertain to any and all of the subsequent penile/vaginal intercourse incidents that occurred on subsequent days.

5RP at 955.

The court found that the prosecution had established a prima facie case for each count and ruled that the issue of merger and double jeopardy was premature, and denied the motion to dismiss the counts. 5RP at 957-58.

e. Jurors and jury inquiry

Defense counsel informed the court that Juror 5 and 6 were seen “whispering and exchanging glances” during presentation of evidence and that they were “seen passing a note and then rolling their eyes during the proceedings[.]” 6RP at 1136. After clarification, the jurors were identified as Jurors 6 and 7. 6RP at 1139. Juror 6 was questioned by the court and stated that she did not discuss the case and did not pass a note. 6RP at 1141.

Juror 7 was questioned separately, and stated that Juror 6 told her that “[‘]I can’t hear what she’s saying.[‘]” Juror 7 also told the court that she “maybe poked me a couple times and rolled her eyes because she was bored but otherwise no.” 6RP at 1142.

Juror 10, who had a preplanned vacation, was released by the court. 6RP at 1144. An alternate was selected by drawing to replace Juror 10. 6RP at 1146, 1148.

The jury submitted an inquiry, which was taken by Judge Scott Collier in place of Judge Fairgrieve, who was absent. 7RP at 1256. The

jury asked to see the visual of which acts the State elected as corresponding to the events described by A.K.A. 7RP at 1256. The jury was instructed that it had received all the evidence and to continue with deliberations. CP 212.

f. Verdict, motion for arrest of judgment, and sentencing:

The jury found Mr. Torrence guilty of the nine counts as charged, and also found the aggravating factor of abuse of a position of trust or confidence in the commission of the offense in Counts I, II, IV, V, VI, VII, VIII and IX and that A.K.A. was under the age of fifteen at the time of the commission of Counts IV and V. RCW 9.94A.837, RCW 9.94A.507(3)(c)(ii).⁴ 7RP at 1260-67; CP 274-291.

Defense counsel moved for arrest of judgment on the basis that the email to the victim advocate was not provided to the defense in discovery and that it was a surprise to the defense that the statement had been made. 7RP at 1288. Counsel argued that the email from Savannah should have been admitted to impeach A.K.A.'s credibility. 7RP at 1289. Defense counsel argued that it should have been admissible under ER 106. 7RP at

⁴The statute provides in relevant part: If the offense that caused the offender to be sentenced under this section was rape in the first degree, rape in the second degree, indecent liberties by forcible compulsion, or kidnapping in the first degree with sexual motivation, and there has been a finding that the victim was under the age of fifteen at the time of the offense under RCW 9.94A.837, the minimum term shall be either the maximum of the standard sentence range for the offense or twenty-five years, whichever

1288. Counsel also argued that the state presented insufficient evidence, that A.K.A. described three incidents: one when she was in her room getting undressed and she alleged that Mr. Torrance rubbed her leg and alleged that she described one act of molestation; the second incident which A.K.A. described as when she was in the couch in the living room, and the incident she described as a rape occurring in the bedroom and moved for dismissal of the counts. 7RP at 1293-95.

The State responded that there was sufficient evidence to support each of the convictions, and that the contents of the email were hearsay and it was correctly excluded. 7RP at 1297. The State argued that even assuming it was erroneously excluded, any prejudice was not contemplated by CrR 7.5. 7RP at 1297.

Regarding the email proffered by the defense, the court stated:

[I]t seemed to the court this was out sort—an out-of-court statement so I questioned was it offered for the truth of the matter asserted. It seemed to the court that that’s why it was being offered. I appreciate the fact that counsel indicates that’s not—not the reason. But I think the court had some concern about that about the nature of the statement itself.

...

You know—I think that what was also important is that there’s cross-examination about this issue subsequently and this whole issue was developed in cross examination. So I think that certainly the Defendant here had an opportunity and was able to develop that information during cross examination and was able to make his argument to the jury.

is greater.

...

In terms of being the only corroborative piece of evidence I don't view that as being the case. This—you know—allegedly was a piece of physical evidence but – of course—it wasn't in terms of the jury because it—you know—was never preserved.

RP at 1298-99.

The court also found that there was sufficient evidence to support the concerns viewing the evidence in a light most favorable to the State and denied the motion for arrest of judgment. 7RP at 1301.

The court entered findings and conclusions from the CrR 3.5 hearing. 7RP at 1304-05; CP 406. The court also adopted the proposed findings and conclusions regarding double jeopardy and offender score. 8RP at 1319; CP 392.

The matter came on for sentencing on September 10, 2018. 8RP at 1307-39. The State filed a Sentencing Memorandum and argued that a sentence of three hundred months based on the special findings made in Counts IV and V that the victim was under fifteen years old, and requested an exceptional sentence of 540 months based on the “free crimes” aggravator under RCW 9.94A.535(2)(c) and “abuse of trust” aggravator. 8RP at 1309-11; CP 372.

Defense counsel recommended a sentence of 25 years. 8RP at 1317-18.

Based on the State's calculation of the offender score of 28, and

the “free crime” aggravator and special verdict of abuse of trust, the court sentenced Mr. Torrance to an indeterminate exceptional sentence of a total of 360 months to life. 8RP at 1320, 1322, 1323; CP 433. The sentence imposed for each count is as follows:

Count 1	198 months to life
Count 2	Exceptional sentence of 360 months to life
Count 3	198 months to life
Count 4	25 years (300 months) to life
Count 5	25 years (300 months) to life
Count 6	Exceptional sentence 360 months to life
Count 7	198 months to life
Count 8	Exceptional sentence of 360 months to life
Count 9	198 months to life

The standard range sentence for Counts 2, 6 and 8 was 240 to 318 months.

The court entered the following findings of fact in support of the exceptional sentence:

Regarding Counts 1-9, the defendant used his position of trust or confidence to facilitate the commission of each of the current offenses under RCW 9.94A.535(3(n)).

The defendant has committed multiple current offenses and the defendant’s high offender score results in some of the current offense going unpunished under RCW 9.94A.535(c)(2).

CP 450.

The court also adopted the State’s findings and conclusions entered in

support of the State's calculation of the offender score. The State elected that the nine counts over the course of four incidents:

- Count 1: (first degree child molestation) office on the couch in the living room.
- Count II: (first degree rape of a child) and Count III (first degree child molestation) involving the allegation of digital-vaginal penetration in A.K.A.'s bedroom.
- Counts IV (second degree rape), Count V (indecent liberties), Count VI (first degree rape of a child), and Count VII (first degree child molestation) was the first act of forcible sexual contact and penile-vaginal penetration described by A.K.A., taking place in her bedroom.
- Counts VIII (first degree rape of a child) and Count IX (first degree child molestation) pertains to the acts of sexual contact and penile-vaginal penetration that occurred in A.K.A.'s bedroom following the incident in Count IV, V, VI, and VII.

CP 393-94.

The court adopted the following conclusions of law proposed by the State: the offenses of first degree rape of a child and first degree child molestation that occurred in the same incident do not violate double jeopardy. Conclusion of Law 2.2. The court also adopted the State's conclusion of the convictions for second degree rape by forcible compulsion and first degree rape of a child in the same incident do not violate double jeopardy. Conclusion of Law 2.3. the court also adopted the State's conclusion of the convictions for second degree rape by forcible compulsion and indecent liberties committed in the same incident do not violate double jeopardy. Conclusion of Law 2.4. Last, the court adopted the State's

conclusion of the convictions for first degree child molestation and indecent liberties committed in the same incident do not violate double jeopardy. Conclusion of Law 2.5. CP 394-95.

The State argued that Mr. Torrance have no contact with minors under the age sixteen. 8RP at 1326. Following argument, the court restricted Mr. Torrance's contact with his biological children to telephone calls and written communication. 8RP at 1324-27; CP 448. Defense counsel argued that Mr. Torrance's contact should include in-person contact with his children, who were age 12 and 14 at the time of sentencing. 8RP at 1325. The court overruled the defense objection and restricted in-person contact with his children C.T. and V.T. 8RP at 1329. The judgment and sentence provides:

You shall not have any contact with minors under the age of sixteen years without prior approval of DOC and your sexual deviancy treatment provider. The Defendant may have contact in writing and by phone with his biological children.

CP 448. Judgment and Sentence, Appendix A, condition 4.

The court found Mr. Torrance to be indigent and waived "any non-mandatory legal financial obligations." 8RP at 1335-36. The court imposed a \$500.00 crime victim assessment, and a \$200.00 criminal filing fee. 8RP at 1336; CP 440. The judgment and sentence states that "[t]he financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil

judgments. RCW 10.82.090.” CP 441. The judgment and sentence also provides that the defendant “shall pay supervision fees as determined by DOC.” CP 440.

Timely notice of appeal was filed September 14, 2018. CP 453. This appeal follows.

D. ARGUMENT

1. THE COURT VIOLATED MR. TORRENCE'S RIGHT TO PRESENT A COMPLETE DEFENSE IN PROHIBITING THE STATE'S EXPERT WITNESS FROM TESTIFYING REGARDING "GROOMING BEHAVIOR"

Mr. Torrence had very limited contact with A.K.A., consisting of contact of only a few weeks' duration over a period lasting approximately three months. The sexual offenses described by A.K.A. were alleged to have taken place in 2011, but were not reported for five years, in November 2016.

Dr. Christopher Johnson testified regarding the prevalence of “delayed reporting” of sex offenses in juveniles. Defense counsel argued that “grooming” testimony was not “reverse propensity” evidence, that he had previously questioned Dr. Johnson as an expert and that he had provided testimony regarding the pattern of “grooming” sex offense victims in prior cases. 5RP at 714, 716-17. In an offer of proof, Dr. Johnson testified that “grooming” was common behavior in sex offense cases and

that the “whole purpose of grooming is to develop a relationship so the child is less likely to report.” 5RP at 713.

Due process requires an accused be given "a meaningful opportunity to present a complete defense." *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994). Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant has the right to offer the testimony of her witnesses in order to establish a defense. *State v. Cheatam*, 150 Wn.2d 626, 648, 81 P.3d 830 (2003).

"The right to offer the testimony of witnesses . . . is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies." *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967).

Mr. Torrence had the constitutional right to elicit the expert testimony of Dr. Johnson to refute A.K.A.'s account of the alleged crime by showing that grooming of victims was often seen in sex offense cases, allowing the defense to show that the absence of grooming behavior in this case, thus supporting Mr. Torrence's defense that he did not commit the offense alleged.

The jury was faced with an accusation involving alleged abuse that

occurred in 2011, made by a witness with significant personal problems and deeply troubled family history. Moreover, there was no physical evidence presented and the case hinged entirely on witness credibility. Dr. Johnson's expert testimony would have cast grave doubt on A.K.A.'s allegation and the jury was entitled to hear it before it decided the truth of the matter. Reversal of the convictions is required because denial of the defense's ability to elicit Dr. Johnson's opinion regarding grooming was not harmless error.

2. THE MULTIPLE CONVICTIONS IN TWO OF THE INCIDENTS ELECTED BY THE STATE CONSTITUTED THE SAME CRIMINAL CONDUCT FOR SENTENCING PURPOSES BECAUSE EACH OFFENSE INVOLVED THE SAME VICTIM, SAME TIME, AND SAME INTENT

Mr. Torrence was convicted of first-degree rape of a child and first-degree child molestation in Counts II and III. CP 276, 278. He was convicted of second-degree rape of a child, indecent liberties, first-degree rape of a child and first degree child molestation in Counts IV, V, VI, and VII, respectively. CP 280, 282, 284, 286. The State elected that Counts II and III occurred during the incident involved sexual contact and digital/vaginal penetration in the bedroom. The State elected that Counts IV, V, VI and VII occurred in the bedroom and involved the first act of forcible sexual contact and penile-vaginal petition.

These counts involved the same criminal conduct and furthered the other crime(s); the crimes were committed instantaneously or over a relatively short period of time, each count involved the same victim, and the crimes were perpetrated with the same criminal intent – forcible sexual gratification. Therefore, Counts II and III constituted the same criminal conduct, as do Counts IV, V, VI, and VII, and both groupings should have been sentenced as one offense for each group under the most serious charge rather than separately counted or consecutively sentenced.

If two or more crimes constitute the same criminal conduct, the current offenses are counted as one crime and the sentences are served concurrently. RCW 9.94A.589(1)(a); *State v. French*, 157 Wn.2d 593, 612-14, 141 P.3d 54 (2006). To constitute “same criminal conduct” for purposes of sentencing, two or more criminal offenses must involve (1) the same criminal intent, (2) the same time and place, and (3) the same victim. RCW 9.94A.589(1)(a). If any of these elements is missing, the multiple offenses do not encompass the same criminal conduct, and the trial court must count each offense separately in calculating the offender score. *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 160 (1987). This Court reviews a trial court’s decision on “same criminal conduct” de novo. *State v. Torngren*, 147 Wn. App. 556, 562, 196 P.3d 742 (2008).

In this case, all the sex offenses clearly involved the same victim. Moreover, the offenses in Counts II and III and Counts IV, V, VI, and VII occurred at the same time. In addition, the offenses occurred at the same place: in the bedroom used by A.K.A. during her visit.

The only remaining issue under the “same criminal conduct” test is whether the offenses had the same criminal intent. When examining intent, the focus is “the extent to which the criminal intent, as objectively viewed, changed from one crime to the next.” *State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237 (1987). This often includes an examination of “whether one crime furthered the other and if the time and place of the two crimes remained the same.” *Id.*

In *State v. Dolen*, the defendant was convicted of both child rape and child molestation based on “continuous sexual behavior over a short period of time.” 83 Wn. App. 361, 365, 921 P.2d 590 (1996).

The Court held that the victim, time and place were all the same. *Id.* at 365. Moreover, the defendant’s crimes involved the “same objective criminal intent—present sexual gratification.” *Id.* Specifically, the Court found the same criminal intent in that “the child molestation furthered the child rape.” *Id.* That is, “the inappropriate rubbing and touching of the child led to the penetration of the child’s vagina.” *Id.* Thus, the Court held that the two

offenses should have been considered the “same criminal conduct” for purposes of sentencing. *Id.*

Here, the offenses involved the same time, place and victim. The only remaining issue is criminal intent. In that regard, this case is like *Dolen* above. The child molestation and rape were all committed sequentially over a short period of time. Each crime furthered the next with the ultimate criminal intent being the same – sexual gratification of the defendant.

Given that there was no change in criminal intent, time, place or victim, the trial court should have found that the offenses encompassed the same criminal conduct and sentenced accordingly.

Similarly, the State charged Mr. Torrence was charged and convicted in Count V of indecent liberties under RCW 9A.44.100(1)(a) (sexual contact by forcible compulsion), child molestation under RCW 9A.44.083, rape in the second degree under 9A.44.050(1)(a), and rape in the first degree under RCW 9A.44.073. CP 70.

For purposes of RCW 9.94A.589(1)(a), the convictions for indecent liberties and the rape in the first degree occurred in a very short period of time, [3RP at 385-87], same place (bedroom), involved the same victim, and the same objective intent as the continuing indecent liberties and molestation furthered the rapes.

The court adopted Conclusion of Law 2.7 regarding same criminal conduct:

The Washington Supreme Court case of *State v. Chenoweth*, 185 Wash.2d 218, 370 P.3d 6 (2016) controls this court's calculation of the offender score under the same criminal conduct analysis. The crime of Indecent Liberties by forcible compulsion, Child Molestation in the First Degree, Rape in the Second Degree by forcible compulsion and Rape of a Child in the First Degree have different criminal intents and therefore cannot constitute the same criminal conduct even if occurring in the same incident. All current convictions score against one another.
CP 396.

The court's reliance on *State v. Chenoweth* in the conclusion of law, however, is misplaced. In two recent decisions involving defendants convicted of child rape and incest against the same victim, our Supreme Court has held that the test for determining intent for a "same criminal conduct" analysis is whether the two crimes have the same statutory intent. See *State v. Chenoweth*, 185 Wn.2d 218, 370 P.3d 6 (2016); *State v. Bobenhouse*, 166 Wn.2d 881, 214 P.3d 907 (2009). The test for whether two crimes involved the same intent for a "same criminal conduct" analysis, as articulated in *Dunaway*, has not been expressly overruled. *Dunaway*, 109 Wn.2d at 215; see also *State v. Haddock*, 141 Wn.2d 103, 3 P.3d 733 (2000); *State v. Tili*, 139 Wn.2d 107, 985 P.2d 365 (1999); *State v. Garza-Villarreal*, 123 Wn.2d 42, 864 P.2d 1378 (1993); *State v. Lessley*, 118 Wn.2d 773, 827

P.2d 996 (1992); *State v. Lewis*, 115 Wn.2d 294, 797 P.2d 1141 (1990); *State v. Burns*, 114 Wn.2d 314, 788 P.2d 531 (1990). Also, test that the court used in *Chenoweth*, 185 Wn.2d 218, as of the date of this brief, has been limited to crimes involving child rape and incest. *Chenoweth*, 185 Wn.2d at 224.

Given that there was no change in criminal intent, time, place or Victim in Counts II and III, no change in criminal intent, time, place or victim in Counts IV, V, VI, and VII the trial court should have found that the offenses encompassed the same criminal conduct, Mr. Torrence's offender score should be reduced. Even if this Court finds that only some of these crimes constituted the same criminal conduct, Mr. Torrence's offender score should still be reduced appropriately for those offenses that encompass the same criminal conduct, and current offenses should be sentenced concurrently according to RCW 9.94A.589(1)(a).

3. COUNSEL'S UNPROFESSIONAL ERRORS AT TRIAL AND DURING SENTENCING CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL AND REQUIRE REVERSAL

A defendant has the constitutional right to the effective assistance of counsel under Wash. Const. art. 1, § 22; U.S. Const. amend. VI. To prevail on a claim that counsel was ineffective, an appellant must establish both deficient representation and resulting prejudice. *State v. Thomas*, 109 Wn.2d 222, 225,

743 P.2d 816 (1987). The standard for evaluating effectiveness of counsel is set forth in *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) and *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The court must decide (1) whether counsel's conduct constituted deficient performance and (2) whether the conduct resulted in prejudice. to prevail, appellant must show (1) that his lawyer's representation was deficient and (2) that the deficient conduct affected the outcome of the trial. *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2D 512 (1999); *Strickland*, 466 U.S. at 693-94.

Performance is deficient if it falls "below an objective standard of Reasonableness based on consideration of all the circumstances." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The defendant need show only a reasonable probability the outcome would have differed in order to undermine confidence in the outcome and demonstrate prejudice. *Strickland*, 466 U.S. at 693-94. Representation that falls sufficiently below an objective reasonableness standard overcomes the strong presumption of reasonableness. *Thomas*, 109 Wn.2d at 226.

- a. ***Counsel was unaware of a critical email pertaining to blood spots described by Savannah Alexander despite evidence that the email had been provided to the defense by the prosecution***

Counsel was inadequately prepared by not being aware of the email from Savannah Alexander to the victim advocate which describes the blood drops found in A.K.A.'s underwear. The evidence was critical because it was

the single reference to physical evidence and permitted the jury to speculate that the blood drops were the result of the rapes described by A.K.A. Counsel stated repeatedly that he was not aware of the e-mail, despite the signed receipt for the document produced by the State.

To provide constitutionally adequate assistance, “counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.” *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir.1994) (citing *Strickland*, 466 U.S. at 691). Counsel is not expected to perform flawlessly—an impossible standard in what is a uniquely “human” profession. But counsel will be considered ineffective if lack of preparation is so substantial that no reasonably competent attorney would have performed in such manner. Defense counsel's failure to adequately be familiar with the anticipated evidence and the facts fell below the standard of reasonableness. See, e.g. *State v. Jury*, 19 Wn.App. 256, 263, 576 P.2d 1302 (1978). The failure of counsel to adequately acquaint himself with a critical piece of evidence, which the record tends to show was received by the defense, was an omission which no reasonably competent counsel would have committed. Here, defense counsel was unaware of the critical email. It is hard to conceive of a circumstance where this deficiency would not have prejudiced a client in receiving a fair and just adjudication, but the omission is especially damning in this circumstance because the case is a clear he said/she said case in which witness credibility was a key component. Mr. Torrence

should be granted a new trial.

- b. Counsel should have argued at sentencing that Mr. Torrence's offenses encompass the same criminal conduct.*

As noted above, when a defendant is convicted of multiple current offenses, for each offense the other current offenses are counted as prior offenses in calculating the offender score, unless the multiple current offenses encompass the same criminal conduct. If the current offenses encompass the same criminal conduct, they are counted as a single offense in calculating the offender score. RCW 9.94A.589(1)(a). Offenses encompass the same criminal conduct when they “require the same criminal intent, are committed at the same time and place, and involve the same victim.” *Id.*

Although a defendant generally waives the right to argue on appeal that multiple convictions constitute the same criminal conduct if he did not raise issue below, the Court of Appeals will reach the issue if the trial attorney's failure to argue same criminal conduct amounts to ineffective assistance of counsel. *State v. Saunders*, 120 Wn. App. 800, 825, 86 P.3d 232 (2004). Defense counsel renders ineffective assistance of counsel when he fails to argue that the current offenses encompass the same criminal conduct when the evidence and case law would support a same criminal conduct finding. *Saunders*, 120 Wn. App. at 825.

As argued above, Counts II and III constitute the same criminal conduct, and the same holds true for Counts IV, V, VI and VII. Because the

evidence and case law supported an argument that the offenses encompassed the same criminal conduct, trial counsel was ineffective in failing to make the argument. See *Saunders*, 120 Wn. App. at 825. Prejudice results from a reasonable probability that the result would have been different but for counsel's deficient performance. *Thomas*, 109 Wn.2d at 226. Applying the facts to the law, Mr. Torrence's ineffective assistance of counsel claim prevails because there is a reasonable probability the sentencing court would have exercised its discretion to find that the offenses constituted the same criminal conduct. Remand for resentencing is required. *Saunders*, 120 Wn. App. at 824-25.

4. INSUFFICIENT EVIDENCE WAS PRESENTED TO SUPPORT FINDING BEYOND A REASONABLE DOUBT THAT MR. TORRENCE COMMITTED THE OFFENSES

a. The State was required to produce sufficient evidence to prove beyond a reasonable doubt every essential element of the crime of child molestation in the first degree.

The State bears the burden of producing sufficient evidence to prove beyond a reasonable doubt every essential element of a crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Bunker*, 169 Wn.2d 571, 585, 238 P.3d 487 (2010).

A criminal defendant's fundamental right to due process is violated when a verdict is based upon insufficient evidence. *Winship*, 397 U.S. at

358; U.S. Const. amend. XIV; Wash. Const. art. I, sec. 3; *City of Seattle v. Slack*, 113 Wn.2d 850, 859, 784 P.2d 494 (1989). Evidence is sufficient to support a conviction only if, “after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 318, 99 S. Ct. 628, 61 L.Ed.2d 560 (1970). See also *State v. DeVries*, 149 Wn.2d 842, 849, 72 P.3d 748 (2003). A claim of insufficiency admits the truth of all of the State's evidence and all of the inferences that can reasonably be drawn from it. *Id.* However, there must be at least substantial evidence that supports the elements of the crime charged. *State v. Cleman*, 18 Wn. App. 495, 498, 568 P.2d 832 (1977).

While circumstantial evidence is no less reliable than direct evidence, *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), evidence is insufficient if the inferences drawn from it do not establish the requisite facts beyond a reasonable doubt. *State v. Beaza*, 100 Wn.2d 487, 491, 670 P.2d 646 (1983).

b. The State presented insufficient evidence to establish Mr. Torrence committed the offenses alleged

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial

evidence may be attacked for the first time on appeal as a due process violation. *Id.* “Substantial evidence” in the context of a criminal case, means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). The remedy for a conviction based on insufficient evidence is reversal and dismissal with prejudice. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S. Ct. 1745, 90 L. Ed. 2d 116 (1986).

The critical question in this case is whether, even in its best light, the State’s evidence proved Mr. Torrence committed the offenses alleged. The only substantive evidence at trial identifying Mr. Torrence as the perpetrator was the testimony of A.K.A. Here, A.K.A. testified about incidents that had allegedly happened during four separate occurrences. The evidence however, was extremely limited and vague. A.K.A. testified that the first incident took place on a couch in the living room of the house and he touched her over her clothing. 2RP at 376. She testified that in another incident, in the bedroom she used during the visit, he came into the room and rubbed her legs and put his finger in her vagina. 2RP at 370. During the third incident, A.K.A. stated that she was in the bedroom and he touched her and she tried to get out of the room. 2RP at 380-81. She stated that he grabbed her and closed the door and locked it and blocked it with the toy chest, grabbed her arms and pinned her and then put his penis in her

vagina. 2RP at 380-81, 3RP at 385-89.

However the jury was given absolutely no evidence upon which it could determine beyond a reasonable doubt that molestation or sexual intercourse took place in the manner required by the jury instructions—that Mr. Torrence had sexual contact with A.K.A. or that his penis or finger penetrated A.K.A.’s vagina. Cf., *State v. Hayes*, 81 Wn. App. 425, 431–32, 434, 914 P.2d 788 (evidence sufficient to show specific instances of “sexual intercourse” where child victim told third party that defendant “had been putting his private into hers”, and testified “he put his private part into mine”), rev. denied, 130 Wn.2d 1013, 928 P.2d 413 (1996). Here, there was no physical examination of A.K.A. and no physical evidence whatsoever. Instead, the entirety of the State’s case rested on an accusation made literally years after the alleged offenses.

The evidence presented in support of Counts VIII and IX was even more nebulous. For those counts, when asked if she remembered any details about those counts, A.K.A. merely said that “it just started happening” and that it happened “[a]bout seven times.” 3RP at 395, 396. A.K.A. provided no details whatsoever regarding the sexual offenses alleged in those counts. As instructed by the court there was insufficient evidence that Mr. Torrence had sexual intercourse or molested A.K.A. The information charged generally that Mr. Torrence “did have sexual intercourse with A.K.A.” (CP 72, Count VIII), and that that he “did have sexual contact with A.K.A.” (CP

73 Count IX). The jury was given a specific instruction that defined “sexual contact” to “mean[] any touching of the sexual or other intimate parts or a person done for the purpose of gratifying sexual desires of either party.” Instruction No. 11. The jury was instructed that “sexual intercourse” to “mean[] that the sexual organ of the male penetrated the sexual organ of the female and occurs upon any penetration, however slight or [] any penetration of the vagina, however slight, by an object, including a body part[.]” Instruction No.13 ; CP 46,48 . But the State presented no evidence that sexual contact or penetration took place and/or that it took place in the manner described in the definitional instructions.

A.K.A.’s testimony was devoid of any specifics or details whatsoever other than to say, when asked by the prosecution “how many times after [the earlier incident] did penis and vagina sex happen afterwards,” that it happened “[a]bout seven times.” 3RP at 396. A.K.A. provided absolutely no specific testimony regarding when these alleged rapes occurred other than they occurred during the week following the “first rape” that she described.

c. The proper remedy is reversal of the convictions.

Mr. Torrence’s convictions in all nine counts were based on insufficient evidence. Even in the light most favorable to the State, a rational trier of fact could not have found beyond a reasonable doubt that Mr. Torrence committed any of the offenses alleged. The absence of proof

beyond a reasonable doubt requires dismissal of the convictions. *State v. Green*, 94 Wn.2d 216, 616 P.2d 628 (1980). To retry Mr. Torrence for the same conduct would violate the prohibition against double jeopardy. *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1979); *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005). Since there was no evidence to support the verdicts, the convictions must be reversed and dismissed with prejudice. *DeVries*, 149 Wn.2d at 853.

5. THE CONDITION PROHIBITING IN-PERSON CONTACT WITH HIS MINOR CHILDREN VIOLATES MR. TORRENCE'S CONSTITUTIONAL RIGHT TO PARENT

As a condition of community custody, a sentencing court may order an offender to “[r]efrain from direct or indirect contact with the victim of the crime or a specified class of individuals.” RCW 9.94A.703(3)(b). Under RCW 9.94A.505(9), the court may also impose “crime-related prohibitions” as a condition of sentence. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192, 129 S. Ct. 2007, 173 L. Ed. 2d 1102 (2009).

Such prohibitions may include “an order of a court prohibiting contact that directly relates to the circumstances of the crime for which the offender has been convicted.” RCW 9.94A.030(10).

The community custody condition prohibiting in-person contact with Mr. Torrence’s children until they reach age sixteen violates his fundamental

liberty interest in the care and custody of his children. The condition must be stricken or modified to allow for supervised contact with his children.

Parents have a fundamental liberty interest in the care and companionship of their children protected by due process. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982); *In re Welfare of Sumey*, 94 Wn.2d 757, 762, 621 P.2d 108 (1980); U.S. Const. amend. XIV; Wash. Const. art. I, § 3.

The imposition of crime-related prohibitions is generally reviewed for abuse of discretion. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). But appellate courts more carefully review conditions that interfere with a fundamental constitutional right. *Id.* A sentencing court necessarily abuses its discretion by violating an accused's constitutional rights. *State v. Iniguez*, 167 Wn.2d 273, 280, 217 P.3d 768 (2009). A court also abuses its discretion when its decision is based on incorrect legal analysis or an erroneous view of the law. *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005). The court may impose and enforce crime-related prohibitions in appropriate circumstances. RCW 9.94A.505(9). Crime-related prohibitions may include orders prohibiting contact with specified individuals for the statutory maximum term. *State v. Armendariz*, 160 Wn.2d 106, 116, 156 P.3d 201 (2007). State interference with a fundamental right is subject to strict scrutiny. *State v. Warren*, 165 Wn.2d 17, 34-35, 195 P.3d 940 (2008), cert. denied, 556 U.S. 1192, 129 S. Ct. 2007,

173 L. Ed. 2d 1102 (2009). Crime-related prohibitions affecting fundamental rights must be narrowly drawn, which means "[t]here must be no reasonable alternative way to achieve the State's interest." *Warren*, 165 Wn.2d at 34-35.

In this case, the judgment and sentence provides that Mr. Torrence "shall not have any contact with minors under the age of sixteen years without prior approval of DOC and your sexual deviancy treatment provider[,] and may have contact with writing or by phone with his biological children. CP 458.

This condition unconstitutionally infringes on Mr. Torrence's fundamental parental rights because the blanket restriction is not reasonably necessary.

Under this standard, a reviewing court must determine whether the State proved the restriction on the right to parent was "sensitively imposed" and "reasonably necessary to accomplish the essential needs of the State." *Rainey*, 168 Wn.2d at 374 (quoting *Warren*, 165 Wn.2d at 32). To withstand constitutional scrutiny, restrictions on contact with biological children must be reasonably necessary to protect them from harm. *Rainey*, 168 Wn.2d at 377; *State v. Letourneau*, 100 Wn. App. 424, 439, 997 P.2d 436 (2000).

In *State v. Letourneau*, 100 Wn. App. 424, 442, 997 P.2d 436 (2000), Division One recognized that, "The general observation that many offenders who molest children unrelated to them later molest their own

biological children, without more, is an insufficient basis for State interference with fundamental parenting rights.” In subsequent cases, where the record disclosed – and the sentencing judge found – that the defendant posed a similar danger to his own children, courts have been permitted to extend as “reasonably necessary” such prohibitions to biological children. See *State v. Corbett*, 158 Wn. App. 576, 597-6019, 242 P.3d 52 (2010); *State v. Berg*, 147 Wn. App. 923, 941-944, 198 P.3d 529 (2008), abrogated on other grounds by *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011).

In *State v. Berg*, the defendant was convicted of molesting his wife's 14-year-old daughter and the sentencing court imposed a no contact order covering all unsupervised contact with minor females, thereby extending to Mr. Berg's 2-year-old biological daughter. *State v. Berg*, 147 Wn. App. 923, 941, 198 P.3d 529 (2008), abrogated on other grounds by *State v. Mutch*, 171 Wn.2d 646, 254 P.3d 803 (2011). The court upheld the order because the victim had lived in a home with Berg acting as her parent when the abuse occurred, and "the court reasonably feared that it would be putting A.B. in the same situation that A.A. was in when Berg sexually abused her." *Berg*, 147 Wn.App. at 942-43. The prohibition on unsupervised contact was sufficiently tailored to the crime because it prevented the defendant from exploiting a child's trust in him as a parental figure and putting his own child at the same risk of harm. *Id.* at 944.

The court in *State v. Corbett*, 158 Wn. App. 576, 597-601, 242 P.3d

52 (2010) relied on the *Berg* rationale in upholding a prohibition on contact with all minors, which extended to the defendant's own sons. Significantly, Corbett was allowed to have supervised visits with his children so long as the visits were pre-approved. *Corbett*, 158 Wn. App. at 601 n.14.

Mr. Torrence is requesting the opportunity for supervised contact. In order to comport with his fundamental right to parent his children, the prohibition on in-person contact should be stricken or modified to allow for supervised contact.

6. THE COURT ERRED IN IMPOSING THE \$200.00 FILING FEE, INTEREST ACCRUAL, AND COMMUNITY SUPERVISION FEE

a. *Recent statutory amendments prohibit discretionary costs for indigent defendants*

A court may order a defendant to pay legal financial obligations (LFOs), including costs incurred by the State in prosecuting the defendant. RCW 9.94A.760(1); RCW 10.01.160(1), (2). The legislature recently amended former RCW 36.18.020(2)(h) in *Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess.* (Wash. 2018) (HB 1783) and as of June 7, 2018, trial courts are prohibited from imposing the \$200 criminal filing fee, former RCW 36.18.020(2)(h), on defendants who are indigent at the time of sentencing. Laws of 2018, ch. 269, § 17; *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018). The amendment applies prospectively and is applicable to cases pending on direct review and not final when the amendment was enacted.

Ramirez, 191 Wn.2d at 739, 746-50.

House Bill 1783 amended “the discretionary LFO statute, former RCW 10.01.160, to prohibit courts from imposing discretionary costs on a defendant who is indigent at the time of sentencing as defined in RCW 10.101.010(3)(a) through (c).” *Ramirez*, 191 Wn.2d at 746 (citing Laws of 2018, ch. 269, § 6(3)); see also RCW 10.64.015 (“The court shall not order a defendant to pay costs, as described in RCW 10.01.160, if the court finds that the person at the time of sentencing is indigent as defined in RCW 10.101.010(3)(a) through (c).”). HB 1783 establishes that the \$200 criminal filing fee is no longer mandatory if the defendant is indigent. The Supreme Court in *Ramirez* concluded the trial court impermissibly imposed discretionary LFOs and a \$200 criminal filing fee and remanded for the trial court to amend the judgment and sentence to strike the improperly imposed LFOs. *Ramirez*, 191 Wn.2d at 750.

In this case, the court imposed a \$500 crime victim fund assessment, which HB 1783 retains as a mandatory LFO. RCW 7.68.035(1)(a). *State v. Catling*, No. 95794-1, filed April 18, 2019, ___ P.3d ___, 2019 WL 1745697 at *3.

The trial court imposed a \$200 criminal filing fee pursuant to RCW 36.18.020(2)(h). The record shows that Mr. Torrence is indigent and that he qualified for court appointed appellate counsel. CP 457.

As amended in 2018, subsection (3) of RCW 10.01.160 now states,

“[t]he court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c).” RCW 10.01.160(3). Subsection .010(3) defines “indigent” as a person who (a) receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose “available funds are insufficient to pay any amount for the retention of counsel” in the matter before the court. RCW 10.101.010(3).

b. The court did not inquire into Mr. Torrence’s financial situation

The sentencing court must conduct on the record an individualized inquiry into the defendant's present and future ability to pay before imposing discretionary costs. *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). This inquiry requires the court to consider factors such as incarceration and a defendant's other debts, including restitution, when determining his ability to pay. *Id.* Here, the court did not engage in a *Blazina* inquiry, but instead agreed with the defense that the LFOs should consist of “non-mandatory legal financial obligations.” 8RP at 1335. RCW 10.01.160 is mandatory: “it creates a duty rather than confers discretion.” *Blazina*, 182 Wn.2d at 838 (citing *State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)). “Practically speaking ... the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the

required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay.” *Id.*

“Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant's other debts . . . when determining a defendant's ability to pay.” *Id.*

c. Mr. Torrence was indigent

Mr. Torrence was represented by court-appointed counsel, and shortly after sentencing the court found Mr. Torrence indigent and unable to contribute to the costs of his appeal while ordering the appeal to proceed solely at public expense. CP 457. Thus, the record indicates that Mr. Torrence was indigent under RCW 10.101.010(3) at the time of sentencing.

d. The trial court erred by imposing discretionary community supervision and interest accrual LFOs

In Section 4.2(B) of the judgment and sentence, the court also directed Mr. Torrence to pay a community supervision fee to the Department of Corrections. Although the judgment and sentence cites no authority for these costs, a statute allows them as a discretionary community custody condition. RCW 9.94A.703(2)(d).

This Court recently made it clear these costs are discretionary. *State v. Lundstrom*, 6 Wn.App.2d 388, 429 P.3d 1116, 1121 n.3 (2018). Because these costs are discretionary and prohibited by statutory amendments, this Court should remand to strike them.

Mr. Torrence also challenges the interest accrual on non-restitution LFOs assessed in Section 4.3(a) of the judgment and sentence. CP 439. The 2018 legislation eliminated the accrual of interest on non-restitution LFOs. The judgment and sentence states that financial obligations imposed by it shall bear interest from the date of the judgment until payment in full at the rate applicable to civil judgments. CP 438. The 2018 legislation states that as of its effective date “penalties, fines, bail forfeitures, fees, and costs imposed against a defendant in a criminal proceeding shall not accrue interest.” As amended, RCW 10.82.090 now provides:

- (1) Except as provided in subsection (2) of this section, restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of the effective date of this section [June 7, 2018], no interest shall accrue on non-restitution legal financial obligations.

(2)

See Laws of 2018, ch. 269.

The interest accrual provision in the September 10, 2018 judgment and sentence pertaining to non-restitution LFOs should be stricken.

E. CONCLUSION

The reasons stated, Zackery Torrence respectfully asks the Court to reverse his convictions and grant him a new trial in Counts I through IX, or alternatively to reverse his sentence and remand for resentencing for recalculation of his offender score consistent with the arguments presented herein.

Alternatively, for the reasons stated, this Court should reverse and dismiss the convictions in all nine counts with prejudice.

Mr. Torrence respectfully requests this Court remand for resentencing with instructions to strike the discretionary costs of the criminal filing fee, community supervision fee and the interest accrual provision to the extent it applies to non-restitution LFOs.

DATED: May 20, 2019.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
ptiller@tillerlaw.com
Of Attorneys for Zachery Torrence

CERTIFICATE OF SERVICE

The undersigned certifies that on May 20, 2019, that this Appellant's Opening Brief was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Joseph Jackson Prosecuting Attorney and copies were mailed by U.S. mail, postage prepaid, to the following:

Colin Hayes
Clark County Prosecuting Attorney
PO Box 5000
Vancouver, WA 98666-5000
Colin.hayes@clark.wa.gov

Mr. Derek M. Byrne
Clerk of the Court
Court of Appeals
950 Broadway, Ste.300
Tacoma, WA 98402-4454

Mr. Zackery Torrence
DOC # 355318
Coyote Ridge Correction Center
PO Box 769
Connell, WA 99326

LEGAL MAIL/SPECIAL MAIL

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on May 20, 2019.



PETER B. TILLER

THE TILLER LAW FIRM

May 20, 2019 - 4:51 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52432-5
Appellate Court Case Title: State of Washington, Respondent v Zackery Christopher Torrence, Appellant
Superior Court Case Number: 17-1-01632-2

The following documents have been uploaded:

- 524325_Briefs_20190520164855D2588162_2313.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 20190520164638725.pdf
- 524325_Motion_20190520164855D2588162_7284.pdf
This File Contains:
Motion 1 - Other
The Original File Name was 20190520164718584.pdf

A copy of the uploaded files will be sent to:

- CntyPA.GeneralDelivery@clark.wa.gov
- colin.hayes@clark.wa.gov

Comments:

Sender Name: Becca Leigh - Email: bleigh@tillerlaw.com

Filing on Behalf of: Peter B. Tiller - Email: ptiller@tillerlaw.com (Alternate Email: bleigh@tillerlaw.com)

Address:
PO Box 58
Centralia, WA, 98531
Phone: (360) 736-9301

Note: The Filing Id is 20190520164855D2588162