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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.

ZACKERY CHRISTOPHER TORRENCE, Appellant

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FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-01632-2

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BRIEF OF RESPONDENT

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**TABLE OF CONTENTS**

RESPONSE TO ASSIGNMENTS OF ERROR..... 1

- I. The trial court did not abuse its discretion in excluding expert testimony regarding the prevalence of grooming in sexual abuse cases. .... 1
- II. The crimes did not constitute the same criminal conduct; Torrence’s offender score was properly calculated and he was appropriately sentenced. .... 1
- III. Torrence had the benefit of effective counsel ..... 1
- IV. The State presented sufficient evidence to support Torrence’s convictions..... 1
- V. The trial court properly prohibited contact with all minors as a condition of Torrence’s sentence. .... 1
- VI. The trial court properly imposed the \$200 filing fee..... 1

STATEMENT OF THE CASE..... 1

ARGUMENT ..... 10

- I. The trial court did not abuse its discretion in excluding expert testimony regarding the prevalence of grooming in sexual abuse cases. .... 10
- II. The crimes did not constitute the same criminal conduct; Torrence’s offender score was properly calculated and he was appropriately sentenced. .... 16
- III. Torrence had the benefit of effective counsel ..... 22
- IV. The State presented sufficient evidence to support Torrence’s convictions..... 28
- V. The trial court properly prohibited contact with all minors as a condition of Torrence’s sentence. .... 36
- VI. This matter should be remanded for consideration of Torrence’s indigency status. .... 39
  - a. Criminal Filing Fee..... 42
  - b. Interest accrual ..... 42

CONCLUSION..... 43

## TABLE OF AUTHORITIES

### Cases

<i>City of Sumner v. Walsh</i> , 148 Wn.2d 526, 61 P.3d 1111 (2003) .....	37
<i>In re Pers. Restraint of Rainey</i> , 168 Wn.2d 367, 229 P.3d 686 (2010) .....	37
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) .....	29
<i>Nunez v. City of San Diego</i> , 114 F.3d 935, 952 (9th Cir. 1997) .....	37
<i>Roe v. Flores-Ortega</i> , 528 U.S. 470, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) .....	25
<i>State v. Aho</i> , 137 Wn.2d 736, 975 P.2d 512 (1999) .....	25
<i>State v. Albarran</i> , 187 Wn.2d 15, 383 P.3d 1037 (2016) .....	21
<i>State v. Ancira</i> , 107 Wn.App. 650, 27 P.3d 1246 (2001) .....	38
<i>State v. Barry</i> , 184 Wn.App. 790, 339 P.3d 200 (2014) .....	11
<i>State v. Berg</i> , 147 Wn.App. 923, 198 P.3d 529 (2008) .....	38
<i>State v. Braham</i> , 67 Wn.App. 930, 841 P.2d 785 (1992) .....	12, 13
<i>State v. Brown</i> , 55 Wn.App. 738, 780 P.2d 880 (1989) .....	33
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990) .....	29
<i>State v. Chenoweth</i> , 185 Wn.2d 218, 370 P.3d 6 (2016) ..	18, 19, 20, 21, 27
<i>State v. Chhom</i> , 128 Wn.2d 739, 911 P.2d 1014 (1996) .....	19
<i>State v. Cienfuegos</i> , 144 Wn.2d 222, 25 P.3d 1011 (2011) .....	24
<i>State v. Clafflin</i> , 38 Wn.App. 847, 690 P.2d 1186 (1984), <i>rev. denied</i> , 103 Wn.2d 1014 (1985) .....	12
<i>State v. French</i> , 157 Wn.2d 593, 141 P.3d 54 (2006) .....	17, 19
<i>State v. Garrett</i> , 124 Wn.2d 504, 881 P.2d 185 (1994) .....	24, 25
<i>State v. Gosby</i> , 85 Wn.2d 758, 539 P.2d 680 (1975) .....	29
<i>State v. Graciano</i> , 176 Wn.2d 531, 295 P.3d 219 (2013) .....	17
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980) .....	29
<i>State v. Gurrola</i> , 69 Wn.App. 152, 848 P.2d 199 (1993) .....	20
<i>State v. Hayes</i> , 81 Wn.App. 425, 914 P.2d 788 (1996) .....	34
<i>State v. Hernandez</i> , 95 Wn.App. 480, 976 P.2d 165 (1999) .....	18, 20
<i>State v. Irwin</i> , 191 Wn.App. 644, 364 P.3d 830 (2015) .....	36
<i>State v. Kyлло</i> , 166 Wn.2d 856, 215 P.3d 177 (2009) .....	24, 25
<i>State v. Lessley</i> , 118 Wn.2d 773, 827 P.2d 996 (1992) .....	17
<i>State v. Markle</i> , 118 Wn.2d 424, 823 P.2d 1101 (1992) .....	20
<i>State v. Maule</i> , 35 Wn.App. 287, 667 P.2d 96 (1983) .....	12
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995) .....	24
<i>State v. McKnight</i> , 54 Wn.App. 521, 774 P.2d 532 (1989) .....	20
<i>State v. Partin</i> , 88 Wn.2d 899, 567 P.2d 1136 (1977) .....	29

<i>State v. Petrich</i> , 101 Wn.2d 566, 683 P.2d 173 (1984) .....	12
<i>State v. Polk</i> , 187 Wn.App. 380, 348 P.3d 1255 (2015).....	18
<i>State v. Price</i> , 103 Wn.App 845, 14 P.3d 841 (2000).....	17
<i>State v. Quigg</i> , 72 Wn.App. 828, 866 P.2d 655 (1994) .....	15
<i>State v. Ramirez</i> , 191 Wn.2d 732, 426 P.3d 714 (2018).....	40
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004) .....	25
<i>State v. Renfro</i> , 96 Wn.2d 902, 639 P.2d 737 (1982) .....	25
<i>State v. Rice</i> , 48 Wn.App. 7, 737 P.2d 726 (1987) .....	11
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	37
<i>State v. Rodriguez</i> , 61 Wn.App. 812, 812 P.2d 868 (1991).....	18
<i>State v. Russell</i> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	11
<i>State v. Saiz</i> , 63 Wn.App. 1, 816 P.2d 92 (1991).....	20
<i>State v. Smith</i> , 177 Wn.2d 533, 303 P.3d 1047 (2013).....	21
<i>State v. Tharp</i> , 27 Wn.App. 198, 616 P.2d 693 (1980) .....	11, 16
<i>State v. Theroff</i> , 25 Wn. App. 590, 608 P.2d 1254, <i>aff'd</i> , 95 Wn.2d 385, 622 P.2d 1240 (1980).....	29
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	23, 24, 25
<i>State v. Vike</i> , 125 Wn.2d 407, 885 P.2d 824 (1994).....	17
<i>State v. Walden</i> , 69 Wn.App. 183, 847 P.2d 956 (1993).....	16, 20
<i>State v. Warren</i> , 165 Wn.2d 17, 195 P.3d 940 (2008).....	36, 37
<i>State v. Wilson</i> , 136 Wn.App 596, 150 P.3d 144 (2007) .....	17
<i>State v. Yallup</i> , 3 Wn.App.2d 546, 416 P.3d 1250, 1253 (2018). 29, 32, 33, 34	
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	23, 24, 25

### **Statutes**

RCW 10.01.160 .....	40
RCW 10.01.160(2).....	40
RCW 10.01.160(3).....	40
RCW 10.101.010(3)(a)-(c).....	10, 40, 41, 42
RCW 10.101.010(3)(d) .....	41
RCW 10.46.190 .....	40
RCW 10.82.090(1).....	42
RCW 36.18.020(2)(h).....	42
RCW 74.09.035 .....	40
RCW 9.94A.030(10).....	36
RCW 9.94A.505(9).....	36
RCW 9.94A.5345(2)(c) .....	9
RCW 9.94A.589(1)(a) .....	16, 17
RCW 9.94A.703(3)(f).....	36

RCW 9A.44.010(1).....	30
RCW 9A.44.010(2).....	30
RCW 9A.44.010(6).....	31
RCW 9A.44.050.....	19
RCW 9A.44.073.....	19, 30
RCW 9A.44.083.....	19, 30
RCW 9A.44.100.....	19
RCW 9A.44.100(1)(a) .....	31
<b>Other Authorities</b>	
House Bill 1783 .....	39, 40, 42
LAWS OF 2018, ch. 269 .....	39
<b>Rules</b>	
ER 401 .....	11
ER 402 .....	11
ER 403 .....	11, 12
GR 14.1(a).....	18, 19, 37
<b>Constitutional Provisions</b>	
U.S. CONST. amend VI .....	23
WASH. CONST. art. I § 22 .....	23
<b>Unpublished Opinions</b>	
<i>State v. Baza</i> , 197 Wn.App. 1072, 2017 WL 589189 .....	18
<i>State v. Miller</i> , 198 Wn.App. 1008 (Div. 3 2017) .....	37
<i>State v. Ohnemus</i> , 194 Wn.App. 1039, 2016 WL 3514165.....	18
<i>State v. Sadler</i> , 198 Wn.App. 1023, 2017 WL 1137116 .....	18
<i>State v. Smith</i> , 7 Wn.App.2d 304, 433 P.3d 821 (unpublished portion) (2019).....	18, 19
<i>State v. Standley</i> , 2 Wn.App.2d 1060, 2018 WL 1342449 (2018) .....	18
<i>State v. Yusuf</i> , 2 Wn.App.2d 1048, 2018 WL 1168724 (2018) .....	18

## RESPONSE TO ASSIGNMENTS OF ERROR

- I. The trial court did not abuse its discretion in excluding expert testimony regarding the prevalence of grooming in sexual abuse cases.**
- II. The crimes did not constitute the same criminal conduct; Torrence's offender score was properly calculated and he was appropriately sentenced.**
- III. Torrence had the benefit of effective counsel**
- IV. The State presented sufficient evidence to support Torrence's convictions**
- V. The trial court properly prohibited contact with all minors as a condition of Torrence's sentence.**
- VI. The trial court properly imposed the \$200 filing fee.**

## STATEMENT OF THE CASE

Zackery Torrence (hereafter 'Torrence') was convicted as charged of four counts of Child Molestation in the First Degree, three counts of Rape of a Child in the First Degree, Rape in the Second Degree, and Indecent Liberties by Forcible Compulsion. CP 70-74, 274-91. The victim was Torrence's girlfriend's daughter, A.K.A. CP 70-74. The crimes were alleged to have occurred while A.K.A. was eleven years old, between July 26, 2010 and July 25, 2012. CP 70-74. The state also alleged that Torrence used a position of trust or confidence to facilitate commission of the crimes, and further alleged that the Rape in the Second Degree and

Indecent Liberties by Forcible Compulsion charges were committed against someone under the age of fifteen. CP 70-74.

The matter proceeded to trial and the State called the victim, A.K.A., her parents, grandmother, a police officer, and two experts. The evidence at trial showed the following:

A.K.A. was born on July 26, 2000. RP 353. Brian A.<sup>1</sup> is her father and Laura A. is her mother. RP 355. A.K.A.'s parents divorced when A.K.A. was four years old. RP 356. A.K.A. lived with her father and step-mother, Savannah A., and would have periodic visitations with her mother. RP 356-57. A.K.A.'s mother, Laura A., lived for a time in Vancouver, Washington, and A.K.A. had visits with her in Vancouver between the ages of nine and eleven. RP 358. At the time A.K.A. visited her mother when she was eleven years old, Torrence lived with Laura A. in Vancouver, Washington RP 358-59. A.K.A.'s father lived in the Everett and Lynwood areas further north in Washington at the time of these visits to A.K.A.'s mother. RP 360.

During the summer when A.K.A. was eleven, she and her sister spent about seven weeks with her mother at her mother's house in Vancouver. RP 361-62. Torrence did some odd things at this time, starting with helping A.K.A. get dressed. RP 365-66. He would take off A.K.A.'s

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<sup>1</sup> The State uses initials to denote the names of witnesses with the same last name as the victim so as to protect her privacy.

clothes and it made her feel awkward because she was old enough to dress herself. RP 366. A.K.A. then told the jury about multiple times when Torrence touched her in inappropriate ways.

The first time something occurred, A.K.A. was on her bed and was getting undressed when Torrence opened the bedroom door, came inside, and then closed the door behind him. RP 370-71, 374. This occurred in the bedroom where A.K.A. was staying. RP 370-71. As A.K.A. was partially undressed, Torrence came over to her and grabbed her legs and massaged them. RP 371. He then put his hands under her underwear and massaged her; he then inserted his fingers inside her vagina. RP 371. Torrence moved his fingers around while they were inside her vagina, moving them around in circles and in and out. RP 372. A.K.A. knew what he was doing was wrong, but she didn't stop it; she just froze. RP 372-73. During this incident, Torrence told her it was okay, to not be afraid, and that nothing was wrong. RP 372. A.K.A. was seated on her bed and Torrence sat down next to her when this happened. RP 374.

Another incident happened on the couch in the living room of her mother's house. RP 375. It was early morning and no one else was awake. RP 376-77. A.K.A. was sitting on the couch watching TV; Torrence came into the living room, sat next to her, and started massaging her. RP 376. A.K.A. kept scooting over, but eventually got to the corner of the couch

and she felt trapped. RP 376. Torrence pulled A.K.A. closer to him and touched her over her clothes and then touched her vagina and chest with his hand. RP 377-78. Torrence was rubbing his hand when he touched her body. RP 378. Torrence again told A.K.A. that it was ok, not to be afraid, etc. RP 379. A.K.A. felt nervous and did not like what was happening, but she did not know how to react. RP 379.

A.K.A. also described an incident of penile-vaginal rape. This incident was in the same bedroom as the first incident, and Torrence came in and shut the door and started undressing A.K.A. RP 380. A.K.A. told him that she did not need to change her clothes. RP 380. Torrence sat down on the bed and started taking off A.K.A.'s pants. RP 381. At first A.K.A. was able to pull her pants back on as Torrence tried to take them off. RP 385. Then A.K.A. tried to get out of the room, but he grabbed her and shut the door again and locked it. RP 381, 385. Torrence grabbed A.K.A. by the arms and pinned them. RP 385. After he locked the door he blocked the door with a toy chest. RP 385. Torrence then pulled A.K.A. back and started forcibly undressing her. RP 387. Torrence put A.K.A. on the bed and he took off her pants and underwear. RP 388. A.K.A. started to yell out, but Torrence told A.K.A. to be quiet or otherwise her sister could get hurt and that it would be her fault. RP 388. Torrence also told her her mom would get hurt. RP 389. This incident started out with

Torrence touching her; she tried to push him away, but he was able to pin her down. RP 380. When he pinned A.K.A. down on the bed he put his penis inside her vagina. RP 380. Torrence made the threats about her mom and sister both before, during, and after the time that Torrence had his penis inside her vagina. RP 389. A.K.A. testified that it hurt when Torrence put his penis inside her. RP 390. She was on her back on the bed and he was above her. RP 391. Her legs tingled and her body felt numb around her hips and legs. RP 390. She felt a pain sensation of a 7 out of 10. RP 390. Torrence moved his penis in and out, repeatedly, of A.K.A.'s vagina. RP 390. She started crying when Torrence pinned her down. RP 391. She tried to yell for it to stop, but after he threatened her sister and mother she quieted down and just looked away. RP 391. The threats scared A.K.A. because she didn't want anything to happen to her sister. RP 395-96. And that she had previously seen Torrence be violent factored in to her being afraid. RP 396. A.K.A. was able to see Torrence's penis during this incident and noticed that it did not look like a penis normally looks, using her experience changing her little brother as a reference, but instead it was elongated. RP 392.

The same type of penile-vaginal penetration occurred on multiple additional occasions, about seven additional times. RP 394-96. A.K.A.

stopped fighting Torrence because she did not want anyone to get hurt. RP 395. After every time Torrence told her not to tell. RP 395.

Sometimes after the rapes, A.K.A. would see blood in her underwear and sometimes in the bathroom after wiping. RP 397-98. The blood stained some of her underwear and A.K.A. threw them away. RP 398. A.K.A. also noted that it hurt to urinate after the first rape. RP 401.

Savannah A. testified that she noticed blood in A.K.A.'s underwear when A.K.A. came home from her last visitation with her mother in summer of 2011. RP 816. Savannah A. agreed she had not told defense counsel about seeing the blood on the underwear when he interviewed her, but indicated she remembered it a few days following the interview and sent an e-mail to the advocate detailing her memory. RP 819. Defense counsel objected to this testimony and argued the State had committed a discovery violation by not providing him with a copy of Savannah A.'s email. RP 819. The State proved, however, that it had provided a copy of the e-mail to defense counsel. RP 820-21.

A.K.A. didn't initially tell anyone about the abuse, but she began having anger problems. Her family noticed a lot of anger in A.K.A. RP 555-56, 768-69, 903-07. Eventually, A.K.A. went to live with her grandmother, Dianna Beardall. RP 911. Part of the agreement for going to live with Ms. Beardall was that A.K.A. would start going to counseling.

RP 557. In counseling, A.K.A.'s counselor told her they needed to get to the root of her anger issues. RP410. A.K.A. knew why she was angry and she finally told, first her step-mother, Savannah A., and her grandmother, Ms. Beardall, what happened. RP 410-13; 562. In a phone call with Savannah A., soon after a counseling session she started crying and A.K.A. told Savannah A. that she knew why she was angry, but that she didn't want to talk about it. RP 844-45. She eventually disclosed that Torrence had sexually abused her. RP 776. During this conversation with Savannah A. A.K.A. was very upset, her voice was shaky and she was crying. RP 776. A.K.A. did not give a lot of details about the abuse to her step-mother or grandmother until nearly a year later. RP 611-12.

The State presented Dr. Christopher Johnson who testified regarding delayed reporting of sex offenses. RP 696-708. During cross-examination, defense attempted to question Dr. Johnson about grooming, a subject the State did not raise in its direct questioning of Dr. Johnson. RP 710. The Court sustained the State's objection to the question, and further denied defense's oral motion to recall Dr. Johnson to present the testimony regarding grooming as direct evidence. RP 719-21.

The State also presented testimony from Dr. Kimberly Copeland who testified that it was not uncommon to see no injuries from penetrative

abuse, and that any injuries likely heal very quickly. RP 876. A.K.A. did not have a physical sexual assault exam. RP 538, 781.

Torrence testified in his own defense and indicated that A.K.A. was disciplined during the relevant visitation, and that they had to give her time outs because of her attitude. RP 1058. Torrence denied helping A.K.A. change her clothes at any time, and denied being violent with Laura A. RP 1061-62. Torrence stated that there were people in the house “all the time” and that he was rarely, and only then briefly, alone with A.K.A. RP 1064. Torrence denied ever touching A.K.A. on her chest or vagina. RP 1066-69. Torrence has two prior convictions for Tampering with a Witness. RP 1075-76.

Defense also presented the testimony of Anne Schienle in his defense. She testified that she lived with Torrence and Laura A. during A.K.A.’s visit and that she saw A.K.A. get along with Torrence and that there were no problems between them. RP 977. Ms. Schienle testified she was there every day that A.K.A. was there and that there was never a time that Torrence was in the house when Laura A. was not present. RP 992.

In closing arguments, the State elected which counts were associated with which incident of abuse. Count I pertained for the touching on the couch. RP 1186. Counts II and III pertain to the first incident in the bedroom. RP 1186. Counts IV, V, VI, and VII pertain to

the first incident of penile-vaginal intercourse, and Counts VIII and IX pertain to any of the subsequent rapes in the bedroom. RP 1186. The jury convicted Torrence of all nine counts as charged, and found that the defendant abused his position of trust or confidence in the commission of all counts. CP 274-91. The jury also found that the victim of the offenses in counts IV and V was under the age of fifteen at the time of the offense. CP 281, 283.

At sentencing, the State presented a memo to the Court arguing that none of the charges merged for double jeopardy purposes and that all the offenses scored against each other and were not the same criminal conduct. CP 372. Defense argued for a lesser offender score and that the incidents did include the same intent and therefore should not score against each other. RP1312-18. The trial court agreed with the State's calculation of Torrence's offender score of 28 and sentenced him to an exceptional sentence of 360 months on counts II, VI, and VIII, 25 years mandatory minimum on counts IV and V, and high end standard range on counts I, III, VII, and IX. The trial court imposed the exceptional sentence based on the jury's finding that the defendant abused a position of trust in committing the crimes, and the free crimes aggravator under RCW 9.94A.5345(2)(c). RP 1309-11; CP 436. The trial court concluded that it would have imposed the same sentence based on only one aggravator. CP

436. As a condition of Torrence's sentence, the trial court ordered that he not have any contact with minors under the age of sixteen years without prior approval of DOC and his sexual deviancy treatment provider, but allowed for written and telephone contact with his biological children. CP 448.

The trial court found that Torrence was not indigent pursuant to RCW 10.101.010(3)(a)-(c), but did find that he did not have the ability to pay discretionary legal financial obligations. CP 437. The trial court imposed a \$200 criminal filing fee. CP 440. Torrence timely appealed his convictions. CP 453.

#### ARGUMENT

**I. The trial court did not abuse its discretion in excluding expert testimony regarding the prevalence of grooming in sexual abuse cases.**

Torrence argues the trial court erred in excluding evidence from the State's expert, Dr. Johnson, regarding the prevalence of grooming in sexual abuse cases. The trial court properly excluded this propensity-type evidence as it was an improper attempt to bolster the defendant's credibility, it was improper profile evidence, and it was not relevant. The trial court's decision should be affirmed.

ER 402 prohibits the admission of irrelevant evidence at trial. ER 402. ER 401 defines relevant evidence as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401. In addition, ER 403 provides for the exclusion of relevant evidence if the probative value of that relevant evidence “is substantially outweighed by the danger of unfair prejudice,” if the introduction of the evidence would lead to confusion of the issues or mislead the jury. ER 403. A trial court’s decision whether evidence is relevant or whether the probative value of the evidence is outweighed by the danger of unfair prejudice is reviewed for a manifest abuse of discretion. *State v. Barry*, 184 Wn.App. 790, 801-02, 339 P.3d 200 (2014) (citing *State v. Rice*, 48 Wn.App. 7, 11, 737 P.2d 726 (1987)). A trial court abuses its discretion if its decision is manifestly unreasonable, or based on untenable grounds or made for untenable reasons. *Id.* (citing *State v. Tharp*, 27 Wn.App. 198, 206, 616 P.2d 693 (1980)). Additionally, any error in a trial court’s decision regarding the admissibility of such evidence “requires reversal only if, within reasonable probabilities, it materially affected the outcome of the trial.” *State v. Russell*, 125 Wn.2d 24, 94, 882 P.2d 747 (1994).

“Profile testimony that does nothing more than identify a person as a member of a group more likely to commit the charged crime is inadmissible owing to its relative lack of probative value compared to the danger of its unfair prejudice.” *State v. Braham*, 67 Wn.App. 930, 936, 841 P.2d 785 (1992). Our Courts have held that expert testimony tending to show that the defendant is a member of a group more likely to have committed the crime is inadmissible. In *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984), the Court held it was improper to allow an expert to testify that 85-90% of sexual abuse cases involve someone the victim knows as the perpetrator. *Petrich*, 101 Wn.2d at 576. In *State v. Maule*, 35 Wn.App. 287, 667 P.2d 96 (1983), the Court held it was improper for an expert to testify that the majority of child abuse cases involve a male parent-figure as the perpetrator. *Maule*, 35 Wn.App. at 293. In *State v. Claflin*, 38 Wn.App. 847, 690 P.2d 1186 (1984), *rev. denied*, 103 Wn.2d 1014 (1985) the Court held that testimony that 43% of child molestation cases were reported to have been committed by father figures was inadmissible under ER 403. *Claflin*, 38 Wn.App. at 851-52. And in *Braham*, the Court found that evidence regarding grooming in a child abuse case was used to improperly imply guilt based on the characteristics of known offenders of this type of abuse. *Braham*, 67 Wn.App. at 937. Essentially, expert testimony that a certain type of person is more likely to

commit a crime is inadmissible as its relevance is outweighed by its prejudicial effect.

The evidence that Torrence sought to admit was not relevant, and even if it was relevant it was properly excluded as its prejudicial effect would have outweighed its relevance. In his offer of proof, Torrence presented evidence from Dr. Johnson that grooming is a common feature in a sexual abuse of a child scenario. RP 712. Torrence told the Court that he wanted to argue there was a lack of grooming in this case from Torrence towards the victim, and therefore Torrence could not have committed the crime. This is propensity evidence, and is also an attempt to argue other suspect evidence. Torrence wanted to present a profile of the perpetrator, a profile of characteristics including the characteristic of grooming, just as was involved in *Braham, supra*. The only difference between traditional profile evidence and the evidence that Torrence sought to admit was that Torrence wanted to present profile evidence of a perpetrator and use that to show that he did not meet that profile and therefore could not have committed the crime. As the trial court referred to it, it was “reverse propensity” evidence. Our Courts have repeatedly held that such evidence is not admissible, is overly prejudicial, and its relevance is minimal. In Torrence’s case, the evidence was not even

relevant. Torrence offered no evidence to show that research shows that the lack of grooming characteristics by a particular defendant decreases the probability that the defendant actually committed the crime. *See* RP 712. Dr. Johnson did not testify that the lack of grooming characteristics by a particular defendant decreases the probability that that particular defendant actually committed the crime. *See* RP 712. Therefore the evidence was not relevant to the case at hand. In addition, in order to establish the relevancy, we clearly see the impermissible use of this evidence – to show the defendant’s character, to bolster his good character (as a non-groomer) and to attempt to argue to the jury that because, in his view, Torrence did not “groom” the victim, that Torrence was not the perpetrator of this child’s abuse. This is entirely impermissible character and profile evidence and the trial court properly excluded it.

In addition, simply because someone does not do an act that is common in some child molestation cases does not mean that that individual is less likely to have committed the crime. For this reason, the evidence Torrence sought to admit was irrelevant. This is similar to defendants attempting to admit evidence of all the other children in their lives who have never accused them of sexual assault. Simply because someone could find one or more individuals to say he has never hurt them

is not an exoneration and it is not relevant to whether the defendant did or did not hurt the current victim. Torrence was seeking to admit similar evidence to this. He wanted to argue that because he did not do x, y, and z, and that x, y, and z are common in sexual abuse cases, then he could not have committed the crime. This is flawed logic and simply irrelevant. The trial court properly excluded the evidence in this case.

Even if the trial court should have allowed the evidence to be admitted, the error does not require reversal because it did not materially affect the outcome of the trial. Again, the evidence Torrence sought to admit was solely that grooming is a “common feature” in sexual abuse of a child. *See* RP 712. This evidence would have done nothing to help Torrence’s case. The case was mainly he said/she said, and the jury clearly believed the victim’s version of events. Furthermore, upon the State’s examination of the witness after the defendant’s direct of Dr. Johnson (had the evidence come in it would have been through the defendant’s direct examination of Dr. Johnson), the State would have exposed that there were indeed grooming characteristics involved in this case. “Grooming” is a “process by which child molesters gradually introduce their victims to more and more explicit sexual conduct.” *State v. Quigg*, 72 Wn.App. 828, 833, 866 P.2d 655 (1994). In Torrence’s case, the touching did start as less

and built to more invasive and harmful as time went on. *See* RP 370-95. Thus the evidence Torrence sought to admit was not substantially helpful to his case and would not have changed the outcome of the trial. Therefore any error was harmless and the convictions should be maintained.

**II. The crimes did not constitute the same criminal conduct; Torrence’s offender score was properly calculated and he was appropriately sentenced.**

Torrence argues on appeal that the crimes in counts 2 and 3 constituted the same criminal conduct as each other, and that the crimes in counts 4, 5, 6, and 7 constituted the same criminal conduct as each other. As the crimes do not share the same intent, they are not the same criminal conduct and therefore Torrence’s offender score was properly calculated. Torrence’s claim fails.

In reviewing a trial court’s decision on whether multiple offenses encompass the same criminal conduct, this Court applies an abuse of discretion standard. *State v. Walden*, 69 Wn.App. 183, 188, 847 P.2d 956 (1993). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds, or made for untenable reasons. *Tharp*, 27 Wn.App. at 206.

When a defendant is convicted of two or more crimes the sentencing court “may enter[] a finding that some or all of the current offenses encompass the same criminal conduct.” RCW 9.94A.589(1)(a).

That said, because a finding of same criminal conduct “favors the defendant, it is the defendant who must establish the crimes constitute the same criminal conduct,” i.e., the defendant bears the burden “of production and persuasion” on the issue of same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539-540, 295 P.3d 219 (2013). A trial court’s conclusion that offenses did not encompass the “same criminal conduct” will be reversed by an appellate court only when there is a clear abuse of discretion or misapplication of the law. *Id.* at 533, 535-38; *State v. French*, 157 Wn.2d 593, 613, 141 P.3d 54 (2006).

Two or more crimes may constitute the “same criminal conduct” if they: (1) require the same criminal intent, (2) are committed at the same time and place, and (3) involve the same victim. RCW 9.94A.589(1)(a). The absence of any one prong prevents a finding of “same criminal conduct.” *State v. Vike*, 125 Wn.2d 407, 410, 885 P.2d 824 (1994); *State v. Lessley*, 118 Wn.2d 773, 778, 827 P.2d 996 (1992). Courts “must narrowly construe RCW 9.94A.[589](1)(a) to disallow most assertions of same criminal conduct.” *State v. Price*, 103 Wn.App 845, 855, 14 P.3d 841 (2000); *Graciano*, 176 Wn.2d at 540; *State v. Wilson*, 136 Wn.App 596, 613, 150 P.3d 144 (2007). If the sentencing court finds that the crimes encompass the same criminal conduct, however, “then those . . . offenses shall be counted as one crime.” RCW 9.94A.589(1)(a).

The first step in determining whether crimes require the same criminal intent is examining the relevant criminal statutes. *State v. Chenoweth*, 185 Wn.2d 218, 221-24, 370 P.3d 6 (2016); *State v. Polk*, 187 Wn.App. 380, 396, 348 P.3d 1255 (2015); *State v. Rodriguez*, 61 Wn.App. 812, 816, 812 P.2d 868 (1991). If the statutorily required intents are different then the analysis is over and the offenses shall count as separate crimes. *Chenoweth*, 185 Wn.2d at 223-25<sup>2</sup>; *Polk*, 187 Wn.App. at 396-97, *Rodriguez*, 61 Wn.App. at 816; *State v. Hernandez*, 95 Wn.App. 480, 484, 976 P.2d 165 (1999). Similarly, “[w]here one crime has a statutory intent element and the other does not, the two crimes, as a matter of law, cannot constitute the same criminal conduct.” *Hernandez*, 95 Wn.App. at 485-86. On the other hand, where the statutory intents are the same or there are multiple counts of the same crime, courts are to look objectively at the facts useable at sentencing to determine whether a defendant’s intent was the same or different for each offense. *Polk*, 187 Wn.App. at 396; *Rodriguez*, 61 Wn.App. at 816; *Hernandez*, 95 Wn.App. at 484.

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<sup>2</sup> Unpublished cases addressing same criminal conduct arguments post-*Chenoweth* have readily applied the *Chenoweth* statutory analysis in determining whether offenses require the same criminal intent. See *State v. Baza*, 197 Wn.App. 1072, 2017 WL 589189 at 2 n.8 (2017); *State v. Sadler*, 198 Wn.App. 1023, 2017 WL 1137116 at 5 (2017); *State v. Ohnemus*, 194 Wn.App. 1039, 2016 WL 3514165 at 3 (2016); *State v. Yusuf*, 2 Wn.App.2d 1048, 2018 WL 1168724 (2018); *State v. Standley*, 2 Wn.App.2d 1060, 2018 WL 1342449 (2018); *State v. Smith*, 7 Wn.App.2d 304, 433 P.3d 821 (unpublished portion) (2019). GR 14.1(a) provides that unpublished opinions may be cited as non-binding authorities and “may be accorded such persuasive value as the court deems appropriate.”

In the unpublished portion of *State v. Smith*, 7 Wn.App.2d 304, 433 P.3d 821 (2019), this Court followed the rule set forth in *Chenoweth*, *supra* and stated that “Under *Chenoweth*,[] we look to the relevant statutory text to identify objective criminal intent.”<sup>3</sup> Here, the crimes of child molestation and rape of a child do not have the same statutory intent and therefore could not be considered the same criminal conduct. The crime of Child Molestation in the First Degree requires proof of intent to gratify sexual desires. *French*, 157 Wn.2d at 610-11. Rape of a child has no mens rea requirement. *State v. Chhom*, 128 Wn.2d 739, 743-44, 911 P.2d 1014 (1996). They therefore do not have the same statutory intent, and under *Chenoweth*, *supra*, they cannot be considered the same criminal conduct.

Additionally, the statutory criminal intents of child molestation, rape of a child, forcible rape, and indecent liberties with force all differ from one another. Rape of a child does not have a statutory intent; child molestation requires proof of intent to gratify sexual desires; rape in the second degree (forcible rape) does not have a statutory criminal intent, and indecent liberties requires one act knowingly. *See* RCW 9A.44.073, RCW 9A.44.083, RCW 9A.44.050, RCW 9A.44.100. “By enacting the crime of second degree rape by means of forcible compulsion, the Legislature

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<sup>3</sup> GR 14.1(a) provides that unpublished opinions may be cited as non-binding authorities and “may be accorded such persuasive value as the court deems appropriate.”

criminalized particular conduct-the use of physical force or the threat of physical harm-as a means of inducing nonconsensual intercourse.”

*Walden*, 67 Wn.App. at 895. The force referenced in “forcible compulsion” is not the force inherent in the act of penetration, but the force used or threatened to overcome or prevent resistance. *State v. McKnight*, 54 Wn.App. 521, 527, 774 P.2d 532 (1989). Rape by forcible compulsion does not include a culpable mental state. *Walden*, 67 Wn.App. at 894-96. For this reason, and following *Chenoweth, supra*, Rape in the Second Degree must score against child molestation and indecent liberties as they both have statutory intents. *See Hernandez*, 95 Wn.App. at 485.

The offenses of child molestation and indecent liberties require a showing of sexual gratification because otherwise the touching may be inadvertent. *State v. Gurrola*, 69 Wn.App. 152, 157, 848 P.2d 199 (1993). However, as indecent liberties requires that one act knowingly, and child molestation does not so require, they have different statutory intents and cannot be considered the same criminal conduct.

In addition, “[s]exual gratification is not an element of the crime of rape of a child.” *Gurrola*, 69 Wn.App. at 157 (citing *State v. Markle*, 118 Wn.2d 424, 435, 823 P.2d 1101 (1992) and *State v. Saiz*, 63 Wn.App. 1, 5, 816 P.2d 92 (1991)). Statutory rape is a strict liability offense. *Saiz*, 63

Wn.App. at 4. Therefore indecent liberties and child molestation are not the same criminal conduct as Rape of a Child.

Finally, rape of a child and rape in the second degree are not the same criminal conduct because the criminal intent differs between forcibly having sexual intercourse with another person and having sexual intercourse with a child. *Cf. State v. Smith*, 177 Wn.2d 533, 548-50, 303 P.3d 1047 (2013); *State v. Albarran*, 187 Wn.2d 15, 21-26, 383 P.3d 1037 (2016). Just like the crimes of rape of a child and incest as analyzed in *Chenoweth, supra*, wherein the Supreme Court found there is a different intent behind having sexual intercourse with a family member and having sexual intercourse with a child, here there is a different intent involved in forcibly raping someone and having sexual intercourse with a child. As the intents differ, they cannot be considered the same criminal conduct.

From a review of the record below, it is clear the trial court considered *Chenoweth, supra*, and the criminal intents involved in each crime Torrence now complains of. The trial court did not misapply the law or base its decision on an improper interpretation of the law. The trial court properly found that the crimes involved in Torrence's case did not constitute the same criminal conduct. Torrence's sentence should be affirmed.

Furthermore, even if the trial court erred in calculating Torrence's offender score, there is no need for remand as the trial court would have entered the same sentence based on a recalculation of Torrence's offender score. Even if the crimes constituted the same criminal conduct, Torrence would still have four convictions which would have scored against each other, plus the 4 points he came into sentencing with from prior convictions. He therefore had an offender score over 9. The trial court entered an exceptional sentence based on two aggravators: the free crimes aggravator the trial court found, and the abuse of trust aggravator. CP 436. Only the free crimes aggravator is based on Torrence's offender score being above a 9; his standard range sentences remain the same even if this Court finds the offenses are the same criminal conduct. The trial court entered a finding that it would have imposed the same sentence even if only one of the aggravators was present. Therefore, the court would have imposed the same sentence based on the abuse of trust aggravator without the free crimes aggravator. Accordingly we know the trial court would have imposed the same sentence even if Torrence's offender score was 13 as opposed to 28.

### **III. Torrence had the benefit of effective counsel**

Torrence argues his attorney was ineffective because his attorney was unaware of an e-mail from a witness that the State had provided him in

discovery, and because he failed to argue same criminal conduct at sentencing. Torrence's attorney was effective and any poor conduct did not affect the outcome of the case; additionally, Torrence's attorney did argue regarding same criminal conduct at sentencing and the trial court considered whether the crimes constituted the same criminal conduct, thus the issue is reviewable directly on appeal. Torrence's claim of ineffective assistance of counsel fails.

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right of a criminal defendant to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). In *Strickland*, the United States Supreme Court set forth the prevailing standard under the Sixth Amendment for reversal of criminal convictions based on ineffective assistance of counsel. *Id.* Under *Strickland*, ineffective assistance is a two-pronged inquiry:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said

that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

*Thomas*, 109 Wn.2d at 225-26 (quoting *Strickland*, 466 U.S. at 687); see also *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2011) (stating Washington had adopted the *Strickland* test to determine whether counsel was ineffective).

Under this standard, trial counsel's performance is deficient if it falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Accordingly, the defendant bears the burden of establishing deficient performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A defense attorney's performance is not deficient if his conduct can be characterized as legitimate trial strategy or tactics. *Kylo*, 166 Wn.2d at 863; *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (holding that it is not ineffective assistance of counsel if the actions complained of go to the

theory of the case or trial tactics) (citing *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982)).

A defendant can rebut the presumption of reasonable performance of defense counsel by demonstrating that “there is no conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Not all strategies or tactics on the part of defense counsel are immune from attack. “The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

To satisfy the second prong of the *Strickland* test, the prejudice prong, the defendant must establish, within reasonable probability, that “but for counsel’s deficient performance, the outcome of the proceedings would have been different.” *Kyllo*, 166 Wn.2d at 862. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694; *Thomas*, 109 Wn.2d at 266; *Garrett*, 124 Wn.2d at 519. In determining whether the defendant has been prejudiced, the reviewing court should presume that the judge or jury acted according to the law. *Strickland*, 466 U.S. at 694-95. The reviewing

court should also exclude the possibility that the judge or jury acted arbitrarily, with whimsy, caprice or nullified, or anything of the like. *Id.*

Torrence's first claim has some merit in that it does appear from the record that his attorney did not have an e-mail containing factual information from a witness, and that this was due to his own actions as the State produced the e-mail to defense. There is no argument that failing to have this e-mail was in some way strategic. Therefore the analysis moves to the second issue, whether the failure to have this e-mail prejudiced Torrence.

Torrence does not show how his attorney not being aware of an e-mail a witness sent to the victim advocate prejudiced his case. The witness, the victim's step-mother, informed the State (and the State forwarded this to defense) that she had seen two small spots of blood in the victim's underwear after her return from her visit with her mother the summer she was molested and raped by Torrence. As Torrence's counsel established, this underwear could have only been from the day that the victim returned, which is not when the molestations and rapes occurred, or after she was back from her visit with her mother and Torrence. Therefore the blood that Savannah saw in A.K.A.'s underwear was very likely not associated with the molestations and rapes as it was not near in time to the crimes. Additionally, A.K.A. provided a satisfactory explanation for the

blood in her underwear, which Savannah though was appropriate. This also provided a good opportunity for counsel to expand on his theory of the case, which he did, as there was an opportunity for A.K.A. to disclose sexual abuse to Savannah and she did not do so, and did not disclose for quite some time after this incident with the underwear occurred. This helps prove Torrence's theory of the case that A.K.A. did not disclose abuse until she had a motive to be angry with her mother at a later date. Thus this information was helpful to Torrence's theory of the case and Torrence's attorney used the evidence to his advantage. While it is not strategic to be surprised by evidence, not all errors require reversal, only performance by an attorney that is so significantly poor that it actually prejudiced the defendant's case requires reversal. This error did not prejudice Torrence or the presentation of his case. He has not shown how the outcome of the case would have been different had his attorney been more prepared for the evidence that the e-mail disclosed. Torrence's claim fails.

Torrence's second claim of ineffective assistance of counsel also fails. Torrence claims his attorney did not raise same criminal conduct at sentencing, however, the trial court did address same criminal conduct and analyzed the issues under *Chenoweth, supra*, a purely same criminal conduct case. Torrence's attorney also argued intent under *Chenoweth*,

*supra* and argued that his offender score was less than what the State proffered. Torrence's attorney sufficiently preserved the issue of same criminal conduct for appeal and was therefore not ineffective. Torrence's claim fails.

#### **IV. The State presented sufficient evidence to support Torrence's convictions**

Torrence claims the state presented insufficient evidence to support his convictions. Specifically, Torrence argues that the evidence supporting the convictions was "extremely limited and vague." *See* Br. of Appellant, p. 44. Torrence appears to claim that the evidence was insufficient because there was no physical examination of the victim and that the case "rested on an accusation made literally years after the alleged offenses." *See* Br. of Appellant, p. 45. There is no requirement that the state produce a certain kind of evidence in order to prove its case such as a physical examination of the victim, and no requirement that a victim disclose within a certain time period that would have satisfied the defense in this case. The victim testified to what happened to her and from that alone the State presented sufficient evidence to support Torrence's convictions. Torrence's claim is completely without merit.

When a defendant claims evidence is insufficient to sustain his conviction, this Court reviews the evidence in the light most favorable to

the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). Evidence that is direct or circumstantial may be equally presented to the jury. Circumstantial evidence is no less reliable than direct evidence. *State v. Gosby*, 85 Wn.2d 758, 766-67, 539 P.2d 680 (1975). The reviewing Court does not disturb the jury's credibility determinations. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This standard of review focuses on whether the trier of fact *could* find the elements proved. *State v. Yallup*, 3 Wn.App.2d 546, 416 P.3d 1250, 1253 (2018) (citing *Jackson, supra*).

Torrence appears to argue that there was insufficient evidence for every charge because the victim's testimony was not sufficient. In this review, we must presume the jury found the victim to be credible, and take all the evidence, from the victim and all other witnesses, in the light most

favorable to the State, and interpret all inferences that can be drawn from the evidence in the State's favor. In so doing, it is clear that there was sufficient evidence to convict the defendant because the jury believed the victim and the State's other witnesses.

Torrence was charged with various counts of Rape of a Child in the First Degree, Child Molestation in the First Degree, Rape in the Second Degree, and Indecent Liberties by forcible compulsion. CP 70-75. To convict Torrence of Rape of a Child in the First Degree, the State had to prove that Torrence had sexual intercourse with A.K.A. when she was under the age of twelve and was not married to him and that he was at least twenty-four months older than A.K.A. *See* RCW 9A.44.073. "Sexual intercourse" means penetration of the vagina or anus, however slight, by any object or body part. RCW 9A.44.010(1). To convict Torrence of Child Molestation in the First Degree the State had to prove that Torrence had sexual contact with A.K.A. when she was under the age of twelve, and that he was not married to her and was at least thirty-six months older than her. RCW 9A.44.083. "Sexual contact" is "any touching of the sexual or other intimate parts of a person done for the purpose of gratifying sexual desire of either party or a third party." RCW 9A.44.010(2). To prove Torrence guilty of Rape in the Second Degree, the State had to show that he engaged in sexual intercourse by forcible compulsion with A.K.A.

“Forcible compulsion” is “physical force which overcomes resistance, or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped.” RCW 9A.44.010(6). To prove Torrence guilty of Indecent Liberties by forcible compulsion the State had to show that Torrence knowingly caused A.K.A. to have sexual contact with him by forcible compulsion. RCW 9A.44.100(1)(a).

The evidence presented at trial overwhelmingly proved each of these crimes. A.K.A. testified in significant details to the rapes and molestations that she endured. A.K.A. told the jury about the first time any touching occurred. During this incident Torrence grabbed her legs, massaged her, then put his hands under her underwear and massaged her; he then put his fingers inside her vagina and moved his fingers around in circles and moved them in and out of her vagina. RP 370-72. Torrence touched A.K.A. on her vagina and massaged – this establishes sufficient evidence to prove child molestation. In addition, he then penetrated her vagina with his fingers and moved them around, in and out. This establishes sufficient evidence to prove rape of a child.

The second incident that A.K.A. described occurred on the couch in the living room. Torrence touched A.K.A. on her chest and on her vagina,

rubbing his hand where he touched her. RP 376-78. This establishes sufficient evidence of Child Molestation.

A.K.A. then described a forcible rape, wherein she tried to resist, but Torrence grabbed her, pinned her arms down, and caused her to have sexual intercourse with him by inserting his penis into her vagina. RP 380-92. A.K.A. described how it felt in her body to have Torrence's penis penetrate her vagina, how her legs and hips felt tingly and went numb, but how it hurt immensely, describing the pain as a 7 out of 10. RP 390. Torrence started out by touching her on her body. RP 380. He also used threats to gain A.K.A.'s compliance, threatening to harm her sister and her mother, even telling her it would be her fault if they got hurt. RP 380-92. This incident, as described by A.K.A., more than established sufficient evidence to prove Torrence guilty of Rape in the Second Degree, Indecent Liberties by Forcible Compulsion, Rape of a Child in the First Degree, and Child Molestation in the First Degree. Finally, A.K.A. indicated that what happened during the forcible rape happened seven total times, giving sufficient evidence to prove additional counts of Rape of a Child and Child Molestation.

In *Yallup*, Division III of this Court recently addressed a sufficiency of the evidence claim in a long-term sexual abuse case, wherein the defendant alleged no reasonable trier of fact could have been

convinced the offenses occurred within the charging period as the abuse occurred over such a long period of time and so frequently that the victim was not able to specify exact dates of offenses. *Yallup*, 3 Wn.App.2d at 551. There, this Court discussed the situation of the “‘resident child molester:’ a person who has regular access and frequently abuses his victim, leading to a lack of specificity of timing for each offense.” *Id.* (quoting *State v. Brown*, 55 Wn.App. 738, 748-49, 780 P.2d 880 (1989)). Torrence attempts to benefit from the sheer number of rapes he committed against A.K.A.: because he committed them in nearly identical ways over a short period of time, the victim could not describe each rape with exact specificity. This does not mean, however, that Torrence should not have been convicted of these crimes. In fact, A.K.A. was able to testify in specificity to a number of acts which supports the jury’s verdicts.

Torrence could argue that two convictions, for the fourth or subsequent incident, were based on generic testimony, though he has no argument that any of the other seven convictions were not specific enough in their descriptions. When convictions are based on “generic” testimony, there are three factors which must be present: 1) the victim “must describe the kind of act or acts with sufficient specificity to allow the trier of fact to determine what offense, if any, has been committed; “ 2) the victim “must describe the number of acts committed with sufficient certainty to support

each of the counts alleged by the prosecution;” and 3) the victim “must be able to describe the general time period in which the acts occurred.” *State v. Hayes*, 81 Wn.App. 425, 438, 914 P.2d 788 (1996). All those factors are firmly met in Torrence’s case.

In *Yallup*, the 14-year-old victim testified that the defendant had licked her vagina on multiple occasions when she was 10 and 11 years old; she reported that the occasions of abuse occurred at three different houses she lived at with her mother in the same town. *Yallup*, 416 P.3d at 1252. The victim indicated the first occasion was when she was 10 years old and towards the end of her fourth grade school year, and the last occasion was shortly before her 12<sup>th</sup> birthday. *Id.* She finished fourth grade in 2013 and turned 12 in August 2014. *Id.* In applying the three *Hayes* factors in *Yallup*, this Court found that the victim’s described acts sufficiently described the essential component of a rape, thus meeting the first factor. *Id.* at 1254. The victim also testified the acts occurred more than ten times, and since only two counts were charged, the second factor was met. *Id.* And finally, the victim provided testimony about how old she was and locations the acts occurred at in order to adequately describe the time period when the acts occurred, thus fulfilling the third factor. *Id.* Finding those things, this Court declared, “[m]ore specificity from the victim was not required.” *Id.*

A.K.A. testified to much more detail than did the victim in *Yallup* as described in detail above in the facts section. In applying these factors, this Court should find that there is no question that A.K.A.'s testimony specifically, and with vivid detail, described the acts committed by Torrence. She also indicated she was sure that the last act of penile-vaginal rape occurred on seven occasions, and the time period was very specific, narrowed down to a discrete time frame of a few weeks in the summer of 2012. From A.K.A.'s specific descriptions of the incidents, she was clearly able to describe the "kind of act or acts" perpetrated against her so as to allow the jury to determine what offense had been committed. This *Hayes* factor is clearly met. She also described the exact number of times these incidents occurred and thus the second *Hayes* factor is clearly met. And the victim was easily able to describe the time period of before her twelfth birthday during the summer visitation with her mother in July of 2012. The third *Hayes* factor is also clearly met. The State clearly presented more than sufficient evidence from which the jury could find that four separate and distinct acts of rape and molestation occurred.

The State more than met its burden of proof in all counts charged. Torrence's claim that 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" is wholly without merit. A.K.A. clearly

described sexual contact and penetration of her vagina sufficient to meet the statutory requirements. Torrence's claim fails.

**V. The trial court properly prohibited contact with all minors as a condition of Torrence's sentence.**

Torrence argues the trial court erred in prohibiting contact with all minors as a condition of his sentence as it infringes on his right to parent his own children. The trial court properly prohibited contact with all minors as Torrence abused his position as a parental figure in abusing A.K.A. and thus is a danger to all children, including his own. The State has a valid interest in prohibiting his contact with children. The trial court should be affirmed.

As part of any term of community custody, the court may impose and enforce crime-related prohibitions. RCW 9.94A.505(9); RCW 9.94A.703(3)(f). A crime-related community custody condition prohibits conduct that "directly relates to the circumstances of the crime for which the offender has been convicted." RCW 9.94A.030(10). "Directly related" includes conditions that are reasonably related to the crime. *State v. Irwin*, 191 Wn.App. 644, 656, 364 P.3d 830 (2015). However, when a sentencing condition interferes with a fundamental constitutional right, like the right to parent, more careful review of those sentencing conditions is required. *State v. Warren*, 165 Wn.2d 17, 32, 195 P.3d 940 (2008); *In re Pers.*

*Restraint of Rainey*, 168 Wn.2d 367, 374, 229 P.3d 686 (2010). Thus, sentencing conditions burdening the right to care, custody and companionship of one’s children “must be ‘sensitively imposed’ so that they are ‘reasonably necessary to accomplish the essential needs of the State and public order.’” *Rainey*, 168 Wn.2d at 374 (quoting *Warren*, 165 Wn.2d at 32). But “[p]arental rights are not absolute and may be subject to reasonable regulation.” *City of Sumner v. Walsh*, 148 Wn.2d 490, 526, 61 P.3d 1111 (2003) (citing *Nunez v. City of San Diego*, 114 F.3d 935, 952 (9th Cir. 1997)).

The crimes that Torrence was convicted of, rape of a child and child molestation, are crimes that inherently involve children as victims. Therefore conditions of Torrence’s sentence that seek to limit his access to children are therefore crime-related. *See State v. Miller*, 198 Wn.App. 1008 (Div. 3 2017) (finding in a case involving crimes of rape of a child and child molestation that conditions that sought to limit access to children were crime-related).<sup>4</sup> This Court reviews the imposition of crime-related prohibitions for an abuse of discretion. *State v. Riley*, 121 Wn.2d 22, 37, 846 P.2d 1365 (1993). An abuse of discretion occurs when a decision is manifestly unreasonable or the discretion was exercised on untenable

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<sup>4</sup> GR 14.1 allows citation to unpublished opinions of the Court of Appeals issued on or after March 1, 2013. This opinion is not binding on this Court and may be given as much precedential value as this Court chooses.

grounds or for untenable reasons. *State v. Ancira*, 107 Wn.App. 650, 653, 27 P.3d 1246 (2001).

It was reasonable for the trial court to prohibit Torrence from having contact with any minors, including his biological children, because he is a danger to children, preying on children in his care. Torrence was in a parental role over A.K.A. at the time he abused her; she was his girlfriend's child, and lived with the child as a parent figure. In *State v. Berg*, 147 Wn.App. 923, 198 P.3d 529 (2008), the defendant was convicted of rape of a child and child molestation after he sexually molested a child who lived with him, but who was not his biological child. *Berg*, 147 Wn.App. at 927-31. On appeal, the defendant challenged the reasonableness of the order prohibiting contact with all female minors, which included his own biological daughter. The Court of Appeals upheld the no contact provision finding that Berg acted as her parent when the abuse occurred and that by allowing his own daughter to be alone with him would be putting her in the same situation and putting her at the same risk the victim was put in when she was sexually abused by the defendant. *Id.* at 942-43. The trial court's order restricting contact was reasonably necessary to protect his biological daughter. *Id.*

The situation in this case is very similar. A.K.A. lived with Torrence for nearly two months during which time he abused her.

Torrence had a position of authority over A.K.A., like a parent. So like the defendant in *Berg, supra*, while Torrence did not abuse his own biological child in abusing A.K.A., he abused someone who was like his child and therefore all children who could find themselves in his care or in his presence are at risk, including his own biological children. Thus the trial court did not err in prohibiting Torrence from having contact with all minors as his class of victims includes minors under his care, like his own minor biological children would be. The trial court's imposition of this condition should be affirmed.

**VI. This matter should be remanded for consideration of Torrence's indigency status.**

Torrence argues this Court should strike the fees imposed on this case because he was indigent. While Torrence is correct that trial courts are not permitted to impose certain fees on defendants who are indigent, the trial court determined that Torrence was not indigent as the law requires in order to avoid certain legal fees and costs. Accordingly, the trial court's imposition of the \$200 filing fee should be affirmed.

Amendments to several LFO statutes went into effect on June 7, 2018, before Torrence was sentenced. LAWS OF 2018, ch. 269. These amendments, made through House Bill 1783, changed the absolute mandatory nature of the criminal filing fee. Torrence appears to claim he

was indigent because he qualified for court-appointed appellate counsel (See Br. of Appellant, pp. 52, 54), however he does not demonstrate that he was “indigent” as that term is defined for the imposition of certain LFOs. Torrence’s argument that the decision in *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018) should result in this Court striking the criminal filing fee is incorrect.

The main effect of House Bill 1783 was the amendment to RCW 10.01.160(3), which changed the standard of imposing costs on a criminal defendant from only imposing them if a defendant had an ability to pay now or in the future, to prohibiting imposition of costs if the defendant meets the definition of “indigent” set forth in RCW 10.101.010(3)(a)-(c).<sup>5</sup> The only costs that RCW 10.01.160 applies to are those specially incurred by the state in prosecuting the defendant or in administering a deferred prosecution or for pretrial supervision. RCW 10.01.160(2). This statute also specifically includes costs imposed under RCW 10.46.190 within its

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<sup>5</sup> “Indigent” is defined in RCW 10.101.010(3)(a)-(c) as:

(3) “Indigent” means a person who, at any stage of a court proceeding, is:

- (a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans’ benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, Medicaid, or supplemental security income; or
- (b) Involuntarily committed to a public mental health facility; or
- (c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level;....

application, but does not include fees for DNA, the criminal filing fee, the crime laboratory fee, the domestic violence fee, the domestic violence contact order violation fee, or the victim assessment fee. The holding in *Ramirez* does not support Torrence's argument that the criminal filing fee assessed in his case should be stricken, without remand, due to indigency.

At the sentencing hearing, neither party discussed, nor did the trial court discuss how or why Torrence was not indigent. The trial court clearly entered a finding that Torrence was not "indigent" as defined in RCW 10.101.010(3)(a)-(c). CP 437. Not every definition of indigency is covered by the amendments to the LFO statutes. While Torrence now claims he is indigent in his appeal, he does not indicate that he is indigent pursuant to RCW 10.101.010(3)(a)-(c), but instead argues he is indigent because he has court-appointed appellate counsel, which is a basis for indigency pursuant to RCW 10.101.010(3)(d), but which is specifically excluded as a basis to not impose the filing fee.

Had the trial court found Torrence indigent as defined by RCW 10.101.010(3)(a)-(c), then the trial court was prohibited from imposing certain costs. However, the trial court specifically found Torrence was not indigent pursuant to RCW 10.101.010(3)(a)-(c) and therefore it was required to impose mandatory costs like the \$200 filing fee.

a. Criminal Filing Fee

House Bill 1783 amended RCW 36.18.020(2)(h), changing the criminal filing fee from a mandatory fee to a fee which shall be assessed unless the defendant is “indigent” as defined in RCW 10.101.010(3)(a)-(c). Therefore, when the superior court now sentences a defendant, the court shall impose the filing fee unless the defendant is “indigent” as defined in RCW 10.101.010(3)(a)-(c). However, the trial court has never found that Torrence meets the definition of “indigent” under RCW 10.101.010(3)(a)-(c). Therefore, the amendments to the statute do not prohibit the trial court from imposing the criminal filing fee in Torrence’s case, and in fact still require the imposition of the criminal filing fee as Torrence was not indigent pursuant to RCW 10.101.010(3)(a)-(c).

b. Interest accrual

The State agrees with Torrence that the trial court erred in ordering that interest shall accrue on nonrestitution legal financial obligations. RCW 10.82.090(1) states that “As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations....” RCW 10.82.090(1). Torrence was sentenced after June 7, 2018 and therefore interest should not have been ordered to accrue on his nonrestitution legal financial obligations. This provision should be stricken from his judgment and sentence.

**CONCLUSION**

As discussed above, the trial court did not err in excluding certain testimony regarding grooming or in sentencing Torrence. Additionally, Torrence received effective assistance of counsel and the State presented more than sufficient evidence to support his convictions. The court appropriately imposed community custody conditions, but failed to do an adequate inquiry into Torrence's ability to pay and indigency status and therefore the matter should be remanded to address the LFOs. The trial court should be affirmed in all other respects.

DATED this 22<sup>nd</sup> day of July, 2019.

Respectfully submitted:

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# CLARK COUNTY PROSECUTING ATTORNEY

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## Transmittal Information

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