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Division III
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NO. 34898-9-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JONATHAN BROOKS HAWKINS, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF GRANT COUNTY

The Honorable David G. Estudillo, Judge

BRIEF OF RESPONDENT
(AMENDED)

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II. STATEMENT OF THE CASE¹

A. EVIDENCE OF CRIMINAL ACTS²

Ashlynn Obermeyer reported Jonathan Hawkins to Child Protective Services in February, 2015. 1RP 567; CP 430. Obermeyer's report included Facebook messages between herself and Jonathan Hawkins in which they discussed the family's "open lifestyle." 1RP 568; 1RP 594. Hawkins admitted his participation. 1RP 577. His step-daughter, R.D., was born August 4, 2010 and was four years old at the time of this exchange. 1RP 643. Responding to a question about how the children took to the family lifestyle, Hawkins wrote: "They love it. [R.D.] is learning very well what a female should be." 1RP 594. He wrote, "she helps [Kat]³ with pleasuring and is learning well." 1RP 594. R.D. was learning what he and his wife, Caitlyn⁴ "did." 1RP 595-96. Obermeyer asked: "[R.D.]'s performing sexual acts on you via hand and giving you a hand job and was [sic] well as blow jobs?" 2RP 596. Hawkins replied: "Yes, she is learning." 1RP 596. He wrote:

¹ The State cites to the sequentially paginated, five volume verbatim report of pretrial proceedings and trial (Brittingham) as 1RP ____, the sequentially paginated, three volume verbatim report of pre-trial and trial proceedings (Bartunek) as 2RP ____, and to the clerk's papers as CP ____.

² In consideration of their length, the extensive facts necessary to respond to Hawkins's specific assignments of error are set forth primarily in the State's argument section. In its Statement of the Case, the State provides general facts related to more than one issue, and sets forth procedural facts from pretrial hearings.

³ "Kat" is Hawkins nickname for his wife, Caitlyn. 1RP 647. He spells it with a "K" because Caitlyn was "not a four legged creature that crawls on the ground." 1RP 647.

⁴ The State refers to Mrs. Hawkins as Caitlyn to distinguish her from her husband and means no disrespect.

Been transitioning Kat into dresses that show more of her body in public. We are clothing free at home but in public Im [sic] working her out of them. Having her show her body to males in particular, females to [sic] but concentrating on males, teaching her to bend over for them to show them and inviting them to feel the body, and possibly more. The female was created for male pleasure and to produce babies and milk. She is now wearing what we call for her dresses which society calls lingerie which are sheer and show the body and provide good easy access for males.

CP 265. Replying to a follow-up question, Hawkins answered: “yes. She [Caitlyn] is being used by other males and that is how it is supposed to be a female is a pleasure object for males and produces milk and babies. It doesn’t [sic] matter who the ‘sperm donor’ is, the males take care of the children.” CP 265. The conversation included Hawkins’s assertion that it was very healthy for males to “release often, many times a day and to be pleased alot [sic].” CP 265. He wrote:

she [R.D.] watches when kat is used and knows what it is and loves it. We are training her to be totally unsexual. . . . and she is learning the difference. And how to pleasure the sack and prostate as well. And nipples. She is just learning by example. We don’t force it. Just let *them* watch and learn.”

CP 266 (emphasis added). Hawkins’s wife, Caitlyn, told a detective she regularly “milked” Hawkins by rubbing her finger up and down the shaft of his penis, that R.D. watched and assisted in the procedure, and that she had seen Hawkins’s penis in R.D.’s mouth. CP 431. Their religious belief was that females were created to sexually service males. CP 431. Hawkins and Caitlyn lived at the Comfort Inn in Moses Lake with their three daughters, aged four and a half years, nineteen months, and five months. CP 431. Based upon Obermeyer’s report, Hawkins and Caitlyn were arrested February 11, 2015, and charged with first degree rape of a child and first degree child molestation of the oldest child, R.D. CP 431.

B. PROCEDURAL FACTS

Hawkins’s trial started September 14, 2016. 1RP 6. He was arraigned February 24, 2015, with trial initially set April 15, 2015. CP 25. An omnibus hearing was initially scheduled for

March 17, 2015. CP 25. At that hearing, Hawkins, having just gotten the State's eleven-person witness list, moved to continue trial over the State's objection. 2 RP 3. Defense counsel was going to be unavailable from April 2 through April 10, and was possibly having surgery after that. 1RP 3. The State countered that the forensic child interviewer was the only witness not listed in the initial police reports and that Hawkins had received a video copy of the forensic interview. 1RP 3. The court granted Hawkins's request, for various reasons not relevant here, continuing omnibus to April 28 and trial to June 3. 1RP 3-5; CP 26. At the April 28, 2015 omnibus hearing, Hawkins said he was not yet ready to enter an omnibus order, due to the joint request for a *Ryan*⁵ hearing, his desire to have his own expert interview the child before that hearing, and his troubles obtaining an expert. 1RP 12-13. The State objected, proposed the court schedule the necessary pretrial hearings, and questioned Hawkins's need for a pre-*Ryan* expert defense interview. 1RP 12-13. The court continued omnibus, 1RP 13, and the hearing was held May 19, when Hawkins asked for more time to send documents to his newly-retained expert, reciting difficulties due to R.D.'s age and the fact she was in state custody. 1RP 18-19. The State objected because trial was June 3. 1RP 18-19. The court continued trial to July 8. 1RP 19; CP 31. On June 9, the court entered an omnibus order maintaining the July 8 trial date, scheduling the CrR 3.6 (suppression) and CrR 3.5 (voluntariness) hearings for June 24, and noting a *Ryan* hearing was to be set by the court administrator. CP 32. Hawkins had just received the crime laboratory reports from the search of his motel room and asked to "reserve" on suppression issues until after reviewing that material. 1RP 24. The court later continued the June 24 hearings to July 1, 1RP 25, because defense counsel and one of the officers were unavailable. 1RP 69. The State did not call court administration to schedule the *Ryan* hearing until July 1. 1RP 73. The

⁵ *State v. Ryan*, 103 Wn.2d 165, 691 P.2d 197 (1984) (establishing requirements for admissibility of child hearsay statements)

earliest available date was July 23, two weeks after the scheduled trial date. 1RP 73. At the CrR 3.5 hearing on July 1, the State told Hawkins it would interview Caitlyn the following day, that she would be added to the State's witness list, and that new charges were anticipated. 1RP 69. The State interviewed Caitlyn July 2. 1RP 62.

With trial still set for July 8, Hawkins moved on July 1 to disqualify one of the judges. CP 77. On July 2, that judge requested briefing from both parties and set the matter for hearing July 14, six days after the start of trial. CP 33-34. Immediately before the July 6 readiness hearing, Hawkins filed objections to trial continuance, the amended information, and the amended witness list. CP 41-45. On July 6, with the disqualification issue pending, Hawkins stated he was ready for trial. 1RP 62. The State was not. 1RP 62. Based on Caitlyn's interview, the State planned to file additional charges and told the court it had notified Hawkins "all along" such charges were contemplated. 1RP 62. New charges could not be filed until the State interviewed Caitlyn, which, in turn, required an agreement in exchange for her cooperation. 1RP 74. That was accomplished July 2, the same day as the interview. 1RP 74. Caitlyn's "free talk" confirmed the factual basis for additional charges, including a charge involving a second victim, V.H. 1RP 66. The new evidence also indicated three separate incidents involving R.D. 1RP 76. Hawkins called the advance notice "so much hot air" until probable cause was established. 1RP 71. Both parties understood the State did not want to file additional charges unless plea negotiations on Hawkins's current charges failed, which they had not yet done. 1RP 80.

Both parties knew from the start about Hawkins's incriminating Facebook communications with Obermeyer. RP 82. During Caitlyn's July 2 free talk, the State first learned of relevant Facebook communications between Caitlyn and Hawkins, expected to be a "huge body of evidence," 1RP 82-83, containing explicit, graphic detail. 1RP 68. As of July 6, the State

had not yet acquired these communications. 1RP 82–83. Having forgotten entirely his April 28 request to delay the *Ryan* hearing until after his expert interviewed R.D., Hawkins argued July 6 the State’s delay in scheduling the hearing was prosecutorial mismanagement. 1RP 73. The State admitted it was responsible for the delay caused by failing to schedule the hearing immediately after entry of the June 9 omnibus order, but explained the State delayed scheduling the *Ryan* hearing until Caitlyn’s competency was established and that she had been found competent only the previous week. 1RP 77; 1RP 90. The court held five months since arraignment did not create a speedy trial violation, that the *Ryan* hearing would be held around five-month mark, and there was good cause to continue trial to allow the hearing despite the State’s having waited three weeks from the entry of the omnibus order to obtain a hearing date. 1RP 88-89. The court also found no evidence that Caitlyn’s eleventh-hour offer to cooperate and provide the Facebook evidence was due to any State wrongdoing. 1RP 89. The court granted the State’s request based on the additional charges flowing from Caitlyn’s “free talk,” the need for the *Ryan* hearing, and the request to add V.H. as an additional victim. 1RP 90-91. The court continued trial to July 29 over Hawkins’s objection. CP 46.

A day later, July 7, Hawkins filed a “Motion to Specify Statements Sought to Be Introduced at Ryan Hearing; and OBJECTION to Statements Other than Those Made to Karen Winston; and Motion to State to Provide Witness List and Summary of Anticipated Testimony of those Witnesses State intends to Cal [sic] at Ryan Hearing.” CP 47-48 (capitalization in the original). On July 8, Hawkins renewed his objection to the State’s amended witness list. CP 51-57. On July 13, he filed a memorandum on child hearsay in which he asserted, for the first time, R.D. was incompetent. CP 58-70. At the July 14 hearing on the State’s motion to amend the information, the State reminded the court Hawkins wanted to retain an expert before scheduling

the *Ryan* hearing, RP 101, and that the State had had no control over the timing of Caitlyn's interview and plea negotiations until after her competency evaluation. 1RP 107-08. July 2 was the earliest date the State knew Caitlyn could be a witness. 1RP 108. The State also recited ongoing difficulties obtaining meaningful access to the approximately 150,000 Facebook messages between Hawkins and Caitlyn. 1RP 112. The court found Hawkins had sufficient time to interview Caitlyn before the new July 29 trial date, CP 46, and rejected his "Hobson's choice"⁶ assertion, that he was being forced to choose between adequate preparation and his right to a speedy trial. 1RP 110. The court denied Hawkins's motion to disqualify the judge. CP 77. The court granted the State's motion to file an amended witness list. 1RP 109-10. By agreement, the parties then continued trial from July 29 to September 16, 2015, to allow Hawkins further time to consider the State's plea offer. 1RP 120-21. The State reported on its on-going efforts to obtain the Facebook messages from Caitlyn's account. 1RP 122. The State was willing to share Caitlyn's account access information with Hawkins, but evidence tampering concerns supported a stipulated order limiting dissemination of the access codes and passwords. 1RP 122. The court warned it would give "a chilly reception" to any further requests for extension of time due to the Facebook materials. 1RP 122. The State agreed, pointing it needed the search warrant ordering Facebook to produce the evidence in an accessible format only because "scrolling through this material is excruciatingly slow." 1RP 124.

The next day, July 28, Hawkins filed a motion for supplemental discovery. CP 84-86. On July 30, State filed its second amended witness list, adding R.D.'s foster mother, Chelsea Hill.

⁶ "A Hobson's choice is a free choice in which only one thing is offered. Because a person may refuse to accept what is offered, the two options are taking it or taking nothing. In other words, one may 'take it or leave it'. The phrase is said to have originated with Thomas Hobson (1544–1631), a livery stable owner in Cambridge, England, who offered customers the choice of either taking the horse in his stall nearest to the door or taking none at all." https://en.wikipedia.org/wiki/Hobson%27s_choice

CP 87-88. On August 3, Hawkins filed a motion for a bill of particulars that recited, among other background facts, the State would amend to add charges if Hawkins “refuses to plead.” CP 89. On August 11, the State told the court that, based on new information, the State would not enter into an agreement with Caitlyn. 1RP 127. The State wanted nothing to do with any of the information Caitlyn provided because “there is some indication she was not truthful in her free talk”. 1RP 127-28. The court reset argument on Hawkins’s discovery motions to August 18, the date set for an omnibus hearing. 1RP 128. The hearing that day on Hawkins’s discovery motions was before a different judge. 1RP 131. The State told the court most of what Hawkins demanded had already been produced, but that about ten days earlier, the State learned of disclosures R.D. had just made to her foster mother, Hill, that led the State to conclude Caitlyn was not honest in her free talk. 1RP 132. Caitlyn’s free talk statements were not inculpatory and were consistent with what she told law enforcement, but R.D.’s recent disclosures to Hill indicated both parents participated in sexual assault. 1RP 167. Because the State withdrew its cooperation agreement and did not intend to use any of Caitlyn’s evidence, including the Facebook materials, the State argued Hawkins’s unmet discovery demands were no longer relevant. 1RP 132-34. The judge asked for time to review the pleadings and ordered the State to prepare a written response to Hawkins’s discovery motions. 1RP 134-35. The State filed a third amended list of witnesses eliminating Caitlyn on August 21. CP 93-94.

Hawkins requested a one-week continuance of the August 25 discovery hearing, over the State’s objection. 1RP 140-41. The *Ryan* hearing was currently set for September 25. 1RP 140-41. The discovery hearing was continued to September 9. 1RP 140-41. The parties addressed Hawkins’s motion for a bill of particulars, in which Hawkins demanded the State elect a specific

act for each of the two existing charges. 1RP 148. The State refused, asserting a *Petrich*⁷ instruction would resolve the issue. 1RP 147-49. The court had difficulty with Hawkins's demands, summarizing: "I understand what you're saying, but I don't understand what it relates to the price of tea in China." 1RP 150. The court concluded Hawkins could obtain the specificity he sought by looking at the police reports and denied his motion. 1RP 154. On August 31, Hawkins filed another discovery motion, still seeking all information provided to the State in Caitlyn's free talk. CP 101-14. On September 14, two days before trial, Hawkins said he did not "necessarily" want trial continued but wanted his motions heard.⁸ 1RP 165. The State strongly contested Hawkins's assertion he had not received all discovery in the State's possession. 1RP 165. That hearing contained very little discussion of the *Ryan* date, focusing instead on Hawkins's pending discovery motions. Concerning the *Ryan* hearing, Hawkins said only that if he proceeded to the hearing he would lose his chance to take the State's offer. 1RP 178. Hawkins had continued the earlier *Ryan* hearing date, July 23. 1RP 178. He conceded he needed his discovery issues resolved before that hearing. 1RP 180. The court suggested holding the hearing on the first day of scheduled trial, September 16. 1RP 182. Hawkins repeated he wanted his discovery issues handled first. 1RP 182. The parties agreed to continue trial to September 30 based on the September 25 *Ryan* hearing date. 1RP 164-65⁹; CP 115. Hawkins renewed his demands for the free talk evidence and the State reiterated the evidence was no longer in its possession. 1RP 165-66. Hawkins already had a transcript of the free talk. 1RP 168. The court and parties agreed the discovery matters would require a "special set" hearing. 1RP 166.

⁷ *State v. Petrich*, 101 Wn.2d 566, 683 P.2d 173 (1984).

⁸ The court inquired: "Did you all [defense attorneys] go down [to] some seminar that . . . tells you not to give me a direct answer about whether you want to go to trial or not? You sound like [another Grant County defense attorney]." 1RP 164.

⁹ The report of proceedings for this hearing is incorrectly dated "September 25, 2015, 10:30 A.M." 1RP 164. This hearing was September 14, 2015, confirmed by reference to the *upcoming* September 25 *Ryan* hearing. 1RP 164.

Caitlyn's attorney joined the proposal for a special-set hearing and said Caitlyn planned to file motions related to the discovery issues. 1RP 169. Hawkins recited the history of his discovery motions and told the court exactly what he wanted produced. 1RP 174-76. The court replied: "I'm not - - - I'm not following where this is going. Are you planning on making - - you believe that this information, if you get it, could be grounds for a suppression motion?" 1RP 176.

Hawkins said it did not matter what his grounds were—the State needed to disclose the contested information. 1RP 176. The court asked: "So, are you simply declining to answer my question?" 1RP 176. Counsel replied he had no idea where the evidence would lead and needed to review it to determine how he might be able to use it in Hawkins's defense, but refused to say he was not ready for trial. 1RP 177. The judge said: "Do you see why I'm a little confused?" 1RP 177.

Counsel replied: "Yeah, I'm not - - - I'm not willing to say one way or the other, sir." 1RP 177.

He confirmed the July 23 *Ryan* setting was continued by agreement because Hawkins wanted to keep his options open concerning the State's settlement offer. 1RP 178. He confirmed this was to Hawkins's benefit. 1RP 179. He refused to tell the court whether he agreed or disagreed with the State's request to continue the *Ryan* hearing. 1RP 177.

The State was unavailable for trial the week of October 2. 1RP 184. Caitlyn's trial was scheduled the following week. 1RP 184. Hawkins's counsel was unavailable for a month, starting October 14. 1RP 180. The State proposed a late-November trial date and defense counsel brought up the unresolved discovery issues. 1RP 180. The court expressed concern that, although Hawkins did not object to the trial date, he took no position at all. 1RP 181. This, the court concluded, could cause speedy trial issues. 1RP 181. The State asserted the *Ryan* hearing could proceed as scheduled September 25, with trial following immediately after, and strenuously objected to trial without a *Ryan* hearing. 1RP 181. Hawkins repeated he wanted the discovery

issues handled first. 1RP 182. Finding good cause based on unresolved discovery issues, the need for a *Ryan* hearing, and defense counsel's need to adequately prepare, the court continued trial to September 30. 1RP 182. Hawkins confirmed he had no objection and State urged the court to schedule the discovery hearing. 1RP 182-83. Two days later, on September 16, Hawkins filed a motion to continue the *Ryan* hearing, based on the special-set discovery hearing, and because of the new hearsay statements R.D. allegedly made to Hill on August 6 and 7, 2015. Ex. P34; CP 116-20. The next day, September 17, Hawkins filed a supplemental motion for discovery, CP 121, again demanding evidence obtained through Caitlyn's free talk. CP 121-26.

On September 21, the court heard Hawkins's motion to continue the September 25 *Ryan* hearing and trial. The discovery hearing was set for September 23, trial September 30. R.D.'s new disclosures were "pretty significant." 1RP 189. Caitlyn had just filed her discovery motions and wanted them heard with Hawkins's motions on the special-set date. 1RP 189. Citing the outstanding discovery issues and counsel's month-long vacation starting October 14, Hawkins suggested a December or January trial date. 1RP 191. Recognizing the scheduling issues involved getting a new *Ryan* hearing date, he said he was not opposed to trial in January. 1RP 191. He agreed with the court that the last two weeks of December would raise holiday issues for all concerned, including jurors. 1RP 192. The State intended to hold a single *Ryan* hearing for both cases and a single discovery hearing for the issues raised by both Hawkins and Caitlyn, although *Bruton*¹⁰ issues prevented joinder for trial. Hawkins then laid out the timeline of the new discovery, from when the State was first alerted to production about a month later, stating that length of time was not the State's fault. 1RP 194. Concerned by the administrative and procedural issues raised by continuing special-set hearings, the court asked counsel whether the

¹⁰ *Bruton v. United States*, 391 U.S. 123, 124, 88 S.Ct. 1620, 1621, 20 L. Ed. 2d 476 (1968) (confrontation clause rights violated when non-testifying codefendant's confession naming defendant introduced at joint trial)

current dates could be preserved. 1RP 195-96. Hawkins said R.D.'s new disclosure indicated she had been in daycare outside her foster home that he wanted to interview "those folks" before proceeding. 1RP 196. He said he had no idea what information would be received or whether it would require a discovery motion. 1RP 196. He would not agree further interviews could resolve his discovery issues, although he could not specify what might not be resolved. 1RP 196-97. The court ordered the parties to confer before filing any further discovery motions, that all statements in the prosecutor's possession be turned over, regardless of relevance, and that the State make efforts to obtain the Facebook evidence law enforcement possessed. 1RP 197-98. Trial was continued to January 13, 2016. CP 133.

The State did not re-schedule the *Ryan* hearing until the only available date was January 15, two days after the new trial date. CP 134-36; CP 147. On January 4, 2016, Hawkins filed an objection to the new *Ryan* hearing date. CP 134-36. Hawkins argued this was the second time the State neglected to schedule the hearing, yet again citing his comments from the April 28, 2015 hearing while failing to mention his request to delay the hearing until his expert could interview R.D. CP 137. Hawkins also neglected to recite why, in September 2015, the court struck the special-set discovery hearing. CP 138. He repeated his Hobson's choice-speedy trial complaint, moving to dismiss the case for prosecutorial mismanagement under CrR 8.3. CP 138. Hawkins was out of custody by the time the court heard his dismissal motion at the January 11, 2016 readiness hearing. 1RP 206. He conceded the *Ryan* hearings scheduled for April and July 2015 were continued at his request. 1RP 207. Without elaboration, he said the September 2015 *Ryan* hearing "was not had." 1RP 207. Conceding dismissal was an extraordinary remedy, he suggested alternatives. 1RP 207. The State responded that Hawkins continued the July 2015 hearing because he wanted to interview R.D. first and that he successfully struck the September

25, 2015 hearing over the State's objection. 1RP 208. Defense counsel was unavailable from mid-October through mid-November. 1RP 209. The prosecutor agreed it was her "bad" for neglecting to obtain a new date following the September 25 hearing, but pointed out that was due in large part to attempting to accommodate Hawkins's various requests to delay the hearing. 1RP 210. Hawkins requested a delay in April 2015, then successfully continued the July and September hearings. 1RP 210. Hawkins's conceded he was responsible for these delays. 1RP 212. The court, citing CrR 8.3(b), held Hawkins failed to establish mismanagement sufficient to prejudice his right to a fair trial. 1RP 213. He could still present his defense. 1RP 213. The court continued trial one week, to January 21, 2016. 1RP 213; CP 149.

The following day, January 12, Hawkins filed a second motion for a bill of particulars, CP 150-53, and an objection to venue. CP 154-55. On January 15, he filed another motion to dismiss due to government mismanagement and an objection to the January 15 *Ryan* hearing, based on the State's January 14 production of the video of a November 20, 2015 forensic interview of R.D. CP 156-59. He filed a supplemental memorandum addressing *Ryan* issues on January 19. CP 168-84. Hawkins remained out of custody and attended the January 25 hearing on his renewed motion for a bill of particulars. 1RP 228. Ultimately, the court told Hawkins: "I just don't see where [having the State elect a specific act for each count] would assist you further on this." 1RP 251. The court denied Hawkins's renewed motion. 1RP 251. On February 8, before a different judge, the parties argued Hawkins's on-going demand that R.D. be required to testify at the *Ryan* hearing and her competency be tested at that time. 1RP 258-59. Relying on *State v. Brousseau*,¹¹ the State vigorously opposed requiring the child to testify at the *Ryan* hearing, with both parents present, when she would also have to testify at separate trials for each parent. 1RP

¹¹ 172 Wn.2d 331, 259 P.3d 209 (2011)

259. Hawkins had not formally challenged R.D.'s competency, yet asserted the court was required to determine her competency at the *Ryan* hearing. 1RP 260. The court told Hawkins he was on notice there needed to be a preliminary challenge to competency and rescheduled the hearing for February 17. 1RP 261; 259. On February 17, the court relied on *Brousseau* to deny Hawkins's demands. 1RP 266.

On February 19, Hawkins filed a "2nd Supplemental Memorandum Re: Ryan Hearing", CP 188-93, his third in this series. At a readiness hearing February 29, the first judicial day following the last day of the *Ryan* hearing, Hawkins called ready for trial two days later but stated he had not reviewed the Facebook evidence the State had just decided to use at trial. 1RP 375-76. Caitlyn had pleaded guilty and was again a witness for the State. 1RP 383. The court had not issued its *Ryan* decision. 1RP 376. The State objected that counsel appeared to be "making a [speedy trial] record" contrary to his earlier representations and was leaving himself open for an ineffectiveness claim by asserting he was ready for trial before the court's *Ryan* ruling and before reviewing the Facebook messages. 1RP 377. The court pointed out one week earlier Hawkins said he still needed to review the Facebook materials, and that one of the State's witnesses was unavailable. 1RP 376. The court found good cause to continue trial based on Hawkins's previous representations about what he needed to accomplish before trial. 1RP 376. Hawkins noted his objection. 1RP 377.

The court continued trial 45 days, to April 13. 1RP 378. The parties later agreed to continue that date because Hawkins's ancillary dependency case continued to generate potentially useful defense material and stipulated to good cause. 1RP 383. Four or five weeks earlier, the State received from Facebook and produced 1,974 pages of "dialog" evidence, and another 500 pages of photographs and comments that both parties were still reviewing. 1RP 384.

The court set a status hearing on July 5 and trial July 20. 1RP 384. Counsel, without Hawkins, appeared on June 27 so Hawkins could give the court a “heads up” he was planning to assert “the husband/wife privilege.” 1RP 388. The parties and the court discussed various unresolved questions about the scope of the child abuse exception to that privilege, agreed briefing was required and set hearing for July 11. 1RP 388-39. Hawkins also demanded the State provide a formal offer of proof concerning the marital communications it wanted to offer. 1RP 388. The State did not object to providing “some specificity.” 1RP 389.

On July 6, a year and a half after Hawkins’s arraignment, the State received a number of new defense motions and asked on July 11 that all motions be heard together at a special-set hearing. 1RP 406. Hawkins was still out of custody. 1RP 412. His new motions included a suppression motion, a motion to change venue, and a motion to suppress his custodial statements. 1RP 409; CP 390-395. The State needed time to respond. 1RP 406. Also, the case detective had just finished his Facebook review, leaving little time for either side to review the relevant materials. 1RP 406. The parties agreed each side needed to continue trial, defense counsel stating, “so there’s no objection as long as it’s not during hunting season.” 1RP 408-09. Hawkins was out of custody, living in Oregon. 1RP 418. Hearing on suppression issues and marital privilege was finally held August 17, 2016. 1RP 437. Concerning marital privilege, the court said: “[Hawkins is] charged with a crime against one of the kids and I think that’s the end of it.” 1RP 484. Hawkins disagreed. 1RP 484. Trial was currently a week away. 1RP 485. At the readiness hearing, Hawkins waived his right to jury trial. 1RP 489. The parties were still awaiting rulings on the issues argued the previous week. 1RP 490-91. The State asked the court to continue trial to a “hard set” date to accommodate out-of-state witnesses but asked to leave the outside date unchanged. 1RP 492. Hawkins agreed, so long as his out-of-area witness was

available. 1RP 495. The court continued trial to September 8. 1RP 494. Two days before trial, Hawkins objected to the court's oral ruling on marital privilege. 1RP 500. Another case was ahead of Hawkins on the September 8 trial calendar, so the State canceled travel arrangements for its out-of-area witnesses. 1RP 501. The court continued trial to September 14, but kept the outside date. 1RP 502. Trial commenced September 14, 2016. 1RP 510.

III. ARGUMENT

A. HAWKINS REPEATEDLY REQUESTED THE STATE DELAY THE *RYAN* HEARING TO KEEP HIS SETTLEMENT OPTIONS OPEN, ROUTINELY FILED NEW MOTIONS ON THE EVE OF SCHEDULED TRIAL DATES, AND DID NOT INTERVIEW THE STATE'S WITNESSES IN ADVANCE OF THE FEW CONTINUANCES HE OPPOSED. THE TRIAL COURT DID NOT ERR WHEN, ON THREE OCCASIONS, IT CONTINUED TRIAL OVER HAWKINS'S OBJECTIONS DUE TO *RYAN* HEARING SCHEDULING ISSUES.

Trial was continued 12 times after its initial setting. CP 26; CP 31; CP 46; CP 80; CP 115; CP 133; CP 149; CP 162; CP 228; CP 235; CP 339. Hawkins complains the three continuances arising from the State's failure to obtain a date for the *Ryan* hearing before the scheduled trial date created prejudice sufficient to deny him his constitutional rights to speedy trial because he was forced to choose between his right to speedy trial and his right to be adequately prepared. The facts demonstrate Hawkins was responsible for most of the trial continuances, including multiple continuances of far longer duration than the one-week to three-week delays occasioned by the *Ryan* hearing scheduling issues, and that his objections to those continuances were strategic because he was unprepared for trial.

1. *Hawkins repeatedly asked to delay the Ryan hearing to preserve the State's plea offer, filed motions immediately before his trial readiness hearings, had not interviewed witnesses or reviewed voluminous discovery at the time he objected to trial continuance, and rejected a solution preserving a current trial date. Hawkins cannot demonstrate prejudice from the State's failure to obtain hearing dates before trial. The trial court properly found good cause to continue trial.*

Trial in this case was continued 12 times after its initial setting. CP 26; CP 31; CP 46; CP 80; CP 115; CP 133; CP 149; CP 162; CP 228; CP 235; CP 339. “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.” U.S. CONST. amend. VI. Because denial of a defendant’s constitutional rights is necessarily an abuse of discretion, appellate courts review de novo a claim that Sixth Amendment speedy trial rights were violated. *State v. Iniguez*, 167 Wn.2d 273, 280–81, 217 P.3d 768 (2009).¹² This speedy trial right is “amorphous,” “slippery,” and “necessarily relative.” *Barker v. Wingo*, 407 U.S.514, 522, 92 S.Ct. 2182, 33 L. Ed. 2d 101 (1972). It is “consistent with delays and depends upon circumstances.” *Id.* “It is impossible to determine with precision when the right has been denied.” *Id.* “[A]ny inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case.” *Id.* The nature of the speedy trial right “makes it difficult to articulate at what point too much delay has occurred.” *Iniguez. supra.* 176 Wn.2d at 282 (citing *Vermont v. Brillon*, 566 U.S. 181, 129 S.Ct. 1283, 1290, 173 L. Ed. 2d 231 (2009)). Tolerable delay for ordinary street crime is considerably less than for more complex charges. *Barker*, 407 U.S. at 531. ““It is ... impossible to determine with precision when the right has been denied. [Courts] cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate.”” *Iniguez*, 167 Wn.2d at 282 (quoting *Barker*, 407 U.S. at 521) (ellipses in original; bracketed material added).

“As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial. ... Thus ... any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case.”

¹² Speedy trial protections under article I, section 22 of the Washington State Constitution are the same as those provided under Sixth Amendment, and the method of analysis is substantially the same. *Iniguez*, 167 Wn.2d. at 288. Washington courts routinely look to federal case law when determining whether pre-trial delay violated a defendant’s Sixth Amendment speedy trial rights. *Id.* at 288–89

Id. (quoting *Barker*, 407 U.S. at 521–22). Washington adopts *Barker*'s “functional analysis of the right in the particular context of the case”—a four-part ad hoc balancing test examining the State's conduct and that of the defendant—to determine whether speedy trial was denied.

Iniguez, 167 Wn.2d at 283. The relevant factors are the length of the delay, the reason for the delay, defendant's assertion of his Sixth Amendment right, and the extent of prejudice to the defendant. *Barker*, 407 U.S. at 530.

At issue here are the reasons underlying three trial continuances necessitated by the State's admitted error in failing to schedule a *Ryan* hearing before the trial date, and whether Hawkins was prejudiced. “*Barker* instructs that ‘different weights should be assigned to different reasons,’ and in applying *Barker*, we have asked “whether the government or the criminal defendant is more to blame for th[e] delay.” *Brillion*, *supra*, 556 U.S. at 90, 129 S. Ct at 1290, (quoting *Doggett v. United States*, 505 U.S. 647, 651, 112 S.Ct. 2686, 120 L.Ed.2d 520 (1992)). “Deliberate delay ‘to hamper the defense’ weighs heavily against the prosecution.” *Id.* (quoting *Barker*, 407 U.S. at 531, 92 S.Ct. 2182). “[M]ore neutral reason[s] such as negligence or overcrowded courts’ weigh less heavily ‘but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant.’” *Id.* “In contrast, delay caused by the defense weighs against the defendant: ‘[I]f delay is attributable to the defendant, then his waiver may be given effect under standard waiver doctrine.’” *Id.* The Supreme Court recognized in *Brillion* and *Barker* the reality that delay often works to a defendant's benefit. *Brillion*, 556 U.S. at 81 (citing *Barker*, 407 U.S. at 421). This includes delay attributable to defense counsel, who is the defendant's agent when acting or failing to act in furtherance of the litigation. *Id.* (citing *Coleman v. Thompson*, 501 U.S. 722, 753, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)).

a. Trial continuance from July 8 to July 29, 2015

Hawkins ignores his April 28, 2015 request that the State not schedule a *Ryan* hearing until his own expert could interview R.D. 1RP 12-13. It appears the State's obligation to schedule the hearing did not arise until entry of the June 9 omnibus order. 1RP 77. The facts contradict Hawkins's self-serving assertions that he was prepared to go to trial July 8. First, he filed a motion to disqualify a judge on July 1, CP 77, so the judge requested briefing and set hearing on his motion for July 14, six days after the trial date. CP 33-34. There is no evidence Hawkins objected to the hearing date before or after the July 6 hearing. Second, his codefendant wife had just been found competent the week before, 1RP 90. The State had waited to schedule the *Ryan* hearing, the determination of which would also apply to Caitlyn's case, until after she was found competent. 1RP 90. This may have been misjudgment on the State's part, but it was neither ill-intentioned nor negligent. Third, Caitlyn entered into a cooperation agreement with the State on July 2, immediately after being determined competent, and gave a free talk interview confirming the factual basis for additional charges, including charges against a second victim. 1RP 76, 82. The State told Hawkins about Caitlyn's cooperation on July 1, that she would be a trial witness, and that new charges were anticipated. 1RP 69. During the July 2 interview, the State first learned of the voluminous file of Facebook messages between Hawkins and Caitlyn containing explicit, graphic communications relevant to the charges. 1RP 82.

Neither side had seen the contents of the Facebook messages, nor does it appear Hawkins had interviewed Caitlyn. The court specifically found no State wrongdoing in Caitlyn's eleventh-hour offer to cooperate and produce her Facebook messages, concluding five months from date of arraignment to trial did not violate Hawkins speedy trial rights. 1RP 90-91. In a follow-up hearing July 14, Hawkins again raised his Hobson's choice argument, which the court rejected.

1RP 110. The court also denied Hawkins's motion to disqualify one of the judges. CP 77. The parties then agreed to continue trial six weeks, from July 29 to September 16, so that Hawkins could consider the State's offer. 1RP 120-21. Hawkins stated desire to take advantage of the State's offer contradicts the claim he was ready for trial or prejudiced by its continuance.

Hawkins cannot demonstrate prejudice from the State's failure to schedule the *Ryan* hearing before his July 8 trial date. This was a complicated case with very young victims. Corroboration of R.D.'s disclosures was critical and Caitlyn's evidence appeared substantial, even before its scope was fully appreciated. Late discovery of what Caitlyn had to offer was justified by her competency proceedings. Hawkins himself filed a motion that could not be decided before trial and then agreed to a lengthy continuance to keep settlement options open, indicating his objections were strategic only.

b. Trial continuance from September 16 to September 30, 2015

Hawkins new discovery motions and motion for a bill of particulars were argued September 9, and a motion he filed August 31 was not heard until the September 14 trial readiness hearing. 1RP 140-41. At that hearing, Hawkins frustrated the court when he refused to commit to whether he wanted trial continued. 1RP 165. There was little discussion about the *Ryan* hearing date, other than Hawkins's confirmation that if he proceeded with the *Ryan* hearing, he would lose his chance to take the State's settlement offer. 1RP 178. Still wanting to keep his options open, he rejected the court's suggestion to hold the *Ryan* hearing at the start of trial two days later. 1RP 182. He confirmed this was beneficial to him. 1RP 179. He conceded he needed his discovery issues resolved before the hearing. 1RP 180. The parties agreed to continue trial to September 30. 1RP 182-83.

This Court should find Hawkins did not raise speedy trial issues on September 14, 2015, deliberately and voluntarily choosing not to go to trial two days later.

c. Trial continuance from January 13, 2016 to January 21, 2016

Hawkins was no longer in custody when his January trial was continued. 1RP 206. The State, by attempting to accommodate the schedules of counsel for both parties and Hawkins's requests to delay the *Ryan* hearing, was unable to obtain a new hearing date before trial. 1RP 209-10. The State had circulated available dates, asking both defendants for a response. 1RP 209. The new hearing was scheduled two days after the trial date. Caitlyn's counsel did not notify the State he was unavailable for the January 15 hearing until after it was set. 1RP 209.

Hawkins moved to dismiss for prosecutorial misconduct. 1RP 213. The court denied his motion, finding he had not established mismanagement sufficient to prejudice his right to a fair trial. 1RP 213. The court continued trial one week, to January 21, 2016. 1RP 213; CP 149.

The next day, Hawkins renewed his motion for a bill of particulars, CP 150-53, and filed an objection to venue. CP 154-55. He filed a supplemental memorandum addressing *Ryan* issues on January 19. CP 168-84.

This Court should conclude Hawkins was still not ready to go to trial on January 13, 2016 and suffered little, if any, prejudice from the State's failure to set the *Ryan* hearing before the trial date. Further, this Court should conclude the State's failure to timely schedule this hearing was due, in part, to the failure of the defendants to promptly notify her of their availability before pre-trial dates were taken.

2. *The State's refusal to produce Facebook materials was based on reasonable ethical concerns about disclosing evidence obtained during the codefendant's rejected free talk that could not have been obtained any other way. The State did not commit misconduct when it required a court order to produce those materials.*

When the State decided not to continue its agreement with Caitlyn, based on Caitlyn's purported dishonesty during the free talk. 1RP 127-28, it told Hawkins it wanted nothing to do with any of her evidence. 1RP 127. Hawkins already had a recording of the interview. 1RP 128. Caitlyn had voluntarily given the State access to her Facebook account. 1RP 480. Because the State now rejected the free talk offer—an offer to provide information in exchange for favorable treatment—it instructed law enforcement to stop its review of the evidence obtained with Caitlyn's Facebook password and to seal those materials. 1RP 133, 160. The State suggested to Caitlyn's lawyer that his client change her password. 1RP 133. The State told the court Caitlyn also had rights, rights the State believed would be violated by turning over rejected free talk evidence to her codefendant. 1RP 136.

Hawkins continued to pursue Caitlyn's free-talk evidence under the mistaken belief the State still had a right to use it, or, perhaps, that he had a right to a codefendant's free talk statements regardless of whether the State had such a right. 1RP 175-76. When the court asked the purpose of the request, Hawkins responded it did not matter what his grounds were. 1RP 176. He asserted the State was obligated to turn over the Facebook materials simply because they possessed them. 1RP 176. Ultimately, the court ordered the State to produce the requested discovery. 1RP 198. Hawkins had access to all the Facebook evidence. He was on the other end of every relevant communication and did not need an outside source. He could have shared that information with his lawyer. What Hawkins really wanted was to learn how much of his incriminating communication was known to the State, despite the State's repeated assertion it had not reviewed the evidence and did not intend to use it.

This Court should conclude a free talk is just that—free for the talker if the State rejects the evidence. This Court should find the State's ethical concerns were reasonable, even if

overruled by the trial court. This Court should further conclude Hawkins suffered no prejudice from the State's delayed production because he knew what the evidence contained and what the State did or did not know was irrelevant if State did not intend to use that knowledge at trial.

B. HAWKINS AGREED TO TALK WITH LAW ENFORCEMENT AND DID NOT ASK FOR A LAWYER AFTER BEING ADVISED OF HIS RIGHTS TO REMAIN SILENT AND TO COUNSEL. HAWKINS'S STATEMENTS WERE VOLUNTARY AND CURED ANY TAIN T FROM FAILURE TO ADVISE HIM OF HIS RIGHT TO COUNSEL IMMEDIATELY UPON ARREST.

1. *Hawkins custodial statements were voluntary.*

a. Facts

During the voluntariness hearing, the woefully unprepared Detective Vang could not recall even approximately what time it was when he first made contact with Hawkins on the night of February 11, 2015. 1RP 42. He thought it might have been 9:00 or 10:00 p.m., or even later. 1RP 42. Vang did not know how long Hawkins sat in another officer's car before being transported to the police station. 1RP 44; 46. He did not recall what Hawkins was wearing when he left the motel. 1RP 44. After Hawkins left, Vang interviewed Caitlyn for approximately 40 minutes. 1RP 45. He also assisted with the execution of a search warrant that started around 10:30 p.m. 1RP 43, 45. Hawkins was no longer in the parking lot when Vang came outside after interviewing Caitlyn and assisting with the search. 1RP 46.

Vang interviewed Hawkins at the police station after finishing at the motel. 1RP 47. Vang introduced himself as soon as he joined Hawkins in the interview room and asked whether Hawkins would speak with him. 1RP 37. When Hawkins said he would, Vang read aloud the *Miranda*¹³ warnings from a form used by the Moses Lake Police Department (MLPD). 1RP 37. Hawkins said he understood his rights and agreed to an interview. 1RP 39. Hawkins did not ask

¹³ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

to speak with an attorney at any time. 1RP 49. He did not appear to be under the influence of intoxicants, tired, or ill. 1RP 40, 46. Vang was wearing street clothes and did not display a weapon or otherwise threaten Hawkins. 1RP 46. He did not promise anything. 1RP 46. Hawkins never indicated he did not understand questions or ask to terminate the interview. 1RP 40.

At the voluntariness hearing, Hawkins raised the length of time he was detained before questioning. 1RP 52. Based on Vang's estimates, both parties argued a four or five hour delay. 1RP 48, 52. The court found Vang accurately read Hawkins the *Miranda* warnings. 1RP 55; CP 445. The court also considered the "fairly significant period of time" between Hawkins's arrest at the motel and his interview at the police station. 1RP 55. The court recognized it was cold outside in February, and that the interview was at three or four o'clock in the morning. 1RP 55. While that caught the court's attention, the court found no evidence of other circumstances or facts leading him to conclude Hawkins's statement were not freely or voluntarily made. 1RP 55-56; CP 446. "While the statements made by the defendant were made four to five hours after the officers' initial contact with Mr. H, the length of time does not speak for itself in casting doubt on the voluntariness of the defendant's statements." CP 446.

b. Argument.

A confession is voluntary, i.e., not coerced, if based on the totality of the circumstances, the defendant's will was not overborne. *State v. Burkins*, 94 Wn. App. 677, 694, 973 P.2d 15 (1999) (citing *State v. Broadaway*, 133 Wn.2d 118, 132, 942 P.2d 363 (1997)). The totality test encompasses a number of factors, including defendant's physical condition, age, mental abilities, physical experience, and police conduct. *Id.* (citing *State v. Aten*, 130 Wn.2d 640, 664, 927 P.2d 210 (1996)). The trial court's ruling is upheld when substantial evidence in the record supports a finding of voluntariness by a preponderance of the evidence. *Id.* at 694 (citing *State v. Cushing*,

68 Wn. App. 388, 393, 842 P.2d 1035 (1993) (citing *State v. Ng*, 110 Wn.2d 32, 37, 750 P.2d 632 (1988))). *Burkins* is instructive. Defendant *Burkins* asserted his post-*Miranda* statements were involuntary because he was in custody for more than five hours and because the police deceived him into making a confession. *Id.* As here, the question was whether the officers' behavior was sufficient to overbear *Burkins*'s will to resist, bringing about a confession not freely self-determined. *Id.* But *Burkins*, like *Hawkins*, did not argue his physical condition, age, mental abilities, or physical experience affected his decision to confess. *Id.* at 695. The record did not support *Burkins*'s contention his will was overborne. *Id.* at 696.

Both parties argued *Hawkins* was held between four and five hours, based on *Vang*'s estimates. Here, the trial court correctly considered evidence of the lengthy pre-interview detention before ruling *Hawkins*'s statements voluntary. The court calculated *Hawkins* could have been in custody up to six hours before *Vang*'s interview, a number *Hawkins* now adopts as uncontroverted fact despite neither side having used that number in argument.

Hawkins received his warnings immediately before speaking with *Vang*. *Hawkins* did not argue his will was impaired by any personal circumstances, not by cold or lack of sleep or confusion. Even if this Court accepts *Hawkins*'s inflation of pre-*Miranda* detention to six hours, he cannot, without more, transform a voluntary interview into a coercive environment sufficient to have overborne his will.

This Court should affirm the trial court's conclusion that *Hawkins*'s statements were knowing, intelligent, and voluntary.

2. *Before Hawkins made any statements to law enforcement, Vang properly advised him of his right to an attorney at public expense and of his right to remain silent, curing any taint from violation of the CrR 3.1 requirement of immediate notice of the right to counsel.*

- a. Facts.

Hawkins did not give the trial court an opportunity to consider the effect, if any, of law enforcement's failure to advise him immediately upon arrest of his Sixth Amendment right to counsel as required by CrR 3.1.¹⁴ He did not argue the issue at the voluntariness hearing or at trial, although he alluded to it when he argued "once a suspect's freedom of actions curtail to a degree associated with formal arrest, that *Miranda* becomes applicable as soon as possible." 1RP 57. He argued, "*Miranda* needed to apply, I think, in the patrol car" 1RP 57. The court responded it would make more sense to have *Miranda* rights read closer in time to the time the statements were elicited. 1RP 58. Hawkins did not mention that he should have been advised of his right to counsel. 1RP 57-58.

During trial, MLPD Officer Juan Serrato testified he participated in the ruse that got Hawkins out of his motel room and into the parking lot somewhere "around midnight or so." 1RP 555-56. Hawkins was placed in the rear of Serrato's patrol car. 1RP 557. Vang did not recall whether he advised Hawkins of the reason for his detention when he placed him in the patrol car. 1RP 567. Serrato stayed in the car with Hawkins and had his engine running because of cold weather. 1RP 557. Serrato was told to take Hawkins to the police station to be interviewed and estimated his entire time at the motel to be around ten minutes. 1RP 557. It took Serrato about five minutes to get to the station. 1RP 560. Serrato did not talk with Hawkins. 1RP 560. Serrato did not know any details concerning the allegations against Hawkins. 1RP 562. Serrato took Hawkins to an interview room to wait for Vang. 1RP 558. The door was unlocked. 1RP 558.

¹⁴ CrR 3.1(c) provides in part: "(1) When a person is taken into custody that person shall immediately be advised of the right to a lawyer. Such advice shall be made in words easily understood, and it shall be stated expressly that a person who is unable to pay a lawyer is entitled to have one provided without charge. (2) At the earliest opportunity a person in custody who desires a lawyer shall be provided access to a telephone, the telephone number of the public defender or official responsible for assigning a lawyer, and any other means necessary to place the person in communication with a lawyer."

Hawkins was not restrained. 1RP 558. He did not complain of feeling ill and he did not appear to be tired or under the influence of anything. *Id.* Hawkins was left by himself as he waited for Vang. 1RP 558-59.

b. Argument

i. Issue not raised below

Hawkins had two opportunities to address law enforcement's failure to give him notice of his Sixth Amendment right to counsel under CrR 3.1(c) and failed both times to raise the issue. Having failed to raise it at the voluntariness hearing, he could have raised it at trial as part of a challenge to the reliability of Hawkins's confession. CrR 3.5(d)(4).¹⁵

Hawkins's rights under CrR 3.1 are procedural, not constitutional. *State v. Greer*, 62 Wn. App. 779, 790 n.4, 815 P.2d 295 (1991) (citing *State v. Clark*, 48 Wn. App. 850, 863, 743 P.2d 822, review denied, 109 Wn.2d 1015 (1987); *State v. Guzman-Cuellar*, 47 Wn. App. 326, 334, 734 P.2d 966, review denied, 108 Wn.2d 1027 (1987)). A claim of error may be raised for the first time on appeal only when the error is manifest and affects a constitutional right. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007) (citing RAP 2.5(a)(3). *State v. Walsh*, 143 Wn.2d 1, 7, 17 P.3d 591 (2001); *State v. Toliias*, 135 Wn.2d 133, 140, 954 P.2d 907 (1998)).

This Court should find Hawkins waived this error and decline review.

ii. Suppression is not the remedy

¹⁵ CrR 3.5(d) provides: "Rights of Defendant When Statement Is Ruled Admissible. If the court rules that the statement is admissible, and it is offered in evidence: (1) *the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement*; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) *if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.*" (emphasis added)

Hawkins would not be entitled to suppression of his statements regardless of whether he raised the CrR 3.1 violation at trial. The rule requires that access to a telephone and attorney telephone numbers be provided at the earliest opportunity to any person in custody who expresses the desire for a lawyer. CrR 3.1(c)(2). But Hawkins did not ask for a lawyer. Vang gave *Miranda* warnings at the beginning of his interview. Hawkins agreed to talk.

A CrR 3.1 violation requires suppression of evidence tainted by the violation. *State v. Copeland*, 130 Wn.2d 244, 283, 922 P.2d 1304 (1996). The taint of a prior violation is removed when a defendant is advised of his right to counsel before providing evidence. *See State v. Templeton*, 148 Wn.2d 193, 220-21, 59 P.3d 632 (2002) (apparent that defendants given incorrect notice of immediate right to counsel would not have made request even if given a correct notice; none requested a lawyer after being advised of right to counsel before and during questioning). Although Hawkins should have been told in the motel parking lot of his immediate right to counsel, he was advised of his right to remain silent and his right to counsel before he made any statements. He chose to talk. None of Hawkins's statements were tainted by the violation and none should be suppressed.

- iii. Trial counsel's assistance was not ineffective because, on the facts of this case, Hawkins cannot establish prejudice.

Counsel was not ineffective for failing to raise the CrR 3.1 violation because there was no prejudice. Failure to advise Hawkins immediately upon arrest of his right to counsel could not have affected the outcome of his trial. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). This is not a case where a defendant was not provided meaningful access to counsel after having made the request. Hawkins never asked. His post-*Miranda* admissions were admissible.

This Court should find the failure to notify Hawkins of his right to counsel immediately upon being taken into custody was harmless error.

C. HAWKINS FILED A WRITTEN WAIVER OF HIS JURY TRIAL RIGHT AND ENGAGED IN A COLLOQUY WITH THE COURT OVER FIVE MONTHS AFTER THE STATE ALLEGED AGGRAVATING FACTORS, AND STOOD SILENT AT TRIAL DURING ARGUMENT OVER EVIDENCE THE COURT COULD CONSIDER RELATED TO THOSE AGGRAVATORS. HAWKINS KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT TO HAVE A JURY DECIDE THE AGGRAVATORS.

1. Facts

Hawkins is a literate, English-speaking adult. He has a degree in agricultural business and science. 1RP 868. Hawkins waived his right to a jury trial on August 22, 2016, six months after the State filed its Notice of Intent to Seek Aggravated Exceptional Sentence on February 19, 2016. 1RP 489; CP 212. The notice identified the two aggravating circumstances on which Hawkins ultimately went to trial. CP 212. The State first announced its intent to add the aggravators on January 15, 2016. 2RP 38.

On August 17, 2016, defense counsel told the court Hawkins would submit a jury trial waiver. 1RP 445. Hawkins filed a written, signed waiver August 22, CP 436-37, and engaged in a colloquy with the trial court. 1RP 489. He confirmed he went over the form with counsel and discussed the relative pros and cons of jury trial and bench trial, that he knew he had a constitutional right to a jury of twelve peers and chose instead to have a judge decide his guilt. 1RP 489. The court read the entire waiver aloud and Hawkins agreed he understood everything recited in the waiver. 1RP 490. His written waiver states: “I hereby waive and give up my right to a jury trial and elect to have this matter tried before a judge alone.” CP 436. Hawkins confirmed he understood “the judge will hear the evidence and determine the facts and make a decision as to whether I am not guilty or guilty[.]” 1RP 490. During pre-trial limine motions the first day of trial, September 14, 2016, the parties extensively argued defense counsel’s assertion the court could not hear evidence of acts supporting the aggravating factors if they occurred outside Grant County. 1RP 518; 1RP 539–40; 1RP 542–45. Hawkins remained silent throughout

the argument. 1RP 518; 1RP 539–40; 1RP 542–45

2. *Argument*

While waivers of constitutional rights must be made knowingly, voluntarily, and intelligently, “waivers of different constitutional rights meet this standard in different ways.” *State v. Frawley*, 181 Wn.2d 452, 461, 334 P.3d 1022 (2014) (citing *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996); *State v. Stegall*, 124 Wn.2d 719, 725, 881 P.2d 979 (1994) (“[T]he inquiry by the court will differ depending on the nature of the constitutional right at issue.”)). In *Stegall*, the Supreme Court distinguished evidence sufficient to show waiver of the right to jury trial from that required to demonstrate waiver of the right to counsel or the numerous constitutional waivers involved in a guilty plea. *Stegall*, 124 Wn.2d at 725. Not all constitutional waivers require the same level of inquiry. Waiver of the right to counsel requires a “full colloquy . . . establish[ing] defendant knew the relative advantages and disadvantages of proceeding pro se.” *Id.* (citing *Bellevue v. Acrey*, 103 Wn.2d 203, 207-08, 691 P.2d 957 (1984); *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979)). Guilty pleas require “not only a voluntary and intelligent waiver, but also an understanding of the waiver’s direct consequences.” *Id.* (citing *State v. Smissaert*, 103 Wn.2d 636, 643, 694 P.2d 654 (1985)). “By contrast, no such colloquy or on-the-record advice as to the consequences of a waiver is required for waiver of a jury trial; all that is required is a personal expression of waiver from the defendant.” *Id.* (citing *Acrey*, at 207-08; *Wicke*, *supra*; *State v. Brand*, 55 Wn. App. 780, 785 n.5, 780 P.2d 894 (1989) (citing additional cases), *review denied*, 114 Wn.2d 1002, 788 P.2d 1077 (1990)). The defendant’s personal expression of waiver must be unequivocal. *Id.* at 725.

In *Stegall*, “the record was devoid of any personal expression by the defendant or any other indication that his attorney had discussed the waiver with him prior to orally stipulating to

proceed with fewer than 12 jurors.” *Id.* at 731. Mr. Hawkins was not so uninformed. On August 17, 2016, defense counsel told the court of the jury trial waiver. 1RP 445. Five days later, on August 22, 2016, Hawkins presented a written waiver. CP 436-37. A written waiver “is strong evidence that the defendant validly waived the jury trial right.” *State v. Pierce*, 134 Wn. App. 763, 771, 142 P.3d 610 (2006). Hawkins answered: “Yes, Your Honor” when the court asked whether he was requesting the waiver. 1RP 489. He confirmed he had gone over the form with his lawyer. 1RP 489. The court read the entire waiver aloud and Hawkins agreed he understood everything. 1RP 490. He confirmed he had been advised of his constitutional right to a jury, the pros and cons of a jury trial, and the pros and cons of a bench trial. 1RP 490. He confirmed he understood “the judge will hear the evidence and determine the facts and make a decision as to whether I am not guilty or guilty[.]” 1RP 490 “Where a defendant is demonstrably aware of the constitutional right to a jury and has expressly waived that right in writing, the waiver will be effective.” *Acrey, supra*, 103 Wn.2d at 208.

Hawkins argues his waiver was invalid because the trial court did not advise him he was also waiving a jury on the alleged aggravating sentencing factors. Br. of Appellant at 40-41. Nothing in the law or the facts here support that Hawkins did not knowingly and voluntarily waive his right to have 12 peers determine the aggravating factors when he unequivocally wanted a single judge to determine his guilt. Hawkins’s argument presupposes that waiver of jury trial applies only to the underlying crime unless a defendant’s waiver explicitly identifies aggravating factors as well as guilt. The statutory scheme establishing procedure for deciding aggravating factors refutes his assumption. RCW 9.94A.537(4) provides that “[e]vidence regarding any facts supporting aggravating circumstances . . . shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for

resentencing.”¹⁶ The right to a jury trial is not bifurcated.¹⁷ When a defendant waives the right to be tried by a jury, evidence supporting aggravating circumstances is presented to the court. RCW 9.94A.537(3).¹⁸ This statutory scheme requires the fact finder to decide the aggravating factors in the same proceeding as the underlying crimes. Waiver of a jury thus encompasses determination of both issues—guilt and the aggravating factors—as a matter of law.

When the record amply demonstrates a defendant’s desire to waive a jury for all purposes, waiver as to the aggravating factors will be upheld even when the waiver occurs before aggravators are added to the case. *State v. Trebilcock*, 184 Wn. App. 619, 632, 341 P.3d 1004, 1010 (2014). In *Trebilcock*, the defendant signed a written jury trial waiver and engaged in a colloquy with the court about three weeks after the State filed its initial charges. *Id.* at 626. The State then amended the information twice, alleging aggravators in its final charging. *Id.* Division Two of this Court found ample evidence of Trebilcock’s desire to waive for all purposes from the following facts: before the aggravators were added, Trebilcock and her lawyer discussed the waiver over a period of months. *Id.* at 632. Trebilcock affirmed she was aware of her rights and chose instead to have a single person, a judge, decide. *Id.* at 632-33. She did not move to rescind her waiver after the State added the aggravators. *Id.* at 633. Counsel stated on the record the defendant understood and agreed the judge would decide the aggravating factors. *Id.* During an

¹⁶ The subsection provides in its entirety: “(4) Evidence regarding any facts supporting aggravating circumstances under RCW 9.94A.535(3) (a) through (y) shall be presented to the jury during the trial of the alleged crime, unless the jury has been impaneled solely for resentencing, or unless the state alleges the aggravating circumstances listed in RCW 9.94A.535(3) (e)(iv), (h)(i), (o), or (t). If one of these aggravating circumstances is alleged, the trial court may conduct a separate proceeding if the evidence supporting the aggravating fact is not part of the res geste of the charged crime, if the evidence is not otherwise admissible in trial of the charged crime, and if the court finds that the probative value of the evidence to the aggravated fact is substantially outweighed by its prejudicial effect on the jury’s ability to determine guilt or innocence for the underlying crime.”

¹⁷ The State did not charge any of the four aggravating circumstances for which a court has discretion to authorize a separate proceeding.

¹⁸ “The facts supporting aggravating circumstances shall be proved to a jury beyond a reasonable doubt. The jury’s verdict on the aggravating factor must be unanimous, and by special interrogatory. *If a jury is waived, proof shall be to the court beyond a reasonable doubt, unless the defendant stipulates to the aggravating facts.*” RCW 9.94A.537(3) (emphasis added).

evidentiary objection, counsel admitted certain evidence could be considered by the court when considering the aggravators, and in closing argued certain evidence might go toward determination of those factors. *Id.*

Hawkins waived his right to a jury on August 22, 2016, six months after the State filed its Notice of Intent to Seek Aggravated Exceptional Sentence. 1RP 489; CP 212. The notice identified both aggravating circumstances. 1RP 489; CP 212. Hawkins filed a written, signed waiver and orally confirmed he discussed with counsel the relative merits of jury trial versus bench trial, knew he had a constitutional right to a jury of twelve peers, and chose instead to have a judge decide his guilt. 1RP 489. His written waiver states: "I hereby waive and give up my right to a jury trial and elect to have this matter tried before a judge alone." CP 436. Hawkins is a literate, English-speaking adult with a degree in agricultural business and science. 1RP 868. He attended the hearings in which the State notified the court of its intent concerning aggravating factors. During pre-trial limine motions the first day of trial, the parties extensively argued whether the court could hear evidence of acts supporting the aggravating factors if they occurred outside Grant County. 1RP 518; 1RP 539–40; 1RP 542–45. Hawkins did not indicate he wanted a jury to hear evidence concerning aggravating factors. 1RP 518; 1RP 539–40; 1RP 542–45.

In *State v. Cham*, Division One found a valid waiver of the right to be tried by a jury on an aggravating factor because the evidence demonstrated the defendant's informed acquiescence. 165 Wn. App. 438, 448, 267 P.3d 528, 534 (2011). Cham's underlying charges had been tried to a jury with conviction in a second trial after mistrial. *Id.* at 444. Outside Cham's presence, defense counsel told the court Cham agreed to waive jury for determination of an aggravating factor. *Id.* at 449. Counsel repeated the representation with Cham present. *Id.* Cham demonstrated knowledge of the function and role of the jury in a colloquy concerning his

interpreters. *Id.* Although the trial court accepted Cham’s oral waiver without either a written waiver or a colloquy, *id.* at 445, Cham’s demonstrated understanding of the role of a jury, his jury trial experience, and his counsel’s unchallenged statements were sufficient to overcome any presumption his waiver was not knowing, intelligent, and voluntary. *Id.* at 449.

In addition to Hawkins’s written waiver and colloquy, Hawkins’s silence during the pre-trial limine motions amply demonstrates he, like Trebilcock and Cham, desired to waive jury for all purposes. This Court should find his waiver knowing, intelligent, and voluntary.

D. CAITLYN GAVE THE STATE ACCESS TO HER FACEBOOK MESSENGER ACCOUNT CONTAINING DISCUSSION WITH HAWKINS THAT INCLUDED OVERT AND IMPLIED REFERENCES TO SEXUAL ABUSE OF THEIR DAUGHTERS, BUT A WARRANT WAS REQUIRED TO OBTAIN THE DATA IN A USEABLE FORMAT. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE FROM THAT SINGLE, VOLUMINOUS CONVERSATION.

I. Facts

During its July 2, 2015 free talk with Caitlyn, the State learned of Facebook Messenger communications between Hawkins and Caitlyn supporting crimes already charged as well as additional charges involving both R.D. and V.H. 1RP 67. Caitlyn offered this evidence to the State as part of her free talk. XXX Facebook Messenger was the couple’s primary mode of communication. CP 261. Although the State had not yet seen the messages and had not entered into a formal cooperation agreement, it notified the court of the potential new evidence on July 6, 2015. 1RP 67; 75-76. By July 14, the detective was unable to download the conversation onto his computer. 1RP 112-13. Scrolling through the messages was “excruciatingly slow,” taking “hours to go through every day.” 1RP 124. Jones applied to Facebook, Inc. for a warrant to obtain the already-gathered evidence in a format that allowed faster review. 1RP 113. The material identified in the warrant was relatively self-contained, involving a single “conversation”—an unbroken exchange of messages—between two identified cellular telephones for a designated

period of time. 1RP 123. The warrant authorized seizure of “[t]he complete Facebook Messenger communication exchange, also known as ‘conversation,’ all embedded images and videos in context between [Caitlyn] . . . and [Hawkins] . . . between January 31, 2014 and February 11, 2015, both dates inclusive. CP 258.”

Jones included screen shots¹⁹ from Caitlyn’s phone in his warrant affidavit. CP 261. He explained the screenshot display, pointing out where the message thread identified the last message, its date and time, and the total number of messages in the ongoing conversation that contained approximately 150,000 messages. CP 261. Jones was unable to locate the first message in the string without all the older messages loading, a very time consuming process that caused Facebook to quit running on his computer, forcing him to start each time from the beginning. CP 261. Jones had been unsuccessful with a Facebook archiving process, but from trying that he was able to determine the conversation started over a year earlier, January 31, 2014. CP 263. However, the end of the archived text stopped at January 22, 2015, weeks before the final February 11, 2015 entry. CP 263. The archiving process did not store videos, images, or hyperlinks, which were necessary to keep all the messages in context and to have images and video for review. CP 263. Caitlyn had given permission for this review. It was Facebook, Inc. that demanded the search warrant. CP 263.

Without the data Facebook data, the detective could see only messages starting February 10, 2015, one day before the couple’s arrest, messages which included sexually explicit videos and images of Caitlyn and the girls “in different states of undress with breasts and genitals exposed.” CP 261. The detective also included Hawkins’s encouragement that Caitlyn leave their room dressed in little or no clothing and to be sexually active with him and others. CP 261. This

¹⁹ A screenshot is a digital image of what should be visible on a monitor, television, or other visual output device. <https://en.wikipedia.org/wiki/Screenshot>.

miniscule fraction of the total was consistent with Caitlyn's post-arrest statement and with information from the manager of the motel where the family lived. CP 263. Caitlyn and Hawkins both told law enforcement of their religious belief that men and women have certain roles, and females are used to sexually service males. CP 263 In his affidavit, the detective noted this "was an ongoing and frequently re-enforced narrative [between the couple] that also included they be unclothed as much as possible to include the children in the home." CP 263. Jones wrote both parents had admitted the oldest child had had sexual contact with Jonathan and would assist in "milking" him. CP 263. To further support the warrant, Jones included verbatim the conversation between Obermeyer and Hawkins which Hawkins told Obermeyer about Caitlyn appearing semi-nude in public to indicate her sexual availability, "teaching her to bend over for them to show them and inviting them to feel the body, and possibly more." CP 265. The affidavit included Hawkins's assertion that it was very healthy for males to "release often, many times a day and to be pleased alot [sic]." CP 265. The affidavit contained Hawkins's assurance to Obermeyer that

[R.D.] watches when kat [sic] is used and knows what it is and loves it. We are training her to be totally unsexual. . . . and she is learning the difference. And how to pleasure the sack and prostate as well. And nipples. She is just learning by example. We don't force it. Just let *them* watch and learn."

CP 266 (emphasis added).

2. *Argument*

Appellate courts review de novo challenges to probable cause supporting a search warrant. *In re Det. of Petersen*, 145 Wn.2d 789, 799-800, 42 P.3d 952 (2002). Affidavits are viewed in a commonsense fashion, giving great deference to the issuing magistrate. *State v. Vickers*, 148 Wn.2d 91, 108-09, 59 P.3d 58 (2002). Courts also review de novo a challenge to the warrant particularity requirement. *State v. Clark*, 143 Wn.2d 731, 753, 24 P.3d 1006 (2001). The court resolves any doubt as to the sufficiency of the affidavit in favor of the State. *Id.* at 748.

- a. The affidavit supporting the search warrant satisfied probable cause because Caitlin gave law enforcement access to her Facebook Messenger account and a warrant was required only to obtain the single, voluminous Messenger conversation from Facebook, Inc. in a more convenient format.

An affidavit supporting a search warrant must contain on its face sufficient facts to establish probable cause. *State v. Patterson*, 83 Wn.2d 49, 52, 515 P.2d 496 (1973)). Probable cause in this context is simply the probability of obtaining evidence of criminal activity, not necessarily evidence sufficient to support conviction. *State v. Carver*, 51 Wn. App. 347, 350-51, 753 P.2d 569 (1988). The circumstances here are analogous to the plain view doctrine: that if contraband left in open view is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no “search” within the meaning of the Fourth Amendment. *Minnesota v. Dickerson*, 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L. Ed. 2d 334 (1993) (citing *Illinois v. Andreas*, 463 U.S. 765, 771, 77 L. Ed. 2d 1003, 103 S.Ct. 3319 (1983); *Texas v. Brown*, 460 U.S. 730, 740, 75 L. Ed. 2d 502, 103 S.Ct. 1535 (1983) (plurality opinion)). Caitlyn gave the State a lawful, unrestricted vantage point. 1RP 112. No warrant was required for full access to the contents of the entire Facebook conversation. The policies of Facebook, Inc. prohibited dissemination of that information to third parties without a warrant. 1RP 112. The State applied for the warrant because the format of the Facebook data provided a more efficient means of reviewing the 150,000-plus individual messages between the couple. 1RP 124. The issuing judge was told Caitlyn consented to review of her account. 1RP 124. This information was sufficient to support a finding of probable cause to issue the warrant, the sole purpose of which was to satisfy Facebook, Inc.’s the internal privacy policies.

- b. The affidavit supporting the Facebook search warrant satisfied probable cause when it included images from the exchange discussing the sexual training of three children, two of whom were alleged victims in the case.

The information Jones provided in his affidavit included facts supporting a reasonable

belief the Facebook Messenger exchange would include evidence relevant to charges of child sexual assault: the existence of images of the children with their breasts and genitals exposed and a sexually explicit video Hawkins sent Caitlyn demonstrating the couple was comfortable messaging sexual content. CP 262. Both parents had discussed their religious belief that females must sexually service males, that men and women have specific roles, and that everyone in the home should remain unclothed as much as possible. CP 263. The detective wrote this was “an ongoing and frequently re-enforced narrative” and that both parents admitted sexual contact with R.D. in their post-arrest interviews, CP 263. The affidavit contained screen shots from Hawkins’s exchange with Obermeyer in which he bragged about how well R.D. was learning:

she (R.D.) watches when kat [sic] is used and knows what it is and loves it. We are training her to be totally unsexual. . . . and she is learning the difference. And how to pleasure the sack and prostate as well. And nipples. She is just learning by example. We don’t force it. Just let *them* watch and learn.”

CP 266 (emphasis added). Hawkins’s lack of embarrassment and caution in this exchange with Obermeyer, the couple’s demonstrated willingness to discuss their lifestyle and beliefs with others, including law enforcement, and their exchange of sexually explicit material in the Facebook Messenger exchange supported the reasonable inference their single on-going, year-long conversation, would contain other evidence supporting charges of child sexual assault.

- c. The affidavit supporting the Facebook search warrant satisfied the particularity requirement when it identified a single, voluminous Facebook Messenger conversation between Caitlyn and Hawkins occurring in the year immediately preceding the couple’s arrest.

The particularity requirement of U.S. CONST. amend. IV prevents issuance of general warrants authorizing unlimited searches for evidence of unspecified crime. *State v. Stenson*, 132 Wn.2d 668, 691, 940 P.2d 1239 (1997). Its purpose is to prevent the State from engaging in unrestricted “exploratory rummaging in a person’s belongings” for any evidence of any crime.

Coolidge v. New Hampshire, 403 U.S. 443,467, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The required degree of particularity may be achieved by specifying the suspected crime. *State v. Ollivier*, 161 Wn.App.307, 254 P.3d 883 (2011); *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993). The appellate court’s “commonsense, practical” review applies to the particularity requirement as well as to the requirement of probable cause. *Stenson, supra*, 132 Wn.2d at 692. The warrant must be sufficiently definite to allow law enforcement to “identify with reasonable certainty” the items to be seized. *Id.* at 691-92. “[W]here the precise identity of items sought cannot be determined when the warrant is issued, a generic or general description of items will be sufficient if probable cause is shown and a more specific description is impossible.” *Id.* at 692 (citing *State v. Perrone*, 119 Wn. 2d 538, 547, 834 P.2d 611 (1992); *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S.Ct. 2737, 49 L. Ed. 2d 627 (1976); *State v. Scott*, 21 Wn. App. 113, 118, 584 P.2d 423 (1978) (warrant authorizing a search for and seizure of “employment and business records” was not impermissibly broad); *United States v. Gomez-Soto*, 723 F.2d 649, 653 (9th Cir. 1984) (search of records relating to international travel not impermissibly broad as it related to crimes under investigation)). The detective’s affidavit stated access to the entire exchange was necessary to ensure contextual review of everything in the conversation, whether text, image, or video. CP 263. His affidavit limited the evidence sought to that supporting crimes of child sexual assault. CP 263. The affidavit established probable cause to believe specific evidence of child sexual assault would be found in the single conversation for which he obtained the warrant. This Court can easily conclude, based on Hawkins’s communication with Obermeyer, that a more specific, or Boolean,²⁰ search would be impossible, e.g., searching for such innocuous search terms as *body*, *cloth!*, *pleasur!*, *male*, *female*, or *milk*.

²⁰ A Boolean search allows users to combine keywords and modifiers such as “and”, “not”, and “or” to produce more relevant results.

This Court should find sufficient probable cause and particularity in the supporting affidavit to legally obtain the single Messenger conversation in a format that preserved its integrity while allowing efficient review of the evidence.

E. THE TRIAL COURT CONSIDERED THE CIRCUMSTANCES SURROUNDING DISCLOSURES BY FOUR YEAR OLD R.D. TO FORENSIC INTERVIEWERS AND TO HER FOSTER MOTHER AND THE EVIDENCE CORROBORATING THOSE DISCLOSURES. THE COURT CORRECTLY DETERMINED THE DISCLOSURES WERE MADE UNDER CIRCUMSTANCES INDICATING THEIR RELIABILITY AND THAT THE CHILD WAS A COMPETENT WITNESS.

1. Facts

R.D. was born August 4, 2010. 1RP 643. She was four and a half years old when interviewed by Karen Winston, MSW, on February 19, 2015, Pre-Trial Ex. P3, about a week after her parents' arrest. Winston noted R.D. had been ill with a temperature over 100 degrees during the interview, although none of the adults were aware at the time she was ill. Pre-Trial Ex. P3 at 1. R.D. made statements Winston "could clearly understand" in which she described a clothing-free home environment and having seen her parents get into bed naked. Pre-Trial Ex. P3 at 1. She also described her mother milking her father's penis with her mouth and her hands. Pre-Trial Ex. P3 at 2. R.D. reported her mother sometimes swallowed the milk and sometimes put it in a bottle, that she cooked with it, and had put it in potatoes. Pre-Trial Ex. P3 at 2. R.D. told Winston she also had to milk her father's penis and that either he had put his penis in her mouth or that she put her mouth on his penis for him. Pre-Trial Ex. P3 at 2. She reported her little sister, V.H., had done this. Pre-Trial Ex. P3 at 2. Winston concluded R.D. loved her parents and was unaware the family lifestyle was "sexual in nature and not acceptable." Pre-Trial Ex. P3 at 2.

A year earlier, on January 31, 2014, Hawkins and Caitlyn's Facebook Messenger conversation included the following exchange:

J.H. No regular clothes from now on. And always clothing free in house
C.H. Yes sir.....

J.H. And as much outside the appt

C.H. Yes sir.....

Ex. P38. Two weeks later, on February 13, 2014, the couple discussed nudity, the proper training of their female children, and three-year-old R.D.'s training progress:

J.H. right. theres no harm for a child to see a naked adult.
especially if they grow up with it

C.H. yes

J.H. they should grow up with no clothes and using females and seeing "sex" as normal. There should be no closed doors anywhere...

C.H. yes

J.H. closed or secret just means trouble later for children. the more they see and know and see as normal the better.

C.H. Yes agreed

J.H. [R.D.] is getting better with "sex" and males using momy as a female..
but we have always been open with her with sex.
even when we were sexual.

C.H. Yes she is

Yeah we've never have hidden anything

J.H. She went through a little bit of body consciousness after coming back but that was gone fairly quickly

C.H. Yes it was

J.H. and we never should hide anything

C.H. she likes watching

J.H. Dont know how she will be this time

C.H. Think she'll be ok

J.H. yeah she does. and she is waiting for when she can be used.
which I think is cool

C.H. Yes she is! She's looking forward to daddy using her

Ex. P21. On May 11, 2014, they celebrated:

J.H. I was very pleased with [R.D.] last night!!!

C.H. She's been doing better today too... I'm happy about that

J.H. Good!!!

And for sucking me!

C.H. Sorry if I sounded angry but in my family we have never had secrets from each other and have always been up front and tried to include people if they didn't understand... so I'm very hurt by that and I thought we were close enough with them they'd try

Yes she did awesome and the fact she wanted to do more

J.H. Yeah that was cool!!!! I was soooooo happy

C.H. I know you were...

J.H. Yeah I thought so too
I think she will learn well if you keep doing as a female should. And not having pleasure but giving it. She will learn its not for her as a female. And that its to pleasure the male only. Shes not to feel the pleasure or enjoy it. Still need to work her vagina but that will come

C.H. Yep it will

J.H. But that was a good start

C.H. Yes it was she did good

J.H. The more she does it the better

Ex. 22. On May 31, 2014, the couple again discussed R.D.'s progress:

J.H. [R.D.] did good massaging the balls it helped me go
* * *

C.H. Glad I knew she wanted to help and she's got that part understood

J.H. Yeah

C.H. She was happy and totally pleased she helped milk daddy

J.H. Sometimes she doesn't do it right and it makes me not go but she actually did good
Yeah. It actually gave me pleasure and wasn't just a milking
Why didn't you lick it up

C.H. I had her use both hands and just massage nothing else. She does better with them than shaft.

J.H. Yeah. She does OK with shaft sometimes too... She's getting better
Part I have to think of her as just a female too...

C.H. Only reason I didn't was I can't really bend my head to I choke and almost vomit cause of being sick

J.H. Ah...

C.H. Yeah which is hard she's your girl
Glad you got pleasure

J.H. Just wondered.. It would have been good for you but I thought there probably was a reason.

C.H. She doesn't realize she's just a female she thinks she's daddy's little girl

J.H. Yeah but I have to think of her as just a female

C.H. Yeah
* * *

J.H. * * * and she would be a good bimbo because of her ass

C.H. and boobs

J.H. because bimbos don't have to have a good front fuckhole because its not used except for lube

C.H. yeah I know

J.H. that's going to [V.H.] right now

C.H. yeah

Ex. P26. A week later, on June 7, 2014, Hawkins expressed concern about R.D. not knowing

“what a female is for”.

- J.H. Why would [R.D.] know that daddy will be able to and should use her and she give daddy pleasure if she doesn't understand what a female is for. And she knows you're supposed to be used by males.
- C.H. Cause she likes to make daddy happy and its what we've taught
- J.H. Yeah but its not just mommy daddy
- C.H. No she's seen me be used
- J.H. Idk I just have sensed she understands female role and male role better than you think. It is natural from God. Society fucks it up
- C.H. Right
But the bond thing is what I'm worried about and she's never seen you use anyone elsec [sic]
- J.H. She will be ok
- C.H. Yeah
- J.H. And she can still help and learn

Ex. P14. Hawkins's on-going training program of sexual domination continued through the end of 2014. On December 11, 2014, he and Caitlyn wrote:

- J.H. I want you to be trained to be a full slut, and our daughters to be trained in it, and sons. I would like more females for myself trained, 3-4 to start, and then more. When we have a farm, they will work and do their duty as well. servicing the males and producing milk and babies. I would make a barn with stalls specifically for the females. And id like to train and relaease as many females as we can as well. And males but mostly focus on females.
- C.H. Ok so that is what our future will be
- J.H. But that doesnt have to happen
- C.H. It kills me it makes me sad, but I can't anymore there is no peace either way for me!!! Because I know what I have to do for the program, and I know what not doing the program does to you so there is no peace either way

Ex. P19. About a week later, on December 19, 2014, Caitlyn appeared more supportive:

- J.H. A slut's cunt is for breeding, her shit hole is for pleasure. Don't use her cunt unless all other holes are filled.
- C.H. Yeah
No blood today!!!
- J.H. I strongly believe fathers should train and fuck their daughters very early on, and should always be the ones to dress them. Each lesson should begin when they are old enough to understand.understand but before they are taught differently.

Ex. P20. At the start of the February 25, 2016 *Ryan* hearing, the judge asked whether the State would provide evidence of corroboration in the event the court found R.D. competent at trial.

1RP 274. The State responded with an offer of proof, based on an interview with Caitlyn earlier that morning, telling the court Caitlyn “was familiar with several incidents involving the child massage [sic] the Defendant’s testicles, supposedly for health benefits”, that Caitlyn also observed R.D. stroking Hawkins’s penis, arguably to produce “milk,” which the State believed was semen, and Caitlyn said she saw Hawkins’s penis in R.D.’s mouth. 1RP 274-75.

The State did not call the child to testify at the *Ryan* hearing or schedule a pre-trial competency hearing due to concerns regarding potential psychological detriment to the child, “as well as concerns regarding the boundaries of the hearing itself.” CP 201. A key concern was that the four year old child would have to face both parents together at the *Ryan* hearing, then face each of them separately at trial.²¹ To require R.D. to do so would be unnecessarily cruel. CP 202.

In addition to Winston, the court heard from Chelsea Hill, R.D.’s foster mother for about nine months, starting in March 2015. 1RP 277-78. R.D. was four years old when she first came to live with Hill. 1RP 278. On August 6, 2015, R.D. initiated a conversation with Hill while they sat in a car. 1RP 281-82. R.D. was in the back seat, eating a sandwich. 1RP 283. It was about 2:30 in the afternoon. 1RP 285. They were alone. 1RP 283. R.D. was not in any kind of trouble. 1RP 284. As she had several times in the past, 1RP 282, R.D. asked Hill why her mom and dad were in jail. 1RP 283. Hill replied, as she always had, that they had made bad choices. Although R.D. had never before pursued the issue, 1RP 282, this day she continued the conversation while Hill, in the front seat, took contemporaneous notes as close to verbatim as she could make them. 1RP 283-84. The notes were admitted into evidence²² as Pre-trial Ex. P1; Ex. P34. Hill’s notes

²¹ At the time the State filed the *Ryan* memorandum, all parties anticipated trying Caitlyn and Hawkins in separate trials to avoid issues raised by *Bruton v. United States*. 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). CP 201

²² The State’s pre-trial exhibits admitted at this hearing were designated P1 through P7. The State’s trial exhibits P1 through P7 are not the same as the exhibits admitted at the *Ryan* hearing. To avoid confusion, the State refers to exhibits admitted at the *Ryan* hearing as Pre-Trial Ex. P__ and those admitted at trial as Ex. P__.

memorialized the following three conversations:

August 6, 2015 at 2:30 p.m.

R.D.: Why is my mom and dad in jail?

HILL: They made bad choices, [R.D.]

R.D.: Mommy can I tell you something[?]

HILL: You can always talk to me anytime, about anything.

R.D.: Remember when you were teaching us about safe touch, and no safe touch.

HILL: Yes I do.

R.D.: Well maybe they are in jail because they not safe touched me all the time.

R.D.: You know what mommy, my dad. his name was Jonathan and he made [V.H.] and me put our mouth on his penis, but then [V.H.] bited it. He said don't bite be gentle. Mom made me and [V.H.] lay down and touch her and put our mouths on her vagina, she did it to us too.

R.D.: Dad made me put my mouth on his penis too but I didn't want to, and a lot of times. He told me to trust him, but when I didn't trust him and I was crying and he put his penis in me [points to vagina] my mom watched us and told Dad to do it more. It hurt really bad, I was crying but he said to trust him.

When he was done, he put white stuff that came out of him in our food and he gave me candy.

But mommy

HILL: Yes, [R.D.]

R.D.: Did you know, my papi put his penis in me too when we lived in Oregon. He did it with my dad. He was my other mommy, Caitlynn's [sic] dad.

August 7, 2015 at 8:00 p.m.

R.D.: Nani was fishing when papi and daddy put them penis in me. My mommy was there and said don't tell anyone. My papi said I would bleed and hurt for a little bit, but if we do it everyday it won't hurt anymore. He said to trust him.

August 12, 2015 at 8:00 a.m.

R.D.: Sometimes we went to visit Nani [and] papi and we used to go to the barn, and papi and Dad put them penis in me there too. There was no animals in the barn only a cute cat in a chair and just a bed.

Pre-trial Ex. P1; Ex. P34. After receiving Hill's notes, law enforcement the Cottage Grove (Oregon) Police Department reported back that while there was no barn on Caitlyn's parents' property, there was a large shed. 1RP 829-30.

In a July 31, 2014 Facebook Messenger exchange, Hawkins and Caitlyn considered how

to incorporate R.D.'s recent experience at her maternal grandparents' property into her training.

C.H. We can't teach [R.D.] that it's wrong what Nanny and Poppie did and teach her its OK for others to be secret about it

J.H. no. I didn't say it is ok for them to be secret but that's what they do in this society. what they do is right not the secrecy

C.H. I know, but I'm trying to figure out is [sic] right to teach then

* * *

J.H. *Teach her that rape is right not secrecy about it, it should be open.* That is what females are for, to be used by males. If you teach her the role of the female, that they are holes for males and male pleasure and to produce, then *rape will be just another way they are used but it is not secret.* Society has made it that way
The female slut is a cum and pee receptacle

* * *

You do not have sex with her or make love to her. or fuck her. You use, impregnate, fuck, or rape her. She does not ask for sex or love, she should be to be used and impregnated. Using this word exclusively reinforces her place in society.

C.H. yeah

Ex. P16 (emphasis added).

2. *Argument*

a. The trial court correctly concluded R.D. was competent to testify.

All witnesses, children and adults, are presumed competent until proven otherwise. *State v. Brousseau, supra*, 172 Wn.2d at 341, (citing RCW 5.60.050; *State v. S.J.W.*, 170 Wn.2d 92, 100, 239 P.2d 568 (2010)). The challenging party must prove by a preponderance of the evidence that the witness is "incapable of receiving just impressions of the facts" or "relating them truly."

Brousseau, 172 Wn.2d at 342 (quoting RCW 5.60.050).

The true test of the competency of a young child as a witness consists of the following: (1) an understanding of the obligation to speak the truth on the witness stand; (2) the mental capacity at the time of the occurrence concerning which he is to testify, to receive an accurate impression of it; (3) a memory sufficient to retain an independent recollection of the occurrence; (4) the capacity to express in words his memory of the occurrence; and (5) the capacity to understand simple questions about it.

State v. Allen, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967). “Appellate courts give great deference to a trial court’s determination of a child’s competency or lack thereof--the trial judge’s findings ‘will not be disturbed on appeal in the absence of proof of a manifest abuse of discretion.’” *State v. Swan*, 114 Wn.2d 613, 645, 790 P.2d 610 (1990) (quoting *Allen*, 70 Wn.2d at 692). Because the competency of a youthful witness is not easily reflected in a written record, reviewing courts ‘rely on the trial judge who sees the witness, notices the witness’s manner, and considers his or her capacity and intelligence.” *State v. Woods*, 154 Wn.2d 613, 617, 114 P.3d 1174 (2005).

Although the exercise of the trial court’s discretion must be based on the entire testimony, the court is entitled to select which portions have the greater persuasive value on the ultimate issue. There is probably no area of the law where it is more necessary to place great reliance on the trial court’s judgment than in assessing the competency of a child witness. The trial judge is in a position to assess the body language, the hesitation or lack thereof, the manner of speaking, and all the intangibles that are significant in evaluation but are not reflected in a written record.

State v. Borland, 57 Wn. App. 7, 10-11, 786 P.2d 810, review denied, 114 Wn. 2d 1026, 793 P.2d 974 (1990). Although the trial court determines competency before trial, the reviewing court may examine the entire record to review the competency decision. *Id.*; *State v. Avila*, 78 Wn.App. 731, 737, 899 P.2d 11 (1995). Hawkins fails to prove, even by a preponderance of the evidence, R.D. was “incapable of “receiving just impressions of the facts” or “relating them truly.” *Brousseau, supra*, 172 Wn.2d at 342 (quoting RCW6). The child’s allegations are corroborated by “the most effective” type of corroboration: a confession and admissions by the accused.” *Swan, supra*, 114 Wn.2d at 622–23.

Hawkins is mistaken in his conclusion the trial court “focused exclusively” on only one of the *Allen* factors, R.D.’s understanding of her obligation to speak the truth. Br. of Appellant at 49. He emphasizes her inability or unwillingness to recount the details she gave Winston and Hill in subsequent interviews and at trial, arguing those inconsistencies proved R.D. incapable of

accurately receiving and remembering events. Br. of Appellant at 50. Inconsistencies in a child's testimony or reluctance to testify do not go to the question of competency. *State v. Carlson*, 61 Wn.App. 865, 874-875, 812 P.2d 536 (1991). Equivocation or inability to recall details goes to the weight of the testimony but does not render the child incompetent. *State v. Pham*, 75 Wn.App. 626, 879 P.2d 321 (1994). While the record does contain a number of inconsistent statements, including R.D.'s unwillingness at trial to acknowledge a relationship with Hawkins and with her biological mother, substantial evidence supports the accuracy and validity of her allegations, confirming her ability to receive and retain accurate impressions of the incidents she recounted. Hawkins and Caitlyn engaged in communications between themselves which independently and contemporaneously confirmed the events R.D. eventually recounted. Any contradiction between what R.D. told Winston and Hill and what she testified to was for the trial court to resolve. Based on its assessment of her demeanor, the court could determine whether she truly did not remember or was simply reluctant to answer questions on such an intimate subject.

R.D.'s three statements to Winston, that she had seen her parents naked, that she and her sister, V.H., had touched Hawkins's penis, and that the two girls had participated in milking him are corroborated by Hawkins's confession to Vang in which he discussed the milking procedure, the parties' Facebook Messenger discussions demonstrating the accuracy of R.D.'s assertion she and her mother performed oral sex on Hawkins, that V.H. did as well, and that she saw her parents naked. Ex. P38; Ex. P21. The couple rhapsodized over R.D.'s increasing ability to "milk daddy." Ex. P26. This was in the same conversation in which they exulted over R.D. having given Hawkins pleasure when she massaged his testicles, and in which they mused that Hawkins would have to learn to think of their then-three-year-old not as "daddy's little girl" but as just a female who "would be a good bimbo because of her ass. And boobs." Ex. P26. A week later,

they confirmed R.D. watched Caitlyn “being used” as they worried about how the child would react when she watched Hawkins use someone other than her mother. Ex. P14. They engaged in chilling discussions of the proper female role, including Hawkins’s vision of an idyllic little farm in which his wife and all his female children, having been trained to be “full sluts,” would be housed in a barn in “stalls specifically for the females.” Ex. P19. Ideally, there would be other women available for Hawkins’s pleasure, females he could share with other males, including any sons the couple might produce. Ex. P19. About a week later, Hawkins wrote: “I strongly believe fathers should train and fuck their daughters very early on, and should always be the ones to dress them. Each lesson should begin when they are old enough to understand. understand but before they are taught differently.” Ex. P20. This corroborated R.D.’s disclosures to Winston.

R.D.’s disclosures to Hill were also corroborated, again primarily through the couple’s Facebook Messenger exchanges. Those disclosures started with R.D. wondering whether, maybe, her parents were “in jail because they not safe touched me all the time.” Pre-Trial Ex. P1; Ex. P34. She repeated to Hill, six months after her interview with Winston, that Hawkins made her and V.H. put their mouths on his penis. Pre-Trial Ex. P1. She added facts most five year olds presumably would not know to make up: that V.H. “bited” Hawkins’s penis and that Hawkins said “don’t bite be gentle.” Pre-Trial Ex. P1. She also disclosed Caitlyn stood by in maternal encouragement as Hawkins inserted his penis into R.D.’s vagina, while the child cried in protest. Pre-Trial Ex. P1. Again, R.D. included a fact that tends to support the accuracy of her memory—that Hawkins told her to trust him. Pre-Trial Ex. P1. She said he put the white stuff that came out of him into their food and gave her candy. Pre-Trial Ex. P1. Hawkins’s Facebook Messenger communications included a comment, made when R.D. was three years old, that they “[s]till need to work on her vagina but that will come”. Ex. P22.

R.D.'s disclosure that Caitlyn's father and Hawkins raped her in a barn on her grandparents' property is also corroborated. She described the barn as having no animals, "only a cute cat in a chair and just a bed." Pre-trial Ex. P1; Ex. P34. The "cute cat in a chair" detail lends credibility to this description. It is something a child, even a child being raped, could recall and describe. The Cottage Grove Police Department confirmed Caitlyn's parents had a large shed on their property. 1RP 829-30. R.D. reported her grandfather telling her she "would bleed and hurt for a little bit, but if we do it every day it won't hurt anymore. He said to trust him." Pre-trial Ex. P1; Ex. P34. Hawkins and Caitlyn confirmed the fact this rape, even referring to it as rape. Ex. P16. Hawkins's only issue with what happened was that "Nanny and Poppie" were being secret about it. Ex. P16. He instructed Caitlyn:

Teach her that rape is right not secrecy about it, it should be open. That is what females are for, to be used by males. If you teach her the role of the female, that they are holes for males and male pleasure and to produce, then rape will be just another way they are used but it is not secret. Society has made it that way. The female slut is a cum and pee receptacle

* * *

You do not have sex with her or make love to her. or fuck her. You use, impregnate, fuck, or rape her. She does not ask for sex or love, she should be to be used and impregnated. Using this word exclusively reinforces her place in society.

Ex. P16 (emphasis added).

This Court should conclude the trial court properly exercised its discretion when it determined R.D. met the *Allen* criteria for witness competency, including her demonstrated ability to accurately receive, recall, and relay impressions concerning historic events, despite her unwillingness at trial to repeat any of the statements while seated on the witness stand across the courtroom from Hawkins.

- b. The trial court properly admitted R.D.'s hearsay statements to Winston and Hill under the standards and procedures dictated by RCW 9A.44.120.

Before a child's hearsay statements to third parties may be admitted at trial, the court determines whether the time, content, and circumstances of their making provide a sufficient indicia of reliability that they may be offered into evidence when the child testifies, or, if the child is unavailable to testify, when other evidence corroborates the hearsay statements. RCW 9A.44.120. The trial court must consider:

- (1) Whether the child has an apparent motive to lie;
- (2) The child's general character;
- (3) Whether more than one person heard the statements;
- (4) Whether the statements were made spontaneously;
- (5) The time of the declaration and the relationship between the declarant and the witness;
- (6) Whether the statement contains any express assertion about past fact;
- (7) Whether cross-examination could not show the child's lack of knowledge;
- (8) Whether the possibility of the child's faulty recollection is remote; and
- (9) Whether the circumstances surrounding the statement are such that there is no reason to suppose the child misrepresented defendant's involvement.

State v. Ryan, 103 Wn.2d 165, 175-176, 691 P.2d 197, 205 (1984). Whether the statements contain express assertions of past fact is generally considered of minimal relevance, as is whether cross-examination might uncover the declarant's lack of knowledge. *State v. Lopez*, 95 Wn. App. 842, 852-54, 980 P.2d 224 (1999) (citing *Borland, supra*, 57 Wn. App. 7; *State v. Stange*, 53 Wn. App. 638, 769 P.2d 873. *review denied*, 113 Wn. 2d 1007, 779 P.2d 727 (1989)). When the *Ryan* factors are "substantially met," not every factor needs to be satisfied. *Swan*, 114 Wn. 2d at 652, 790 P.2d 610; *State v. Jones*, 112 Wn.2d 488, 495, 772 P.2d 496 (1989).

Whether statements are admissible under the child abuse hearsay exception lies within the sound discretion of the trial court. *State v. Lopez*, 95 Wn. App. at 852-53 (citing *In re Dependency of S.S.*, 61 Wn. App. 488, 494-95, 814 P.2d 204, *review denied*, 117 Wn. 2d 1011, 816 P.2d 1224 (1991)). The trial court needed to apply these factors to the statements R.D. made

to Winston and to Hill. Because the trial court exercised its discretion based on the evidence introduced at the *Ryan* hearing, this court should base its review on the same evidence.

Here, the trial court found the time, content, and circumstances of R.D.'s statements to Winston and Hill provided sufficient indicia of reliability. CP 229. In its Order, the court noted the questions concerning R.D.'s competency or unavailability, and the existence of corroborating evidence, were reserved for trial. CP 230.

The court first found no evidence indicating R.D. had a motive to lie at the time she made her statements to Winston and to Hill, and that Hawkins had not argued such a motive. CP 231. Hill testified to incidents the court referred to as "normal lying" about such events as taking food at night from a cupboard and hitting her sister. CP 231. The court rejected that these lies suggested lack of trustworthiness, characterizing R.D.'s conduct as appearing "normal and not otherwise out of the ordinary for a 4 or 5 year old child." CP 231. The court considered Hill's description of R.D.'s general character, as well as its observations of R.D.'s demeanor in the recorded Winston interview, and rejected the argument that R.D.'s memory lapses in the Winston interview indicated untrustworthiness. CP 231. The court noted that some of R.D.'s statements to Winston were repeated to Hill six months later, including the statement that Hawkins placed his penis in her and V.H.'s mouths. CP 231.

The court also found R.D.'s statements to Winston spontaneous, despite having occurred in a forensic interview. CP 232. The court likened R.D.'s statements to the disclosure in *State v. Madison*, in which a child's masturbatory behavior led to questioning by her foster mother, which, in turn, led to disclosure of sexual abuse. CP 232 (citing *Madison*, 53 Wn. App. 754, 756, 770 P.2d 662 (1989)). Division One of this Court concluded "that while the setting was not spontaneous, the details of the event and the identity of the defendant was not suggested and

were ‘spontaneously’ volunteered.” *Id.* at 759. Here, the court reviewed the interview video and could not conclude Winston’s questions were suggestive. It was R.D., not Winston, who brought up Hawkins’s penis being in V.H.’s mouth and the concept of “milk” being produced. CP 232. The court referred to R.D.’s “hand gestures that appeared to show a jerking motion as she described the ‘milk’ being placed in a bottle. Winston did not introduce or suggest these concepts or actions.” CP 232.

The trial court correctly found the statements to Hill were “offered by R.D. spontaneously – in every sense of the word.” CP 232. Hill did not ask R.D. to clarify anything, allowing the child to speak or not speak as she wished. CP 232. R.D. was not being disciplined when she made the statements, and she and Hill were not discussing her parents when R.D. first raised the subject. CP 232. Trustworthiness was also suggested by the timing of R.D.’s statements and the relationship between the child to both Winston and Hill. Referring to *State v. Young*, 62 Wn. App. 895, 802 P.2d 829 (1991), *opinion modified on reconsideration*, 62 Wn. App. 895, 817 P.2d 412 (1991), the court found Winston’s professional role “enhanced the reliability of the statement as her perceptions were not impaired by a personal attachment to R.D.” CP 232-33. In *Young*, the court reiterated that Washington law “recognizes that a child’s answers are spontaneous so long as the questions are not leading or suggestive.” 62 Wn. App. at 901. Because professionals are trained to be objective, their presence can enhance reliability. *Id.* The reliability of a child’s statements is also enhanced when the witness is in a position of trust with the child. *Swan, supra*. 114 Wn.2d at 650. The court remarked that the relationship developed between R.D. and Hill in the five months preceding R.D.’s first disclosure suggested the statements were expressed without outside influence. CP 233. Following Washington case law, the court found little remarkable or relevant from the fact that R.D.’s statements contained

express assertions of past fact.” CP 233. The court doubted cross-examination would show lack of R.D.’s knowledge, as long as her trial testimony was consistent with her “very clear” description of the acts, which included drawings of body parts. CP 233.

The court found no indication R.D.’s recollection was faulty. CP 233. She was clear and did not contradict herself. CP 233. She recalled similar details in her conversation with Hill six months after her interview with Winston, indicating a remote possibility of faulty recollection. CP 233. The same cluster of facts—spontaneous statements describing similar acts—gave no indication R.D. misrepresented Hawkins’s involvement. The court discounted the defense interview of R.D. in which the child neither discussed alleged acts of abuse nor denied or recanted any of her earlier statements, observing R.D. appeared agitated and fidgety and did not say much about anything. CP 234. The defense interview neither enhanced nor detracted from R.D.’s previous statements and had no effect on the remainder of the court’s analysis. CP 234. The trial court is given broad discretion to determine the reliability of a child victim’s hearsay. *Woods, supra*, 154 Wn. 2d at 625. Here, as in *Woods*, ample evidence supported the trial court’s findings that at least eight of the nine *Ryan* factors were satisfied. This Court should conclude the court did not abuse its discretion in finding the time, content, and circumstances of R.D.’s statements to Winston and Hill established their reliability.

F. THE FACEBOOK MESSENGER COMMUNICATION BETWEEN HAWKINS AND CAITLYN DISCUSSED THEIR GENERAL LIFESTYLE AND PHILOSOPHIES AND SPECIFIC ACTS OF SEXUAL ASSAULT AGAINST R.D. AND V.H. THE TRIAL COURT CORRECTLY CONCLUDED THE EVIDENCE WAS ADMISSIBLE TO SHOW MOTIVE, OPPORTUNITY, INTENT, PREPARATION, PLAN OR ABSENCE OF MISTAKE OR ACCIDENT UNDER ER 404(B).

I. Facts

Thirty admitted exhibits, P2 through P27 and P36 through P39, are identified on the trial exhibit list as containing portions of the Facebook Messenger conversation, CP 447-48.

2. *Argument.*

- a. The trial court properly admitted relevant Facebook evidence of Hawkins's prior bad acts demonstrating motive, opportunity, common scheme or plan, knowledge, and absence of accident or mistake.

Hawkins asserts the trial court erred when it admitted the Facebook exhibits and related testimony, unarguably evidence of prior acts. Br. of Appellant at 56. He complains the court “fail[ed] to specify which of the approximately twenty-nine exhibits of Facebook entries it relies upon to come to its conclusion [that the Facebook evidence established motive, opportunity, intent, preparation, plan or absence of mistake or accident].” *Id.* at 57. Hawkins limits his argument to generalities, not citing to any of the “approximately twenty-nine” Facebook exhibits, nor to related testimony about their contents. *Id.* at 56-58. He presents only a general claim that the various exhibits fail to meet any of the purposes for which such evidence is allowed under ER 404(b). Each of his three examples identify a broad topic of conversation and assert, without meaningful analysis, the topic is irrelevant to one of the many purposes for which it could have been admitted.²³ Br. of Appellant at 57-58. “It is incumbent on counsel to present the court with argument as to why specific findings of the trial court are not supported by the evidence and to cite to the record to support that argument.” *Murphy v. Lint (In re Estate of Lint)*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998). An appellant’s brief is generally considered “insufficient if it merely contains a recitation of the facts in the light most favorable to the appellant even if it contains a sprinkling of citations to the record throughout the factual recitation. *Id.* 531-32. “Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.” *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (citing

²³ Properly understood, ER 404(b) identifies one improper purpose for which evidence may be admitted “and an undefined number of proper purposes.” *State v. Gresham*, 173 Wn.2d 405, 421, 269 P.3d 207 (2012). “[T]he list of other purposes in the second sentence of ER 404(b) is merely illustrative.” *Id.* at 420.

State v. Johnson, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992)).

- b. Hawkins believed himself ordained by God to rape his female children and strove to live his religion, rendering relevant all evidence of his lifestyle and philosophies.

Hawkins's claim of error over admission of evidence of the couple's "lifestyles and philosophies"—evidence of extramarital sex, dietary habits, and "whether Mrs. Hawkins wore lingerie in the motel common areas"—is, again, based only on generalities. Br. of Appellant at 58. This couple's lifestyle and religious philosophy included "training" tiny girls to become sexual receptacles believing they were put on this planet solely to please males and make milk and babies. CP 266. It included training female children to appear in public in lingerie designed to "show the body and provide good easy access for males." CP 265. It included training a four year old to massage Hawkins's testicles and penis, and to allow her to watch as he "used" his wife. CP 266. Evidence of other crimes, wrongs, or acts is admissible to show motive, intent, plan, knowledge, and absence of mistake or accident. ER 404(b).²⁴ Evidence of the couple's lifestyle and philosophies was relevant to show their motive for the sexual abuse of their three daughters and to counter any claim that R.D.'s mouth on Hawkins's penis was accidental. It also demonstrated knowledge and a common scheme or plan—to train their female children to be submissive sex slaves and baby-makers. All lifestyle and philosophy evidence was relevant because this family truly lived its religion.

- c. Spousal privilege cannot be claimed during any portion of a criminal proceeding involving crimes against a child and cannot be claimed piecemeal based on the nature of the evidence.

Here again, Hawkins declines to specify the evidence he claims irrelevant, other than to

²⁴ ER 404(b) provides: Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

reiterate that the couple's lifestyle and philosophies had nothing to do with sexual abuse of the children. Br. of Appellant at 59. He appears to argue the statutory spousal privilege applies to all spousal communications that are not direct evidence of crimes committed against a child, but cites no supporting authority. "Testimonial privileges are creatures of statute, and should therefore be strictly construed." *State v. Sanders*, 66 Wn. App. 878, 883, 833 P.2d 452 (1992). Spousal privilege does not apply in a *criminal action or proceeding for a crime* committed by a spouse against any child of whom the defendant is the parent or guardian. RCW 5.60.060(1) (emphasis added). Nothing in that language limits a spouse's testimony or other disclosures to such specific communications as: "He told me he had sex with our toddler." In *Sanders*, Division One of this Court smacked down a similar assertion of privilege concerning a wife's testimony relevant to a witness tampering charge against the husband. *Sanders*, 66 Wn. App. at 884. The Court looked at the underlying crime, not the nature of the testimony. "Witness tampering in this case was accomplished specifically for the purpose of frustrating effective prosecution of a child sexual abuse case." *Id.* The wife's testimony was not direct evidence of the crime against the child, yet the spousal privilege did not apply because tampering was relevant to the underlying charge. *Id.* Here, evidence irrelevant to the child sexual assault charges would have been excluded regardless of spousal privilege. Irrelevant evidence is inadmissible. ER 402.

This Court should find spousal privilege did not apply to Caitlyn's testimony or the Facebook evidence, or, in the alternative, that Hawkins failed to brief the issue sufficiently to warrant review.

G. THE TRIAL COURT PROPERLY DENIED ADMISSION OF HEARSAY TESTIMONY CONCERNING FORENSIC EVIDENCE OF A NON-TESTIFYING EXPERT WHEN HAWKINS COULD HAVE CALLED THE SCIENTIST OR OBTAINED A CERTIFIED COPY OF HIS REPORT UNDER CrR 611(B)(1). COUNSEL'S DEFICIENT PERFORMANCE DID NOT PREJUDICE HAWKINS BECAUSE THE EVIDENCE WAS MARGINALLY RELEVANT IN LIGHT OF OVERWHELMING EVIDENCE HAWKINS ENGAGED IN SEXUAL ACTS WITH AT LEAST TWO OF HIS CHILDREN.

1. *Facts*

Vang interviewed Caitlyn in the family's residential motel room while two other officers executed a search warrant and collected baby bottles, sheeting, and swabs. 1RP 570-71. Some of these items were sent to the Washington State Patrol Crime Laboratory (crime lab) for "DNA²⁵ analysis for the swabs of the milk." 1RP 630. The State did not include the forensic scientist on its witness lists. CP 28-29, 78-79, 87-88, 93-94, 185-86. The State did not ask about test results at trial. 1RP 603-12. During Vang's cross examination, Hawkins tried to elicit testimony that DNA evidence "came back negative." 1RP 628-29. The court sustained the State objections that the question was outside the scope of direct examination and called for hearsay. 1RP 629. Hawkins countered: "I don't think it calls for hearsay, Judge. Just that it came back negative", then asked why Vang submitted evidence to the crime lab. 1RP 629. The court overruled the State's relevance objection and Vang answered it was sent for evidence of the "milk." 1RP 629. Hawkins asked: "And in that regard, you don't have any DNA analysis here that shows it's positive for semen." 1RP 629. Vang replied: "I don't recall what it said, but I think yeah, we didn't get anything back." 1RP 629. The State again objected, this time to facts not in evidence and to minimal relevance because there was no evidence of which items were tested. 1RP 630. The State told the court no witness was scheduled to discuss the DNA results and defense counsel responded: "Well, Judge, they seized it. He just testified they sent it out for testing and it came back negative for semen." 1RP 630. The State asked counsel to identify just *what* came back negative. 1RP 630. Counsel replied: "Oh the - - - all the materials." 1RP 630. The State responded: "They didn't test all the materials. The State crime lab doesn't test all the materials. So, *unless counsel is gonna put somebody from the State crime lab on to testify* as to what they -

²⁵ Deoxyribonucleic acid

- - the State isn't offering any lab results." 1RP 630. Vang testified he thought he submitted only the swabs. 1RP 631. The State again objected to relevance because it had not alleged a positive DNA result. 1RP 630. The court stated it would not consider the evidence if the State was not offering it, but told defense counsel the court would consider the forensic evidence if offered by the defense. 1RP 631-32. Counsel retorted "that's essentially what I'm doing here is offering evidence through their State's witness that they collected materials, they sent them in for DNA analysis, they came back negative for semen." 1RP 632. The court sustained the State's objection to counsel testifying. 1RP 630.

During Caitlyn's cross examination, Hawkins confirmed she had spoken the day before with the deputy prosecutor and Vang and had recently discussed her anticipated testimony and her plea agreement with the prosecutor. 1RP 730. After pointing out the agreement required her to testify truthfully, Hawkins asked Caitlyn who would determine whether she told the truth. 1RP 730. Caitlyn responded that she "assum[ed] it would be the Court based on the evidence and what [was] presented." 1RP 730. Counsel then brought up four interviews Caitlyn had participated in, two with Vang, the free talk, and a subsequent defense interview. 1RP 731. Caitlyn confirmed in the free talk she admitted lying to Vang. 1RP 730. Counsel then asked: "So, which version that you gave in the interviews is the truth?" 1RP 730. The court sustained the State's objection to the form of the question as argumentative on the grounds the question was vague. 1RP 730. Counsel rephrased his question, asking: "Which interview is consistent with your deal?" 1RP 730. The court sustained the State's objection that the question assumed facts not in evidence—the fact that some of Caitlyn's statements were internally inconsistent—without having shown the witness the purportedly inconsistent statements. 1RP 730. Hawkins asked: "You did lie to Detective Vang, correct?" 1RP 730. Caitlyn responded that her lie was

unknowing and that she corrected herself the next time she saw Vang. 1RP 732-33. Hawkins then questioned Caitlyn concerning Hawkins's hernia, where the family had lived at different times, where Hawkins worked, and the family's customary household routines. 1RP 732-743. He questioned her about the incidents where she claimed to have seen R.D.'s mouth on Hawkins's penis. 1RP 743-44. Caitlyn confirmed she said she saw R.D. "touch" Hawkins 20 times. 1RP 745. Counsel asked about church practices and related social events. 1RP 746-47. Counsel then asked: "Okay, do you recall what your first plea negotiation was in this or in your case?" 1RP 747. Caitlyn did not remember her original charges. 1RP 747. He then asked: "You're not charged as an accomplice to your husband, with the same charges he's facing?" 1RP 747-48. Hawkins recited into the record Caitlyn's original charges. 1RP 748-49. The court noted the original charges were not in dispute. 1RP 749. Counsel detailed the amount of time Caitlyn would have faced if convicted of the original charges, then asked: "Okay, so why did the plea negotiation break down the first time?" *Id.* The court sustained the State's objection that the question asked for speculation and that exploring the underlying plea negotiations is improper. 1RP 749. Counsel attempted an offer of proof, interrupted by the State's objection that "[u]nless [counsel] has been reading my mind, he doesn't know why the original plea negotiations fell apart. 1RP 749. The court again sustained the State's objection. 1RP 750. Hawkins then asked Caitlyn about conclusions in a report generated by Eastern State Hospital following her interview at that facility. 1RP 750. The State objected that the evidence needed to come from the person who prepared the report. 1RP 750. In response to the court's inquiry into relevance, counsel stated one of the diagnoses was that Caitlyn "was malingering and I'd like to know her understanding of what the report said." 1RP 750. The court sustained the State's relevance objection. 1RP 750. Counsel went on to ask the terms of the second plea agreement and also

inquired into what medications she was currently taking and whether she had been diagnosed with other mental disorders. 1RP 751-52. Following additional inquiry into her mental health issues, counsel returned to factual issues related to the charges against Hawkins. 1RP 752-54.

2. *Argument*

- a. Hawkins did not call the forensic scientist who tested certain evidence for his DNA, trying instead to elicit evidence of negative DNA test results from a detective on cross-examination. The trial court correctly prohibited admission of the hearsay in cross-examination after stating it would not reject the DNA evidence if Hawkins properly offered it. Counsel's deficient performance did not prejudice Hawkins because substantial evidence demonstrated he performed sexual acts on at least one of his daughters, rendering the lack of DNA evidence on his bedsheets only marginally relevant, if at all.

Under Evidence Rule 611(b), the trial court has discretion to determine the scope of cross examination. *State v. Campbell*, 103 Wn.2d 1, 20, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 85 L. Ed. 2d 526, 105 S.Ct. 2169 (1985). Limitation of cross-examination is reviewed for abuse of discretion. *State v. Lee*, 188 Wn.2d 473, 486, 396 P.3d 316 (2017) (citing *State v. Garcia*, 179 Wn.2d 828, 844, 318 P.3d 266 (2014); *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002)). ER 611(b)(1)²⁶ limits the scope of cross-examination to the subject matter of direct examination and to the credibility of the witness, although the court has discretion to permit inquiry into additional matters. An appellate court will not reverse a trial court's rulings on the scope of cross examination absent a manifest abuse of discretion. *Id.* It was improper for Hawkins to try to elicit hearsay testimony outside the scope of direct examination concerning someone's recollection of the results of a crime lab report prepared by a non-testifying scientist. *See, e.g. State v. Neal*, 144 Wn.2d 600, 607-08, 30 P.3d 1255, 1259 (2001) (strict compliance

²⁶ ER 611(b) provides: "*Scope of cross examination.* Cross examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination."

with CrR 613(b) required to overcome hearsay exception). “Such hearsay statements repeating opinions of third parties are not subject to any hearsay exception and are inadmissible.” *State v. Nation*, 110 Wn. App. 651, 661, 41 P.3d 1204 (2002) (citing *State v. Martinez*, 78 Wn. App. 870, 879-80, 899 P.2d 1302 (1995); *People v. Campos*, 32 Cal. App. 4th 304, 308, 38 Cal.Rptr.2d 113 (1995); *State v. Towne*, 142 Vt. 241, 453 A.2d 1133 (1982)). Nothing prevented Hawkins from obtaining a certified copy of the crime lab report for use at trial or from calling the scientist as a defense witness. That evidence was admissible.

This Court should find the trial court properly exercised its discretion to exclude inadmissible hearsay and did not deny Hawkins the opportunity to present admissible evidence in his defense. The court should further find counsel’s deficient performance had no effect on the trial outcome.

Counsel’s apparent assumption he could elicit DNA test results during Vang’s cross-examination is inarguably deficient performance. Hawkins, however, cannot establish a reasonable probability that, but for counsel’s error, the outcome of his trial would have been different. *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (1993) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984)). He cannot demonstrate a reasonable probability that the fact certain items tested by the crime laboratory did not test positive for his semen “could have overcome the overwhelming evidence against him.” *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 720, 101 P.3d 1 (2004). Whether evidence of his semen was or was not on various items sent to the crime lab could not have significantly swayed the finder of fact one way or the other.

- b. Hawkins failed to follow established procedure for confronting a witness about prior inconsistent statements, but the purpose for which he sought to introduce the evidence—to demonstrate Caitlyn’ untruthfulness—was

already before the court and her opinion about why the State withdrew its first plea agreement called for speculation and was irrelevant.

Hawkins argues, incorrectly, he was wrongly precluded from fully exploring Caitlyn's credibility because he could not question her about the specific lie that offended the State during plea negotiations. Br. of Appellant at 61. When he asked: "So, which version that you gave in the interviews is the truth?" 1RP 731-33, the State objected the question was argumentative and the court concluded it was vague. 1RP 731. Hawkins was prohibited only from asking Caitlyn to volunteer which single assertion made during one of four statements was false or inconsistent when she had not first been shown any of those statements, and about her personal opinion of why State rescinded its first plea agreement. He was not barred from all inquiry related to credibility, such as going over testimony with the State right before trial, 1RP 730, or her understanding of who would determine whether she testified truthfully. 1RP 730. Caitlyn admitted she lied to Vang. 1RP 731. "Courts may deny cross-examination if the evidence sought is 'vague, argumentative, or speculative.'" *State v. Lee, supra*, 188 Wn.2d at 487 (quoting *Darden*, 145 Wn.2d at 619). In *Lee*, the defendant was charged with third degree rape of a child, based on the testimony of a victim who had made a false rape allegation against another classmate. *Id.* at 478-79. The court allowed evidence of the false allegation but prohibited Lee from specifying it was rape. *Id.* at 480. During cross-examination, the victim admitted she made the false accusation but said she immediately corrected it. *Id.* at 482. On appeal, Lee argued the trial court violated the confrontation clause by excluding the fact that rape had been the crime falsely alleged. *Id.* at 485. The Supreme Court disagreed. *Id.* Recognizing the right of confrontation assures the accuracy of the fact-finding process and must be zealously guarded, the Court pointed out "the right to confront a witness through cross-examination is not absolute." *Id.* at 487 (citing *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L. Ed. 2d 297

(1973)). A defendant is guaranteed “an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.” *Id.* (emphasis in original) (citing *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 88 L. Ed. 2d 15 (1985)). Trial judges have wide latitude to impose reasonable limits on cross-examination. *Id.* Although relevant credibility evidence may include specific instances of lying, admission of those instances “is highly discretionary under ER 608(b).” *Id.* at 488 (citing *State v. Kunze*, 97 Wn. App. 832, 859, 988 P.2d 977 (1999)). Nevertheless, a specific lie related directly to the case at issue should generally be admitted. *Id.* (citing *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)). Unlike the defendant in *Lee*, Hawkins did not confront Caitlyn with a specific lie or ask which of two inconsistent statements was correct. His question about the breakdown of the first plea agreement required Caitlyn to volunteer her assessment of what might or might not have caused the State to conclude she was untruthful. As the State pointed out, the relevance was that the State had, at one point, concluded Caitlyn could not be trusted. That uncontested and undeniably relevant fact was already in evidence. The exact nature of Caitlyn’s untrustworthiness was of marginal additional value to the finder of fact. This Court should conclude the trial court did not violate Hawkins’s right of confrontation.

H. HAWKINS’S FACEBOOK COMMUNICATIONS AND ADMISSIONS TO LAW ENFORCEMENT CONTAINED GRAPHIC DETAIL OF AGGRAVATED SEXUAL ASSAULT OF R.D. AND V.H. THIS EVIDENCE WAS SUFFICIENT TO SUPPORT THE COURT’S GUILTY VERDICTS ON THE CHARGES AND THE AGGRAVATING FACTORS.

The State will not repeat here the overwhelming evidence establishing Hawkins’s sexual assaults of R.D. and V.H., aggravated by his pattern of sexually abusing of both particularly vulnerable victims. His own words convicted him of two counts of aggravated first degree rape of a child and aggravated first degree child molestation. The evidence corroborating R.D.’s disclosures was properly admitted. Hawkins’s argument has no merit.

I. HAWKINS'S ASSIGNMENTS OF ERROR HAVE NO MERIT. THERE WAS NO CUMULATIVE ERROR.

Hawkins asserts cumulative error deprived him of a fair trial. For all of the reasons cited in sections A through G—that Hawkins was not deprived of his right to speedy trial, that his custodial statements were properly admitted, that his jury waiver included the aggravating factors, that the affidavit for the the Facebook Messenger warrant was legally sufficient, that the court properly found R.D. competent and that her statements to Winston and Hill were made with a sufficient indicia of reliability, that the court admitted the Facebook Messenger evidence of other crimes, wrongs, or acts for proper purposes, that Hawkins was not entitled to claim spousal privilege nor was he denied an opportunity to present a defense, and that sufficient evidence established his aggravated crimes—this argument, too, is meritless.

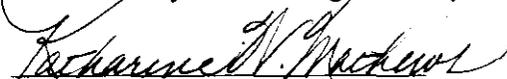
IV. CONCLUSION

This Court should affirm Hawkins's convictions.

DATED this 28th day of June, 2018.

Respectfully submitted,

GARTH DANO
Grant County Prosecuting Attorney


KATHARINE W. MATHEWS

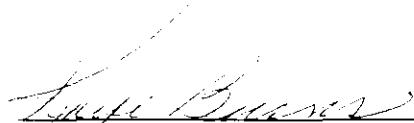
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CERTIFICATE OF SERVICE

On this day I served a copy of the Brief of Respondent (Amended) in this matter by e-mail on the following parties, receipt confirmed, pursuant to the parties' agreement:

Mark A. Larranaga
mark@jamlegal.com

Dated: June 28, 2018.



Kaye Burns

GRANT COUNTY PROSECUTOR'S OFFICE

June 28, 2018 - 3:47 PM

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