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Court of Appeals
Division III
State of Washington

No. 34925-0-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

EASTON C. YALLUP

Appellant.

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

The Honorable Judge Brian Altman

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Easton Yallup was convicted of two counts of first-degree rape of a child based on testimony from M.V. that, starting when she was 10-years-old and ending before she was 12-years-old, the defendant engaged in various forms of sexual contact with her. But at least one of the counts must now be reversed and dismissed with prejudice, because M.V.'s specific testimony to support a second count of rape of a child fell well outside the charging period. In addition, her generic testimony was inadequate to prove a second count of specific and distinct conduct of rape of a child during the charging period.

Alternatively, because the court failed to enter written findings and conclusions and the trial judge is now unavailable, both counts should be reversed and dismissed. The findings error is not harmless and cannot be remedied by remand for written findings before a successor judge.

At a minimum, this matter should be resentenced and the trial court ordered to conduct the required comparability analysis prior to counting a 1996 federal offense toward Mr. Yallup's offender score. Mr. Yallup's offender score will be lowered by as much as six points once the second count is dismissed and if the federal offense is not comparable. The judgment and sentence should also be amended to strike the unlawful community custody condition requiring Mr. Yallup to pay restitution.

Finally, in the event the State is the substantially prevailing party in this appeal, Mr. Yallup objects to appellate costs being imposed.

B. ASSIGNMENTS OF ERROR

1. The court erred by convicting Mr. Yallup of a second count of first-degree rape of a child where the evidence was insufficient to clearly delineate this second count via either specific or general testimony.

2. The trial court erred by failing to enter written findings of fact following this bench trial.

3. The court erred by including a federal conviction in the calculation of Mr. Yallup's offender score without conducting a comparability analysis. Trial counsel was ineffective for failing to object to or alert the trial court to its comparability analysis requirement.

4. The trial court erred by ordering restitution as a condition of community custody.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether there is insufficient evidence Mr. Yallup committed more than one count of first-degree rape of a child during the charging period.

a. "Specific testimony" did not establish a second count of first-degree rape of a child within the charged period of "on or between 01/01/2010 through 12/31/2013."

b. Mr. Yallup's second count of first-degree rape of a child cannot stand where it relied on unclear, generic testimony of various sexual contacts at uncertain times, including times outside the charging period.

Issue 2: Whether the trial court's failure to enter written findings and conclusions should result in reversal and dismissal, because the oral ruling is not sufficient to render the error harmless, and remand for entry of written findings would prejudice the defendant in this case either due to tailoring of findings or improper entering of findings by a successor judge.

Issue 3: Whether Mr. Yallup was denied his right to effective assistance of counsel when his attorney failed to object to the inclusion of a prior federal conviction in his offender score without a comparability analysis.

Issue 4: Whether, at resentencing, the trial court must strike the unlawful community custody condition requiring Mr. Yallup to pay restitution.

Issue 5: Whether this Court should deny the imposition of costs on appeal in the event the State is the substantially prevailing party on review.

D. STATEMENT OF THE CASE

Easton Yallup (DOB: 5/6/1977, RP 19) lived with his girlfriend Lila Jack and her children in Goldendale, Washington, from approximately 2011 until the couple broke up in 2014 and Mr. Yallup moved out. RP 18-19, 56, 60, 73.

In April 2015, Ms. Jack's daughter M.V. (DOB: 8-3-2002, RP 52) told her mother that Mr. Yallup had touched her in a sexual manner when they lived together. RP 17, 20, 61-62, 73. Ms. Jack contacted family friend Melissa Wykes, who reported the allegations to Goldendale Police Officer Leo Lucatero. RP 62-63, 92, 94. After M.V. was interviewed by Officer Lucatero (RP 17, 20, 63), Mr. Yallup was charged with two counts of rape of a child, which, according to the charging document, were committed "on or between 01/01/2010 through 12/31/2013" (CP 1-2; RP 21).

Mr. Yallup waived his right to a jury and proceeded to a bench trial where the court heard testimony from Officer Lucatero, M.V. and Ms. Wykes. RP 11-12, 17-51, 52-87, 89-103; CP 72. Details of the sexual allegations themselves were provided only by M.V. RP 64-69. M.V. testified Mr. Yallup repeatedly called her into his bedroom on the bed where he had "nasty" videos on, took off her clothes, licked her bare vagina, and sometimes pushed her hand onto his penis both under and over his clothes. *Id*.; Exhibit P1. M.V. said the first incident happened at the end of her fourth grade year when she was 10-years-old and living at a house on Washington Street in Goldendale. RP 56-57, 66. Based on M.V.'s date of birth, her grade in school and testimony about when she lived on Washington Street, this first incident necessarily occurred in the spring of 2013. *See id*.

M.V. testified the aforementioned sexual occurrences occurred repeatedly, at least 10 times but not more than 15 times. RP 66. She did not specify when particular incidences occurred, just that the first incident, as discussed above, occurred at the end of fourth grade when she was 10-years-old (i.e. spring of 2013) (RP 66), and that the last incident occurred in June when she was 11-years-old and living with the family on Woodland Street in Goldendale (i.e. June 2014) (RP 56, 60, 67, 71-72). Besides testimony about the oral sexual contact in the spring of 2013 and

perhaps in June of 2014 (RP 65-66, 68), it is not clear when any additional contacts occurred, particularly whether any second or subsequent oral sexual contact occurred after the first incident in spring of 2013 but before the outer date limit set forth in the charging document of 12/31/2013 (*see* RP 64-73).

After the bench trial, the judge found Mr. Yallup guilty as charged of two counts of first-degree rape of a child. RP 116; CP 75. In its oral ruling, the court commented it found M.V.'s allegations credible and that M.V. was victimized by Mr. Yallup "consistently and repeatedly." RP 115. The court did not specify particular dates for when two separate and distinct counts of child rape occurred, but instead found that repeated sexual intercourse occurred "during an approximate three year period" (the charging document spanned a four year period of "01/01/2010 through 12/31/2013," CP 1-2). RP 114. The trial court did not enter detailed written findings and conclusions following the bench trial, but instead wrote it found Mr. Yallup guilty as charged. *See* CP 1-139, 75.[1]

At sentencing, Mr. Yallup was given the high end of the standard range consisting of a minimum term of confinement of 318 months and a maximum term of life. RP 125. The court based this sentence on an offender score of ten-plus, which included three points for a 1996 federal

[1] The undersigned counsel learned from counsel for the State after requesting for written findings to be entered that, sometime after presiding over this bench trial, Judge Altman retired from the court, and defense counsel has since left his public defense contract.

conviction of abusive sexual contact. RP 121; CP 82, 99. No party requested, and the trial court did not perform, any comparability analysis before including this federal conviction in Mr. Yallup's offender score. *See* RP 119-27.

The sentencing court imposed only mandatory legal financial obligations ("LFOs"). CP 104. It also imposed the following community custody condition: "Pay restitution for counseling obtained by victim." CP 103, 111.

In December 2016, Mr. Yallup filed a notice of appeal and an indigency form declaring he was unemployed prior to his arrest, he had earned no income in the past 12 months, and he could not afford any costs of this appeal. CP 115, 134-38. The trial court acknowledged Mr. Yallup's indigency, that he "lacks sufficient funds to prosecute an appeal," and ordered defense counsel to be appointed on appeal "wholly at public expense." CP 137. The trial court also ordered clerk's papers and verbatim report of proceedings, along with copies of other papers on review, to be provided at public expense. *Id*.

In support of his argument against costs in this appeal, Mr. Yallup has filed a Report as to Continued Indigency, which shows he continues to have no real or personal property, no employment history, and only $25 income per month from a tribal per capita. *See* Report as to Continued

Indigency dated 1-27-17, filed and served on the same date as this opening brief. Mr. Yallup also declared in this same report that he has PTSD, anxiety and stress, and is financially responsible for three dependents. *Id*.

E. ARGUMENT

Issue 1: Whether there is insufficient evidence Mr. Yallup committed more than one count of first-degree rape of a child during the charging period.

The "specific testimony" in this case was M.V. testifying Mr. Yallup committed oral sexual contact with her starting at the end of her fourth grade year when she was 10-years-old and living on Washington Street (i.e. spring of 2013), with the last occurrence in June 2014 while the family lived on Woodland Street just before M.V. turned 12-years-old (i.e. summer 2014). RP 66-67, 71-72. However, the charging information alleged Mr. Yallup committed two counts of rape of a child "on or between 01/01/2010 through 12/31/2013." CP 1-2. The evidence may support one count of child rape during this charging period, but the evidence regarding sexual contact in June 2014 falls well outside the charging period and, therefore, does not support Mr. Yallup's conviction of a second count of first-degree rape of a child.

Furthermore, M.V. provided "generic testimony" that Mr. Yallup repeatedly performed oral sexual contact, and/or forced her to touch his penis both over and under clothing, between 10 and 15 times during the

aforementioned dates (spring 2013 through June 2014). RP 66-68. However, while the conduct from the spring of 2013 may be supported by sufficient evidence, the generic testimony of repeated conduct sometime thereafter (including outside the charging period) does not satisfy the three-part test to affirm for sufficient evidence as set forth in *State v. Hayes, infra*. Accordingly, Mr. Yallup's second count of first-degree rape of a child should now be reversed and dismissed with prejudice.

Mr. Yallup was convicted of two counts of first-degree rape of a child. CP 97. A person commits this offense when he engages in sexual intercourse with another who is less than 12-years-old and not married to the perpetrator who is at least 24 months older than the victim. RCW 9A.44.073(1). "Sexual intercourse" means "any act of sexual contact between persons involving the sex organs of one person and the mouth… of another..." RCW 9A.44.010(1)(c). M.V. testified to two types of sexual contact: Mr. Yallup licking her bare vagina (i.e., oral sexual contact, RP 65, 68) and Mr. Yallup causing M.V. to touch Mr. Yallup's penis with her hand both over and under his clothing (i.e., sexual contact rather than intercourse, RP 67-68). The former oral sexual contact could support a conviction for rape of a child (*see* RCW 9A.44.073(1) and .010(1)(c)), whereas the latter sexual contact would instead establish child molestation (for which Mr. Yallup was never charged or convicted). *See*

RCW 9A.44.083(1); RCW 9A.44.010(2); *State v. Jones*, 71 Wn. App. 798, 825, 863 P.2d 85 (1993) ("Child molestation requires that the offender act for the purpose of sexual gratification…, and first degree rape of a child requires that penetration or oral/genital contact occur…").

M.V. testified Mr. Yallup committed oral sexual contact with her for the first time when she was 10-years-old at the end of her fourth grade year, i.e., in the spring of 2013. RP 66. For purposes of this brief only (without conceding any issues Mr. Yallup may later argue in a Statement of Additional Grounds for Review or a collateral attack), Mr. Yallup does not challenge there was sufficient evidence to affirm this first count of first-degree rape of a child. Rather, the pertinent issue here is whether there is sufficient evidence, via either specific or generic testimony, that Mr. Yallup committed a second count of first-degree rape of a child during the charging period "on or between 01/01/2010 through 12/31/2013" (CP 1-2).

In every criminal prosecution, due process requires the State to prove, beyond a reasonable doubt, every fact necessary to constitute the charged crime. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). Where a defendant challenges the sufficiency of the evidence, the proper inquiry is "whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found

guilt beyond a reasonable doubt." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citing *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980)). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." *Id*. (citing *State v. Partin*, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977)). Furthermore, "[a] claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id*. (citing *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254 (1980)).

"Circumstantial evidence and direct evidence are equally reliable." *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Circumstantial evidence "is sufficient if it permits the fact finder to infer the finding beyond a reasonable doubt." *State v. Askham*, 120 Wn. App. 872, 880, 86 P.3d 1224 (2004) (citing *State v. King*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002)). The appellate court "defer[s] to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence." *Thomas*, 150 Wn.2d at 874-875.

Sufficient means more than a mere **scintilla** of evidence; there must be that quantum of evidence necessary to establish circumstances from which the finder of fact could reasonably infer the fact to be proved. *State v. Fateley*, 18 Wn. App. 99, 102, 566 P.2d 959 (1977). In reviewing

the sufficiency of the evidence following a bench trial, this Court determines whether substantial evidence supports the challenged finding of fact and whether the findings support the trial court's conclusions of law. *State v. Smith*, 185 Wn. App. 945, 956, 344 P.3d 1244, *review denied*, 183 Wn.2d 1011 (2015). A party challenging the finding of fact bears the burden of demonstrating the finding is not supported by substantial evidence. *Id*. at 957.

"[A] criminal defendant may always challenge the sufficiency of the evidence supporting a conviction for the first time on appeal." *State v. Sweany*, 162 Wn. App. 223, 228, 256 P.3d 1230 (2011), *aff'd*, 174 Wn.2d 909, 281 P.3d 305 (2012) (citing *State v. Hickman*, 135 Wn.2d 97, 103 n. 3, 954 P.2d 900 (1998)); *see also* RAP 2.5(a)(2) (stating "a party may raise the following claimed errors for the first time in the appellate court . . . failure to establish facts upon which relief can be granted. . . ."). "A defendant challenging the sufficiency of the evidence is not obliged to demonstrate that the due process violation is 'manifest.'" *Id*. The remedy for insufficient evidence to prove a crime is reversal, and retrial is prohibited. *State v. Smith*, 155 Wn.2d 496, 505, 120 P.3d 559 (2005).

a. "Specific testimony" did not establish a second count of first-degree rape of a child within the charged period of "on or between 01/01/2010 through 12/31/2013."

As a threshold matter, the State is required to prove the alleged offense(s) occurred within the charging period. *State v. Jensen*, 125 Wn. App. 319, 325, 104 P.3d 717, *review denied*, 154 Wn.2d 1011 (2005).

Our courts have recognized the language "on or about" in a charging document is sufficient to affirm a conviction where the evidence proved the offense was committed shortly after the specific charging period dates. *Jensen*, 125 Wn. App. at 325; *State v. Hayes*, 81 Wn. App. 425, 431-33, 914 P.2d 788 (1996). For instance, in *State v. Hayes*, the State charged Hayes with four counts of rape of a child "on or about" 7/1/1990 through 5/31/1992. *Id*. at 427. The victim provided "specific testimony" of sexual abuse that occurred two or three times per week, with the last specific instance occurring two weeks before June 18, 1992, or about a week after the last set forth date in the charging document. *Id*. at 429, 432. The Court held the charging language "on or about…the 31st of May, 1992" should be construed to include the June date as proof of the fourth charged count against Hayes. *Id*. at 432. The Court explained, "A defendant may not be convicted for a crime with which he or she was not charged. But where time is not a material element of the charged crime, the language 'on or about' is sufficient to admit proof of the act at any

time within the statute of limitations, so long as there is no defense of alibi." *Id*. In other words, a rational juror could infer from the victim's testimony that the State proved Hayes had sexual intercourse with the victim at least once *about* the date charged. *Id*. at 433.

Importantly, however, the *Hayes* court did not expand its ruling beyond a week after the "on or about" date of the charging period. 81 Wn. App. at 432-34. That is, the Court specifically declined to rely on alleged incidents from two years *before* the charging period to establish any of the counts against Hayes. *Id*. at 434; *accord Jensen*, 125 Wn. App. at 326. The Court was also not faced with the charging language at issue in this case, which alleged Mr. Yallup committed both counts "on or between" certain dates rather than "about" certain dates. *C.f. Hayes*, 81 Wn. App. 425; *Jensen*, 125 Wn. App. at 326 ("on or about" charging language); CP 1-2. Unlike the word "about," which may be construed to include dates around or closely outside those listed in the charging period, the word "between" sets forth more specific timing periods. *C.f. id.* at 432-35 (emphasizing the importance of the word "about" in the charging language so as to include alleged sexual offenses one week outside the specific charging period).

Mr. Yallup was not charged with committing rape of a child "about" the latter date in the charging document of December 31, 2013.

He was charged with committing the offenses no later than December 31, 2013, i.e., "on or between 01/01/2010 through 12/31/2013." CP 1-2. M.V.'s testimony regarding oral sexual contact in June 2014 cannot support the second count against Mr. Yallup as it is well outside the charging period. Regardless, no known case has extended the reasoning of *Hayes, supra*, to conduct that occurred six months outside the charging period, particularly where, as here, the charging document alleged misconduct "between" certain dates rather than "about" certain dates. Mr. Yallup's second count of first-degree rape of a child cannot be affirmed where it relies on specific conduct alleged to have occurred outside the charging period.

b. **Mr. Yallup's second count of first-degree rape of a child cannot stand where it relied on unclear, generic testimony of various sexual contacts at uncertain times, including times outside the charging period.**

As set forth above, M.V. provided specific testimony that Mr. Yallup engaged in oral-genital sexual contact in the spring of 2013. M.V. also indicated some of the subsequent sexual contacts involved Mr. Yallup pushing M.V.'s hand onto his penis both under and over clothing, with the last offense occurring in June 2014. RP 67-68, 71-72. M.V. said the various sexual contacts occurred between 10 and 15 times. RP 66. However, this generic testimony is not adequate to prove Mr. Yallup committed a second count of first-degree rape of a child, and particularly

not during the charging period. It is not sufficiently clear Mr. Yallup committed a second or subsequent offense during the charging period, as opposed to after December 31, 2013. It is also not clear there was a second instance of oral-genital sexual contact during the charging period so as to prove child rape, as opposed to sexual contact between hand and genitalia that would have instead established child molestation.

The trial court's oral ruling mirrors this inadequacy in the evidence, as the court did not find specific dates of misconduct during the charging period, nor did it specifically find Mr. Yallup committed oral-sexual contact on a second occasion during the charging period. *See* RP 115 (trial court generally found M.V. was victimized by the defendant over a three-year period (RP 115), though it is not clear whether this time period may have been outside the charging range or whether the victimization may have involved molestation as opposed to rape as to the second count.) The generic testimony in this case is insufficient to prove a second, distinct count of first-degree child rape.

In sexual abuse cases, the difficulty in proving the offense arises where the State brings multiple identical charges based on a child's allegations that the same act of sexual abuse occurred more than once. Where such multiple counts are alleged to have occurred during the same charging period, the State is not required to elect particular acts associated

with each count so long as the evidence clearly delineates specific and distinct incidents of sexual abuse during the charging period. *State v. Edwards*, 171 Wn. App. 379, 401, 294 P.3d 708 (2012) (emphasis added). In other words, the prosecutor must provide some factual details that serve to distinguish one incident from another.

A three-prong test was set forth in *Hayes, infra*, and is used to determine whether generic testimony about a course of sexual abuse – as opposed to specific testimony describing the details of a particular sexual offense at a certain time – sufficiently describes specific and distinct incidents of abuse in order to affirm a conviction on multiple counts. *Edwards*, 171 Wn. App. at 402. That is,

> the alleged victim must (1) describe the act or acts with sufficient specificity to allow [the fact finder] to determine what offense, if any, has been committed; (2) describe the number of acts committed with sufficient certainty to support each count the prosecution alleged; and (3) be able to describe the general time period in which the acts occurred.

Edwards, 171 Wn. App. at 401-402 (evidence must "clearly delineate[] specific and distinct incidents of sexual abuse during the charging periods.") (emphasis added) (citing *Hayes*, 81 Wn. App. at 431).

In *State v. Hayes, supra*, the victim testified Hayes "put his private part in mine" at least "four times" and "two or three times a week" between 1990 and 1992 (same as the charging period in that case). *Hayes*, 81 Wn. App. at 427, 435. The *Hayes* Court explained it would unfairly

immunize resident child molesters from prosecution to immunize these offenders from prosecution simply because the victim is unable to pin point exact dates of sexual abuse. *Id*. at 435-36, 438. Applying the three prongs above, the Court held the victim's description of the usual course of sexual conduct was described in sufficient detail. *Id*. at 438. As to the second prong, the victim's testimony that Hayes had intercourse with her "four times" and up to "two or three times a week" sufficiently established the number of acts to support the four counts charged. *Id*. at 439. Third, the victim testified the acts occurred between 1990 and 1992, before authorities took her away in June 1992, which the Court held was sufficiently specific to prove the time specificity requirement that matched the charging period of "on or about" 7/1/1990 through 5/31/1992. *Id*. at 427, 439. The victim's generic testimony on the (1) type of act committed, (2) the number of acts committed, and (3) the general time period was sufficient to sustain four separate counts of child rape. *Id*.

Conversely, in *State v. Jensen, supra*, the Court found there was insufficient evidence on one of the counts of child molestation. *Jensen*, 125 Wn. App. at 326-328. Jensen had been charged with committing one count of indecent exposure and three counts of child molestation "on or about August 1, 2001 through February 19, 2002." *Id*. at 326. The victim testified to an instance of indecent exposure involving a mirror and two

incidents where Jensen touched her between the legs and on her breast during the summer of 2001. *Id*. at 323, 326-27. The victim testified Jensen touched her private area "a few times." *Id*. at 327. And, she testified Jensen entered her room at night on two other occasions, though it was not clear what, if any, sexual contact took place during those incidents. *Id*. at 328. Applying the three-prong analysis from above, the *Jensen* Court found the victim's testimony did not describe a third act of molestation with sufficient specificity. *Id*. The Court affirmed one count of indecent exposure and two counts of child molestation, but reversed the third count due to the inadequate "generic testimony." *Id*. at 327-28.

Similarly, one of two counts of child molestation was found to have been properly vacated by the trial court in *State v. Edwards*, due to insufficient "generic testimony" of sexual abuse. 171 Wn. App. at 383. There, like here, the victim testified the defendant touched her sexually 10 to 15 times, though she only provided details of the first incident. *Id*. at 384. The victim said the touching always occurred the same way, with the defendant picking her up while sleeping, taking her to a chair, removing her clothes and touching her "front private" with his hand. *Id*. But it was still not sufficiently clear from the evidence during what time period, after the first incident, the 10 to 15 subsequent acts may have occurred. *Id*. at 403. And, the trial court found there was not sufficient specificity in the

testimony to differentiate between any of the acts of alleged molestation. *Id*. at 402.

The Court of Appeals agreed, noting the victim's testimony did not describe a specific act of child molestation as occurring during the "10 to 15" incidents mentioned above, even though the victim testified that all of the touchings occurred the same way. *Edwards*, 171 Wn. App. at 403. The Court further held, "[t]he evidence does not clearly delineate between specific incidents of sexual abuse during the charging period." *Edwards*, 171 Wn. App. at 403. As such, one of the two child molestation counts was properly vacated due to inadequate generic testimony of when the 10 to 15 other encounters may have occurred. *Id*.

Division Two recently found the generic testimony of sexual offenses to be sufficient in the unpublished case of *State v. George*, *infra*. For purposes of this appeal, its discussion as to the charging period is particularly apt and persuasive. *State v. George*, Nos. 46323-7-II and 46326-1-II, 2016 WL 687264, at *1-6 (Wash. Ct. App. Feb. 17, 2016).[2] In *State v. George*, the victim testified George would take her in the bedroom, lock the door, take off her pants and underwear, take off his pants and underwear, and move on top of her so his private part touched

[2] "Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court. However, unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate." GR 14.1. This case is cited as persuasive authority only.

her private part until she felt a warm liquid on her stomach. *Id*. at *2. The victim said it happened at least three times. *Id*. at *2, 4. The Court held the victim's description of the details of these incidents and the number of acts was sufficiently specific to satisfy the first two-prongs of the test for generic testimony. *Id*. at *4.

As to the third prong – describing the general time period with sufficient specificity – the victim said the acts occurred when she was in the fourth grade when she was nine or ten years old (she turned nine in November 2010). *George*, 2016 WL 687264, at *5. Importantly, unlike here, the charging period in *State v. George* spanned those dates testified to by the victim (the charging period was "January 1, 2008 to September 1, 2012.") *Id*. The Court held the victim "<u>clearly defined the time period by giving the grade she was in and her age when the acts occurred. Further, the charging period encompasses the period that AQ described</u>." *Id*. (emphasis added). Accordingly, the Court found AQ's generic testimony satisfied all three prongs and sufficiently established three specific and distinct incidents of child molestation. *Id*.

Here, however, the victim's generic testimony fails both the first and third prongs of the *Hayes* test– (1) description of the acts with sufficient specificity to determine what particular offense was committed, and (3) description of the general time period in which the acts occurred to

match the charging period. *Hayes*, 81 Wn. App. at 431; *Edwards*, 171 Wn. App. at 401-02; *George*, 2016 WL 687264, at *5.

First, while M.V. testified as to sexual contacts committed by Mr. Yallup, only her testimony of the first incident described oral sexual contact with sufficient specificity so as to sustain one count of first-degree child rape. RP 65, 68. Her remaining testimony indicated some form of sexual contact occurred 10 to 15 additional times after the first incident. RP 66. But there was insufficient specificity as to the nature of the sexual contact to distinguish the first instance of oral sexual contact from other forms of sexual contact that may instead establish child molestation.

Unlike in *State v. Edwards*, 171 Wn. App. at 383, where the victim testified the defendant touched her in the same way each time, each of which would have established child molestation, M.V. did not testify that there was oral-genital sexual contact during subsequent incidents. And yet, even in *Edwards, supra*, where the testimony was that the victim was touched in the same way 10 to 15 times, this testimony was still insufficient to sustain one of the counts of child molestation. This case is not even as close as *Edwards* where the victim testified that 10 to 15 incidents of sexual contact occurred in the same way. Here, the victim did not specify that oral-genital contact occurred on subsequent incidents; M.V. never testified that the 10 to 15 incidents involved oral-genital

sexual contact. The generic testimony fails the first prong of *Hayes, supra,* as the description of subsequent acts was not sufficiently specific to determine what particular subsequent offenses were committed.

Like in *State v. Jensen, supra*, one of the counts of sexual abuse must be set aside in this case due to unclear testimony about what type of sexual contact occurred during subsequent incidents. 125 Wn. App. at 328. In *Jensen*, the generic testimony did not specify what type of sexual contact occurred when the defendant entered the victim's room at night on at least two occasions. *Id*. Similarly, here the evidence did not delineate what type of sexual contact occurred during second or subsequent encounters. The evidence does not clearly delineate proof of a separate and distinct incident of first-degree rape of a child, as opposed to perhaps a count of child molestation if the defendant indeed forced M.V.'s hand to touch his penis. The generic testimony in this case cannot withstand a sufficiency challenge since it fails the first prong of *Hayes* by failing to describe the acts with sufficient specificity to determine what particular offense was committed. *Hayes*, 81 Wn. App. at 431.

In addition, the generic testimony fails the third prong of the *Hayes* test as well. That is, there was not a sufficient description of the general time period in which the acts occurred to match the charging period. *Hayes*, 81 Wn. App. at 431; *Edwards*, 171 Wn. App. at 401-02. Like in

Edwards, supra, the victim in this case testified that 10 to 15 sexual acts were performed on her by the defendant. *Id*. at 384, 403; RP 66. But the time period of these acts was not clear in *Edwards* and is not clear in this case. *Id*. at 403. There was not sufficient proof that separate and distinct acts of child molestation had occurred during the charging period in *Edwards*. *Id*. Likewise, there was not sufficient proof that separate and distinct acts of child rape occurred prior to December 31, 2013, the outer date in the charging document against Mr. Yallup. CP 1-2.

Division Two's analysis in *State v. George* is particularly helpful in deciding this case. 2016 WL 687264, *5. Just like in this case, the victim there testified the defendant performed sexual acts on her starting when she was in the fourth grade. *Id*.; RP 66. But in *State v. George*, the third prong of *Hayes* was satisfied because the victim testified all of the sexual contacts occurred when she was nine or 10 years old (the victim turned nine in November 2010 and ten in November 2011). *George*, 2016 WL 687264, at *5. Importantly, the charging document there actually spanned that entire time period by charging the defendant with conduct committed "January 1, 2008 to September 1, 2012." *Id*. Unlike in *George*, *supra*, the third prong of *Hayes* fails in this case, because the general time period of sexual contacts described by M.V. was spring 2013 through June 2014, half of which was outside the charging period. RP 66-

67, 71-72. *C.f., George,* 2016 WL 687264, at *5 (third prong of *Hayes* satisfied since "charging period encompasses the period that [the victim] described.")

Finally, the court's oral findings reflect the inadequacies of the evidence, as the court failed to find specific and distinct conduct that would amount to a second count of first-degree rape of a child. The court merely referenced "repeated victimization" (RP 115), which may have included uncharged sexual contact that does not amount to rape.

The court's oral findings also reflected the inadequate proof of the general time period requirement in this case, since the court did not find a second or subsequent offense specifically occurred before the latter date in the charging document, and it instead found some form of victimization occurred over an unspecified three-year period. To the extent the court found M.V. was victimized over a three-year period, including any inference that such a period was during the span of the charged dates, such a finding was clearly not supported by substantial evidence and must be set aside. *Smith*, 185 Wn. App. at 956-57. M.V. testified Mr. Yallup engaged in various forms of sexual contact over an approximate one-year period starting at the end of her fourth grade (i.e. spring 2013 when she was 10-years-old) and ending in June before she turned 12-years-old (i.e. June 2014). Substantial evidence does not prove that any sexual offenses

occurred over a three-year period, let alone multiple counts of first-degree rape of a child during the charging period. The evidence and court's findings do not reflect that a second count of first-degree rape of a child occurred prior to December 31, 2013, the outer charged date.

Ultimately, M.V. alleged sexual offenses were committed against her by Mr. Yallup starting in the spring of 2013 and ending in June 2014. It is not possible to determine on this record that a second count of first-degree rape of a child (as opposed to no offense or perhaps some form of child molestation) happened prior to the expiration of the charging period on December 31, 2013. Neither the specific nor generic testimony constituted sufficient evidence to sustain a second count of first-degree rape of a child in this case. Accordingly, Mr. Yallup requests this Court reverse and dismiss one count of rape of a child with prejudice. *Smith*, 155 Wn.2d at 505 (setting forth this remedy).

Issue 2: Whether the trial court's failure to enter written findings and conclusions should result in reversal and dismissal, because the oral ruling is not sufficient to render the error harmless, and remand for entry of written findings would prejudice the defendant in this case either due to tailoring of findings or improper entry of findings by a successor judge.

The trial court erred by failing to enter written findings of fact and conclusions of law following Mr. Yallup's bench trial. This error is not harmless beyond a reasonable doubt, particularly in light of the deficient oral ruling that fails to address the factual basis and elements of each

crime charged. Furthermore, remand for entry of written findings at this juncture is not appropriate, as doing so would prejudice Mr. Yallup. It is highly likely, given the issue presented above, that the State and trial court would attempt to tailor the findings to the sufficiency issue. Additionally, Mr. Yallup would be prejudiced by written findings and conclusions being entered by a successor judge who never heard the evidence in this case. And, retrial is not a proper remedy, since the trial court is forbidden on double jeopardy grounds from hearing additional evidence in this case.

"In a case tried without a jury, the court shall enter findings of fact and conclusions of law." CrR 6.1(d). "Those findings must address each element of the crime separately and indicate the factual basis for each element. *State v. Silva*, 127 Wn. App. 148, 151n.2, 110 P.3d 830 (2005). Written, rather than oral findings, are the requirement. "A court's oral opinion is not a finding of fact." *State v. Hescock*, 98 Wn. App. 600, 605, 989 P.2d 1251 (1999) (internal citations omitted). An oral ruling may be looked at to interpret written findings and conclusions, but it is "not binding 'unless it is formally incorporated into findings of fact, conclusions of law, and judgment.'" *Id*. at 606 (quoting *State v. Dailey*, 93 Wn.2d 454, 459, 610 P.2d 357 (1980)); *see also State v. Head*, 136 Wn.2d 619, 624, 964 P.2d 1187 (1998) (trial court's oral ruling is informal

opinion and is not binding unless formally incorporated in the written findings.)

"The purpose of requiring written findings and conclusions is to ensure efficient and accurate appellate review." *State v. Cannon*, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996) (internal citations omitted). Courts have aptly said the failure to timely enter the required findings has created "an enormous waste of time and energy by defense counsel and [the appellate] court…" *See. e.g., State v. Taylor*, 69 Wn. App. 474, 477, 849 P.2d 692 (1993). "Since the purpose in requiring written findings of fact and conclusions of law is to enable an appellate court to review the issues raise on appeal…, the lack of findings and conclusions in a given case necessarily delays the orderly and efficient process of appellate review." *Id*. Timely filed findings and conclusions simplify and expedite appellate review. *Head*, 136 Wn.2d at 622-23.

Some courts have recognized a harmless error analysis when determining whether a trial court's failure to enter adequate written findings and conclusions necessitates remand. *See e.g. State v. Banks*, 149 Wn.2d 38, 43-44, 65 P.3d 1198 (2003); *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002); *State v. Heffner*, 126 Wn. App. 803, 811, 110 P.3d 219 (2005) ("Insufficiency of findings of fact and conclusions of law from a bench trial is subject to a harmless error analysis."); *State v.*

Robertson, 88 Wn. App. 836, 843, 947 P.2d 765 (1997) (where juvenile court failed to enter adequate written findings, Court of Appeals looked to oral findings to aid review). The failure to timely enter adequate written findings is harmless where "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Brown*, 147 Wn.2d at 341. "An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred.... A reasonable probability exists when confidence in the outcome of the trial is undermined." *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted).

However, most courts have recognized that the complete "failure to enter written findings of fact and conclusions of law as required by CrR 6.1(d) requires remand for entry of written findings and conclusions." *Head*, 136 Wn.2d at 624; *State v. West*, No. 47491-3-II, 2017 WL 359100, at *1 (Wash. Ct. App. Jan. 24, 2017) (see FN 2 above, as this unpublished case is cited for persuasive authority only); *State v. McCarty*, 152 Wn. App. 351, 354, 215 P.3d 1036 (2009) (complete failure to enter written findings and conclusions would normally require remand); *State v. Otis*, 151 Wn. App. 572, 576-77, 213 P.3d 613 (2009) (appellate Court was only able to decide issues that did not require findings of fact for their resolution; otherwise, remand for entry of findings was the appropriate

remedy where the trial court failed to enter written findings of fact and conclusions of law following a bench trial).

In this case, the court's only written "finding" was as follows: "After a trial to the bench on two counts of rape of a child in the first degree, RCW 9A.44.073, the court finds beyond a reasonable doubt the defendant guilty of the crimes charged." CP 75. This verdict form entered by the trial court is no substitute for the written findings and conclusions requirement of CrR 6.1(d) to separately address the factual basis for each element of the charge. *Silva*, 127 Wn. App. at 151n.2. To the extent the trial court's verdict was intended to serve as written findings and conclusions, it is wholly inadequate.

Some courts, as noted above, have deemed the failure to enter sufficient written findings harmless upon reviewing the trial court's oral ruling or other written findings. But doing so in this case would be improper. First, the trial court's oral ruling is an informal opinion, it is not a substitute for a proper finding of fact, and it is not binding. *Head*, 136 Wn.2d at 624; *Hescock*, 98 Wn. App. at 605. Furthermore, the court's oral ruling in this case does not address the elements of the crime charged. Instead, the trial court merely held M.V. was victimized by Mr. Yallup "consistently and repeatedly" over a three year period. RP 114-15. The trial court did not specify that M.V. was "victimized" one two separate

and distinct occasions by oral sexual genital contact during the charging period. The trial court could have instead been expressing its opinion that M.V. was victimized by any other form of sexual contact that does not amount to rape. And, the trial court's oral ruling does not match the evidence presented as to the time period of M.V.'s alleged victimization. The court ruled that M.V. was victimized over a three year period, but this "finding" does not mirror the testimony of sexual contact during an approximate one-year time period. The oral ruling in this case is not nearly specific enough as to the factual basis and elements of two counts of rape of a child so as to find the deficient written findings harmless beyond a reasonable doubt.

It would also not be appropriate to remand this case for entry of written findings at this time; doing so would prejudice the defendant. *See Cannon*, 130 Wn.2d at 329-30. Where findings are not filed before the Appellant's brief is filed, an appearance of unfairness arises in remanding for entry of findings where it is likely the findings would be tailored to address the issues the defendant raised in his brief. *See. e.g., Taylor*, 69 Wn. App. at 477 (citing cases); *Head*, 136 Wn.2d at 622-25 (citing cases).

The Supreme Court held in *State v. Head* that remand for entry of written findings was the proper remedy where the trial court neglected to enter the findings and conclusions required by CrR 6.1(d). 136 Wn.2d at

621-22. However, the Court also "note[d] the possibility that reversal may be appropriate where a defendant can show actual prejudice resulting from the absence of findings and conclusions or following remand for entry of the same." *Id*. at 624. The Court further held that, while remand for entry of findings was the ordinary proper remedy, "no additional evidence may be taken; the findings and conclusions are to be based on the evidence already taken." *Id*. at 625 (citing *State v. Alvarez*, 128 Wn.2d 1, 20-21, 904 P.2d 754 (1995)) (double jeopardy principles prohibit second trial, but do not prohibit remand for entry of findings based on evidence previously introduced).

Here, Mr. Yallup anticipates he will be prejudiced by the State's and trial court's efforts to tailor written findings upon remand to the issues presented in this case, particularly as to sufficiency of the evidence. Thus, if findings are ordered to be entered on remand, it is highly likely Mr. Yallup will be required to file supplemental briefing objecting to the findings. *See Head*, 136 Wn.2d at 625 (noting prejudice from anticipated tailored findings will not be inferred at the time the remand is ordered, and must be addressed after remand).

Regardless of the fact that Mr. Yallup would likely be prejudiced by the entry of tailored findings on remand, Mr. Yallup is able to establish prejudice immediately in this case on another basis so that reversal and

dismissal is the only appropriate remedy at this time. The State has been unable to enter written findings in this case[3], apparently due at least in part to Judge Altman's retirement since hearing this case.

"The rule is well-settled that a successor judge is without authority to enter findings of fact on the basis of testimony heard by a predecessor judge." *State v. Bryant*, 65 Wn. App. 547, 549, 829 P.2d 209, *as corrected* (1992) (citing *Tacoma Recycling Inc. v. Capital Material Handling Co.*, 42 Wn. App. 439, 711 P.2d 388 (1985) (successor judge following a remand was without authority to adopt the findings and conclusions of original judge)). The court in *Bryant, supra*, held that its ruling was consistent with CrR 6.11, which directs a mistrial be declared if the judge before whom a trial without jury commenced is unable to proceed. "Taken together, the case law and civil and criminal rules set forth the rule that a successor judge only has the authority to do acts which do not require finding facts. Only the judge who has heard evidence has the authority to find facts." *Bryant*, 65 Wn. App. at 550.

Mr. Yallup would be prejudiced by the entry of written findings by any judge other than Judge Altman, who presided over this bench trial. And, because taking additional evidence before a successor judge would run afoul of double jeopardy principles (*see Head*, 136 Wn.2d at 625; and

[3] The undersigned counsel requested the State enter written findings and conclusions prior to filing this brief and was informed by the State a few weeks after her request of Judge Altman's retirement and that findings had not been entered.

Alvarez, 128 Wn.2d 1, 20-21), the only appropriate remedy in the event Judge Altman is unavailable is to reverse and dismiss the charges against Mr. Yallup with prejudice.

Issue 3: Whether Mr. Yallup was denied his right to effective assistance of counsel when his attorney failed to object to the inclusion of a prior federal conviction in his offender score without a comparability analysis.

Mr. Yallup's offender score was calculated as a "10" based in part on the inclusion of three points for a 1996 federal "abusive sexual contact" conviction. RP 121; CP 99-100. Defense counsel was ineffective for failing to request a comparability analysis prior to the court counting this offense in Mr. Yallup's offender score. This case must now be remanded for resentencing in order to conduct the required comparability analysis, as it is impossible to conduct either the required legal or factual analysis on the existing record.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a)(3). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

To establish ineffective assistance of counsel, a defendant must prove the following two-prong test: (1) [D]efense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Under the Sentencing Reform Act of 1981 (SRA), a defendant's offender score establishes his standard range sentence. RCW 9.94A.525 and .530(1). "To properly calculate a defendant's offender score, the SRA requires that sentencing courts determine a defendant's criminal history based on his or her prior convictions and the level of seriousness of the current offense." *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004) (citing *State v. Wiley*, 124 Wn.2d 679, 682, 880 P.2d 983 (1994)).

Generally, in order for prior federal felony convictions to contribute to a defendant's offender score, the SRA requires the offense be comparable to a Washington offense, or else the offense is counted as an equivalent class C felony under Washington law. RCW 9.94A.525(3) ("Federal convictions for offenses shall be classified according to the

comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.")

"Washington law employs a two-part test to determine the comparability of a foreign offense." *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). First, the sentencing court must determine whether the foreign conviction is legally comparable, by asking "whether the elements of the foreign offense are substantially similar to the elements of the Washington offense." *Id*. Second, "[i]f the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must determine whether the offense is factually comparable – that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute." *Id*. (citing *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998)). "In making its factual comparison, the sentencing court may rely on facts in the foreign record that are admitted, stipulated to, or proved beyond a reasonable doubt." *Id*. It is the State's burden to prove, by a preponderance of the evidence, the comparability of a defendant's prior out-of-state conviction. *Ross*, 152 Wn.2d at 230.

In *Thiefault*, our Supreme Court held the failure to object to a deficient comparability analysis of a prior Montana conviction constituted ineffective assistance of counsel. *Thiefault*, 160 Wn.2d at 417. The Court found the defendant's attorney provided deficient representation under the first prong of the *Strickland* test when he did not object to the sentencing court's inadequate comparability analysis. *Id*.; *see also Strickland*, 466 U.S. at 687. The Court reasoned the prior Montana conviction was not legally or factually comparable to a Washington offense. *Id*. The Montana conviction was not legally comparable, because the Montana statute at issue was broader than its Washington counterpart. *Id*. And, the documents submitted by the State at sentencing were insufficient to establish factual comparability. *Id*.

The *Thiefault* Court further found the defendant was prejudiced by his attorney's deficient representation, because "[a]lthough the State may have been able to obtain a continuance and produce the information to which [Mr.] Thiefault pleaded guilty, it is equally as likely that such documentation may not have provided facts sufficient to find the Montana and Washington crimes comparable . . . ." 160 Wn.2d at 417. The Court vacated Mr. Thiefault's sentence and remanded the case to the trial court to determine whether the Montana conviction was factually comparable to a Washington offense. *Id*. at 417, 420.

In an unpublished opinion that is cited herein for persuasive purposes only (*see* footnote 2 above), this Court recently reversed and remanded for resentencing where the trial court failed to conduct a comparability analysis before counting five prior California convictions toward the defendant's offender score. *State v. Navarette*, No. 31823-1-III, 2014 WL 4723168, at *1 (Wash. Ct. App. Sept. 23, 2014). The Court and parties agreed, "factual questions of the comparability of the four challenged out-of-state convictions should be considered by a sentencing court on remand." *Id*. The Court did not conduct a legal comparability analysis of the California offenses and instead remanded for the trial court to conduct a comparability analysis, due to the insufficient record. *Id*. Following the decision in *Thiefault, supra*, and the statutory requirement in RCW 9.94A.525(3), the Court held Navarette's defense counsel was ineffective when he did not object to the sentencing court's lack of a comparability analysis. *Id*.

Here, as in *Thiefault* and *Navarette, supra*, Mr. Yallup received ineffective assistance of counsel when his defense attorney failed to object to three points in his offender score that were based on a 1996 federal conviction for abusive sexual contact. Given the record, remand is the only appropriate remedy at this time, as it is impossible to begin a proper legal or factual comparability analysis on the existing record.

That is, it is not clear from the existing record that the federal "abusive sexual contact" conviction is legally comparable to a Washington offense. The conviction was briefly mentioned at the sentencing hearing when Mr. Yallup's history was recited to the trial court. RP 121 ("Use of sexual contact [sic] [inaudible] conviction 12/13/1996.") And it was listed in Mr. Yallup's judgment and sentence as "abusive sexual contact," though no particular statute or subsection of the federal code was cited. CP 99. The record does not indicate what offense or conduct was actually committed by Mr. Yallup to establish this prior conviction.

"Abusive sexual contact" encompasses a large number of various sexual federal offenses. 18 U.S.C. §2244; 18 U.S.C. §2246(2)(A), (3). It includes "sexual conduct" where the person "knowingly engages in or causes sexual contact with or by another person" if doing so would violate various subsections of §§§2241, 2242 or 2243. 18 U.S.C. §2244(a). It also includes other circumstances of sexual contact where a person "knowingly engages in sexual contact with another person without that person's permission," and sexual contact offenses involving children. 18 U.S.C. §2244(b) and (c). In turn, §§2241, 2242, and 2243 address the myriad of sexual offenses to which an "abusive sexual contact" conviction may relate. These include aggravated sexual abuse, such as by force or rendering another person unconscious or using substance to impair the

person's ability, and sexual acts with children of varying ages. 18 U.S.C. §2241(a) – (c). A conviction of abusive sexual contact may result from "sexual abuse" where certain acts threaten or place another in fear, or where the victim is incapable of engaging in the sexual act. 18 U.S.C. §2242. A conviction of abusive sexual contact may result from various other sexual acts with a minor. 18 U.S.C. §2243. These are but a few examples of offenses to which an abusive sexual contact offense may relate. Others may be relevant upon reviewing the specific circumstances of Mr. Yallup's conviction, particularly upon comparing the statutes as existed in 1996 at the time of Mr. Yallup's conviction.

In sum, a federal conviction of abusive sexual contact pursuant to 18 U.S.C. §2244 cannot be compared against its Washington counterpart without additional detail on the conviction. *See* RCW 9A.44 et seq. Without knowing which particular federal offense Mr. Yallup is supposed to have committed, it is quite impossible to attempt to engage in the required legal comparability analysis at this time. Similarly, there were no facts introduced regarding this underlying conviction, so it is impossible to conduct a factual comparability analysis. Like in *Navarette*, 2014 WL 4723168, at *1, the only fair course of action at this time is to remand to the trial court to conduct the requisite comparability analysis. There is quite simply nothing for this Court to review at this time. The record does

not even reveal which, of all the federal sex offenses that may have been penalized in 1996, Mr. Yallup is supposed to have committed.

If on remand it is determined there is no clearly comparable offense between the federal conviction and Washington law, or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense is required to be scored as a class C felony equivalent if it was a felony under the relevant federal statute. *State v. Priest*, 147 Wn. App. 662, 672, 196 P.3d 763 (2008) (citing RCW 9.94A.525(3)). In *Priest*, this Court held the pertinent federal theft offense was a felony under the relevant statute and was subject to exclusive federal jurisdiction. *Id*. As such, the federal offense was required to be scored as a class C felony equivalent. *Id*.

The federal offense of "abusive sexual contact" may be subject to exclusive federal jurisdiction so that it should be scored as a class C felony equivalent. RCW 9.94A.525(3); 18 U.S.C. §2244(a) (Making abusive sexual contact unlawful as to "Whoever, in the special maritime and territorial jurisdiction of the United State or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in or causes sexual

contact with or by another person…") In this scenario, the trial court will count the federal offense as the equivalent of a class C felony.

Regardless, even if the federal offense is to be counted as a class C felony equivalent, a comparability analysis must still occur to determine whether it is a "sex offense" under Washington law and how many points it contributes to Mr. Yallup's offender score. *See* RCW 9.94A.030(47) ("sex offense" means "any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.") Sex offense priors generally contribute three points to an offender score, but federal convictions only qualify as a "sex offense" if it is an offense that under the laws of this state would be a felony classified as a sex offense. RCW 9.94A.030(47). In other words, there is no escaping the need for a comparability review by the trial court here. In the event the federal offense is not comparable to a Washington sex offense, the federal prior should contribute no more than one point as a general class C equivalent. *See* RCW 9.94A.030(d); RCW 9.94A.525(8); RCW 9.94A.525(17); RCW 9.94A.525(3).

Defense counsel's failure to object to the inclusion of the federal conviction in the offender score prejudiced Mr. Yallup. It was equally likely any documentation obtained by the State may or may not have provided proof sufficient to find this offense comparable to a Washington

offense, and particularly to a Washington "sex offense." *See Thiefault*, 160 Wn.2d at 417. If the documentation would not provide facts sufficient to find the federal offense legally or factually comparable to a sex offense in Washington, Mr. Yallup's offender score would have been lower. In other words, the results of the sentencing proceeding would have been different. *McFarland*, 127 Wn.2d at 334-35 (citing *Thomas*, 109 Wn.2d at 225- 26). Defense counsel's failure to challenge the lack of a comparability analysis or alert the trial court to its duty to conduct that analysis deprived Mr. Yallup of his constitutional right to effective assistance of counsel. Because a comparability analysis could have changed Mr. Yallup's score, Mr. Yallup has demonstrated sufficient prejudice to require reversal of this matter for resentencing.

Ultimately, the State did not provide any underlying judgment and sentence on the federal conviction. The State did not supply any information to the trial court with regard to the facts underlying this conviction. It is impossible for this Court to substitute into the position of the trial court and conduct either a legal or factual comparability analysis on the existing record. The sentencing court's failure to conduct the comparability analysis required by the SRA deprived Mr. Yallup of due process under the Fourteenth Amendment to the United States Constitution and Wash. Const. art. I, § 3, and deprived him of his

constitutional right to effective assistance of counsel. Mr. Yallup should be resentenced to determine his accurate offender score following a comparability analysis. *See Thiefault*, 160 Wn.2d at 417, 420 (setting forth this remedy).

Issue 4: Whether, at resentencing, the trial court must strike the unlawful community custody condition requiring Mr. Yallup to pay restitution.

The trial court lacked authority to order, as a condition of community custody, that Mr. Yallup pay restitution for counseling obtained by the victim. CP 103, 111. This condition must be stricken from Mr. Yallup's judgment and sentence.

A defendant may object to community custody conditions for the first time on appeal. *See State v. Jones*, 118 Wn. App. 199, 204, 76 P.3d 258 (2003). Whether the trial court has statutory authority to impose a community custody condition is reviewed de novo. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). A trial court may impose a sentence only if it is authorized by statute. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007).

The trial court may order an offender to pay restitution to compensate crime victims for counseling reasonably related to the offense. RCW 9.94A.753(3). Here, however, restitution was not requested at the sentencing hearing (*see* RP 119-27), there is no indication in the online

court docket for this case that any restitution hearing has ever occurred (*see* Klickitat County No. 15-1-00121-5, docket sub-numbers 01-59), and the trial court did not order restitution (*see id.*).

The statutes authorizing community custody conditions do not authorize the court to order the offender to pay the costs of a crime victim's counseling as a condition of community custody. RCW 9.94A.703 sets forth mandatory, waivable, and discretionary conditions of community custody, and restitution for counseling expenses is not included in any of these categories.

Additionally, requiring Mr. Yallup to pay counseling as a condition of community custody essentially delegates the court's duty to determine restitution to the Department of Corrections (DOC). It is the function of the judiciary to determine guilt and impose sentence. *State v. Sansone*, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005). The imposition of restitution is part of an SRA sentence, and the SRA makes it clear that the court is responsible for determining restitution. RCW 9.94A.505; RCW 9.94A.753. The court may not delegate its authority to set the amount of restitution to another agency. *State v. Forbes*, 43 Wn. App. 793, 800, 719 P.2d 941 (1986) (court could not order the defendant to pay restitution "in the amount set by King County Prosecutor's Office VAU.").

Our courts have already addressed this issue and found the remedy for unlawfully ordering restitution as a condition of community custody is to "remand to the trial court to remove this community custody condition." *State v. Land,* 172 Wn. App. 593, 604, 295 P.3d 782 (2013) (remanding to strike restitution as condition of community custody). *See also State v. O'Cain*, 144 Wn. App. 772, 775, 184 P.3d 1262 (2008) (where the trial court lacked authority to impose a community custody condition, the appropriate remedy was remand to strike the condition). Mr. Yallup requests this Court remand for the trial court to strike the community custody condition that he "[p]ay restitution for counseling obtained by [the] victim." CP 103, 111.

Issue 5: Whether this Court should deny the imposition of costs on appeal in the event the State is the substantially prevailing party on review.

Mr. Yallup preemptively objects to any appellate costs being imposed against him, should the State be the prevailing party on appeal, pursuant to the recommended practice in *State v. Sinclair,* 192 Wn. App. 380, 385-94, 367 P.3d 612, 618 (2016), this Court's General Court Order issued on June 10, 2016, and RAP 14.2 (amended effective January 31, 2017).

The trial court did not inquire into Mr. Yallup's ability to pay legal financial obligations and only imposed mandatory costs in the judgment

and sentence. *See* RP 119-27; CP 103-04. An order finding Mr. Yallup indigent was entered by the trial court (CP 137-38), and there has been no improvement to this indigent status according to Mr. Yallup's Report as to Continued Indigency filed contemporaneously with this brief.

The imposition of costs under the circumstances of this case would be inconsistent with those principles enumerated in *Blazina*. *See State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015). In *Blazina*, our Supreme Court recognized the "problematic consequences" LFOs inflict on indigent criminal defendants. *Blazina*, 182 Wn.2d at 835-37. To confront these serious problems, the Court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." *Blazina*, 182 Wn.2d at 834. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." *Id*.

The *Blazina* Court addressed LFOs imposed by trial courts, but the "problematic consequences" are every bit as serious with appellate costs. The appellate cost bill imposes a debt for losing an appeal, which then "become[s] part of the trial court judgment and sentence." RCW 10.73.160(3). Imposing thousands of dollars on an indigent appellant after

an unsuccessful appeal results in the same compounded interest and retention of court jurisdiction. Appellate costs negatively impact indigent appellants' ability to successfully rehabilitate in precisely the same ways the *Blazina* court identified for trial costs.

Although *Blazina* applied the trial court LFO statute, RCW 10.01.160, it would contradict and contravene our High Court's reasoning not to require the same particularized inquiry before imposing costs on appeal. Under RCW 10.73.160(3), appellate costs automatically become part of the judgment and sentence. To award such costs without determining ability to pay would circumvent the individualized judicial discretion *Blazina* held was essential before imposing monetary obligations. This is particularly true where, as here, Mr. Yallup has demonstrated his indigency and current and likely future inability to pay costs.

Furthermore, the *Blazina* court instructed *all* courts to "look to the comment in GR 34 for guidance." *Blazina*, 182 Wn.2d at 838. That comment provides, "The adoption of this rule is rooted in the constitutional premise that *every level of court* has the inherent authority to waive payment of filing fees and surcharges on a case by case basis." GR 34 cmt. (emphasis added). The *Blazina* court said, "if someone does meet the GR 34[(a)(3)] standard for indigency, courts should seriously

question that person's ability to pay LFOs." *Blazina*, 182 Wn.2d at 839. Mr. Yallup met this standard for indigency. CP 137-38.

This Court receives orders of indigency "as a part of the record on review." RAP 15.2(e); CP 137-38. "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent." RAP 15.2(f). This presumption of continued indigency, coupled with the GR 34(a)(3) indigency standard, requires this Court to "seriously question" this indigent appellant's ability to pay costs assessed in an appellate cost bill. *Blazina*, 182 Wn.2d at 839. It does not appear to be the burden of Mr. Yallup to demonstrate his continued indigency given the newly amended RAP 15.2, since his indigency is presumed to continue during this appeal. Nonetheless, Mr. Yallup has filed a Report as to Continued Indigency with this opening brief in order to resolve any question about his continued inability to pay appellate costs.

This Court is asked to deny appellate costs at this time. RCW 10.73.160(1) states the "supreme court . . . <u>may</u> require an adult . . . to pay appellate costs." (Emphasis added.) "[T]he word 'may' has a permissive or discretionary meaning." *Staats v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). *State v. Blank, infra*, too, recognized appellate courts

have discretion to deny the State's requests for costs. *State v. Blank*, 131 Wn.2d 230, 252-53, 930 P.2d 1213 (1997). Pursuant to RAP 14.2, effective January 31, 2017, this Court, a commissioner of this court, or the court clerk are now specifically guided to deny appellate costs if it is determined the offender does not have the current or likely future ability to pay such costs. RAP 14.2. Importantly, when a trial court has entered an order that the offender is indigent for purposes of the appeal, that finding of indigency remains in effect pursuant to RAP 15.2(f), unless the commissioner or court clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency. *Id*.

There is no evidence Mr. Yallup's current indigency or likely future ability to pay has significantly improved since the trial court entered its order of indigency in this case. To the contrary, Mr. Yallup's Report as to Continued Indigency demonstrates his ongoing indigency and likely future inability to pay. Mr. Yallup has no real or personal property, no known employment history, and only $25 income per month from a tribal per capita. Mr. Yallup's PTSD, anxiety and stress may interfere with his ability to seek future employment, along with the fact that Mr. Yallup would be in his mid-sixties, at a minimum, when first considered for release if his convictions stand.

Given Mr. Yallup's dire financial circumstances, appellate costs should not be imposed in this case.

F. **CONCLUSION**

Based on the foregoing, Mr. Yallup requests that one count of rape of a child be reversed and dismissed with prejudice for insufficient evidence. If this Court disagrees that one count lacks sufficient evidence, both counts should nonetheless be reversed and dismissed due to the trial court's failure to enter written findings, an error that cannot be remedied by remand at this time. At a minimum, this matter should be resentenced to require the trial court to conduct a comparability analysis before counting the 1996 federal conviction in Mr. Yallup's offender score. The matter should also be remanded to strike the community custody condition requiring Mr. Yallup to pay restitution for the victim's counseling. Finally, Mr. Yallup preemptively requests this Court deny the imposition of any costs on appeal.

Respectfully submitted this 4th day of May, 2017.

/s/ Kristina M. Nichols _____
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Attorney for Appellant

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON	)	
Plaintiff/Respondent	)	COA No. 34925-0-III
vs.	)	Klickitat County No. 15-1-00121-5
	)	
EASTON CHARLES YALLUP	)	PROOF OF SERVICE
Defendant/Appellant	)	
_____	)	

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on May 4, 2017, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Easton Charles Yallup, DOC #343551
T-A-64
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001-2049

Having obtained prior permission, I also served a true and correct copy of the same document on the Respondent at paappeals@klickitatcounty.org using Division III's e-service feature.

Dated this 4th day of May, 2017.

/s/ Kristina M. Nichols_____
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