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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DALE TENINTY, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Has the defendant established a due process violation in the excusal of juror 34 for cause, where the defendant has failed to demonstrate that the reason for the juror's excusal disparately affects people of color, and where this argument was not made below and is not a manifest error?
2. If there was some error in the for cause excusal of juror 34, was that error harmless beyond a reasonable doubt where juror 34 would never have deliberated on Mr. Teninty's jury?
3. Does the defendant's argument that the trial court abused its discretion in admitting child hearsay require this Court to improperly second-guess the trial court's factual and credibility determinations?
4. Is the defendant's challenge to the court's child hearsay ruling unpreserved where the challenge requires this Court to rely on trial testimony, given after the child hearsay ruling was already made, no objection was made in the trial court on this basis, and the claimed error was not manifest such that this Court should have sua sponte reversed its earlier child hearsay ruling?
5. Did the court abuse its discretion in finding that the two counts first degree child molestation were not the same course of conduct for sentencing purposes where the evidence established that the crimes occurred at different times and places?

II. STATEMENT OF THE CASE

The State charged Dale Teninty by amended information with one count of attempted first degree child molestation, occurring on or about October 7, 2016, and three counts of first degree child molestation occurring on or about between January 1, 2014, and October 6, 2016. CP 97-98. A jury convicted the defendant of two counts of first degree child molestation,

acquitting the defendant of the other two counts. CP 147-50. Because the defendant challenges the court's ruling admitting child hearsay, most facts below are taken from the child hearsay hearing.¹

Factual Background.

A.E., who was born on May 8, 2009, lived with, among others, her mother, Tonya Best, and for a time, Dale Teninty. RP 30-31, 33. Mr. Teninty was Mrs. Best's sister's boyfriend, and lived with the Bests for approximately two years.² RP 34. Although Mr. Teninty and his girlfriend separated, he continued to live with the Bests, having become friends with Mr. Best. RP 34-35.

When living with the Bests, Mr. Teninty usually slept in Mrs. Best's father's lift chair ("papa's chair") or outside on the front porch on a green chair. RP 37. Mr. Teninty was "Uncle Dale" to the children, and on occasion, Mr. Teninty babysat them; he would play with them as a "normal" uncle would. RP 38, 39. Because Mrs. Best worked graveyard shifts, she was often away from the house at night and would sleep during the day. RP 39.

¹ The State notes that in defendant's argument relating to the admission of child hearsay, the defendant cites trial testimony, not that from the child hearsay hearing (which was considered by the court in its ruling). Br. 27-29.

² Mr. Teninty moved into the residence in late 2014. RP 670.

Mrs. Best did not have any concerns with Mr. Teninty's treatment of A.E., who would sit on his lap and watch videos. RP 40. However, in October 2016,³ Mrs. Best awoke from her afternoon nap early, and found A.E. sitting on a bed, her lap covered by a blanket; one of Mr. Teninty's hands was under the blanket in the front, and his other hand was on A.E.'s back. RP 41, 43-44. Mr. Teninty and A.E. jumped when Mrs. Best entered the room, and Mr. Teninty threw up his hands. RP 43-44. Mrs. Best called her husband because she did not know what else to do. RP 45. As a result, Mrs. Best and her husband told Mr. Teninty to leave the house. RP 46.

Mrs. Best did not ask A.E. to provide any details of what had occurred and A.E. did not volunteer a disclosure of abuse at that time. RP 46. A few days later, however, when A.E. was being bathed by an older female cousin, Makayla Mason, A.E. disclosed to Ms. Mason⁴ that

³ At the time of the events, A.E. was seven-years-old. At the time of trial, she was ten-years-old. RP 436.

⁴ Ms. Mason described their relationship as "close," indicating she had been in A.E.'s life since she was a baby and saw her every other weekend. RP 60. When A.E. had a bad day at school, she would call Ms. Mason when she needed someone to speak to. RP 61. Ms. Mason had also talked to A.E. about the value of truthfulness and believed A.E. could tell the difference between the truth and a lie. RP 61-62.

Mr. Teninty had touched her.^{5, 6} RP 48-49. When Mrs. Best spoke with A.E. that evening, all A.E. would tell her was that she was “inappropriately uncomfortably touched.” RP 50. Because Mrs. Best had been sexually abused herself, Mrs. Best, like Ms. Mason, did not press her daughter for additional details, believing herself incapable of handling the information about her daughter’s abuse. RP 50, 53. Instead, she called the police, who took a statement from Mrs. Best but not from A.E.⁷ RP 51. Later, Mrs. Best brought A.E. to Partners with Families and Children for a child forensic interview. RP 51.

Tatiana Williams was a trained forensic child interviewer; law enforcement would refer children to her for interviews. RP 92. In conducting a child interview, Ms. Williams would ask open-ended, general questions to allow the child to provide narrative responses. RP 95, 97. While Ms. Williams generally reviewed police reports prior to engaging in a child forensic interview, she would not introduce that information into the

⁵ During the bath, Ms. Mason observed that A.E. appeared upset. RP 63. Ms. Mason asked her if she had something to tell her; A.E. appeared to look away; Ms. Mason told A.E. she did not need to speak to her if she did not want to; then, A.E. told Ms. Mason that “Uncle Dale touched” her “no-no part,” which was A.E.’s name for her vagina or around her buttocks. RP 64-65. Because Ms. Mason had experienced a similar situation, she did not press A.E. for details. RP 65.

⁶ During trial, A.E. also testified that the first person she told about the abuse was her cousin, Ms. Mason, and the disclosure was made during a bath. RP 449.

⁷ Per department policy, Officer Tim Schwering did not speak with A.E.; instead, he deferred to a detective who was trained in child interviews. RP 606.

interview itself, seeking to obtain the information from the child without suggesting it. RP 100. In responding to Ms. Williams's questions, a child could provide nonverbal answers, including drawings or hand gestures. RP 101. On occasion, a child could be interviewed a second time if, among other reasons: the child indicated he or she has information to share but wished to share at a different time; the interview was protracted and the child needed a break; or the child did not feel well. RP 101-02.

Ms. Williams interviewed A.E. on two occasions: December 8, 2016, and January 24, 2017. RP 104. During the first interview, A.E. told Ms. Williams that she was uncomfortable, that she did not remember, but that there were things to talk about with Ms. Williams, and wrote, in her own spelling, the word, "inappropriate." RP 109-10; Ex. P13, P15, P31. During the first interview, Ms. Williams took a break from speaking with A.E. to see if the investigating detective had additional questions for A.E.; however, she found that the detective had left on an emergency. RP 108. As a result of A.E.'s desire not to speak at that time and the detective's absence, Ms. Williams decided to request A.E. return at a different time. RP 110. Ms. Williams testified that there has been research indicating that multiple interviews are not suggestive to the child when those interviews allow the child to become more comfortable, build rapport, and allow the child to build upon the earlier conversation. RP 110.

A.E. returned for the second interview on January 24, 2017. Ex. P14. During that interview, A.E. described that “Uncle Dale” lived in her home, Ex. P14, P32 at 20 ll. 835-41; he did “inappropriate” things to her, Ex. P14, P32 at 25 ll. 1074-80; that the “inappropriate” things occurred outside on the porch, and inside when the others were sleeping, both on papa’s chair and on the couch, Ex. P14, P32 at 26-27 ll. 1087-1149, 28 ll. 1178-88; she felt scared when the inappropriate things happened to her, Ex. P14, P32 at 29 ll. 1252-59; in writing and orally, A.E. stated “Uncle Dale” had touched and played with her “privates,” and drew a sad face next to the word, Ex. P14, P18, P19, P20, P32 at 32 ll. 1372-79; in writing, by illustration and verbally, she indicated “Uncle Dale” had used his hands to touch her privates, Ex. P14, P17, P32 at 33-34 ll. 1432-71; by writing, illustration, and eventually orally, she disclosed that “Uncle Dale” had told her to touch his privates, but she had not done so, and had not seen his privates, Ex. P14, P21, P22, P32 at 43, 46, 53 ll. 1881-83, 2003-09, 2301-16; and lastly, A.E. disclosed, in writing and orally, that “Uncle Dale” had touched her both inside her underwear and outside of her clothes, when he did so, it made her privates feel “weird,” and she was scared. Ex. P14, P26, P27, P32 at 55-56 ll. 2394-2436, P32 at 59 ll. 2572-97. She was able to orally articulate that the private area that “Uncle Dale” touched is used for going to the bathroom

– specifically “to pee.”⁸ Ex. P14, P32 at 60 ll. 2612-53. After she began to disclose more information to Ms. Williams, A.E. said that it felt good to tell Ms. Williams what had occurred. Ex. P14, P32 at 35 ll. 1490-98. Aside from her accusation against Mr. Teninty, A.E. never alleged anyone else had touched her inappropriately. RP 40.

Procedural History.

The State moved to admit A.E.’s statements to her mother, Ms. Mason and Ms. Williams pursuant to the child hearsay statute, RCW 9A.44.120. RP 119. After hearing testimony and argument from the State and defense counsel, the court admitted the child forensic interview and other statements A.E. made, finding A.E. to be competent to testify and the child hearsay admissible.

Specifically, regarding A.E.’s competency as a witness, the court found A.E. understood the obligation to tell the truth, manifested by many considerations, including her mother’s impression that she is truthful, the fact that she corrected Ms. Williams during the forensic interview, and the

⁸ During trial, A.E. similarly testified that Mr. Teninty used his hand to touch her “front-private,” under her underwear. RP 447. Sometimes this touching hurt her. RP 447. At trial, A.E. recalled only that the touching occurred on the front porch. RP 448. She testified, however, that the touching that occurred on the front porch occurred more than once and on different days. RP 448. A.E. was too afraid to tell her mother about the touching until Mr. Teninty was gone. RP 457.

A.E. also testified that she believed her memory was better when she talked with Ms. Williams, rather than at the time of her testimony. RP 451.

court's impression that she credibly testified during the child hearsay hearing to understanding her obligation to tell the truth. RP 151. The court found A.E. to be a "really impressive little girl" who was "poised and authentic" and the court did not have a sense that "she was overstating anything." RP 151. Regarding her ability to receive an accurate impression of the events that had occurred, the court found A.E. to be a "bright little girl" who was able, "albeit three years later...to articulate things that happened then that demonstrated the ability to observe and comprehend what was happening." RP 151. The court found that her ability to articulate the events that had occurred by drawing them during the forensic interview was her way of informing adults "but not having to speak the unspeakable." RP 152.

Regarding the sufficiency of A.E.'s memory to retain an independent recollection of the occurrence, the court found that at the time of the child hearsay hearing, A.E. remembered the "most salient" portions of what had occurred, including that she had been touched on the porch in her "no-no or private area" and that at the time of the forensic interview, she was "quite descriptive" of what had occurred three to four months before. RP 152. The court believed that A.E.'s responses were the product of her own memory, and that her memory was sufficient to retain an independent recollection of the occurrence. RP 152. Further, the court

found A.E. had the capacity to describe the occurrence, and had done so in court, to Ms. Williams and to her cousin. RP 153. The court found that A.E. had “tremendous capacity” to understand simple questions, both during the forensic interview, when she was seven years old, and at the hearing, when she was ten years old. RP 153. Based on those findings, the court found A.E. was competent to testify at trial. RP 153.

Regarding the *Ryan*⁹ factors, relevant to the admissibility of child hearsay, the court found that it had not been presented with any evidence that A.E. had a motive to lie; the court found that A.E. was “firm to not allow things to be attributed to what happened or what she alleges happened that didn’t happen.” RP 154. The court found A.E. “to be of as high character as one might expect of a seven or ten-year-old”; she was “diligent” in answering questions, attentive, and chose not to say more than she could recall. RP 153-54.

Although each time A.E. disclosed abuse, only one person heard her statements, the court found that the statements described the abuse with great consistency. RP 155. Regarding the spontaneity of the statements, the court found that Ms. Williams was a “credentialed examiner” who was careful not to ask suggestive questions; further, the court found by the

⁹ *State v. Ryan*, 103 Wn.2d 165, 175-76, 691 P.2d 197 (1984).

circumstances described that neither A.E.'s mother nor Ms. Mason had planted any ideas in A.E.'s head. RP 155-56. The court found A.E.'s relationship with her mother and cousin was close, and the statements were made within days of the event in the bedroom which was witnessed by Mrs. Best. RP 156. The court did not find that A.E.'s relationships with any of the individuals to whom she disclosed created any question about the reliability of her statements. RP 157.

The court found A.E.'s disclosures to be expressions of past fact. RP 160-61. Regarding whether cross-examination could demonstrate A.E.'s lack of knowledge, the court addressed A.E.'s purported inability to identify or recall Mr. Teninty,¹⁰ finding her body language during the hearing suggested otherwise. RP 161. Additionally, the court found that A.E. demonstrated knowledge and a recollection of the circumstances that she had disclosed to her cousin, mother and the forensic interviewer. RP 161. The court further found that the circumstances did not suggest that A.E. misrepresented Mr. Teninty's involvement; she was very careful to describe what did and did not happen, was "authentic" and careful not to embellish. RP 161. Thus, under all of the *Ryan* factors, the court found A.E.'s pretrial statements admissible. RP 162.

¹⁰ No person named "Dale," other than Dale Teninty, ever lived in the home with the Bests and A.E. RP 467.

During individual voir dire, prospective juror 34 indicated to the court that he once had a friend who, while in his thirties, had been accused of “having relations with a minor,” and the alleged victim was fourteen or fifteen-years-old. RP 256-57. The matter proceeded to trial and juror 34 testified as a “character witness” for the accused. *Id.* Juror 34 believed his friend spent months in jail “for nothing.” RP 258. Juror 34 indicated that “if there’s proof and I believed that somebody did something, well, then I’m going to say guilty. But if I don’t fully believe that they did something, I would say not guilty,” RP 258, and that he could be unbiased, RP 259; however, he also indicated that he believed his friend had been treated unfairly, RP 259, was wrongfully charged, RP 258, 261, and, when probed about whether his friend’s experience could impact his view of the court case, replied, “You know, I guess I can’t really say because I don’t know the circumstances. *But I guess if I feel it’s along the same lines, I could be persuaded by the situation,*” RP 261 (emphasis added). Juror 34 believed the young alleged victim in his friend’s trial was “trying to get rid of [his friend from her house] so she could have what she wanted. And that’s the way the jury viewed it at the end. So if it’s the same kind of thing, I could

see where I could be persuaded to see it”¹¹ and conceded “it’s possible” that his background could impact his abilities to sit as a juror. RP 262.

The State moved to strike juror 34 for cause, arguing that he admitted that his ability to be fair and impartial might be affected by his experience with his friend who was acquitted of a similar crime. RP 264. The defense opposed the court striking juror 34 for cause, arguing that the statements made by juror 34 indicated that he did not have a pretrial bias in favor of either side, and would convict if the evidence “led him that way.” RP 264. The defense argued that juror 34’s belief that the alleged victim in his friend’s case had fabricated the allegations was not “on all fours with the fact pattern in this case.” RP 264.

The judge found significant juror 34’s admission that his friend’s circumstance could “affect his thinking in this case,” and his twice expressed belief that his friend had been wrongfully charged with a crime. RP 264. The court found that if the roles had been reversed and a juror had expressed reservations that were similarly adverse to Mr. Teninty, the court

¹¹ Although A.E. was not specifically alleged to have lied about the abuse to precipitate Mr. Teninty’s departure from the house, the defense *did* argue that her allegations were the product of her suggestibility, RP 453-54, and the end result of the allegations was that Mr. Teninty left the house and A.E. did not see him again, RP 449, 451. There is no way to know if this situation was “similar” enough to juror 34’s friend’s experience to affect juror 34’s ability to fairly deliberate Mr. Teninty’s matter.

would strike that juror for cause out of fairness to the defendant; out of fairness to the State, therefore, the court struck juror 34 for cause based on his expressed predisposition against the prosecution's case. RP 265.

During trial, the witnesses testified in a manner generally consistent with their testimony during the child hearsay hearing. Mr. Teninty testified on his own behalf, stating nothing occurred during the incident observed by Mrs. Best – he had only turned on the television for the children and left the room. RP 666-67. Although he averred nothing happened while he lived in the house, he agreed there were times that he was alone, sitting under a blanket with A.E., on the front porch. RP 675. Mr. Teninty also agreed that there had been no arguments or issues between himself and the Bests at the time A.E. made the allegations. RP 692.

III. ARGUMENT

A. THE DEFENDANT HAS FAILED TO DEMONSTRATE ANY ERROR IN THE REMOVAL OF JUROR 34 FOR CAUSE.

Citing *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), *City of Seattle v. Erickson*, 188 Wn.2d 721, 398 P.3d 1124 (2017), and *State v. Pierce*, 195 Wn.2d 230, 455 P.3d 647 (2020), the defendant claims that the removal of juror 34 for cause violated due process because the removal of that juror was based upon a “racially disproportionate factor,” i.e., the juror’s association or friendship with a

person acquitted of a crime. Br. at 12, 14. Defendant does not claim that the removal of juror 34 violated *Batson* or its progeny, nor could he do so, as he has failed to demonstrate that juror 34 was a member of a racially cognizable group, and in fact, concedes that juror 34's race is immaterial to his argument. Br. at 10; *Erickson*, 188 Wn.2d at 732. Thus, he has failed to make even a prima facie case suggesting an inference of discriminatory purpose that would give rise to a *Batson* claim.¹² Instead, he claims that the reliance on the factor used to remove juror 34 from his jury panel "disproportionately excludes people of color from juries." Br. at 12-13. Notwithstanding that the defendant has failed to prove that any person of color was excluded from his jury for this, or any other reason, this claim fails for several reasons.

1. Applicable law.

The State denies a criminal defendant equal protection of the laws when it excludes members of the jury, even during a peremptory challenge, on the basis of race. A juror may be excluded if unfit, but a person's race

¹² The accused carries the burden of showing the ethnicity of the removed and remaining jurors when asserting a *Batson* challenge on appeal. *State v. Bennett*, 374 N.C. 579, 843 S.E.2d 222, 231 (2020); *State v. Raynor*, 334 Conn. 264, 221 A.3d 401, 404 (2019); *Commonwealth v. Reid*, 627 Pa. 151, 99 A.3d 470, 485 (2014). Subjective impressions of race by counsel do not suffice. *State v. Brogden*, 329 N.C. 534, 407 S.E.2d 158 (1991).

does not render him or her unfit as a juror. *Thiel v. S. Pac. Co.*, 328 U.S. 217, 227, 66 S.Ct. 984, 90 L.Ed. 1181 (1946); *Batson*, 476 U.S. at 87. A juror may be excused for cause “for the existence of a state of mind on the part of the juror in reference to the action, or to either party, which satisfies the court that the challenged person cannot try the issue impartially and without prejudice to the substantial rights of the party challenging...which is known...as actual bias.” RCW 4.44.170. The judge who observed and heard the juror is in the best position to determine whether to make an excusal for cause, and the appellate court reviews the decision to excuse a juror for cause for manifest abuse of discretion. *State v. Perez*, 166 Wn. App. 55, 67, 269 P.3d 372 (2012).

Here, the defendant claims that juror 34 was excused for cause because of his association with an individual acquitted of a crime, and that such a dismissal violated due process. Contrary to the defendant’s claim, however, the court dismissed the potential juror because the juror’s experience with a person acquitted of a child sex offense *affected his state of mind* such that he may have had difficulty in being fair and impartial to the State during a trial on a similar charge. The defendant has failed to demonstrate how, based on this record, the court abused its discretion in excusing juror 34, who expressly indicated his background could affect his ability to remain impartial. The juror was properly excused.

2. Defendant's claim is unsupported by sufficient authority or reasoned analysis.

Although defendant cites a single law review article which avers that “data about arrests, charges, convictions, and imprisonment show racial and ethnic disproportionalities in Washington’s criminal justice system,” Br. at 13, the defendant failed to provide the trial court (or this Court) with any statistics demonstrating a correlation between race or ethnicity and exoneration or acquittal rates. Even assuming that minorities *are charged and convicted* at a disparate rate, it does not necessarily follow that they are acquitted at a greater rate as well. If people of color suffer a greater incarceration rate, it stands to reason they do not enjoy a greater acquittal rate. Thus, the foundational premise of the defendant’s argument (that minorities are more likely to be among those who are acquitted of a crime, and therefore, the excusal of a juror based on association with one exonerated of a crime disproportionately affects minority jurors) is inherently flawed.

3. Defendant's current challenge is unreserved.

During trial, the defendant opposed the excusal of juror 34 for cause based upon his argument that juror 34 indicated that he could be fair to both parties. Now, for the first time on appeal, the defendant alleges that the excusal of the prospective juror was impermissible because it was

predicated upon a “racially disproportionate factor.” This claim is unpreserved.

RAP 2.5(a)(3) permits an appellate court to review an unpreserved claim of error if it involves a “manifest error affecting a constitutional right.” RAP 2.5(a)(3) analysis involves a two-prong inquiry: first, the alleged error must truly be of constitutional magnitude and, second, the asserted error must be manifest. *State v. Kalebaugh*, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). Due process is an issue of constitutional magnitude.

Analysis of whether an issue is manifest must strike “a careful policy balance between requiring objections to be raised so trial courts can correct errors and permitting review of errors that actually resulted in serious injustices to the accused.” *State v. Dunleavy*, 2 Wn. App. 2d 420, 427, 409 P.3d 1077, *review denied*, 190 Wn.2d 1027 (2018) (citing *Kalebaugh*, 183 Wn.2d at 583). To establish manifest error, the complaining party must show actual prejudice. *Kalebaugh*, 183 Wn.2d at 584. “To demonstrate actual prejudice, there must be a plausible showing...that the asserted error had practical and identifiable consequences in the trial of the case.” *Id.* (quoting *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)). The “consequences should have been *reasonably obvious* to the trial court, and the facts necessary to adjudicate the claimed error must be in the record.”

Dunleavy, 2 Wn. App. 2d at 427 (internal citations omitted) (emphasis added).

The defendant's challenge to the excusal of juror 34 is not predicated on an objection made in the trial court. The current challenge has nothing to do with whether the trial court abused its discretion by finding juror 34 was *actually biased* against the State, the basis expressed by the court for the juror's excusal, and the basis challenged by the defendant at trial. *See e.g., State v. Reano*, 67 Wn.2d 768, 771, 409 P.2d 853 (1966). (The court will not review a case on a theory different from that which was presented at the trial level). Notwithstanding the fact that defendant has failed to demonstrate that juror 34 was *actually a* minority (or his acquitted friend was a minority) or that that such a practice does, in fact, disproportionately affect prospective minority jurors, the defendant's claim also fails because it was not raised below and therefore, the trial court was not afforded an opportunity to make a record regarding the juror's ethnicity, his friend's ethnicity, or otherwise consider and make a record as to the merits of the defendant's claim. It is the defendant's obligation to provide this Court with a record that is sufficient for review. If the trial court could not have foreseen the potential error or the record on appeal does not contain sufficient facts to review the claim, the error is not manifest. *State v. Davis*, 175 Wn.2d 287, 344, 290 P.3d 43 (2012). Notably, in *Davis*, the court

rejected a challenge to the constitutionality of the death penalty because the defendant provided unsupported statistics to the trial court, as well as statistics presented for the first time on review (which were stricken by the Supreme Court), finding “a severe lack of information on the death penalty’s implementation, which makes it difficult for us to perform any meaningful analysis.” *Id.* at 345. Based on the lack of any record, the defendant’s inadequately supported argument, and the fact that there has been no showing that the alleged error is manifest, this Court should not review this issue for the first time on appeal.

4. If any error occurred, it was harmless beyond a reasonable doubt.

The defendant claims that the error alleged was structural error, and therefore, no prejudice is required and the conviction must be reversed. Assuming some error occurred, it certainly was not structural error, nor was it a harmful error.

Structural error is a special category of constitutional error that affects the framework within which the trial proceeds, rather than simply an error in the trial process itself. *State v. Wise*, 176 Wn.2d 1, 13-14, 288 P.3d 1113 (2012). Where there is such an error, “a criminal trial cannot reliably serve its function as a vehicle for determin[ing] guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.” *Id.* at 14. The defendant has failed to demonstrate how this claimed error is

structural in nature or how it undermined the trial process so grievously that it cannot be said Mr. Teninty's trial was fundamentally fair.

Unless a structural error, a violation of the right to due process is subject to harmless error analysis. *State v. Irby*, 170 Wn.2d 874, 885, 246 P.3d 796 (2011). Here, any theoretical error was harmless beyond a reasonable doubt.

Even if juror 34 had not been struck for cause, he would not have decided Mr. Teninty's guilt or innocence.¹³ Alternates 1, 2, and 3 were dismissed prior to deliberations. RP 758, 760. Alternates 1, 2, and 3 were jurors who originally were designated jurors 30, 33, and 37. CP 99-103. Thus, even if the court had not granted the motion to strike juror 34 for cause, and even assuming juror 34 had not been subject to one of the two peremptory strikes the State reserved and waived for the alternate jurors, CP 100, 102, juror 34 would have been selected *only* as an alternate juror (instead of juror 37)¹⁴ and would have occupied the third alternate juror seat. As the third alternate, juror 34 would have been dismissed prior to deliberations. For the sake of argument, the use of a for cause challenge to

¹³ *See Irby*, 170 Wn.2d at 886, finding the State had failed to meet its burden to demonstrate harmlessness beyond a reasonable doubt because it failed to demonstrate that the jurors who were excused in the defendant's absence "had no chance to sit on Irby's jury."

¹⁴ Alternate 1 was juror 30 and Alternate 2 was juror 33. CP 100.

excuse juror 34 had no effect on the jurors who actually comprised Mr. Teninty's jury. Any error, therefore, is harmless beyond a reasonable doubt as juror 34 would not have been seated on Mr. Teninty's jury and there is no indication that the jurors who did deliberate were biased or that Mr. Teninty otherwise did not receive a fair trial.

B. THE COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING A.E.'S HEARSAY STATEMENTS.

1. Standard of Review and Applicable Law

On appeal, a trial court's determination of the admissibility of child hearsay statements is reviewed for abuse of discretion, and the trial court is necessarily vested with considerable discretion in evaluating the indicia of reliability. *State v. Swan*, 114 Wn.2d 613, 648, 790 P.2d 610 (1990). "Abuse of discretion requires the trial court's decision to be manifestly unreasonable or based on untenable grounds or untenable reasons." *State v. Athan*, 160 Wn.2d 354, 375-76, 158 P.3d 27 (2007) (citing *State v. Michielli*, 132 Wn.2d 229, 240, 937 P.2d 587 (1997)). A trial court abuses its discretion when its decision adopts a view that no reasonable person would take. *State v. Sisouvanh*, 175 Wn.2d 607, 623, 290 P.3d 942 (2012). Reviewing courts defer to the trial court on issues of witness credibility and the weight of the evidence because the trial court has had the opportunity to evaluate the witnesses' demeanor in court. *Swan*, 114 Wn.2d at 666.

The legislature has determined that statements made by children under the age of ten, relating to “sexual contact performed with or on [them] by another, describing any attempted act of sexual contact with or on the child by another, or describing any act of physical abuse of the child by another that results in substantial bodily harm” are admissible under certain circumstances.¹⁵ RCW 9A.44.120.

State v. Ryan, 103 Wn.2d at 175-76, sets forth a non-exhaustive list of criteria for the court to consider in determining whether such “child hearsay” statements are reliable and may be admitted at trial. Those factors include: (1) whether there is an apparent motive to lie; (2) the general character of the declarant; (3) whether more than one person heard the statement; (4) whether the statements were made spontaneously; (5) the timing of the declaration and the relationship between the declarant and the witness; (6) whether the statement contains an express assertion about past

¹⁵ Those circumstances are:

(b) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability; and

(c) The child either:

(i) Testifies at the proceedings; or

(ii) Is unavailable as a witness: except that when the child is unavailable as a witness, such statement may be admitted only if there is corroborative evidence of the act.

RCW 9A.44.120(1).

fact; (7) whether cross-examination could not help show the declarant's lack of knowledge; (8) whether the possibility of the declarant's faulty recollection is remote; and (9) whether the circumstances surrounding the statement are such that there is no reason to suppose that the declarant misrepresented the defendant's involvement. *Ryan*, 103 Wn.2d at 175-76 (citing *State v. Parris*, 98 Wn.2d 140, 145, 654 P.2d 77 (1982)); *Dutton v. Evans*, 400 U.S. 74, 88-89, 91 S.Ct. 210, 27 L.Ed.2d 213 (1970).^{16, 17} A trial court applies a totality of the circumstances test in evaluating the reliability of child hearsay statements under the *Ryan* factors, as each factor is non-exclusive and non-essential. *Swan*, 114 Wn.2d at 647-52. The factors must only be "substantially met." *Id.* at 652.

In this case, the State sought to admit statements made by A.E. to her mother (Mrs. Best), her cousin (Ms. Mason), and to the forensic interviewer (Ms. Williams). Before ruling on the State's motion to admit the child hearsay, the court considered the testimony of those four individuals as well as the videotaped interviews of A.E. with Ms. Williams.

¹⁶ The first five *Ryan* factors are derived from *Parris*, and the next four factors are derived from *Dutton*.

¹⁷ *State v. Karpenski* has observed that several of these factors are of "doubtful validity" and that the United States Supreme Court has disapproved of factors seven, eight and nine and the sixth factor is "of little use" when applying RCW 9A.44.120. 94 Wn. App. 80, 110-11 n.125-28, 971 P.2d 553 (1999).

The defendant maintains on appeal that the trial court abused its discretion in admitting A.E.'s out of court statements, claiming that A.E.'s memory had been tainted by her mother and cousin. This claim fails because the defendant has failed to demonstrate the trial court abused its discretion based on the testimony given during the child hearsay hearing.

Briefly, as set forth above, after the child hearsay hearing the trial court found A.E. had no motive to lie, RP 154; was of "as high character" as one would expect for a child, RP 154; was diligent in answering questions, and only stated what her memory recalled, RP 153-54; was firm to not allow things to be attributed to the defendant that did not happen, RP 154; *was not influenced by her mother or Ms. Mason*, RP 156; did not have any relationships that created any question regarding the reliability of her statements, RP 157; and the circumstances and A.E.'s authenticity did not suggest that A.E. had misrepresented Mr. Teninty's involvement, RP 161.

For such hearings, the appellate court defers to the fact finder on the resolution of conflicting testimony, credibility determinations, and the persuasiveness of the evidence. *See State v. A.X.K.*, 12 Wn. App. 2d 287, 298, 457 P.3d 1222 (2020) (citing *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004)). Those determinations are not subject to review. *Id.* (citing *State v. Cardenas-Flores*, 189 Wn.2d 243, 266, 401 P.3d 19 (2017)).

Therefore, here, the court's determination that A.E. was authentic and credible while testifying, and the court's belief that Ms. Mason and Mrs. Best were truthful when they told the court that they had not pressed A.E. for additional details or otherwise suggested details to her by discussing the events at length, are not subject to review.¹⁸ Because the defendant's current claim that A.E.'s testimony was tainted by Mrs. Best and Ms. Mason requires this Court to second-guess the credibility determination of the trial court,¹⁹ it necessarily fails.

2. Defendant's claim that trial testimony undermined the court's child hearsay ruling is unpreserved.

In his brief, the defendant cites to no portion of the child hearsay hearing report of proceedings, opting instead to cite to the trial record in support of his argument. The State can only assume, therefore, that the defendant intends to undermine the trial court's child hearsay ruling with the trial testimony that was given after the court made its child hearsay ruling. Any error relating to the subsequent testimony given at trial and its effect on the court's earlier child hearsay ruling is not manifest, such that

¹⁸ This finding is supported by Mrs. Best and Ms. Mason's testimony that each had been through a similar experience and did not press A.E. for additional details pertaining to her allegations.

¹⁹ For that matter, the defendant fails to assign error to the court's finding of fact that Mrs. Best and Ms. Mason did not influence A.E.'s testimony. RP 156. Unchallenged findings of fact are verities on appeal. *A.X.K.*, 12 Wn. App. 2d at 293.

the trial court should have, sua sponte, reversed its earlier ruling admitting the child hearsay.

The State does not dispute that the trial court's initial ruling regarding the admissibility of A.E.'s hearsay statements is subject to appellate review. However, if the defendant seeks to challenge that ruling with testimony that occurred after the ruling was made, the defendant must raise the issue to the trial court and provide the court with an opportunity to address the claimed error. Here, the claim that A.E.'s statements or memory were tainted by her mother and cousin is not "so obvious on the record that the error warrants appellate review" in the absence of a renewed objection at trial, had the defendant believed that the trial testimony undercut the court's earlier ruling admitting the child hearsay. *O'Hara*, 167 Wn.2d at 100. Any claimed error is not "so obvious" that the trial court should have "foreseen the potential error" and corrected it, even in the absence of an objection. *Id.* To the extent that the defendant's challenge to the child hearsay ruling appears to rely on testimony given at trial, rather than at the child hearsay hearing, it is an unpreserved error not subject to review for the first time on appeal.

C. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE COUNTS OF FIRST DEGREE CHILD MOLESTATION DID NOT CONSTITUTE THE SAME COURSE OF CONDUCT.

A trial court's determination of what constitutes the same criminal conduct for purposes of calculating an offender score will not be reversed absent an abuse of discretion or misapplication of the law. *State v. Walden*, 69 Wn. App. 183, 188, 847 P.2d 956 (1993). The defendant has the burden of proving that current offenses constitute the same criminal conduct. *State v. Graciano*, 176 Wn.2d 531, 539-40, 295 P.3d 219 (2013). Because this finding favors the defendant by lowering his offender score, it is the defendant who must convince the sentencing court to exercise its discretion in his favor. *Id.*

The scheme - and the burden - could not be more straightforward: each of a defendant's convictions counts toward his offender score *unless* he convinces the court that they involved the same criminal intent, time, place, and victim. The decision to grant or deny this modification is within the sound discretion of the trial court and, like other circumstances in which the movant invokes the discretion of the court, the defendant bears the burden of production and persuasion.

Id. at 540 (emphasis in original).

Offenses are the same criminal conduct if they require the same criminal intent, are committed at the same time and place, and involve the same victim. RCW 9.94A.589(1)(a). In this context, "intent" does not mean the particular statutory mens rea required for the crime. *State v. Davis*,

174 Wn. App. 623, 642, 300 P.3d 465 (2013). Rather, it means the defendant’s “objective criminal purpose in committing the crime.” *Id.* at 642 (quoting *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990) (“[F]or example, the intent of robbery is to acquire property, and the intent of attempted murder is to kill someone”)). As part of this analysis, courts also look to whether one crime furthered another. *Graciano*, 176 Wn.2d at 540.

Courts narrowly construe the same criminal conduct rule and if any of the three elements is missing, each conviction must count separately in the calculation of the defendant’s offender score. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). This narrow construction disallows most claims that multiple offenses constitute the same criminal act. *Graciano*, 176 Wn.2d at 540.

Here, the trial court did not err in finding that the two acts of first degree child molestation of which the defendant was convicted were not the same criminal conduct. At sentencing, the State argued that, although Mr. Teninty’s victim was the same for each offense, the time and location for each of the offenses was different. RP 791. Count two²⁰ was alleged to

²⁰ In closing argument, the State elected an act to be proved for each count. Count one was the incident alleged to have been observed by Mrs. Best. RP 718. Count two encompassed the molestations occurring in the green chair. RP 719. Count

have occurred in the green chair, which was outside the house. RP 791. Count three was argued to be for those events alleged to have occurred on “papa’s chair,” inside the house. RP 792. A.E. testified that the abuse occurred on more than one occasion. It would have been physically impossible to molest A.E. inside the house on papa’s chair and outside on the green chair at the same time. RP 792.

Based upon A.E.’s statements to Ms. Williams, indicating that the incidents happened at separate times, as well as the fact that at least one incident occurred on papa’s chair and at least one incident occurred on the green chair on the porch, the court found that the evidence did not support a finding that the crimes were the same criminal conduct. RP 804. This decision was based on A.E.’s testimony at trial and her child hearsay statements, and was tenable given that evidence. Ex. P14 at 33:05-35:00, 35:50, 37:10, P32 at 26-27 ll. 1087-1149, 28-29 ll. 1178-1231.

The defendant cites *Walden*, 69 Wn. App. 183, in support of his argument that the trial court abused its discretion in finding count two and count three were not the same criminal conduct. Walden dragged a thirteen-year-boy up a hill; he then forced him to masturbate and perform fellatio on him, and then Walden attempted to anally rape the child. *Id.* at 184. The

three encompassed the acts of molestation occurring in papa’s chair. RP 719. Count four encompassed the acts alleged to have occurred on the couch. *Id.*

Court of Appeals found that the two counts – second degree rape and attempted second degree rape – were the same course of conduct, having occurred at the same place, nearly the same time, with the same victim and the same objective. *Id.* at 188. Here, unlike *Walden*, the abuse occurred over a number of years. When it occurred on the green chair, it occurred outside the house. When it occurred on papa’s chair, it occurred inside the home. Unlike *Walden*, where only one overarching incident occurred, on the hill, in which the defendant violated the child a number of ways, the facts of Mr. Teninty’s case establish that the molestation took place at different times and different locations. The court did not abuse its discretion in finding the offenses were not the same criminal conduct.

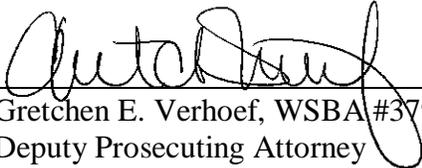
IV. CONCLUSION

The defendant’s challenge to the court’s finding that juror 34 could be challenged for cause in its current iteration is unpreserved and the record is undeveloped for review. Even assuming error to have occurred, juror 34 would never have deliberated on Mr. Teninty’s jury, and therefore, any error is harmless beyond a reasonable doubt. The defendant’s challenge to the discretionary decisions of the court, i.e., the admission of child hearsay and the finding that the offenses were not the same criminal conduct are

without merit. The State respectfully asks this Court affirm the lower court and jury verdicts.

Dated this 27 day of August, 2020.

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

STATE OF WASHINGTON,

Respondent,

v.

DALE TENINTY,

Appellant.

NO. 372537-III

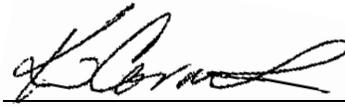
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 27, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Stephanie Taplin
stephanie@newbrylaw.com

8/27/2020
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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