NO. 46426-8-II

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

STATE OF WASHINGTON, Respondent

v.

JOHN THOMAS TYLER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.02-1-00419-9

BRIEF OF RESPONDENT

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B. STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

John Tyler was charged by amended information with 12 counts of Rape of a Child in the First Degree, 2 counts of Child Molestation in the First Degree, and 1 count of Rape of a Child in the Second Degree for a series of incidents of sexual assault that began on September 25, 1992, and ended on February 16, 2002. CP 15-21. Five of the counts charged an

alternative, lesser degree offense. CP 15-21. The case proceeded to trial before The Honorable John Wulle, which commenced on August 20, 2002, and concluded on August 22, 2002, with the jury's verdict. RP 115-572.

The jury found Mr. Tyler guilty of the 15 primary counts and, as a result, left the alternative, lesser degree verdict forms blank. CP 68-87; RP 567-572. The trial court sentenced Mr. Tyler to an exceptional sentence of 787 months. RP 451; CP 90-103. This direct appeal, while coming thirteen years after his convictions and following a personal restraint petition, is properly before the court. Brief of Appellant at 8-9.

II. STATEMENT OF FACTS

John Tyler born September 30, 1966, was Kimberly Kohlschmidt's (formerly Kimberly Rich) boyfriend for about eleven years. RP 249-50. The two had one biological child in common. RP 250. This child was E.M.K. and she was born on January 20, 1993, and was nine years and seven months old at the time of the trial. RP 157, 250. Ms. Kohlschmidt had three additional children, J.A.R., born September 25, 1988, H.M.R., born February 21, 1990, and J.R. born November 6, 1991, they were thirteen years old, twelve years old, and ten years old respectively at the time of the trial. RP 116, 184, 237-38, 250-51.

The family, including Mr. Tyler, lived in an apartment in Clark County from 1992 until the end of January 1995. RP 252-54, 280. In February of 1995 the family moved to a house on Rancho Drive, which was also located in Clark County. RP 252, 255. The family lived together at the Rancho Drive house until February 16, 2002, when H.M.R. disclosed to her mother, Ms. Kohlschmidt, that Mr. Tyler had been sexually abusing her. RP 264-68. On the date of the disclosure, J.A.R. was thirteen years and four months old, H.M.R. was eleven years and eleven months old, and E.M.K. was nine years old.

Following the family's flight from Mr. Tyler, he began sending letters to various people and continued to do the same after the initiation of these proceedings. RP 266-69, 271-74, 300-01, 307-10, 321-23. In his letters, Mr. Tyler stated, amongst many pleas for forgiveness, the following: "I am guilty," "I molested my girls," "I hated myself every time I hurt the girls," "I am guilty of doing this to the girls," "I am a sick person," "Kim, I'm so sorry I've put you through so much pain and the kids to do [sic] so much pain," and "[f]orgive me for the pain and suffering I've caused you guys [(Ms. Kohlschmidt and the kids)]." RP 301-04, 323-324, 330-34.

The same day as H.M.R.'s initial disclosure, E.M.K disclosed to Michelle Ellis, a neighbor, that Mr. Tyler had sexually abused her as well.

RP 234-35. J.A.R. ended up telling nurse Janice Blakemore the same. RP 355-57. The three girls were each examined at the hospital by Dr. John Stirling, and he testified that in completing genital examinations he observed physical findings, i.e., trauma and tearing, consistent with penetration of the hymen in each. RP 366-391.[1] Between Ms. Blakemore and Dr. Stirling, the girls disclosed that the sex abuse by Mr. Tyler started for each of them when they were in Head Start or kindergarten and continued every week or every other week until February 15, 2002, the day before H.M.R.'s disclosure, and included penile-vaginal intercourse, penile-anal intercourse, digital penetration, and oral sex. RP 345-389.

Each of the girls testified at trial consistent with their disclosures. *See generally* RP 115-228. J.A.R. testified that Mr. Tyler began abusing her when they lived at the apartment and when she was in Head Start or kindergarten. RP 119-20, 123. The abuse at the apartment happened more than once and included him putting his penis in her vagina. RP 124-125. Additional abuse and types of abuse happened at the Rancho Drive house, and J.A.R. was able to testify to specific instances, Mr. Tyler's general course of conduct when he sexually abused her, and to specific types of abuse. RP 126-151. For example, J.A.R. testified that Mr. Tyler anally raped her in her room during the daytime and specifically the afternoon,

[1] H.M.R. had been a victim of a sexual assault when she was five years old, which resulted in injuries and Dr. Stirling was the treating physician. RP 375-76.

that Mr. Tyler put clear stuff on his penis from a little tube, that it hurt really badly, that she cried, and that Mr. Tyler told her to shut up. RP 139-140. While J.A.R. testified that anal intercourse did not happen that much, vaginal intercourse happened "a lot." RP 140.

Additionally, J.A.R. explained regarding oral sex:

> [J.A.R.] He would sit down and he would tell me to get on my knees, and he would take his -- he would unzip his pants. And -- and I would have to put my mouth on it, and he would push my head up and down.
>
> [STATE] Okay. Would anything come out of his penis?
>
> [J.A.R.] Yes.
>
> [STATE] What was it?
>
> [J.A.R.] That white stuff.
>
> [STATE] Okay. And where would it go?
>
> [J.A.R.] In my mouth.
>
> [STATE] Okay. And then what did you do with it when it would go in your mouth?
>
> [J.A.R.] He would tell me to swallow it, but I really spit it out.
>
> [STATE] Okay. Where would you spit it out?
>
> [J.A.R.] In the toilet or the sink.
>
> [STATE] Okay. And did that happen one time or more than one time?
>
> [J.A.R.] More than one time.

RP 141-42.

J.A.R. also testified to language and statements Mr. Tyler made while sexually abusing her that buttressed her credibility because of high unlikelihood she would be familiar with the words used or concepts communicated absent him really saying or doing these things. J.A.R. testified that Mr. Tyler would say to her that he liked her "titties," and that he liked her "tight" "pussy." RP 148-49. Additionally, J.A.R. would have to say to him while he was raping her, "I like you F-word-ing me," and that he would grab her breasts and say "Whose are these?" and she would have to reply "yours." RP 149. 357. Mr. Tyler also told J.A.R. that "the reason I want you to get a boyfriend is because if I ever get you pregnant, then we could all blame it on him." RP 150, 358. J.A.R. never previously told anyone about the abuse "because [she] was scared." RP 150.

Though less detailed, H.M.R. and E.M.K. also testified about Mr. Tyler's sexual abuse of them in general, when it started, specific incidents, and Mr. Tyler ejaculating during the sex acts. *See generally* RP 156-228. Furthermore, Detective Barbara Kipp, who had interviewed E.M.K., told the jury about E.M.K's disclosures to her including the fact that Mr. Tyler had been sexual abusing her for "about four years," that the sex acts hurt her, and that she sometimes bled from the incidents and would "find [the blood] when she would wipe when she went to bathroom." RP 290-91. E.M.K also told Detective Kipp that she had asked Mr. Tyler if he "did

this to anyone else" and he answered that he "does it" to her sisters and her mother. RP 292.

Once incident for which Mr. Tyler was charged involved both J.A.R. and H.M.R. At trial, J.A.R. told the jury that one night Mr. Tyler made her and H.M.R. go into his bedroom while their mom was away from home working at the fair. RP 147. Once both girls were in the bedroom, Mr. Tyler told them that they "better be bare-butt naked," so both girls got into bed naked. RP 147. Next, J.A.R. explained that Mr. Tyler "would put his penis in our vaginas [sic] at a time, and then -- and then he would suck on one of ours, and then he would go to the next one, and then he would keep doing that stuff over and over again." During that incident, he also made the girls lick each other's vagina. RP 148. H.M.R. confirmed this incident occurred during her testimony. RP 223-25.

Mr. Tyler did not testify nor did he present any witnesses. *See generally* RP.

C. ARGUMENT

I. THE STATE PRESENTED SUFFICIENT EVIDENCE OF EACH COUNT FOR WHICH MR. TYLER WAS CONVICTED BECAUSE THE SPECIFIC TESTIMONY AND "GENERIC" TESTIMONY OVERWHELMINGLY PROVED THAT THE ACTS OCCURRED.

Evidence is sufficient to support a conviction if, when viewed in a light most favorable to the prosecution, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990); *State v. W*alton, 64 Wn.App. 410, 415-16, 824 P.2d 533 (1992). Furthermore, "specifics regarding date, time, place, and circumstance are factors regarding credibility. . . ." *State v. Hayes*, 81 Wn.App. 425, 437, 914 P.2d 788 (1996) *review denied* 130 Wn.2d 1013 (1996). In order to determine whether the necessary quantum of proof exists, the reviewing court "need not be convinced of the defendant's guilt

beyond a reasonable doubt but only that substantial evidence supports the State's case." *State v. Gallagher*, 112 Wn.App. 601, 613, 51 P.3d 100 (2002) (citations omitted).

Washington courts have found sufficient evidence and affirmed multiple-count sex offense convictions on appeal "notwithstanding the State's reliance on 'generic' child testimony." *Hayes*, 81 Wn.App. at 435; *State v. Jensen*, 125 Wn.App. 319, 327, 104 P.3d 717 (2005) *review denied*, 154 Wn.2d 1011 (2005); *State v. Brown*, 55 Wn.App. 738, 780 P.2d 880 (1989) *review denied*, 114 Wn.2d 1014 (1990). "Generic testimony" is typically of the type where a child victim testifies about sexual abuse and indicates about how often it happened over a general time period, e.g., an act of intercourse occurred about once a month for between three and four years. *Hayes*, 81 Wn.App. at 435-38; *Brown*, 55 Wn.App. at 746-749 (where the victim's testimony was limited to estimates of the number of times the defendant molested her, and general descriptions of the frequency of particular acts, such as "sometimes," and "just about every day," without an indication of specific dates). Even though this type of testimony or evidence is "generic," it "outlines a series of specific . . . incidents each of which amounts to a separate offense, and each of which could support a separate criminal sanction." *Hayes*, 81 Wn.App. at 437.

Courts in holding that "generic testimony" can be sufficient to sustain a conviction of a "resident child molester" note that to hold otherwise "risks unfairly immunizing from prosecution those offenders who subject young victims to multiple assaults. *Id.* at 438. This is unsurprising given that:

> when the accused resides with the victim or has virtually unchecked access to the child, and the abuse has occurred on a regular basis and in a consistent manner over a prolonged period of time, the child may have no meaningful reference point of time or detail by which to distinguish one specific act from another. The more frequent and repetitive the abuse, the more likely it becomes that the victim will be unable to recall specific dates and places. Moreover, because the molestation usually occurs outside the presence of witnesses, and often leaves no permanent physical evidence, the state's case rests on the testimony of a victim whose memory may be clouded by a blur of abuse and a desire to forget.

Brown, 55 Wn.App. at 746-47 (citations omitted). Simply put, "[t]o require [the victim] to pinpoint the exact dates of oft-repeated incidents of sexual contact would be contrary to reason." *State v. Ferguson*, 100 Wn.2d 131, 139, 667 P.2d 68 (1983).

That said, in order for "generic testimony" *by itself* to be sufficient to support multiple counts "the alleged victim must be able to describe (1) the kind of act or acts with sufficient specificity for the jury to determine which offense, if any, has been committed; (2) the number of acts committed with sufficient certainty to support each count alleged by the

prosecution; and (3) the general time period in which the acts occurred. *Jensen*, 125 Wn.App. at 327 (citing *Hayes*, 81 Wn.App. at 438). Thus, for example, *Hayes* found, in sustaining convictions for four counts of child rape based on a victim's generic testimony, that the first prong was satisfied when the victim testified that the defendant "put his private part in mine," along with her description of the usual course of conduct; the second prong was satisfied when the victim testified that the defendant did this at least "four times" and up to "two or three times a week"; and the third prong was satisfied when the victim testified that incident took place during the charging period. *Hayes,* 81 Wn.App. at 438-39.

Here, Mr. Tyler challenges the sufficiency of the evidence underlying his convictions for counts 2, 4, 6, and 8, but the evidence presented at trial, both specific and generic, when taken in the light most favorable to State was sufficient to support each of the convictions. Also, to be clear, the State's position is that the "generic" testimony is itself sufficient to support the four counts for which Mr. Tyler was convicted and Mr. Tyler now complains regardless of the trial prosecutor linking specific acts and specific evidence to specific counts during the closing

argument. There was no true election here as the jury was properly given a unanimity instruction.[2] CP 29.

a) Count 1

Mr. Tyler argues that there was insufficient evidence to support count 2 or to differentiate it from the act(s) underlying count 1. J.A.R. testified that during the time period alleged in counts 1 and 2, she lived in an apartment, which she was able to describe with some specificity, and was attending Head Start followed by kindergarten. RP 119-121. During this time period, Mr. Tyler began to touch her in a way that made her feel uncomfortable. RP 123. J.A.R. explained this touching was of her "bottom part," which she called "[a] pussy" or a "vagina." RP 124. The method by which Mr. Tyler perpetrated this touching was by "put[ting] his penis in there." RP 125. Mr. Tyler accomplished these touchings of J.A.R. by telling her to go somewhere, take her pants down, and get on the bed. RP 125. J.A.R. confirmed that she remembered "it" happening "more than once." RP 125.

That she had been raped multiple times while that young was corroborated in part by her general disclosures to Ms. Blakemore and Dr. Stirling. RP 354-357, 379-382. Dr. Stirling testified that as part of his

[2] *See Brown*, 55 Wn.App. at 746-749 (discussing jury unanimity and general testimony in "resident molester cases" where the State need not elect an act upon which it will rely for conviction where several distinct criminal acts may satisfy a count charged).

examination of J.A.R. she indicated that the sexual assaults began when she was in kindergarten and occurred every week or every other week. RP 381-82. Similarly, Ms. Blakemore testified that J.A.R. revealed a longstanding pattern of sexual abuse at the hands of Mr. Tyler that consisted of oral, vaginal, and/or anal sex and that occurred every week or two. RP 356-57. Additionally, the jury instructions and the State's closing argument made clear that in order for the jury to convict Mr. Tyler of count 2 they had to unanimously agree to an act separate from the one that constituted count 1. CP 28-29, 36-37; RP 496, 498.

When compared to *Hayes*, the evidence here was sufficient to satisfy the required three-part test[3] as the first prong was satisfied when J.A.R. testified that Mr. Tyler "put his penis in" her "bottom part" or "vagina" along with her description of the usual course of conduct (the directions to go somewhere, take her pants down, and get on the bed); the second prong was satisfied when J.A.R. testified that Mr. Tyler did this "more than once"; and the third prong was satisfied when J.A.R. testified that incidents took place during the charging period, i.e., at the apartment.

[3] "the alleged victim must be able to describe (1) the kind of act or acts with sufficient specificity for the jury to determine which offense, if any, has been committed; (2) the number of acts committed with sufficient certainty to support each count alleged by the prosecution; and (3) the general time period in which the acts occurred. *Jensen*, 125 Wn.App. at 327 (citing *Hayes*, 81 Wn.App. at 438).

RP 119-25. That J.A.R.'s testimony was sufficient under *Hayes*, is bolstered by the additional evidence supplied by Ms. Blakemore and Dr. Stirling, not to mention Mr. Tyler's confessions.

b) Count 4

Mr. Tyler argues there was insufficient evidence to support count 4 on the basis that evidence was insufficient to show that J.A.R. was under twelve at the time of the crime. After the jury began deliberations, it asked a question about count 4: Question 1: "Please clarify whether Count 4 pertains to a specific incident or just an additional incident within the timeframe given. Also, if we can't all agree that she is under 12 in Count 4 - do we automatically vote for Count 5 or do we all have to agree that she is 12 or older?". CP 67; RP 563-64. The trial court responded "[r]ead carefully instruction #16 and instruction #31 as pertains [sic] to Count 4 & Count 5." CP 67. Instruction sixteen was the to-convict instruction for count 4 and the alternative, lesser included of count 5 (Rape of a Child in the Second Degree) and instruction thirty-one was the concluding instruction. CP 40-41, 60-66. These instructions combined with State's multiple explanations to the jury during closing argument that "[i]f you believe it happened but you're not sure of her age, then you find him guilty of . . . Rape Child 2 in Count 5" made it clear that the jury had to believe that a certain incident happened when J.A.R. was under 12 for it to

find Mr. Tyler guilty of count 4. CP 505-06 ("And again, the only thing -- the only difference between Count 4 and 5 is that he told her to get in the bedroom bare-butt naked after September 25th of the year 2000. If you're firmly convinced that that happened, but you're -- you have a doubt as to the date, then you have to find that it was after September 25th. You have to find [J.A.R.] was over twelve, but under fourteen, because that makes it rape of a child in the second degree.").

J.A.R. testified that last year "[w]hen mom worked at the fair at night, [Mr. Tyler] told me to – I better be naked or he'll put his penis in my butt because it – it hurt. . . . And – and he – and if I was – and if I was not naked, then he would put his penis in my butt. . . ." RP 136-37. The testimony continued:

> [STATE] So what would you have to do?
>
> [J.A.R.] *I would have to be* bare-butt naked.
>
> [STATE] In what room?
>
> [J.A.R.] In mom and [Mr. Tyler's].
>
> [STATE] Okay. And that was when your mom worked at the fair?
>
> [J.A.R.] Yes.
>
> [STATE] And then would you go to his room?
>
> [J.A.R.] Yes.
>
> [STATE] Would you take your clothes off?
>
> [J.A.R.] Yes.

> [STATE] Okay. And then what would he do to you when you were in the room?
>
> [J.A.R.] *He would* put his penis in my vagina.
>
> [STATE] Okay. So it happened in your mom and [Mr. Tyler]'s room when your mom worked at the fair?
>
> [J.A.R.] Yes.
>
> [STATE] Okay. Do you -- do you remember if it was daytime or nighttime?
>
> [J.A.R.] Nighttime.

RP 137-38 (emphasis added).

J.A.R's mother, Ms. Kohlschmidt, confirmed that "[s]ometimes during the summer" she would work nights "at a couple of the fairs" and Mr. Tyler would watch the kids. RP 263-64, 282. Additionally, J.A.R. said that she believed that sexual abuse in her mother's room happened when she was nine and that it did happen when she was eleven. RP 136. Moreover, this type of evidence, "specifics regarding date, time, place, and circumstance are factors regarding credibility" and are for the jury to assess rather than to be extensively parsed by a reviewing court. *Hayes*, 81 Wn.App. at 437. Thus, given that the above testimony suggested a course of conduct where Mr. Tyler would have sexual intercourse with J.A.R. in her mother's room at nighttime while Ms. Kohlschmidt worked the fairs, the jury was free to, and the evidence was sufficient to, convict Mr. Tyler of count 4 (Rape of a Child in the First Degree) rather than electing to

convict him of the alternative of count 5 (Rape of a Child in the Second Degree) for the most recent episode of the sexual intercourse that took place.

Even if, however, this court finds that the evidence was insufficient to support count 4, the remedy is to remand and direct the trial court to enter a judgment of guilty on count 5. In general, a remand for entry of guilty on a lesser included offense on which the jury was instructed is permissible because "upon the giving of such an instruction it has been held that the jury necessarily had to have disposed of the elements of the lesser included offense to have reached the verdict on the greater offense." *In re Heidari*, 174 Wn.2d 288, 293, 274 P.3d 366 (2012) (citations omitted). In particular, however, the reviewing court may only do this when "the lesser offense was necessarily proven at trial." *State v. A.M.*, 163 Wn.App. 414, 421, 260 P.3d 229 (2011) (citations omitted); *State v. Bucknell*, 144 Wn.App. 524, 530-31, 183 P.3d 1078 (2008) (reversing for insufficient evidence of Rape in the Second Degree and remanding for entry of judgment of guilty on the lesser charge of Rape in the Third Degree). Here, the jury necessarily found that (1) Mr. Tyler had sexual intercourse with J.A.R.; (2) they were not married at the time and J.A.R. was less than fourteen years old; (3) Mr. Tyler was at least thirty-six months older than J.A.R.; and (4) the acts occurred in Clark County,

Washington. Consequently, if the court reverses count 4 for insufficient evidence it must remand for an entry of guilty of count 5.

c) Count 6 and Count 8

Mr. Tyler argues there is insufficient evidence to support count 6 and count 8 again on the basis of the evidence of J.A.R.'s age on the date the crimes took place. The State argued in closing that two specific incidents testified to by J.A.R. could be used to convict Mr. Tyler of counts 6 and 8. RP 509-512.

The first was an incident of anal sex. RP 138-140. When asked when the incident took place, J.A.R. testified that she did not know how old she was and did not remember what grade she was in. RP 139. J.A.R. did remember, however, that the act took place in her room, during the daytime, and specifically the afternoon, that Mr. Tyler put clear stuff on his penis from a little tube, that it hurt really badly, that she cried, and that Mr. Tyler told her to shut up. RP 139-140. J.A.R. also said that this type of incident occurred multiples times, but it did not happen "that much." RP 140. Ms. Blakemore corroborated this testimony by relating that J.A.R. told her that Mr. Tyler "used baby oil, especially during rectal penetration." RP 357

The second was an incident in which Mr. Tyler put J.A.R.'s hand on his penis. RP 146.[4] J.A.R. did not remember what grade she was in at a time when this act occurred. RP 146. J.A.R. did remember, however, that this type of act occurred at the Rancho Drive house, in her mother's bedroom (Mr. Tyler's room), and that Mr. Tyler placed her hand on his penis and made her move her hands up and down until white stuff came out. RP 146.

The State candidly admitted in closing that J.A.R. did not remember her exact age during a specific act of anal rape or a specific act of Mr. Tyler making her place her hands on his penis. RP 509-513. The State also clearly instructed the jury to consider the alternative, lesser included crimes of each count if it was unsure of J.A.R.'s age when one of these acts occurred. RP 509-513. But the State also accurately pointed out that there was "overwhelming evidence that [the crimes] happened on multiple occasions throughout her life and that there is enough there to find that [they] did happen when she was under – under twelve. . . ." RP 514. This is especially the case with J.A.R. where she was being sexually abused by Mr. Tyler for approximately seven years before

[4] This testimony by J.A.R. again suggested a regular course of conduct. J.A.R. indicated that it happened in her room or Mr. Tyler's room, that he "*would* grab my hand and put it on – put it on his penis," and move it up or down. RP 146 (emphasis added). That she was able to remember the sequence of the act and the different places it happened, but unable to remember when the incidents took place supports this position.

turning twelve. Here, the specific evidence coupled with the "generic testimony," testimony from Ms. Blakemore, and Mr. Tyler's confessions established sufficient evidence for the jury to convict Mr. Tyler of counts 6 and 8.

Additionally, the jury could have selected from other specific acts of sexual abuse to which J.A.R. testified in order to convict Mr. Tyler of either count. For example, J.A.R. testified to a course of conduct in which she would have to perform oral sex on Mr. Tyler and identified herself as in third grade, i.e., ten or eleven years old, when this occurred, that it happened more than one time, that it happened in her bedroom, the living room, and in Mr. Tyler's room, and that she would spit the white stuff that came out of his penis into either the toilet or the sink. RP 140-142.[5]

Similarly, the jury could have convicted Mr. Tyler of count 6 and/or count 8 for performing oral sex on J.A.R. RP 525. She testified that Mr. Tyler put his mouth on her vagina, that it happened more than one time, during the daytime, and specifically in the afternoon, that it happened in her mother's room (Mr. Tyler's room), and that she would end up there because "[h]e *would* tell me to go in there." RP 144-45.

Even if, however, this court finds that the evidence was insufficient to support count 6 or count 8, the remedy is to remand and direct the trial

[5] The State argued in closing argument that an episode of oral sex in J.A.R.'s room could satisfy count 11. RP 518-520.

court to enter judgments of guilty on count 7 and count 9. As discussed above in section b, regarding count 4, the lesser offenses were necessarily proven at trial when the jury convicted Mr. Tyler of the greater offenses.

II. THE TRIAL COURT MADE AN IMPROPER COMMENT WHEN IT INCLUDED THE VICTIMS' BIRTHDATES IN THE JURY INSTRUCTIONS BUT THE RECORD AFFIRMATIVELY SHOWS THAT NO PREJUDICE COULD HAVE RESULTED.

Challenged jury instructions are reviewed *de novo* and within the context of the jury instructions as a whole. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). Under the Washington Constitution, "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." WASH. CONST. art. IV, § 16. In other words, a judge makes an impermissible comment on the evidence when it instructs a jury "that matters of fact have been established as a matter of law." *Jackman*, 156 Wn.2d at 744 (quoting *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). When the victim's age is an element of the crime charged, a judge makes an impermissible comment when it includes the victim's birth date in the jury instructions. *State v. Baxter*, 134 Wn.App. 587, 593, 141 P.3d 92 (2006) (citing *Jackman*, 156 Wn.2d at 744). "Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice

could have resulted." *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d 1076 (2006) (citation omitted).

Jackman is instructive, as is *State v. Zimmerman*, 135 Wn.App. 970, 146 P.3d 1224 (2006) which applies and distinguishes *Jackman*. *Jackman*, 156 Wn.2d 736; *see also State v. Baxter*, 134 Wn.App. 587, 141 P.3d 92 (2006) (distinguishing *Jackman* in holding that the improper judicial comment of putting the victim's date of birth in the to-convict instruction was not prejudicial). In *Jackman*, the defendant was charged with multiple crimes where the victims' minority was an essential element. *Jackman,* 156 Wn.2d at 740-41. The victims each testified to their birthdate and corroborating evidence of three of the victims' birthdates was introduced. *Id.* at 740. The defendant did not stipulate to the fact of the victims' ages, but he did not dispute their ages either. *Id.* at 745. Nonetheless, the trial court included the victims' birth dates in the jury instructions. *Id.* at 740-41. *Jackman* found these to be impermissible comments and concluded that the record did not affirmatively show that no prejudice could have resulted because it was conceivable that a reasonable jury could have determined the victims were not under the relevant age at the time of the offenses if the trial court had excluded their birth dates in the jury instructions. *Id.* at 745.

The court reasoned that the victims' minority was a threshold issue "*without which there was no crime.*" *Id.* (emphasis added). Moreover, though the victims testified to their birthdates, their credibility was at issue because two of them testified at trial that they had lied about their ages to the defendant at the time of the offenses and the defendant asserted that he did everything he could to ascertain the victims' ages. *Id.* at 744 FN 7, 745. "Thus, the jury could have chosen not to believe their testimony as to *their correct birth dates* at the time of the events." *Id.* at 744 FN 7 (emphasis added).

In *Zimmerman*, the defendant was charged and convicted of one count of Child Molestation in the First Degree. *Zimmerman*, 135 Wn.App. at 972. The to-convict instruction included the victim's birthdate and amounted to an improper comment on the evidence. *Id.* at 972-973. *Zimmerman*, however, held that the "record affirmatively show[ed] the error was not prejudicial." *Id.* at 975. In so holding, *Zimmerman* stated that "[c]ritical to our conclusion is the fact that [defendant] is [the victim's] biological father, and even though he denied molesting her, he knew and never disputed knowing her age." *Id.* Additionally, "unlike *Jackman*, there was no dispute regarding [the victim's] age or date of birth at any point during the proceedings." *Id.* Thus, the record affirmatively demonstrated that no prejudice occurred because no jury could have reasonably

concluded that the victim was over the threshold age during the charging period as a result of the victim's birthdate being included in the jury instructions. *Id.*

Here, the determinative facts are indistinguishable from those in *Zimmerman* in the way the record affirmatively shows that the error—and including the victims' birthdates in the jury instructions was error—was not prejudicial. First, Mr. Tyler was the step-father or father of each of the victims and had lived with them for years. *See e.g.,* RP 355 (J.A.R. referred to Mr. Tyler as "dad"), 448, 379 (H.M.R. indicated that Mr. Tyler was her "father" or "stepfather"), 160, 234 (E.M.K said that Mr. Tyler was her "dad"). Second, there was no dispute regarding the victims' actual ages or dates of birth at any point during the proceedings. *See generally* RP. Third, the victims, who were still young children when they testified, each testified to their age and birthdate, which their mother, in part, corroborated. RP 116, 157, 184, 250-54. Finally, to the extent that the age of the victims was an issue at trial, the issue was not when were these victims born and how old would they have been at an identifiable and discrete moment in time, but rather how old were the victims at the time of an episode of sexual abuse when the exact date of the abuse was in question. This issue is one that is substantively different from the one confronted in *Jackman.* When considering the above arguments with the

fact that "specifics regarding date, time, place, and circumstance are factors regarding credibility" are for the jury to determine, like in *Zimmerman*, the record affirmatively shows that the errors were not prejudicial. *Hayes*, 81 Wn.App. at 437.

III. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF MR. TYLER'S PHYSICAL ABUSE OF EACH OF THE CHILDREN BECAUSE IT WAS RELEVANT TO SHOW WHY THEY SUBMITTED TO THE SEXUAL ABUSE AND FAILED TO REPORT OR ESCAPE IT, TO REBUT THE IMPLICATION THAT THE MOLESTATION DID NOT OCCUR AND TO SHOW DEFENDANT'S INTENT TO DOMINATE THE VICTIMS AND CREATE AN ENVIRONMENT IN WHICH HE COULD SEXUALLY ABUSE THEM.

Appellate courts review evidence admitted under ER 404(b) for abuse of discretion. *State v. Lough,* 125 Wn.2d 847, 863, 889 P.2d 487 (1995). A court abuses its discretion if it is exercised on untenable grounds or for untenable reasons. *State v. Thang*, 145 Wn.2d 630, 642, 41 P.3d 1159 (2002). That said, a reviewing court can affirm the trial court's evidentiary rulings "on any grounds the record and the law support." *State v. Grier*, 168 Wn.App. 635, 644, 278 P.3d 225 (2012) (citing *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004)).

ER 404(b) provides that: "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other

purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Additionally, such evidence can be admissible in sex abuse cases to "explain why the victim submitted to the sexual abuse and failed to report or escape it, to rebut the implication that the molestation did not occur and to show defendant's intent to dominate the victim and create an environment in which he could sexually abuse her." *State v. Wilson*, 60 Wn.App. 887, 890, 808 P.2d 754 (1991); *State v. Fisher*, 165 Wn.2d 727, 745-746, 202 P.3d 937 (2009); *United States v. Powers*, 59 F.3d 1460, 1464-1466 (4th Cir. 1995) (citing *Wilson* and holding that "evidence of [defendant's] violence against [the victim] and her family members was admissible to explain [the victim's] submission to the acts and her delay in reporting the sexual abuse" even though she did not directly testify that she failed to report the abuse as a result of the beatings).

The test for admitting evidence under ER 404(b) "is well established. To admit evidence of other wrongs, the trial court must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect." *State v. Hartzell*, 156 Wn.App. 918, 930, 237 P.3d 928 (2010).

When a trial court's ruling on ER 404(b) evidence is in error, reversal will only be required "if there is a reasonable possibility that the testimony would have changed the outcome of trial." *State v. Aguirre*, 168 Wn.2d 350, 361, 229 P.3d 669 (2010) (citing *State v. Fankhouser*, 133 Wn.App. 689, 695, 138 P.3d 140 (2006)).

Here, trial court properly allowed the State to present evidence of Mr. Tyler's physical abuse of the children to explain why the disclosure of the sexual abuse they suffered at his hands was significantly delayed. RP 19-20. This purpose would be proper even absent explicit testimony from the victims that the reason they submitted to the abuse and delayed reporting was because of a fear of physical discipline. *Wilson*, 60 at 889 ("[defendant] began hitting her [(the victim)], kicking her with his steel-toed boots, and digging his fingers into her face. The physical abuse never occurred at the same time as the sexual abuse. However, the victim testified that she was afraid to leave [defendant]'s home because she feared him and because he threatened to find her if she ever left."). The State presented evidence commensurate with *Wilson* in so far as the fact there was physical abuse directed at each of the children by the defendant which led them to be scared of him and delayed the reporting of the sexual abuse. RP 150-152, 171-72, 215-16, 242-244, 234-35, 353, 380. Thus, when J.A.R. was asked why she didn't disclose she responded, "[b]ecause I was

scared." RP 150. And upon further questioning J.A.R indicated that Mr. Tyler would "beat us with a belt" if she did not do her chores and that these beatings would leave marks on her. RP 151-52. Moreover, J.A.R. testified that Mr. Tyler threatened her by telling he would "put his penis in [her] butt" if she was not naked for him upon his request because he knew that act "hurts really bad." RP 137.

Similarly, E.M.K. testified that she was scared of Mr. Tyler, that he had hurt her by spanking her with a belt and a paddle, and that he told her that she would get in trouble if she told anyone about the sexual abuse. RP 171-72. In addition, Ms. Ellis, in relaying E.M.K's demeanor when she was told by E.M.K. about Mr. Tyler's abuse, stated that E.M.K. was very scared and crying. RP 234. Ms. Ellis also testified that E.M.K told her that she was afraid Mr. Tyler would find her (E.M.K.). RP 235.

H.M.R. likewise testified about suffering physical abuse at the hands of Mr. Tyler. For example, during her direct examination the following conversation took place:

[STATE] ... And what did John make you do?

[H.M.R] He made me take off my clothes.

[STATE] Okay. And what -- did he have clothes on?

[H.M.R] Yes.

[STATE] What did he do with his clothes?

[H.M.R] He took them off.

[STATE] And then what did he do after he took his clothes off?

[H.M.R] He told me to lay down.

[STATE] Lay down where?

[H.M.R] On my bed.

[STATE] On your bed? And then did you do that?

[H.M.R] Yes.

[STATE] What would happen if you didn't do that?

[H.M.R] I would get hurt.

[STATE] Has he hurt you before?

[H.M.R] Yes.

[STATE] How?

[H.M.R] He would hit me.

[STATE] With what, Hun?

[H.M.R] His hand.

[STATE] Did he use anything else?

[H.M.R] He hit -- he hit us with his belt.

[STATE] With his belt?

[H.M.R] If we didn't do our chores.

[STATE] Okay. Did he ever tell you anything if you didn't do what he told you?

[H.M.R] That –

[STATE] And -- I'm sorry, go ahead.

[H.M.R] That I would get in worse trouble.

RP 215-16.

H.M.R.'s fear of Mr. Tyler was corroborated by Dr. Stirling and Ms. Blakemore. RP 353, 379-380. Dr. Stirling testified that when he examined H.M.R., she told him "that she had thought about telling before but was – was afraid, saying that he would beat her up if – if she told." RP 380. H.M.R. reported to Dr. Stirling that she was scared of Mr. Tyler and had been afraid to come home from school because Mr. Tyler would be there alone "and that was when the bad things happen." RP 380. Along those same lines, Ms. Blakemore indicated that when she asked H.M.R. if she had been threatened by Mr. Tyler, that H.M.R. said Mr. Tyler told her that if she told anyone about the most recent rape, which H.M.R. reported was painful, that he would do it again. RP 353.

Furthermore, even J.R. feared physical abuse at the hands of Mr. Tyler if he reported the abuse of the girls. RP 239-244. J.R. testified that he saw Mr. Tyler do "gross things" to J.A.R. while both were naked, but when confronted by Mr. Tyler about whether he saw anything J.R. said he did not. RP 241-42. J.R. lied to Mr. Tyler because he feared if told the truth he would get spanked, and Mr. Tyler had spanked J.R. before with a "paddle, belt, and all kind[s] of different stuff." RP 243. When asked why

he did not report the sexual abuse to anyone, J.R. said that if he did Mr. Tyler would be waiting for him at the house and would "spank" him. RP 243-44.

Consequently, the testimony elicited at trial supported the basis by which the trial court allowed the evidence to come in—to explain the delayed reporting. The evidence, in total, made clear that the children were scared of Mr. Tyler, the physical abuse he perpetrated on them was part and parcel of why they feared him, and they did not report the sexual abuse because they were scared of him and what he would do.[6] Moreover, there were additional proper bases to admit the physical abuse testimony including to "explain why the victim[s] submitted to the sexual abuse and failed to . . . escape it, to rebut the implication that the molestation[s] did not occur and to show defendant's intent to dominate the victim[s] and create an environment in which he could sexually abuse [them]." *Wilson*, 60 Wn.App. at 890. Thus, the evidence was properly admitted by the trial court.

Even if, however, the evidence was improperly admitted there was overwhelming evidence of Mr. Tyler's guilt and there is no reasonable possibility.that excluding the testimony would have changed the outcome

[6] At sentencing, the trial court noted "[e]ach victim was terrified of the Defendant as evidenced by the trauma they clearly displayed when they were testifying here in court." RP 603.

of trial.[7] Given Mr. Tyler's admissions in his letters, the physical evidence of the sexual abuse to which Dr. Stirling testified, and other corroborating evidence that helped to bolster the victims' credibility, any error in admitting evidence of Mr. Tyler's physical abuse of the children was harmless.

IV. THE STATE DID NOT COMMIT FLAGRANT AND ILL-INTENTIONED MISCONDUCT DURING ITS CLOSING ARGUMENT AND BECAUSE THE EVIDENCE AGAINST MR. TYLER WAS SO OVERWHELMING THERE IS NO CHANCE THAT ANY PREJUDICE WOULD HAVE HAD A SUBSTANTIAL LIKELIHOOD OF AFFECTING THE JURY'S VERDICT OR COULD NOT HAVE BEEN CURED WITH A LIMITING INSTRUCTION.

At trial, "[c]ounsel are permitted latitude to argue the facts in evidence and reasonable inferences" in their closing arguments. *State v. Smith*, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985). Any allegedly improper statements by the State in closing argument "should be viewed within the context of the prosecutor's entire argument, the issues in the

[7] Without assigning error, Mr. Tyler complains that the trial court "failed to give a limiting instruction, prohibiting the jury from considering the testimony as propensity evidence." Br. of App. at 18. But, "[a] court is under no duty to give a limiting instruction sua sponte" *State v. Wilcoxon*,185 Wn.App. 534, 341 P.3d 1019, 1023 (2015) (citing *State v. Noyes*, 69 Wn.2d 441, 446-47, 418 P.2d 471 (1996); *State v. Russell*, 171 Wn.2d 118, 123–24, 249 P.3d 604 (2011) ("Since *Noyes*, this court has continued to hold that absent a request for a limiting instruction, the trial court is not required to give one sua sponte."); *State v. Athan*, 160 Wn.2d 354, 383, 158 P.3d 27 (2007) (holding the omission of a limiting instruction is not reversible error where defendant fails to request the instruction during trial). At no point did Mr. Tyler request a limiting instruction. *See generally* RP. Furthermore, the State did not make a propensity argument during its closing argument or rebuttal closing. RP 486-555, 560-62.

case, the evidence discussed in the argument, and the jury instructions." *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.2d 432 (2003) (citing *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997)). Juries are presumed to follow jury instructions absent evidence to contrary. *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007) (citing *State v. Davenport*, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984)).

Engaging in "[m]ere appeals to the jury's passion or prejudice are improper." *State v. Gregory*, 158 Wn.2d 759, 147 P.3d 1201 (2006) (citation omitted) (overruled on other grounds *State v. W.R., Jr.*, 181 Wn.2d 757, 336 P.3d 1134 (2014)). Additionally, a prosecutor may not make prejudicial statements unsupported by the record. *Dhaliwal*, 150 Wn.2d at 577. That said, a prosecutor may reference the "'horrible' nature of the crime and the effect on its victims." *State v. Borboa*, 157 Wn.2d 108, 123, 135 P.3d 469 (2006). This follows from the fact that Washington courts have long held that "[a] prosecutor is not muted because the acts committed arouse natural indignation." *Id.* (quoting *State v. Fleetwood*, 75 Wn.2d 80, 84, 448 P.2d 502 (1968)).

If the defendant can establish that misconduct occurred, the determination of whether the defendant was prejudiced is subject to one of the two standards of review: "[i]f the defendant objected at trial, the defendant must show that the prosecutor's misconduct resulted in

prejudice that had a substantial likelihood of affecting the jury's verdict. If the defendant did not object at trial, the defendant is deemed to have waived any error, unless the prosecutor's misconduct was so flagrant and ill-intentioned that an instruction could not have cured the resulting prejudice." *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012) (citations omitted).

Simply put, a defendant must first establish a prosecutor engaged in misconduct and then, when failing to object at trial, that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." *Id.* at 760-61 (citation omitted); *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Under the heightened standard, "[r]eviewing courts should focus less on whether the prosecutor's misconduct was flagrant or ill-intentioned and more on whether the resulting prejudice could have been cured." *Id.* at 762; *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994) ("Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request."). Importantly, "[t]he absence of a motion for mistrial at the time of the argument strongly suggests to a court that the argument or event in question did not appear critically prejudicial to an

appellant in the context of the trial." *State v. Swan*, 114 Wn.2d 613, 661, 790 P.2d 610 (1990) (citations omitted).

Here, Mr. Tyler did not object a single time during the State's closing to the arguments that he now asserts are misconduct. Consequently, Mr. Tyler must first establish the State engaged in misconduct and then that "(1) no curative instruction would have obviated any prejudicial effect on the jury and (2) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict." He cannot meet his burden.

Mr. Tyler's crimes were horrible and they had a devastating impact on his victims. He raped his biological daughter and what amounts to his two step-daughters from the time each of them was four or five years old until the abuse was disclosed years later. He raped them vaginally, anally, orally, and in one instance made them perform sex acts on each other.[8]

Given this setting, and viewing the State's arguments within the context of the State's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions, it cannot be said the State engaged in flagrant and ill-intentioned misconduct. In fact, given the

[8] That these were particularly heinous crimes with a clear impact on the victims was recognized by the trial court at sentencing when it noted that "[t]he trauma was so intense in this case, so intense. Worse than I have ever seen." RP 604. It also stated: "there were two cases over the years that I never could get behind that box, get behind that wall. They were so ugly that they have haunted me for years. Now, I have a third one that is going to haunt me for years." RP 605.

facts and strength of the case, the State's closing argument was rather restrained as page after page of the report of proceedings shows that the State's closing argument was mostly a technical discussion of the law and of each of the counts and evidence supporting them. *See* RP 486-555, 560-62. Moreover, because the State may reference the "'horrible' nature of the crime[s] and the effect on its victims" and is "not muted because the acts committed arouse natural indignation" it is unsurprising, and also not misconduct, that the State referenced the pain J.A.R. felt when being anally raped by Mr. Tyler and described that what happened to the victims as "one of the most horrifying experiences any child could endure." *Borboa*, 157 Wn.2d at 123; RP 486, 508-09.

Additional instances that Mr. Tyler claims amounted to misconduct were either plain facts or reasonable inferences from the evidence. For example, referring to one of the victim's as Mr. Tyler's "own flesh-and-blood" is a fact, and one that distinguishes that victim from the other two. RP 540. To the extent that such a reference is inflammatory that is only because the act of raping one's own biological daughter itself may arouse more natural indignation for some.

Furthermore, the State's reference to Mr. Tyler as "calculating" is a fair and reasonable inference from the evidence elicited at trial given that the argument was made based on the testimony that Mr. Tyler told J.A.R.

that they needed to find her a boyfriend so that if Mr. Tyler got her pregnant from raping her they could blame the boyfriend. RP 524.[9] Additionally, that Mr. Tyler's behavior was calculating is self-evident from the fact that he was able to avoid detection and disclosure as he raped his three victims over many years. Similarly, the State's brief mentions of the 404(b) physical abuse evidence in its closing argument were fair and reasonable inferences from the evidence presented and did not amount to flagrant and ill-intentioned misconduct as Mr. Tyler now complains despite not objecting to the statements at trial. RP 524, 539.[10] As discussed above in section III, the evidence supported the State's arguments.[11]

Mr. Tyler, on the other hand, does identify statements by the State that are arguably misconduct. Those statements are that the jury was

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[9] "And then a twelve -- eleven-, twelve-, thirteen year-old little girl has to be in fear of getting pregnant by her stepdad, who has beaten her before so that she won't tell anybody. . . . And then he's -- she's required to go find a boyfriend so that if she does get pregnant, they can blame it on him. That's pretty calculating for a human being to do to a little girl. . . ."

[10] Mr. Tyler claims that "none of [the victims] said that he hit them to get them to comply with his sexual advances." Br. of App. at 21. But E.M.K testified that she had to lay down on her bed naked for Mr. Tyler to have sex with her and that if she refused she "would get hurt" and that he had hurt her before by hitting her. RP 215-16. J.A.R. testified that Mr. Tyler threatened her by telling he would "put his penis in [her] butt" if she was not naked for him upon his request because he knew that act "hurts really bad." RP 137.

[11] Mr. Tyler claims that "none of the children said that he hit them in order to prevent disclosure of the alleged abuse." Br. of App. at 21. But Dr. Stirling testified that when he examined H.M.R. she told him "that she had thought about telling before but was – was afraid, saying that he [(Mr. Tyler)] would beat her up if – if she told." RP 380. Additionally, Ms. Blakemore indicated that when she asked H.M.R. if she had been threatened by Mr. Tyler, that H.M.R. said Mr. Tyler told her that if she told anyone about the most recent rape, which H.M.R. reported was painful, that he would do it again. RP 353. Even J.R. said that he did not report the sexual abuse to anyone because if he did Mr. Tyler would be waiting for him at the house and would "spank" him. RP 243-44.

"fortunate" because it could find Mr. Tyler guilty, that Mr. Tyler had a "harem" at the home, and that there were not any more victims "that we know of." RP 486, 524, 540. Notwithstanding whether those statements were improper, the conclusion that (1) they were flagrant and ill intentioned; (2) no curative instruction would have obviated any prejudicial effect on the jury; and (3) the misconduct resulted in prejudice that had a substantial likelihood of affecting the jury verdict is untenable. That these three comments separated over 70 pages of a proper closing argument could result in prejudice that had a substantial likelihood of affecting the jury verdict is farfetched, especially in light of the strength of the State's case and that the absence of a motion for mistrial or a contemporaneous objection "at the time of the argument strongly suggests . . . that the argument . . . in question did not appear critically prejudicial . . . in the context of the trial." *Swan*, 114 Wn.2d at 661; RP 486-555, 560-62. The potentially improper statements were singular, in the sense that they were not repeated, short-lived, in the sense that they were not part of a theme or overarching argument, and, thus, did not infect the State's closing argument. As a result, any prejudice that resulted from the statements could have been obviated by a curative instruction.

Furthermore, the jury, which we presume follows the courts instructions, was properly instructed by the court that: "the attorneys'

remarks, statements and arguments are intended to help you understand the evidence and apply the law. They are not evidence. Disregard any remark, statement or argument that is not supported by the evidence or the law as stated by the court." CP 24. The jury was also instructed that "[y]ou are officers of the court and must act impartially and with an earnest desire to determine and declare the proper verdict. Throughout your deliberations you will permit neither sympathy nor prejudice to influence your verdict." CP 25. Those instructions combined with the fact of the defendant's admissions in his letters, the physical evidence of sexual abuse, the victims' trial testimony, the victims' disclosures that were consistent with their trial testimony, and the overall strength of the case, make it beyond believable that any comments by the State resulted in prejudice that was not curable and had a substantial likelihood of affecting the jury verdict.

V. THE CHARGING DOCUMENT WAS SUFFICIENT BECAUSE IT CONTAINED EVERY ELEMENT OF THE CHARGED OFFENSES AND THE PARTICULAR FACTS SUPPORTING THEM.

Challenges to the sufficiency of a charging document are reviewed *de novo* and the general rule is that such a challenge may be raised for first time on appeal. *State v. Kjorsvik*, 117 Wn.2d 93, 102, 812 P.2d 86 (1991); *State v. Williams*, 162 Wn.2d 177, 182, 170 P.3d 30 (2007). When the defendant challenges the charging document for the first time on appeal,

however, reviewing courts construe the document liberally in favor of validity. *State v. Lindsey*, 177 Wn.App. 233, 244-45, 311 P.3d 61 (2013); *State v. Tandecki,* 153 Wn.2d 842, 848-49, 109 P.3d 398 (2005).

When a defendant is charged with a crime, the information must allege (1) every element of the charged offense and (2) particular facts supporting them. *State v. Nonog*, 169 Wn.2d 220, 226, 237 P.3d 250 (2010) (citing *State v. Leach*, 113 Wn.2d 679, 688, 782 P.2d 552 (1989)). The purpose of this well-settled rule is to provide the defendant notice of the nature of the charge so that he or she is able to prepare a defense. *State v. Zillyette*, 173 Wn.2d 784, 785-86, 270 P.2d 589 (2012); *Tandecki,* 153 Wn.2d. at 846.

The requirement that the charging document alleges facts supporting the elements of the crime charged, however, "does not impose any additional requirement that the State allege facts beyond those that sufficiently support the elements of the crime charged or that the State describe the facts with great specificity." *State v. Winings*, 126 Wn.App 75, 85, 107 P.3d 141 (2005). Thus, a "failure to allege specific facts in an information may render the charging document vague, but . . . not constitutionally defective." *State v. Laramie*, 141 Wn.App 332, 340, 169 P.3d 859 (2007) (citation omitted).

Contrary to the general rule that defendant may challenge a charging document for the first time on appeal, when a defendant complains that the charging document is vague rather than that the essential elements of the crime are missing, he or she has waived the challenge if "no bill of particulars was requested at trial." *Leach*, 113 Wn.2d at 687 (holding "[a] defendant may not challenge a charging document for 'vagueness' on appeal if no bill of particulars was requested at trial") (citing *State v. Holt*, 104 Wn.2d 315, 320, 704 P.2d 1189 (1985); *State v. Bonds*, 98 Wn.2d 1, 17, 653 P.2d 1024 (1982)).

Here, the information charged Mr. Tyler with multiple counts of Rape of a Child and Child Molestation. The following counts from the information are representative as to how he was charged:

> COUNT 03 - RAPE OF A CHILD IN THE FIRST DEGREE - 9A.44.073
> That he, JOHN THOMAS TYLER, in the County of Clark, State of Washington between January 1, 1995 and February 28, 1995, on an occasion separate from that charged in Counts 1, 2, 4, 6, 8, 11 and 13, did have sexual intercourse with another, to-wit: J.A.R. (female, DOB: 9-25-88), who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim, in violation of RCW 9A.44.073, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Washington.

> COUNT 08 - CHILD MOLESTATION IN THE FIRST DEGREE -9A.44.083
> That he, JOHN THOMAS TYLER, in the County of Clark, State of Washington between February 1, 1995 and September 24, 2000, on an occasion separate from that charged in Counts 3, 4, 6, 11 and 13, did have sexual contact with another, to-wit: J.A.R. (female, DOB: 9-25-88), who is less than twelve years old and not married to the perpetrator and the perpetrator is at least thirty-six months older than the victim, in violation of RCW 9A.44.083, contrary to the statutes in such cases made and provided, and against the peace and dignity of the State of Washington.

CP 15-21. Each count contains every element of the charged offense and particular facts supporting them, e.g., Mr. Tyler had sexual intercourse with a particular person who was a particular age during a particular time period. CP 15-21. Consequently, the charging document contained the requisite facts and was constitutionally sufficient.

Mr. Tyler complains, however, that the charging document "did not include enough information to permit him to prepare a defense or to protect against subsequent prosecution for the same acts." Br. of App. at 26, 28 ("there is no information within . . . the charging document permitting Mr. Tyler to differentiate the allegations . . ."). But as noted above, case law does not require the State to "allege facts beyond those that sufficiently support the elements of the crime charged or that the State

describe the facts with great specificity." *Winings*, 126 Wn.App at 85.[12] Moreover, Mr. Tyler's contention that this information lacks specific facts does not make it "constitutionally defective;" instead, if the argument is accepted as true, it only renders the charging document vague. *Laramie*, 141 Wn.App. at 340. Thus, Mr. Tyler's complaint is essentially one of vagueness and because Mr. Tyler did not request a bill of particulars at trial, he may not now "challenge [the] charging document for 'vagueness' on appeal." *Leach*, 113 Wn.2d at 687. Consequently, this court should decline to review his challenge to the charging document.

VI. THE STATE CONCEDES IT FAILED TO PROVE MR. TYLER'S CRIMINAL HISTORY.

The State concedes that it failed to provide sufficient evidence of Mr. Tyler's prior convictions at his sentencing hearings. RP 576-580, 586-608. As a result, the trial court erred when it increased Mr. Tyler's offender score on the basis of those convictions. The State agrees with Mr. Tyler's suggestion that remand for correction of the Judgment and Sentence by deleting the prior convictions is appropriate. Br. of App. at 30. If, however, this court remands for resentencing it should, pursuant to *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014) and RCW 9.94A.530(2),

[12] *See also Brown*, 55 Wn.App. at 746-749 (discussing jury unanimity and general testimony in "resident molester cases" where the State need not elect an act upon which it will rely for conviction where several distinct criminal acts may satisfy a count charged)

remand for a resentencing in which the parties "shall have the opportunity to present and the court to consider all relevant evidence regarding criminal history, including criminal history not previously presented."

D. CONCLUSION

For the reasons argued above, Mr. Tyler's convictions should be affirmed and his case remanded for correction of the Judgment and Sentence.

DATED this 21 day of May, 2015.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
AARON T. BARTLETT, WSBA #39710
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

May 21, 2015 - 3:11 PM

Transmittal Letter

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